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Sales Taxation in Interstate Commerce

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SALES TAXATION IN INTERSTATE COMMERCE

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I. INTRODUCTION

A treatment of the constitutional problems involved in "sales taxation" concerning multi-state sales transactions should cover more than "sales taxes" as that terminology ordinarily may be understood. The ordinary "sales tax" includes within its scope all business sales of tangible personal property at either the retailing, wholesaling, or manufacturing state. The statute, of course, often gives exemptions from the tax.

In many instances, however, the "sales tax" also is imposed on other kinds of transactions. Sometimes the sale of professional services and other services, of real property, and of intangible personal property is covered by the tax. Some states also include the receipt of dividends, interest, rental payments, wages and salaries. The extraction and sale of unmanufactured natural resources may also be included in the reach of a "sales tax."

Haig and Shoup,[1] leading authorities in the field, group "sales taxes" into four categories:

(a) the retail sales tax—the most restricted type—is imposed only upon sales of tangible personal property at retail or for use or consumption. This category includes taxes which affect sales of services of public utilities and admissions.

(b) the general sales tax reaches sales of tangible personal property both at retail and for resale, and also the extracting of natural resources and manufacturing. This category also includes certain taxes which reach sales of services by business enterprises, sales of admissions and sales of real property.

(c) gross receipts tax, which includes the essential elements of the general sales tax, and in addition it is levied upon sales of personal and/or professional services, and in some instances sales of intangibles.

(d) gross income tax, which taxes gross income from all sources, including, in addition to the main elements noted above, gross income from all sources, such as gross income from rents, interest and salaries.

In addition to the above four categories of "sales taxes," this discussion of "sales taxation" will include:

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1. HAIG AND SHOUP, THE SALES TAX IN AMERICAN STATES 3-4 (1934).

(e) various species of use taxes; and

(f) various privilege taxes affecting the occupation of selling. Consequently, the subject matter of this treatment of "sales taxation" will consider materials from all of the foregoing six categories in order to give adequate coverage of the subject under consideration.

In dealing with the subject of sales taxation of multi-state transactions we must reckon principally with two clauses of the Federal Constitution. Both the commerce clause and the due process clause of the fourteenth amendment have a direct impact on the taxing power of the states as they seek to harvest revenue from multistate sales transactions. Most of the emphasis will be upon the commerce clause, but the due process clause requires some consideration.

The scope of the protection afforded by the commerce clause has been widened by the Court to include much more than the actual movement of the commerce itself across state lines.[2] Thus, taxes for the privilege of engaging in various interstate activities often have been called into question on commerce clause grounds.[3] Also, commerce clause protection has been invoked frequently where local taxes were levied on receipts derived from interstate transactions.[4] Moreover, taxes levied on the *means* and *instrumentalities* used in connection with the interstate commerce often have run into commerce clause difficulty.[5] Even though a particular tax can withstand a

2. Taxes on the actual transportation of the commerce were banned comparatively early in our constitutional history. Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872); Coe v. Errol, 116 U.S. 517 (1886); Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922); Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926). That is present day constitutional doctrine. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

3. Railway Express Agency v. Virginia, 347 U.S. 359 (1954); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925). Presently there will be considerable discussion of this facet of protection.

4. Railway Express Agency v. Virginia, 347 U.S. 359 (1954); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Freeman v. Hewit, 329 U.S. 249 (1946); Philadelphia S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887). This phase of protection will occupy considerable space in the discussion of the subject matter under consideration.

5. Aside from property taxes, the means and instrumentalities thought to be an integral part of the commerce itself were virtually free from taxation for many years. Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937); New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U.S. 338 (1930); Helson and Randolph v. Kentucky, 279 U.S. 245 (1929); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925). Whatever the particular form of the tax levied on the means and instrumentalities, if the Court regarded it essentially only property taxation, it would be sustained. St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350 (1914); United States Express Co. v. Minnesota, 223 U.S. 335 (1912); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897); Western Union Tel. Co. v. Attorney Gen., 125 U.S. 530 (1888). More recently privileges closely connected with interstate commerce have been regarded as distinct from the commerce for purposes of taxation. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938). The textual discussion of the subject here under consideration will consider some aspects of taxation on the means and instrumentalities of interstate commerce. For a more com-

commerce clause attack on any of the foregoing grounds, nevertheless it may be challenged on the ground that it discriminates against interstate commerce.[6] We will see that sales taxation cuts across all of these aspects of commerce clause protection.

While the due process clause has figured less frequently than the commerce clause in sales taxation of multi-state transactions, it does nevertheless place limitations on such revenue measures. Due process requirements are concerned with whether the tax in practical operation has relation to opportunities, benefits or protection afforded by the taxing state.[7] The due process clause prevents the taxing power from reaching or laying hold of a subject with which the state has no sufficient nexus; it keeps the taxing power at home, so to speak.[8]

So, to employ a metaphor from the classics, in order for a tax craft to reach the harbor of constitutionality, it must sail safely past the Scylla of the commerce clause, as well as the Charybdis of due process.

II. Taxes on the Occupation of Selling

That a state may require payment of a tax for the privilege of engaging in a local business or occupation, although mingled with interstate business, in so far as the commerce clause is concerned, is a general proposition no longer debatable.[9] However, taxes thought by the Supreme Court to be levied upon the privilege of carrying on interstate commerce, regardless of the amount of the levy, have uniformly been held obnoxious to the commerce clause on the ground that the privilege is given by the national government and not the state government.[10] "No State," says the Court, "can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce."[11] "Any such excise burdens interstate commerce and is therefore invalid," declares the Court, "without regard to

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plete treatment of property taxes and interstate commerce, see Hartman, State Taxation of Interstate Commerce 73 (1953).

6. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940). We will have considerable to say a little later in this discussion about discrimination.

7. Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938); see Nelson v. Montgomery Ward, 312 U.S. 373, 375 (1941). In our later discussion of the collection aspects of the use tax we will see that due process has been of considerable significance.

8. Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); see Ott v. Mississippi Barge Line Co., 336 U.S. 169, 174 (1949); Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).

9. Chicago v. Willett Co., 344 U.S. 574 (1953) (annual license tax computed by the number of trucks used by taxpayer where each taxed truck did some local as well as interstate business); Norton Co. v. Department of Revenue, 340 U.S. 534 (1951); Dalton Adding Mach. Co. v. Virginia, 246 U.S. 498 (1918); Pacific Express Co. v. Seibert, 142 U.S. 339 (1892).

10. We will examine in detail a wide variety of such taxes as our discussion proceeds.

11. Atlantic & Pac. Tel. Co. v. Philadelphia, 190 U.S. 160, 162 (1903).

measure or amount."[12] Moreover, "the constitutional infirmity of such a tax persists," concludes the Court, "no matter how fairly it is apportioned to business done within the state."[13] That commerce clause infirmity is present whether the taxpayer is engaged in interstate commerce exclusively, or whether a portion of the taxed business is local with the tax levied either upon the privilege of engaging in the interstate branch or upon the whole business.[14]

The fact that a portion of a business is local and taxable has not justified a tax which also is imposed on the interstate branch of the business. To be sustained as a tax for the privilege of engaging in a local business or occupation, where the interstate and local facets of the business are intermingled, the tax cannot extend beyond the local aspects of the business; it cannot constitutionally apply to the interstate phases.[15] A privilege or occupation tax which a state imposes with respect to both interstate and intrastate business, through an indiscriminate and inseparable application to instrumentalities common to both branches of the business, frequently has fallen before a commerce clause attack.[16] The tax will be upheld, however, if the statute is of a separable nature so that the levy on the interstate aspects can be eliminated from the assessment.[17]

A particular type of privilege tax of the occupational variety frequently before the Court on commerce clause grounds is an exaction imposed on the occupation of selling goods shipped through interstate channels. One familiar form the tax takes is a levy on the occupation of soliciting and negotiating sales of goods prior to their interstate shipment into the purchaser's state. That is the sort of tax levied on the itinerant salesman, sometimes called a "drummer," who solicits orders for goods to be delivered to the purchaser from an out-of-state source of supply. The fountainhead of a plethora of decisions in this field is *Robbins v. Shelby County Taxing District.*[18] There the Court refused, on commerce clause grounds, to allow the taxing authorities of Shelby County, Tennessee, to exact a license tax from a salesman not having a regularly licensed place of business

12. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 217 (1925).
13. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 609 (1951).
14. Business exclusively interstate: Railway Express Agency v. Virginia, 347 U.S. 359 (1954); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951); State Tax Comm'n v. Interstate Natural Gas Co., 284 U.S. 41 (1931). Levied on the whole of mixed local and interstate business: Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Texas Transp. & Terminal Co. v. New Orleans, 264 U.S. 150 (1924).
15. Postal Tel.-Cable Co. v. City of Fremont, 255 U. S. 124 (1921); Ewing v. City of Leavenworth, 226 U.S. 464 (1913).
16. *E.g.*, Cooney v. Mountain States Tel. Co., 294 U.S. 384 (1935); Bowman v. Continental Oil Co., 256 U.S. 642 (1921); Tennessee v. Pullman So. Car Co., 117 U.S. 51 (1886).
17. Bowman v. Continental Oil Co., 256 U.S. 642 (1921); Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888).
18. 120 U.S. 489 (1887).

in the taxing district, as a condition precedent to soliciting trade within the taxing unit. The salesman was soliciting orders for an out-of-state merchant who would subsequently fill the order by interstate shipment. In striking down the tax, a majority of the *Robbins* Court was of the opinion that the tax erected a very real obstacle to the development of interstate trade. The Court visualized that such a tax would hamper the marketing of products in other states. The Court was solicitous about protecting the out-of-state manufacturer or merchant who would not know whether there would be any demand or market for his products, and would need to obtain orders prior to the interstate shipment of his wares. In its condemnation of the *Robbins* tax the Court laid down a broad, sweeping rule that the "negotiations of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiations are made, is interstate commerce."[19] The Court stated that "interstate commerce cannot be taxed at all, even though the same amount of tax . . . [is] laid on domestic commerce. . . ."[20] In condemnatory doctrinal declarations that became familiar, the tax was labelled a burden on interstate commerce. For good measure, the Court also indicated that the tax should be invalidated as a discrimination against interstate commerce.

Including the *Robbins* case, the Court has made short shrift of at least twenty-one such statutes and municipal ordinances to the extent they imposed a tax on the occupation of selling goods prior to their interstate shipment. This doctrine of immunity has not been limited to the state of solicitation and delivery. Such taxes levied on the occupation of selling would be condemned whether imposed by the state of the buyer[21] or imposed by the state of the seller.[22] Activities which are insulated from this species of occupation tax include not only the solicitation and negotiation of the sales, but also the delivery of the article to the purchaser.[23]

The itinerant salesman who engages in interstate selling occupies

19. 120 U.S. at 497.
20. *Ibid.*
21. Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940); Real Silk Hosiery Mills v. Portland, 268 U.S. 325 (1925); Davis v. Virginia, 236 U.S. 697 (1915); Stewart v. Michigan, 232 U.S. 665 (1914); Crenshaw v. Arkansas, 227 U.S. 389 (1913); Dozier v. Alabama, 218 U.S. 124 (1910); Rearick v. Pennsylvania, 203 U.S. 507 (1906); Caldwell v. North Carolina, 187 U.S. 622 (1903); Stockard v. Morgan, 185 U.S. 27 (1902); Brennan v. Titusville, 153 U.S. 289 (1894); Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Asher v. Texas, 128 U.S. 129 (1888); Corson v. Maryland, 120 U.S. 502 (1887). Two cases involved corporation excise taxes levied on foreign corporations engaged solely in making interstate sales. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918); *cf.* Norton Co. v. Department of Revenue, 340 U.S. 534 (1951).
22. Heyman v. Hays, 236 U.S. 178 (1915); Norfolk & W. Ry. v. Sims, 191 U.S. 441 (1903).
23. Rearick v. Pennsylvania, 203 U.S. 507 (1906).

an anomalous position in the eyes of the Court, however. If he carries goods with him for immediate delivery, he is in the category of a "peddler" and as such he is engaged in a local business and becomes subject to state or municipal taxes levied for the privilege of selling.[24] Of course, taxes which discriminate against the "peddler" are invalid as a discrimination against interstate commerce.[25] If, however, the itinerant salesman sells, either with or without sample, for subsequent delivery from an out-of-state source of supply, he falls in the category of a "drummer," and as such he is considered engaged in interstate commerce; and his business of soliciting orders is exempt, on commerce clause grounds, from state or municipal levies under the firmly entrenched doctrine of the *Robbins* case.[26]

While the "drummer" and "peddler" as such, may be figures of bygone days, their modern prototypes continue to exist under more euphonious appellations. So, too, endure the distinctions in determining permissible and nonpermissible taxes on the occupation of selling, when challenged on commerce clause grounds. The distinction has been preserved in determining the validity of taxes on various privileges even in large corporate enterprises operating within the taxing state for sale and subsequent interstate delivery of goods. Consistent with the commerce clause, a tax can be levied on the sale made by the extra-state seller which maintains in the taxing state a sales establishment through which the particular order was handled, even though delivery was made by interstate shipment to the purchaser from the out-of-state home office of the corporation.[27] However, the existence of a local office in the taxing state is not sufficient to allow the state to tax the sale where the order was sent by the purchaser directly to the out-of-state office of the seller,[28] although a use tax apparently would be proper under exactly the same circumstances and the out-of-state seller required to collect the tax of the state of the buyer.[29] Likewise, if a foreign corporation chooses to remain at home in all respects, except to send abroad in other states advertising or itinerant salesmen to solicit orders which are sent directly to the home office of the selling foreign corporation where they are accepted and filled, the state in which the purchaser is located has no taxable grip on the out-of-state seller in so far as

24. Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941); Wagner v. City of Covington, 251 U.S. 95 (1919); Emert v. Missouri, 156 U.S. 296 (1895).

25. Walling v. Michigan, 116 U.S. 446 (1886); Welton v. Missouri, 91 U.S. 275 (1875); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).

26. See cases cited notes 21, 22 and 23 *supra.*

27. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951); Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918).

28. In addition to cases cited in note 27 *supra,* see Sonneborn Bros. v. Cureton, 262 U.S. 506, 515 (1923).

29. Nelson v. Montgomery Ward, 312 U.S. 373 (1941); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).

taxing the sale is concerned.[30] Just as the salesman who solicited the order was exempt from privilege taxes on the occupation of soliciting, in like fashion the out-of-state corporation which fills the order cannot be reached by a sales tax, when resisted on commerce clause grounds. But if a foreign corporation approaches a local market to gain the advantage of a local business outlet, it loses its commerce clause tax immunity as to all sales reasonably attributable to the local business.[31] Thus, when the out-of-state corporation engages in a local business, rather than the business of soliciting orders only, it falls in the same category as the "peddler" and there is a sufficient basis to support a tax by the buyer state, over commerce clause objections, on the corporation.

The law of sales has not generally been made the turning point of valid and invalid taxes as applied to the occupation of selling.[32] Thus, the change of title is not determinative of the commerce clause question. Here the court has insisted that "what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed."[33] Even though the title to the goods passes within the taxing state, the exemption from taxation is not removed where the sale results from an order solicited in the taxing state and filled from an outside source of supply.[34] Moreover, the cloak of immunity is not removed even if the goods are delivered by the salesman,[35] or are held at an office in the taxing state for the customer's disposal.[36]

The conflicting policy considerations behind efforts to tax and regulate itinerant salesmen are of considerable importance. Without doubt, considerable stimulus to this type of legislation has been provided by local trade programs designed to promote local business.[37] Outside competition may prove injurious to local merchants unable

30. See Norton Co. v. Department of Revenue, 340 U.S. 534, 537 (1951); *cf.* McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).

31. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951); Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941); Cheney Bros. v. Massachusetts, 246 U.S. 147 (1918); Singer Sewing Mach. Co. v. Brickell, 233 U.S. 304 (1914); *cf.* Dalton Adding Mach. Co. v. Virginia, 246 U.S. 498 (1918).

32. See Rearick v. Pennsylvania, 203 U.S. 507, 512 (1906). *But cf.* McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) (Court virtually let law of sales (passage of title beyond taxing state) determine constitutional question).

33. Dozier v. Alabama, 218 U.S. 124, 128 (1910).

34. Western Oil Refining Co. v. Lipscomb, 244 U.S. 346 (1917); Norfolk & W. Ry. v. Sims, 191 U.S. 441 (1903); *cf.* East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931) (Court found that change of title or custody was not determinative of commerce clause question of tax in interstate transportation of oil).

35. Rearick v. Pennsylvania, 203 U.S. 507 (1906) (goods delivered by salesman who negotiated contract of sale in taxing state and filled order from extra-state source of supply).

36. Brennan v. Titusville, 153 U.S. 289 (1894) (license tax on soliciting agent of foreign manufacturer).

37. See Hemphill, *The House to House Canvasser in Interstate Commerce*, 60 AM. L. REV. 641, 642 (1926).

to compete successfully with larger out-of-state concerns. Moreover, there is present a certain nuisance element in the house-to-house doorbell-ringing canvasser. Likely, however, one of the major factors that led to such legislation has been the dishonesty of many solicitors and drummers, coupled with the opportunities for fraud afforded by the transient nature of the business.[38] Opposing these reasons favoring the legislation are those considerations which the commerce clause historically was designed to prevent, the erection of trade barriers.[39] In many instances the license tax imposed on the itinerant salesman appeared to be aimed at suppressing or placing at a disadvantage the type of business handled by the itinerant solicitor when brought into competition with local sales. This was accomplished mainly by not requiring merchants having a fixed place of business to pay the license tax. Or the statute may be so camouflaged that the net effect of its practical operation is to impose a lighter tax on the local retail merchant, although nominally the statute treats local and out-of-state transients alike.[40]

Most all of the taxing statutes or ordinances which have been struck down when applied to itinerant salesmen, in practical operation, seemed capable of use, by an increase of the tax, to make the cost of distribution extremely burdensome or prohibitive. While a small tax might not have that stifling effect, if the power to impose such a tax exists, its amount might be increased so as to prohibit the extra-state merchant's most effective method of obtaining a market. Apparently, neither the commerce clause nor the due process clause would place a limitation on the amount of an otherwise valid revenue measure.[41] In short, when read in their proper setting, these license taxes levied on itinerant salesmen were of a kind likely to be used as an instrument of discrimination against interstate business. Basi-

38. *Id.* at 643.

39. See Passenger Cases, 48 U.S. (7 How.) 283, 445 (1849); 1 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 106-18 (2d ed. 1836); 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 308 (rev. ed. 1937); 3 *id.* at 478, 547-48; Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 MINN. L. REV. 432, 481-94 (1941).

40. See Best & Co. v. Maxwell, 311 U.S. 454 (1940).

41. Although the authority is scarce as to the commerce clause aspects, it appears that neither the commerce nor the due process clause would limit the *amount* of an otherwise valid tax. See the dissent of Justices Stone, Brandeis and Cardozo in Great No. Ry. v. Weeks, 297 U.S. 135, 157 (1936); see also Helson and Randolph v. Kentucky, 279 U.S. 245, 250 (1929). The cases seem to make it clear that the due process clause would not make such a limitation. A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934); Alaska Fish Co. v. Smith, 255 U.S. 44 (1921); see Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 370-71 (1940). In the case of taxes for the use of public facilities, such as highways, the amount of the exaction is limited by the commerce clause to an amount reasonably necessary to defray the cost of the purpose for which it is levied. *E.g.,* Ingles v. Morf, 300 U.S. 290 (1937). Such exactions are not true revenue measures, but are in the nature of a rental charge for the use of the public facility. See Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 190 (1931). For a fuller discussion of exactions for the use of public facilities, see HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 122 (1953).

cally, the discriminating features of these taxes are what ought to call for commerce clause condemnation. If no discrimination is present, it seems unfair to give interstate commerce this tax advantage over the local business which must be saddled with the tax.

III. Sales and Use Taxes

A. *Sales Taxes Incident to Interstate Sales*

The term "sales tax" as used in this section of our discussion of "sales taxation" refers generally to the retail sales tax and the general sales tax as classified in the opening paragraphs of this article on "Sales Taxation in Interstate Commerce." Some sales taxes apply to the sale of a commodity each time it changes hands; these are often called turnover, or transaction, taxes. Sales of the single-stage type apply to the sale of a commodity only once as it passes through production and distribution channels and into the hands of consumers. The single-stage sales tax is a kind of general excise which can be imposed on any stage of the production process. Ordinarily it is levied at one of three stages of production and distribution. It may be applied either at the manufacturing, the wholesaling or the retailing stage. This section of our discussion of "sales taxation" will not include, except incidentally by way of reference, those taxes levied on gross receipts or gross income of the taxpayer at an annual or some other stated period, and formally called gross receipts or gross income taxes. Those will be considered in a later section of this article.

Prior to 1940 it had been taken for granted that interstate sales enjoyed a great deal of freedom from sales taxes. The Court had, however, narrowed considerably the scope of the tax immunity of such transactions, presumably with an eye to preserving a source of state revenue and perhaps also to lessen the competitive handicap of local merchants who must shoulder such taxes.

The Court had made it clear that the parties, by contractual manipulations, could not convert an otherwise local sales transaction into an interstate sale, at least where the contract achieved nothing else. Thus, where the goods that were the subject of the taxed sale were in the hands of the purchaser to do with as he liked, the fact that the parties by their contract fixed the place for the passage of title in another state could not convert the local sale, subject to state control, into an interstate transaction protected by the commerce clause from taxation.[41a]

Likewise, the Court had refused immunity from sales taxes where the sales contract did not necessarily *require* nor *contemplate* ship-

41a. Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390 (1930).

ment from a point outside the taxing state, although the shipment was in fact so made to fill the contract. That was the teaching of *Wiloil Corp. v. Pennsylvania.*[42] The *Wiloil* opinion also reveals some practical considerations which the Court took into account in sustaining the tax. The Court significantly points out that tax immunity would cause inequality of tax burden between competing products, and therefore between competing merchants, to the prejudice of local business in the taxing state. The *Wiloil* opinion also observes that since the burden of the tax on interstate commerce was equal to that on local business, therefore, no discrimination against interstate commerce could result.

The Court had also refused sales tax immunity in dealership transactions where the source of supply was beyond the borders of the taxing state but the dealer and customer were located within its borders. *Banker Brothers Co. v. Pennsylvania*[43] set the pattern here. The Court analyzed the Banker Brothers automobile dealership transaction as two separate sales, one interstate from the out-of-state manufacturer to the in-state dealer, the other—the taxed one—from the dealer to the customer, both of whom were within the taxing state. Characterizing this typical sales transaction as an "intrastate contract of sale" rather than an interstate transaction, the Court upheld the tax.

The *Wiloil* and *Banker Brothers* doctrines substanially limited the

42. 294 U.S. 169 (1935). The extent to which the *Wiloil* doctrine might be carried, however, is difficult to predict. Is taxability dependent upon whether the contract *contemplated* interstate shipment, or must the contract *require* an interstate journey in order to fall within the *Wiloil* doctrine? Suppose the seller manufacturing goods outside the taxing jurisdiction has neither warehouse nor property of the type sold within the taxing state. A shipment from the extra-state source is contemplated; but, in the absence of some further showing of necessity for making an interstate shipment, is the taxing power of the state impaired under the *Wiloil* doctrine? The seller might purchase the goods from some third person within the taxing state. The *reductio ad absurdum* actually is reached if one imagines a case where no goods of the type ordered are yet in existence. Can it be that the mere possibility of making these articles within the state, although the factory is located outside, brings the situation within the *Wiloil* principle? No language by the Court in any subsequent case suggests any such narrowing of the commerce clause protection from taxation. See Warren and Schlesinger, *Sales and Use Taxcs: Interstate Commerce Pays Its Way,* 38 COLUM. L. REV. 49, 59 (1938).

43. 222 U.S. 210 (1911). In this case Banker Brothers of Pittsburgh sold automobiles manufactured by Pierce Company of Buffalo, New York, keeping no stock of cars on hand. A purchaser signed a contract with Banker Brothers in which he agreed to buy a car, paying the freight from Buffalo and receiving in turn a warranty directly from the Buffalo manufacturer. Purchaser made a down payment and the balance was due when the car was delivered. Banker Brothers accepted a draft drawn by the manufacturer and received a bill of lading pursuant to which it took delivery of the car which had been shipped from Buffalo and had been delivered to Pennsylvania. Thereupon the dealer made delivery to the purchaser. The taxpayer contended that there was only one sale, with the dealer acting merely as the agent for the manufacturer. For a most careful and enlightening discussion of the *Wiloil* and *Banker Brothers* cases in the total picture of sales taxes in interstate commerce, see Lockhart, *Sales Tax in Interstate Commerce,* 52 HARV. L. REV. 617 (1939).

sweeping doctrinal declarations of the *Robbins* case which had declared:

> "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce. . . . The negotiations of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."[44]

Both the *Wiloil* and *Banker Brothers* situations clearly involved "negotiations of the sale of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made"; yet the tax was upheld in both cases.

For an interlude of our constitutional history the "original package doctrine" found judicial acceptance as a prohibition against sales taxes.[45] Eventually, however, the court discarded the "original package" doctrine as an aid for determining whether goods transported interstate had lost their immunity from sales taxes.[46]

But with an interstate sales transaction thus confined to these narrower limits for commerce clause protection, freedom from any form of sales taxation of such transactions was taken for granted. As we have just seen, the *Robbins* case and its successors in kind had insulated from taxation the occupation of making such a sale. Moreover, a tax by the state of the seller upon the proceeds of sales made by a seller to an out-of-state purchaser had been expressly relegated to the limbo of a "direct burden" on interstate commerce. This was the teaching of *Crew Levick Co. v. Pennsylvania*.[47] Although foreign commerce was involved in *Crew Levick*, the Court seemed to take pains to make it clear that the same result would follow in interstate commerce.[48] While there was no case squarely in point with respect to the power of the buyer state to impose a sales tax, it had been taken for granted by the Supreme Court that such a tax would be a violation of the commerce clause.[49] Presumably it was on the assumption that an interstate sales transaction enjoyed tax immunity that caused the states to develop the use taxes, which are

44. Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887).

45. This doctrine had its birth in the development of a limitation on the power of the states to tax imports, where there is an express constitutional prohibition against state taxation of imports. Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827). Nevertheless the doctrine carried over to some extent into the field of interstate commerce. It did not find acceptance at first, however. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868); Brown v. Houston 114 U.S. 622 (1885). For a period of time it did receive judicial approval as a limitation on taxation of interstate commerce. *E.g.*, Texas Co. v. Brown, 258 U.S. 466 (1922); Bowman v. Continental Oil Co., 256 U.S. 642 (1921).

46. Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923). In the field of imports, the "original package" doctrine still has vitality as a limitation on state taxing power. Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945).

47. 245 U.S. 292 (1917).

48. See 245 U.S. at 296.

49. See Sonneborn Bros. v. Cureton, 262 U.S. 506, 515 (1923).

used to make a compensating levy on goods brought into the state as a result of an interstate sales transaction or an out-of-state purchase. These use taxes we will examine in detail presently.

Not only was a sales tax incident to an interstate sale considered prohibited; but, as we will see more in detail a little later, relatively unsuccessful too had been attempts to reach an interstate sale through a tax levied upon gross proceeds, which included receipts derived from an interstate sale. When a sales tax went before the Court in *McGoldrick v. Berwind-White Coal Mining Co.*[50] in 1940, prospects for a valid tax did not look encouraging. Just two years earlier in *J. D. Adams Manufacturing Co. v. Storen*[51] the Court had nullified an Indiana gross receipts tax as applied to the receipts of a local manufacturer of road machinery derived from interstate sales.

Since there was no apportionment of the *Adams* tax, it was thought by the Court to threaten a double tax burden not borne by local commerce, on the theory that if Indiana's (the taxing state) were sustained, a similar tax could also be imposed by the buyer's state. Justice Roberts, speaking for the majority, states the matter as follows:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed."[52]

This language seemed to forbode evil days for the sales tax called into question in *McGoldrick v. Berwind-White Coal Mining Co.* This case involved the application of the sales tax levied by New York City to sales of coal by a coal company to local customers under contracts made in New York but calling for shipment and delivery direct from mines in Pennsylvania. The tax was fixed at "two percentum of the receipts from every sale in the City of New York." Sale was defined by the act as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor." The law also provided that the tax "shall be paid by the purchaser to the vendor, for or on account of the City of New York." The vendor, who was authorized to collect the tax, was required to charge it to the purchaser, separately from the sales price; and the vendor was made liable, as an insurer, for the

50. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940). For an exhaustive treatment of this case, see Powell, *New Light on Gross Receipts Taxes*, 53 HARV. L. REV. 909 (1940).
51. 304 U.S. 307 (1938).
52. 304 U.S. at 311.

payment of the tax to the city. In the event of the nonpayment of the tax to the vendor, the buyer was required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller, who was authorized to set up a procedure for collection of the tax from the purchaser. Purchases for resale were exempt from the tax.

The transaction involved in this case clearly was an interstate sales transaction even as narrowed by the *Banker Brothers*[53] and *Wiloil* cases.[54] There seemed little practical distinction between the New York sales tax, which was measured by the gross receipts of the sale, and the tax levied directly on gross receipts from sales which was condemned in the *Adams* case. It would seem that the unapportioned *Berwind-White* tax, like the *Adams* tax, as applied to receipts from interstate sales included "in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods were sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden."[55] This was the vice of the *Adams* tax. If the buyer's state (here New York) could reach the gross receipts by a sales tax, presumably the seller state could do likewise.

The *Berwind-White* case tax was, nevertheless, sustained by a divided Court. Justice Stone, speaking for the majority, reasoned that interstate commerce should pay its fair share of the tax burden; that the tax was not discriminatory against interstate commerce, and it was imposed on a "local activity," distinct from commerce. "Its [the tax] only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end."[56] As to the economic effect of the tax on interstate commerce, Justice Stone concluded that it had "no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce . . . or the tax on storage or withdrawal for use by the consignee of gasoline . . . or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey."[57]

In the *Berwind-White* opinion, Justice Stone explained that the *Adams* tax, which was measured by the total gross receipts from

53. Banker Bros. Co. v. Pennsylvania, 222 U.S. 210 (1911). See note 43 *supra*, and textual material supported by note 43 *supra*, for discussion of case.
54. Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935). See note 42 *supra*, and textual material supported by note 42 *supra*, for discussion of case.
55. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).
56. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 49 (1940).
57. *Ibid.*

interstate commerce, included proceeds derived from extra-state activities in interstate commerce, as distinguished from the receipts from wholly local activities.[58] On the other hand, the "transfer of possession to the purchaser," which was held to be the "taxable event" in the *Berwind-White* case, was said to be a wholly local activity which could not be taxed elsewhere. The economic incidence of the *Berwind-White* case, would seem to be the same as the *Adams* tax since neither of them was apportioned.

The *Berwind-White* dissent, led by Chief Justice Hughes, spearheaded an attack against the tax on the ground that the majority permitted other states to reach what is essentially the same transaction. The Chief Justice pointed out that delivery (the taxable event), unlike subsequent use or sale, is an integral part of the interstate transaction. If New York can lay a tax on the local act of delivery, it seems just as logical, argued the Chief Justice, that Pennsylvania can impose a tax on the local act of shipment, and New Jersey the transshipment, likewise integral parts of the interstate transaction. Hence commerce between the states is exposed to the danger of a "multiple tax" burden much like the theory of the *Adams* case, before Justice Stone had interpreted it in the *Berwind-White* opinion.

The full possible implications of the *Berwind-White* decision could have been far-reaching but subsequent cases seem to have limited the decision considerably. *Berwind-White,* without doubt, at that time, further committed the Court to the proposition that interstate commerce should "pay its way." While the Court was concerned with avoiding "cumulative tax burdens" on interstate commerce that would place the commerce at a competitive disadvantage with local business, it seemed to have modified that doctrine as developed in the *Adams*[59] and *Gwin, White*[60] cases. It did so in *Berwind-White* by holding that the "transfer of possession" at the end of interstate transportation is a taxable local event, separate and distinct from the commerce itself, thus permitting the seller state (New York) to tax the interstate sale in full. Whereas, the taxes levied on the proceeds of the sale by the state of the seller in the interstate sales transactions in the *Adams* and *Gwin, White* cases were thought by the Court to be imposed on interstate commerce itself; and, since they were not apportioned, the Court felt that they exposed that commerce to the risk of a double tax burden not borne by local business. While the "local activity" concept had been used to prevent tax nullification prior to the *Berwind-White* era, never before that era had such an integral part of an interstate transaction been considered a taxable, local event as that in *Berwind-White.*

58. See *id.* at 57-58.
59. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).
60. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939).

To avoid unfair treatment to interstate commerce by a tax on the proceeds from an interstate sales transaction, it might be necessary either to apportion the tax or to deny the seller state the power to tax the sales transaction at all. Of course, local sales could conceivably be taxed in full both on the seller's end and the buyer's end; and in that manner a tax in full at both ends of the interstate sale would be the same kind of treatment as that accorded local business. Permitting the interstate sale to be taxed in full by the state of the buyer, even though the seller state is denied the power, does have merit. In the state of the buyer is where the goods would enter competition with goods sold locally and which would be subject to the same sales tax. Thus, the tax burden would necessarily fall equally on both interstate and local trade. The competitive situation would remain the same as if no sales tax were imposed, because the tax burden upon interstate and local sales would be the same. Neither interstate nor local business would suffer any competitive disadvantage resulting from a heavier tax burden. The state of the seller has all the productive processes from which it can get its revenue. Thus, it would not be left impecunious. Too, allowing only the buyer state to tax in full would avoid any cumbersome attempts at apportionment of the proceeds of the sale between the buyer and the seller state, as suggested in the *Adams* case, as necessary where interstate sales are involved. It involves, however, a pure policy decision by the Court. But then the Court made a policy decision in the first instance where it declared interstate commerce cannot be taxed at all.[61]

During the same term of Court and on the authority of the *Berwind-White* case the New York City sales tax was upheld in three companion cases.[62] In *McGoldrick v. Compagnie Generale Transatlantique*, and *Jagels, A Fuel Corporation v. Taylor*, the corporate and other relevant facts were essentially like those in the *Berwind-White* case, with the exception that in the *Jagels* case the sales contracts were concluded outside the taxing city. In *McGoldrick v. Felt & Tarrant Mfg. Co.*, decided concurrently with *Berwind-White*, there were differences that seem to be substantial. The taxpayer, Du Grenier, in the *Felt & Tarrant* case, had no place of business in the taxing municipality, and accepted orders outside the taxing city. The

61. Justice Rutledge did some thinking along these lines in his vigorous dissent in McLeod v. J. E. Dilworth Co., 322 U.S. 327, 335 (1944). Other authorities in this field have pointed out the merits of this approach. See Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 710, 739-41 (1947); Lockhart, *Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617, 625 (1939).

62. McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940); Jagels, "A Fuel Corporation" v. Taylor, 255 App. Div. 965, 8 N.Y.S.2d 456 (1st Dep't 1938), *aff'd*, 280 N.Y. 766, 21 N.E.2d 526 (1939), *aff'd per curiam*, 309 U.S. 619 (1940); McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940).

goods were then shipped into the taxing city, f.o.b. the place of shipment. Without even mentioning these differences, the Court, in the *Felt & Tarrant* case, said that, like the *Berwind-White* case, the "transfer of possession" took place in the taxing jurisdiction. Upon this basis the Court sustained the tax. Presumably, the Court meant that the transfer of the goods from the carrier to the buyer within the taxing jurisdiction was the "transfer of possession" sufficient to constitute a taxable event.

The same basic constitutional considerations would seem to apply where the sales tax is imposed on each isolated transaction as it transpires (*Berwind-White* and its companion decisions), as would apply where the proceeds from a sales transaction are included in gross receipts upon which a tax is imposed annually or at some other stated period. The Court emphatically so declared in the case of *International Harvester Co. v. Department of Treasury*,[63] which sustained, over commerce clause objections, a tax on gross receipts, including receipts from sales *followed* by interstate transportation, as well as receipts from another sales transaction at the *end* of an interstate journey. The Court relied upon *Berwind-White* as authority for upholding the tax imposed on each end of the interstate journey, the Court declaring that there is the same practical equivalence whether the tax is on the selling or on the buying phase of the transaction. Each was said to be, in substance, an imposition of a tax on the transfer of property. Too, the Court let it be known that there is no constitutional difference whether the tax utilized is one laid on gross receipts or whether it is a sales tax imposed on each isolated sales transaction. Substance, not dialectics, said the Court, in its enthusiasm of the moment, is what matters.

On the same day the Court decided this *International Harvester* case, it also decided *McLeod v. J. E. Dilworth Co.*,[64] which is a source of considerable confusion and difficulties. This case involved an Arkansas retail sales tax. The complaining taxpayers were Tennessee corporations, which had not qualified to do business in Arkansas and had no place of business there. Orders were solicited in Arkansas by traveling salesmen, or by mail or by telephone. After the Tennessee seller had accepted the orders, shipments were made from Tennessee direct to purchasers in Arkansas where possession was transferred from the carrier to the purchaser. Title passed in Tennessee on delivery to the carrier. In a five to four decision the Court held that the Arkansas sales tax applied to these transactions would be repugnant to the commerce clause. Since title had passed in Tennessee, "the Tennessee seller was through selling in Tennessee." Since

63. 322 U.S. 340 (1944).
64. 322 U.S. 327 (1944).

the sale occurred in Tennessee, the majority said Arkansas had no constitutional power to apply a sales tax to the transaction.

In explaining why the state where the produce would be marketed and consumed could not impose the *Dilworth* sales tax, although it is virtually certain that it could have levied a use tax, the majority was forced to draw a distinction between a sales and a use tax. A sales tax was said to be a tax on the freedom of purchase, while a use tax is imposed on the enjoyment of that which is purchased. This five man *Dilworth* majority seemed impervious to the fact that on the same day as the *Dilworth* decision the Court in *International Harvester* had called the two taxes the same in substance and the same in their effect on interstate commerce. Too, on the same day as the *Dilworth* tax demise, the *General Trading* case had upheld an Iowa use tax on facts essentially similar in corporate and commercial aspects to the *Dilworth* case facts.

The Court allegedly felt that since the Arkansas Court had construed the tax to be a sales tax, it could not hold that the incidence of the tax was such that it fell in the same constitutional category as a use tax. It felt that it could not look behind the label and give the tax a construction that would sustain it. It is a bit strange to have the *Dilworth* Court declare that the Arkansas court's construction of the tax is "controlling," in light of another of its decisions at the same term of Court as the *Dilworth* case. In *International Harvester Co. v. Wisconsin Department of Taxation*,[65] the Supreme Court not only ignored the label which the state court had pinned on a tax in striking it down, but reversed the state court and sustained the tax. The Court was concerned with the constitutional power of a state, it said in the *International Harvester* case, and not with labels which the state courts used to characterize the tax. The same thing had occurred just three years earlier in *Wisconsin v. J. C. Penney Co.*,[66] where the Court ignored the pigeon-hole into which the state court had placed the tax and sustained it.

In the *Berwind-White* decision and its companion cases, the *Wood Preserving*[67] decision and the *International Harvester*[68] holding, the "delivery of possession" of the goods within the taxing state was said to be a taxable event for the sales tax, which was the same sort of tax as that in the *Dilworth* case. It is clear that there was also a "delivery of possession" in the taxing state to the *Dilworth* purchaser. The *Dilworth* majority distinguished the *Berwind-White* case

65. 322 U.S. 435 (1944).
66. 311 U.S. 435 (1940). Apparently the latest instance where the Court refused to be bound by the label placed on the tax by the highest court of the state is Railway Express Agency v. Virginia, 347 U.S. 359 (1954).
67. Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941).
68. International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944).

on the ground that the *Berwind-White* seller had a sales office in the taxing state, made the sales contract in the taxing state and also made delivery there.[69] These were not regarded as the taxable events when *Berwind-White* was handed down, as shown by the validation of the tax in its companion case of *McGoldrick v. Felt & Tarrant.*[70] There the taxpayer, Du Grenier, had no place of business in the taxing state and accepted all orders outside the taxing state. Delivery of possession alone was the event that supported the tax in the *Felt & Tarrant* case. Moreover, Justice Stone expressly declared in his *Berwind-White* opinion that "transfer of possession" constituted the taxable event.[71]

The *Dilworth* case seems to conflict squarely with the *McGoldrick v. Felt & Tarrant* case, which also upheld the New York City sales tax. In both the *Dilworth* and the *Felt & Tarrant* cases, the taxpayer had no established place of business in the taxing state; in both cases orders were solicited in the taxing state by agents, forwarded to out-of-state sellers for approval, and the goods were shipped f.o.b. points outside the taxing state to the purchasers in the taxing state. In every essential commercial and corporate respect the two cases appear to be virtually identical. The *Dilworth* case thrust down the tax; *Felt & Tarrant* held the tax constitutionally impeccable.

However, *Dilworth* did not expressly overrule *Felt & Tarrant,* although both cases seem to involve precisely the same essential facts. Notwithstanding the clear inconsistency of these two cases, the Court in the *International Harvester* case, decided on the same day as *Dilworth,* cited *Felt & Tarrant* as good authority. The Court thus got itself into the anomalous and perhaps unprecedented predicament of impliedly overruling a case and also expressly following it on the same day.

Moreover, when Mr. Justice Frankfurter makes constitutional power turn on the passage of title in the *Dilworth* case, he is doing what had previously been condemned as unsound constitutional doctrine. The question whether title passes in the state of origin of the goods or in the state of destination had not been thought a controlling factor under the commerce clause prior to the advent of *Dilworth.* Justice Holmes had thought that "commerce among the several States is a practical conception, not drawn from the 'witty diversities' of the law of sales."[71a] Following Mr. Justice Frankfurter's *Dilworth* teachings, it would seem possible for parties by contractual manipulation to rig what would otherwise be an exclusively local activity into an interstate trans-

69. McLeod v. J. E. Dilworth Co., 322 U.S. 327, 329-30 (1944).
70. 309 U.S. 70 (1940).
71. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 49 (1940).
71a. East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931); Rearick v. Pennsylvania, 203 U.S. 507, 512 (1906). See also Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390 (1930).

action, so that it could enjoy whatever tax immunity the commerce clause can confer.

In deciding the validity of the *Dilworth* tax, the Court gave no attention to the practical considerations which had found their way into a few of the earlier cases. It gave no recognition to the essential fairness that those engaged in interstate commerce should bear their fair share of the cost of the local government where they operate and whose protection they enjoy. Moreover, the economic effect of the tax ostensibly was not thought to be a factor in determining its validity. Nor did the Court concern itself with the fact that tax immunity in the *Dilworth* transaction would cause inequality of tax burden between competing products to the prejudice of the local business in the taxing state. Nor was the Court impressed by the fact that there was no discrimination against the interstate business there involved, since the burden of the tax on the *Dilworth* business was exactly the same as that on the local business which was saddled with the tax. When a sales tax is levied by the buyer's state, is it too much to suggest that the commerce clause issue ought to be whether the buyer state is treating all purchases made therein alike? Instead, the commerce clause, as applied in the *Dilworth* case, compelled the buyer state to accord a discriminatory favor to purchasers of commodities that come from other states.

The *Dilworth* decision, while adverse to the taxing power of the states, fortunately did not cripple the states with respect to interstate sales as a source of revenue. Arkansas and states similarly situated can resort to the Iowa use tax statute, which was sustained in *General Trading*,[72] as a guide and mow a swathe to the extent their collecting staff can harvest. *General Trading* sustained a use tax exaction under facts similar in all material respects to the *Dilworth* facts.

It is thus apparent that if the questioned tax is styled a sales tax, the scope of state power is much more restricted than if the levy is labelled a use tax, which is levied upon the buyer but with its impact upon the seller who often must serve as collector of the use tax.[73]

B. *Sales and Use Taxes as Applied to Articles Used in Interstate Commerce*

Several efforts have been made to apply sales and use taxes to articles used in interstate commerce. This has been especially the

72. General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944).

73. In characterizing the tax case opinions of this period, Professor Powell has declared that "names were made to matter more than mathematics or economics." See Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 503 (1947). The collection aspects of the use tax will be examined in detail a bit later. See the sub-division "The Use Tax Collecting Device and the Constitutional Question," *infra*.

situation with respect to gasoline when used to propel water craft, trains, busses and planes which are instrumentalities of interstate commerce.

In *Helson and Randolph v. Kenucky*[74] the Court faced for the first time the problem of the validity of use taxes as applied to articles used in interstate commerce. There Kentucky levied a tax upon all gasoline used or sold within the state. The objecting taxpayer was a citizen and resident of Illinois where it had its place of business. Taxpayer did an exclusively interstate ferry business and the gasoline used to create the motive power of the ferry was purchased outside Kentucky, although seventy-five per cent of it was actually consumed within the borders of Kentucky. The effort of Kentucky to apply her tax to the gasoline used by the ferry business was thwarted by the Court. Using familiar doctrinal declarations, the Court condemned the use tax as a "direct burden" upon the "privilege of using an instrumentality of interstate commerce." The Court said:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. . . . A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."[75]

Not long after the *Helson* case, a New Mexico statute, which required a common carrier engaged exclusively in interstate transportation, to pay an excise tax upon the use of motor fuel brought in from another state and used only in transportation in the taxing state, was questioned in *Bingaman v. Golden Eagle Western Lines.*[76] The objecting taxpayer's busses were powered entirely by gasoline purchased without the state. On the authority of the *Helson* case the Court upset the tax as applied.

Under the *Helson* doctrine there seems to be but little opportunity for a state to raise revenue by imposing a use tax upon the use of supplies and equipment while actually employed in interstate commerce.[77]

Following the immunity from use taxes granted by the *Helson* doctrine, an escape from *sales* taxes on articles to be used in interstate commerce was attempted in *Eastern Air Transport, Inc. v. South*

74. 279 U.S. 245 (1929).
75. See 279 U.S. at 252.
76. 297 U.S. 626 (1936).
77. In addition to the *Helson* and *Bingaman* cases, *cf.* Cooney v. Mountain States Tel. Co., 294 U.S. 384 (1935) (Court struck down a state excise tax on each telephone used, in part, in interstate commerce). The exaction was applied indiscriminately without apportionment to an instrumentality common to interstate and local business. One writer has questioned whether the *Helson* doctrine is still the law. See Brown, *The Future of Use Taxes,* 8 LAW & CONTEMP. PROB. 495, 496 (1932).

Carolina Tax Commission.[78] The Court refused, however, to expand the zone of tax immunity in this field. In the *Eastern Air Transport* case South Carolina had imposed on all dealers in gasoline a license tax measured by the number of gallons of gasoline sold in the state. The complaining taxpayer operated planes only in interstate commerce. Purchases of gasoline were made in the taxing state for use of its planes and the seller added the amount of the tax to the price which the seller had to pay. In refusing an injunction against the collection of the tax as an alleged violation of the commerce clause, the Court sustained the validity of the tax as applied to the taxpaying carrier, although engaged exclusively in interstate commerce. The "mere purchase of supplies or equipment for use in conducting interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers," said the Court.

The Court found no difficulty in distinguishing the sales tax involved in the *Eastern Transport* case from the use tax struck down in the *Helson* case, on the ground that a use tax is "manifestly different from . . . a tax upon purely local sales." This difference is that the sales tax occurred at a stage more remote from interstate transit than the use tax, which was thought to be directly upon that commerce. From a time or geographical standpoint the sales tax on this article used to carry on interstate commerce is not so identified with the subsequent interstate commerce as is the use tax on articles employed in interstate commerce. But from an economic viewpoint, the two taxes would seem to be an equal burden upon interstate commerce. The net effect of both types of tax would seem to produce the same overall decrease, if any, in the volume of interstate business, since the sales tax was here clearly passed on to the taxpayer engaged in interstate commerce. It is difficult to see how the condemned *Helson* use tax could have any greater propensities to hamper or hinder interstate trade than would the sanctioned *Eastern Air Transport* sales tax. But then the Court has attached but little significance to economic effects of the tax in determining whether the tax is permissible or not permissible.[79] Use tax litigation has furnished no exception to the rule that the Court has been chiefly concerned with activities having some physical connection with interstate movement in determining the validity of a tax. The tests resorted to by the

78. 285 U.S. 147 (1932).

79. See Southern Pac. Co. v. Gallagher, 306 U.S. 167, 177-78 (1939); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 217 (1925). It would neither be correct nor fair to say that the Court has never given consideration to the economic consequences of the tax in deciding its validity. See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 49 (1940); Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935); United States Glue Co. v. Oak Creek, 247 U.S. 321, 329 (1918).

Court are thus mechanical.[80] Economic similarity as an exclusive test would, of course, make pertinent precedents out of many cases otherwise in conflict with each other. In no other instance is that better shown than in the cases involving sales and use taxes as applied to articles and instrumentalities used in interstate commerce.

C. *Use, Storage and Withdrawal Taxes on Articles Transported in Interstate Commerce*

When the Court struck down the use tax as applied to the actual consumption of gasoline by a vehicle doing an interstate business in the *Helson*[81] case, it became clear that the use tax had definite limitations as a revenue raising measure. Storage and withdrawal for use taxes were attempted, apparently in an effort partially to get around the effects of *Helson*.

Storage or withdrawal taxes may be imposed at three different stages—before the articles start their interstate movement, after the movement ends, or during an interruption or break of the interstate movement. The use tax generally is levied after the articles have completed an interstate trip, but this tax may be imposed, like storage and withdrawal taxes, between two segments of an interstate journey.

In determining whether a use, storage or withdrawal tax as applied to articles transported in interstate commerce is a forbidden burden, the Court has been primarily concerned, as it has been with other taxes, with whether the event upon which the tax was laid has some physical connection with interstate movement. Little significance, if any, has been attached to the economic burden of the tax.

The Court early evolved the doctrine that articles ceased to be subject to state taxation when the goods started on a final journey out of the state;[82] and conversely, when the interstate movement had not begun, the mere fact that such movement was contemplated did

80. The Court, at times, makes a forthright recognition of the mechanical nature of the test. See Parker v. Brown, 317 U.S. 341, 360 (1943). Justice Stone's *Di Santo* dissent also pointed this out. See Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (dissenting opinion).

81. Helson and Randolph v. Kentucky, 279 U.S. 245 (1929). See textual treatment supported by notes 74-78 *supra*, for development of doctrine.

82. In Coe v. Errol, 116 U.S. 517, 525 (1886), the Court pointed out that the dividing line between a taxable and a non-taxable activity should be dependent upon whether interstate movement had started. For cases holding that goods are non-taxable while in interstate movement, see Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872). For a late case where the same principle was invoked where gas was shipped interstate, see Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

not withdraw the property from the state's power to tax it.[83] Even practical continuity of production and interstate movement has not always made an activity a part of interstate commerce for tax protection purposes.[84] The fact that articles intended for movement in interstate channels have work done on them, which adapts them to the needs of commerce, has not immunized from various forms of local taxation either the articles themselves or those who produced or prepared them for a trip beyond the borders of the state.[85] So, by analogy, storage of goods before their movement in interstate commerce begins has not exempted the goods from a storage tax, although an interstate movement was contemplated. A non-discriminatory tax upon the business of storing goods which have not yet begun their interstate journey has been sanctioned, although the goods were awaiting shipment beyond the borders of the taxing state.[86] The burden of the storage tax was said to be too indirect and remote to transgress constitutional limitations in such instances.[87] In like fashion, articles that have been transported interstate, after the termination of their interstate journey, no longer remain subjects of interstate commerce and they may constitutionally be made the subject of use or other enjoyment taxes.[88] The tax is considered an excise laid upon the privilege of local use of the goods which have passed beyond interstate commerce and have lost their interstate character.

Some elaboration on the idea of moving in interstate commerce, as a criterion for determining the validity of storage and use taxes, is needed where the movement is checked or interrupted. In short, what is the status taxwise of goods which are thus halted between two segments of interstate commerce? This facet of use and storage taxes has an added constitutional feature where articles have been transported interstate, and stored, awaiting use or consumption in an interstate business, where the use tax could not be applied because of the *Helson*[89] doctrine.

83. Chassaniol v. Greenwood, 291 U.S. 584 (1934) (tax on buying and selling cotton to go into out-of-state commercial channels); Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934) (tax on storing and compressing cotton which had not yet begun to move in intended interstate commerce); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) (tax on ore to be sent out of the taxing state).

84. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (tax on generation of electricity where the production and transmission of electricity were instantaneous and simultaneous); *cf.* Southern Pac. Co. v. Gallagher, 306 U.S. 167 (1939).

85. *E.g.*, Chassaniol v. Greenwood, 291 U.S. 584 (1934); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932); Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); *cf.* American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).

86. Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934).

87. See *id.* at 22.

88. Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934); *cf.* J. Bacon & Sons v. Martin, 305 U.S. 380 (1939) (tax on the "receipts" of goods construed and sustained as a tax on sale and use of goods after retailer had received them).

89. Helson and Randolph v. Kentucky, 279 U.S. 245 (1929).

As we have seen, a state may not tax property in transit in interstate commerce,[90] and until 1940 it was thought that an interstate sales transaction was likewise entitled to the same tax immunity.[91] Couple with those two principles the doctrine of the *Helson* case, which exempted from taxation the use of articles used in interstate commerce, and there existed the possibilities of large scale tax avoidance by rigging purchases of goods so as to constitute interstate sales. That is what large users of articles did. After the articles were delivered in the buyer's state through an interstate sale, they would be stored and withdrawn as needed for use in interstate commerce. In this way the users of the articles enjoyed freedom from a great deal of state taxation.[92] It was to this sort of practice that storage and withdrawal taxes were directed, with a view to removing the tax immunity from goods halted for storage purposes between two segments of interstate commerce.

Storage and withdrawal taxes, as applied to articles transported interstate for use or consumption in interstate commerce, seem to have been called into judgment for the first time in 1933 in *Nashville, Chattanooga & St. Louis Ry. v. Wallace.*[93] There Tennessee had levied a "privilege tax" on the storage of gasoline within the state and its withdrawal from storage for sale or use. The tax was assailed by the taxpaying railroad on commerce clause grounds, as applied to gasoline brought into Tennessee by the taxpayer, stored, withdrawn and used as a source of motive power for moving its interstate trains. The attack was spearheaded on the double ground that it was imposed on the gasoline while still the subject of interstate commerce in the course of transportation from points of origin outside the taxing state; and on the ground that it was, in effect, a tax upon the use of gasoline in taxpayer's business as an interstate carrier.

Over all the objections, the tax was sustained as a valid exercise of the taxing power of the state. When the gasoline was "unloaded and stored [it] ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation."[94] In sustaining the tax, the Court relied heavily on the analogy to the power of a state to levy personal property taxes on goods similarly situated. While adhering to the doctrine that the states may not tax property in transit in interstate commerce, the Court reasoned that it is also well settled that, by reason of a break in the transit, the

90. See cases in note 82 *supra.*
91. See cases in notes 47-51 *supra,* and textual material supported by those notes.
92. See Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way,* 38 COLUM. L. REV. 49, 55 (1938).
93. 288 U.S. 249 (1933).
94. 288 U.S. at 266.

property may come to rest within a state and become subject to the power of the state to impose a non-discriminatory property tax.

Not all pauses in interstate movement will permit a property tax, however. The crucial question in determining whether the state's power may thus be exerted to tax personal property that has been halted in its interstate journey, is dependent upon the purpose for which the transit is broken. The decisions established the principle that when property comes to rest within a state primarily because of its owner's business reasons, and is subject to his complete power of disposal either within or without the state as his interests dictate, the property is deemed to be a part of the general mass of property within the state and subject to the state's taxing power.[95] On the other hand, if the stoppage is a mere temporary interruption due to the necessities of the journey or for the purpose of safety or convenience, the property remains immune from state taxation.[96]

On the personal property tax analogy, the Court felt that the storage tax in the *Wallace* case was levied on the privilege of storing gasoline that had become a part of the common mass of goods within the state and subject to local taxation. The gasoline, upon being unloaded and stored, ceased to be a subject of interstate commerce. When the gasoline was shipped from points of origin outside the taxing state, no destination for any part of it, other than the storage tanks of the taxpayer in the taxing state, had been arranged. Although in the usual course of business a variable and undefined part of the gasoline would be segregated and again would be transported across state borders, the taxpayer was free to distribute it either within or without the state for use in its business or for any other purpose. So reasoned the Court.

In line with the then prevailing doctrinal declarations, the Court was of the opinion that the storage tax in the *Wallace* case would only indirectly affect interstate commerce. The tax was, therefore, not one imposed on the use of the gasoline as an instrument of commerce, where such tax was invalidated as a "direct burden" on interstate commerce in the *Helson*[97] case.

At the same term of Court as the *Wallace* decision, *Edelman v. Boeing Air Transport, Inc.*[98] was decided. There the Court sustained a use tax statute, substantially identical to the *Wallace* storage tax,

95. *E.g.*, Susquehanna Coal Co. v. South Amboy, 228 U.S. 665 (1913); Bacon v. Illinois, 227 U.S. 504 (1913); General Oil Co. v. Crain, 209 U.S. 211 (1908); American Steel & Wire Co. v. Speed, 192 U.S. 500 (1904); Diamond Match Co. v. Ontonagon, 188 U.S. 82 (1903); see Minnesota v. Blasius, 290 U. S. 1, 10 (1933).

96. Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929); Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922); Kelley v. Rhoads, 188 U.S. 1 (1903).

97. Helson and Randolph v. Kentucky, 279 U.S. 245 (1929).

98. 289 U.S. 249 (1933).

as applied to an interstate air transport company. The *Wallace* case statute was labelled a storage and withdrawal tax; the nomenclature used in the statute upheld in the *Edelman* case was that of a use tax. Both tax statutes were of the same nature and designed to reach the same event.

The use tax, coupled together with a storage tax in the same statute, was upheld in two cases involving a California statute. These cases are of some significance because they substantially narrowed the scope of tax immunity given to articles used in interstate commerce. The first was *Southern Pacific Co. v. Gallagher*,[99] which sustained the statute on storage and use as applied to railroad equipment and supplies purchased outside and brought into the state for use in the operation of an interstate railroad. The Court found a taxable moment when the articles "had reached the end of their interstate transportation and had not begun to be consumed in interstate operation." During this break, the privilege of "storage and use—retention and exercise of a right of ownership respectively—was effective" as a taxable event.

At the same term of Court, California's use and storage tax was again sustained, over commerce clause objections, in *Pacific Telephone & Telegraph Co. v. Gallagher*.[100] There the questioned tax was applied to equipment, apparatus, materials and supplies purchased outside and shipped into the state to be used in operation, maintenance and repair of an interstate communications system. The tax was validated on the authority of the *Southern Pacific* case. The Court decided that the taxpaying communications company exercised two rights of ownership in the taxing state—retention and installation of the equipment—after the termination of the interstate shipment and before the use or consumption in interstate commerce began. They could properly serve as taxable events.

The *Southern Pacific* and the *Pacific Telephone* decisions expanded to a considerable extent the taxing power of the state over the

99. 306 U.S. 167 (1939).

100. 306 U.S. 182 (1939). In Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947), a divided Court sustained a municipal ordinance which required the payment of a license fee for carrying on the business of storing personal property as applied to coal shipped from another state, stored in the jurisdiction awaiting shipment by owner to its final destination, either to another state or to other points in the same state. Most of the coal was, in fact, shipped out of the taxing jurisdiction to other states. The coal was stored in the taxing jurisdiction because storage space in the state of destination (New York) was so scarce and rates so prohibitive that it was stored elsewhere than in New York. The Court felt that the coal was stored primarily for the owner's "business reasons" rather than "transit reasons." This reasoning is consistent with earlier opinions upholding taxes where the tax was imposed during a break in an interstate journey for the "business reasons" of the owner, rather than during a break for "transit reasons," where a tax cannot be imposed. See notes 95-96 *supra*, and textual material supported by those notes.

Wallace case and the *Edelman* holding. In *Wallace* and *Edelman* there had been a period of time during which the taxed materials were in "storage" at the end of the interstate delivery. There was thus a break of considerable duration in the interstate movement. The taxable grip was on the storage and the withdrawal from storage for use of these materials in interstate commerce. In the *Southern Pacific* and *Pacific Telephone* decisions a part of the articles were sent from outside the taxing state to the place of installation where they immediately were put into interstate operation. The entire interstate movement and installation were "as nearly continuous as managerial efficiency can contrive."[101] The interval of taxable use was thus reduced to the very brief period of actual installation.

D. *Compensating Use Taxes Incident to Interstate Sales*

1. *Nature and Purpose of the Compensating Use Tax*

Even though a state imposes a sales tax, its residents likely will continue to make most of their minor purchases from local sources. They are likely, however, to go bargain hunting outside the state to a less tax-burdened market for their major purchases. The unfortunate result of such extra-state bargain hunting is not merely a short-changing of the state's coffers, but local merchants whose transactions are subject to the local sales tax may find themselves at a competitive disadvantage with an extra-state seller who is not burdened with any equivalent sales tax.[102] The legislatures of states having a sales tax have not been able to plug these economic leaks by extending the reach of the sales tax. For one thing, the due process clause of the fourteenth amendment would seem to be an impediment to taxation of extra-territorial sales.[103] Moreover, as we have had occasion to see, prior to the 1940 decision of *McGoldrick v. Berwind-White*,[104] it was taken for granted that the state of the purchaser was constitutionally powerless to impose a sales tax on an interstate sales transaction.[105] These limitations on the taxing power of the states enabled residents of states having a sales tax to make their purchases tax-free, either by making the purchase beyond the borders of their state or by arranging the

101. Southern Pac. Co. v. Gallagher, 306 U.S. 167, 173 (1939).

102. For authorities recognizing these infirmities in the sales tax structure, see Carlson, *Interstate Barrier Effects of the Use Tax*, 8 LAW & CONTEMP. PROB. 223-25 (1941); Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 COLUM. L. REV. 49, 64 nn. 65-70 (1938).

103. See Lowndes, *State Taxation of Interstate Sales*, 7 MISS. L. J. 223, 228-29 (1935). For a relatively late commerce clause obstacle to such tax, see McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).

104. 309 U.S. 33 (1940).

105. See notes 53-55 *supra*, and textual material supported by those notes.

transaction so as to constitute an interstate sale. It was to this sort of bargain hunting, hurtful both to local business and state revenue raisers, that the compensating use tax was directed.

Compensating use tax statutes take the form of a levy on the local privilege of using property within the taxing state, which would have been subject to a sales tax had the property been purchased within the taxing state. The compensating use tax rate is the same as the local sales tax levy, and provision is made that no article on which a sales or use tax has once been paid shall again be subject to the use tax. The compensating use tax is thus geared as complementary to the local sales tax.

2. *Discriminatory Aspects of the Compensating Use Tax*

Apparently one of the purposes, and certainly one of the results, of the compensating use tax is to help the retail sellers in the taxing state to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding tax burden. Another ostensible purpose, and certainly another tendency of the use tax, is to avoid the likelihood of a drain upon the revenue of the state by removing from buyers the temptation to place their orders in other states in an effort to avoid payment of the tax on local sales. These purposes and consequences of the compensating use tax are frankly recognized by the Court, but do not militate against the constitutionality of the tax.[106]

The possible discriminatory aspects of the compensating use tax, complementary to the sales tax, apparently was first questioned on commerce clause grounds in 1937, in *Henneford v. Silas Mason Co.*[107] There, the complaining taxpayer had purchased machinery and materials outside the taxing state (Washington) for use in building Grand Coulee Dam on the Columbia River. After the property had come to rest, Washington sought to apply to it her tax levied on the use of chattels in that state. The Silas Mason Company assailed the tax as a violation of the commerce clause insofar as the tax applied to chattels purchased in another state and used in Washington thereafter. The Court, speaking through Justice Cardozo, upheld the tax and refused the requested injunction against its enforcement.

The Court was of the opinion that the incidence of the use tax was not upon the operation of interstate commerce, but upon the local privilege of using the goods after commerce had ended. To support its decision, the Court again relied upon the general property tax as well as the general use tax. It reasoned that things acquired or transported in interstate commerce may be subjected to a property

106. See Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941); Henneford v. Silas Mason Co., 300 U.S. 577, 581 (1937).

107. 300 U.S. 577 (1937).

tax, nondiscriminatory in operation, when they have become part of the common mass of property within the state of destination; and for like reasons they have been subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. The privilege of use was declared to be only one attribute, among many, of the bundle of privileges that make up property ownership, and a state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. Calling the *Silas Mason* use tax an excise when laid solely upon the use of the property did not, thought the Court, make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership.

The compensating use tax has considerable similarity to the general use, storage and withdrawal taxes. However, one different feature that claimed considerable attention by the Court in the *Silas Mason* case was the possible discriminatory aspects of the compensating use tax, since it was levied only on goods purchased out of state or through interstate channels. But the Court found no grounds for holding that the compensating use tax discriminated against interstate commerce. While the questioned Washington statute imposed a tax upon the use of the chattels within the taxing state, it was subject to an offset if another use or sales tax had been paid on it. That was true whether the offsetting tax became payable to Washington by reason of purchase or use within the state, or whether the offsetting tax had been paid to another state by reason of use or purchase there. In short, no one who used property in Washington after buying it at retail was to escape a tax upon the privilege of enjoyment except to the extent that he had paid a use or sales tax somewhere, but everyone who paid a use or sales tax in any other state, to that extent, was exempt from the payment of the use tax in the State of Washington. As Justice Cardozo put it: "Equality is the theme that runs through all sections of the statute. . . . When the account is made up, the stranger from afar is subject to no greater burden as a consequence of ownership than the dweller within the gates."[108]

Although the sales and use taxes do not appear in the same statutory enactment, that is not enough to condemn the use tax as discriminatory. It seems necessary, however, to find the tax on the local purchases complementary to the use tax in order that the interstate buyer will not bear an economic burden disproportionate to that borne by the local purchaser, with resulting discrimination against interstate business. Where the sales and use taxes appear in the same statute, there is no trouble in finding them complementary.

108. 300 U.S. at 583-84.

In view of the fact that the sales exaction often appeared earlier than the use tax, it became necessary to read the two statutes together to avoid condemnation as discriminatory. Whether read together by the highest state court,[109] or absent such construction by the state forum, the Supreme Court of the United States has experienced no difficulty in reading the statutes as complementary.

The question of discrimination is not necessarily confined to the particular tax statute under attack, but may depend upon the resultant of that and other tax statutes. Thus, if in the end product, the burden borne by the interstate transaction is balanced by an equal burden in another statute where the sale is strictly local, there is no discrimination.[110] " 'There is no demand . . . in [the] Constitution,' " says the Court, " 'that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.' "[111]

Although the *Silas Mason* case was the first case involving the validity of the compensating use tax, complementary to general sales levies, the principle of compensating taxation in the interstate commerce field had already received commerce clause blessing by the Court. As early as 1868 the problem was presented to the Court in *Hinson v. Lott.*[112] This appears to have been among the Court's earliest excursions into discriminating tax aspects of interstate commerce law. In the *Hinson* case, Alabama had laid a gallonage tax on the sale of spiritous liquors, the products of sister states, but which was not laid on local liquors. Comparing the gallonage tax on dealers of out-of-state liquors with other taxes applicable to domestic products, the Court found that the tax levied on the out-of-state liquors was not discriminatory since local distillers were subject to an equivalent amount of tax. While the methods of collection were different, the taxes were complementary and were intended to effect equality of the burden. The state was not playing favorites with home folks.

Another instance of constitutional compensating taxation can be found in *General American Tank Car Corp. v. Day.*[113] There Louisiana laid, solely on nonresident corporations, a tax in lieu of local taxes on rolling stock operated within the state. In comparing the tax on the nonresident corporation with the local taxes upon residents, the Court found no discrimination. In *Interstate Busses Corp. v. Blodgett,*[114] a tax of one cent per mile of highway traversed by busses in interstate commerce was upheld although there was no similar tax on intrastate motor carriers. Intrastate carriers were subject to a gross re-

109. Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).
110. General American Tank Car Corp. v. Day, 270 U.S. 367 (1926).
111. Henneford v. Silas Mason Co., 300 U.S. 577, 584 (1937).
112. 75 U.S. (8 Wall.) 148 (1868).
113. 270 U.S. 367 (1926).
114. 276 U.S. 245 (1928).

ceipts levy and an income tax, however, to which the interstate busses were not subject. Upon comparison of the taxes imposed upon the local carriers with the taxes imposed upon the interstate carriers, the Court, speaking through Justice Stone, found that the complaining taxpayers had not shown that the tax complained of fell with disproportionate economic weight on him. The mere fact that different measures of taxation were applied to interstate and local carriers was not tantamount to a discriminating preference to local business.

The case that perhaps most nearly answered the discrimination argument in the *Silas Mason* compensating use tax case was *Gregg Dyeing Co. v. Query.*[115] There South Carolina taxed the use of gasoline but exempted fuel upon which the local sales tax had been paid. The United States Supreme Court construed the use tax as being complementary to the sales tax and found the law did not discriminate against interstate commerce. The taxpayer had "failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact."[116]

The crux of this position on tax discrimination is succinctly and picturesquely stated by Justice Cardozo in sustaining the *Silas Mason* use tax:

> "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed."[117]

In short, a party complaining of a tax does not establish discrimination against interstate commerce merely by showing that the tax to which he is subjected is different in form,[118] or adopts a different measure or method of assessment, or that he is subject to a larger number of taxes than is a taxpayer doing wholly a local business.[119] A tax is not discriminatory against interstate commerce if other related taxes impose equal burdens on local business. In order to show that a taxpayer is discriminated against within the meaning of the commerce clause condemnation it generally is necessary to show that in actual practice the tax complained of falls with disproportionate economic weight on the complaining taxpayer.[120]

115. 286 U.S. 472 (1932).
116. 286 U.S. at 482.
117. Henneford v. Silas Mason Co., 300 U.S. 577, 584 (1937).
118. Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932); Hinson v. Lott, 75 U.S. (8 Wall.) 148 (1868).
119. Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950); Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928); *cf.* Armour & Co. v. Virginia, 246 U.S. 1 (1918).
120. See Henneford v. Silas Mason Co., 300 U.S. 577, 584-85 (1937); Gregg Dyeing Co. v. Query, 286 U.S. 472, 480 (1932); Interstate Busses Corp. v. Blodgett, 276 U.S. 245, 251 (1928).

A statute may, of course, show on its face that it is aimed at placing at a disadvantage out-of-state business when brought into competition with competing local business.[121] But the commerce clause condemns discriminatory taxation whether forthright or ingenious.[122] Consequently, even though a tax is nondiscriminatory in form, if in practical operation the tax gives local business a competitive advantage over interstate business, it will be condemned as discriminatory.[123] Only by an evaluation of all the facts and circumstances can the issue of discrimination be determined by the Court.[124]

3. *Summary Comment on Sales and Use Taxes*

With the *Helson*[125] case as the fountain-head, there seems but little opportunity for a state successfully to impose a use or other enjoyment tax upon the operations of interstate commerce, where the tax is upon the use of articles still considered within the stream of that commerce, or upon the use of supplies or equipment actually employed in conducting the commerce. But, subject to the limitation that a state cannot levy a use tax on these actual operations of interstate commerce, the general use and other enjoyment taxes are now excises so common that their validity has been virtually removed from the area of debate, subject to a collection feature which will be considered presently. Articles acquired or transported in interstate commerce may be subjected, when once they are at rest, either at the end of their interstate transportation or when they are at rest during a break in the trip for the business purpose of the owner, to a nondiscriminatory tax upon their use or enjoyment. The tax is considered as a levy upon the privilege of local use of the goods after

121. A means of discrimination that made its appearance at a fairly early date was that of exempting from the tax in question the local goods, thus leaving only interstate business subject to the tax. I. M. Darnell & Son v. Memphis, 208 U.S. 113 (1908); Walling v. Michigan, 116 U.S. 446 (1886); Tiernan v. Rinker, 102 U.S. 123 (1880); Welton v. Missouri, 91 U.S. 275 (1875). Another form of discrimination that has been condemned is that of subjecting nonresident business to higher tax rates than local business. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).

122. See Best & Co. v. Maxwell, 311 U.S. 454, 455 (1940).

123. Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940).

124. See Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940); Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 16 (1940). Justice Stone introduced a new concept of tax discrimination in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939). In practical operation, he thought that interstate commerce is discriminated against if it is subjected to the risk of a cumulative tax burden not borne by local business, even though the taxing state in no sense purported to play favorites with its own businesses. This is not the usual meaning of discrimination, however. For an extensive treatment of discriminatory aspects of taxation, see Overton, *State Taxation of Interstate Commerce*, 19 TENN. L. REV. 870 (1947).

125. Helson and Randolph v. Kentucky, 279 U.S. 245 (1929). For a discussion of the doctrine of this case, see the textual treatment supported by notes 74-77 *supra*.

the commerce has lost its interstate character and not a prohibited tax upon the operations of interstate commerce.

In some respects the handling by the Court of sales, use and other enjoyment taxes represents a keen awareness by the Court of the revenue needs of the states. Activities and events indispensable to interstate commerce have often been recognized by the Court as local privileges for tax purposes, although the taxable moment may be most brief, as illustrated by the use tax on supplies and equipment shipped interstate for installation in interstate operations. The entire movement, including the taxable installation, was "as nearly continuous as managerial efficiency can contrive."[126]

The fact that use and other enjoyment taxes are directed at single acts in the employment of articles, such as storage, withdrawal and installation, seems to be the feature that often saves the tax from condemnation as an exaction on the privilege of interstate commerce. The legislator can here learn a valuable lesson in statutory draftsmanship. Instead of phrasing the tax so that it will meet its Waterloo as a tax levied on the privilege of engaging in interstate business, by astute draftsmanship acts or events closely related to interstate commerce can be singled out as the incidence of the tax, and the statute may produce as much revenue as if the legislature had been permitted to invade that judically designated sanctuary of the privilege of engaging in interstate commerce.

But the distinction between permissible and nonpermissible use and enjoyment taxes demonstrates clearly the mechanical nature of the test employed by the Court to determine constitutionality, with but little significance attached to the economic consequences of the levy. Thus, the use tax cannot, consistent with the commerce clause, be levied on the consumption of articles in interstate commerce, because the Court feels that it is a tax on the privilege of engaging in interstate commerce. However, a sales tax imposed upon the single local activity of selling the same articles would have been upheld, even though the amount of the tax is passed on to the interstate business. Similarly, use and storage taxes upon the single local activity of storing or installing the articles immediately before they begin to be consumed in interstate operation are valid, even though the state had a taxable grip for only a brief moment.

It does seem to tax one's credulity a bit to understand how the economic effect of those taxes held valid and those held invalid could be appreciably different, especially where the burden of the tax is shifted to the interstate business; all would seem to impinge upon commerce equally from an economic standpoint. The increased cost to the interstate operator from a sales tax or "a tax on installa-

126. Southern Pac. Co. v. Gallagher, 306 U.S. 167, 173 (1939).

tion is the same as from a tax on consumption or operation," says the Court, but it adds that "this is not significant."[127] "The prohibited burden upon commerce between the states [in such instances]," pontificates the Court, "is created by state interference with that commerce, a matter distinct from the expense of doing business."[128] Yet it is difficult for the writer to get away from the thought that the real nub of a burden on commerce or the unreasonable hampering or interference with commerce, which the commerce clause was designed to prevent, is the dollars and cents effect of the tax. The thing that will place interstate commerce at a competitive disadvantage with a local business and thus erect a trade barrier, is a discriminatory cost handicap resulting from unequal tax treatment, and not an inconsequential encroachment upon some conceptual judicial notion of what is interstate commerce.

E. *The Use Tax Collecting Device and the Constitutional Questions*

Questions of discrimination and interstate trade barriers have not been the only constitutional hurdles which the compensating use tax has had to cross. A convenient administrative device employed by the taxing states has been the requirement of the use tax statute that the out-of-state seller serve as tax collector. The out-of-state seller is required by the statute to collect the use tax and he is then left to reimburse himself by increasing his price. So, although the use tax itself may be cleared of constitutional objections, there remains the question whether the practice of requiring the out-of-state seller to collect and pay the use tax constitutes an unconstitutional interference with interstate commerce or a denial of due process. In short, granting a valid taxable event, is there also constitutional collectibility? The tax itself is a burden on one engaged in local use, but coerced collection has a direct impact only on one engaged in interstate transactions. Moreover, the taxing state pretty clearly could not, consistent with due process or commerce clauses, tax the out-of-state sale.[129]

Until recently, this collection aspect of the use tax has not given the Court much pause, but in arriving at its conclusion that the collection method imposes no constitutional difficulty, the Court often confuses valid taxability with constitutional collectibility.

The constitutionality of the collection aspects of the use tax was first raised in *Monamotor Oil Co. v. Johnson.*[130] There, Iowa laid a tax on the use of gasoline, but the out-of-state seller was doing business in the taxing state. In sustaining the tax as against the objection that the collection requirement ran afoul of constitutional

127. *Id.* at 177.
128. *Id.* at 177-78.
129. See McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).
130. 292 U.S. 86 (1934).

requirements, the Court jumped from constitutional taxability to constitutional collectibility. Speaking through Justice Roberts, with respect to the point, the Court said:

> "The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the State, report and pay the tax on gasoline thus coming into the State for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant [out-of-state collector]."[131]

With the *Monamotor* case as a precedent, until 1954, the Court has made short work of the constitutional objection to collectibility with either a quotation of the foregoing excerpt from the *Monamotor* opinion, or a statement that making "the distributor the tax collector for the State is a familiar and sanctioned device."[132]

Where the tax collector-seller has come into the state and does business within its jurisdiction through agents with offices in the state,[133] even though the transaction in question did not concern the local business,[134] the seller-collector has pretty clearly submitted to the power of the taxing state. But where the out-of-state seller has never qualified to do business in the taxing state and has no office, branch, warehouse, or general agents in the taxing state, and its only business is done through travelling salesmen, the nexus of the taxing state with the collector-seller is rather slim. Nevertheless, coerced collection of the tax by the out-of-state seller has been sustained in this type of factual setup in *General Trading Co. v. Tax Commission*.[135] The Court disposed of the constitutional question of collectibility with one observation: "To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co. v. Johnson . . . Felt & Tarrant Manufacturing Co. v. Gallagher. . . .*"[136]

It was a "familiar and sanctioned device" to make the out-of-state seller serve as a collector when he had localized himself by operating through a retail outlet within the taxing state, as was the *Monamotor* and *Felt & Tarrant* situations; but it was neither familiar nor had it been sanctioned when this was not the situation. In both *Monamotor* and *Felt & Tarrant* the out-of-state tax collectors were doing business within the taxing jurisdiction and had submitted themselves to its power. These cases are hardly due process precedents, however, for the *General Trading* case, where the sales were made in the taxing

131. 292 U.S. at 95.
132. General Trading Co. v. State Tax Comm'n, 322 U.S. 335, 338 (1944).
133. Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939).
134. Nelson v. Montgomery Ward, 312 U.S. 373 (1941); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).
135. 322 U.S. 335 (1944).
136. General Trading Co. v. State Tax Comm'n, 322 U.S. 335, 338-39 (1944).

state through solicitation of orders by travelling salesmen. As the dissent pointed out through Justice Jackson, the Court held in the *General Trading* case that a state has power to make a tax collector out of one on whom it has no power to lay a tax.

In *Miller Brothers Co. v. Maryland*,[137] the Court felt that the buyer's state had gone too far, consistent with due process, in making the out-of-state seller serve as a use tax collector. There, the taxpayer, a Delaware seller, resisted a Maryland use tax statute which required this nonresident seller to collect from Maryland residents making retail purchases at seller-collector's Delaware store. Some of the taxed sales were cash-and-carry; others, amounting to some $8,000 over a four-year period, involved delivery in Maryland by private truck or common carrier. The seller was neither qualified to do business in Maryland nor did it send its salesmen, solicitors or agents into Maryland. No orders were taken by mail or telephone. This extra-state seller advertised with only Delaware newspapers and radio stations; but, although no ads were directed specially to them, some did reach Maryland residents. Circulars were periodically mailed to all former customers by seller, and these included Maryland customers. Seller resisted Maryland's use tax collecting device, as applied to him, on substantive due process of law grounds.

By a 5-4 vote the Court, in an opinion by Justice Jackson, who wrote the dissent in *General Trading*, struck down Maryland's tax collection statute as applied to this extra-state seller on the ground that the facts do not disclose a connection between the taxing state and this seller sufficient to satisfy the requirements of substantive due process.

The Court distinguished *General Trading* on the ground that there the out-of-state seller engaged in an "aggressive operation within a taxing state"; and that the *General Trading* merchant's "rivalry with the local merchants was equivalent to being a local merchant." Whereas Miller Brothers engaged in only "the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." Miller Brothers was said to have participated in "no invasion or exploitation of the consumer market in Maryland." The sales by Miller Brothers were said to have resulted from purchasers travelling from Maryland to Delaware to exploit its less tax-burdened selling market. Actually, in *General Trading*, the only connection of the out-of-state seller with the taxing state, as appears from the opinion, was the solicitation of business by travelling salesmen. The writer has some difficulty in understanding how *General Trading* solicitation is a different connection with the taxing state, for anything in the due process clause,

137. 347 U.S. 340 (1954).

from the deliveries and advertisement of Miller Brothers, all of which activities in both cases were designed to create and hold a market for the extra-state seller's goods.

Miller Brothers dissenting justices would sustain the Maryland tax collecting device as applied to this out-of-state seller. The seller engaged in a regular course of conduct in which it regularly injected advertising into media reaching Maryland consumers and regularly effected deliveries within Maryland by its own delivery trucks and by common carriers. In fact, service of process was accomplished on seller by attaching his truck on a trip into Maryland. The dissent also points out that the seller would get paid for his trouble in serving as tax collector. The Maryland statute provides that the seller-collector may retain three percent of the gross tax as compensation for collection and remittance expenses.

In upsetting Maryland's tax collecting device, the Court uses language which seems to indicate that since the taxing state cannot levy a sales tax on the out-of-state seller, it cannot make this seller serve as use tax collector. Justice Jackson's opinion emphasized that Maryland could not have levied a sales tax in the situation at hand, and views as "strange law" a rule that would make the Delaware seller "more vulnerable to liability for another's tax than to a tax on itself."[138] If the Court means to convey the idea that a seller cannot constitutionally be compelled to collect a use tax where he would not be subject to a sales tax, it is going squarely in the teeth of all precedent. While an out-of-state seller is not subject to a sales tax imposed by the state of the purchaser,[139] we have just seen that there is an abundance of authority which has required the out-of-state seller to collect a use tax due from a purchaser where there was sufficient contact to satisfy the requirements of substantive due process. We need mention only *General Trading,*[140] *Monamotor Oil Co.,*[141] and *Felt & Tarrant Manufacturing Co.,*[142] all of which cases we have just examined.

It is possible, of course, that the Court is laying the ground work for nullifying the use tax collecting device, where a nonresident seller is asked to collect, and thus make the reach of this use tax collecting device have only the same constitutional scope as the sales tax. That, of course, would deal a body-blow to the revenue raising powers of the states. If the Court did not intend to question the basic constitutionality of the nonresident seller collection device, it is indeed regrettable that it has muddied the water in a yet not fully charted stream.

138. Miller Bros. v. Maryland, 347 U.S. 340, 345 (1954).
139. McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).
140. General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944).
141. Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).
142. Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939). To these cases can also be added Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).

Although the legislative power of the states to impose upon the out-of-state seller the duty of collecting the tax may be found to satisfy substantive due process requirements, consistent with *Miller Brothers*, in a particular situation, some very practical and troublesome problems yet remain in connection with the collection of the use tax from the out-of-state seller. In short, granting legislative jurisdiction in the states to impose upon the seller the duty of collecting in the particular situation, do the states have judicial jurisdiction to enforce that duty? In *General Trading* the defendant-seller voluntarily appeared in the tax collection suit and filed an answer. The question of process, which was uncontested in *General Trading,* may become crucial in other cases where the seller does not voluntarily appear in the tax collection suit. There due process may present another real obstacle, in addition to the *Miller Brothers* doctrine, to the collection of the tax from the extra-state vendor.

Attachment as a means of process in a suit to collect the tax may be out of the picture in most cases since the out-of-state seller usually parts with title when he delivers the goods to the carrier. Or the seller may keep his property out of the jurisdictional reach of the buyer state, beyond the reach of attachment. Garnishment of some debt due the seller or service of process on one of seller's travelling salesmen appear to be the only remaining possibilities for service of process. If the purchaser goes into the seller's state, there makes the purchase and returns to the taxing state, or if the salesman has left the state ahead of the process server, there may be no way by which the taxing state can constitutionally reach the seller.

Even though the collecting state is fortunate enough to find a debt that can be garnished or an article that can be attached, the value of the article or the amount of the obligation may not equal the amount of the tax. If the obligation garnished or the article attached do not satisfy the amount of the tax, the taxing state is constitutionally precluded from taking a judgment for the full amount of the tax based on the garnishment or attachment (a personal judgment) that is entitled to full faith and credit in other states. Attachment or garnishment would thus appear to be pretty lame methods of collecting use taxes under such circumstances.

If the Court can say that the out-of-state seller is doing business within the taxing state so as to be regarded as present, service on a soliciting agent could be the basis of a personal judgment for the full amount of the tax. The fact that a foreign corporation is engaged exclusively in interstate commerce does not prevent it from being brought into court by service on an agent.[143] Once the taxing state has reduced the tax claim to a valid judgment in its own forum, the

143. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

seller state must give full faith and credit to judgments for taxes.[144] However, there is some doubt whether the taxing state could maintain a suit against the out-of-state seller in the seller's state on the original tax claim, without having first reduced the claim to judgment.[145]

The nonresident motorist statutes concept, which pioneered in the field of jurisdiction over nonresidents, might be extended to the out-of-state seller who makes sales within the taxing state by agents or mail-orders.[146] The pursuit of profits within the taxing state should be as fair and adequate basis for jurisdiction as is the enjoyment of travel on the highways of the state. Also there is a growing view that "doing an act" within the state furnishes a sufficient nexus to satisfy due process, as long as reasonable provision for notice is made.[147]

Where the buyer has gone out of the taxing state and made the purchase beyond its borders, *Miller Brothers* teaches us that there is no legislative jurisdiction to impose the duty of collecting the use tax on the seller. Likewise, it is difficult to see how the taxing state can there acquire any judicial jurisdiction to require the extra-state seller to collect the tax. Under such circumstances there seems real force in Lord Ellenborough's rhetorical question: "Can the island of *Tobago* pass a law to bind the rights of the whole world?"[148]

IV. TAXES ON GROSS RECEIPTS FROM INTERSTATE SALES TRANSACTIONS

A. *Nature and Development*

Much of the development of constitutional doctrine with respect to taxation of interstate sales has taken place in the field of gross receipts taxes where proceeds from sales of tangible personal property

144. Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935).

145. A state may properly refuse to entertain a suit by another state or municipality to enforce a tax claim. Lending support to that proposition is Moore v. Mitchell, 281 U.S. 18 (1930). *Accord,* Wayne County v. American Steel Export Co., 277 App. Div. 585, 101 N.Y.S.2d 522 (1st Dep't 1950). But in State *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (1946), Missouri did enforce a tax claim of Oklahoma. There is now a federal statute which requires full faith and credit to be granted to acts of legislatures, as well as to judgments of other states. 28 U.S.C.A. § 1738 (1950).

146. Hess v. Pawloski, 274 U.S. 352 (1927).

147. Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950); International Shoe Co. v. Washington, 326 U. S. 310 (1945); Note, *Recent Constitutional Developments on Personal Jurisdiction of Courts,* 4 VAND. L. REV. 661 (1951). Congress had removed the commerce clause obstacle in both *Travelers* and *International Shoe.* In *International Shoe* Chief Justice Stone spoke of the estimate of the inconveniences to both parties and concluded that due process would be met by such "contacts or ties with the state of the forum to make it reasonable . . . to permit the state to enforce the [particular suit which is brought there]." International Shoe Co. v. Washington, *supra* at 320.

148. Buchanan v. Rucker, 9 East. 192, 194, 103 Eng. Rep. 546, 547 (K.B. 1808).

and sales of utility services made up all or part of the amount of the proceeds affected by the tax.

A consideration of many of the cases included in the earlier section dealing expressly with "sales taxes" might have been included under the present section dealing with taxes on gross proceeds. Likewise, many of the cases which are considered in the present category could have been included in the earlier discussion of "sales taxes." Some mention was made there, by way of comparison, of a few gross proceeds tax cases where the taxed gross proceeds included receipts from sales. The division, actually made, of the cases between the section dealing with sales taxes and the present section dealing with gross proceeds taxes was determined by using a somewhat narrow definition of gross proceeds taxes, adopted primarily for the convenience of discussion.

In its somewhat narrow meaning, and the one adopted here, taxes on gross receipts or gross income include only those formally called such and imposed on the recipient of gross receipts or income at an annual or some other stated period. The tax may be imposed upon all reported taxable gross proceeds of the taxpayer from whatever source derived, including sales of various services. A basic exemption may also be allowed to each taxpayer. Gross receipts tax as here used include both the "gross receipts tax" and the "gross income tax" as classified and defined in the opening paragraphs of this article.[149]

While the Court has looked with distinct disfavor upon taxes involving gross receipts from interstate commerce during most of our constitutional history when challenged on commerce clause grounds, nevertheless the first such attempt was sustained in the case of *State Tax on Railway Gross Receipts*.[150] There Pennsylvania had imposed a tax on the gross receipts of transportation companies, the receipts being made up from freight charges received from transporting merchandise in interstate commerce. While adhering to the premise that a state could not constitutionally regulate interstate commerce, the Court kept the tax out of that pitfall by deciding that the fruits of interstate transportation ceased to be immune from taxation after they became intermingled with the other property of the carrier. As an alternative ground of decision, the Court considered the levy an excise tax upon the franchise of a corporation created by the state, with gross receipts being a fair and convenient measure of the exercise of that franchise.

Gross receipts taxes as a means of tapping this lucrative and easily accessible source of revenue remained undisturbed for a period of only about fifteen years, however. Then two cases were decided, in

149. See the classification of taxes as found in the material supported by note 1 *supra*.
150. 82 U.S. (15 Wall.) 284 (1872).

which the Court laid down principles that have influenced the judicial thinking in this field virtually ever since. The cases were *Fargo v. Michigan*[151] and *Philadelphia & Southern Steamship Co. v. Pennsylvania*.[152] The *Fargo* case upset a tax levied on gross receipts of a railroad received for carriage of freight and passengers across state lines. It was declared void as a tax on interstate commerce. The *Philadelphia & Southern* case struck down a like tax levied on the gross receipt of a steamship company.

The Court took the position that income received from interstate commerce was as necessary to the commerce as the transportation itself; and when the state taxed the gross receipts from the transportation it was attempting by the tax to regulate the commerce itself, in conflict with the exclusive power of Congress over interstate commerce.[153]

Although the ban against taxation of gross receipts from interstate commerce had its origin in the transportation field, the compass of the prohibition was so widened that it came to forbid levies on gross receipts not only from transportation, but also communication receipts and proceeds from interstate sales of goods. Such levies were outlawed as a direct burden on interstate commerce, which came to be the doctrinal declaration used by the Court to condemn a tax as violative of the commerce clause.[154]

The doctrine of the decisions striking down taxes involving gross receipts from interstate commerce has not been applied to taxes involving taxes on "net" income derived from interstate commerce. Here it is said the tax is levied after the commerce has taken place, expenses have been paid, losses adjusted and the individual is free to use the money as he sees fit. Thus, taxes on "net" income have withstood an assault on commerce clause grounds, although the profits are derived principally from interstate sales transactions.[155]

151. 121 U.S. 230 (1887).
152. 122 U.S. 326 (1887).
153. Philadelphia and So. S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887).
154. Western Union Tel. Co. v. Alabama State Bd. of Assessment, 132 U.S. 472 (1889); Western Union Tel. Co. v. Pennsylvania, 128 U.S. 39 (1888); Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888). In the much later case of J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) the Court used this theory as an alternative ground for upsetting a tax levied on gross receipts from sales.
155. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942); Wisconsin v. Minnesota Mining & Mfg. Co., 311 U.S. 452 (1940); Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413 (1923); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); United States Glue Co. v. Oak Creek, 247 U.S. 321 (1918); *cf.* West Publishing Co. v. McColgan, 27 Cal. 2d 705, 116 P.2d 861, *aff'd per curiam*, 328 U.S. 823 (1946). A footnote in the *Spector Motor* opinion seems to cast some doubt as to whether the Court will continue, in the future, to uphold taxes levied on "net" income derived from interstate commerce. In the *Memphis Natural Gas* case, Chief Justice Stone had said, at page 656, that "even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income. . . . derived from within the state. . . is not prohibited by the commerce clause."

Even a tax *measured* by "net" income from sales will be upset, however, where the *subject* of the tax is the privilege of engaging in a business that is *exclusively* interstate.[156]

1. *Early Methods of Imposing a Limited Tax on Gross Receipts*

It did not follow that all taxes involving gross receipts would transcend commerce clause limitations. Two methods of shrinking the zone of tax immunity of gross receipts evolved.

One method was the so-called "in lieu of" tax, which meant that the gross receipts tax was levied as a fair substitute for all other taxes which the taxing state could constitutionally impose on taxpayer's property. An early instance where the Court held it competent for a state to levy this type of a tax was *United States Express Co. v. Minnesota*,[157] where Minnesota had taxed the gross receipts of express companies, although they were engaged in interstate business within her borders. Professing to adhere to the doctrine that a state could not burden or regulate interstate commerce by taxing the conduct of that commerce, the Court held that since the tax on gross receipts was imposed "in lieu of" all taxes upon the property of the express companies, it was a competent exercise of the state's taxing power. The tax was treated as a fair substitute for a property tax on the business of a going concern.

The resort to gross receipts taxes as a fair substitute for all other taxes which the taxing state could constitutionally impose on the taxpayer's property has become a familiar and sanctioned type of tax.[158]

A second method of reaching gross receipts by a tax was to levy the tax on some "local activity" which could be separated from the interstate branch of a multistate business, and to measure the amount of the tax by gross receipts from the activity. One of the early cases in this field successfully to withstand a commerce clause attack was *Maine v. Grand Trunk Ry.*,[159] decided in 1891, just four years after the states had been rebuffed in their gross receipts tax attempts in the *Philadelphia & Southern* case. The Court had before it a statute of Maine imposing upon a foreign corporation engaged in interstate

The writer of the *Spector Motor* opinion observes, at page 609, footnote 6, that the language quoted from the *Memphis Natural Gas* opinion is not essential to the decision of that case. One writer apparently is completely satisfied that the *Spector* footnote gave the quietus to the view that net income derived wholly from interstate commerce can be taxed. See Marsh, *Interstate Commerce: State Taxation of Motor Carriers*, 41 A.B.A.J. 603 (1955).

156. *E.g.*, Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925).

157. 223 U.S. 335 (1912).

158. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); United States Express Co. v. Minnesota, 223 U.S. 335 (1912).

159. 142 U.S. 217 (1891).

railroad business a tax "for the privilege of exercising its franchise within the State of Maine." The tax was measured by the gross receipts from interstate and local commerce which were derived from business within the taxing state. The tax was not imposed upon interstate commerce, but upon the local privilege of exercising the corporate franchise within the state, gross receipts constituting only the measure of the tax. Since only those gross receipts which were derived from business within the taxing state were included in the reach of the tax, it was thought to be a fair means of ascertaining the value of the local privilege of carrying on business within the state by a foreign corporation. The Court took pains to point out, however, that the Maine tax was not levied on the receipts themselves, either in form or in fact. Similarly, gross receipts may be used to fix the figure of the tax where the taxable event is the privilege of existing as a domestic corporation.[160] Since the right to exist as a state corporation and carry on business in a corporate capacity as a domestic corporation depends solely upon the grace of the state, the incorporating state may measure a charge for that privilege by the gross receipts of business transacted within the state.

Using gross receipts to determine the value of a local activity or event for tax purposes has been applied to a wide variety of business activities including manufacturing, production and extraction of natural resources. That manufacturing, production and extraction are not in themselves interstate commerce, for tax purposes, even when followed by interstate transportation, has always been sound constitutional gospel.[161]

This is true even though the power of Congress over interstate commerce gives Congress power to deal with many aspects of these basic local pursuits.[162] Consequently, the state of origin could impose a

160. Cornell Steamboat Co. v. Sohmer, 235 U.S. 549 (1915); Ashley v. Ryan, 153 U.S. 436 (1894) (tax on privilege of consolidation of corporations).

161. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (generation of electricity); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (extraction of gas); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) (mining); American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919) (manufacture of goods for sale).

162. In Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945), Chief Justice Stone declared that "Congress has undoubted power to redefine the distribution of power over interstate commerce," and added that "it may either permit the States to regulate the commerce in a manner which would otherwise not be permissible" or "exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." The power of Congress to regulate interstate commerce is so complete and paramount in character that Congress may supersede state action even in fields which are admittedly local, where Congress uses that power as the basis for the affirmative establishment of national policy over interstate commerce, and conflicting state action becomes inoperative. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); New York v. United States, 257 U.S. 591 (1922); Railroad Comm'n of Wisconsin v. Chicago, B. & Q.R.R., 257 U.S. 563 (1922); Houston, E. & W.T. Ry. v. United States, 234 U.S. 342 (1914) (Shreveport Rate Cases); *cf.* Wickard v. Filburn, 317 U.S. 111 (1942).

tax on the privilege of manufacturing,[163] production of commodities[164] or extraction of resources[165] sold in interstate commerce and measure the tax by the gross receipts from such sales. The tax is considered as levied on a local activity distinct from interstate commerce. The use of the gross receipts, including gross receipts from interstate sales, as a measure, is simply a convenient, sanctioned means of arriving at the value of the local privilege of manufacturing, production and extraction. Here the gross receipts tax has been upheld even when levied "in addition to an ad valorem property tax."[166]

Considerable litigation has resulted over taxation of receipts from the sale of oil and gas. In determining the taxability of the receipts after propulsion of the oil or gas has started a journey across state lines, there arises the question whether there can be such a "local activity" or does the entire operation constitute interstate commerce so as to preclude the imposition of a tax. The Court has had no hesitancy in permitting the states to use the gross proceeds from the interstate sale of the oil and gas in determining the value of the local taxed activity of extraction and production.[167] Also, there may be a taxable event at the conclusion of the interstate transportation of the oil and gas. The Court has gone rather far at times in finding localism on the consuming end, and receipts from sales of gas brought in from a sister state can be taxed if the sale is necessarily the last, because consummated by consumption of the commodity.[168] Ostensibly the Court has given considerable weight to the reduction of the pressure of the gas and of the increase of its volume to make it safe and suitable for entry into the pipes and burners of the consumers. The Court has observed that the "treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."[169] The tensile strength of the Court's analogy of reducing pressure to the "breaking of the original package" to create a taxable event is not very great nor reliable, because the reduction of pressure to make delivery to a connecting carrier in an interstate journey of oil and gas has not created a taxable event. There the Court has expressly forbidden

163. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).
164. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (electricity).
165. Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (gas); *cf.* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) (mining).
166. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).
167. Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (state taxed proceeds from interstate sale of gas in estimating value of the product at the well).
168. East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931); *cf.* Southern Natural Gas Corp. v. Alabama, 301 U.S. 148 (1937). In this connection, it should also be remembered the extent to which the Court went in finding a taxable local event for a sales tax in McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), and its three companion cases. For a discussion of these cases see textual material supported by notes 50-60 *supra*.
169. East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465, 471 (1931).

taxation where the pressure is reduced for the purpose of making delivery by the taxpayer to a distributing company which, in turn, will sell the commodity.[170] The policy of the Court in permitting a tax where the sale is to the consumer, and striking down the tax where the sale and transfer is to another pipeline carrier solely for further transportation, may be fair and equitable; although some of the reasoning by which the decisions were reached cannot be supported.

Even though an intrastate business and an interstate business are inseparable, a local privilege tax measured by gross receipts will be good if not laid inseparably upon both.[171] The intrastate aspects of the business can serve as a proper subject of a tax with the gross receipts as a fair measure, and a taxpayer cannot avoid a tax upon the taxable aspects of a business by engaging in nontaxable phases of the business.

In dealing with taxes on gross receipts prior to 1938, the Court was concerned with two main considerations. On the one hand, it seemed generally concerned with the essential fairness that the states should be allowed to tax property and local events within their boundaries, to tax them at actual value as a going concern, which took into account the augmentation of value attributable to the interstate business in which it might be employed.[172] On the other hand, the Court generally tried to adhere to the judicially declared doctrine that the states could not constitutionally tax interstate commerce. These two considerations hardly admit of an absolutely logical or philosophical reconciliation. The Court was, therefore, confronted with the task of striking what appeared to the Court a practical, workable balance. When the state legislature used the gross receipts simply as a measure to value local activities and property, there was less likelihood, thought the Court, that the taxing state would attempt to, or would, affect injurious interferences with commerce than when it aimed its tax directly at the receipts from interstate commerce.[173]

170. State Tax Comm'n v. Interstate Natural Gas Co., 284 U.S. 41 (1931). To the same effect in granting tax immunity to oil and gas where the pipe line transportation is purely interstate, see Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925); United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921); Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921); *cf.* Western Oil Refining Co. v. Lipscomb, 244 U.S. 346 (1917) (tax invalidated on privilege of distributing oil transported interstate by tank cars to fill orders). *But cf.* Interstate Oil Pipeline Co. v. Stone, 337 U.S. 662 (1949). Nor did increasing gas pressure create a taxable local activity in Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

171. Ficklen v. Shelby County, 145 U.S. 1 (1892) (sustained a tax upon brokers measured by gross commissions earned in negotiating interstate sales). For a careful analysis of this, somewhat controversial case, see Lockhart, *Sales Tax in Interstate Commerce,* 52 Harv. L. Rev. 617, 629-31 (1939). For additional authority supporting this general proposition, see Pacific Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936) (occupation tax measured by gross receipts struck down where the tax was laid inseparably on both); see Southern Ry. v. Watts and Watts, 260 U.S. 519, 530 (1923).

172. *E.g.,* Pullman Co. v. Richardson, 261 U.S. 330 (1923).

173. See United States Express Co. v. Minnesota, 223 U.S. 335, 345 (1912);

There is language in some of the opinions indicating that the Court considered the tax invalid because gross receipts were used as a *measure* or method of valuing a local activity or event. The Court, at times, seemed to feel that interstate commerce was unconstitutionally burdened by the measure of the tax rather than the subject.[174] Ordinarily, however, if the tax is laid upon a subject within the taxing power of the state, it has not been condemned because of the measure as such. The "validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount."[175] Thus spoke the Court. And as if to emphasize the point, the Court went on to declare that no "constitutional objection lies in the way of a legislative body prescribing any mode or measurement to determine the amount it will charge for the privilege it bestows." On occasions, however, the language used by the Court goes rather far in supporting the view that the legislatively designated measure is an infringement of the commerce clause.[176] An examination of the language employed by the Court in upsetting a tax because of an unsuitable measure indicates that the Court perhaps treated the alleged *measure* of the tax as really the *subject* or operating incidence of the tax.

2. *Summary Comment on Pre-1938 Approach*

Prior to 1938, a state could impose a tax on gross receipts from interstate commerce only if the tax (1) was levied in lieu of a property tax; or (2) was used as a fair measure of the value of a local event or activity. Unless the Court was satisfied that the gross receipts tax satisfied these requirements, prior to 1938 it had a firm policy against permitting taxes on gross receipts derived from interstate transactions. Short shrift was made of such taxes by labelling them "regulation of the commerce, a restriction upon it,"[177] or a "direct burden" upon the commerce.[178]

Galveston, H. & S.A. Ry. v. Texas, 210 U.S. 217, 227 (1908). Even though the tax was expressly designated a gross receipts tax, if it amounted to no more than an ordinary tax upon property or a just equivalent therefor, it was not open to attack. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); Pullman Co. v. Richardson, 261 U.S. 330 (1923); Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918). If the gross receipts tax was levied in addition to ad valorem property taxes, rather than "in lieu of" such taxes, it was proscribed by the commerce clause. New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U.S. 338 (1930); Meyer v. Wells, Fargo & Co., 223 U.S. 298 (1912).

174. New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U.S. 338 (1930). This has been particularly true in some of the capital stock franchise tax cases. *E.g.*, Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1 (1910).

175. Home Ins. Co. v. New York, 134 U.S. 594, 600 (1890); see also Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 87 (1913).

176. New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U.S. 338 (1930). For a later case where the Court seems to treat the designated measure of gross receipts as, in effect, the subject of the tax, see Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939).

177. See Galveston, H. & S.A. Ry. v. Texas, 210 U.S. 217, 227 (1908); Philadelphia & So. S.S. Co. v. Pennsylvania, 122 U.S. 326, 336 (1887).

178. See Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 297 (1917).

Especially before 1938, and for a good bit of the time since that date, from the standpoint of the economic effect of the tax, the Court drew a distinction in gross receipts taxes that is artificial and mechanical. Thus, while the Court forbade the states to levy a privilege tax "on" unapportioned gross receipts from multistate transactions, the states ordinarily could nevertheless constitutionally impose a tax on certain "local activities" and measure the value of the taxed activity by the gross receipts.[179] A tax upon a local privilege measured by the volume of gross receipts from both local and interstate trade would seem to have, in practical results, the same consequences for hampering or suppressing the commerce as one laid "directly" upon the receipts. *American Manufacturing Co. v. St. Louis*[180] serves as a ready instance of this distinction drawn by the Court. There the tax was levied on the privilege of manufacturing and measured by the gross income of the manufacturing plant, which included out-of-state sales. St. Louis, of course, used the correct statutory ritual—it phrased the statute so that it was a tax "on" the privilege of manufacturing, measured by gross receipts.[181] In the subsequent *Adams*[182] case Justice Roberts significantly points out that the tax in the *American Manufacturing* case "was upon the privilege of manufacturing within the state and it was permissible to measure the tax by the sales price of the goods produced rather than by their value at the date of manufacture. If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another state."[183]

It should follow, therefore, that the imponderables of the commerce clause and gross receipts taxes would disappear with changes in the wording of the questionable or condemned tax statutes from a tax "upon gross income" to a tax upon some other subject such as "upon the privilege" of manufacturing, production, residence or some other local activity or event, even though calculated at the same rate on the same gross income from the same transaction as before. Such has not been the case, however. Constitutionality has not always been achieved by simply casting the tax in terms of having as its subject some selected "local incident," and the Court has failed to develop

179. "Names were made to matter more than mathematics or economics." Powell, *More Ado about Gross Receipts Taxes*, 60 HARV. L. REV. 501, 503 (1947).

180. 250 U.S. 459 (1919).

181. In a per curiam opinion in 1941 the Court sustained a Mississippi privilege tax measured by gross income, where applied to the receipts of a taxpayer who manufactured goods in Mississippi, accepted the orders solicited by his out-of-state salesmen and shipped the goods out of Mississippi. Aponaug Mfg. Co. v. State Tax Comm'n, 190 Miss. 805, 1 So. 2d 763 (1941), *aff'd per curiam sub nom.* Aponaug Mfg. Co. v. Stone, 314 U.S. 577 (1941).

182. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

183. *Id.* at 312, 313. *Cf.* Powell *Contemporary Commerce Clause Controversies over State Taxation*, 76 U. PA. L. REV. 773, 774 (1928) ("states can tax interstate commerce if they go about it in the right way.").

a workable standard to guide the legislatures in deciding when a tax was "on" a "local activity" rather than "on" an interstate activity.[184]

B. *Justice Stone and a Pragmatic Approach to Gross Receipts Taxes: Interstate Commerce Pays Its Way*

1. *Cumulative Burdens Test of Tax Validity*

In 1938 a different approach to the constitutionality of gross receipts taxes made its appearance. Justice Stone worked out an approach to the question of the validity of state gross receipts taxes which would not only be more reliable but which would also give more consideration to the possible economic effects of the particular tax on interstate commerce and less consideration to the formal aspects of the tax. Explicit, too, in his approach is the essential fairness that interstate commerce should bear its fair share of the cost of local government whose protection it enjoys.

Justice Stone's views reached fruition in the case of *Western Live Stock v. Bureau of Revenue*.[185] New Mexico had levied an occupation tax on the privilege of engaging in certain businesses, one of which was the publication of newspapers and magazines. The tax imposed was two per cent of the gross receipts from the sale of advertising. The Court sustained the tax as applied to the proceeds of the sale. One ground of the holding was the application of the traditional test of calling it a tax on the "local activity" of preparing, printing and publishing magazine advertising and the gross receipts from the business fairly measured the value of the local enterprise. The fact that the advertising rate was computed, in part, on the basis of the interstate circulation of the magazine imposed no burden upon interstate commerce which the commerce clause interdicts; the burden was said to be too remote; the effect of the tax was innocuously incidental.

184. A comparison of a few cases will furnish ready examples of the unreliableness of the standard developed by the Court. Loading and unloading interstate commerce has been held an integral, non-taxable part of interstate commerce. Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U.S. 90 (1937) and Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947). But the transfer of possession of articles transported interstate by land has been held a local, taxable event. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940). An occupation tax on radio broadcasting, measured by gross receipts from sales of time to customers has been invalidated as a tax on interstate commerce. Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650 (1936). It might well be inquired whether the broadcasting activities really were any more interstate commerce than the generation of electricity where the generation and transmission are simultaneous as in Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932), where the Court found a "local activity" to serve as the subject of the tax.

185. 303 U.S. 250 (1938). For a discussion of this case and others applying the same approach to the question of tax validity, against the background of much of the earlier case law on sales taxes in interstate commerce, see Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617 (1939).

As an "added reason" for sustaining the tax, Justice Stone introduced the "cumulative burden" test for determining the validity of gross receipts taxes. Justice Stone's explanation of this new criterion seemed to be that while interstate commerce, as such, could be taxed, the validity of a tax would be determined by whether, in form or substance, the tax could be repeated by another state on the same segment of interstate commerce, so as to make that commerce bear a cumulative tax burden not borne by local business. The theory behind this test was the practical double demand that (1) interstate commerce should "pay its way," by not escaping the burdens of local government whose benefits it enjoys; and (2) state taxes on interstate commerce should be sustained when not involving risk of "cumulative burdens not imposed on local commerce." The Court could see no risk of other states imposing a forbidden cumulative tax burden on the same transactions as that taxed in the *Western Live Stock* case. So the tax was sustained.

In the *Western Live Stock* opinion Justice Stone marshalled cases of gross receipts taxes on interstate transportation, originally sustained on very different grounds, to support the "cumulative burdens" doctrine. The potential risk of a multiple or cumulative tax burden on interstate commerce as compared with local business was made, by Justice Stone's analysis, the controlling factor in separating those gross receipts taxes on transportation which had been struck down from those which had been upheld. He explained that such taxes had "been sustained when fairly apportioned to the commerce carried on within the taxing State."[186]

In grouping the gross receipts tax cases used to support the "cumulative burdens" doctrine, into those sustained where apportioned, Justice Stone makes a neat, but not a doctrinally accurate, classification of the cases. The Court that decided those gross receipts cases at no place in the opinions mentioned any sort of doctrine such as apportionment to avoid a cumulative tax burden. An examination of the cases reveals that in those instances where the Court upheld a tax it did so on one of two theories. The tax was sustained either on the traditional theory that the "subject" of the tax was some "local" event (privilege or franchise), separate and distinct from the commerce, with its value determined by gross receipts,[187] or that the gross receipts tax was levied "in lieu" of, and as a fair substitute for, all other valid taxes on taxpayer's property.[188] The cases cited by Justice Stone, where the gross receipts tax had been outlawed, had

186. *Id.* at 256.

187. Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903); Maine v. Grand Trunk Ry., 142 U.S. 217 (1891).

188. Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); United States Express Co. v. Minnesota, 223 U.S. 335 (1912).

been considered by the Court making the decision, to transcend constitutional limitations upon the traditional doctrine that the tax was tantamount to a regulation of interstate commerce by the states, a power thought vested exclusively in Congress.[189] No mention was made by the Court of a lack of apportionment.

In truth, Justice Stone's *Western Live Stock* opinion misinterpreted the facts of the *Fargo*[190] case, when he stated that the gross receipts tax was invalidated because it extended to "commerce carried on without the state boundaries and, if valid, could be similarly laid in every other state in which the business was conducted." The *Fargo* tax was confined to earnings received from the use of the taxed cars within the state. It is difficult to see how an apportionment could have been fairer or how it more clearly could have avoided the risk of "cumulative burdens," which Justice Stone reasoned in his *Western Live Stock* opinion was the "vice characteristic of those taxes [taxes from transportation measured by gross receipts] which have been held invalid." Presumably "unapportionment" was a tax "vice" of which the Court was not cognizant when it decided the *Fargo* case.

A few weeks after *Western Live Stock* the "cumulative burdens" test again was invoked in a case which was concerned with gross receipts taxes imposed by the state from which the seller shipped to the extra-state buyer. This time the shoe was put on the other foot in so far as the "cumulative burden" test was concerned. In *Adams Manufacturing Co. v. Storen*,[191] an Indiana gross income tax ran afoul of the commerce clause when imposed directly on the receipts of a local manufacturer derived from interstate sales requiring out-of-state delivery. Although not spelled out so clearly, the "cumulative burden" test was used as an alternative theory for striking down the tax, the Court speaking also of the tax as a burden on the commerce. In the *Adams* case there was no attempt to apportion the receipts so as to represent only those activities which took place within the state. As later pointed out in the *Berwind-White*[192] case, at least part of the receipts covered by the *Adams* tax included values attributable to extra-state activities. Since the tax was not apportioned to those values attributable to the taxing state, it was thought to threaten a double tax burden not borne by local commerce, on the theory that if the tax by the manufacturing state were sustained, a similar tax could be imposed by the buyer's state. Interstate commerce would thus be subject to the risk of a double tax burden, not borne by local

189. Meyer v. Wells Fargo & Co., 223 U.S. 298 (1912); Galveston, H. & S.A. Ry. v. Texas, 210 U.S. 217 (1908); Fargo v. Michigan, 121 U.S. 230 (1887).

190. Fargo v. Michigan, 121 U.S. 230 (1887).

191. 304 U.S. 307 (1938). For a helpful discussion of the "cumulative burden" doctrine, see Hellerstein, *State Franchise Taxation of Interstate Businesses*, 4 TAX L. REV. 95 (1948).

192. See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 57 (1940).

commerce. In condemning the tax, a divided Court spoke through Justice Roberts, in part declaring that "the vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate's commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured."

It really is not clear from Justice Roberts' *Adams* opinion exactly what he means by the phrase "without apportionment." It is not clear whether he meant only "without apportionment between local and interstate receipts," or whether he meant "without splitting the interstate receipts between the participating States."[193]

The Court differentiated the *Adams* tax from that in the *American Manufacturing*[194] case on the grounds that the *American Manufacturing* tax was not a sales tax but an excise on manufacturing, measured by the proceeds of the sales of the manufactured goods. The Court then goes on to observe that had the *American Manufacturing* exaction been a sales tax the taxing authority could not have used interstate sales to measure the amount of the tax.[195] It seems fairly clear, however, that both types of tax would have yielded the same amount of revenue in the *American Manufacturing* situation.

In the *Adams* case, Mr. Justice Black delivered the first of a series of dissenting opinions[196] to the effect that, absent discrimination against interstate commerce, no state tax should be struck down as violative of the commerce clause. He would leave the matter to Congress and until such time as Congress did act to forbid a particular type of state tax, he thinks the Court should let it stand. Mr. Justice Black's theory is that only Congress has constitutional authority or practical capacity to formulate rules for curtailing state taxes.

Shortly after the *Adams* case, the Court, in the *Gwin, White*[197] case condemned a Washington occupation tax, measured by gross receipts from sales made by taxpayers who were commission merchants of a Washington sales agency engaged in obtaining orders for and supervising shipment and sale of Washington fruit throughout

193. Compare Justice Roberts' statement in J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), at page 311 with his statement at page 314 of the same case. See Powell, *More Ado About Gross Receipts Taxes,* 60 HARV. L. REV. 501, 521-22 (1947).

194. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).

195. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 312-13 (1938).

196. *Id.* at 316. See, *e.g.*, dissenting opinions in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 455 (1939), and in McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188 (1940). Mr. Justice Black apparently has had a change of heart as to what is the proper judicial function for the Court, for he has joined in striking down a state tax although there was no discrimination. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

197. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939).

the United States. For the privilege of engaging in business activities, Washington levied a tax measured by the proceeds from sales of fruit grown in and shipped from Washington. The Court felt that the taxed proceeds included not only that part of the proceeds of sales attributable to the taxpayer within the taxing state, but also included receipts attributable to extra-state activities by sales agencies. These sales agency employees or agents outside the state would sell fruit shipped to points beyond the state before there were orders for it. The reach of the tax, however, included income only from the sale of those apples that grew in the taxing state. The Court reasoned that if the *Gwin, White* tax were valid, a similar tax could be imposed on the same sales proceeds by those states in which the sales agents operated, thus resulting in a heavier tax burden on interstate sales than local sales. The tax would thus place interstate commerce at a competitive disadvantage with local commerce. Since the *Gwin, White* tax was not apportioned, the Court felt that it tried to reach receipts derived from activities beyond the territorial limits of the taxing state.

Speaking for the majority, Justice Stone felt that in practical operation the *Gwin, White* tax discriminated against the interstate commerce, through the risk of a cumulative tax burden not borne by local business. This interpretation of discrimination is not the usual meaning applied to that term, however. A tax is generally said to be discriminatory only when the taxing state is giving its own business better treatment taxwise than interstate business.[198] That was not true of the *Gwin, White* case tax. The theme of the tax was equality. One wonders whether Justice Stone put this particular thought into his opinion in an effort to woo and win Mr. Justice Black, who would strike down no state tax unless actual discrimination against interstate commerce were proved; the risk of discrimination is not enough for Mr. Justice Black. While he may have been wooed; he was not won. He dissented.

It should be noted in passing that the condemned Washington tax had as its "subject" the taxpayer's occupation, which is clearly a local event, and gross receipts were used as the "measure" of the tax. Nevertheless, the Court held that the observance of this traditional statutory "subject-measure" ritual did not absolve the tax of commerce clause infirmities. Justice Stone observes "that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume." This language suggests that the Court is using the legislatively designated

198. See textual material supported by notes 118-24 *supra*.

measure as a factor in deciding what really is the subject or operative incidence of the tax.[199] Viewing the matter realistically, if the state is given completely free rein in selecting a measure of the tax, its tax could be as oppressive to interstate commerce as if it were permitted unlimited use of the commerce itself as the subject.

Both the *Adams* and *Gwin, White* taxes on gross proceeds from sales had been on the seller's end of the interstate operation. Shortly thereafter, under the caption of a local "taxable event" the Court sanctioned a sales tax imposed on the "transfer of possession" of goods at the situs of the goods when the sales transaction was consummated by delivery to the purchaser at the conclusion of an interstate journey. That was the teaching of the sales tax case of *McGoldrick v. Berwind-White*,[200] and its three companion cases.[201] During the next few years after the historic *Berwind-White* decision, the Court handed down a series of cases involving taxes laid "directly on" gross receipts received over a stated period rather than a tax on a single sale or event, as was the situation in the *Berwind-White* matter. In one case the tax was applied to gross income, including receipts from interstate transactions other than sales, but in several cases the tax was laid on gross receipts which included proceeds from interstate transactions.

Within a few years after the *Berwind-White* decision, the Court not only had an opportunity to visit gross income tax situations factually akin to the *Berwind-White* state of purchaser tax, but it also had a look at gross income taxes by the seller state. In *Department of Treasury v. Wood Preserving Corp.*[202] in 1941, the Court was confronted with the question whether it would permit the state of the seller to include in a tax laid directly on gross income the receipts from sales where the sale was followed by interstate transportation.

Indiana's gross receipts tax was again called into judgment in that case. There the seller taxpayer, a Delaware corporation, made contracts outside Indiana for the sale of railroad ties. Ties were obtained from producers in Indiana and delivered to the buyer (Baltimore & Ohio Railroad) in Indiana, where they were immediately loaded on cars and shipped out of the state to seller's plant in Ohio for creosoting. Payments for the ties were made to the taxpayer-seller in Pennsylvania, where it had its principal place of business. The Court, speaking through Chief Justice Hughes, unanimously held that Indiana

199. For a discussion of the "subject-measure" ritual as a criterion of tax validity, see textual material supported by notes 173-75 *supra*.

200. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

201. McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940); McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940); Jagels, "A Fuel Corporation" v. Taylor, 255 App. Div. 965, 8 N.Y.S.2d 456 (1st Dep't 1938), *aff'd*, 280 N.Y. 766, 21 N.E.2d 526 (1939), *aff'd per curiam*, 309 U.S. 619 (1940).

202. 313 U.S. 62 (1941).

did not exceed its constitutional authority when it imposed a tax directly on the gross receipts from those sales. The sale and delivery of the ties to the railroad company were held to be local transactions, despite the fact that immediately after the sale the ties were shipped out of the state by the buyer pursuant to the contract.

Moreover, no apportionment was necessary, since the sole subject of the challenged tax was the income derived from the sale. The creosoting operations in Ohio and the income derived therefrom, were not included in the questioned tax. This feature points up the vice of having included in the reach of the tax any receipts from extra-state activities that would give rise to the risk of multiple tax as was said to be the situation in the *Adams* and *Gwin, White* cases, where the seller state imposed the nullified tax. The entire taxed *Wood Preserving* receipts were thus attributable to the taxing state because substantial activity occurred there and nowhere else. The *Wood Preserving* case is thus consistent with the *Adams* and *Gwin, White* doctrine, especially as explained by Justice Stone in the *Berwind-White* case.

In 1944 the Court had a comprehensive look at the validity of a tax laid directly on gross income from sales at *both ends* of the interstate journey in *International Harvester Co. v. Department of Treasury.*[203] There the question before the Court was the validity of the inclusion in a tax levied on gross income of the receipts from sales followed by interstate transportation, as well as the inclusion of receipts from sales where the sale followed after the interstate journey. The seller-taxpayer, a foreign corporation authorized to do business in Indiana (the taxing state), maintained manufacturing and sales branches in the taxing state and in other states.

In this case the taxpayer contested three different types of transactions to which Indiana applied her gross receipts tax. In class C type sales Indiana buyers bought from branches of the seller-taxpayer outside Indiana. The contracts of sale were entered into outside Indiana, but the buyers took delivery to themselves at factories of

203. 322 U.S. 340 (1944). Indiana's Department of Treasury had made two additional, successful trips to the Supreme Court of the United States. In Department of Treasury of Indiana v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941), the Court sustained her tax on gross income as applied to receipts of a company enameling stove parts brought into Indiana for that purpose and shipped out again immediately following the enameling operation. The business had been solicited by agents operating in other states. The Court felt that the whole taxed operation was attributable to the taxing state. The Court thus found a taxable local event even though interstate commerce was necessary for the performance of the enameling operation. Also, in Department of Treasury v. Allied Mills, Inc., 220 Ind. 340, 42 N.E.2d 34 (1942), *aff'd per curiam,* 318 U.S. 740 (1943), Indiana successfully applied her tax on gross income to receipts from sales to resident customers in Indiana to whom deliveries of goods were made from plants of taxpayer in Illinois pursuant to orders taken in Indiana and accepted in Illinois. Taxpayer had factories in Indiana and also Illinois.

the seller-taxpayer in Indiana. In class *D* type sales buyers outside Indiana bought from branches in Indiana, and the contracts were entered into in Indiana. The buyers took delivery at factories of the seller-taxpayer in Indiana. In Class *E* type sales, Indiana buyers made purchases from Indiana branches where the contracts were made, but the goods were shipped by the seller-taxpayer from its factories outside the state to the buyers in Indiana.

The Court held that Indiana's tax on gross receipts could be applied to all three classes of sales without infringing either the commerce clause or the due process clause of the fourteenth amendment. In all three classes of sales the Court found local transactions, separate from the interstate phases, which could properly serve as taxable events. It was thought not unreasonable to attribute the entire proceeds of the transactions to the taxing state, because substantial activities occurred there and the tax did not purport to reach proceeds from extra-state activities which had no connection with the taxing state, as was the situation in the *Adams* and *Gwin, White* cases. The state could thus tax the full proceeds of the sales even though the proceeds might be taxable again elsewhere. This rationale is consistent with the theory upon which the *Berwind-White* decision is predicated.

In class *C* sales, the delivery of the goods in Indiana at the end of the interstate journey was declared an adequate taxable event. The Court reasoned that Indiana could have imposed a sales or a use tax on these class *C* transactions. And if this is true, concluded the Court, "there is no constitutional objection to the imposition of a gross receipts tax by the State of the buyer."[204] When the taxing state (Indiana) lays hold of the transaction and imposes a tax on the receipts which accrue from it, she is asserting authority over the fruits of a transaction consummated within her borders. So reasoned the Court.

In class *D* sales, the delivery of the goods at the beginning of the interstate journey and the making of the contracts within the taxing state were thought to be an adequate basis for the tax. Although the goods sold and delivered in the class *D* transactions were to be transported out of the taxing state immediately on delivery, that was held not to affect the taxability of the transaction. Although the class *D* sales were on the opposite end of the interstate journey from the *Berwind-White* sales, it was thought to be authority for the class *D* tax. The taxable event in each case was considered to be a "local transaction" separate and distinct from the transportation in interstate commerce.

Thus, under the decision of the *Berwind-White* case and the class *D* tax in the present case, the states at both ends of the interstate journey

204. International Harvester Co. v. Department of Treasury, 322 U.S. 340, 345 (1944).

would ostensibly have the authority to tax the proceeds of the interstate sale in full. The class *D* interstate sale might thus be subject to the risk of cumulative tax burdens to the extent of the full amount of the sale on each end of the journey. That argument apparently was pressed upon the Court, but it side-tracked the issue with the observation that "it will be time to cross that bridge when we get to it."[205] The *risk* of having to pay a tax elsewhere was not enough to hold the tax bad. The cumulative burden as thus argued is, in essence, the same as the *Berwind-White*[206] dissent conceived the cumulative burden doctrine to be. It is interesting to speculate whether the Court might have thought differently as to the validity of the class *D* tax had the taxpayer shown that he actually was subject to the burden of the tax at the end of the completed interstate journey. Presumably not. A similar argument was later made in the 1947 case of *International Harvester v. Evatt*,[207] which involved a tax for the privilege of doing business of a multi-state enterprise, measured by gross receipts from interstate sales of the manufactured articles. The complaining taxpayer similarly argued that the *Evatt* case tax, although apportioned, would be subject to the danger of multiplication by other states. The Court answered that "since it [the tax] is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other States. None of them can tax the privilege of operating factories and sales agencies in Ohio."[208]

In class *E* sales, where the Indiana buyer bought goods from an Indiana seller which shipped the goods to the buyer in Indiana from points outside the state, the consummation of the transaction in Indiana was considered a taxable event. It was considered an event distinct from the interstate movement of the goods and it took place after the interstate journey ended. This is pretty much the *Berwind-White* type situation. The court relied on the use tax cases to support the tax in class *E* transactions, with a mention of the *Berwind-White* case. In its reliance on the use tax cases, the Court took occasion to observe that while the gross receipts tax on the proceeds of class *E* sales was different in name from a use tax, it was dealing with matters of substance, and not with dialetics.

In the case of *International Harvester v. Department of Treasury*, the Court not only reaffirmed and applied the *Berwind-White* doctrine, but it also applied the doctrine to a tax on the full sales price at the beginning of the interstate journey. Without equivocation the Court

205. *Id.* at 348.
206. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 59 (1940).
207. 329 U.S. 416 (1947).
208. *Id.* at 423.

also declared that there is no constitutional difference when a "gross receipts" tax, a "sales tax" or a "use tax" is utilized.[209]

Beginning with the epochal *Western Live Stock* decision, the Court had increasingly emphasized the consequences and effects, either actual or threatened, of the questioned tax to hamper or hinder interstate transactions in deciding the commerce clause issue. In answering the constitutional question, the dominant concern of the Court was with whether the tax would place interstate commerce at a competitive disadvantage with local business. Without equivocation the Court also had declared that there is no constitutional difference when a "gross receipts" tax, a "sales tax" or a "use tax" is utilized. At times, too, the Court had recognized that tax immunity to interstate commerce would cause inequality of tax burden between competing products to the prejudice of local business. In deciding whether the state had exceeded commerce clause bounds, the Court had also given weight to the essential fairness that interstate commerce should pay its way. The Court further declared that there is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. Each was said to be in substance an imposition of a tax on the transfer of property. Moreover, during the years following the *Western Live Stock* case the Court had obliterated the pointless, mechanical distinction between a tax levied "on" gross receipts and taxes imposed on some other subject and "measured" by gross receipts. The exaction would be sustained if the proceeds taxed, whether from sales transactions or from services, were fairly attributable to activities and events having a substantial connection with the taxing state. That was true whether the subject of the tax was some local privilege measured by gross receipts, or whether the tax was laid directly on gross receipts as the subject of the tax. Whatever the subject of the tax, it would be nullified, however, if it threatened to result in a heavier tax burden on interstate business than on a local transaction. The emphasis and stress upon formulae and labels were greatly reduced. A pragmatic approach to the problem had been adopted and interstate commerce paid its way.

C. *Retreat to the Conceptual Approach to Gross Receipts Taxes*

1. *Expansion of Zone of Tax Immunity and Resort to Mechanical Tests of Taxability*

All the practical considerations which were built up by the Court, especially since the *Western Live Stock* case in 1938, were jettisoned in 1946 by *Freeman v. Hewit*,[210] which again had up for consideration

209. See *id.* at 347-48.
210. 329 U.S. 249 (1946). "The failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that Freeman v. Hewit, 329 U.S. 249, marked the end of one cycle under the Commerce Clause and the beginning of another." Mr. Justice

Indiana's tax on gross income. There a trustee, domiciled in Indiana, in managing the investment portfolio of a testamentary trust created and administered under the laws of Indiana, placed an order to sell certain stocks and bonds with an Indiana broker. Through the New York correspondent of the Indiana broker the securities were sold on the New York Stock Exchange. The proceeds were delivered to the Indiana trustee. Indiana assessed a one per cent tax on the amount received by the trustee.

A majority of the Supreme Court struck down the Indiana tax as a burden on interstate commerce because the tax as applied was laid "on the very sale" or "on the very processes" of interstate commerce. Speaking through Mr. Justice Frankfurter, the Court dismissed the "cumulative burdens" test of constitutionality as mere "fashions" in judicial writing, and resurrected the doctrine that the states cannot tax interstate commerce at all. Moreover the economic burden of the tax is said by the *Freeman* opinion to be irrelevant in determining constitutionality. During the course of the opinion the Court made it clear that it will brook no interference with interstate commerce by way of taxation no matter how light the economic burden:

> "Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. Any exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."[211]

The sensible recognition that interstate commerce should "pay its way" was thus abandoned. This doctrinal declaration of *Freeman v. Hewit* thus marked a recrudescence of the view that interstate commerce cannot be taxed at all, even by the very states where it operates and whose protection the commerce enjoys and whose local businesses must shoulder the tax. The doctrine that "practical rather than logical distinctions must be sought" in deciding constitutional questions likewise was discarded.

The terminology which the Court used to condemn the *Freeman* tax is a revised version of old labels. While Justice Strong and his contemporaries in the 1870's said a tax was in conflict with the commerce clause if "on" interstate commerce,[212] and Justice Butler and his school of judicial thought in the heyday of the "direct-indirect" burdens test of the 1920's and 1930's condemned the tax if it was

Douglas dissenting in Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 444 (1947).

211. Freeman v. Hewit, 329 U.S. 249, 256-57 (1946).

212. See Philadelphia and So. S.S. Co. v. Pennsylvania, 122 U.S. 326, 341 (1887).

thought to be a "direct burden,"[213] Mr. Justice Frankfurter and those of his persuasion will invalidate the tax if they conceive that it is "directly on" interstate commerce, or levied "on the very processes" of interstate commerce. Unfortunately, as we will continue to see, the doctrines laid down in *Freeman v. Hewit* have been the pole star by which the Court generally has since continued to steer in determining tax validity.

Obviously, the *Freeman v. Hewit* formula of constitutionality gives but little help as to what is the stuff that makes a tax bad.[214] Decisions of the magnitude of the constitutionality of a tax should not be made by resort to such labels or virtually meaningless formulas. As Justice Cardozo once put it "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."[215] Or as Justice Stone declared in deprecating the "direct-indirect" burdens test, it is "too mechanical, too uncertain in its application, and too remote from actualities, to be of value," and to employ it was "little more than using labels to describe a result rather than any trustworthy formula by which it is reached."[216]

The *Freeman* dissent would have sustained the tax on the theory that the gross receipts were the fair value of the "local activity" of "management of the investment portfolio," which it compared with manufacturing of goods, which was a taxable event in *American Manufacturing Co. v. St. Louis,*[217] and with publication of a trade journal, which was the taxable event in the *Western Live Stock*[218] case. Both cases permitted gross proceeds to be used to value the local activity. Nor would the Court agree to treat the *Freeman* tax as levied on the privilege of "domicile" of the taxpayer, and measured by the gross receipts. The Court would not adopt any of the approaches urged on it; instead it apparently reverted to the mechanical unrealistic approach of invalidating a gross receipts tax when levied "on" gross receipts attributable to a local activity; whereas a tax levied on a local activity and measured by gross receipts presumably would be upheld.

Because of the substantial local incidence of the transaction in the taxing state, the gross receipts could have been used as a fair value of that local activity. The local aspects of the transaction consisted not only of the domicile of the trustee and beneficiary but also

213. See New Jersey Bell Tel. Co. v. State Bd. of Taxes and Assessments, 280 U.S. 338, 346 (1930); Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71, 83 (1924).

214. For an astute criticism of the *Freeman* case, see Dunham, *Gross Receipts Taxes on Interstate Transactions,* 47 COLUM. L. REV. 211 (1947).

215. Carter v. Carter Coal Co., 298 U.S. 238, 327 (1936) (dissenting opinion).

216. Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (dissenting opinion).

217. 250 U.S. 459 (1919).

218. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

the situs of the trust.[219] As we have already seen, the use of gross receipts as a fair measure of a "local incident" has long been sanctioned. Although the Indiana tax had been construed as a tax "on gross receipts," it has not been uncommon for the Court to look beyond the statutory label placed on the tax and determine its constitutionality by what the Court thinks is the incidence of the tax.[220]

The 1947 case of *Joseph v. Carter & Weekes Stevedoring Co.*,[221] decided a year after *Freeman v. Hewit*, perpetuated the doctrine of *Freeman v. Hewit* to the effect that interstate commerce is immune from taxation. In so doing, the Court professed to apply the "multiple burdens" doctrine. *Carter & Weekes* invalidated New York's gross receipts tax as applied to stevedoring, where both interstate and foreign commerce were loaded and unloaded. Unable to find "stevedoring" distinct enough from interstate commerce to permit the tax on the "local event" theory, the majority of the Court felt that the tax violated the commerce clause insofar as the loading of interstate commerce was concerned. The Court then went further and decided that the risk of a "multiple tax burden" was enough to nullify the tax on commerce clause grounds because of the possibility of an additional tax on the unloading of the cargo at another port of call in the United States. It seems clear that the "multiple burdens" test as applied here means something entirely different from the meaning used by Justice Stone. Statements of the multiple burdens doctrine prior to *Carter & Weeks* had assumed the validity of an apportioned gross receipts tax levied on a taxpayer engaged exclusively in interstate commerce. For testing the validity of gross receipts taxes, the multiple burdens test would appear to sanction a separation of interstate commerce into as many taxable segments as there are states through which the commerce passed. The "multiple burdens" test as applied in *Carter & Weekes* is not so much a device for validating taxes, as it is an *additional* hurdle which a challenged tax must clear.[222] The "multiple burdens" doctrine has thus been

219. See Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 COLUM. L. REV. 211, 226 (1947). That would have been in line with the Court's earlier decision on Indiana's gross receipts tax. See, *e.g.*, International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944).

220. See, *e.g.*, International Harvester Co. v. Wisconsin Dep't of Taxation, 322 U.S. 435 (1944); Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940). The Court has also disregarded the label given by state authorities to a tax and has struck it down. See Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954). Also, the Court had upheld Indiana's tax "on" gross proceeds, which *Freeman v. Hewit* invalidated. The Court treated the receipts as fairly attributable to a local event. See International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944).

221. 330 U.S. 422 (1947).

222. Essentially that same meaning was given the "multiple burdens" test in the late case of Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954). For a strong plea that the "multiple burdens" doctrine as originally developed to make interstate commerce pay its own way offers the best solu-

tortured out of all recognition from its intended purpose of making interstate commerce pay its way. The "multiple burdens" doctrine has now become an additional weapon to be used in striking down a tax.

In *Carter & Weekes* the same incident, *i.e.,* loading cargo, clearly cannot be reached, taxwise, by any other state. The activity of loading was confined exclusively to the state that imposed the tax, and a tax upon gross receipts from unloading in another state would be taxation of receipts from an entirely separate activity. So, the risk of multiple taxation of the same proceeds simply did not exist in *Carter & Weekes.* Thus the Court's "multiple burdens" basis for the unconstitutionality of the *Carter & Weekes* tax assumed the existence of a premise which factually did not exist.

Local business in New York, including stevedoring, presumably must pay the gross receipts tax litigated in *Carter & Weekes* on both loading and unloading operations. Therefore, interstate commerce would not be placed at a competitive disadvantage with local business by reason of the tax. In fact, the effect of the *Carter & Weekes* holding that all gross proceeds from loading interstate commerce are tax free gives to interstate commerce a large tax immunity as compared with the tax burden on local business. Thus, the law served not to equalize the tax burden as between interstate and local business, but to give interstate business a competitive advantage. The grant of immunity to *Carter & Weekes* was thus the grant of a discriminatory preference to this interstate business—a result which it is exceedingly difficult to believe the commerce clause ever was intended to achieve.

Beginning with *Central Greyhound Lines, Inc. v. Mealey,*[223] decided two years after the *Freeman* decision and one year after *Carter & Weekes,* there was an interlude of a much more sensible approach to the problem of taxation of gross receipts than had been followed in the *Freeman* and *Carter & Weekes* cases. The *Mealey* case involved a New York statute which imposed a tax of two per cent on the gross receipts of all utilities doing business within the state. The tax was applied to the total receipts of the Greyhound Bus Company derived from transporting passengers from a point within New York to another point within the same state over a route which passed through New Jersey and Pennsylvania. The Court held the tax an infringement of the commerce clause on the ground that the unapportioned tax on the gross receipts made interstate commerce bear more than its fair share of the cost of local government. The tax would be upheld, however, said the Court, if apportioned according to the percentage

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tion yet devised by the judiciary to the problem of taxing interstate commerce, see Hellerstein, *State Franchise Taxation of Interstate Business,* 4 TAX L. REV. 95, 114-16 (1948).

223. 334 U.S. 653 (1948).

of the total mileage which was traversed within the taxing state.

There are two major phases to the rationale of the *Mealey* holding, which are noteworthy. In the first place, a tax levied directly "on" gross receipts was held to be a "direct" tax on interstate commerce. In the second place because it was not fairly apportioned, the tax could not escape the ban of the commerce clause. The dictum, however, says that if properly apportioned, such a tax, although levied "on" gross receipts rather than "measured by" gross receipts, would be upheld, at least insofar as gross receipts from interstate transportation are concerned.

By a reasonable interpretation, this dictum suggests the willingness of the Court to permit interstate commerce to be taxed, so long as no other state can repeat the tax and thereby subject interstate commerce to multiple tax burdens not borne by local business. This conclusion seems to follow from the Court's language, because taxes levied "on" gross receipts have long been regarded as "direct" in the cases which held that "direct" taxes on interstate commerce are forbidden by the commerce clause.[224] Unfortunately, the Court resorted to the discredited practice of using "direct" to condemn the tax, since it agreed that an apportioned tax would be sustained. Apportioned valid taxes are none the less "direct" than are unapportioned invalid taxes. It is significant to note that the Court did not follow the earlier artificial distinction that it is not competent for a state to levy a tax "on" gross receipts from an interstate transaction; but that the state could nevertheless constitutionally levy a tax "on" certain local incidents and measure the tax by gross receipts from an interstate transaction, even though the revenue derived from the business of the taxpayer in both situations was precisely the same.

In the 1949 case of *Interstate Oil Pipe Line Co. v. Stone*,[225] four of the nine members of the Court voted to sustain a tax on the privilege of doing business measured by the gross receipts from the operation of an interstate pipe line, engaged in transporting oil exclusively in interstate commerce. A fifth justice voted to uphold the tax on the ground that the event taxed was a local activity. Thus the tax was sustained, but the remaining four members of the Court dissented. They took the view that "the privilege of carrying on interstate commerce itself is immune from state taxation," because "the commerce clause of the Constitution does not leave to the States any power to permit or refuse the carrying on of interstate commerce."

As the case stands, it means but little, since later pronouncements by the Court make it clear that it will not uphold a tax which it thinks is an encroachment on the privilege of engaging in interstate

224. Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917); Leloup v. Port of Mobile, 127 U.S. 640 (1888).
225. 337 U.S. 662 (1949).

commerce.[226] When gross receipts from sales are taxed, the Court still clings to the view that a state has no taxable grip on the interstate sales operation unless "some local incident occurs sufficient to bring the transaction within its taxing power."[227] An occupation tax on the business of selling at retail, where the basis for computation of the tax is gross receipts, is permissible in so far as the commerce clause is concerned, only if the Court concludes that the taxed event is a local incident. That is the teaching of *Norton Co. v. Department of Revenue*.[228] There the state could constitutionally impose a tax on the occupation of selling, measured by gross receipts, where the local branch of the multi-state business either received the order or distributed the goods sent from an extra-state branch. However, by the same *Norton* case a state cannot reach the gross receipts from orders sent directly to an out-of-state branch of business by customers and shipped directly to the customers from the out-of-state branch. Such proceeds are said not to be reasonably attributable to a local business.

2. *Gross Receipts as a Factor in a Fiscal Formula*

When a state tries to use gross receipts to ascertain the value of a local activity for tax purposes, it may use the receipts as the only measure of the value of the privilege, or the receipts may be one of several factors in the formula. A fiscal formula for computing the value of the activity in a far-flung multi-state business may include a portion of the gross receipts from sales, along with such other factors as the capital stock.

That principle is demonstrated in *International Harvester Co. v. Evatt*[229] where a tax on the privilege of doing business was computed, in part, on the basis of gross receipts from both interstate and intrastate sales, and partly on a proportion of the capital stock of the corporation. Taxpayer was engaged in manufacturing and marketing machinery. Factories, warehouses and sales agencies were owned by taxpayer both within and beyond the taxing state. The business of taxpayer within the taxing state was valued partly by the value of products sold outside the state, as well as by goods manufactured outside the state and sold within the taxing state. The tax was resisted on both commerce and due process clause grounds. The taxpayer contended that this transformed the tax on its business to a tax on an activity outside the taxing state, in violation of the due process, as well as the commerce clause. The Court sustained the tax, however.

The Court rejected the commerce clause arguments, since the apportionment formula used to determine the value of the local business

226. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).
227. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951).
228. 340 U.S. 534 (1951).
229. 329 U.S. 416 (1947).

was thought to be fair. The fact that the computation included receipts from interstate sales did not, thought the Court, affect the validity of a fair apportionment. Using gross receipts from interstate sales to determine the fair value of a local activity such as manufacturing, of course, has long been regarded as sound commerce clause gospel.

Rejecting the due process argument also, the Court made it clear that a tax will not be invalidated merely because the result is achieved through a formula which takes into consideration interstate and out-of-state transactions having a relation to the local privilege. The privilege of doing business within the state is made more valuable owing to its being part of a multistate enterprise. The recognition of that fact for tax purposes is not in itself a violation of the due process clause. The opportunities afforded by the taxing state have a direct and substantial relationship to the interstate operations. So reasoned the Court.

Ford Motor Company v. Beauchamp[230] not only shows the various factors that may go into the allocation formula, along with gross receipts from sales, but it also represents an expansion of the idea of the value, to a corporation engaged in interstate commerce, of the privilege of doing local business, beyond the value of the property actually employed within the taxing state. There, Texas levied an annual franchise tax on every domestic and foreign corporation authorized to do business in the state, measured by a charge upon such proportion of (a) the outstanding capital stock; (b) surplus and undivided profits of the corporation; plus (c) the long-term indebtedness, as the gross receipts from its Texas business bore to its total receipts. The complaining taxpayer, Ford Motor Company, sent parts into Texas for assembly and intrastate sale to dealers. Ford's capital, as defined in the statute, was over $600,000,000. Total gross receipts for the year were over $800,000,000; Texas gross receipts were over $34,000,000. The capital allocable to Texas by the statutory formula was over $23,000,000; and the book value of all assets located in Texas was around $3,000,000. Payment was made under protest and suit instituted to recover the amount of tax paid on the $20,000,000 in excess of the book value of assets in Texas. The taxpayer contended that the tax was at war with the commerce clause in that it was levied on assets used in interstate business; and that it was repugnant to the due process clause because it taxed activities and property outside the taxing state and over which it had no jurisdiction.

Over these objections, the Court sustained the tax. The Court was satisfied that the statutory formula for arriving at the amount of the tax did not violate either clause of the Constitution since the measure

230. 308 U.S. 331 (1939).

of the tax only recognized the increased value of the privilege of doing business within the state resulting from the use of property beyond the state. In essence, the Court was of the opinion that it was a legitimate franchise tax for the privilege of carrying on business in Texas. The exploitation by a foreign corporation of interstate opportunities under the protection and encouragement of a state government afforded a sufficient basis for the taxation. In levying the privilege tax, the state was simply placing a charge upon that privilege commensurate with the protection it afforded.

The *Beauchamp* and *Evatt* decisions give realistic recognition to the national character of the modern corporation whose property is scattered through several states, but whose use, management and balance sheet are unitary. While apportionments between the intrastate and interstate activities have been upset upon a showing that they were materially contrary to fact, or that improper factors have been included, the Court found that that argument had no basis in *Beauchamp* and *Evatt* cases for the reason that the apportionment formula in each case was found to be fair; and capital employed in any part of these multistate businesses tended to make every other part of the business more valuable. In a large unitary enterprise such as the Ford Motor Company and International Harvester, property located outside the state, when correlated in use with property within the state, almost of necessity it seems, must affect the worth of the privilege within the state. So, in determining the value of the intrastate privilege, the weight given to the value of the property beyond the boundaries of the taxing state is simply a recognition of the value of the privilege granted by the taxing state.

The "unit rule" followed in *Beauchamp* and *Evatt* was originally developed to apportion property or earnings of such unitary enterprises as communication or transportation companies.[231] Those, of course, are companies whose property does have real intangible value above its physical worth owing to its use as part of one entire enterprise, and whose earnings are incapable of separation into the respective portions derived from intrastate and interstate business. This "unit rule" has been thus extended, wisely it seems, to corporations engaged in production and selling activities. While it may be more difficult to determine what rightfully belongs to a state when a sale is concerned in multi-state sales than when the receipts are from multi-state transportation or communication, as *Beauchamp* and *Evatt* show, there can be a constitutional allocation of income from multistate enterprises whose income is derived from interstate sales.

The task to which the Court should direct its efforts when a state

231. See, *e.g.*, St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350 (1914); Western Union Tel. Co. v. Missouri *ex rel.* Gottlieb, 190 U.S. 412 (1903).

is taxing a multistate business enterprise is the determination of what portion of the business organism may fairly be attributed to the taxing state. That portion of the business fairly attributable to the state should be a proper subject for raising revenue for the state, under whose protection the business is carried on, irrespective of whether the Court can segregate some part of the business and call it a "local activity." An interstate business ought not be given a tax preference over local business. That ought to be the real nub of the commerce clause issue, whether the state is trying to reach gross receipts derived from interstate sales or services, or whether the state has levied a property tax on such unitary multistate enterprises as transportation and communication systems. Such is not the law, however. When proceeds from sales and services are affected by a tax, the Court must still find that some "local incident" occurs to bring the transaction within the taxing power of the state. In sales taxation the Court continues to follow a rule which will "relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce."[232]

232. Justices Stone, Holmes and Brandeis protesting against the tax immunity given in Helson and Randolph v. Kentucky, 279 U.S. 245, 252-53 (1929).