

STATE TAXATION OF INTERSTATE COMMERCE: FROM FORM TO SUBSTANCE AND BACK AGAIN

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The problems presented by state taxation in the area of interstate commerce have been numerous and possess remarkable longevity. From Marshall's discussion in *Brown v. Maryland* in 1827¹ to the year 1954, when the Supreme Court considered the matter at length in several cases², the probing for lasting solutions to the frequent conflict between the commerce clause and the power of the state or one of its political subdivisions to tax has continued.³ Nor does the absence of written opinion by the Supreme Court in the last three years indicate that principles have finally, or even temporarily, crystalized for the guidance of state legislatures, state departments of revenue and taxpayers, and that disagreement is at an end. An inspection of the docket for the current term of the Supreme Court as of the time when the final draft of this article is in preparation (December, 1956) reveals the filing of no less than seven cases involving this issue.⁴ True, certiorari has been denied or the appeal dismissed in nearly all, and perhaps the remainder will produce no major decision. However, the current confusion surrounding the commerce clause issue no doubt was one of the factors that impelled attorneys to carry the cases up, and Justice Frankfurter has reminded us on a number of occasions that a

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¹ 25 U. S. (Wheat.) 419 (1827).

² *Michigan Wisconsin Pipe Line v. Calvert*, 347 U. S. 157 (1954); *Railway Express Agency v. Virginia*, 347 U. S. 359 (1954); *Braniff Airways v. Nebraska State Board of Equalization*, 347 U. S. 590 (1954); *Miller Brothers Co. v. Maryland*, 347 U. S. 340 (1954), basically a due process case, but so closely related to commerce clause problems as to be fairly includable.

³ As might be expected, the probing has not been limited to Supreme Court decisions. The author of this article is obviously indebted to many men for his ideas. In this field recognition should be particularly accorded to the following extended discussions; GAVIT, *THE COMMERCE CLAUSE* (1932), HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* (1953) and POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION*, Ch. VI (1956), somewhat of a summary in his *Carpentier Lectures* of his extensive writings over a long period of years.

⁴ *Pacific Western Oil Corp. v. Franchise Tax Board*, 136 Cal. App. 2d 794, 286 P. 2d 287 (1955), *cert. denied* 352 U. S. 805 (1956); *Leonard v. Bowers*, 164 Ohio St. 578, 132 N.E. 2d 107 (1956), *cert. denied* 352 U. S. 835 (1956); *Williams-McWilliams Industries, Inc. v. McKeigney*, 86 So. 2d 672 (Miss. 1956) *appeal dismissed* 352 U. S. 807 (1956); *Michigan Corporation and Securities Comm. v. Panhandle Eastern Pipe Line Co.*, 346 Mich. 50, 77 N. W. 2d 249 (1956), *cert. denied* 352 U. S. 890 (1956); *West Point Wholesale Grocery Co. v. City of Opelika*, 264 Ala. 700, 87 So. 2d 667, *probable jurisdiction noted* 352 U. S. 924 (1956); *Alabama v. Plantation Pipe Line*, 89 So. 2d 549 (Ala. Sup. Ct. 1956), *cert. denied* 352 U. S. 943 (1956); *Pennsylvania v. Eastman Kodak Co.* 385 Pa. 607, 124 A. 2d 100 (1956), *cert. denied* 352 U. S. 952 (1956).

failure of the Supreme Court to accept and review a case on the merits should not be deemed a concurrence in the correctness of the decision of the state court.⁵ So it is that the topic of this symposium remains ever timely and there may be some justification in the task assigned this article by the editors of the symposium to retrace the major aspects of the effort to evolve a test for the validity of state taxation.

One further generalization is in order, however, before turning to the task at hand. As in all problems involving constitutional tests, there is not only the search for principle but also the difficulty of application. The two actually are but facets of a single problem, try as we may to distinguish them for purposes of summary. The applicability of state taxation in the area of interstate commerce provides an outstanding example of difficulties of this nature. The Supreme Court may say, as it did for a good many years, that a state may not levy a tax upon interstate commerce.⁶ But this sweeping principle merely shifts the issue to an inquiry into just what constitutes "a prohibited tax *on* interstate commerce" for this particular purpose and ultimately, though not inevitably, the trail has led to an analysis of form rather than substance.⁷

A HISTORY OF EARLY DEVELOPMENTS

As indicated at the outset of this article, the consideration of the problem originated, as did so many others, with an opinion of John Marshall. In *Brown v. Maryland*, the state levied a license tax upon importers of foreign goods before the privilege of selling these items of foreign origin could be exercised. The clause of the United States Constitution prohibiting a state from levying an impost or duty on imports⁸ was no doubt adequate to support a decision that the statute was unconstitutional and Marshall so held.⁹ However, counsel for Brown had urged that the statute also violated the commerce clause¹⁰ and this contention was accepted and made a second basis for the decision¹¹. Of course, the power of the State to tax was acknowledged by Marshall, but, he reasoned, it must have limitations when applied to interstate commerce.¹² Taxation

⁵ See Frankfurter's most recent comments in denying certiorari in *Shepard v. Ohio*, 352 U. S. 910 (1956). Earlier cases containing similar comments are collected in STERN AND GRESSMAN, *SUPREME COURT PRACTICE* 151 (2d. ed. 1954).

⁶ *e.g.*, *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 497 (1887).

⁷ At least three of the writers who have treated this topic at length in recent years have tended ultimately to classify the actions of the Supreme Court by label rather than principle, albeit complaining about the necessity for so doing. See GAVIT, *THE COMMERCE CLAUSE*, Ch. XIII (1932); HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* (1953); POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION*, Ch. VI (1956).

⁸ U. S. Const. art. 1 §10.

⁹ 25 U. S. (Wheat.) 419, 445 (1827).

¹⁰ *Id.* at 437.

¹¹ *Id.* at 448.

¹² *Id.* at 449.

is regulation, regulation is committed to the national government, and the national power is supreme.

As every student of the Court is aware, a trend away from any doctrine suggested in *Brown v. Maryland* that the commerce clause vests exclusive regulatory power in the national government promptly set in. However, the commerce clause cases for the next forty years were not, in general, instances of state tax power opposed to national commerce power but rather presented problems of the scope of state "police" or regulatory powers directly applied to commerce. Marshall himself contributed to the acquiescence in state concurrent power over commerce in *Willson v. Black Bird Creek Marsh Co.*,¹³ and the Court under Chief Justice Taney firmly set the pattern for recognition of concurrent state power to regulate in the *Cooley* case¹⁴ in 1851, a power which could be exercised except upon items demanding national uniformity.

At this point in the development of commerce clause doctrine it would seem logical to expect the beginnings of a rather tolerant view of the scope of state taxation in areas involving interstate commerce, paralleling the flowering of the concurrent power to regulate theory. Thus, if a state may regulate directly in many instances, the doctrine would run, surely it could exercise its sovereign powers of taxation in these instances and perhaps more.¹⁵ But neither Taney himself nor the court of his era had the opportunity to fully enunciate principle on the interstate situation.¹⁶ And when the cases involving state taxation which touched in some manner upon interstate commerce did begin to flow to the Supreme Court in some volume in the era of rapid commercial expansion in the last thirty years of the nineteenth century, the climate, after some vacillation, again became somewhat different. True, the first few cases show a recognition of the possibility of applying the *Cooley* doctrine and it was frequently urged by counsel, but this evolution never quite became established.

The trend of this period toward a doctrine of the insulation of interstate commerce from taxation began with the State Freight Tax Cases¹⁷ in 1873, in which a Pennsylvania tax of a fixed amount per ton upon all freight transported within the state was held invalid as applied to freight moving in Pennsylvania to out of state destinations. The court put it thus:¹⁸

Merchandise is the subject of commerce. Transportation

¹³ 27 U. S. (Pet.) 244 (1829).

¹⁴ *Cooley v. Board of Port Wardens*, 53 U. S. (How.) 298 (1851).

¹⁵ Cf. Frankfurter's comments, in refusing to accept this rationale. *Freeman v. Hewit*, 329 U. S. 249, 251 (1946).

¹⁶ But see Taney's dissenting opinion in the *Passenger Cases*, 48 U. S. (How.) 283, 464 (1849) in which the majority struck down a state tax on alien ship passengers.

¹⁷ 82 U. S. (Wall.) 232 (1872).

¹⁸ *Id.* at 281.

is essential to commerce; and every burden laid upon it is pro tanto a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no state can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation.

Adopting the language of the Court, it would appear that any tax is some burden, hence a restriction and so forbidden. But the Court was not prepared to go quite that far at that time.

In the same year, a tax on the gross receipts of a railroad, incorporated in Pennsylvania and operating solely within the state, but carrying goods bound for out of state destinations, was held valid.¹⁹ The result as to gross receipts was to stand unaltered for only fourteen years²⁰, but the reasoning has shown more endurance, though not always acceptance. It reflected the line taken right down to the present by those seeking to uphold the power of a state to tax. The Court conceded that every tax upon property, occupation or franchise affected commerce but stated that not everything which affected commerce was a regulation thereof, within the meaning of the Constitution. Hence the Court said, it would be admitted that the states had power to tax real and personal property within their boundaries, despite their use for interstate commerce²¹ and in subsequent years the Court so held.²²

THE EMERGENCE OF DIRECT BURDEN AND SIMILAR TESTS

The two cases just discussed indicated the pattern which would develop. On the one hand, when the Court talks of burdens, restrictions, regulations or direct effect upon interstate commerce, it is prepared to erect

¹⁹ State Tax on Railway Gross Receipts (Reading R. Co. v. Pennsylvania), 82 U. S. (Wall.) 284 (1872).

²⁰ Philadelphia and Southern Steamship v. Pennsylvania, 122 U. S. 326 (1887), held invalid a gross receipts tax on a steamship line engaged in interstate commerce along the coast, effectively limiting the Railway Gross Receipts Tax Case, *supra* n. 17. The result was foreshadowed by Fargo v. Stephens, 121 U. S. 230 (1887), holding invalid a gross receipts tax on a company carrying freight through Michigan. But see Maine v. Grand Trunk Ry., 142 U. S. 217 (1891).

²¹ *Supra*, n. 19 at 293 (1872).

²² Henderson Bridge Company v. Henderson, 173 U. S. 592 (1899), as to real property; Transportation Co. v. Wheeling, 99 U. S. 273 (1878), as to personal property (river boats) by state of owner; *cf.* Standard Oil Co. v. Peck, 342 U. S. 382 (1952), as to present necessity of some apportionment based upon time or mileage within state, when such tax is levied on vessels. The same rule applies to railway cars. Union Transit v. Kentucky, 199 U. S. 194 (1905). Conversely, states other than that of owner into which vehicles of interstate commerce go can tax if they will but make a reasonable apportionment. Railway cars, Am. Ry. Co. v. Hall, 174 U. S. 70 (1899); river boats, Ott v. Mississippi Barge Line Co., 336 U. S. 169 (1949); airplanes, Braniff Airways v. Nebraska, 347 U. S. 590 (1954).

a barrier against state taxation.²³ A fortiori, it finds invalid taxes which actually discriminate against interstate commerce.²⁴ But also invalid are franchise taxes exacted from foreign corporations for the privilege of doing solely an interstate business, without consideration of their actual economic effect, but rather because of possible harm.²⁵ License taxes upon drummers (the nineteenth century forerunner of the sales representative) meet the same fate.²⁶ Indeed, during this formative period, the Court will say upon occasion that interstate commerce cannot be taxed at all.²⁷

On the other hand, if the state will but go about it in the right way, revenues need not suffer too greatly, although on occasion local business may suffer some competitive disadvantage. Taxes which can be found to rest on a local activity, which may be said to affect interstate commerce only indirectly, or which are believed not to burden it, will receive the approval of the Court. Thus taxes may rest upon a manufacturer, although his business involves the making of goods to be shipped in interstate commerce.²⁸ So too may the vendor after interstate commerce be reached if the goods are at hand, be he auctioneer²⁹ or even itinerant peddler who comes from out of state bringing his goods with him.³⁰ By the same token, property itself destined for interstate commerce may be taxed before departure,³¹ or while temporarily halted in transit, if the stopover is for the benefit of the owner.³² Obviously, it may be reached after arrival.³³ Finally, even a franchise tax upon a foreign corporation for the privilege of engaging in intrastate business may be valid, even though as a matter of economics the interstate and intrastate business of the corporation are closely related.³⁴ Thus the doctrine emerges from a host of cases.

The earlier years of the present century saw some decrease in the number of cases coming to the Court involving a state tax and the commerce clause, although the stream has never been completely dry since 1873. Many of the taxes of the day had been litigated, and the failure to discuss them in detail herein is no reflection of the volume of cases

²³ *Crutcher v. Kentucky*, 141 U. S. 47 (1891), uses all of these terms in invalidating a license tax upon a foreign express company doing interstate business in Kentucky.

²⁴ *Welton v. Missouri*, 91 U. S. 275 (1875).

²⁵ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (1885).

²⁶ *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887).

²⁷ *Id.* at 497.

²⁸ *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919). But only if the state goes about it in the right way. See *Adams Manufacturing Co. v. Storen*, 304 U. S. 307 (1938).

²⁹ *Woodruff v. Parham*, 75 U. S. (Wall.) 123 (1868).

³⁰ *Emert v. Missouri*, 156 U. S. 296 (1894).

³¹ *Coe v. Errol*, 116 U. S. 517 (1886).

³² *Brown v. Houston*, 114 U. S. 622 (1885).

³³ *Id.* at 633.

³⁴ *Pullman Co. v. Adams*, 189 U. S. 420 (1903); but cf. *Allen v. Pullman Co.*, 191 U. S. 171 (1903).

which had actually come before the Court by 1900. True there are always new problems, and they offer opportunity for refinement. For example, the Court did have to decide the fate of a net income tax levied upon income derived from interstate commerce, upholding it upon the grounds that it was merely an indirect burden upon commerce.³⁵

By and large, the "form" referred to in the title of this article and by others³⁶ had taken shape by 1900, but the shape was not necessarily symmetrical. During the following years, Holmes in particular recognized this, injecting the thought in more than one case that while the problem is one in which "nice distinctions are to be expected,"³⁷ so also "commerce . . . is a practical conception".³⁸ However, he admitted that the line of demarcation as to permissible limits of state taxation, while it was thus practical in his opinion, was not always logical.³⁹ He did deny the fact that it was a matter of label or form.⁴⁰ On this score eminent critical authority did not necessarily agree with him for it was concerning this era that Thomas Reed Powell made his oft quoted comment that "Names were made to matter more than mathematics or economics".⁴¹ Be that as it may, Holmes in his usual fashion, whether in dissent or writing for the Court, contributed to a clearer description of just what was the basis for decision. He also laid some ground work for later developments when he said, "Even interstate commerce must pay its way".⁴²

THE MULTIPLE BURDEN TEST—A TEST OF SUBSTANCE

With the increasing percentage of business with interstate aspects after World War I and even more particularly with the pressure upon state finances created by the depressions of the thirties, new approaches were made to taxation by a number of states and so a new spate of major cases became inevitable. At roughly the same time as business went into this period of expansion, Justice Stone came to the Court and, after appearing in dissent on occasion, came to be more successful than Holmes in persuading the Court to bring a fresh viewpoint to bear upon the problem. If Holmes, the jurist, was correct in urging that even interstate commerce must pay its way, and Thomas Reed Powell, the critic,

³⁵ *United States Glue Company v. Town of Oak Creek*, 247 U. S. 321 (1918).

³⁶ *E.g.* Barrett, *Substance vs. Form in the Application of the Commerce Clause to State Taxation*, 101 Pa. L. R. 740 (1953).

³⁷ *Galveston, Harrisburg and San Antonio Railway v. Texas*, 210 U. S. 217, 225 (1907).

³⁸ *Rearick v. Pennsylvania*, 203 U. S. 507, 512 (1906).

³⁹ *Galveston, Harrisburg and San Antonio Railway v. Texas*, 210 U. S. 217, 227 (1907).

⁴⁰ *Ibid.*

⁴¹ Powell, *More Ado About Gross Receipts Taxes*, 60 Harv. L. Rev. 501, 503 (1947).

⁴² *New Jersey Bell Telephone Company v. State Board*, 280 U. S. 338, 351, (1930).

was correct in his observations concerning this period that, indeed, the states can tax interstate commerce if they go about it in the right way,⁴³ the issue became one of developing a test which would permit more complete achievement of Holmes' goal and would provide a more adequate guide to the states in seeking to accomplish that which Powell said they could. This Stone set about to do, despite the fact that it might have seemed a hopeless task in the face of precedent.

In the *Western Live Stock* case,⁴⁴ he had his first real opportunity. New Mexico had imposed a gross receipts tax upon advertising revenues of a magazine. Certain of the advertising was solicited from out of state sources and the magazines had an interstate circulation. However the entire business operation and the physical plant was located in New Mexico. Pursuant to precedent, a strong argument could be made that the tax was a gross receipts tax on interstate commerce and ipso facto invalid.⁴⁵ So also the state might well reply that it was a tax on a "local activity" or "for a local privilege," and so distinguishable.⁴⁶ Stone, writing for the Court, chose to meet the problem head on rather than follow the suggested distinction. Recognizing the traditional invalidity of gross receipts taxes laid upon interstate business, he pointed out that this should necessarily be so only where there was possibility of a multiple burden by virtue of several states reaching the same transaction in the same way. Absent such multiple burden which would place interstate commerce at a definite economic disadvantage, commerce should bear its share of local taxation.

Mr. Justice Stone again spoke to the problem of state taxing powers in a second gross receipts tax case some two years later. In *Gwin, White and Prince v. Heneford*⁴⁷ he found that a Washington tax upon the gross receipts of a local corporation shipping apples and pears to other states for sale was not valid. He conceded that certain local taxes upon gross receipts from interstate commerce were permissible, citing his own *Western Live Stock* decision, but pointed out that such cases did not involve the possibility of a multiple burden, each measured by the entire amount of the commerce.⁴⁸ The factual situation in the case did make possible such a burden, he felt, for not only might Washington tax the gross receipts from sales if permitted, but so too might the state of sale tax the transaction. Taken together with *Western Live Stock*, the case makes plain that to Stone, labels do not matter nor are the words "interstate commerce" the touchstone which insures freedom from state taxation.

⁴³ Powell, *State Production Taxes and the Commerce Clause*, 12 Calif. L. Rev. 17 (1923).

⁴⁴ 303 U. S. 250 (1938).

⁴⁵ *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887).

⁴⁶ See *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919).

⁴⁷ 305 U. S. 434.

⁴⁸ *Id.* at 438.

The crux of the problem becomes the possible economic effect of the tax, and commerce should be accorded equal treatment on this basis rather than on some assumption from the name usually given the tax.

The actual effect of Stone's multiple or cumulative burdens approach outside of the area of gross receipts taxation has been questioned.⁴⁹ Certainly it does not appear to have been decisive in many cases, other than those involving gross receipts, even during the years it supposedly prevailed. Even Stone, in deciding in *Berwind-White*⁵⁰ that a sales tax could be collected at the destination end of an interstate shipment, made relatively little use of his multiple burden approach. True, he makes some mention of the same line of reasoning that led to the result in *Western Live Stock*,⁵¹ but he appears to make the decision turn upon a "local activity" basis.⁵²

Often other justices also gave no more than passing consideration, if any at all, to the test promulgated in the *Western Live Stock* case. Thus Reed, writing for the Court in 1938 in upholding the application of the California use tax to equipment bought outside the state by a railroad and immediately installed upon the railroad when brought into the state,⁵³ first notes a possible application of the multiple or cumulative burden test,⁵⁴ but then seems to turn his decision upon earlier approaches, stating that the tax rests upon an intrastate activity,⁵⁵ and quoting much from direct-indirect burden cases as well.⁵⁶ Douglas, in allowing a state to impose the task of use tax collection upon out of state mail order houses, if they but have local outlets, states the test to be whether in practice it imposes a discriminatory burden.⁵⁷ Roberts, reiterating the rule that flat license fees are valid when levied upon peddlers who arrive from out of state bringing their goods,⁵⁸ largely contented himself with the local activity—no burden—test, but also did look to see whether actual discrimination existed.⁵⁹ In *Northwest Airlines v. Minnesota*,⁶⁰ Stone speak-

⁴⁹ See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE, 40 (1953).

⁵⁰ *McGoldrick v. Berwind-White Coal Co.*, 309 U. S. 33 (1940).

⁵¹ *Id.* at 46.

⁵² *Id.* at 58.

⁵³ *Southern Pacific Co. v. Gallagher*, 306 U. S. 167 (1938).

⁵⁴ *Id.* at 175.

⁵⁵ *Id.* at 176.

⁵⁶ *E.g., id.* at 179. *Cf.* Reed's approach in reaffirming the long standing line of cases concerning "drummers" when he held that a flat license fee upon a salesman by sample was not valid in *Best and Co. v. Maxwell*, 311 U. S. 454 (1939). He stated at p. 455, "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

⁵⁷ *Nelson v. Sears Roebuck*, 312 U. S. 359, 366 (1941). Roberts, dissenting in this case phrased his position, p. 378, in terms the majority of the Court had been using a few years earlier. To him, despite the arguments of Stone a few years earlier, the state may not directly burden interstate commerce.

⁵⁸ *Caskey Baking Co. v. Virginia*, 313 U. S. 117 (1941).

⁵⁹ *Id.* at 120.

⁶⁰ 322 U. S. 292 (1943).

ing in dissent, however, did rely heavily upon the possibility of a multiple burden in urging that Minnesota could not be permitted to levy a personal property tax upon airplanes with their home port in the state without some apportionment based upon their ventures elsewhere.⁶¹ Frankfurter, writing for the court, was more concerned with the nature of Minnesota as a domiciliary state and the power it should thus possess.⁶²

Other cases could be discussed but enough has been said to indicate that the actual prevalence of Stone's test, as such, was perhaps not as significant a factor as was the apparent willingness of the majority to consider facts more important than labels. No doubt the progress toward substance from form was neither as rapid nor as clear cut as the change in views on economic due process, for example.⁶³ Still, the plea of Holmes for the "practical" concept seemed in sight. If there could not be complete acceptance of Stone's exact phrasing of a test to provide it, perhaps some variation would produce agreement.

THE RETURN TO FORM

But form dies hard and labels are labels. Three cases decided May 15, 1944,⁶⁴ prove that order does not come from chaos with any rapidity. The trend for a time may point to multiple burden as a test but the development is never full. Still the proposed test is not quite forgotten, as will be pointed out.

Thus Arkansas, in one of the 1944 cases just mentioned, cannot levy a sales tax upon a purchase by an Arkansas resident from a Tennessee concern, if the sale is technically made in Tennessee, because it is a sales tax.⁶⁵ The Court said that it wasn't a "matter of nomenclature".⁶⁶ Three dissenters thought that the majority decision was and that labels were decisive, for it apparently was generally conceded that Arkansas could impose a *use* tax under the circumstances,⁶⁷ and those who disagreed could see no difference in the economic effect of a sales and a use tax.⁶⁸ Justice Stone voted with the majority, and did not set forth his

⁶¹ *Id.* at 310.

⁶² *Id.* at 297.

⁶³ See *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U. S. 525, 534-536 (1949).

⁶⁴ *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327 (1944); *General Trading Co. v. State Tax Commission*, 322 U. S. 335 (1944); *International Harvester Co. v. Department of Treasury*, 322 U. S. 340 (1944).

⁶⁵ *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327 (1944); *Cf.* result in *Norton v. Department of Revenue*, 340 U. S. 534 (1951) where maintenance of a sales office as distinguished from the use of a drummer allowed Illinois to exact a gross receipts tax.

⁶⁶ *Id.* at 331.

⁶⁷ *General Trading Co. v. State Tax Commission of Iowa*, 322 U. S. 335 (1944) which was decided the same day as the *Dilworth* case, *supra*, n. 65.

⁶⁸ Collection, of course, might be another matter if vendor did not appear personally. *Cf.* *Miller Bros. v. Maryland*, 347 U. S. 340 (1954). A fourth justice, Rutledge, also dissented, but stated his views in his concurring opinion in *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 349 (1944).

own thinking. Apparently, however, his agreement that Arkansas could not tax was not attributable to a belief that Tennessee could levy a sales tax on this interstate transaction. At least his opinion in *Gwin, White and Prince v. Heneford*⁶⁹ (discussed earlier in this article) precluding state of origin taxation of the gross receipts from the sale of apples, would so indicate.⁷⁰ Still, despite this lack of multiple burden, perhaps there is a sufficient difference in fact, if not in economic effect, between sale and use to hold Stone with Frankfurter in the decision.⁷¹ Indeed it has been classified as a due process case involving jurisdiction rather than a commerce clause case and on such basis the result may be more palatable.⁷²

The other two cases referred to in the preceding paragraphs of this discussion as having been decided on May 15, 1944, may be noted more briefly. In one, the Court held that Iowa could impose a use tax under circumstances quite comparable to those just described as preventing an Arkansas sales tax. In the other, Indiana, as the vendor's state, was allowed to apply her gross income tax to a situation in which an out of state vendee took delivery in Indiana. While the situation thus differed from the Iowa case, possibly his home state could levy a use tax. Multiple burden was not shown to be actually present in any of these three cases, but the hazard was there. Slight differences in fact as well as major differences in label undeniably existed, but economic reconciliation on any basis of multiple burden is difficult and the name of the tax again appeared to assume major significance in the area of sales, use and gross receipts taxes.

Whatever one's feelings as to the proper way in which the cases of May 15, 1944, should have been decided and even more particularly why they should have been so decided, the results made abundantly clear that rationalization of tax cases was not yet at hand, despite the promise of a few cases.

Subsequent events have proved that this remains the situation. The immediate post war decade has added cases but no single guiding principle. A few examples will suffice.

Thus, in the troubled area of gross receipts, for which *Western Live Stock* had promised some order, *Freeman v. Hewitt*⁷³ held that the Indiana gross income tax could not be levied upon the proceeds of the

⁶⁹ 305 U. S. 436 (1938). See also his comments in the Berwind-White case at p. 57, that the decision therein did not affect *Adams Manufacturing Co. v. Storen*, 304 U. S. 307 (1937) invalidating an Indiana gross income statute on the vendor in interstate sales.

⁷⁰ Cf. Rutledge's discussion of the point. *International Harvester Co. v. Dept. of Treasury*, 322 U. S. 340, 358 (1944).

⁷¹ See Thomas Reed Powell's discussion. Note, 56 Harv. L. Rev. 1093 (1944).

⁷² See Note, *State Taxation and Interstate Commerce*, 54 Col. L. Rev. 261, 265 (1954). But Cf. Rutledge's own comments on the due process aspects in his dissent to the case, 322 U. S. 340 at 352-357 (1943).

⁷³ 329 U. S. 249 (1946).

sale of certain securities of an Indiana estate, which had been sold for the estate by a local broker acting through a New York broker, with the actual sale taking place upon the New York Stock Exchange. Frankfurter, writing for the Court, found the tax fatally defective because it was a direct tax upon an interstate sale.⁷⁴ Rutledge concurred because the tax gave no recognition to the possibility of a multiple burden and made no effort at apportionment, but objected to the test of direct burden, applied by the majority, as a return to formalism.⁷⁵ Douglas and Murphy, in dissent, felt that the local activity of the estate could be separated from the interstate activities of the broker.⁷⁶

In other gross receipts tax situations during the decade the problems were less striking. The Court allowed Illinois to apply a tax upon persons selling at retail, measured by gross receipts, to an out of state concern which maintained a local sales office but shipped goods to local purchasers from out of state in some instances,⁷⁷ a result seemingly justified on the basis of precedent by *Berwind-White*, although factually somewhat between that case and *Dilworth* in certain of its variations. The Court also upheld a franchise tax measured by gross receipts levied upon a local carrier handling goods moving in interstate commerce⁷⁸ and the same tax, when apportioned by mileage, to a carrier actually operating interstate.⁷⁹

In the area of license and privilege taxes, the Court has remained adamantly opposed to several forms of taxation involving interstate commerce. In *Nippert v. City of Richmond*⁸⁰ a plea by the taxing authority that the local events doctrine of *Berwind-White* authorized a fixed sum license fee upon solicitors representing out of state firms was rejected both on the basis of precedent in previous drummer cases⁸¹ and on the possibility of a discriminatory burden.⁸² There are those who have felt that this approach, applied without weighing facts, may serve to favor interstate commerce at the expense of the local merchant rather than protect interstate commerce from discrimination.⁸³ Again, in *Spector Motor Service v. O'Connor*,⁸⁴ a tax measured by a share of net income apportioned to the taxing state and thus apparently neither an undue burden nor dis-

⁷⁴ *Id.* at 257.

⁷⁵ *Id.* at 270, 282.

⁷⁶ *Id.* at 285.

⁷⁷ *Norton v. Department of Revenue*, 340 U. S. 534 (1951).

⁷⁸ *Canton v. Rogan*, 340 U. S. 511 (1951).

⁷⁹ *Western Maryland v. Rogan*, 340 U. S. 520. See also *Central Greyhound Lines v. Mealey*, 334 U. S. 653 (1947).

⁸⁰ 327 U. S. 416 (1946). See also *Memphis Steam Laundry v. Stone*, 342 U. S. 389 (1952).

⁸¹ A "long line" beginning with *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887) and including among others, such cases as, *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325 (1925).

⁸² Indeed at one point Rutledge terms the burden possibly cumulative. *Nippert v. City of Richmond*, 327 U. S. 416, 429 (1946).

⁸³ Douglas and Murphy, dissenting in *Nippert* at 436.

⁸⁴ 340 U. S. 602 (1950).

criminary was held invalid because it was exacted as a franchise tax for the privilege of carrying on solely interstate business in Connecticut. Presumably Connecticut could have taxed for the use of its highways, measuring the tax as it did,⁸⁵ or perhaps it could have even taxed by the same measure merely because Spector was present in the state and enjoying its protection.⁸⁶ Certainly it could have been taxed in this manner if it had done a mixed interstate and intrastate business, if the tax was apportioned.⁸⁷ But the state could not tax, said the Court, for the privilege of coming into the state since the state could not deny this privilege.⁸⁸ Finally, and along the same lines, the Court held in 1954 that an express company doing a solely interstate business in Virginia could not be required to pay a privilege tax measured by gross receipts apportioned to the state.⁸⁹

IN CONCLUSION

Today, as pointed out in the preceding discussion, there is no basic agreement upon the Court in a number of areas involving collision between state taxing power and the commerce clause. While recent appointees remain uncommitted,⁹⁰ it is unlikely that their presence will bring any real degree of order into the situation, in view of the opposing positions taken in a number of cases by those who still remain on the Court. Recently Professor Barrett of California has suggested that the Court can ultimately meet the situation by decision, if they will invalidate taxes which discriminate and hold valid all others.⁹¹ He also points to the possibility of legislative solution, either by reciprocal state action or by Congressional action, possibly through an administrative agency.⁹² His comments on possible judicial solution are somewhat more optimistic than those of Professor Hartman of Vanderbilt who suggests Congressional action as probably the only completely effective approach.⁹³

While not questioning the availability of either method, a prediction as to the likelihood of their use may be ventured, based upon the ex-

⁸⁵ Cf. *Bode v. Barrett*, 344 U. S. 583 (1953) tax for privilege of using highway measured by gross weight.

⁸⁶ Cf. *Memphis Gas Co. v. Stone*, 335 U. S. 80 (1947), tax for privilege of maintaining a pipeline within state, measured by amount of capital employed in the state; *Texas Gas Transmission Co. v. Atkins*, 197 Tenn. 123, 270 S.W. 2d 384 (1954), cert. denied 348 U. S. 883 (1954).

⁸⁷ *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217.

⁸⁸ *Spector Motor Service v. O'Connor*, 340 U. S. 602, 609 (1950).

⁸⁹ *Railway Express Co. v. Virginia*, 347 U. S. 359 (1954).

⁹⁰ Chief Justice Warren was on the bench during the October 1953 term in which four commerce clause tax cases were decided, voting with the majority twice and the dissenters twice but wrote no opinions. Justices Harlan and Brennan have participated in no major decisions on this issue. At this writing, an additional appointment is pending.

⁹¹ Barrett, *Substance v. Form in the Application of the Commerce Clause to State Taxation*, 101 Pa. L. R. 740, 749 (1953).

⁹² *Id.* at 789.

⁹³ HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE*, 275-285 (1953).

perience of the past few years. Stone sought to bring judicial methods to bear on the problem and this article has traced the somewhat less than wholly successful result. Congress has seen fit to venture into the field in recent years only once,⁹⁴ despite Black's invitation,⁹⁵ and that venture, brought about by unusual circumstances,⁹⁶ was hardly prophetic of any general trend. It would appear that for some years to come, rather close attention must be paid to the form which a state tax takes and past precedent as to the treatment of such form. If change is in the making, there is as yet no real evidence of the manner in which it will come or of the substance of which it will consist.

⁹⁴ 59 Stat. 34 (1945), 15 U.S.C. §1012 (1952). *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946).

⁹⁵ *Gwin, White and Prince Inc. v. Henneford*, 305 U. S. 434, 449-455 (1939).

⁹⁶ The desire to preserve state regulation of insurance despite the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944).