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Edward L. Barrett Jr.

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STATE TAXATION OF INTERSTATE COMMERCE—"DIRECT BURDENS," "MULTIPLE BURDENS," OR WHAT HAVE YOU?

EDWARD L. BARRETT, JR.*

The problem of determining the permissible extent of state taxation of interstate commerce is as old as the Constitution.[1] From Chief Justice Marshall's dissertation upon the subject in 1827 in *Brown v. Maryland*[2] to the present, thousands of pages of words upon the subject have found their way into the Supreme Court reports. Despite this judicial outpouring, however, the Supreme Court of the United States has yet to evolve a satisfactory theory upon which to decide cases in this field. In fact, the Court in 1951 appears as sharply divided in its basic approach to the problem as at any time in history. Two years ago no five judges were able to agree upon the test to be used in determining the constitutionality of a state privilege tax measured by the gross receipts from operating pipe lines within the state in interstate commerce. Every reason given for upholding the tax by one

*Professor of Law, University of California, Berkeley, California.

1. The literature on the subject is extensive. The following incomplete list gives the books and articles which have been helpful to me. ALTMAN AND KEESLING, ALLOCATION OF INCOME IN STATE TAXATION (2d ed. 1950); Arditto, *State and Local Taxation of Scheduled Local Airlines*, 16 J. AIR. L. & COM. 162 (1949); Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 COL. L. REV. 211 (1947); Hellerstein, *State Franchise Taxation of Interstate Businesses*, 4 TAX L. REV. 95 (1948); Hellerstein & Hennefeld, *State Taxation in a National Economy*, 54 HARV. L. REV. 949 (1941); Johnson, *Multi-State Taxation of Interstate Sales*, 27 CALIF. L. REV. 549 (1939); Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617 (1939); Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253 (1940); Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 HARV. L. REV. 40 (1943); Mendelson, *Recent Developments in State Power to Regulate and Tax Interstate Commerce*, 98 U. OF PA. L. REV. 57 (1949); Molloy, *Twelve Times and Out—Application of Indiana Gross Income Tax Act of 1933 Again Declared Unconstitutional*, 23 NOTRE DAME LAW. 54 (1947); Overton, *State Taxation of Interstate Commerce*, 19 TENN. L. REV. 870 (1947); Powell, *State Excises on Foreign Corporations*, 12 PROC. NAT. TAX ASS'N 203 (1919); Powell, *State Income Taxes and the Commerce Clause*, 31 YALE L.J. 799 (1922); Powell, *State Production Taxes and the Commerce Clause*, 12 CALIF. L. REV. 17 (1923); Powell, *Business Taxes and the Federal Constitution*, 18 PROC. NAT. TAX ASS'N 164 (1925); Powell, *Contemporary Commerce Clause Controversies over State Taxation*, 76 U. OF PA. L. REV. 773 (1928); Powell, *Business Taxation and Interstate Commerce*, 30 PROC. NAT. TAX ASS'N 337 (1937); Powell, *New Light on Gross Receipts Taxes: The Berwind-White Case*, 53 HARV. L. REV. 909 (1940); Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501 & 710 (1947); Silverstein, *Problems of Apportionment in Taxation of Multistate Business*, 4 TAX L. REV. 207 (1949); Sutherland & Vinciguerra, *The Octroi and the Airplane, a Reconsideration of Some Old Problems of Local Taxation and of Commerce Among the Several States*, 32 CORNELL L.Q. 161 (1946); Traynor, *Tax Decisions of the Supreme Court, 1937 Term*, 33 ILL. L. REV. 371 (1938); Traynor, *State Taxation and the Commerce Clause in the Supreme Court, 1938 Term*, 28 CALIF. L. REV. 168 (1940); Warren & Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 COL. L. REV. 49 (1938); Note, *Taxation: New Developments in State Taxation of Gross Receipts from Interstate Commerce*, 27 CALIF. L. REV. 336 (1939); Note, *The Multiple Burden Theory in Interstate Commerce Taxation*, 40 COL. L. REV. 653 (1940); Note, *State Taxation of Interstate Commerce: The Western Live Stock Case*, 52 HARV. L. REV. 502 (1939); Note, *Gross Receipts Taxes: A Change in Doctrine*, 56 YALE L.J. 898 (1947).

2. 12 Wheat. 419, 6 L. Ed. 678 (1827).

group of four judges was explicitly rejected by another group of four who voted against the tax.[3] And in January 1951 the Court ordered a reargument in a case involving the application of a state franchise tax measured by net income to the local income of a motor carrier doing an interstate business—a case which started its judicial journey in 1942 and had been before the Court once before in 1944 only to have a decision on the merits postponed.[4]

A review of the course of decision during the past two decades is necessary to an identification and understanding of the issues which are dividing the Court today. This article will attempt such a review. Only the broad picture will be painted with no thought of giving the details of the cases relating to the various forms of state taxation. The cases dealing with state taxes actually discriminating against interstate commerce will be excluded from consideration since all members of the Court agree that such taxes are invalid.[5] Attention will be focused instead upon cases dealing with the application of nondiscriminatory state franchise, privilege, net income, gross receipts, sales and use taxes to interstate businesses. The discussion will be divided chronologically as follows: (1) the pre-1938 decisions; (2) the multiple burdens doctrine, 1938 to 1943; and (3) the current confusion.

I. The Pre-1938 Decisions

Prior to 1938 the Court applied tests derived from both the due process and the commerce clauses in determining the validity of nondiscriminatory state taxes upon interstate commerce. In its broadest terms the due process test was phrased as follows: "In this Court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment."[6] Although the Court was finding it difficult to determine the impact of this rule upon the taxation of intangible property,[7] its application to other forms of taxation could be simply stated:

> "The state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed."[8]

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3. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 Sup. Ct. 1264, 93 L. Ed. 1613 (1949) (discussed in detail *infra*).
4. Spector Motor Service v. McLaughlin, *cert. granted*, 340 U.S. 806 (1950); argued Nov. 29, 30, 1950, 19 U.S.L. Week 3155 (1950); ordered restored to docket for reargument Jan. 2, 1951, 19 U.S.L. Week 3184 (1951). The case and its prior history are discussed *infra*.
5. Best & Co. v. Maxwell, 311 U.S. 454, 61 Sup. Ct. 334, 85 L. Ed. 275 (1940).
6. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 210, 50 Sup. Ct. 98, 74 L. Ed. 371 (1930).
7. The leading cases are discussed in Traynor, *State Taxation and the Supreme Court, 1938 Term*, 28 Calif. L. Rev. 1 (1939).
8. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 424, 57 Sup. Ct. 772, 81 L. Ed. 1193 (1937).

The commerce clause test on the other hand was phrased in terms of the manner in which the tax impinged upon interstate commerce. If the tax was found to bear directly upon interstate commerce, it was forbidden. If it had only an indirect or remote effect upon interstate commerce it was upheld as exacting no more than a legitimate contribution for the services rendered by the taxing state. A typical statement of the test was made by Chief Justice Hughes in *Minnesota v. Blasius:*[9]

> "The States may not impose direct burdens upon interstate commerce, that is, they may not regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce. Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it."

The two tests were not sharply distinguished in the cases.[10] Most taxes which met due process standards were also valid under the commerce clause and the Court frequently decided the due process issue in commerce clause language. Thus the fact that the tax was upon property or activities outside the taxing state would be held to show that the tax imposed a forbidden burden upon interstate commerce. But the commerce clause test was not entirely superfluous as applied to nondiscriminatory state taxation. In certain kinds of cases important state taxes were held to impose forbidden direct burdens upon commerce even though they fully met due process requirements.

A few examples will serve to show the interrelationship of the due process and commerce clause standards during this period.

Ad Valorem Property Taxes.—Property having its situs in the taxing state was subject to property taxation even though used in interstate commerce. Thus, an interstate railroad was subject to local taxation upon the value of its roadbed, its repair shops, even upon its rolling stock. So far as the commerce clause was concerned such taxation was held to affect interstate commerce "only incidentally" and was thought "not to be inconsistent with the constitutional immunity from the imposition of direct burdens."[11] The problems in this field of taxation were the due process problems of proper allocation of values to the taxing state.[12]

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9. 290 U.S. 1, 8, 54 Sup. Ct. 34, 78 L. Ed. 131 (1933).

10. See, *e.g.,* Southern Natural Gas Corp. v. Alabama, 301 U.S. 148, 57 Sup. Ct. 696, 81 L. Ed. 970 (1937); Union Tank Line Co. v. Wright, 249 U.S. 275, 282, 39 Sup. Ct. 276, 63 L. Ed. 602 (1919); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355 (1910).

11. Virginia v. Imperial Coal Sales Co., 293 U.S. 15, 19, 55 Sup. Ct. 12, 79 L. Ed. 171 (1934).

12. Many cases dealt with the problems of allocation raised when states attempted to tax ships and railroad rolliug stock. See, *e.g.,* Johnson Oil Refining Co. v. Oklahoma,

Goods actually in the process of moving in interstate commerce, on the other hand, were held free from property taxation under the commerce clause even though due process standards were met.[13] Goods within the state on tax day were fully subject to taxation if the interstate journey had not yet commenced, or had been sufficiently interrupted, or had ended; but if the journey was in progess they were completely free from taxation. Taxes on goods in transit were held to be direct taxes upon interstate commerce and hence forbidden.

Franchise Taxes.—Where corporations did both intrastate and interstate business, it was held that franchise taxes could validly be imposed for the privilege of doing the intrastate business even though measured by values attributable to the interstate business. Thus the tax would be upheld if measured by the entire amount of capital employed in the state including that used in the interstate business[14] or by that proportion of the total capital stock that the value of the assets used within the state bore to total assets,[15] or by the net income arising from business done within the state.[16] So far as the commerce clause was concerned, the effect of such taxes upon interstate commerce was held to be only "incidental and remote, not differing in this respect from the effect of ordinary *ad valorem* taxation of property within the State."[17] The principal problems with such taxes were the due process problems of allocating values to the taxing state. Where domestic corporations were concerned, it should be noted, neither the due process nor the commerce clause required allocation.[18]

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290 U.S. 158, 54 Sup. Ct. 152, 78 L. Ed. 238 (1933); Union Tank Line Co. v. Wright, 249 U.S. 275, 39 Sup. Ct. 276, 63 L. Ed. 602 (1919); New York v. Miller, 202 U.S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155 (1906); American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899 (1899); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 (1891); Morgan v. Parham, 16 Wall. 471, 21 L. Ed. 303 (1873).

Attempts by the state to use some form of allocation formula to get at the unitary or system value of transportation and communication companies also gave rise to considerable litigation. See, *e.g.*, Wells Fargo & Co. v. Nevada, 248 U.S. 165, 39 Sup. Ct. 62, 63 L. Ed. 190 (1918); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683 (1897); Western Union Tel. Co. v. Taggart, 163 U.S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49 (1896); Cleveland, Cincinnati, Chicago & St. L. Ry. v. Backus, 154 U.S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041 (1894).

13. The cases are cited and discussed in Minnesota v. Blasius, 290 U.S. 1, 54 Sup. Ct. 34, 78 L. Ed. 131 (1933).

14. Southern Natural Gas Corp. v. Alabama, 301 U.S. 148, 57 Sup. Ct. 696, 81 L. Ed. 970 (1937).

15. Atlantic Lumber Co. v. Comm'r of Corps. & Taxation, 298 U.S. 553, 56 Sup. Ct. 887, 80 L. Ed. 1328 (1936).

16. Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441, 56 Sup. Ct. 553, 80 L. Ed. 791 (1936). The special treatment given to franchise taxes measured by gross receipts will be discussed *infra*.

17. Southern Natural Gas Corp. v. Alabama, 301 U.S. 148, 157, 57 Sup. Ct. 696, 81 L. Ed. 970 (1937).

18. In two cases franchise taxes measured by the entire capital stock of domestic companies doing business, including interstate business, outside the state were upheld. Kansas City, M. & B.R.R. v. Stiles, 242 U.S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176 (1916); Kansas City, Ft. Scott & Memphis Ry. v. Botkin, 240 U.S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617 (1916).

Where corporations did a wholly interstate business, however, franchise taxes imposed for the privilege of doing business within the state were held invalid at least with respect to foreign corporations even though measured by property, activities or net income properly allocated to the taxing state.[19] The taxes, although meeting due process standards, were held to be imposed directly upon interstate commerce and hence forbidden by the commerce clause.

License, Privilege and Occupation Taxes.—Taxes of this character were held valid when formally imposed on intrastate activity, regardless of their impact upon interstate commerce. Flat sum license taxes were upheld when levied upon the intrastate portions of the business done by railroad, telephone and express companies.[20] Similar taxes were upheld when imposed on peddlers, agents and brokers handling the sale of goods within the state, even though they dealt exclusively in goods which had come from other states.[21] Excise or occupation taxes levied upon the privilege of manufacturing, mining, severance or generation of power and measured by the value of the goods produced were upheld even though most of the goods went immediately into interstate commerce.[22] License and privilege taxes were upheld even though imposed on an intrastate business which was only a minor and unprofitable incident of an interstate business.[23] Such taxes did

19. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916 (1925); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 45 Sup. Ct. 184 69 L. Ed. 439 (1925); *see* Atlantic Lumber Co. v. Comm'r of Corps. & Taxation, 298 U.S. 553, 555, 56 Sup. Ct. 887, 80 L. Ed. 1328 (1936). At least one case suggested that a state might impose an unalloeated franchise tax upon a domestic corporation engaged wholly in interstate and foreign commerce. Schwab v. Richardson, 263 U.S. 88, 44 Sup. Ct. 60, 68 L. Ed. 183 (1923).

20. Postal Telegraph-Cable Co. v. City of Fremont, 255 U.S. 124, 41 Sup. Ct. 279, 65 L. Ed. 545 (1921); Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252, 39 Sup. Ct. 265, 63 L. Ed. 590 (1919); Ewing v. Leavenworth, 226 U.S. 464, 33 Sup. Ct. 157, 57 L. Ed. 303 (1913); Williams v. Talladega, 226 U.S. 404, 33 Sup. Ct. 116, 57 L. Ed. 275 (1921); Allen v. Pullman's Palace Car Co., 191 U.S. 171, 24 Sup. Ct. 39, 48 L. Ed 134 (1903); Pullman Co. v. Adams, 189 U.S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877 (1903); Osborne v. Florida, 164 U.S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586 (1897); Postal Telegraph-Cable Co. v. Charleston, 153 U.S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871 (1894).

21. Wagner v. City of Covington, 251 U.S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157 (1919); Watters v. Michigan, 248 U.S. 65, 39 Sup. Ct. 29, 63 L. Ed. 129 (1918); Singer Sewing Machine Co. v. Brickell, 233 U.S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974 (1914); Kehrer v. Stewart, 197 U.S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663 (1905); *cf.* Chassaniol v. City of Greenwood, 291 U.S. 584, 54 Sup. Ct. 541, 78 L. Ed. 1004 (1934) (license tax on cotton buyer dealing in cotton prior to its interstate shipment).

22. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 Sup. Ct. 548, 76 L. Ed. 1038 (1932) (generation of electricity); Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 Sup. Ct. 639, 71 L. Ed. 1049 (1927) (production of natural gas); Lacoste v. Dep't of Conservation, 263 U.S. 545, 44 Sup. Ct. 186, 68 L. Ed. 437 (1924) (severance tax on furs); Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 Sup. Ct. 526, 67 L. Ed. 929 (1923) (mining); Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 Sup. Ct. 83, 67 L. Ed. 237 (1922) (mining); American Mfg. Co. v. St. Louis, 250 U.S. 459, 39 Sup. Ct. 522, 63 L. Ed. 1084 (1919) (manufacturing); *cf.* Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 Sup. Ct. 267, 78 L. Ed. 622 (1934) (privilege tax on operating cotton compresses which baled cotton prior to interstate shipment).

23. Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403, 56 Sup. Ct. 522, 80 L. Ed. 760 (1936) (occupation tax measured by gross receipts from intrastate business upheld even though intrastate business inseparable from the interstate and operated at a loss);

not burden interstate commerce, the Court reasoned, because they could always be avoided by ceasing to do the intrastate business.[24]

But taxes of this character were held invalid whenever levied in the form of a tax for the privilege of engaging in an interstate business even though an intrastate business was also done.[25] A fixed sum license tax imposed generally upon all telegraph companies doing business within the state was held invalid as applied to a company doing both an interstate and an intrastate business.[26] A license tax of a specified amount upon each telephone instrument used within the state was held invalid because the instruments were used in part for interstate calls.[27] License taxes upon drummers or other agents who confined their activities to taking orders to be followed by interstate shipment of goods to the buyer were held invalid.[28] And in other cases where a wholly interstate business was done, license and privilege taxes were held invalid.[29]

Most of the license and privilege tax cases involved taxes which by their nature were limited to activities within the taxing state and presented no due process problems of allocation. In one important instance, however, an unallocated license tax was held to meet both due process and commerce clause standards. In *American Manufacturing Co. v. St. Louis*,[30] a city

Postal Telegraph-Cable Co. v. City of Fremont, 255 U.S. 124, 41 Sup. Ct. 279, 65 L. Ed. 545 (1921) (local business operated at a loss during prior two years); Osborne v. Florida, 164 U.S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586 (1897) (express company with only 5% of business intrastate).

24. Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403, 56 Sup. Ct. 522, 80 L. Ed. 760 (1936).

25. See *id.* at 414.

26. LeLoup v. Port of Mobile, 127 U.S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311 (1888).

27. Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384, 55 Sup. Ct. 477, 79 L. Ed. 934 (1935).

28. Western Oil Refining Co. v. Lipscomb, 244 U.S. 346, 37 Sup. Ct. 623, 61 L. Ed. 1181 (1917); Crenshaw v. Arkansas, 227 U.S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565 (1913); Dozier v. Alabama, 218 U.S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965 (1910); Stockard v. Morgan, 185 U.S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785 (1902); *cf.* Heyman v. Hays, 236 U.S. 178, 35 Sup. Ct. 403, 59 L. Ed. 527 (1915) (license tax on dealer whose sole business was shipping goods to buyers in other states pursuant to mail orders held invalid).

29. State Tax Comm'n v. Interstate Natural Gas Co., 284 U.S. 41, 52 Sup. Ct. 62, 76 L. Ed. 156 (1931) (privilege tax of a specified sum per mile of pipe line within the state applied to pipe line company doing wholly interstate business); Texas Transport & Terminal Co. v. New Orleans, 264 U.S. 150, 44 Sup. Ct. 242, 68 L. Ed. 611 (1924) (license fee on agent for interstate steamship company).

One exception to this rule should be noted. "While a state may not lay a tax on the privilege of engaging in interstate commerce . . . it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon." Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 185, 51 Sup. Ct. 380, 75 L. Ed. 953 (1931). The motor vehicle cases are exceptional and will not be given detailed treatment in this article. As examples of the distinctions drawn during the period under discussion, see Ingels v. Morf, 300 U.S. 290, 57 Sup. Ct. 439, 81 L. Ed. 653 (1937); Morf v. Bingaman, 298 U.S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245 (1936); Bingaman v. Golden Eagle Western Lines, 297 U.S. 626, 56 Sup. Ct. 624, 80 L. Ed. 928 (1936); Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285, 55 Sup. Ct. 709, 79 L. Ed. 1439 (1935); Hicklin v. Coney, 290 U.S. 169, 54 Sup. Ct. 142, 78 L. Ed. 247 (1933).

30. 250 U.S. 459, 39 Sup. Ct. 522, 63 L. Ed. 1084 (1919).

license tax upon the privilege of manufacturing was measured by the gross receipts from sales made during the prior year, including in this case sales made from warehouses outside the state. The Court said that the tax could have been measured by the value of the goods at the time of manufacture but that the ascertainment and payment of the tax had been postponed for the convenience of the taxpayer until the goods had been marketed. The tax was valid under the commerce clause, the Court said, because it imposed only an "incidental and indirect effect" upon interstate commerce and "for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of his property without due process of law."[31]

Net Income and Gross Receipts Taxes.—In applying the commerce clause test the Court drew a distinction between taxes measured by net income and those measured by gross receipts.

> "The difference in effect between a tax measured by gross receipts and one measured by net income . . . is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government like a tax upon property. . . ."[32]

Taxes on or measured by net income were held valid as applied to businesses which were both intrastate and interstate in character if they met due process standards by being allocated to income arising from activities within the state.[33] The fact that some intrastate business was done was sufficient justification for the tax even though most of the income taxed came from interstate operations. However, if a wholly interstate business were done, a franchise or privilege tax measured by net income was held invalid

31. *Id.* at 464. Compare the suggestion in Hope Natural Gas Co. v. Hall, 274 U.S. 284, 288, 47 Sup. Ct. 639, 71 L. Ed. 1049 (1927), that such taxes must be limited to a fair measure of the value at the time of production.

32. United States Glue Co. v. Oak Creek, 247 U.S. 321, 328, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918).

33. Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441, 56 Sup. Ct. 553, 80 L. Ed. 791 (1936); Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413, 43 Sup. Ct. 620, 67 L. Ed. 1051 (1923); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 Sup. Ct. 45, 65 L. Ed. 165 (1920); Shaffer v. Carter, 252 U.S. 37, 57, 40 Sup. Ct. 221, 60 L. Ed. 445 (1920); United States Glue Co. v. Oak Creek, *supra* note 32; *cf.* Bass, Ratcliff & Gretton v. State Tax Comm'n, 266 U.S. 271, 45 Sup. Ct. 82, 69 L. Ed. 282 (1924) (foreign commerce). The very difficult problems of allocation are discussed at length in ALTMAN AND KEESLING, ALLOCATION OF INCOME IN STATE TAXATION (2d ed. 1950).

as a direct burden upon commerce even though properly allocated.[34] It was assumed, though not yet decided, that an allocated tax imposed directly "on" net income would be upheld even as applied to a wholly interstate business.[35] One qualification should be noted with respect to domestic corporations and resident individuals. It was held that the privilege of domicile afforded a sufficient basis so far as due process was concerned for the taxation of entire net income regardless of where earned and it was assumed that in such a case the fact that part or all of the business was interstate was immaterial.[36]

Taxes measured by gross receipts, on the other hand, were held invalid to the extent that gross receipts from interstate commerce were included even though imposed upon intrastate business and properly allocated. Thus privilege, license or franchise taxes were held invalid to the extent that the measure of the taxes included any gross receipts from interstate commerce.[37] The only exception to this rule lay in the field of property taxation. To avoid the difficult problems of valuing the local portion of unitary transportation and communication companies, states were permitted to

34. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916 (1925); *see* Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441, 446, 56 Sup. Ct. 553, 80 L. Ed. 791 (1936).

35. The distinction between a tax on net income and a franchise or privilege tax measured by net income is discussed at length in West Publishing Co. v. McColgan, 27 Cal.2d 705, 708, 166 P.2d 861 (1946), *aff'd mem.*, 328 U.S. 823 (1946). Professor Powell suggested in 1937 that a tax on net income from a solely interstate business would be upheld. Powell, *Business Taxation and Interstate Commerce*, 30 PROC. NAT. TAX ASS'N 337, 358 (1937).

36. The leading due process cases were New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 57 Sup. Ct. 466, 81 L. Ed. 666 (1937); Lawrence v. State Tax Commission, 286 U.S. 276, 52 Sup. Ct. 556, 76 L. Ed. 1102 (1932). In two commerce clause cases the application of a net income tax to domestic corporations was upheld without examination of the particular allocation formulae used. Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441, 56 Sup. Ct. 553, 80 L. Ed. 791 (1936); United States Glue Co. v. Oak Creek, 247 U.S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918). The Court has yet to decide a case directly presenting the problem of a tax imposed upon the entire net income of a domestic corporation engaged in interstate commerce in more than one state. ALTMAN AND KEESLING, ALLOCATION OF INCOME IN STATE TAXATION 30 (2d ed. 1950); *cf.* Rock Island Refining Co. v. Oklahoma Tax Comm'n, 322 U.S. 711, 64 Sup. Ct. 1159, 88 L. Ed. 1553 (1944) (per curiam opinion dismissing appeal "for want of a substantial federal question").

37. Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90, 58 Sup. Ct. 72, 82 L. Ed. 68 (1937); Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650, 56 Sup. Ct. 608, 80 L. Ed. 956 (1936); New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338, 50 Sup. Ct. 111, 74 L. Ed. 463 (1930); Meyer v. Wells Fargo & Co., 223 U.S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445 (1912); Galveston, H. & S.A. Ry. v. Texas, 210 U.S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031 (1908) (overruling or distinguishing prior cases which had suggested a contrary result).

Gross receipts from business found to be intrastate were, of course, taxable even though an interstate business was also done. Puget Sound Stevedoring Co. v. State Tax Comm'n, *supra;* Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403, 56 Sup. Ct. 522, 80 L. Ed. 760 (1936). In some cases the Court avoided the rule against the imposition of taxes on gross receipts from interstate commerce by terming intrastate what was essentially interstate business. New York v. Sohmer, 235 U.S. 549, 35 Sup. Ct. 162, 59 L. Ed. 355 (1915) (transportation between two points in one state over a line running part way in another state); Lehigh Valley R.R. v. Pennsylvania, 145 U.S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672 (1892) (same); New York v. Knight, 192 U.S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325 (1904) (cab service between interstate ferry and homes of patrons).

impose taxes upon gross receipts in lieu of property taxes if properly allocated and if not greatly in excess of the amount which would have been collectible by use of a property tax.[38]

Sales and Use Taxes.—The tests applied by the Court in determining the validity of excise taxes upon sales or use were very similar to those applied to ad valorem property taxes upon goods in transit. If when the sale and delivery took place the goods had not yet commenced their interstate journey or had arrived in the state after such a journey the Court consistently upheld the imposition of a sales tax.[39] Since the sale and delivery took place in the taxing state, there was no due process objection. And the Court found only an indirect burden upon the interstate commerce which followed or preceded the sale. But where the sale was made by a seller in one state to a buyer in another and was followed by shipment of the goods, it was assumed that the tax would be invalid because imposed upon the interstate transaction.[40]

The rule against taxing the interstate sale was, however, largely avoided by the imposition of taxes upon the use of property within the state. The earliest cases were those of taxes upon the use of gasoline which were upheld even though the gasoline was brought from without the state for tbe purpose of use within or for use in interstate carriers.[41] Later, a general use tax designed to supplement a sales tax by reaching all property which had been the subject of non-taxable interstate sales was upheld.[42] The Court held that use taxes had only the same indirect effect upon commerce as property taxes upon goods which had come to rest within the state after an interstate journey.[43]

38. Great Northern Ry. v. Minnesota, 278 U.S. 503, 49 Sup. Ct. 191, 73 L. Ed. 477 (1929); Pullman Co. v. Richardson, 261 U.S. 330, 43 Sup. Ct. 336, 67 L. Ed. 682 (1923); Cudahy Packing Co. v. Minnesota, 246 U.S. 450, 38 Sup. Ct. 373, 62 L. Ed. 827 (1918).

39. The earliest case was Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382 (1869). In 1923 the rule was applied to sales of goods in their original packages. Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 Sup. Ct. 643, 67 L. Ed. 1095 (1923). Sales taxes were upheld even though the goods were sold for use in the process of interstate transportation [Eastern Air Transport Inc. v. South Carolina Comm'n, 285 U.S. 147, 52 Sup. Ct. 340, 76 L. Ed. 673 (1932) (sale of gasoline to interstate air line)], were as a matter of practice immediately taken out of the state by the buyer [Superior Oil Co. v. Mississippi, 280 U.S. 390, 50 Sup. Ct. 169, 74 L. Ed. 504 (1930)], or were purchased outside the state by the seller subsequent to the sale to fill the order. Wiloil Corp. v. Pennsylvania, 294, U.S. 169, 55 Sup. Ct. 358, 79 L. Ed. 838 (1935) (interstate transportation not required or contemplated by the buyer).

40. See cases cited notes 28 and 39, *supra*. The assumption of invalidity of a sales tax on an interstate sale was implicit also in Henneford v. Silas Mason Co., 300 U.S. 577, 57 Sup. Ct. 524, 81 L. Ed. 814 (1937).

41. Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 Sup. Ct. 575, 78 L. Ed. 1141 (1934); Edelman v. Boeing Air Transport, Inc., 289 U.S. 249, 53 Sup. Ct. 591, 77 L. Ed. 1155 (1933); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730 (1933); Gregg Dyeing Co. v. Query, 286 U.S. 472, 52 Sup. Ct. 631, 76 L. Ed. 1232 (1932).

42. Henneford v. Silas Mason Co., 300 U.S. 577, 57 Sup. Ct. 524, 81 L. Ed. 814 (1937).

43. "Things acquired or transported in interstate commerce may be subjected to

General Comments.—Three matters of significance should be noted in connection with the cases discussed above in which the Court had used the direct burden commerce clause test to hold invalid taxes which met due process standards. First, the cases rested upon formal bases which had little or no relationship to the actual extent of the burden imposed on commerce by the taxes in question. Thus, if a foreign corporation did 5% of intrastate business and 95% of interstate business within a state, that state could impose franchise, license or privilege taxes either in a flat sum or measured by capital stock or property or net income properly allocated to the state, including the 95% devoted to the interstate business. If, however, the corporation had 100% of interstate business, all of these taxes would fall. A tax on an interstate sale was held invalid, but a use tax of the same amount on the goods which had been the subject of that sale was upheld. An occupation tax measured by gross receipts was held invalid as to the receipts of a stevedoring company from the loading and unloading of ships by men under its direction (an interstate operation) but was held valid as to receipts from furnishing men to do similar work under the direction of the shipowners (an intrastate operation akin to an employment agency).[44]

Second, many of the decisions were mere lessons in draftsmanship to state legislators and purely verbal changes in a taxing statute could secure the Court's blessing for previously invalidated taxes. An invalid fixed sum license tax upon the entire business of a telegraph company could be validly imposed in the same amount upon the intrastate business done.[45] An invalid tax on interstate commerce or for the privilege of engaging in such commerce, could be reimposed (unless measured by gross receipts) upon intrastate business done and measured by the total business including the interstate commerce business.

Third, in two situations the decisions imposed serious limits upon important sources of state revenue which could not be avoided by proper

a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. . . . For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment." *Id.* at 582.

44. Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90, 58 Sup. Ct. 72, 82 L. Ed. 68 (1937). The formal character of the decisions in this period was aptly described in Powell, *State Income Taxes and the Commerce Clause,* 31 YALE L.J. 799 (1922): "Law, like politics, makes strange bedfellows. Among the queerest of such companions are the doctrine that the states cannot tax interstate commerce and the fact that they can. . . . The truth is that there is a wrong way and a right way for the states to tax interstate commerce. When the wrong way is adopted, the doctrine maintains its supremacy. When the right way is chosen, the fact prevails. The doctrine then saves its face by the nominalistic legerdemain of asserting that what is being taxed is not interstate commerce but something else."

45. *Compare* LeLoup v. Port of Mobile, 127 U.S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311 (1888) ($225 license fee on telegraph companies held invalid), *with* Postal Tel. Cable Co. v. Charleston, 153 U.S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871 (1894) ($500 license fee on the intrastate business of a telegraph company upheld).

draftmanship. (1) The power of states to tax enterprises doing a wholly interstate business within their borders was severely limited. Ad valorem property taxes were permitted. The validity of a tax on net income was assumed. Interstate sellers might be required to collect use taxes from their customers within the state.[46] But franchise, license, privilege and occupation taxes were forbidden even though they were allocated to meet due process standards.[47] (2) Taxes measured by gross receipts from interstate commerce (except where imposed in lieu of property taxes) were invalid even though levied on an intrastate activity and allocated to receipts arising from business done within the state.

II. The Multiple Burdens Doctrine—1938-1943

In 1938 Justice Stone, who had long been critical of the application of the direct burden test to state regulation of commerce,[48] wrote an opinion for the Court in *Western Live Stock v. Bureau of Revenue*[49] suggesting a different test to be applied in state taxation cases. In this opinion he said:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate commerce must pay its way,' . . . and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business."[50]

After referring to cases upolding the application of property and net income taxes to concerns engaged in interstate commerce, he continued:

> "All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. . . . The multiplication

46. *Cf.* Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 Sup. Ct. 376, 83 L. Ed. 488 (1939), relying on Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 Sup. Ct. 575, 78 L. Ed. 1141 (1934).

47. The cases involving state taxation of motor vehicles were exceptions to this statement. See the cases cited in note 29, *supra*.

48. In his dissent in Di Santo v. Pennsylvania, 273 U.S. 34, 44, 47 Sup. Ct. 267, 71 L. Ed. 524 (1927), he said: "In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

49. 303 U.S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823 (1938).

50. *Id.* at 254.

of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."[51]

He then went on with an attempt to fit previous gross receipts tax cases into this pattern, suggesting that such taxes had been held invalid only when not apportioned to commerce carried on within the taxing state. Apportioned gross receipts taxes, he said, had been sustained as

"a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on."[52]

The majority of the Court (Justices McReynolds and Butler dissenting) thus rejected the unquestioned rule of the previous thirty years against any tax measured by gross receipts from interstate commerce whether or not apportioned in favor of a new approach giving principal significance to the essentially due process test of proper allocation of receipts to the taxing state. What was the significance of this elaborate statement of new doctrine?[53] Three possibilities for change in the course of decision appeared: (1) The new doctrine could be used to permit state taxes levied upon an intrastate subject to be measured by allocated gross receipts from interstate commerce. (2) It could go further to permit states to impose allocated franchise, license and privilege taxes directly upon interstate commerce, without the necessity for isolating an intrastate activity to serve as the subject of the tax. An allocated tax of this kind even upon a wholly interstate business would appear to involve no greater risk of a multiple burden than one imposed upon an intrastate subject but reflecting the interstate activity in its measure. (3) The doctrine could even be used to invalidate all unallocated state taxes under the commerce clause whether or not due process standards were met. Taxes on manufacturing measured by gross sales including interstate sales involved risks of multiple burdens comparable to those resulting from unallocated taxes upon gross receipts. And if the new doctrine were to permit the imposition of allocated gross receipts taxes by states of origin of goods, then previously upheld sales and use taxes in states of destination would result in a form of multiple burden.[54]

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51. *Id.* at 255.
52. *Id.* at 257.
53. Several astute student comments on the implications of the decision appeared in the reviews. Comment, *Taxation: New Developments in State Taxation of Gross Receipts from Interstate Commerce*, 27 CALIF. L. REV. 336 (1939); Note, *State Taxation of Interstate Commerce: The Western Live Stock Case*, 52 HARV. L. REV. 502 (1939); Note, *The Multiple Burden Theory in Interstate Commerce Taxation*, 40 COL. L. REV. 653 (1940).
54. The multiple burdens doctrine might conceivably have been used to challenge the validity of unallocated franchise and net income taxes upon domestic corporations doing an interstate business. However, no suggestion of this kind has appeared in the cases.

The cases during this period gave at least tentative answers to all three of these questions.

Taxes Measured by Gross Receipts.—While the multiple burdens doctrine was used principally as a justification for invalidating unapportioned gross receipts taxes,[55] the cases made it reasonably clear that taxes on an intrastate activity measured by allocated gross receipts from interstate commerce would be upheld. The *Western Live Stock* case itself came the closest to presenting the problem directly. A New Mexico privilege tax upon the local business of publishing a magazine measured by the entire gross receipts from the sale of advertising was upheld. The publisher sold space to advertisers outside the state and claimed that performance of his advertising contracts required interstate circulation of the magazine. The Court stated the question as being whether the tax was invalid "because it is measured by gross receipts which are to some extent augmented by appellants' maintenance of an interstate circulation of their magazine."[56] In upholding the tax, however, the Court did not make a clear break with the past. After its elaborate statement of the new multiple burdens test, it said that this case could be sustained upon the authority of *American Manufacturing Co. v. St. Louis,* [57] where the tax on the privilege of manufacturing was measured by the price of goods sold. Furthermore, the court said:

> "So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax."[58]

And the Court said: "Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation."[59] Only as an "added reason" did the Court suggest that the tax was sustainable because it "is not one which in form or substance can be repeated by other states in such a manner as to lay an added burden on the interstate distribution of the magazine."[60]

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55. Gwin, White & Prince v. Henneford, 305 U.S. 434, 58 Sup. Ct. 325, 83 L. Ed. 272 (1939); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365 (1938). Justice Black rejected this application of the doctrine. He argued that only taxes which actually imposed "unjust, unfair, and discriminatory burdens against interstate commerce as such" should be invalidated by the Court and that it should be left to Congress to provide any remedy needed against the cumulation of nondiscriminatory state levies. See his dissents in the *Storen* case, *supra* at 316 and the *Gwin, White & Prince* case, *supra* at 442. See also his dissent in McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 183, 60 Sup. Ct. 504, 84 L. Ed. 683 (1940), in which he was joined by Justices Douglas and Frankfurter.
56. 303 U.S. at 254.
57. 250 U.S. 459, 39 Sup. Ct. 522, 63 L. Ed. 1084 (1919).
58. 303 U.S. at 259.
59. *Ibid.*
60. *Id.* at 260.

In three cases decided shortly after *Western Live Stock* the Court stated by way of dictum that a tax measured by apportioned gross receipts would be valid. In *Adams Manufacturing Co. v. Storen,*[61] it held an Indiana tax on gross receipts invalid as applied to the entire gross receipts of a company which manufactured machinery within the state and sold 80% of it to customers outside the state.

> "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, and which the commerce clause forbids."[62]

And in *Gwin, White & Prince v. Henneford,*[63] a Washington business activities tax measured by gross receipts was held invalid as applied to the entire gross receipts of a company which marketed Washington-grown fruit in other states. Again the Court emphasized the lack of apportionment to activities within the state and stated:

> "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."[64]

In *Southern Pacific Co. v. Gallagher,*[65] the Court (in upholding an application of the California use tax) stated:

> "Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself. This rule is applicable to a tax on gross receipts from interstate transportation; an occupation tax measured by gross receipts from radio broadcasting, and a general tax at specified rates upon the gross income of every resident, construed as 'a tax upon gross receipts from commerce' 'without apportionment.' The measurement of a tax by gross receipts where it cannot result in a multiplieation of the levies is upheld."[66]

For the last statement the Court cited the *Western Live Stock* case as its principal authority.

61. 304 U.S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365 (1938).
62. *Id.* at 311.
63. 305 U.S. 434, 58 Sup. Ct. 325, 82 L. Ed. 272 (1939).
64. *Id.* at 439.
65. 306 U.S. 167, 59 Sup. Ct. 389, 83 L. Ed. 586 (1939).
66. *Id.* at 174, 175.

Taxes on Interstate Commerce or the Privilege of Engaging in It.—During this period no attempt was made to use the multiple burdens doctrine affirmatively to uphold apportioned taxes on or for the privilege of engaging in interstate commerce. Instead the Court continued to state the old rule barring such taxes. In *Coverdale v. Arkansas-Louisiana Pipe Line Co.*,[67] decided only a few weeks after *Western Live Stock*, the Court said: "While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce, privilege taxes for 'carrying on a local business,' even though measured by interstate business, have been sustained."[68] In *Gwin, White & Prince v. Henneford*,[69] Justice Stone in rephrasing the multiple burdens test said for the Court that "a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state . . . burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce. . . ."[70] In *Dixie Ohio Express Co. v. State Revenue Comm'n*,[71] the Court said: "It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce." In *Southern Pacific Co. v. Gallagher*,[72] the Court said that it is "quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid." In *McGoldrick v. Berwind-White Coal Min. Co.*[73] Justice Stone writing for the Court said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey."[74]

During this period, however, the Court was increasingly friendly to attempts by the states to avoid the formal ruling against taxes directly upon commerce or the privilege of engaging in it. States were permitted to tax essentially interstate businesses or transactions by isolating a local incident[75]

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67. 303 U.S. 604, 58 Sup. Ct. 736, 82 L. Ed. 1043 (1938).
68. *Id.* at 609-10.
69. 305 U.S. 434, 58 Sup. Ct. 325, 82 L. Ed. 272 (1939).
70. *Id.* at 439.
71. 306 U.S. 72, 76, 59 Sup. Ct. 435, 83 L. Ed. 495 (1939). This was a motor vehicle case and the Court's next sentence read as follows: "But, consistently with the commerce clause, a State may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax as compensation for the privilege of using its highways for that purpose."
72. 306 U.S. 167, 174, 59 Sup. Ct. 389, 83 L. Ed. 586 (1939).
73. 309 U.S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565 (1940).
74. *Id.* at 48.
75. The Court made the transition from requiring intrastate business as the subject of the tax to permitting the use of a local incident of a wholly interstate business to serve as the subject without clearly spelling out what it was doing. As a result "local incidents" and "intrastate activities" are frequently confused in the decisions.

to serve as the subject of the tax. Thus in *Coverdale v. Arkansas-Louisiana Pipe Line Co.,*[76] the Court sustained a Louisiana license tax of one dollar per horsepower imposed upon the privilege of operating certain gasoline engines. The engines were used to operate compressors on a natural gas pipeline. Of the gas carried in the lines, 96.6% was delivered outside the state. The Court said:

> "While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce, privilege taxes for 'carrying on a local business,' even though measured by interstate business, have been sustained. . . . Privileges closely connected with the commerce may be regarded as distinct for the purposes of taxation."[77]

After referring to cases such as those upholding taxes upon manufacturing, mining, and generation of electricity, the Court said: "While the use of the engine for the production of power synchronizes with the transmission of that power to the compressor, production occurs prior to transmission. It is just as much local as the generation of electrical power."[78]

The fact that a selection of a proper local incident for the tax was still of more importance to the Court than the actual economic burden of the tax upon commerce was made clear in the use and sales tax cases. In *Southern Pacific Co. v. Gallagher,*[79] the Court upheld the California use tax as applied to property purchased by the company outside the state and brought into it for use in the operation of an interstate railroad business. The property was put into use as rapidly as possible upon arrival in California. The Court said:

> "There is agreement upon the principle involved. Appellant states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use."[80]

Then it referred to two lines of authority: one making it clear that a tax on the privilege of operating in, or the carrying on of commerce, is invalid; and the other upholding taxes upon intrastate events separate and apart from commerce. Here, the Court said:

76. 303 U.S. 604, 58 Sup. Ct. 936, 82 L. Ed. 1043 (1938).
77. *Id.* at 609-10.
78. *Id.* at 611. The Court also referred to the multiple burdens doctrine: "It is true that each state through which a pipe line passes could lay a tax on the use of engines for the production of power, that that would not be multiple taxation 'merely because interstate commerce is being done'. . . . It would not be a tax on the same activity, either in form or in substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business." *Id.* at 612, 613.
79. 306 U.S. 167, 59 Sup. Ct. 389, 83 L. Ed. 586 (1939); see also the companion case of Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182, 59 Sup. Ct. 396, 83 L. Ed. 595 (1939).
80. 306 U.S. at 174.

"We think there was a taxable moment when the [goods] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun. . . . 'Practical continuity' does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon the choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress."[81]

Shortly thereafter, in *McGoldrick v. Berwind-White Coal Mining Co.*,[82] a New York City sales tax was upheld as applied to sales by a Pennsylvania corporation of Pennsylvania coal to New York customers. The sales contracts were entered into in New York and were followed by delivery of the coal from Pennsylvania to the customers in New York. The Court said:

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau of Revenue*. . . . Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."[83]

The tax here, the Court reasoned, imposed no more of a burden upon commerce than such previously upheld taxes as use taxes, sales taxes imposed where the goods were within the state when the sale was made, and property taxes upon goods which have reached the end of an interstate journey. In holding that the multiple burdens doctrine did not apply, the Court concluded:

"Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."[84]

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81. *Id.* at 177, 178.
82. 309 U.S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565 (1940).
83. *Id.* at 46, 47.
84. *Id.* at 58.

In two companion cases decided with only a brief opinion[85] the Court upheld the application of the tax to two other situations. In one, orders were taken at a New York sales office subject to approval at the Illinois office of the corporation. The goods were then shipped to the New York sales office, inspected and adjusted, and delivered to the purchaser. In the other, orders were taken at a New York office, subject to acceptance in Massachusetts, and followed by shipment of the goods by rail or truck from Massachusetts directly to the purchaser. "In both cases," the Court said, "the tax was imposed on all of the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the *Berwind-White Company* case."[86]

Unallocated Manufacturing, Sales and Use Taxes.—The cases during this period also made it clear that the multiple burdens doctrine was not going to restrict previously approved state taxes. No general principle against multiple state levies upon the same interstate economic activity was to be enforced.

In the *Western Live Stock* case Justice Stone relied heavily upon *American Manufacturing Co. v. St. Louis,*[87] which in effect had upheld an unapportioned tax upon gross receipts from interstate commerce. His emphasis was upon the local character of the activity taxed and only as an "added reason" did he state that the "tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine."[88]

In *J. D. Adams Manufacturing Co. v. Storen,*[89] the situation was in substance identical with that in *American Manufacturing Co. v. St. Louis.* In each case the tax was collected from a manufacturer within the state who sold a substantial portion of his manufactures in other states. In each case the tax was measured by the sales price of all the goods sold, including sales outside the state. The only difference was the formal one that in the *St. Louis* case the subject of the tax was the privilege of manufacturing while in the *Storen* case it was said to be "a privilege tax upon the receipt of gross income." The Court in the *Storen* case, instead of relying completely upon prior precedents which would have disallowed even an apportioned gross receipts tax directly upon interstate commerce, used the multiple burdens rationalization and referred to the lack of apportionment. Yet the Court seemed to say

85. McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70, 60 Sup. Ct. 404, 84 L. Ed. 584 (1940); see also Jagels, "A Fuel Corporation" v. Taylor, 309 U.S. 619, 60 Sup. Ct. 589, 84 L. Ed. 1035 (1940) (memorandum opinion).
86. 309 U.S. at 77.
87. 250 U.S. 459, 39 Sup. Ct. 522, 63 L. Ed. 1084 (1919).
88. 303 U.S. at 260.
89. 304 U.S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365 (1938).

(in a confusing passage) that the *St. Louis* case was distinguishable because the tax was imposed upon the privilege of manufacturing rather than upon the gross sales themselves. "If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another state."[90] In *Gwin, White & Prince v. Henneford,*[91] the Court merely said that the tax in the *St. Louis* case was not "open to the objection directed here to the present tax . . . that the tax is measured by gross receipts from activities in interstate commerce conducted both within and without the taxing state and that the exaction is of such a character that if lawful it might be laid to the fullest extent by the states in which the merchandise is sold as well as by those from which it is shipped."[92]

In the use and sales tax cases the Court summarily dismissed the contention that to permit the state of destination of goods to impose such taxes (which were not subject to apportionment) necessarily involved a multiple burden on commerce if the state of origin could impose an allocated tax upon the gross receipts from their sale. In the passage quoted above from *Southern Pacific Co. v. Gallagher,*[93] the Court said that the basis of decision was not the extent of the economic burden imposed upon commerce by the tax but rather the manner in which the tax was imposed. A tax on the operations of commerce was a forbidden interference. "A tax on property or upon a taxable event in the state, apart from operation, does not interfere."[94] In *McGoldrick v. Berwin-White Coal Min. Co.,*[95] Justice Stone, writing for the Court, explained the multiple burdens doctrine as applying only to state taxes "upon the operations of interstate commerce." He said:

> "In *Adams Manufacturing Co. v. Storen* . . . a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. It was pointed out . . . that had the tax been conditioned upon the exercise of the taxpayer's franchise or its privilege of manufacturing in the taxing state, it would have been sustained, despite its incidental effect on interstate commerce, since the taxpayer's local activities or privileges were sufficient to support such a tax, and that it could fairly be measured by the sales price of the goods."[96]

He then cited the *St. Louis* case with approval and concluded that the New York City sales tax did not fall within the multiple burdens doctrine

90. *Id.* at 313.
91. 305 U.S. 434, 58 Sup. Ct. 325, 82 L. Ed. 272 (1939).
92. *Id.* at 440.
93. 306 U.S. 167, 59 Sup. Ct. 389, 83 L. Ed. 586 (1939).
94. *Id.* at 178.
95. 309 U.S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565 (1940).
96. *Id.* at 57, 58.

because it "is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption."[97]

III. The Current Confusion

Starting in 1944 vigorous attempts were made by a few members of the Court to extend the multiple burdens doctrine to new situations. Justices Rutledge, Murphy, Douglas and Black urged the doctrine as a basis for upholding all apportioned state taxes upon interstate commerce or the privilege of engaging in such commerce, without reference to local incidents. Justice Rutledge started a one-man campaign to apply the doctrine to restrict the power of states to impose unapportioned taxes in any situation, whether or not a local activity was made the formal subject of the tax. Thus was touched off a controversy which still rages, undecided, in the Court.

Three cases in 1944 first brought the dispute into the open.[98] In *General Trading Co. v. State Tax Commission*,[99] it was held that Iowa could validly require a Minnesota company to collect the Iowa use tax from its customers in Iowa under the following circumstances: The company maintained no office or place of business in Iowa, had no property there, and had not qualified to do local business. Goods were shipped from Minnesota to

97. *Id.* at 58. Other cases of importance decided by the Court during the 1938-43 period which have not been discussed in this article include the following: Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 Sup. Ct. 857, 86 L. Ed. 1090 (1942) (dictum that tax on net income would be valid as applied to wholly interstate business); Department of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 61 Sup. Ct. 866, 85 L. Ed. 1313 (1941) (upholding an application of the Indiana gross income tax); Caskey Baking Co. v. Virginia, 313 U.S. 117, 61 Sup. Ct. 881, 85 L. Ed. 1223 (1941) (upholding flat sum license tax on bread peddler operating across state line); Department of Treasury v. Wood Preserving Corp., 313 U.S. 62, 61 Sup. Ct. 885, 85 L. Ed. 1188 (1941) (upholding an application of the Indiana gross income tax); Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 61 Sup. Ct. 586, 85 L. Ed. 888 (1941) (upholding the provision of use tax law requiring out-of-state seller to collect the tax); Best & Co. v. Maxwell, 311 U.S. 454, 61 Sup. Ct. 334, 85 L. Ed. 275 (1940) (invalidating discriminatory license tax); Wisconsin v. Minnesota Mining & Mfg. Co., 311 U.S. 452, 61 Sup. Ct. 253, 85 L. Ed. 274 (1940) (upholding allocated net income tax); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 332, 60 Sup. Ct. 968, 84 L. Ed. 1254 (1910) (upholding mileage apportionment formula in property tax case); McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 60 Sup. Ct. 504, 84 L. Ed. 683 (1940) (motor vehicle case); Illinois Cent. R.R. v. Minnesota, 309 U.S. 157, 60 Sup. Ct. 419, 84 L. Ed. 670 (1940) (upholding gross receipts tax imposed in lieu of a property tax); Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 Sup. Ct. 273, 84 L. Ed. 304 (1939) (upholding allocation formula in franchise tax case); Clark v. Paul Gray, 306 U.S. 583, 59 Sup. Ct. 744, 83 L. Ed. 1001 (1939) (motor vehicle case); Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 59 Sup. Ct. 435, 83 L. Ed. 495 (1939) (same).

98. In a fourth case decided at the same time, Northwest Airlines v. Minnesota, 322 U.S. 292, 64 Sup. Ct. 950, 88 L. Ed. 1283 (1944), the Court split 5 to 4 in upholding the right of Minnesota to impose an unallocated property tax upon the entire fleet of planes operated in interstate commerce by Northwest Airlines. No more than three of the majority justices agreed upon the reason for upholding the tax and the dissent, written by Justice Stone, contained a vigorous argument for the application of the same apportionment rules to airplanes as had been applied to railroad rolling stock. For a discussion of the aftermath of this case, see Arditto, *State and Local Taxation of Scheduled Local Airlines*, 16 J. Air L. & Com. 162 (1949).

99. 332 U.S. 335, 64 Sup. Ct. 985, 88 L. Ed. 1309 (1944).

Iowa customers as the result of orders solicited by traveling salesmen in Iowa. In an opinion written by Justice Frankfurter, the Court said:

> "Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock v. Bureau*. . . . That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share."[100]

Justice Jackson, joined by Justice Roberts, dissented on the ground that the decision "authorizes . . . an unwarranted extension of the power of a state to subject persons to its taxing power who are not within its jurisdiction and have not in any manner submitted themselves to it."[101] Justice Rutledge concurred in a separate opinion which will be discussed below.

In *McLeod v. Dilworth*,[102] the factual situation was substantially similiar to that in the *General Trading Co.* case. A Tennessee corporation, having neither property nor place of business in Arkansas, used traveling salesmen to solicit orders in Arkansas which were filled, on approval at the home office, by shipments directly to the purchasers in Arkansas. Arkansas attempted to collect its sales tax on these transactions and the Court, in an opinion by Justice Frankfurter which confused due process and commerce clause concepts, held the tax invalid. The *Berwind-White* case was distinguished on the ground that there the sale was completed at the New York sales office while here the sale was completed by the acceptance in Tennessee. "For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."[103] To the suggestion that Arkansas could validly have levied a use tax on the same transaction, the Court replied:

> "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several states. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States."[104]

100. *Id.* at 338.
101. *Id.* at 339.
102. 322 U.S. 327, 64 Sup. Ct. 1023, 88 L. Ed. 1304 (1944).
103. *Id.* at 330.
104. *Ibid.*

Justices Douglas, Black and Murphy dissented. They argued first that the *Berwind-White* and companion cases were controlling. Next they said no reason was apparent for distinguishing between the sales and use taxes.

"It is not enough to say that the use tax and the sales tax are different. A use tax may of course have a wider range of application than a sales tax. . . . But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. . . .

"In terms of state power, receipt of goods within the State of the buyer is as adequate a basis for the exercise of the taxing power as use within the State. And there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same. . . .

"The question is whether there is a phase of the interstate transaction on which the State of the buyer can lay hold without placing interstate commerce at a disadvantage. There is no showing that Tennessee was exacting from these vendors a tax on these same transactions or that Arkansas discriminated against them. I can see no warrant for an interpretation of the Commerce Clause which puts local industry at a competitive disadvantage with interstate business. If there is a taxable event within the State of the buyer, I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics."[105]

Justice Rutledge dissented in the separate opinion discussed below.

In the third case, *International Harvester Co. v. Department of Treasury*,[106] the Court, in an opinion written by Justice Douglas, upheld the application of the Indiana gross income tax to gross receipts from the following transactions of a company which maintained manufacturing and selling branches both within and without Indiana:

"*Class C:* Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

"*Class D:* Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.

"*Class E:* Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing."[107]

The tax was upheld on the Class C sales because "delivery of the goods in Indiana is an adequate taxable event."[108] With respect to the Class D sales the tax was sustained because both the agreement to sell and the delivery of the goods took place in Indiana and it was immaterial that the goods were to be transported out of that state immediately upon delivery. The tax on the Class E sales was found to be valid because buyer, sellers and the agreement to sell were all in Indiana. "The consummation of the transaction

105. *Id.* at 333, 334.
106. 322 U.S. 340, 64 Sup. Ct. 1019, 88 L. Ed. 1313 (1944).
107. *Id.* at 342.
108. *Id.* at 345.

was an event within the borders in Indiana" which "was distinct from the interstate movement of the goods and took place after the interstate journey ended."[109] Throughout the opinion the Court relied upon sales and use tax cases and argued that no different result should follow where a gross receipts tax is utilized because "we are dealing in this field with matters of substance, not with dialectics."[110] Yet the Court rejected the argument that the multiple burdens doctrine should apply since at least the Class D sales would be subject to sales taxes in the state where the purchasers resided. "But it will be time to cross that bridge when we come to it," the Court said.

> "Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the seller. . . . We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' . . . are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage."[111]

Justice Rutledge concurred and Justice Jackson dissented without opinion.

Justice Rutledge, in an elaborate separate opinion applicable to all three cases, argued first that the due process clause could not rationally be applied to defeat taxes by either the state of origin or the state of the market in interstate sale situations. Each state, he said,

> "considered without reference to the other, always has a sufficiently substantial relation in fact and in tax benefit conferred to the interstate transaction to sustain an exertion of its taxing power, a fact not always recognized. And from this failure . . . comes the search for some 'taxable incident taking place within the state's boundaries' as a hook for hanging constitutionality under due process ideas. 'Taxable incident' there must be. But to take what is in essence and totality an interstate transaction between a state of origin and one of market and hang the taxing power of either state upon some segmented incident of the whole and declare that this does or does not 'tax an interstate transaction' is to do two things. It is first to ignore that any tax hung on such an incident is levied on an interstate transaction. For the part cannot be separated from the whole. It is also to ignore the fact that each state, whether of origin or of market, has by that one fact alone a relation to the whole transaction so substantial as to nullify any due process prohibition. Whether the tax is levied on the 'sale' or on the 'use,' by the one state or by the other, it is in fact and effect a tax levied on an interstate transaction. Nothing in due process requirements prohibits either state to levy either sort of tax on such transactions."[112]

In the second part of his opinion he argued that the real question presented was the application of the multiple burdens doctrine.

109. *Id.* at 348.
110. *Id.* at 347.
111. *Id.* at 348, 349.
112. *Id.* at 357.

"Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit as the Iowa tax does, or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter."[113]

He then concluded that the choice should be made in favor of allowing the state of the market to tax and prohibiting tax by the state of origin except upon allowing credit for destination state taxes.

In the cases decided since 1944 first one view and then another of the impact of the commerce clause on state taxation has been controlling. No consistent pattern, either in the legalisms used or in the results reached, can be discerned. A brief examination of the more important cases will illustrate the confusion.

Three cases in 1946 should be noted. In *Nippert v. City of Richmond*,[114] the Court held invalid a municipal fixed sum license fee on agents or solicitors as applied to a solicitor for an out of state seller. The Court, in an opinion by Justice Rutledge, reviewed the previous drummer cases and concluded that the ordinance was invalid because the "tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one."[115]

In the course of the opinion the Court answered the argument that under the doctrine of the *Berwind-White* case the tax should be upheld as resting on a separable local incident in language suggesting that the validity of taxes on interstate commerce should turn on their substantive economic effect rather than on the subject chosen for the tax:

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each

113. *Id.* at 360.
114. 327 U.S. 416, 66 Sup. Ct. 586, 90 L. Ed. 960 (1946).
115. *Id.* at 434.

State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affectnig commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."[116]

Justice Black and Justice Douglas dissented on the ground that discrimination against interstate commerce had not been proved to have existed in fact in the case before the Court.

In *West Publishing Co. v. McColgan,*[117] the Court affirmed *per curiam* the application of a California tax "upon the net income of every corporation derived from sources within this State" as applied to a company which had not qualified to do a local business and which confined its activities to the soliciting of orders for lawbooks to be shipped from Minnesota to the purchasers in California. The California Supreme Court had contended that while a franchise or privilege tax measured by net income would be invalid as applied to a corporation doing a wholly interstate business, a tax directly upon the net income would be valid.[118] In affirming the California decision the Court merely cited four prior cases,[119] none of which presented directly the problem of a net income tax on a corporation doing a wholly interstate business.

In *Freeman v. Hewit,*[120] Justice Frankfurter wrote an opinion for the Court which reverted to the direct burden test of the early 1930's. The

116. *Id.* at 423, 434.
117. 328 U.S. 823, 66 Sup. Ct. 1364, 90 L. Ed. 1603 (1946).
118. West Publishing Co. v. McColgan, 27 Cal.2d 705, 166 P.2d 861 (1946).
119. International Shoe Co. v. Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945) (upholding application of unemployment compensation tax to company doing only interstate business, but with the commerce clause objection eliminated by a federal statute consenting to such taxes on commerce); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 Sup. Ct. 857, 86 L. Ed. 1090 (1942) (tax on net income upheld on ground taxpayer doing intrastate business, with dictum that tax would be valid even if business wholly interstate); Interstate Busses Corp. v. Blodgett, 276 U.S. 245, 48 Sup. Ct. 230, 72 L. Ed. 551 (1938) (mileage tax upon bus company doing solely interstate business upheld); United States Glue Co. v. Oak Creek, 247 U.S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918) (allocated tax on net income held valid as applied to domestic corporation doing both intrastate and interstate business). Other cases in which the Court had suggested that a tax on net incomes might be valid as applied to an interstate business are discussed in the California Supreme Court opinion in the *West* case, 27 Cal.2d at 709.
120. 329 U.S. 249, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946).

Indiana gross income tax was held invalid as applied to the entire receipts from the sale of securities on the New York Stock Exchange by an Indiana resident through an Indiana broker. Justice Frankfurter stated that state laws taxing interstate commerce were to be scrutinized more carefully than those regulating it because the needed revenue could be obtained from other sources and because "the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations."[121] He also rejected the argument that the tax should be upheld as nondiscriminatory because a similar tax was collected from local transactions: a state "cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade."[122] In what apparently was a reference to the multiple burdens doctrine, he said: "Language alters, and there is a fashion in judicial writing as in other things."[123] After listing the various types of taxes which had been upheld under the Commerce Clause, he concluded that

> "a seller State has various means of obtaining legitimate contribution to the cost of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."[124]

To the suggestion that the validity of the tax should depend on whether or not another state had also sought to tax the transaction, he replied:

> "But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. 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. An 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. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable."[125]

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121. *Id.* at 253.
122. *Id.* at 254.
123. *Ibid.*
124. *Id.* at 256.
125. *Id.* at 256, 257.

Justice Black dissented without opinion. Justices Douglas and Murphy dissented on the ground that "the Court confuses a gross receipts tax on the Indiana broker with a gross receipts tax on his Indiana customer."[126] In an argument for the application of the local incident rule to uphold the tax even in its unapportioned form they said: "Concededly almost any local activity could, if integrated with earlier or subsequent transactions, be treated as parts of an interstate whole. In that view *American Mfg. Co. v. St. Louis . . .* would find survival difficult."[127] And here "the least that can be said is that the local transactions or activities of this taxpayer can be as easily untangled from the interstate activities of his broker."[128]

Justice Rutledge wrote a concurring opinion in which he elaborated more fully his theory of expanded application of the multiple burdens doctrine. To him as a state tax was invalid only if it discriminated against interstate commerce or if, even though not discriminatory, it involved the risk of imposition of multiple burdens on interstate commerce. Thus, he argued a state tax was invalid even though imposed upon an intrastate activity if measured by unapportioned gross receipts from interstate commerce. Therefore, he suggested, *American Manufacturing Co. v. St. Louis* should have been overruled rather than distinguished in the *Storen* case. Furthermore, he recognized that a multiple burden resulted from decisions upholding both apportioned gross receipts taxes by states of origin and sales and use taxes by states of destination and reiterated his preference for a rule permitting only the destination state to tax. One passage will show the emphasis in his opinion on the substantive economic effect of taxes upon commerce rather than their formal incidence:

> "Unless we are to return to the formalism of another day, neither the 'directness' of the incidence of a tax 'upon the commerce itself' nor the fact that its incidence is manipulated to rest upon some 'local incident' of the interstate transaction can be used as a criterion or, many times, as a consideration of first importance in determining the validity of a state tax bearing upon or affecting interstate commerce. Not the words 'direct' and 'indirect' or 'local incident' can fulfill the function of judgment in deciding whether the tax brings the forbidden results. See the dissenting opinion of Mr. Justice Stone in *Di Santo v. Pennsylvania. . . .* That can be done only by taking account of the specific effects of state legislation the clause was intended to outlaw, and of the consequences actual or probable of the legislation called in question to create them."[129]

In 1947 the case of *Joseph v. Carter & Weeks Stevedoring Co.*[130] reinforced the suggestion in *Freeman v. Hewit* that the old formal distinctions were to control. The problem presented was the same as that in the case

126. *Id.* at 283.
127. *Id.* at 284.
128. *Id.* at 285.
129. *Id.* at 269, 270.
130. 330 U.S. 422, 7 Sup. Ct. 815, 91 L. Ed. 993 (1947).

of *Puget Sound Stevedoring Co. v. Tax Commission*,[131] decided by the Court in 1937. A New York City business tax measured by gross receipts was applied to the entire receipts of a stevedoring company which engaged in the business of loading and unloading ships wholly within the territorial limits of the city. In holding that tax invalid as applied to both the interstate and the foreign commerce involved, the Court, in an opinion by Justice Reed, continued to imply that an apportioned gross receipts tax would be upheld when imposed on a local activity, but raised doubts as to the Court's definition of apportionment:

"We do not think that a tax on gross income from stevedoring, obviously a 'continuation of the transportation,' is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself."[132]

In the remainder of the opinion the Court explicitly took the position that the formal incidence of the tax rather than the extent of the burden it placed upon interstate commerce was the controlling factor. Two passages will show the reasoning used:

"A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. *Western Live Stock v. Bureau of Revenue*. . . . The selection of an intrastate incident at the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading. The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—*ad valorem*, net income or excise. . . . We need consider only whether or not the loading and unloading is distinct enough from the commerce to permit the tax on the gross. . . .

"Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. . . . Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company*. 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman v. Hewit*. . . . Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax."[133]

131. 302 U.S. 90, 58 Sup. Ct. 72, 82 L. Ed. 68 (1937).
132. 330 U.S. at 427, 428.
133. *Id.* at 429, 433.

In the concluding sentences of the opinion the Court attempted one economic justification of the result:

> "What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."[134]

Justice Black dissented without opinion. Justices Douglas and Rutledge dissented as to the interstate commerce involved, arguing that the tax was a valid apportioned tax on gross receipts, and concurred as to the foreign commerce on the basis of the export-import clause. Justice Murphy, dissenting as to both types of commerce, joined in the first part of the Douglas opinion.[135]

Two cases in 1948 appeared to herald a shift back to consideration of substance rather than form as a basis for upholding state taxes. In *Central Greyhound Lines v. Mealey*,[136] a New York emergency tax of 2% upon the gross receipts of every utility doing business in the state and subject to the supervision of the State Department of Public Service was applied to a bus company doing both interstate and intrastate business. The controversy arose over the levy of the tax upon the entire gross receipts from the sale of bus tickets in New York City to passengers whose destination was in upstate New York, even though about 42% of the total mileage on such trips was outside New York. Justice Frankfurter, writing for the Court, first discussed and denied the contention that essentially local, not interstate, transportation was involved, and held that the tax on the un-

134. *Id.* at 433-34. This reasoning failed to recognize the obvious need of the port city which handles a great deal of interstate and foreign commerce to collect non-discriminatory taxes from that commerce if it is to be able to support the high level of governmental services made necessary by the commerce.

135. Three other cases decided during 1947 should be mentioned. In International Harvester Co. v. Evatt, 329 U.S. 416, 67 Sup. Ct. 444, 91 L. Ed. 390 (1947), the Court upheld an apportionment formula by which Ohio applied its franchise tax even though the gross proceeds from sales outside the state of goods manufactured within went into the formula. In an opinion by Justice Black the Court reaffirmed the case of *American Mfg. Co. v. St. Louis*. In Independent Warehouses v. Scheele, 331 U.S. 70, 67 Sup. Ct. 1062, 91 L. Ed. 1346 (1947), the Court re-examined the property tax cases involving the question of what is a sufficient interruption in the interstate journey of goods to permit local taxation. A city license tax upon coal held in a storage depot was upheld. In Aero Mayflower Transit Co. v. Board of Railroad Comm'rs, 332 U.S. 495, 68 Sup. Ct. 167, 92 L. Ed. 99 (1947), a flat sum motor vehicle tax was upheld as applied to an interstate motor carrier.

136. 334 U.S. 653, 68 Sup. Ct. 1260, 92 L. Ed. 1633 (1948). The opinion of the Court did not set out the detailed facts of the case. Those given here were taken from the opinion of the New York Court of Appeals, 296 N.Y. 18, 68 N.E. 2d 855 (1946).

apportioned gross receipts from interstate commerce was an invalid "direct burden" on the commerce. Next, he went on to say that:

"the entire tax need not fall. The tax may be 'fairly apportioned' to the 'business done within the state by a fair method of apportionment.' *Western Live Stock v. Bureau of Revenue*. . . . There is no dispute as to feasibility in apportioning this tax. On the record before us the tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State."[137]

The judgment was then remanded for "further proceedings not inconsistent with this opinion." Thus the Court almost without discussion upheld for the first time since the turn of the century an apportioned tax upon gross receipts from interstate commerce not imposed in lieu of a property tax. Justice Rutledge concurred in the result without opinion. Justices Murphy, Black and Douglas dissented, arguing that the transportation involved was essentially local in nature and hence the entire gross receipts were taxable. They rejected the contention that since the other states through which the route ran could tax a portion of the gross receipts, a multiple burden would result. If taxes by those states were sustained, they said:

"the resulting multiple burden on the gross receipts would simply be a natural consequence of conducting a local business in such a manner as to use the facilities of more states than one. But that type of multiple burden is not outlawed by the commerce clause. Nor does the possibility of such a burden make the business of transporting persons between points in New York any less loeal in nature."[138]

In *Memphis Natural Gas Co. v. Stone*,[139] a Mississippi "franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of capital used, invested or employed within this state" was upheld as applied in the following circumstances: A foreign corporation had 135 miles of pipe lines and two compressing stations within Mississippi. It was stipulated that no intrastate commerce was done. The only sales made by the company within Mississippi were interstate sales at wholesale to a local distributor. The company had not qualified to do business in Mississippi and had no office or agent for service or process. The state supreme court had construed the tax as an exaction for protection of "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." No five members of the Court were able to agree upon an opinion. Justice Reed, in an opinion signed by Justices Douglas and Murphy, said that the company's business in the state was interstate business and that "a state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied (1) upon the privilege of doing interstate business within the state, or

137. 334 U.S. at 663.
138. *Id.* at 671, 672.
139. 335 U.S. 80, 68 Sup. Ct. 1475, 92 L. Ed. 1832 (1948).

(2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself."[140] He then went on to conclude that in view of the characterization of the tax by the Mississippi Supreme Court, it was not one upon the privilege of engaging in interstate commerce and that the local activities here were sufficiently apart from the flow of interstate commerce to permit the tax. Justice Black concurred in the judgment without opinion. Justice Rutledge concurred in a separate opinion, the opening paragraph of which read as follows:

> "In accordance with views which I have heretofore expressed, it is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is non-discriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state."[141]

Justices Frankfurter, Vinson and Jackson and Burton dissented. They discussed principally the implications of a stipulation of facts made by the parties. But apart from that problem Justice Frankfurter stated that it was "clear beyond peradventure" that the tax was "on the privilege of engaging in the doing of interstate business within the State, and such a tax is, of course, invalid under the Commerce Clause."[142]

The disparity of views between the justices was made vividly clear in 1949 in the case of *Interstate Oil Pipe Line Co. v. Stone*.[143] The facts were simple. A Delaware corporation owned and operated pipe lines in Mississippi. It picked up oil at the oil fields in Mississippi and transported it to railroad loading racks also in Mississippi. At the loading racks the oil was pumped into railroad cars for shipment out of the state. The pipe line company acted as agent of the owners of the oil in transporting it and in arranging with the railroad for the out of state shipment. The state of Mississippi imposed "annual privilege taxes, measured by the amount or volume of business done" upon a wide variety of enterprises. With respect to persons transporting oil or gas in pipe lines for compensation or hire between two points in the state, the tax levied was 2% of the gross income of the business. The Mississippi courts held this tax validly applicable to the business of the pipe line company.

140. *Id.* at 88-89.

141. *Id.* at 96, 97.

142. *Id.* at 104. In a case decided early in 1949, Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 Sup. Ct. 432, 93 L. Ed. 585 (1949), the Court held that river barges could be subjected to local property taxation by the application of a milage apportionment formula similar to that used for railroad rolling stock.

143. 337 U.S. 662, 69 Sup. Ct. 1264, 93 L. Ed. 1613 (1949), 3 VAND. L. REV. 310 (1950).

Mr. Justice Rutledge announced the judgment of the Court affirming the Mississippi courts and delivered an opinion in which he was joined by Justices Black, Douglas and Murphy. These justices found it unnecessary to decide whether the activities of the pipe line company were technically interstate or intrastate commerce; in either event Mississippi had power to impose the tax. They explicitly rejected the contention that the tax was invalid merely because it imposed "a 'direct' tax on the 'privilege' of engaging in interstate commerce." They also found no due process objection to the tax since all the activities taxed took place in Mississippi. They then stated that the commerce clause did not invalidate the tax for the following three reasons:

> "[1] The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. [2] The nature of the subject of the taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. [3] No other state can repeat the tax."[144]

Mr. Justice Burton concurred in the judgment of the Court but expressly refused to join in Justice Rutledge's opinion. He concluded that the tax was upon the privilege of transporting oil in intrastate rather than interstate commerce. Such conclusion enabled him to uphold the validity of the tax without further consideration of its actual effect upon interstate commerce. On that basis also he stated that it was unnecessary to decide whether or not a privilege tax could validly be imposed upon the privilege of transporting oil in Mississippi in interstate commerce.

Mr. Justice Reed delivered a dissenting opinion in which he was joined by Chief Justice Vinson and Justices Frankfurter and Jackson. In the first part of the opinion he concluded that the pipe line company actually was engaged in interstate commerce. In the second part of this opinion he concluded that a privilege tax for carrying on a wholly interstate transportation business measured by a fairly apportioned part of the gross receipts for carriage in interstate commerce is invalid. The opinion makes it difficult to isolate the controlling theory upon which he proceeded and a careful analysis is needed. First he said:

> "Phrased in terms of a privilege for carrying on an interstate business, such a tax historically has been deemed unconstitutional. The cases abound in statements to the effect that the privilege of carrying on interstate commerce itself is immune from state taxation. This is because it is a privilege beyond the power of a state to grant."[145]

He then referred to cases holding that privilege, excise or franchise taxes may not be imposed upon foreign corporations for the privilege of carrying

144. *Id.* at 668.
145. *Id.* at 677.

on or the actual doing of solely interstate business after admission to a state. He noted that the decisions in these cases were reached "in spite of the fact that in each of them the tax sought to be levied was fairly measured according to the connections of the corporate taxpayer with the state."[146] In the next paragraph he suggested the limitations upon this rule. He referred to a recent case in which a tax on motor carriers was upheld "only after stressing the fact that the tax was 'affirmatively laid for the privilege of using the state's highways' and was not imposed upon 'the privilege of doing the interstate business.'"[147] He noted that where a corporation does an intrastate business as well as an interstate business that a franchise, privilege or excise tax upon the former "is of course permissible" even though measured by property or receipts which were used in or attributable to interstate business.

Second, Justice Reed discussed the policy behind the precedents. He noted that interstate commerce had grown so extensive that all states were called upon to give governmental services to it—services which should be paid for by the commerce. In the absence of Congressional action

> "this Court has interpreted the commerce clause to permit state nondiscriminatory taxation, for the use of state facilities, upon the property used in interstate commerce, upon production for commerce and upon net proceeds therefrom. Through such taxes, the states may exact payment for their protection and encouragement of commerce. . . . We have upheld a tax on gross receipts from interstate transportation 'when apportioned as to the mileage within the State.' *Central Greyhound Lines v. Mealey*. . . .
>
> "Notwithstanding the wide latitude for taxation of incidents connected with interstate commerce . . . this Court has never interpreted the commerce clause to allow a state tax for the privilege of carrying on interstate commerce or one upon that commerce itself. . . . This is not because of the financial burden. Other taxes may equally burden the commerce. It is not because in transportation the same result cannot be obtained by levying a tax for intrastate activities measured by gross receipts appropriately apportioned to the activities in the state. It is 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. It likewise bars a state from taxing the privilege of doing interstate commerce or the doing of interstate commerce, with or without fair apportionment even if not discriminatory."[148]

Despite the statement in the foregoing paragraph that the financial burden imposed upon interstate commerce by the particular tax was not the test of its validity, he suggested in the two concluding paragraphs of his opinion that in some ill-defined way the rule for which he contended would encourage the free flow of commerce:

> "Control of interstate commerce passed into the hands of Congress and thus welded the Federation into a Nation. So long as states are forbidden to impose taxes upon interstate commerce or for the privilege of carrying it on, a toll cannot be exacted

146. *Id.* at 678.
147. *Ibid.*
148. *Id.* at 679, 680.

from interstate commerce even if a similar tax is borne by local commerce. So, interstate commerce is not susceptible to taxation, as such, and thus has been protected against exactions aimed at it, no matter how nondiscriminatory. It may be taxed only under enactments which likewise tax intrastate commerce for like intrastate activities. It gets no advantage over intrastate commerce from anything furnished by the state and pays the state nothing for what the state doesn't possess, that is, the power to allow interstate business within its borders.

"All interstate commerce thus has free access to local markets, subject only to nondiscriminatory taxes such as the tax on apportioned gross receipts from intrastate mileage as in *Central Greyhound Lines v. Mealey* . . . or the tax on disconnected local incidents as discussed in the opinions in *Memphis Natural Gas Co. v. Stone* . . . or in *International Harvester Co. v. Evatt* . . . or *American Mfg. Co. v. St. Louis.* . . . So long as a tax on the privilege of doing interstate business or a tax on the doing of that business is prohibited, interstate commerce remains free from state exactions levied on that commerce. Yet, that commerce must bear, like the intrastate commerce, the cost of those facilities or protections, apart from the interstate commerce itself, which the state furnishes or allows within its borders. Such has been and is the freedom that the commerce clause grants to those engaged in commerce between the states."[149]

It should be noted that every ground set forth for affirmance in Justice Rutledge's opinion was rejected by Justice Reed. He said, in effect, that the tax should be held invalid merely because it imposed a direct tax on the privilege of engaging in interstate commerce. He explicitly stated that it made no difference that the tax did not discriminate against interstate commerce and that it was apportioned to activity within the state. Inferentially, he stated that it made no difference that no other state could repeat the tax.[150]

CONCLUSION

What is the law today? After the decision of the *Interstate Oil Pipe Line* case in 1949 the Court appeared to line up about as follows:

(1) A state tax upon an intrastate subject measured by fairly allocated gross receipts from interstate commerce would have been held valid by all nine of the justices. An allocated tax "on" gross receipts (and, a *fortiori*, "on" net income) from interstate commerce apparently would have received the same treatment, at least where, as in *Central Greyhound Lines v. Mealey*, the company was doing some intrastate business.

(2) A franchise, license or privilege tax directly upon the doing of interstate commerce or the privilege of engaging in such commerce by a nonresident or foreign corporation would probably have been held invalid even

149. *Id.* at 681, 682.

150. The difficulties faced by state court judges in determining the validity of privilege taxes measured by gross receipts in the light of the *Interstate Oil Pipe Line* case are well illustrated by the recent case of Martin Ship Service Co. v. Los Angeles, 34 Cal.2d 793, 215 P.2d 24 (1950). Justice Traynor's opinion contains a masterful reconciliation of the cases for the purpose of sustaining the tax—although in a place or two in the opinion it appears that the temptation to tell the Court that its decisions just did not make sense almost overcame him.

though fairly allocated by the votes of Chief Justice Vinson and Justices Burton, Frankfurter, Jackson and Reed. Justices Black, Douglas, Murphy and Rutledge would have voted to uphold the tax if allocated. Justice Black, and possibly Justices Douglas and Murphy, might have voted to sustain such a tax regardless of allocation. Two qualifications must be made to these broad statements, however. In some kinds of cases, Justice Burton voted so as to swing the decision to the Black group by finding intrastate commerce where all others saw only interstate. And Justice Reed's vote occasionally went with the Black group when the tax could be said to be upon a local incident of even a wholly interstate business instead of on the commerce itself or the privilege of engaging in it. The vagaries of these two judges enabled the Black group to control the result in *Memphis Nat. Gas Co. v. Stone* and *Interstate Oil Pipe Line Co. v. Stone,* the last two cases of this type before the Court.

(3) Only Justice Rutledge appeared to be in favor of using the multiple burdens doctrine to hold invalid unallocated taxes upon such local activities as manufacturing. He was also alone (and this would qualify his adherence to the majority position discussed in (1) above) in suggesting that states of origin of goods should not be permitted to impose even allocated taxes on or measured by gross receipts without giving credit for sales and use taxes imposed in states of destination.

The death of Justices Rutledge and Murphy since the decision of the *Interstate Oil Pipe Line* case would not appear materially to affect the course of decision, regardless of the positions taken by their successors, except in the cases where Justices Burton and Reed gave their votes to the Black group. The only case decided during the 1949 term was a motor vehicle tax case which shed little light on the position of the new justices in other types of cases.[151] For what it may be worth, it can be noted that the majority opinion by Justice Black upholding the tax commanded the votes of Justices Clark and Minton along with those of Chief Justice Vinson and Justices Reed and Burton. Justices Frankfurter and Jackson dissented and Justice Douglas did not participate.

The case of *Spector Motor Service v. McLaughlin* now before the Court presents an opportunity for a clarification of doctrine. A tax described by the Supreme Court of Errors of Connecticut as "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign" and measured by allocated

151. Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 Sup. Ct. 806, 94 L. Ed. 1053 (1950). A Maryland titling tax "of 2% upon the fair market value of motor vehicles" imposed for the privilege of road use was upheld as applied to interstate motor carriers. The controversy on the Court was over the question whether a tax for such a privilege had to bear some reasonable relation to the use of the roads.

net income was applied to the net income of a company doing a wholly interstate business as a motor carrier. Litigation was commenced in 1942 and after climbing the ladder of federal courts twice and the state courts once,[152] the case is now before the Court for decision on the merits. Arguments were heard in late November 1950[153] but apparently they did not satisfy, since in January 1951 the case was ordered restored to the docket for reargument.[154] The decision when it comes may[155] at least give us the present position of the Court on the validity of allocated state taxes imposed upon the privilege of doing an interstate business. And it could, if the Court answers the prayers of taxpayers and tax administrators, serve as a vehicle for the pronouncement of a doctrine which will command enough votes to give some predictability to decision in this most confused area of constitutional law.[156]

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152. The case was first tried in the federal district court in 1942 and judgment given for the taxpayer. Spector Motor Service v. McLaughlin, 47 F. Supp. 671 (D. Conn. 1942). This judgment was reversed by the Circuit Court of Appeals [Spector Motor Service v. Walsh, 139 F.2d 809 (2d Cir. 1943)], and on certiorari the Supreme Court held that the federal courts should defer determination of the constitutionality of the tax until the state courts had settled the issues of local law involved. Spector Motor Service v. McLaughlin, 323 U.S. 101, 65 Sup. Ct. 152, 89 L. Ed. 101 (1944). Proceedings were then commenced in the state trial court in 1944 which finally resulted in a judgment of the Supreme Court of Errors in 1948 upholding the application of the tax. Spector Motor Service v. Walsh, 135 Conn. 37, 61 A.2d 89 (1948). Following this decision the federal district court was asked to dissolve its injunction against collection of the tax and upon its refusal an appeal was taken. The court of appeals reversed [Spector Motor Service v. O'Connor, 181 F.2d 150 (2d Cir. 1950)], and the Supreme Court granted certiorari. Spector Motor Service v. McLaughlin, 340 U.S. 806 (1950).

153. The arguments are reported in 19 U.S.L. WEEK 3155 (1950).

154. 19 U.S.L. WEEK 3184 (1951). The case was reargued Jan. 10, 1951.

155. Or it may not. In the original argument the state contended that the tax though labeled a franchise tax is really a tax on the use of tangible personal property and real estate in Connecticut. See 19 U.S.L. WEEK 3156.

156. An indication that the Court has not yet settled its doctrinal differences is given by a case decided since this article was written. In Norton Co. v. Department of Revenue, 71 Sup. Ct. 377 (1951), the application of the Illinois Occupation Tax to the gross receipts from sales made by a Massachusetts manufacturing concern with a branch office and warehouse in Chicago was before the Court. Justice Jackson, speaking for a majority of five, held that the tax could be applied to sales made from stock in the Chicago office, to sales made where the order was taken at the Chicago office and forwarded to Massachusetts to be filled by shipments directly to the customer, but not to sales made by orders sent directly to Massachusetts by the customer and filled by direct shipments. Justices Clark, Black and Douglas dissented in part, arguing that since the company by establishing its Chicago branch had "adopted the label of a home-town merchant" it should be taxed on all sales made to Illinois customers including those resulting from orders sent directly to the Massachusetts office. Justice Reed, dissenting in part, argued that the majority had gone too far in permitting the state to tax sales resulting from orders forwarded by the branch office to the home office and filled by shipments directly to the customer. Referring to the drummer cases he said: "I can see no difference, constitutionally, between solicitation by salesmen in a branch office or on the road." *Id.* at 382.

POSTSCRIPT

On March 26, 1951, after this article was in print, the Supreme Court decided the *Spector Motor Service* case,[157] holding the tax in question invalid. In an opinion written by Justice Burton, the Court placed the decision squarely upon the proposition that the states may not impose a tax upon the privilege of engaging in interstate commerce, even though the tax is nondiscriminatory and fairly apportioned to activities carried on within the state. The Constitution delegates to the United States, the Court said, "the exclusive power to tax the privilege to engage in interstate commerce." The answer in the present case "is not a matter of labels. The incidence of the tax provides the answer. . . . The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State." Justice Clark, in an opinion signed by Justices Black and Douglas, dissented, arguing that "there is no reasonable warrant for cloaking a purely verbal standard with constitutional dignity. 'Exclusively interstate commerce' receives adequate protection when state levies are fairly apportioned and nondiscriminatory."

157. 71 Sup. Ct. 508 (1951).