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Justice Rutledge and State Taxation of Interstate Commerce

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JUSTICE RUTLEDGE AND STATE TAXATION OF INTERSTATE COMMERCE*

When the late Wiley Blount Rutledge was elevated to the Supreme Court in 1943, an erstwhile law school associate[1] predicted that the former law school dean[2] would bring to the high court a refreshing clarity of thought and expression.

Justice Rutledge did just that in giving new judicial interpretation to the age-old problem of state taxation of interstate commerce.

However voluminous the "essays" he penned and however close they bordered on judicial legislating, the decisions of the late justice were distinguished for a consistency and boldness of approach[3] that too often was lacking on the part of the full court during the past decade.

Projected onto the national scene during a period marked by repeated changes of court personnel and almost as many changes in court philosophy, Justice Rutledge found constant need for all the judicial art that had been ascribed to him: "The careful analysis of facts, the appreciation of the interests at stake, the identification of the legal issues involved, the attention to the purposes underlying the law, and, finally, the decision in terms of the ends to be served."[4]

These are the essentials of the judicial art of a scholar, and they were the modus operandi of the court's severest critic during his six years on the high court. Justice Rutledge's primary thesis was that consequences, not captions, should be determinative of the constitutionality of any piece of legislation. This was

* This paper was written as part of the requirements for the course in Public Finance.

1. Fuchs, *The Judicial Art of Wiley B. Rutledge*, 28 WASH. U. L. Q. 115 (1943).

2. Justice Rutledge was Associate Professor of Law at the University of Colorado from 1924 to 1926, successively Professor of Law and Dean at Washington University from 1926 to 1935, and Dean at the State University of Iowa from 1935 to 1939. He served as a member of the United States Court of Appeals of the District of Columbia from May 2, 1939, to February 15, 1943, the date of his induction to the Supreme Court.

3. In paying tribute to his late colleague on the Circuit Court of Appeals, Justice Henry W. Edgerton wrote: "It was Brandeis who said: 'If we would guide by the light of reason, we must let our minds be bold.' . . . Few judges in our time have done this so notably as Rutledge. In boldness and imagination, in sense and defense of democracy, he was in the great tradition." Edgerton, *Mr. Justice Rutledge*, 63 HARV. L. REV. 293, 296 (1949).

4. Fuchs, *supra* note 1 at 146.

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particularly important, he believed, in the field of state taxation of interstate commerce.

The use, he declared, of such terms of art as "direct" taxes, "indirect" taxes and "local incidents" was not only unrealistic but a hopelessly inaccurate attempt to draw the protecting line around interstate commerce envisaged by Article I, Section 8, of the Constitution.

> Not 'directness' or 'immediacy' of incidence per se, whether 'upon the commerce itself' or upon a 'local incident' is the outlawing factor, but whether the tax, regardless of the special point of incidence, has the consequences for interstate trade intended to be outlawed by the Commerce Clause.[5]

The Constitution had said simply:

> Congress shall have the power . . . to regulate commerce . . . among the several states.[6]

From 1873[7] to 1938[8] the court had held that states could not lay a direct tax on interstate commerce. A newly liberalized court in the latter year had relaxed the rigidity of the "no direct tax" ban, but only where no cumulative burden was present or potential. This new bloc within the court, headed by the late Justice Stone and initially numbering among its disciples Justices Frankfurter, Black and Douglas, applied a mechanical test. When satisfied as to due process requirements, it asked a single question: Does it offer a present or potential cumulative burden? If the answer was affirmative, the tax automatically fell.[9] If the answer was negative, the tax was upheld.[10] Thus judicial blessing was given to a new form of direct taxation.[11] But the dispensation was short lived. In *McGoldrick v. Berwind-White Coal*

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5. Freeman v. Hewit, 329 U. S. 249, 268 (1946).
6. U. S. CONST. Art. I, §8, cl. 3.
7. In the case of the State Freight Tax, 15 Wall 232 (1873), the court held invalid a tax on interstate shipments because "the transportation of passengers or merchandise . . . from one state to another" is in its nature "national" and admit of "one uniform system or plan of regulation."
8. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (Interstate Commerce clause cannot relieve those engaged in interstate commerce from just share of state tax burden even though it increases the cost of doing the business).
9. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Gwin, White & Prince Inc. v. Henneford, 305 U.S. 434 (1939).
10. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).
11. Justice Rutledge contended that the following taxes, sustained because they were apportioned, were non the less "direct" taxs: Capital stock tax—Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 450 (1891); net income—Illinois Central Railroad v. Minnesota, 246 U. S. 450 (1918); gross receipts—Central Greyhound Lines v. Mealey, 334 U.S. 653 (1947).

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Co.[12] in 1940 the court disavowed its approval of any direct tax. But by segmenting the act of delivery from what theretofore had been one complete interstate transaction, the court upheld a state of market sales tax while refusing to call it a levy on interstate commerce.

It was this puzzling play on words which served as prelude for Justice Rutledge's appointment to the Supreme Court in 1943. He took the court at face value when it held in the *Berwind-White* case that a state of market could·tax an interstate transaction. He regretted the reasoning employed to reach that decision but found the result altogether to the liking of his practical mind.

He was not prepared, therefore, to accept without a polite rebuke to his colleagues the majority decision in *McLeod v. Dilworth*,[13] where, under somewhat comparable facts, the court invalidated a state of market tax levied by Arkansas. The majority reasoned there that since "title passed" to the goods in Tennessee, the imposition of a tax by Arkansas was an extraterritorial projection of its powers, which due process denied. The *Berwind-White* case was distinguished on the ground that a sales office was maintained in New York, whereas there were only solicitors in Arkansas, and there was a "transfer of possession" in New York, while there was none in Arkansas.

McLeod v. Dilworth was one of a trilogy decided January 6, 1944, and a single opinion in which he dissented to the Arkansas sales tax decision and concurred in the other two[14] gave the freshman justice his first opportunity to espouse judicially a state of market tax philosophy, which, like his apportioned direct tax theory, was to distinguish his brief term on the upper court. It also was the occasion for the first of his numerous blasts at the court's "eternal search for a taxable incident" on which to "hang constitutionality under due process ideas."

As Justice Rutldege saw it, the majority opinion was an unsustainable due process decision, not an answer to the only question he found involved: Does it violate the Commerce Clause? Both states, said Justice Rutledge, had factual connections sufficient

12. 309 U.S. 388 (1940).
13. 322 U.S. 349 (1944).
14. International Harvester Co. v. Dept. of Treasury, 322 U.S. 340 (1944); General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944).

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to nullify due process prohibitions. Both states, said Justice Rutledge, thus could tax, insofar as due process was concerned. Wherefore, the presence or potentiality of a cumulative burden became the next and paramount issue.

Had Justice Rutledge chosen to follow the cumulative burden theory of the *Western Live Stock* court, his ax would have fallen on the proposed tax right there, for the actuality or potentiality of two states taxing a transaction added up to a cumulative burden.

But Justice Rutledge—and this fact sometimes is overlooked—was never a cumulative burden disciple of the Stone variety. Had he followed the Stone doctrine, he would have joined the majority in striking down the Arkansas sales tax. For under the reasoning of both Justice Rutledge and the majority Tennessee had sufficient incidence to sustain a tax due process-wise. Instead Justice Rutledge recognized judicially by name what he said the court already had recognized IN EFFECT in the *Berwind-White* decision, the right of the state of market to levy on an interstate transaction.

Viewed in this light, the more than one dozen Commerce Clause decisions in which Justice Rutledge participated follow a logical, consistent doctrine. The Iowa use tax in the *General Trading Co.* case was upheld, as had been other use taxes in a number of important decisions, as a state of market tax. The court had given its blessing to such use taxes during the previous decade where reciprocal clauses provided that the use tax should give way to the extent other taxes were levied in the state of origin. But under the formula propounded at considerable length at the conclusion of his joint opinion, Justice Rutledge would require that the state of origin give way to the state of market.[15]

The problem in *International Harvester Co. v. Dept. of Treasury* was much simpler. A gross receipts tax was construed, under the facts, as the equivalent of a sales or use tax, and, as sale and delivery concurred in the single state, no jurisdictional question was posed. Yet so knotty was the trilogy decided that day that while six justices believed the sales and use tax cases

15. The fact that Iowa, in adopting the already judicially approved reciprocal clause granting priority to the state of origin, Minnesota, had asked for less than Justice Rutledge would have ascribed to it, did not prevent his validating that portion for which Iowa had asked.

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should go the same way, they did not agree which way they ought to go.[16]

Applying his basic test of "consequences, not captions," Justice Rutledge argued that the Iowa use tax and the Arkansas sales tax were exactly the same thing:[17]

> Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that 'title passes' on delivery to the carrier in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial differences, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that factor alone is the will-o-the-wisp, insufficient to crux a due process connection from selling to consuming state and incapable of increasing or reducing any burden the tax may place upon the interstate transaction.[18]

It was this alleged unwillingness of the court to articulate its thinking and abandon traditional assumptions concerning state taxation "neither axiomatic in our Constitutional system nor dictated by the language of the Commerce Clause"[19] with which Justice Rutledge was quarreling. The primary vice of paying lip service to abandoned doctrines lay not in the confusion created in the public's mind but in the court's own mind, he believed:

> . . . to take what is in essence and totality an interstate transaction between a state of origin and one of market and hang the taxing power of either state upon some segmented incident of the whole and declare that this does or does not 'tax an interstate transaction' is to do two things. It is first to ignore that any tax hung on such an incident is levied on an interstate transaction. For the part cannot be separate from the whole. It is also to ignore the fact that each state, whether of origin or of market, has by that fact alone a relation to the whole transaction so substantial as to nullify

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16. Justice Frankfurter wrote both majority opinions. Justices Black, Douglas, Murphy and Rutledge dissented from condemning the Arkansas sales tax. Justices Roberts and Jackson dissented from condoning the use tax because it made a tax collector of an out-of-state seller.

17. Quipped the Harvard Law Review: "After these two decisions the states may readily enough clothe their statutes with the verbal dressing requisite to save them from the charge of economic exposure." Note, 57 HARV. L. REV. 1088, 1089 (1944).

18. McLeod v. Dilworth, 322 U.S. 349, 351 (1944).

19. Hellerstein and Hennefield, *State Taxation in a National Economy*, 54 HARV. L. REV. 949, 950 (1941).

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> any due process prohibition. Whether the tax is levied on the 'sale' or on the 'use', by the one state or by the other, it is in fact and effect a tax levied on an interstate transaction.[20]

II

To justices of the traditional school all direct taxes on interstate commerce again had become anathema by 1944 unless they were (1) apportioned, (2) "in lieu of" or (3) use taxes saved by reciprocal clauses. But to Justice Rutledge's practical mind this adherence to stare decisis was equally disturbing. He acknowledged the increasing need for new sources of state taxation. He deplored the tax refuge created in both states by the decision in *J. D. Adams Mfg. Co. v. Storen.*[21] He sensed with prophetic insight a resurgence of the pre-1938 thinking which he so often had lamented.

Since the early days when he "rode circuit" with his Baptist preacher-father, Justice Rutledge's heroes had been the nation's founding fathers who "broke with a great past . . . faced squarely the hard facts of that day and seized responsibility for making the great changes those facts dictated."[22]

It was not surprising then that on the lecture platform he so often warned of

> . . . static, stagnant, perfect law . . . law that has become dead. . . . For without creative force, law stagnates, justice gives way to anachronism, ossification sets in, and law becomes the enemy, the barrier, withering to social and individual progress.[23]

His belief, he reaffirmed often, was

> . . . in the living, moving, growing law . . . in law not as an end in itself, but as the great and universal means by which men move on from the jungle to more and more perfect unions for living in civilized society.[24]

But Justice Rutledge recalled with regret that

> Once we emerged from our golden age of legal creation, our profession settled back too easily to rest upon the comfortable delusion that the work of creation had been done and was well nigh, if not altogether, perfect.[25]

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20. McLeod v. Dilworth, 322 U.S. 349, 357 (1944).
21. 304 U.S. 307 (1938).
22. Address before Federal Bar Association, 1948, reprinted, THE FEDERAL EMPLOYEE, November, 1948, 7.
23. *Ibid.*
24. *Ibid.*
25. *Id.* at 17.

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Faced with the "hard facts" of the court's vacillating views on taxation, Justice Rutledge cast his lot with the state of market. This was by no means an original concept, as it had been recommended—as a legislative remedy—by eminent legal scholars in the tax field,[26] had been endorsed by the National Association of State Administrators and the Interstate Commission on Conflicting Taxation, and was embodied in the Harrison Resolution adopted by the Senate in 1935.[27]

Justice Rutledge's opinion is filled with references to present and potential cumulative burdens. But he indicates the wide divergence of his views from those of the Stone school when he expresses doubt that a potential risk "will have any substantial effect in restraining the commerce such as the actual application of that power would have."[28]

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26. "Effective solution of the problem of state sales and use taxes requires that in each situation only one state be permitted to tax the sale. Congress might enact a statute which would forbid sales or use taxes on goods having an interstate origin or destination *except by the state into which the property is moved for use or consumption therein.* It could authorize that state to tax all interstate sales and all goods having an interstate origin. Such a statute would conform to the terms of most of the existing state statutes. Selection of the state of consumption is justified by the fact that sales and use taxes, in essence taxes on consumption, are largely borne by purchaser-consumers. Their local purchasers pay the tax, they should be in a position to use their ballots to eliminate such taxes. That result is achieved if the taxes they pay are imposed by the legislators the local purchaser-consumers elect." Hellerstein and Hennefield, *supra* note 19 at 966. (Emphasis added).

It should be noted that Messrs. Hellerstein and Hennefield favor only legislative action. For in their crystalline anaysis of judicial action during the late Stone Age, they say: "It seems clear that the Supreme Court's attempts to deal with the conflict between state and national interests have failed and must inevitably fail. . . . Judicial action alone has not provided and cannot provide adequate solution to the problem. On the other hand, a solution is imperative, and the very nature of the solution must be national in scope." *Id.* at 961, 962.

27. By this resolution Congress would authorize non-discriminatory "taxes or excises levied by any state upon sales of tangible personal property, or measured by sales of tangible personal property," as applied to interstate sales when imposed by the state into which the property is moved for use or consumption therein.

28. "It may be that the mere risk of double taxation would not have the same consequences, given always of course a sufficient due process connection with the taxing states, that actual double taxation has, or may have, for application of the commerce clause prohibition. Risk, of course, is not irrelevant to burden or to the clogging effect the rule against undue burden is intended to prevent. But in these situations it may be doubted, on entirely practical grounds, that the mere risk Tennessee may apply its taxing power to these transactions will have any substantial effect in restraining the commerce such as the actual application of that power would have. In any event, whether or not the choice must be made now or, as I think, has been

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While Justice Rutledge would not require exclusive power for the state of market, he would require the state of origin's levy to give credit to the extent of, or the full amount of, the state of consumption's tax:

> If in this case it were necessary[29] to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin. The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character. If therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business. Hence, if the risk of taxation by both states may be said to have the same constitutional consequences, under the Commerce Clause, as taxation in actuality by both, the Arkansas tax, rather than the power of Tennessee to tax, should stand.[30]

III

Another decision of far reaching import also was handed down January 6, 1944. In *Northwest Airlines v. Minnesota*[31] the court upset a half-century of precedent by ruling that Minnesota, as the state of domicile, could enforce a personal property tax on Northwest Airlines' entire fleet of airplanes, even though the company's scheduled route mileage in Minnesota was only 14 per cent and its scheduled plane mileage was only 16 per cent of the company's total scheduled route mileage and scheduled plane mileage, respectively, in the United States.

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made, it should go in favor of Arkansas, not Tennessee." McLeod v. Dilworth, 322 U.S. 349, 361 (1940).

29. The use of the word "if" here is in obvious recognition that the case at hand did not necessitate any ruling beyond that concerning the constitutionality of the Arkansas tax. His views on restricting any Tennessee tax are dicta, as no Tennessee tax was involved. But his decision to favor the state of market, an act which bordered on, indeed if it did not encroach upon the legislative field, demanded the explanation.

30. McLeod v. Dilworth, 322 U.S. 349, 361 (1944).

31. 322 U.S. 292 (1944).

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The majority opinion, written by Justice Frankfurter, raised many an eyebrow because of its abandonment of the apportionment formula enunciated in *Pullman's Palace Car Co. v. Pennsylvania*[32] in 1891. Congress, it held instead, never had disturbed a domiciliary state's power to tax except where property or a portion of fungible units were outside the state.[33]

Chief Justice Stone and Justices Reed, Roberts and Rutledge dissented. They pointed out that the constitutional basis for taxation of chattels, unlike intangibles, had always been physical presence, not domicile of owners. While extended here only to the field of aviation, they foresaw the possibility of the entire doctrine of the taxation of tangibles being removed from the protective mantle of apportionment.[34]

IV

When he faced his first case involving legislatively delegated power of taxation to cities,[35] Justice Rutledge again applied his familiar test of "consequences not captions":

> It is no answer . . . that the tax is neither prohibitive nor discriminatory on the face of the ordinance. . . . Not tax in a vacuum of words but its practical consequences.[36]

As a condition precedent to selling even five cents worth of goods within the city, Richmond had required the purchase of a $50 license, assessed alike against both local merchants and "drummers." In addition, the ordinance provided for a tax of one-half of one per cent of annual earnings, receipts, fees and

32. 141 U.S. 18 (1891) (A state may tax an interstate carrier engaged in running railroad cars into, through and out of the state and having at all times a large number of cars within the state . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run).

33. New York Central v. Miller, 202 U. S. 584 (1905), where none was found permanently outside the state, although 12 to 64 per cent was outside the state at some time.

34. "To refuse now to apply the rule of apportionment to petitioner's airplanes, after a half-century of its application by this court as the means of avoiding prohibited multiple state tax burdens of vehicles of interstate transportation; to extend to airplanes moving interstate over fixed routes on regular schedules the rule that intangibles may be taxed at the business domicile whether or not taxed elsewhere; and to revive the abandoned doctrine that vessels may be taxed in full at the home port, while rejecting the correlative rule that they are exempt from taxation elsewhere, is to disregard the teachings of experience and precedent." Northwest Airlines v. Minnesota, 322 U.S. 292, 320 (1944).

35. Nippert v. City of Richmond, 327 U.S. 416 (1946).

36. *Id.* at 431.

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commissions in excess of $1,000. Richmond had sought to justify the tax as a "local incident," non-discriminatory and without possibility of a cumulative burden.

But Justice Rutledge, writing the majority opinion, saw the danger of discrimination magnified by the fact that it was a municipal tax, which could be levied in succession by every city a drummer visited, without relation to volume, its net effect that of a $50 toll gate into every city.[37]

Justices Douglas, Black and Murphy dissented, demanding proof that there was sufficient cumulative burden as to be discriminatory.

V

If there were any doubt after *McLeod v. Dilworth* and *Nippert v. City of Richmond* as to Justice Rutledge's philosophy of "direct" taxation, that doubt was resolved by two documents he drafted and/or delivered in 1946. The first was *A Declaration of Legal Faith,*[38] a compilation of lectures he gave that year at the University of Kansas. The other was his opinion in *Freeman v. Hewit,*[39] a case involving the levying of an unapportioned Indiana gross receipts tax on the proceeds of capital stock sold on the New York Stock Exchange for the benefit of an Indiana resident's estate. Justice Rutledge concurred in the majority opinion that the tax should be struck down but dissented violently from the grounds on which the court bottomed its decision.

The majority opinion, he accused, "is a reversion to ideas once prevalent, but long since repudiated . . . which, if now resurrected for general application, will strike down state taxes in a great variety of forms sustained consistently of late."[40]

> Not since Cooley v. Board of Wardens, 12 How. 299, has the notion prevailed that the mere existence of power in Congress to regulate commerce excludes the states from exacting revenue from it through exercise of their powers of taxation.[41]

This was the thesis developed in his Kansas lectures,[42] where he asserted that time has rejected the Marshallian "emphasis

37. "The tax here in question contains too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce in favor of local competing business." *Id.* at 434.
38. RUTLEDGE, A DECLARATION OF LEGAL FAITH (1947).
39. 329 U.S. 249 (1946).
40. *Id.* at 261, 262.
41. *Id.* at 262.
42. Rutledge, *op. cit. supra* note 38 at 55.

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upon the 'exclusiveness' of Congress' power" and its corollary regard of "the commerce clause as effective to nullify state laws 'of its own force' without reference to any inference of Congress' intent from its silence."[43]

> The early broad idea of complete and total mutual 'exclusiveness' departed with Cooley v. Board of Wardens, never to return. The 'silence of Congress,' taken as an expression of legislative will, no longer is adequate for outlawing state laws. Judges do not now seem to find conflict between what the state has done and what Congress has not done in its 'silently expressed will.' Like others, judicial fingers burnt tend to avoid the flame. The idea that Congress has 'occupied the field,' and thereby precluded legislation by the states, though not altogether eliminated, works within narrower confines. . . . And *the notion has been put to rest, one may hope, that the commerce clause is itself either a limitation upon Congress' power within the field of commerce or one upon the conjoined and consistent exercise of the powers of Congress and the states.*[44] (Emphasis added).

Justice Rutledge could hope, but there was nothing in the majority opinion of *Freeman v. Hewit* to fulfill his hope. For the rationalization of the majority opinion, as he reiterated it, was that "the tax as applied is laid 'directly on' interstate commerce,

43. Of Marshall's trinitarian conception—(1) broad definition of commerce, (2) broad idea of regulation and (3) exclusiveness of Congressional regulation of commerce—Justice Rutledge wrote: "Time has confirmed Marshall's ideas of two of them. Thus, his broad conception of 'commerce' has stood, though not without wavering, as we have shown. As to 'regulation,' the effects of powers when exercised, rather than their labels or purported abstract 'nature,' came to be the more important thing. Not 'regulation' therefore or 'commerce,' but 'complete exclusion' was to give way. Not altogether, however. Exclusion the clause did provide. But it was not necessarily or, as it turned out, appropriately, to be complete and total." *Id.* at 67.

Justice Rutledge also reviewed at length Justice Taney's diametrically opposing views that (1) in the silence of Congress the state may act, and (2) implied negations of state power, like affirmative exertions of federal, come from Congress, not from the courts or from the Constitution operating independently of Congress' will: "In the long flood of litigation which the prohibitive aspect of the commerce clause has created, Marshall's universal exclusion has been rejected; and Taney's denial of any implied direct constitutional exclusion, in his transfer of the exclusion from constitutional grounding to legislative foundation in Congress' silence, likewise has not stood the test of time. But the gist of Marshall's work has survived. And Taney's work aided in bringing it down to practical proportions appropriate for a federal democracy, in which the states and the Congress largely may work together, concurrently regulating commerce, but in which still the federal power is supreme, will override inconsistent local action, and on occasion will enable the states to act where otherwise they might do so." *Id.* at 70.

44. *Id.* at 70.

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is a levy 'on the very sale' or 'the very process' of such commerce, is therefore and solely thereby a 'burden' on it, and subsequently is an exaction the commerce clause forbids."[45]

Justice Rutledge found not only his hopes dashed but his worst fears confirmed. His concurring opinion was an intellectual bill of indictment, so keen was his personal disappointment at seeing the court revert to the formalism of another day,[46] thereby declining his direction to a more pragmatic approach.

His opinion charged first that by grounding its new decision on a wholly different foundation, the court either had qualified or repudiated the doctrine of *Adams Mfg. Co. v. Storen.*[47] The *Adams* case had held the same Indiana tax invalid when applied, without apportionment, to gross receipts derived from interstate sales of goods made by Indiana manufacturers, who sold and shipped them to purchasers in other states. This time the tax was struck down again, but solely because it was a "direct" tax on interstate commerce. The telltale tests of the *Adams* case—(1) lack of apportionment and (2) danger of multiple taxation—were ignored,[48] Justice Rutledge complained.

As Justice Rutledge saw it, the vices of such a decision were legion. He had complained before that the *Adams* ruling created a tax refuge by relieving interstate commerce from liability to pay taxes, unless apportioned, in either state. By ignoring its previous saving clause, "without apportionment," the new decision, Justice Rutledge believed, could give tax exemption even where the levy was apportioned:

> The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the commerce clause. The present decision, by its reversion to the formal and discarded grounding in the 'direct incidence' of the tax, is a reversal of that trend. It is one, moreover, unnecessary for sustaining the result the court has reached. Its conse-

45. Freeman v. Hewit, 329 U.S. 249, 261 (1946).

46. Justic Frankfurter's position was unequivocal: "Nor is there any warrant in the constitutional principles heretofore applied by this court to support the notion that a state may be allowed one single-tax-worth of direct interference with the free flow of commerce." *Id.* at 256.

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

48. Referring to the cumulative burden doctrine which flashed brilliantly in the legal sky in 1938 and then seemed quickly to burn itself out, Justice Frankfurter wrote: "If another state has taxed the same interstate transaction, the burdensome consequences to interestate trade are undeniabl. But that, for the time being, only one state has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated." *Id.* at 256.

> quence, if followed in logical application to apportioned taxes, will be to outlaw them, for they bear as 'directly' on 'the commerce itself' as does the tax now stricken down in its present application.[49]

In short, Justice Rutledge took the majority decision to mean that, unlike the *Adams* court, the present court would hold the Indiana tax invalid even if apportioned.[50] His own invalidation of the tax, he was careful to point out, was designed to avoid the "cumulative and therefore discriminatory tax burdens which would rest on or seriously threaten interstate commerce if more than one state is allowed to impose the tax, as does Indiana, upon the gross receipts from the sale *without apportionment or credit for taxes validly imposed elsewhere.*"[51] (Emphasis added).

Thus he reaffirmed the state of market tax philosophy he had introduced in *McLeod v. Dilforth*:

> I think the solution most nearly in accord with the commerce clause, at once most consistent with its purpose and least objectionable for producing either evils it had no design to bring or practical difficulties in administration, would be to vest the power to tax in the state of the market, subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination. This too is more nearly consonant with what the more recent decisions have allowed, *if full account is taken of their effects.*[52] (Emphasis added).

Justice Rutledge acknowledged that his state of market formula would deny the power to tax to the state of origin,[53] but he pointed out that the forwarding state "has no greater power

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49. *Id.* at 282.
50. *Id.* at 283.
51. *Ibid.*
52. *Id.* at 279.
53. He recognized "three alternative methods for avoiding the multiple state tax burden: (1) To apply the Adams ruling, stopping such taxes at the source, unless the tax is apportioned . . . (2) to rule that either the state of origin or the state of market, but not both, can levy the exaction; (3) to determine factually in each case whether application of the tax can be made by one state without incurring actual danger of its being made in another or the risk of real uncertainty whether in fact it will be so made. . . . The Adams ruling . . . creates for many situations a tax refuge for interstate commerce and does this in both states. . . . To require factual determination of forbidden effects in each case would be to invite costly litigation, make decision turn in some cases, perhaps many, on doubtful facts or conclusions, and encourage the enactment of legislation involving those consequences." *Id.* at 278, 279. It is to be noticed that he purposefully omitted reference to a fourth alternative the "leave it to Congress" view, first enunciated by Justice Taney and followed consistently since Western Live Stock v. Bureau of Revenue, *supra,* by Justice Black.

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under the *Adams* ruling and none at all under the present one if it is to be applied consistently and, as I think, this can be taken to outlaw both unapportioned and apportioned taxes."[54]

Justice Rutledge did not like the *Adams* decision. He believed the court (1) therein created a tax refuge, (2) failed to distinguish the tax on manufacturing in *American Mfg. Co. v. St. Louis*[55] from admitted gross receipts taxes, and (3) by its very thesis, ruled out any taxation by the state of destination.[56] But he much preferred the *Adams* decision to that in *Freeman v. Hewit.* For under the *Adams* ruling, taxes in the state of origin at least would be saved by apportionment. This fact, coupled with the court's recognition of use taxes and the state of market tax in *McGoldrick v. Berwind-White,* was the keystone of Justice Rutledge's tax formula.[57] Under the latter decisions he believed a tax by New York on the *Freeman* transaction would be upheld:[58]

> Indeed, in my opinion, the necessary effect of McGoldrick v. Berwind-White Co., as appellee asserts, is to sustain power in the state of market to tax 'to the fullest extent,' without apportionment by non-discriminatory taxes of general applicability, transactions essentially no different from the ones involved in this case and in the Adams case.[59]

Taking cognizance of the court's distinction of the *McGoldrick* case on the basis of the local incident of "transfer of possession," Justice Rutledge said:

> Apart from the reasons I have set forth above for regarding this as not controlling, that basis was flatly repudiated in Nippert v. Richmond, 327 U.S. 416, as adequate for sustaining a tax having otherwise the forbidden effects and features. So here, in my opinion, it is hardly adequate to distinguish the Adams case, *leaving it unimpaired,* or to differentiate consistently the broader ruling made in this case.[60] (Emphasis added).

54. *Id.* at 280.
55. 250 U.S. 459 (1921).
56. Freeman v. Hewit, 329 U.S. 249, 268 (1946).
57. For an illuminating discussion of whether substantial barriers to interstate trade should be struck down until Congress can be induced to approve them, or whether they should stand until Congress disapproves them, see Lockhart, *State Tax Barriers to Interstate Trade,* 53 HARV. L. REV. 1257 (1940).
58. Freeman v. Hewit, 329 U.S. 249, 280 (1946).
59. *Id.* at 281.
60. *Ibid.*

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Thus Justice Rutledge's conclusion to the whole matter:

> I therefore agree with the appellee that the effect of the Berwind-White ruling was in substance, though not in words, to qualify the Adams decision, and that *the combined effect of the two cases, taken together, was to permit the state of the market to tax the interstate transaction, but to deny this power to the forwarding state, unless by credit or otherwise it should make provision for apportionment.*[61] (Emphasis added).

Being the levy of a state of origin, without the saving grace of apportionment or credit to the state of market, the Indiana tax, he held, must fall.

VI

A widely divergent view of Justice Rutledge's theory concerning multiple taxation is presented in a scholarly review of the late justice's tenure, which appeared recently.[62] Alleging a "shift in position"[63] by Justice Rutledge between the *McLeod v. Dilworth* and the *Freeman v. Hewit* decisions, the author said in part:

> 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

61. *Ibid.*

62. Rockwell, *Justice Rutledge on State Taxation of Interstate Commerce*, 35 CORNELL L. Q. 500 (1950).

63. In alleging a "shift of position," Mr. Rockwell cites from Justice Rutledge's A Declaration of Legal Faith: "His shift in position on this question of potential multipe 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.'" *Id.* at 500. It is submitted that when this extract is read in its entire context and compared with similar wording in his *Freeman v. Hewit* opinion it is obvious that Justice Rutledge was referring to the court's chameleonic character in the early "forties" and not to any prospective personal change: "Nevertheless the general problem of adjustment remains. It has only been transferred to a level more tolerant of both state and federal legislative action. On this level a new or renewed emphasis on facts and practical considerations has been allowed to work. Notwithstanding this, old doctrine retains influence. 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. This 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.*" Rutledge, *op. cit. supra* note 38 at 69.

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> 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 deemed necessary, when the majority espoused it because of a similar potential multiple tax burden in McLeod v. Dilworth.* 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.[64] (Emphasis added).

While Justice Rutledge's opinion in the *McLeod v. Dilworth* case overflowed with references to the evils of cumulative burdens, it contained no objection to the "closed door policy" to which the author alludes. Indeed, it was because he objected to the "open door policy" which he said due process accorded to both states that he found it necessary to choose between the state of origin and the state of market, and chose the latter.

VII

Justice Rutledge's permissible area of direct taxation probably reached its widest—and certainly its most controversial—bounds later in 1947 when he joined Justice Douglas in dissenting to a decision[65] which invalidated a New York City gross receipts tax on stevedoring. In a 5-2-1-1 decision the court held that as loading and unloading are essential parts of transportation, they can-

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64. Rockwell, *supra* note 61 at 500.
65. Joseph v. Carter & Weekes Co., 330 U. S. 422 (1947).

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not be separated from interstate commerce for purposes of taxation.

Although the case exactly paralleled *Puget Sound Stevedoring Co. v. State Tax Commission,*[66] the court granted certiorari because petitioners argued that subsequent holdings[67] of the court had indicated that the reasons which underlie that decision were no longer controlling. The court overruled the suggestion and affirmed the *Puget Sound* decision, holding "those activities are not only preliminary to but are an *essential* part of the safety and convenience of the transportation itself."[68] (Emphasis added).

The dissenting opinion, which Justice Rutledge endorsed, conceded that a direct tax was being levied, but contended that by its very nature as a tax on gross receipts from activities solely within New York City, it provided for automatic apportionment and precluded multiple taxation. The possibility of another levy on loading and unloading at the other end of the interstate journey was dismissed with the statement:

> It is no more relevant that stevedoring is involved in both cases, than is the fact that two States may impose property taxes on terminals or trackage within their respective borders.[69]

Citing the line of cases beginning with *Maine v. Grand Trunk Ry. Co.*[70] "which sustained gross receipts taxes on business engaged in interstate commerce, including transportation and communication, and the new line of cases beginning with *Western Live Stock v. Bureau of Revenue,* which made apportioning the decisive factor," the dissent held that both the *Puget Sound* and *Carter & Weekes* taxes "therefore seem unobjectionable."[71] It

66. 302 U. S. 90 (1937).
67. Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938); Southern Pacific v. Gallagher, 306 U. S. 167 (1938) (Goods having come to rest, California use tax held applicable to railroad's out-of-state purchases, even though some parts were made-to-order and were installed immediately on interstate transportation facilities); McGoldrick v. Berwind-White Co., 309 U. S. 388 (1940); Dept. Treasury v. Wood Preserving Co., 313 U. S. 62 (1940) (Indiana gross receipts tax sustained where seller, a Delaware corporation with principal place of business in Pennsylvania, obtained ties from Indiana producers and delivered them in Indiana to buyer in completion of sales contract made outside Indiana).
68. Joseph v. Carter & Weeks Co., 330 U. S. 422, 428 (1947).
69. *Id.* at 438.
70. 142 U. S. 217 (1891).
71. Joseph v. Carter & Weekes Co., 330 U. S. 422, 441 (1947).

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reminded that the "subject matter" test of *Robbins v. Shelby County Taxing District*,[72] was abandoned by the *McGoldrick v. Berwind-White* court. In its place the court,

> . . . following Wiloil Oil Corp. v. Pa., 294 U. S. 169, upheld a non-discriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of a sales contract, not upon the ground that the delivery was not a part of interstate commerce . . . but because the tax was not a prohibited regulation of, or burden on, that commerce. Illinois Natural Gas Co. v. Central Illinois Pub. Service Comm., 314 U.S. 498, 505.[73]

In recommending an approach in the stevedoring case, the dissent quoted the late Justice Brandeis: " 'The logic of words should yield to the logic of realities.' Dissenting in Di Santo v. Pa., 273 U.S. 34, 43."[74]

But in final lament it added:

> The failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that Freeman v. Hewit, 329 U.S. 249, marked the end of one cycle under the Commerce Clause and the beginning of another.[75]

VIII

A court biographer[76] wrote of Justice Rutledge in 1947: "Rutledge is merely one of those who call them as they see them." Thus in *Memphis Natural Gas Co. v. Stone*,[77] where he cast the pivotal ballot in sustaining a non-discriminatory, apportioned franchise tax which Mississippi had levied on a pipeline running through that state, Justice Rutledge wrote a separate opinion in order to call the tax as he saw it—one laid directly on interstate commerce, but saved by apportionment.

The majority opinion, written by Justice Reed, with only Justices Douglas, Murphy and Black joining, had refused to go that far. Instead it distinguished the "local activities in maintaining, keeping in repair, and otherwise manning the facilities of the system in Mississippi" as "events apart from the flow of commerce," although admitting "of course the interstate commerce could not be conducted without these local activities."

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72. 120 U. S. 489 (1887).
73. Joseph v. Carter & Weekes Co., 330 U. S. 422, 440 (1947).
74. *Id.* at 444.
75. *Ibid.*
76. McCune, The Nine Young Men, 206 (1947).
77. 335 U. S. 80 (1947).

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Accepting the Mississippi Supreme Court's interpretation that the tax was not on the "privilege of doing business,"[78] as the phrase was meant in those statutes which had been held invalid, the majority sought to determine if the "local incidents" essential to interstate commerce were so burdensome as to be prohibited. It noted that the court had approved several excise taxes which *affected* interstate commerce as much or more than the Mississippi levy.[79] But the court declined to take the step for which Justice Rutledge had been waiting—recognition that incidents "essential to" commerce were commerce itself.[80] Instead it held: "These are events apart from the flow of commerce."

Justice Rutledge had always looked askance at the "local incident" escape clauses,[81] conjured up by the court, he believed, to rescue taxes it favored from its own forbidden area of "direct" taxation.

He suspected that the healing waters of apportionment were being misused here to legitimize the court's current brainchild, "These are events apart from the flow of commerce."

He acknowledged that there might be only a verbal difference —for this case—in the distinction between taxes "not upon, though affecting commerce" and "taxable events sufficiently sepa-

78. Several factors complicated the picture. The petitioner had not qualified to "do business" in Mississippi, was conceded to be doing only an interstate business, and by stipulation had admitted it had received no "protection" from Mississippi—the crux of the majority's decision—other than that for which it had paid its ad valorem tax. A 1942 statute provided for a "franchise or excise tax levied upon every corporation" equal to roughly one and one-half per cent of "value of capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state." It was the second time the tax had been upheld as applied to interstate pipelines. A previous Mississippi statute which required a state license as prerequisite to entering business or exercising privileges was held invalid. State Tax Commission v. Interstate Natural Gas Co., 284 U. S. 41 (1931).

79. Union Brokerage Co. v. Jensen, 322 U. S. 202 (1944) (fee for the privilege of using state courts, exacted by the state from a business licensed by the United States to handle customs charges); Aero-Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 (1947) (special privilege tax upon an interstate automobile transportation company for the use of state roads).

80. The four dissenting justices agreed with Justice Rutledge, of course, that a direct tax was being laid here: "For we are all agreed that where the only 'local incident' is the fact of interstate commerce—that the interstate pipe line goes through Mississippi. . . ." Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 102 (1947).

81. As differentiated from Justice Rutledge's view of the same as only the sine qua non factual incidents necessary to nullify due process prohibitions. See note 20 *supra*.

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rate from the commerce, *whether by reason of apportionment or otherwise,* to sustain the tax."[82] But the distinction, he believed, might lead to a reversion to "rationalizations which make merely verbal formulae without reflection of difference in substantive effects controlling in these matters."[83]

The tax measured up to his four requirements for exemption from the Commerce Clause ban: (1) a factual connection to give jurisdiction, (2) non-discrimination, (3) apportionment, (4) absence of a cumulative burden. He thus protested limiting the effectiveness of apportionment to the validation of "events apart from the commerce" when he deemed it sufficient to justify a direct tax.

Since the appellant transacted no intrastate business in Mississippi and the parties by agreement had stipulated that the only protection or enjoyment of privilege was that for which ad valorem taxes had been paid, the issue finally simmered down to: Can a state impose more than one tax of the same type on the apportioned capital investment of a wholly interstate business?

The four majority justices avoided the question by holding the events "apart from interstate commerce." The four dissenting justices answered, No. Justice Rutledge answered, Yes.[84]

IX

Mississippi's pipe lines were back in court again in 1948.[85] This time it was oil instead of gas lines involved, the tax was for the privilege of doing business[86] instead of for "protection" of

82. Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 97 (1947).
83. *Id.* at 98.
84. "Nothing in the commerce clause or its great purpose forbids such an exaction. Nor is the state limited to a single exaction for different or like protections afforded, so long as each is safe-guarded against prohibited effects upon commerce, as are those laid by Mississippi, and their aggregate cannot be shown to contravene the clause's purpose." *Id.* at 98, 99.

Justice Rutledge reiterated this view in Aero-Mayflower Transit Co. v. Railroad Commission, 332 U. S. 495, 506 (1947). There Montana had levied a flat tax of $10 per vehicle and a gross revenue tax, with a minimum of $15 per vehicle, on a foreign corporation doing an exclusively interstate business. The statute specified that it was "for the use of the highways" and "not on the privilege of doing interstate business." The petitioner challenged the double tax on the single event. Writing the majority of opinion—incidentally his only opinion in the field of taxation to which there was no dissent—Justice Rutledge said: "It is of no consequence that the state has seen fit to lay two exactions, substantially identical, rather than combine them into one, or that appellant pays other taxes which are in fact devoted to highway maintenance."

85. Interstate Pipe Line Co. v. Stone, 337 U. S. 663 (1948).
86. In Ozark Pipe Line Co. v. Monier, 266 U. S. 555 (1925) the court

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the investment, and again the statute was upheld by a scant 5-4 margin. It was Justice Burton's concurrence "solely on the ground that the tax . . . was . . . on the privilege of operating a pipe line . . . in intrastate business" which saved the tax.

Justice Burton's qualified concurrence was necessary in view of Justice Rutledge's reaffirmation of his apportioned direct tax theory in introducing his majority decision:

> We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce, *for even if we assume that it is, Mississippi has power to impose the tax involved in this case.*[87] (Emphasis added).

Involved was a pipe line system lying wholly within the state, originating at the various lease wells and terminating at loading racks or tanks which the appellant maintained beside an interstate railroad. The appellant was paid a fee for pumping the oil from the wells to loading racks or storage tanks and another fee for pumping the oil into tank cars. Delivery of the oil to appellant by the owner was accompanied by instructions for shipping it interstate. Storage while awaiting tank cars never exceeded one week. Mississippi imposed a franchise tax on the privilege of operating any intrastate business, including the operation of a pipe line, measured by two per cent of the gross receipts. The statute specifically exempted oil delivered directly into interstate oil pipe lines.[88]

The Mississippi Supreme Court held that the interstate journey had not begun when the appellant completed his last act, the delivery of the oil from the loading racks or storage tanks to the railroad cars. It pointed out that the oil could have been diverted by the owner to downstate points, and held that the shipping contract listing an out-of-state destination was not controlling as to the interstate character of the shipment.

But Justice Rutledge again left no doubt that he was approving a direct tax on interstate commerce:

> The statute is not invalidated by the commerce clause of the Federal Constitution merely because, unlike the statute attacked in Memphis Gas Co. v. Stone . . . it imposes a 'direct'

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had held that an annual franchise tax, apportioned by the amount of capital and surplus employed within the taxing state was invalid as a tax "upon the privilege or right to do business."

87. Interstate Pipe Line Co. v. Stone, 337 U. S. 663, 666 (1948).

88. In contrast to that deposited for pick-up at the depot. After June, 1946, the company began shipping all its oil through these trunk lines, elminating any tax question posed by their delay in transit.

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> tax on the 'privilege' of engaging in interstate commerce. Any notions to the contrary should not have survived Maine v. Grand Trunk R. Co., which flatly rules the case at bar. That case sustained a state statute which imposed upon an interstate railroad corporation 'an annual excise tax (measured by apportioned gross receipts) for the privilege of exercising its franchises in this state.'[89]

Justice Rutledge found (1) sufficient factual connection to give due process jurisdiction, (2) no discrimination, (3) apportionment unnecessary because of the nature of the subject, and therefore (4) no possibility of a cumulative burden. In view of this he asserted it was unnecessary to consider the Mississippi court's finding that the operations were intrastate.

The four dissenting justices, speaking through Justice Reed, who had written the majority opinion in the *Memphis Natural Gas Co.* case, found the *Grand Trunk* case inapposite. That decision, they held, stands only for the proposition that when a corporation doing *both* interstate and intrastate business qualifies to do the latter, the state may then—and then only—impose as the basis of its franchise tax a gross receipts levy apportioned to the mileage within the state. But this was the ultima Thule of the dissent's area of permissible taxation. A state cannot tax the privilege of doing a wholly interstate business, the dissent reiterated, "because the Commerce Clause . . . does not leave to the states any power to permit or refuse the carrying on of interstate commerce."[90]

The case thus served only to enrich the Mississippi state treasury by $20,296.36 and to emphasize the wide variation in tax philosophy within the court in 1948. A clear majority was not given to either the issue of whether the transaction was interstate or intrastate, or to the more pertinent question of whether an apportioned tax could now be levied for the privilege of doing an interstate busines.

SUMMARY

Time alone will evaluate Justice Rutledge's contribution to constitutional interpretation. But none can ever doubt the sincerity of his purpose or fail to admire his unceasing effort to articulate the court's thinking on the recurring problem of state taxation.

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89. Interstate Pipe Line Co. v. Stone, 337 U. S. 663, 666 (1948).
90. *Id.* at 680.

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Justice Rutledge entered the forum in the spirit of a true scholar, bent on scientific research. Due deference was paid to the wisdom of those who preceded him. But no blind obeisance was made to the decisions of yesteryear if the fact situations which fathered them had been displaced by new problems with new consequences in the commercial world he observed around him.

His tax philosophy was oriented to the consumer who paid the taxes. Hence his constant attention and preference to the state of market.

He believed it was to indulge in fancy and to ignore fact to hold that interstate commerce continues up to the moment of delivery and ends one inch short of the goods' destination. To so hold was to exalt the "local incident," to stimulate vain searches for the will-o-the-wisp.

Justice Rutledge found no constitutional objection to direct taxation of interstate commerce simply because it was "direct." The evil to be avoided, he pointed out, was only a cumulative or discriminatory burden.

His judicial yardstick, unlike that of the traditional school, did not provide any basis for measuring "directness" or "indirectness." It measured only discrimination and apportionability. If an interstate transaction was non-discriminatory and apportionable, the pro rata tax was sustained.

In short, he would ascribe no "holy of holies" deference to that area found by formalistic decisions to be "directly" burdened and therefore sacrosanct.

Justice Rutledge found a contradiction in the court's refusal, on the one hand, of permission to states to tax the privilege of doing an apportioned part of interstate business and recognition, on the other hand, of the power of the state to include that same portion of interstate business in computing the basis of a privilege tax on doing an intrastate business, no matter how relatively small the intrastate activities.

He recognized that interstate commerce in the transportation field was not a single unsegregable transaction but was the aggregate of all intrastate transactions which went into its completion. Since intrastate transactions duplicating the segregated functions could be taxed by the respective states, he believed that the

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states also should be permitted to tax the apportioned part of interstate commerce.

This, of course, would short circuit the traditional determination by the court, case by case, of what is interstate commerce. But removing interstate commerce from the realm of "mooted" questions would have been all right with Justice Rutledge. For he believed that a formula applicable only to a single situation was not a formula at all, but only an explanation.

The court had permitted state non-discriminatory taxation for the use of state facilities, upon the property used in interstate commerce, upon production for commerce, upon net proceeds therefrom, and, when used as a measure of franchise taxes, an apportioned levy on the gross receipts of interstate transportation and communication.

Justice Rutledge indicated that he would go even further and permit an apportioned levy on gross receipts of interstate transportation "straight across the board" if the transaction lent itself to proper apportioning.

To the conservative bloc within the Supreme Court this was the grossest heresy, an about-face no less radical than the doctrine of Roger Taney.

Death ended this duel of taxation philosophies, and the conservative view prevails today. But the shifting sands of time have wrought many changes in Supreme Court philosophy since 1930. One wonders if Justice Rutledge's views have gone to stay.

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