Cornell Law Review

Volume 35
Issue 3 *Symposium of Juvenile Delinquency*

Article 1

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Recommended Citation
Landon G. Rockwell, *Justice Rutledge on State Taxation of Interstate Commerce*, 35 Cornell L. Rev. 493 (1950)
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CORNELL LAW QUARTERLY

VOLUME 35 SPRING, 1950 NUMBER 3

JUSTICE RUTLEDGE ON STATE TAXATION OF INTERSTATE COMMERCE

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With the sudden passing of Justice Rutledge the Supreme Court lost not only one of its staunchest defenders of civil liberties but also its most articulate member on issues of state taxation of interstate commerce. His views on civil liberties were shared, in varying degrees, by Justices Black, Douglas, and Murphy. But from 1946 to the time of his death he was the sole consistent advocate of an approach to issues of state taxation of interstate commerce once shared by a majority.

Justice Rutledge regarded these issues as essentially a problem of federalism. The elastic framework of American federalism assures judges a perpetual task in reconciling competing demands of power. In this task, as in most problems of constitutional interpretation, the values to which a judge subscribes are ultimately decisive. In Justice Rutledge's scheme of constitutional values the federal system was the unique institutional core of American democracy. Civil liberties, of course, occupied an unquestioned preferred place in his hierarchy of values and for this he will probably be best remembered.[1a] But to federalism he also assigned a high place. It provided an accommodation between the integration and diversity essential for a viable democratic society. He regarded the commerce clause as the chief instrument in this task. In this process of accommodation he thought the states must be conceded power to meet their needs short of impeding the currents of a continental economy. Therefore as much leeway as *practicable* should be allowed for the play of local economic authority in the federal scheme. To Justice Rutledge the Constitution enjoined both this and rigid protection of civil liberties as essential safegnards against a Leviathan which smothers individuality. In no area of constitutional interpretation did he express himself so vigorously or distinctively as in issues conceruing the rights of persons and the contentious watershed of federalism reflected in cases on state taxation of interstate commerce.

Protection of civil liberties was for him very nearly an absolute general principle, derived *a priori* from the basic premises of democracy.

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[1a] See Rockwell, *Justice Rutledge on Civil Liberties*, 59 YALE L. J. 27 (1949).

In hewing out the lines of federalism in the problem of state taxation of interstate commerce, however, his intellectual method was strictly pragmatic. This followed from an ungrudging recognition of the necessity for very broad federal power under the commerce clause in order to meet the internal and external needs of a giant industrial nation. The federal power cannot be bounded by a fixed line since "it is as broad as the economic needs of the nation." Therefore state power must accommodate itself to these needs as they develop. But insofar as it was consistent with those needs and practicable, he believed that the demands of federalism required deference to state power. The rationalizing principle here was therefore a thoroughly pragmatic one.

In his little volume, *A Declaration of Legal Faith,* Justice Rutledge referred to the commerce clause as "a chapter in democratic living." He thought it "one of the foundations of democratic institutions" because it is "inherently a federal device" and federalism "by its very division of powers creates a safeguard perhaps not otherwise attainable against wholly autocratic action."[1] Since positive federal power under the commerce clause reached its maximum current scope by about 1941[2] Justice Rutledge had little opportunity to contribute to this phase of accommodating the clause to twentieth century federalism. But the extent of the restrictions inferentially imposed on state power by the commerce clause has been quite another matter. On this problem of federalism as posed by issues of state taxation of interstate commerce Justice Rutledge was the most articulate member of the Supreme Court during the past six years.

Issues of federalism are a dime a dozen in constitutional questions but one of the most perplexing ones to confront the Court in recent years has been that of state taxation of interstate commerce. The judicial search for some pattern of consistent criteria by which to test increasing state activity in this area has been singularly involved, oscillating, and without benefit of notable agreement. Justice Rutledge came to the Court at an approximate midpoint of the flux of recent developments. During the six years prior to his appointment, new doctrine had been evolved in a number of important cases.[3]

The "subject matter" approach wherein the test of state power was

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[1] RUTLEDGE, A DECLARATION OF LEGAL FAITH 76 (1947).

[2] *E.g.*, U. S. v. Darby Lumber Co., 312 U. S. 100 (1941).

[3] *E.g.*, Western Livestock v. Bureau of Internal Revenue, 303 U. S. 250 (1938); Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938); Gwinn, White and Prince v. Henneford, 305 U. S. 434 (1939); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940).

whether a tax was levied on a local rather than a predominantly interstate activity had been largely abandoned.[4] In the face of vastly increased efforts of the states to tap new sources of revenue during the depression years the Court, under the aegis of Justice Stone, advanced new criteria based primarily on an examination of the economic facts. The evolution of this new doctrine, the multiple burden test, beginning with *Western Livestock v. Bureau of Internal Revenue*[5] in 1938, and culminating with *McGoldrick v. Berwind-White Coal Mining Co.* in 1940 was rapid, complex, and quite in keeping with the dynamism of the early Roosevelt Court.[6] Professor Powell has commented that in the weeks prior to the *Western Live Stock* decision "there had apparently been a journey along the intellectual road to Damascus with illumination along the way."[7]

The multiple burden test greatly burdened the permissible area of state taxation of interstate commerce. Broadly speaking, by means of this new standard the Court affirmed the right of the states to require interstate commerce to pay its way in competition with local activity provided that taxation did not result in multiple tax burdens on interstate commerce to which local activity was not exposed.[8] Apparently

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[4] Robbins v. Shelby County Taxing District, 120 U. S. 489, 497 (1887), for example, which asserted: "Interstate commerce cannot be taxed at all, even though the same amount of tax should be levied on domestic commerce, or that which is carried on solely within state." This rule was initially adopted by the Court in the Case of the State Freight Tax, 15 Wall. 232 (1873).

[5] 303 U. S. 250 (1938).

[6] For various analyses of this and earlier developments in this field, *see* RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937); Dunham, *Gross Receipts Taxes on Interstate Transactions,* 47 COL. L. REV. 211 (1947); Hellerstein, *State Franchise Taxation of Interstate Business,* 8 LAWYERS GUILD REV. 429 (1948); 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); Morrison, *State Taxation of Interstate Commerce,* 35 ILL. L. REV. 727 (1942); Overton, *Taxation of Interstate Commerce,* 19 TENN. L. REV. 870 (1947); Powell, *State Income Taxes and the Commerce Clause,* 31 YALE L. J. 799 (1922); Powell, *New Light on Gross Receipts Taxes,* 53 HARV. L. REV. 909 (1940); Powell, *More Ado about Gross Receipts Taxes,* 60 HARV. L. REV. 501, 710 (1947); Traynor, *State Taxation and the Commerce Clause in the Supreme Court 1938 Term,* 28 CAL. L. REV. 168 (1940).

[7] 60 HARV. L. REV. 516 (1947).

[8] Justice Stone expounded the multiple burden test in the *Western Live Stock* case as follows: ". . . the vice characteristic of [taxes] which have been held invalid is that they have placed on 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 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 . . ." 303 U. S. 250, 255 (1938).

henceforth the Court would not approve taxes on interstate business when the taxes were apportioned in a manner reasonably to measure the taxing state's fair interest in the business activity involved. Apportionment was thus an important corollary to the multiple tax burden doctrine. This pragmatic approach to the problem initiated in the *Western Live Stock* decision was further buttressed by the requirement that state tax levies on interstate commerce neither operate extra-territorially as to out-of-state goods or transactions nor discriminate against interstate commerce vis a vis local commerce.[9]

Thus, as matters stood in 1940 when the *Berwind-White* opinion crystallized the most recent developments prior to Justice Rutledge's appointment,[10] the comprehensive test of state power to tax interstate commerce was whether or not a given tax imposed a heavier burden on interstate commerce than on local commerce. Under this doctrine the dominant view of the preceding fifty years that under the commerce clause the subject matter of interstate commerce may not be taxed at all by the states was rejected.

At the same time two distinct minority views had been pressed without success by members of the present court. On the one hand, Justices Black, Frankfurter, and Douglas in a striking dissent in 1940 proposed what has since become known as the "leave it to Congress" theory.[11] Maintaining that the protection of interstate commerce from state legislation must come from Congress rather than the Court, the opinion advocated a restrained role for the judiciary: "This Court has but a limited responsibility in that state legislation may here be chal-

[9] A triple rule against discrimination, multiple tax burdens, and extra-territoriality was laid down in Gwinn, White and Prince v. Henneford, 305 U. S. 307 (1938). The clearest statement of the discrimination rule is to be found in *McGoldrick v. Berwind-White Coal Mining Co.*:

"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 . . . 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 journeys. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage with intrastate business or property . . ." 309 U. S. 33, 48 (1940).

These three pragmatic limitations on state power to tax interstate commerce are, of course, closely inter-related; a tax which operates extra-territorially is a special form of discrimination against interstate commerce; similarly taxes imposing a multiple burden on interstate commerce without imposing the same burden on local commerce would discriminate against the former.

[10] For a close analysis of the *Berwind-White* case, *see* Powell, *New Light on Gross Receipts Taxes,* 53 HARV. L. REV. 909 (1940).

[11] McCarroll v. Dixie Greyhound Lines, 309 U. S. 176 (1940).

lenged if it discriminates against that interstate commerce or is hostile to the congressional grant of authority."[12] Justice Frankfurter, however, after initially protesting excessive limitation of state power,[13] by 1946 came to accept the idea that commerce required substantial protection.[14] On the other hand, Justice Jackson has believed all along that the protection of the national economy is a major historical responsibility of the Court. For him, congressional silence does not give consent for state legislatures to meddle with interstate commerce. Of the "leave it to Congress" theory, he remarked in 1941:

> . . . the practical result is that in default of action by us they [the states] will go on suffocating and retarding and Balkanizing American commerce, trade, and industry. . . . I differ basically from my brethren as to whether the inertia of government shall be on the side of restraint of commerce or on the side of freedom of commerce. . . . I am reluctant to see any new local systems for restraining our national commerce get the prestige and power of established institutions.

This, he added, "is a trend with which I will have no part."[15] Rather consistently he has had no part in it.

Such was the judicial climate of opinion in this area of constitutional law when Justice Rutledge joined the Court. Three broad alternatives were available. At one extreme was the pre-1938 view that the very existence of the commerce clause forbade the states to tax interstate commerce at all. At the other extreme was the view, never embraced by a majority of the Court, that the states generally may tax interstate commerce until Congress tells them they can't. Between these two extremes was the multiple burden test. Justice Rutledge consistently adhered to this compromise alternative. Since 1946, however, a majority of the Court has substantially abandoned it.

Fourteen cases between May, 1944, and June, 1949, afforded Justice Rutledge an opportunity to state his position. This he did at some length in nine opinions—more than any of the other Justices produced in these cases.[16] Three separate opinions and one majority opinion con-

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[12] 309 U. S. 176, 184 (1940). This view was initially propounded by Justice Black during his first two years on the Court. It has continued to be his position, shared substantially by Justices Douglas and Murphy. *See* Black, dissenting, in J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 327 (1938), and Gwinn, White and Prince v. Henneford, 305 U. S. 434, 454-455 (1939).

[13] In addition to his dissent in the *McCarroll* case, *see* also his opinion in Wisconsin v. J. C. Penney Co., 311 U. S. 435 (1940), quoted in part in note 23, *infra.*

[14] *See* discussion of Freeman v. Hewit, 329 U. S. 249 (1946), *infra.*

[15] Duckworth v. Arkansas, 314 U. S. 391, 400-420 (1941), dissenting opinion.

[16] Four were for the majority; five were separate opinions.

tain the substance of his views.[17] His agreement with two dissenting opinions offers some further clarification.

The much litigated Indiana gross receipts tax of 1933 provided him with an opportunity to present his views at length in *Freeman v. Hewit*.[18] The case was argued in November, 1944, but since no agreement apparently was reached it was scheduled for reargument. This was done in November, 1946, and the decision handed down in mid-December. One might infer from this that the Court desired to re-examine its basic premises in this area. The inference is not belied by the opinions. Further, there is evidence that Justice Rutledge individually was interested in a careful re-exploration of this judicial chambered nautilus. Two weeks before the decision in *Freeman v. Hewit* was handed down he delivered a series of lectures at the University of Kansas. Discussing recent judicial trends concerning the commerce clause as a limitation on state power, he observed:

> Dogma and formulae, reflecting the certitude of earlier swings in policy continue to appear. Practical considerations and outworn theories at times remain commingled, so as to obscure, if not quite conceal, underlying conflicts of theory and policy concerning the negation's proper scope and application. The resulting pattern, if not kaleidoscopic, still affords highly convenient variables for decision in specific controversies. More often than might be expected from such a footing, reconcilable results have been secured. But rationalization which straddles conflict or ignores it leads eventually to irreconcilable results and thus to necessity for reformulating reasoning.[19]

He seized the opportunity for "reformulating reasoning" in *Freeman v. Hewit*.

The case involved the application of the tax to receipts of gross income by domiciliaries of the state. The receipts in question were proceeds of a sale of securities on the New York stock exchange. Justice Frankfurter condemned the tax for the majority in language which

[17] General Trading Co. v. State Tax Commission of Iowa, 322 U. S. 335 (1944); McLeod v. Dilworth Co., 322 U. S. 327 (1944); and International Harvester Co. v. Treasury Dept., 322 U. S. 340 (1944). Justice Rutledge wrote one separate opinion with reference to all three cases at 322 U. S. 349. Freeman v. Hewit, 329 U. S. 249 (1946), concurring opinion; Memphis Natural Gas Co. v. Stone, 335 U. S. 80 (1948), concurring opinion. The majority opinion referred to is Nippert v. Richmond, 327 U. S. 416 (1946).

The other five opinions add little of significance. They appear in the following cases: majority opinion in Independent Warehouse, Inc. v. Scheele, 331 U. S. 70 (1947); Aero-Mayflower Transit Co. v. R. R. Commissioners, 332 U. S. 495 (1947); Interstate Oil Pipe Line Co. v. Stone, 93 L. Ed. 1163 (1949); concurring opinion in International Harvester Co. v. Evatt, 329 U. S. 416, 423 (1947); Toomer v. Witsell, 334 U. S. 385, 409 (1948).

[18] 329 U. S. 249 (1946).

[19] RUTLEDGE, A DECLARATION OF LEGAL FAITH 69 (1947).

elicited Justice Rutledge's twenty-five page concurring opinion.[20] The majority opinion is notable for its virtual abandonment of the multiple burden test and reaffirmation of the old subject-matter approach dominant prior to 1938. There had been previous signs of Justice Frankfurter's dissatisfaction with the approach to state taxation of interstate commerce developed by Justice Stone and to the position he himself had taken in the *McCarroll v. Dixie Greyhound Lines* dissent.[21] In *Freeman v. Hewit* he led a majority of five for the first time to overrule the late Chief Justice's rationale. The Constitution forbids this levy, the opinion holds, because it is "a direct tax on interstate sales." Thus "what makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce . . . a direct imposition on that very freedom of commercial flow which . . . has been the ward of the Commerce Clause." Thus the old subject-matter test again prevailed. The discrimination test applied in recent cases is rejected with the admonition that "so to argne is to disregard the life of the Commerce Clause." The multiple burden rule is similarly discarded as "irrelevant to the kind of freedom of trade which the commerce clause generated." That kind of freedom, the opinion asserts, cannot tolerate "what amounts to a levy upon the very process of commerce across state lines." Nor can the Court "support the notion that a State may be allowed *one* single-tax-worth of *direct interference* with the free flow of commerce."[22] Formulations of new tests in recent cases are referred to as "an exercise in the logic of empty categories" and "a fashion in judicial writing."[23]

Justice Rutledge protested vigorously against this judicial atavism,

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[20] Justices Black, Douglas, and Murphy dissented; Justice Black, without opinion. Justice Douglas wrote a brief dissent in which Justice Murphy joined.

[21] *See* Justice Frankfurter's opinions in Northwest Airlines v. Minnesota, 322 U. S. 292 (1944) and McLeod v. J. E. Dilworth Co., 322 U. S. 327 (1944).

[22] Italics added.

[23] Justice Frankfurter himself succumbed to that "fashion in judicial writing" six years earlier. Compare these statements with his own condemnation of the pre-1938 formalistic approach in a 1940 case: "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government—that of taxation. . . . A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. . . . We must be on guard against imprisoning the taxing power of the states within the formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize." Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444-445 (1940).

while concurring in the result. "This is a case in which the grounding of the decision is more important than the decision itself. . . . The matter is of large importance and calls for discussion." He examined at length the task of establishing an area of immunity from state taxation. He then presented his own formulations. For him, the infirmity of the tax was to be found in the possibility of multiple taxation (since New York is also free to tax the transaction), and not because it is "a direct tax on interstate sales." The "reversion" of the majority "to ideas once prevalent, but long since repudiated" ignores the design of the commerce clause.

> The commerce clause was not designed or intended to outlaw all state taxes bearing "directly" on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. . . .[24] 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. . . .[25] Judgments of this character and magnitude cannot be made by labels and formulae. They require much more than pointing to a word. It is for this reason that increasingly with the years emphasis has been placed upon practical consequences and effects, either actual or threatened, of questioned legislation to block or impede interstate commerce or place it at practical disadvantage with local trade . . . and the trend of recent decisions to sustain taxes formerly regarded as invalid has been due in large part to this fact.[26]

Although he was primarily worried about the grounds of Justice Frankfurter's opinion, Justice Rutledge was also worried about the possibility of multiple taxation of the proceeds of Mr. Freeman's interstate sale. To that question he addressed the latter half of his opinion. In this case, the state of origin, Indiana, had taxed the proceeds of the sale. New York had not, but could. Hence a *potential* multiple tax burden existed. The majority forestalled this by voiding the Indiana tax, but without reference to the multiple burden issue. Although the bare unexercised power of another state to tax does not produce a cumulative tax burden, it opens the door to it—a door which Justice Rutledge wanted closed at a time when new sources of revenue were being sought. He had objected to this closed door policy, which he now

[24] 329 U. S. 249, 270 (1946).

[25] *Id.* at 269.

[26] *Id.* at 270. *See* note 13 in the concurring opinion, 329 U. S. 249, 265, for a catalogue of cases involving gross receipts taxes which have been sustained or invalidated on grounds other than the "direct" incidence of the tax on interstate commerce itself.

deemed necessary, when the majority espoused it because of a similar *potential* multiple tax burden in *McLeod v. Dilworth*.[27] In that case he argued that *if* it were necessary to choose between the taxing power of the state of market and the state of origin, he would prefer the former. There the majority had closed the door on the state of market because the door was open to the state of origin. At least that was the implication according to Justice Rutledge's reading of the opinion. He would have upheld the tax by the state of market—the existence of a potential multiple tax burden notwithstanding. In the present case the situation was exactly reversed: the state of origin *has* taxed; the state of market *may* tax. This time Justice Rutledge did not like the potential multiple tax situation. It lures tax-thirsty states. Confusion and expensive litigation follow.

Within the frame of reference of the multiple burden test, he saw three alternative methods of protecting interstate commerce from the grasp of more than one state tax collector without creating a total immunity for it. They are: (1) to forbid either the state of origin or the state of the market to tax unless the tax is apportioned, thus eliminating the cumulative burden;[28] (2) to rule that either the state of origin or the state of market, but not both, can tax; (3) to determine factually in each case whether application of the tax can be made by one state without incurring danger of its being made in another. An examination of these alternatives led Justice Rutledge to the conclusion that no ideal solution exists. The choice was therefore among evils. His own preference was the second alternative[29] subject to power in the state of origin also to tax by allowing credit to the full amount of any tax paid or due at destination. This credit provision Justice Rutledge regarded as a form of apportionment. Since there was no provision for apportionment or credit in the Indiana tax he concluded it must fall, since a multiple tax burden threatened should New York exercise its power to tax the transaction also.

His shift in position on this question of a potential multiple tax burden is foreshadowed, inferentially, by his remark in the University of Kansas lectures that "rationalization which straddles conflict or ignores it leads eventually to irreconcilable results and thus to the necessity for reformulating reasoning."

These are the main themes of Justice Rutledge's position on this

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[27] 322 U. S. 327 (1944).

[28] This is, in substance, the ruling of J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938).

[29] This he proposed in his dissent in McLeod v. Dilworth, 322 U. S. 327, 361 (1944).

knotty question of state taxation of interstate commerce. For him the test of state power derived from the concrete economic consequences of taxation, not from conceptions deduced from the commerce clause. For the commerce clause itself merely prescribes a technique by which concrete economic problems are to be resolved in the federal scheme.

Thus in 1944 he argued that the economic effect on interstate commerce of a use tax and a sales tax was virtually identical. He thought them both permissible. That the Court sustained one and invalidated the other on the basis of what the minority regarded as sophisticated legal distinctions—almost on the basis of nomenclature—reflects the degree of technical ramification which has invaded the field in recent years. The first, *General Trading Co. v. State Tax Commission of Iowa*,[30] involved a *use* tax levied by Iowa on goods sold to Iowa by a non-resident vendor who solicited orders in Iowa for goods to be shipped from a Minnesota concern. Writing for the majority, Justice Frankfurter upheld the tax as a non-discriminatory excise laid on all personal property consumed in Iowa. The other case, *McLeod v. Dilworth Co.*,[31] embraced virtually the same factual situation except that the tax imposed this time by Arkansas was construed as a *sales* tax, and was levied on a transaction consummated in Tennessee, although the orders for the goods shipped to Arkansas residents had been solicited by the Tennessee vendor within the jurisdiction of Arkansas. Since title passed with shipment in Tennessee, and no collections were made in Arkansas, the Court ruled, again speaking through Justice Frankfurter, that the incidence of this sales tax was extra-state. It was thus held invalid as a tax on interstate sale. Relying on the fact that the sales transaction was *completed* outside the taxing state, the Court distinguished this tax from the sales tax which it upheld in *McGoldrick v. Berwind-White Coal Mining Co.* on the ground that the out-of-state seller there completed his sales in an office within the taxing state. Here, since legal transfer of ownership took place in Tennessee, for Arkansas to impose a tax on the transaction would be to project its powers beyond its boundaries and tax an interstate transaction. Further, in order to demonstrate the rather tenuous disparity between the *General Trading Co.* use tax and the *Dilworth* sales tax the Court distinguished between use and sales taxes. "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

[30] 322 U. S. 335 (1944).
[31] 322 U. S. 327 (1944).

the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds."[32]

Justice Rutledge disagreed with these distinctions in a separate opinion[33] which reflects at length on the issues raised in these two cases and one other.[34] Concurring in the use tax decision, he dissented from the sales tax decision because "for constitutional purposes" he failed to see any difference "but one of words and scope" between the two taxes. He thought that the legal arguments relied on by the majority failed to distinguish the two taxes adequately on economic grounds.

> Neither [tax] lays a greater burden on the interstate business involved than it does on wholly intrastate business of the same sort. Neither segregates the interstate transactions for separate or special treatment. In both cases the sellers are non-residents of the taxing state. . . . In the face of such identities it is hard to see how one tax can be upheld and the other voided. Surely the state's power to tax is not to turn on the technical legal effect . . . that "title passes" on delivery to the carrier in Memphis. . . . In the absence of other and more substantial difference, that irrelevant technical consideration should not control.[35]

The majority's distinction between "use" and "sales" taxes did not impress Justice Rutledge. The difference in "conception" emphasized by Justice Frankfurter, in Justice Rutledge's view could hardly determine whether the power to levy such taxes existed. "Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state."[36]

Assuming the desirability of defining state powers of taxation insofar as practicable, he suggested the formula which he reiterated two years later in *Freeman v. Hewit*: if it is necessary to choose between the power of the state of origin and that of the state of market to tax and

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32 322 U. S. 327, 330 (1944).

33 322 U. S. 349 (1944).

34 The third case is International Harvester Co. v. Dept. of Treasury, 322 U. S. 340 (1944), in which Justice Rutledge concurred. Justice Jackson was the lone dissenter. This case involved the application of an Indiana gross receipts tax to three types of sales made by the International Harvester Co. which had several branches in the state. The gross-receipts tax was treated as the equivalent of sales tax. Taxes on all the sales were upheld on the grounds that a state may tax the gross receipts from interstate transactions consummated within its borders where it treats wholly local transactions the same way, as it did in this case.

35 The question of whether the title passes in the state of origin of the goods or the state of market had previously not been thought controlling. Caldwell v. North Carolina, 187 U. S. 622 (1908). Justice Stone ignored the point in the *Berwind-White* case, and Chief Justice Hughes dissenting in the same case commented that "the place where the title passes has not been regarded as the test of the interstate character of a sale." 309 U. S. 33, 64 (1940).

36 322 U. S. 340, 353 (1944).

allowing credit in order to avoid a multiple tax burden, the choice should be made in favor of the state of market or consumption. This is preferable because a tax imposed by the state of market is the one most certain to place the same tax load on both the interstate and competing local business.

Early in 1947, a majority of five in *Joseph v. Carter and Weekes Stevedoring Co.*,[37] with hardly a nod to the multiple burden or discrimination tests, reaffirmed a decision of 1937[38] which struck down an unapportioned gross receipts tax on the business of a stevedoring company engaged in loading and unloading vessels employed in interstate and foreign commerce. After the fashion of the opinion in *Freeman v. Hewit* a year earlier this revived the pre-1938 subject-matter test—that the subject matter of interstate commerce, *per se*, was beyond the reach of the long arm of state tax collectors—since stevedoring was held to be a part of interstate commerce. Therefore the tax was *on* interstate commerce. Justice Rutledge concurred in a dissenting opinion written by Justice Douglas[39] which points out that according to recent doctrine the vice of unapportioned gross receipts taxes is the danger of multiplication and duplication. Against the view of the majority which seems to find a "burden" on interstate commerce simply because the tax is "on" such commerce, the dissenting opinion argues that no risk of multiple tax burdens is present since the receipts taxed cannot be reached by other states. Nor was apportionment of receipts from transactions wholly carried on within the taxing jurisdiction necessary, since, as the dissenting opinion pointed out, "gross receipts reflect values attributable to the business or property wholly within the taxing state."[40] The reliance by the majority on the subject matter test at the expense of the multiple burden theory impelled Justice Douglas to conclude his opinion with the lament that "the failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that *Freeman v. Hewit* . . . marked the end of one cycle under the Commerce Clause and the beginning of another."[41]

In the light of his concurring opinion in *Freeman v. Hewit*, Justice Rutledge's alignment with the dissenting opinion in the stevedoring

[37] 330 U. S. 422 (1947).

[38] Puget Sound Stevedoring Co. v. Tax Commissioner, 302 U. S. 90 (1937).

[39] As did Justice Murphy. Justice Black dissented without opinion and without joining the dissenting opinion.

[40] 330 U. S. 422, 438 (1947).

[41] *Id.* at 444.

case clearly indicated that he was committed to following the pragmatic approach developed by Justice Stone. Consistent with that, he insisted on some kind of apportioning device to protect interstate commerce from an actual or potential multiple tax burden or any other kind of discrimination in relation to local commerce.

In *Memphis Natural Gas Co. v. Stone*,[42] a majority of five upheld a Mississippi franchise tax on that portion of an interstate natural gas pipeline company's lines which passed through the state, although the company did no business there. The tax was measured by the value of the capital used or invested within the state. The issue thus presented required over six months between argument and decision to produce three opinions, in none of which did a majority of the Court concur.[43]

Justice Reed's opinion sustains the tax largely by distinguishing it as a levy on "local activities" and hence not a tax on "the privilege of doing interstate business in the State" which, it is conceded, may not be imposed.[44]

But this in itself was insufficient to give the tax a clean bill of health for local activity occurs in all interstate enterprises and a tax on "some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself" was forbidden by *Freeman v. Hewit*. The Justice was thus put to it to delineate the line between taxable and non-taxable local activities which are at the same time integral parts of interstate commerce. He did this by means of a twofold distinction. First, the multiple burden test with its correlative requirement of apportionment was applied. Since the local activities are those involved in the maintenance of the pipe line the tax is not an unapportioned gross receipts tax on the commerce itself. It is apportioned to the capital employed within the state, and "cannot be duplicated in other states." The local incidents selected for taxation, therefore, cannot lend themselves to repeated exactions in other states. Second, local maintenance activities "are events *apart* from the *flow* of commerce" *notwithstanding* the admitted fact that "the interstate commerce could not be conducted without" them. Thus it would appear that the state may exact compensation for the protection it affords these

42 335 U. S. 80 (1948).

43 The majority opinion written by Justice Reed was concurred in by Justices Douglas and Murphy. Justice Black concurred separately and silently. Justice Rutledge wrote a concurring opinion. The dissenters spoke through Justice Frankfurter.

44 *McGoldrick v. Berwind-White Coal Mining Co.* and its near antecedents condemned taxes which "impose a levy for the privilege of doing it [interstate commerce]." 309 U. S. 33, 48 (1940).

local activities within its borders because they are sufficiently local to avoid an "unreasonable burden . . . on the interstate business."[45]

Justice Rutledge was troubled by the "verbal formulae" of this second point. He regarded the tax as substantially similar to the apportioned tax on gross receipts from interstate transportation which the Court had said New York could levy in *Central Greyhound Lines v. Mealey*,[46] and therefore *upon* the commerce itself—a deadly sin from which the "verbal formulae" of the majority tried to rescue it in the *Natural Gas Co.* case. Whether the tax was "upon" the commerce or not did not offend Justice Rutledge, of course, so long as it was apportioned in such a way as to preclude a multiple tax burden. In accordance with the views he had expressed in the previous cases dealing with these issues he was content to sustain this tax simply on the grounds that it (1) did not operate extra-territorially, (2) did not discriminate against interstate commerce by placing a greater burden on it than was placed on competing intra-state commerce, (3) was duly apportioned so as not to tax interstate activities carried on outside the state, (4) could not be repeated by other states and therefore passed the multiple burden test.

Although Justice Rutledge suggested that there was "little more than a verbal difference" between himself and the majority in this case he was concerned that the difference might assume controlling importance in other cases. The difference was more than verbal as Justice Rutledge's opinion reveals on its face. Accepting the well-established dogma that a tax may not be imposed on the privilege of conducting an exclusively interstate business or upon the business itself, the majority is faced with a tax which it believes legitimate, but which clearly appears to violate one or both of these immunities. Considerable pains,

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45 335 U. S. 80, 96 (1948).

46 334 U. S. 653 (1948). The case involved a New York state tax upon a carrier's gross receipts applied to a bus route between two points in New York state, but with a substantial portion of the route in two other states. The majority held that no constitutional infirmity would exist if the tax were fairly apportioned to the mileage traveled within the taxing state, but if it were unapportioned, the levy would unduly burden interstate commerce. Since both appellant and appellee conceded that the tax statute permitted such apportionment, the Court held that this was a matter for the New York courts to determine. Justice Rutledge concurred in the result without comment—presumably in conformity with the views expressed in his concurring opinion in *Freeman v. Hewit*. Justices Black, Douglas, and Murphy, dissenting, regarded the bus trip as local commerce since its purpose was to provide transportation from one point to another within the state. Passage through two other jurisdictions was therefore "a mere geographic incident" in the consummation of the local transaction. Hence apportionment was unnecessary.

therefore, had to be taken to establish that it did neither. Hence the verbalizing to which Justice Rutledge demurs. The multiple burden test is employed by the majority largely to re-enforce the argument that the taxed activities are in fact "apart from the flow of commerce" and hence not really a part of interstate commerce at all, even though the commerce could not be conducted without them! Strong adumbrations, to say the least, of the subject matter test in "multiple-burden clothing" are therefore manifest in this case. Justices Douglas and Murphy subscribe to it despite their protestations in the *Carter and Weekes Stevedoring Co.* case. In effect the majority opinion attempts a kind of shot-gun wedding between the old subject-matter test and the multiple-burden test, employing the latter to *validate* the identification of a tax as not being laid "upon" interstate commerce. In short, a tax is clearly not on interstate commerce if it does not create a multiple burden. It was against this shot-gun wedding that Justice Rutledge protested. He wanted neither the marriage nor any courting of the old but presumably forsaken subject-matter test. The multiple burden *et al* tests would not have proscribed a tax "upon" interstate commerce as such. He took pains to emphasize in his concurring opinion that the incidence of the tax in both this and the *Central Greyhound Lines* case[47] falls flatly on interstate commerce, albeit a local part of it. But this is not controlling, he argues, if the test of constitutionality is the multiple burden test and its corollaries rather than the subject matter test. Nor, of course, is the *localness* of the taxed activities. By this line of reasoning Justice Rutledge developed the multiple burden test beyond the position of its author, Justice Stone, to the point of repudiating the view that the states may not tax the privilege of carrying on an exclusively interstate business.[48] The clear inference of his *Memphis Natural Gas* case opinion is that a tax on the privilege of carrying on an exclusively interstate business is valid provided it is properly apportioned to the activities or the property within the taxing state.[49] The prohibition on state taxation of the privilege of carrying on an exclusively interstate business has reference to the subject matter of commerce. Since this prohibition was included in the multiple burden test as it was developed by the Court after 1938, Justice Rutledge therefore evolved a version of that test which has cleansed it of this vestigial

[47] 334 U. S. 653 (1948).

[48] *See* note 8, *supra*.

[49] Furthermore, in his concurring opinion in *Freeman v. Hewit,* Justice Rutledge made no reference to the invalidity of a tax on the privilege of engaging in an exclusively interstate business.

subject-matter overtone. Justice Rutledge's opinion alone in the *Memphis Natural Gas Co.* case developed this view although Justice Black's separate, silent concurrence in the judgment reflects his consistently expressed opinion that if Congress is silent, there is no constitutional barrier to a non-discriminatory state tax on the privilege of carrying on an exclusively interstate business.[50]

In conformity with these views Justice Rutledge wrote the principal opinion in *Interstate Oil Pipe Line Co. v. Stone*[51] with the concurrence of Justices Black, Douglas, and Murphy. He asserted that a Mississippi "privilege" tax measured by the gross receipts from the operation of a pipeline wholly within the state was not void under the commerce clause because it purported to impose a tax on the privilege of engaging in interstate commerce. The tax was valid because it met the essential tests. It did not discriminate against interstate commerce in favor of similar local commerce. The nature of the subject of taxation made apportionment unnecessary. No multiple burden threatened, for no other state could repeat the tax. And there was no attempt to tax interstate activity carried on beyond Mississippi's jurisdiction. Only by Justice Burton's concurrence with this judgment solely on the ground that the tax was "on" the privilege of operating a pipeline in intrastate commerce was the tax saved.

Consistently with these views Justice Rutledge voted to strike down a state tax only when it imposed or threatened a multiple burden, discrimination, or extra-state incidence on interstate commerce. Hence his vote against the tax in *Freeman v. Hewit.* Similarly in two other significant cases he thought state taxing power exceeded permissible limits.

Northwest Airlines v. Minnesota[52] confronted the Court for the first time with the question of state power to tax airplanes. Apparently the case was a poser since there was a lapse of seven months between argnment in October, 1943, and the announcement of four separate opinions on May 15, 1944. The majority opinion by Justice Frankfurter upheld a Minnesota personal property tax on a fleet of planes having home ports within other states. One or more of these other states had apparently levied taxes on the company's planes. The argn-

[50] *See* dissenting opinions of Justice Black in J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 321 (1938); Gwinn, White and Prince, Inc. v. Henneford, 305 U. S. 434, 446 (1939).

[51] 93 L. Ed. 1163 (1949).

[52] 322 U. S. 292 (1944).

[53] For a close analysis of precedent cases and the four opinions, see Note, 57 Harv. L. Rev. 1097 (1943).

ment hinged on the view that the tax situs of airplanes is the state of domicile of the owner. Minnesota being the state of domicile of the aircraft in question, its power to levy an unapportioned property tax thereon, it was held, is not precluded by the commerce clause. Distinguishing the instrumentalities of land and air commerce, the majority "refused to introduce a new doctrine of tax apportionment" in these circumstances on the grounds that apportionment had heretofore applied only to land commerce where some of the property had been continuously out of the domiciliary state for the tax year.[54]

Justice Rutledge, with Justices Roberts and Reed joined in a dissenting opinion written by Chief Justice Stone based on the multiple burden test. Since the decision left other states free to impose comparable taxes on the same property used as an instrumentality of interstate commerce which Minnesota had already taxed for the entire year at its full value a "fatal economic burden" could be placed on petitioners' planes. Thus Minnesota would be permitted to exceed the limits of state taxing power as defined by the multiple burden standard. To remedy this disability the dissenters favored apportionment by means of appropriate tax ratios for states over which the planes regularly flew with corresponding exemptions by the home state. Thus for Justice Rutledge the constitutional basis for state taxation of airplanes was their *physical presence* within the taxing state, not the domicile of the owner.[55] From this followed the necessity for apportionment in order to avoid multiple tax burdens.

[54] The majority opinion relied heavily on N. Y. *ex rel.* New York Central and H. R. R. Co. v. Miller, 202 U. S. 584 (1906), where a corporation was taxed on all its property within the state during the tax year and none of which was continuously without the state during the whole tax year and therefore had not acquired a tax situs elsewhere. The majority also held inapplicable to the facts of the present case the doctrine of tax apportionment for instrumentalities of interstate commerce introduced by Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891), since that principle was based on continuous protection by a state other than the domiciliary state throughout the tax year.

Justice Jackson and Justice Black each concurred in separate opinions, the former because the majority "falls short of commitment that Minnesota's right is exclusive of any similar right elsewhere." Justice Black, on the contrary, added the reservation that the decision should not be regarded as conclusive concerning the taxing powers of states other than Minnesota. He reiterated his "leave it to Congress" position on these issues expressed in McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 183 (1940) (dissenting opinion).

[55] For this distinction the minority relied heavily on Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905), which distinguished between the basis of taxation of chattels and intangibles. Since intangibles have no physical situs they can only be reached through the domicile of the owner. Since airplanes are chattels, the minority argued that the domicile rule does not apply. The Chief Justice's opinion asserted fur-

Writing the majority opinion in *Nippert v. Richmond*[56] Justice Rutledge held that a fixed sum license tax imposed on a house to house canvasser who solicits orders for goods to be shipped to the local purchaser from another state discriminated against interstate commerce. Such a tax placed a heavier economic burden on the out-of-state solicitor than on the local merchant. The argument hinged on the fixed sum character of the tax which bore no relation to the volume of business and was thus, in effect, unapportioned. This, Justice Rutledge argued, clearly distinguished the tax from the New York sales tax upheld in the *Berwind-White* case.[57] Justice Douglas for the dissenters commented: "The Court does not share the doubts which some of us have had concerning the propriety of the judiciary acting to nullify state legislation on the grounds that it burdens interstate commerce . . . [more] Proof should be required to overcome the presumptive validity of this . . . legislation."[58]

In both of these cases, as in *Freeman v. Hewit*, apportionment would have saved the tax, in Justice Rutledge's view. Unapportioned, he thought they exposed interstate commerce to the multiple burdens or discrimination which the commerce clause forbids.

To sum up, Justice Rutledge was convinced that the multiple burden test and its corollaries, including the discrimination rule, offered the most practicable approach to balancing the counterthrusts of federalism in the field of state taxation of interstate commerce. In this he followed the rationale initially advanced by Justice Stone but with certain modifications. The concomitant doctrine that taxes may not be imposed on

ther that the Court misinterpreted the *Miller* case which applied to a situation where itinerant freight cars had not moved regularly enough in any state outside the state of domicile of the owner to acquire a tax situs there. This situation did not obtain in the present case where the planes moved on a fixed route in accordance with a regular schedule. Hence, according to the *Union Refrigerator Transit Co.* case the planes acquired thereby a tax situs in other states.

[56] 327 U. S. 416 (1946).

[57] And presumably also from the Arkansas sales which Justice Rutledge deemed permissible in *McLeod v. Dilworth*. The New York tax was levied on a percentage of gross receipts, and the economic incidence of the tax fell only on completed transactions, not, as in the present case, on the initial step toward bringing one about.

[58] The minority, had they been more numerous, would have overruled or at least qualified the long line of "drummer cases" to which the decision in this case adheres. In law, a house to house canvasser when carrying goods with him for immediate delivery after sale is termed a peddler. When he solicits for subsequent interstate delivery of the purchased goods he is termed a drummer and considered an instrument of interstate commerce, thus immune from state or municipal taxation according to the "drummer cases." The rule was first laid down in Robbins v. Shelby County Taxing District, 120 U. S. 489 (1886). See Note, 40 YALE L. J. 1094 (1931).

the privilege of carrying on an exclusively interstate business, to which the Court adhered during the evolution of the multiple burden test, he repudiated as contradictory to the logic of the primary test. At the same time he rigidly insisted that some kind of apportionment device must be applied to any tax where risk, actual or potential, of a multiple tax burden is present. As a refinement of the apportionment device he proposed that the state of market be permitted to tax but not the state of origin unless it allowed credit for any tax paid in the state of market. This idea which he contributed to the subject involved a legislative solution; it was not a judicial one. Because of this it is apparently something of an anathema to Justice Frankfurter who eschews such formulations in this field.

Further, Justice Rutledge was the leading advocate, after the death of Chief Justice Stone, of the multiple burden doctrine. In the sense of accepting it as his basic premise he was the sole consistent adherent since the majority seems to have discarded it in *Freeman v. Hewit* and the *Stevedoring Co.* case, and diluted it in the *Memphis Natural Gas Co.* case, while Justices Black and Douglas rely primarily on the "leave it to Congress" view. This is reinforced by the fact that in no case other than those in which he wrote the majority opinion did he agree unreservedly with the Court's position.

Justice Rutledge accepted this compromise approach because he regarded the issue of state taxation of interstate commerce as essentially a problem of federalism for which the Court must perforce assume a share of the responsibility.

That responsibility requires the Court to permit some leeway for state taxing power over interstate commerce. He believed that the multiple burden test was best fitted to accomplish this—best squared with the design of the commerce clause because it contemplated only the economic consequences of state taxation. It thus offered a *modus vivendi* by which interstate commerce enjoys substantial immunities without throttling state power.

Perhaps more than any of the other justices Rutledge was equally sensitive to the need for protecting a continental economy from fragmentation and to the need for protecting the powers of the states in meeting their fiscal requirements. This is reflected in the accompanying chart. Speaking for the Court in 1946 he said: "The versatility with which argument inverts state and national power, each in alternation to ward off the other's incidence, is . . . a recurring manifestation of the continuing necessity in our federal system for accommodating the two

ALIGNMENTS OF JUSTICES ON STATE TAXATION OF INTERSTATE COMMERCE CASES, 1943-1949

JUSTICE	RUTLEDGE VOTED WITH		RUTLEDGE VOTED AGAINST	FOR STATE TAX		AGAINST STATE TAX
	No. of cases	%	No. of cases	No. of cases	%	No. of cases
Black	10	71	4	13	93	1
Douglas	10	71	4	13	93	1
Murphy	10	71	4	13	93	1
Rutledge				9	64	5
Reed	11	79	3	6	43	8
Frankfurter	9	64	5	6	43	8
Burton	7	70	3	4	40	6
Jackson	6	43	8	3	21	11
Vinson	6	60	4	2	20	8

basic powers it comprehends."[59] In his lectures at the University of Kansas he spoke of the commerce clause as a "Chapter in Democratic Living," making "room for the continuing adjustment and readjustment of federal-state relationships, without which no federal scheme could long survive. . . . It [the commerce clause] is inherently a federal device. And such a plan by its very division of powers creates a safeguard perhaps not otherwise attainable against wholly autocratic action."[60]

Thus he was unwilling to go as far as Chief Justice Vinson and Justices Frankfurter, Jackson and Burton in protecting interstate commerce from state exactions. Hence also his exceptions to Justice Frankfurter's and Justice Reed's views in *Freeman v. Hewit* and the *Memphis Natural Gas Co.* case. Nor was he willing to accept the "leave it to Congress" theory espoused by Justices Black and Douglas. In the first place, Justice Rutledge may have been more worried about state impediments to commerce than they. For "a balkanized America today . . . would be unequal to maintaining our people . . . and by outlawing the balkanizing power of the states, it [the commerce clause] has given them the legal and economic foundations which have released their native energies and abilities for the country's vast and rapid development."[61] In the second place, Justice Rutledge was less reluctant to employ the power of the Courts to prevent state intrusions on this continental economy than his two brethren. Contrary to their general view that this is a legislative and not a judicial responsibility, he asserted that "Congress, the states, and the *courts* have all had *important* and

[59] Prudential Insurance Co. v. Benjamin, 328 U. S. 408, 412 (1946).

[60] RUTLEDGE, A DECLARATION OF LEGAL FAITH 72, 76 (1947).

[61] *Id.* at 76.

continuing parts in the regulation of the nation's commerce. *They will keep on doing so.* That power, so distributed, has been a major protection to individual freedom from concentrated authority in any *single* place over the lifeblood of the people, their commerce, their trade."[62] Hence his agreement with the holding in *Freeman v. Hewit* and the *Memphis Natural Gas Co.* case, and his proposal of a legislative formula in the former.[63] In all of this, he quite candidly eschewed the pretenses of mechanical jurisprudence. Here, as elsewhere, the ultimate factor which governs choice lies in policy considerations rooted in the minds of the Justices themselves. Thus he once remarked:

> For cleanly as the commerce clause has worked affirmatively, its implied operation on state power has been uneven, at times highly variable. . . . Into what is thus left open for inference to fill, divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation. That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation.[64]

In exercising his own choice among policies Justice Rutledge employed no conceptual device to determine the limits of state taxation of interstate commerce. Concrete economic consequences were for him determinative. Hence his consistent adherence to the pragmatic multiple burden test. No member of the present Court with the possible exception of Justices Clark and Minton now subscribes to this yardstick, first fashioned by Justice Stone and solely perpetuated from 1946 to 1949 by Justice Rutledge.

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62 *Id.* at 76. Italics added.

63 Although on their *voting* record in these cases Justice Rutledge appears to have been in agreement with Justice Frankfurter about two-thirds of the time this is deceptive in the light of Justice Rutledge's vigorous disagreement with Justice Frankfurter's *grounds* in *Freeman* v. *Hewit*. The same is true, to a lesser extent, with respect to Justice Reed in the light of *Memphis Natural Gas Co. v. Stone*. Insofar as one can indulge in the risky game of classifying the justices on doctrinal grounds and voting records, Justice Rutledge occupied a position between Justice Reed and Justices Douglas and Black. This is clearly indicated in the voting records. It is also borne out by the analysis of the opinions themselves.

64 Prudential Insurance Co. v. Benjamin, 328 U. S. 408, 418 (1946). Italics added.