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TAXATION -- STATE SALES TAXES IN RELATION TO INTERSTATE COMMERCE -- THE BERWIND-WHITE CASE

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TAXATION — STATE SALES TAXES IN RELATION TO INTERSTATE COMMERCE — THE BERWIND-WHITE CASE — One of the underlying theories of the constitutional framework, as exemplified by the commerce clause, is that there shall be a free national market, unhampered by state tariffs or restrictions. Congressmen are free to ward off the rigors of disastrous foreign competition by bringing home industries under the protective umbrella of high national tariffs, but state legislators are supposed to be powerless to protect their local industries from the damaging competition—that "most potent stimulant to improvement and progress" [1]—emanating from other states.

Unfortunately for this theory, practical considerations have eaten

[1] HOOVER, THE CHALLENGE TO LIBERTY 28 (1934).

away a large part of it. Certain necessary interferences with interstate commerce by the states are justified under their taxing and police powers. And these powers in turn have proved fertile growing ground for an ever-increasing economic provincialism, or "balkanization," by the states. Reflecting to a certain extent the forces of isolation and nationalism in the world at large, the several states have set up countless forms of interstate trade barriers.[2] They have neatly veered around the prohibitions erected by the courts and enacted a plethora of excise taxes, license taxes, chain store taxes, foreign corporation taxes, quarantines, and embargoes—many of which bear remarkable resemblance to protective tariffs in form and spirit. "They are forbidden by the Constitution to curtail interstate commerce by enacting tariff laws, but there are other ways of skinning the cat."[3]

Nevertheless, the free national market tradition remains a potent factor in certain areas of constitutional law—often with adverse results. Especially is this true where states have passed revenue producing measures to meet the growing demands on state governments. The general retail sales tax has proved to be one of the most popular and productive of these measures. Twenty-three states at present have such taxes, ranging in amounts from one to three per cent.[4] New York City and New Orleans have city sales taxes, along with six cities in West Virginia. But the constitutional difficulty is at once apparent. The forty-eight state boundaries do not correspond in the least to economic buying areas. Many sales are therefore interstate. Under traditional concepts, it has heretofore been thought that such sales are immune from taxation by either the seller's state or the buyer's state. This naturally results in an advantage or subsidy to the out-of-state seller. Trade tends toward him, though how important this shift has been is not known.[5] The

[2] MELDER, STATE AND LOCAL BARRIERS TO INTERSTATE COMMERCE IN THE UNITED STATES (1937) (Univ. Maine Studies, 2d series, No. 43); Jackson, "The Supreme Court and Interstate Barriers," 207 ANNALS 70 (1940); Brown, "The Legal Aspects of Trade Barriers," 25 BULL. NAT. TAX ASSN. 98 (1940); W.P.A., COMPARATIVE CHARTS OF STATE STATUTES ILLUSTRATING BARRIERS TO TRADE BETWEEN STATES (1939); 34 ILL. L. REV. 44 (1939).

[3] Editorial in 131 N. Y. TIMES 18:2 (May 11, 1932).

[4] Two states have 1% taxes, 15 have 2% taxes, and 6 have 3% taxes. See tables in 8 TAX LEGISLATION BULL. No. 1 (1940) and 13 STATE GOVERNMENT 54 (1940). An excellent analysis of the sales tax in general is contained in JACOBY, RETAIL SALES TAXATION (1938). For the constitutional problems involved, see 33 MICH. L. REV. 614 (1935).

[5] It is impossible to obtain an accurate determination of the extent to which local business in the various states has lost trade to interstate sellers. However, competent observers believe it to be rather extensive, especially in higher priced articles. See the surveys contained in HAIG and SHOUP, THE SALES TAX IN THE AMERICAN STATES (1934).

buyer's market becomes unequal so far as sales taxes are reflected in the prices. In addition, the state loses revenue.

To remedy this inequality, seventeen of the sales tax states, plus New York City and New Orleans, have adopted use taxes, levied on the storage, use, or consumption in the state of tangible personalty on which no sales tax has been paid.[6] But due to the difficulty of enforcement, the use tax has not provided a satisfactory answer to the problem.

Great importance must be attached, therefore, to the latest attempt by the United States Supreme Court to settle this minor tempest on the national scene. In *McGoldrick v. Berwind-White Coal Mining Co.*,[7] the Court had before it the two per cent sales tax levied by New York City for the relief of the unemployed.[8] The Berwind-White Company was incorporated in Pennsylvania and maintained a sales office in New York City. From this office, contracts were made with New York City customers for the sale of coal. The coal was mined in Pennsylvania, sent by rail to Jersey City, and then delivered by the seller's barges to the customers in New York City. The majority of the Court, speaking through Justice Stone, upheld the application of the city sales tax to this transaction, stating that the commerce clause was not infringed thereby. Chief Justice Hughes, with the backing of Justices McReynolds and Roberts, delivered a spirited dissent.

This case, plus the companion cases of *McGoldrick v. Felt & Tarrant Mfg. Co.*,[9] *McGoldrick v. A. H. DuGrenier, Inc.*,[10] and *McGoldrick v. Compagnie Generale Transatlantique*,[11] affords an oppor-

[6] See tables in 8 TAX LEGISLATION BULL. No. 1 (1940) and 7 TAX POLICY, No. 2 (1939). The rates are the same as those imposed by the respective sales taxes. In general, see Warren and Schlesinger, "Sales and Use Taxes: Interstate Commerce Pays Its Way," 38 COL. L. REV. 49 (1938); Waters, "An Appraisal of Use Taxes," 25 BULL. NAT. TAX ASSN. 114 (1940).

[7] 309 U. S. 33, 60 S. Ct. 388 (1940).

[8] N. Y. Local Laws (1934), City of New York Local Law No. 24 (published as No. 25). For a discussion of the reasons leading to the adoption of this law by New York City, see Baum, "Legal Phases of Local Sales Tax," 14 N. Y. UNIV. L. Q. REV. 28 (1936); and Criz, "Emergency Taxes in New York City Since 1933," 18 TAXES 97 (1940).

[9] 309 U. S. 70, 60 S. Ct. 404 (1940). The Court upheld the application of the city sales tax on these facts: An Illinois corporation had its comptometer factory in Illinois, with a sales office in New York City. Agents from this office solicited orders in the city and forwarded them to the home office in Illinois. An accepted order was filled by shipping the machine to the New York City office, where it was inspected and then delivered to the buyer. Remittances were made direct to the Illinois office.

[10] 309 U. S. 70, 60 S. Ct. 404 (1940). Here the tax was sustained under these facts: A Massachusetts corporation sold vending machines through an exclusive sales agent with offices in New York City. Orders taken by agents were sent to the Massachusetts office and filled by shipping direct to the purchasers.

[11] (U. S. 1940) 60 S. Ct. 670. Here the tax was applied to a French steamship company, with offices in New York City, which bought oil from the Standard Oil

tunity for a survey and analysis of the various concepts and doctrines at large in the field of state taxation affecting interstate commerce. A new well is now open for the states to tap and it is important to attempt to determine the dimensions. But it must be noted that nothing definite can be ascertained, for the Court itself has blended together conflicting principles, any one of which may become dominant in the future. These principles, to be discussed herein, may be called the immunity doctrine, the cumulative burdens doctrine, the equality doctrine and the judicial impotence doctrine.

I.

The commerce clause itself appears quite innocent. It merely states that Congress shall have the power to regulate commerce among the several states and with foreign nations. Nothing whatever is said in regard to the power of states to burden or tax interstate commerce. But this simplicity has not prevented the Court, in the absence of Congressional activity, from erecting a complicated immunity doctrine that has long been regarded as absolute. This doctrine has two aspects: (1) a state cannot tax or burden interstate transactions and their integral parts directly, even in a non-discriminatory manner; (2) a state may burden interstate commerce indirectly if there is no discrimination against such commerce.[12] The real meat of the doctrine is contained in the first part, tersely restated in *Robbins v. Shelby County Taxing District*[13] as "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce. . . ."

Although the Court would not admit it, the states are allowed to tax interstate commerce today in a variety of ways in spite of the forceful statements of this dogma. States have constantly demanded protection for local industry and more revenue. Under this pressure, the Court has robbed the doctrine of much of its substance by weaving an amazingly contradictory web of distinctions and refinements. Only reluctance to abandon lip service to the doctrine and to focus attention on the economic realities has kept it alive.

Co. of New Jersey, which also had a New York City office. The contracts were made in New York City. The oil was all stored in New Jersey and was delivered in the oil company's barges direct to the purchaser's vessels in the New York harbor.

[12] Justice Brandeis gives this bifurcated principle in dissenting in Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150 at 155, 44 S. Ct. 242 (1924).

[13] 120 U. S. 489 at 497, 7 S. Ct. 592 (1887). For a thorough analysis of the basis and importance of this case, see Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 (1939). Several conflicting state court decisions involving much the same facts as in the Robbins case have appeared recently: City of Waseca v. Braun, 206 Minn. 154, 288 N. W. 229 (1939); State v. Yetter, 192 S. C. 1, 5 S. E. (2d) 291 (1939); Best & Co. v. Maxwell, 216 N. C. 114, 3 S. E. (2d) 292 (1939), noted in 18 N. C. L. REV. 48 (1939), rehearing denied, 217 N. C. 134, 6 S. E. (2d) 893 (1940).

Several ex post facto rationalizations have been attempted in order to bring order out of the resulting chaos, but with little success. Justice Stone in the *Berwind-White* case suggests two of them:

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage."[14]

and

> "Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state."[15]

But from practical and economic standpoints, these justifications fall of their own weight when applied to the actual distinctions made.

In determining what is a direct or indirect burden on interstate commerce, the Court has moved through highly intricate legal gymnastics. At one time, a concern's gross receipts from both interstate and local commerce were held taxable.[16] But the Court early reversed itself and has consistently held such a tax void because of the notion that it is a direct burden and "affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise."[17] Assuming that such a tax places "interstate commerce at a competitive disadvantage" or that its "burden falls on economic interests without the state," strange it is that the very same tax has been upheld when imposed in lieu of a property tax[18] or when imposed on the privilege of manufacturing[19]—gross receipts from local and interstate commerce

[14] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 45, note 2, 60 S. Ct. 388 (1940).

[15] Ibid., 309 U. S. at 46, note. Professor Traynor suggests this same justification in his excellent article "State Taxation and the Commerce Clause in the Supreme Court, 1938 Term," 28 CAL. L. REV. 168 at 175 (1940).

[16] State Tax on Railway Gross Receipts, 15 Wall. (82 U. S.) 284 (1872); Osborne v. Mobile, 16 Wall. (83 U. S.) 479 (1872).

[17] United States Glue Co. v. Oak Creek, 247 U. S. 321 at 329, 38 S. Ct. 499 (1918). Justice Black, dissenting in Adams Mfg. Co. v. Storen, 304 U. S. 307 at 325, 58 S. Ct. 913 (1938), points out the anomaly of determining the validity of a tax by whether or not there has been a profit made.

[18] United States Express Co. v. Minnesota, 223 U. S. 335, 32 S. Ct. 211 (1912); Pullman Co. v. Richardson, 261 U. S. 330, 43 S. Ct. 366 (1923).

[19] American Mfg. Co. v. St. Louis, 250 U. S. 459, 39 S. Ct. 522 (1919). See the interpretation given this case in Adams Mfg. Co. v. Storen, 304 U. S. 307 at 312, 58 S. Ct. 913 (1938).

being considered merely as the measure of the privilege. By a stroke of the pen, by a slight change in emphasis on what is being taxed, what was once invalid now escapes the ban of the immunity doctrine. Yet it is making a fetish of words to say that by doing indirectly what cannot be done directly the state is tapping an entirely different economic value or that the tax does not place interstate commerce at a competitive disadvantage. The distinction is one between tweedledum and tweedledee. The shareholders' equity in a corporation's assets is taxed just as much whether the tax is on the gross receipts directly or upon the privilege of manufacturing measured by gross receipts. "Logic and taxation are not always the best of friends;"[20] economics and taxation are not even on speaking terms at this point. Other refinements as to directness of the burden are equally as confusing.[21]

No less unrealistic are the distinctions drawn between intrastate and interstate commerce. In the domain of federal power, interstate commerce has been expanded beyond recognition.[22] But in the field of state taxation, interstate commerce and its resulting immunity have been narrowed almost to the vanishing point. A state may not tax goods actually in interstate transit, but it may tax them the instant before they start their journey or the instant they come to final rest.[23] Generation of electricity is held to be a taxable local phenomenon, while the almost instantaneous transmission is interstate. The business of manufacturing goods sold in interstate commerce is a localized, taxable event, but the business of selling goods in interstate commerce is immune—even though the same concern carries on both activities. A tax may not be imposed on the use of an instrumentality or fuel in interstate commerce, but there is no objection to taxing the storage or withdrawal of the fuel just prior to such use. And a sale has been found to be local in nature where both the buyer and seller were in the same state and

[20] Justice McReynolds dissenting in Sonneborn Bros. v. Cureton, 262 U. S. 506 at 522, 43 S. Ct. 643 (1923).

[21] See Johnson, "Multi-State Taxation of Interstate Sales," 27 CAL. L. REV. 549(1939); and comment in 48 YALE L. J. 273 (1938). A collection and discussion of the leading cases are contained in MAHANY, COMMERCE CLAUSE TAX PROBLEMS (1940).

[22] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

[23] The fact that goods have come to a final rest is the basis for sustaining the use tax; interstate commerce is said to have ceased entirely. Note the taxable split second found recently in two use tax cases. The goods were imported from outside the state, stored for a brief period, and then used in interstate commerce. The tax was upheld in both cases: Southern Pacific Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389 (1939); Pacific Tel. & Tel. Co. v. Gallagher, 306 U. S. 182, 59 S. Ct. 396 (1939).

interstate transportation was not required or contemplated, though in fact the goods were shipped interstate.[24]

These illustrative cases indicate that the Court has been led more by the exigencies of the particular situation before it than by any unifying theory grounded on economic considerations. With the self-imposed immunity doctrine before it, the Court has tried to uphold reasonable taxation of interstate commerce by the states and still keep within the words of the immunity doctrine. Perhaps the results reached are desirable, but the criteria employed and the verbal distinctions made seem unrelated to the economic issues at stake and are incapable of any consistently sound and predictable application.

It was this confused background that confronted the Court in its first encounter with a sales tax on an undeniably interstate sale in the *Berwind-White* case. There was much reason to believe that the tax was void. The *Robbins* case had said flatly that interstate transactions could not be taxed, and no case had ever squarely disputed it. Here was a golden opportunity to inject realism into the picture by overruling that statement and starting out anew.

But the force of tradition was too great. The Court, speaking through Justice Stone, refused to admit that this was a tax on an interstate sale. Instead, the form of the immunity doctrine was satisfied by designating it as a tax on the transfer of title or possession to the purchaser within New York City, measured by two per cent of the gross sale price.[25]

The only relation to interstate commerce was found in the fact that "immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end."[26] Thus there is a local event

[24] Wiloil Corp. v. Pennsylvania, 294 U. S. 169, 55 S. Ct. 358 (1935). The absurdity and futility of making the contemplation of the parties the test of the validity of the tax is pointed out by Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 at 640, note 87 (1939). See also the per curiam decision of Graybar Electric Co. v. Curry, 308 U. S. 513, 60 S. Ct. 139 (1940), affirming (Ala. 1939) 189 So. 186. Justice Stone in the Berwind-White case, 309 U. S. 33 at 55, reinterprets these two cases as sustaining the proposition that a sales tax is valid even where interstate shipment is contemplated. But both the seller and buyer were in the same state in the Wiloil and Graybar cases, distinguishing them from the Berwind-White case.

[25] A sale was defined by the ordinance as any transfer of title or possession, or both, in any manner or by any means whatsoever for a consideration or any agreement therefor. N. Y. Local Laws (1934), City of New York No. 24 (published as No. 25), § 1 (e). This is the usual definition of a sale contained in sales tax statutes. Thus a taxable event may be found in any state having a sales tax.

[26] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 49, 60 S. Ct. 388 (1940).

distinct from interstate commerce that may be taxed under the immunity doctrine. This is quite a novel idea for a tax base, however. No previous case had even intimated that transfer of title or possession per se was taxable. In fact, it has been expressly held that the unloading of goods transported in interstate commerce is an integral part of that commerce and hence beyond the power of the state to regulate.[27] And there is an interesting dictum by Justice Cardozo in *Henneford v. Silas Mason Co.*[28] that "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

There is more than a little basis, therefore, for Chief Justice Hughes' complaint that

> "The delivery is but the necessary performance of the contract of sale. Like the shipment from the mines, it is an integral part of the interstate transaction. . . . And when, as here, the buyer in an interstate sale takes delivery in his own State, that delivery in completion of the sale is as properly immune from state taxation as is the transportation to the purchaser's dock or vessel."[29]

By interpreting the transaction as it did, the majority of the Court has raised more questions than it has answered. It is not clear whether a transfer of possession within the buyer's state is a sufficient taxable event standing alone, or whether it must be coupled with an agreement for that transfer consummated within the state.[30] Both were present in New York City in the *Berwind-White* case, so the question is not answered. The problem as to f.o.b. deliveries outside the buyer's state was expressly left open, though it would seem that by holding that the actual delivery is not completed until the goods come to rest within New York City and that this is the taxable event rather than the legal transfer of possession outside the city, the door would be closed to ex-

[27] Rhodes v. Iowa, 170 U. S. 412, 18 S. Ct. 664 (1898).

[28] 300 U. S. 577 at 583, 57 S. Ct. 524 (1937). See also Heyman v. Hays, 236 U. S. 178 at 187, 35 S. Ct. 403 (1915): "substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence . . . the mere method of delivery is a negligible circumstance if in substantial effect the transaction under the facts of a given case is interstate commerce."

[29] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 64-65, 60 S. Ct. 388 (1940) (dissenting opinion).

[30] Justice Stone uses the disjunctive "either . . . or" several times in the opinion and Chief Justice Hughes apparently thought the transfer alone was sufficient under Justice Stone's analysis. But Professor Powell, in "New Light on Gross Receipts Taxes," 53 HARV. L. REV. 909 at 938 (1940), thinks that the question is still unanswered. Both the agreement and the transfer occurred within New York City in the Felt & Tarrant, DuGrenier, and Compagnie General Transatlantique cases. In the DuGrenier case, the only transfer in New York City was from the carrier to the buyer; the seller only solicited orders there. See also 40 COL. L. REV. 653 at 672-673 (1940).

tensive tax evasion by simple contract provisions. Such a holding could also be used to prevent the state where only the legal transfer of possession occurs from taxing that event. Whether there are any taxable local events pertaining to an interstate sale in the seller's state is also an unanswered question. There is confusing language appearing several times in the opinion that either transfer of title or possession is a local event. If taken literally, this might mean that where title is transferred in the seller's state, a tax could be laid thereon. But this would either open the door to tax evasion by the use of the niceties of the law of sales, which the Court has refused to countenance in the past, or conceivably lead to double taxation on the same sale. It is doubtful, especially in view of the statement that transfer of possession is the taxable event regardless of the time or place where title passed, if the Court really meant that transfer of title alone is taxable.

Whatever the precise nature of the taxable event, it must be admitted that the case represents a radical departure from the formal doctrines of the Court as to what constitutes an interstate sale. It is difficult to imagine how, under this decision, the buyer's state could levy an invalid direct tax on an interstate sale. From the standpoint of state taxation, little more remains of interstate commerce than the actual transit of goods across state lines.

If there is to be any valid quarrel with the analysis of the majority of the Court, it is with its failure to admit outright that this was an interstate sale that was being taxed directly. In so far as the buyer's state is concerned, the immunity of interstate sales was practically nullified when the use tax was sustained, for that is but a thinly disguised levy on sales of goods shipped interstate. There is truth in the majority's statement that the sales and use tax affect interstate commerce in precisely the same manner. But the fact still remains that both taxes were sustained on the unrealistic ground that they were levied on events quite separate from interstate commerce. The immunity doctrine was recognized but was left an empty shell. Once it is admitted, however, that interstate commerce is being taxed, the existing hypertechnicalities are destroyed and the ground is cleared for a rational and practical development of other principles of state taxation in this area.

2.

In 1938 a new doctrine suddenly appeared on the horizon of state taxation. In *Western Live Stock v. Bureau of Revenue*,[31] the Court, again speaking through Justice Stone, was engaged in validating a New Mexico tax on the privilege of "providing and selling advertising

[31] 303 U. S. 250, 58 S. Ct. 546 (1938). See comment on cumulative burdens doctrine in 40 COL. L. REV. 653 (1940).

space in a published journal" measured by the gross receipts from the sale of advertising space. By the dogma of the immunity doctrine, such a tax was permissible since the tax base was construed to be a purely local event. But the Court was not content with this analysis alone. It glanced back over previous cases and then boldly reinterpreted them as representing a new doctrine:

> "The vice charactertistic of those [taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed upon local commerce."[32]

Since interstate commerce was not exposed to the risk of "cumulative" or "multiple" burdens in this case, the tax was valid.

The same test was applied in *Coverdale v. Arkansas-Louisiana Pipe Line Co.*[33] to uphold a tax on an event construed to be local in nature. It was first applied to assist in upsetting a tax in *Adams Mfg. Co. v. Storen.*[34] Here the tax was imposed by the seller's state on the gross receipts of a domestic corporation doing eighty per cent of its business in interstate commerce—nothing less than outright heresy under the immunity doctrine. The same principle was used in *Gwin, White & Prince v. Henneford*[35] to invalidate a tax measured by the gross income of a resident marketing agent who solicited local and interstate sales for local fruit.

While it is important to note that in all these cases the cumulative burdens doctrine may have been a makeweight rather than the substantial rationale, the scope and importance of the new test cannot be minimized. It is a product of the commerce clause and is an opening wedge in the direction of permissible outright taxation of interstate transactions.

Its close tie-up with the immunity doctrine is at once evident. It

[32] Ibid., 303 U. S. 250 at 255-256. The tax in this case, even if construed as being laid on gross receipts from the advertising (augmented by interstate circulation) rather than upon the privilege of selling advertising space, could not be duplicated elsewhere. The gross receipts taxed arose solely out of local business and thus they could be taxed only by New Mexico. See also Department of Treasury of Indiana v. South Bend Tribune, (Ind. 1939) 24 N. E. (2d) 275.

[33] 303 U. S. 604, 58 S. Ct. 736 (1938). The tax was on the generation of power used to propel oil in an interstate pipe line. The generation was construed to be a local event, divorced from interstate commerce.

[34] 304 U. S. 307, 58 S. Ct. 913 (1938).

[35] 305 U. S. 434, 59 S. Ct. 325 (1939).

will not be used to invalidate a tax on an activity designated as purely local under the traditional dogmas. Thus the state may levy a tax on the privilege of manufacturing (a local event) measured by the unapportioned total gross receipts from the sales of the products in local and interstate commerce. Since no other state can tax the privilege of manufacturing, there is no danger of cumulative burdens. "The cumulative burdens doctrine does not as it stands undermine the validity of a chronological series of burdens by any number of states upon the same basic values when they are identified with intrastate commerce, and only the state which at the moment has jurisdiction over the values taxes them at a given time."[36]

But the new principle will be applied when the tax is laid directly on interstate transactions or on the privilege of performing within the state activities that are labelled integral parts of interstate commerce. Thus where a tax is laid on the total gross receipts of a foreign or domestic corporation from both local and interstate sales or where the tax is laid on the privilege of soliciting such sales measured by the same gross receipts, the tax is bad under the cumulative burdens doctrine. If such a tax were allowed, another state might tax directly the same gross receipts from interstate commerce. Therefore, both states must be prohibited from levying such taxes. But this protection seems superfluous since both states under these circumstances would already be prohibited from taxing by force of the immunity doctrine. It is immaterial that the other state has not levied the same sort of tax—the mere possibility is enough. It is also apparently immaterial that the other state could not tax all the gross receipts even if the one state were allowed to do so, keeping in mind that the other state would be compelled under the due process clause to limit its taxation to gross receipts from activities within its borders.[37]

However, the vital significance of the cumulative burdens doctrine is the dent it makes on the orthodox concept that interstate commerce may never be taxed. Under the new dispensation, it is suggested that a properly apportioned tax directly on gross receipts from interstate commerce is permissible. Thus both the state of origin and the state of destination may tax that portion of the gross receipts from interstate sales fairly allocable to the activities performed within the respective states. Of course, this assumes that the states devise fair formulae of allocation, the difficulty of which may serve to render the suggestion impractical. But the iconoclastic nature of the proposal is evident, for

[36] Traynor, "State Taxation and the Commerce Clause in the Supreme Court, 1938 Term," 28 CAL. L. REV. 168 at 173 (1940).

[37] Ibid., at 172. In such a case there would be cumulative burdens only on that part of interstate commerce carried on in the other state, but that would be a risk common also to local commerce when carried on by foreign corporations.

apportionment prior to this was never able to save a direct tax on interstate commerce. It has also been suggested that the new doctrine may be used to validate taxes on gross receipts from events exempt under the immunity doctrine but which are so localized within the taxing state that other states are not likely to tax the receipts again.[38]

Inasmuch as the transaction involved in the *Berwind-White* case partook of an interstate nature, the cumulative burdens test along with the immunity doctrine would logically apply to void a sales tax by either Pennsylvania or New York City. But if each apportioned its sales tax, which would create difficulties in administration and inequality in the buyer's market, both taxes would be sustainable. Since New York City did not apportion its tax, it would follow, as Chief Justice Hughes points out, that the danger of multiple taxation on the same interstate sales arises to invalidate it.

Thus the logic of the doctrine so recently conceived by the Court arose to haunt the majority. This is perhaps one of the reasons why the tax was interpreted as it was. By calling it a tax on a local activity, the Court was able to sidestep the absolute prohibitions of the immunity and cumulative burdens doctrines.

This may mean several things. It may mean that the cumulative burdens doctrine is still intact and unchanged and that whenever the state of origin or state of destination tries to place its sales tax directly (whatever that may now mean) on an interstate sale the Court will strike it down. Or it may mean that by innuendo the cumulative burdens doctrine is being limited to taxes on interstate transactions by the state of origin. That was the situation in both the *Storen* and *Gwin* cases, where the test was used to invalidate the taxes. On the other hand, when a sales or use tax is imposed on an interstate sale by the state of destination, reality is tortured to find a fleeting taxable moment occurring solely within the state, thus obviating the application of the doctrine. By using the cumulative burdens test to prevent one state from taxing an interstate transaction and by stretching actualities out of shape to allow another state to tax that same transaction, the Court is enabled to steer its way through to a given result. But such a process serves to drain the so-called test of its vitality.

The basic trouble with the cumulative burdens doctrine is that it is too closely bound up with the artificial dogmas and distinctions of the immunity doctrine. Implicit in the new doctrine is the timid but significant suggestion that interstate commerce may be taxed directly if there is proper apportionment. But apportionment is often too impractical. The Court apparently is fearful of taking the next step and saying that interstate transactions may be taxed, through a sales, use,

[38] 40 COL. L. REV. 653 at 675 (1940).

or gross receipts tax, regardless of apportionment. Once that is admitted, the way is clear for the development of a healthy, useful cumulative burdens doctrine, unhampered by outworn distinctions. By determining on the basis of economic considerations which state should be allowed to tax an interstate sale, the Court could allow that state to impose its entire tax upon the sale without any requirement of apportionment. All other states would be denied the right to tax, thus insulating interstate commerce against multiple burdens and at the same time eliminating the subsidy now given to interstate sellers. But until this is done, the cumulative burdens doctrine will remain largely lifeless and ineffective, dependent for its very existence on another concept which has already been greatly weakened by the subtly erosive process of judicial decision.

3.

An old "seductive cliché" is being given new life in recent decisions—"Interstate commerce must pay its way." [39] This battle cry has various modifications such as "Equality is the theme" and "Equality in the buyer's market." Whatever the form, it represents a most significant trend toward an economic reinterpretation and application of the commerce clause with respect to sales taxes and gross receipts taxes. At present it is little more than an embryonic idea, thrown in as an added reason for upholding a tax under the immunity doctrine. Some day it may serve to guide bewildered tax officials out of the existing disorder.

It has been noted that the main effect of state sales taxes under the immunity doctrine has been to grant interstate sellers a subsidy at the expense of local business. Other things being equal, trade is driven away from the local merchant in order to save the expense of the sales tax.

By allowing the buyer's state alone to impose a use tax or sales tax on these interstate sales, this subsidy is destroyed and the buyer's market becomes equal so far as sales taxes are concerned. All sales in this state are then on an equal footing. On the other hand, if the seller's state were allowed to tax the sale, equality would not be assured. Unless both the buyer's and seller's state had sales taxes imposed at the same rates, discrimination one way or the other would be certain.[40] Goods of a taxing seller state would be at a disadvantage in all markets

[39] This was first stated by Justice Clarke in Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252 at 259, 39 S. Ct. 265 (1919), and repeated by Justice Holmes, dissenting in New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U. S. 338 at 351, 50 S. Ct. 111 (1930).

[40] The seller's state might provide that the tax on the interstate sale should not exceed the tax in the buyer's state. In addition to administrative difficulties, there still would be discrimination possible. Where the seller's state had a lower tax than the buyer's state, the foreign seller would have an advantage over local merchants.

where goods from non-taxing seller states were competing. Thus there are economic reasons for limiting the sales tax to the buyer's state. By making interstate commerce pay its fair share of the buyer's state tax burden, discriminations against local commerce will disappear. This is the basis upon which a realistic cumulative burdens doctrine could be built.

The equality ideal was first expressed by the Court in *Henneford v. Silas Mason Co.*,[41] upholding a use tax by the buyer's state. It is now carried over in the *Berwind-White* case[42] to assist in upholding a sales tax by the buyer's state. If either tax is enforced, the discriminations now existing agaist local commerce vanish and equality in the buyer's market is attained.

A serious question is presented, however, as to whether equality is a permissible goal under the Constitution. This idea would seem to conflict with the original purpose of the commerce clause to maintain a free national market. As Chief Justice Hughes says in his dissenting opinion in the *Berwind-White* case,[43]

> "We have the duty of maintaining the immunity of interstate commerce as contemplated by the Constitution. That immunity still remains an essential buttress of the Union; and a free national market, so far as it can be preserved without violence to state power over the subjects within state jurisdiction is not less now than heretofore a vital concern of national economy."

While it is clear that a free national market is little more than a myth today, the concept is still a doctrinal hurdle in the path of acceptance of the idea of equality.

The most potent of the recent expressions of the national free trade philosophy is found in *Baldwin v. Seelig*,[44] invalidating a New York law prohibiting the sale in New York of milk bought from producers outside the state at less than the New York minimum price. Justice Cardozo, speaking for a unanimous court, expressed disapproval of any measure that would establish "an economic barrier against competition with the products of another state."[45] Many attempts have been made to explain this statement in the light of the later tax decisions.[46] Various distinctions between the cases can be made, none of

[41] 300 U. S. 577 at 583, 57 S. Ct. 524 (1937).

[42] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 48, 60 S. Ct. 388 (1940).

[43] Ibid., 309 U. S. 33 at 69.

[44] 294 U. S. 511, 55 S. Ct. 497 (1935).

[45] Ibid., 294 U. S. at 527.

[46] Warren and Schlesinger, "Sales and Use Taxes: Interstate Commerce Pays Its Way," 38 Col. L. Rev. 49 at 75-76 (1938); 51 Harv. L. Rev. 130 (1937); 36 Col. L. Rev. 1179 (1936).

which are satisfactory.[47] The only conclusion is that the Court has either overruled the statement in the *Seelig* case or has created an exception in the field of state taxation in order to meet pressing economic problems.

While many of the exceptions to the free national market tradition have led to undesirable state trade barriers, it would seem that an exception in the case of sales, gross receipts, and use taxes is fully warranted. The free trade idea should not be carried to the extent of injuring local commerce and fostering the growth of nation-wide business monopolies. To do so would pervert the commerce clause from an armor of defense into a weapon of offense and discrimination. As long as interstate trade is not made the subject of discrimination by the states and as long as the state tax statutes do not conflict with Congressional regulations as in the recent case of *McGoldrick v. Gulf Oil Corp.*,[48] there appears to be no sound reason for exempting interstate transactions from reasonable taxation. Interstate commerce must be free—free from discrimination but not free from fair and just obligations to the states.

4.

At least three members of the present Court, Justices Black, Frankfurter, and Douglas, have subscribed to a "back-to-the-Constitution" movement in state taxation. The commerce clause, they say, literally means what it says—Congress alone shall regulate interstate commerce, and it is an unconstitutional assumption of power by the judiciary for the Court, in the absence of Congressional action, to strike down any state tax statute that does not discriminate against interstate commerce. In such a situation, the Court should be powerless to act and the states should be free to tax as they please in a non-discriminatory manner.

From the several opinions written by this new group, the following

[47] (1) The Seelig case involved a police power regulation, whereas the Silas Mason and Berwind-White cases involved taxation. But the policy underlying the statement is broad enough to cover taxation as well. (2) The factor of controlling a contract made outside the state might be enough to distinguish the Seelig case. Still this does not explain away the statement. (3) The statute in the Seelig case involved an absolute prohibition. Yet the tax statutes in effect prohibit sales of tax-free goods. (4) The tax statutes are revenue-producing measures and underlying motives need not be questioned. But it is clear that the main purpose of use and sales taxes on interstate commerce is not to produce revenue but to remove discrimination against local commerce. (5) In the Seelig case there was control of a basic price factor, whereas the tax statutes only affect artificial differentials. But the Court in the Seelig case, 294 U. S. at 527, seems to talk of the deprivation of artificial advantages as being invalid as well.

[48] (U. S. 1940) 60 S. Ct. 664. Here the New York City sales tax was held inapplicable to sales of fuel oil manufactured in New York City from crude petroleum imported from abroad and sold to vessels engaged in foreign commerce. This was held to conflict with the Federal Revenue Act of 1932. Sec. 630, 48 Stat. L. 256 (1933), exempted the fuel that was involved here from the federal tax levied in § 601, 47 Stat. L. 259 (1932).

streamlined reconstruction of the commerce clause in relation to state taxation can be observed:

(1) The complete elimination of the immunity doctrine is advocated. Interstate commerce may be taxed by the states, the only limits being that of non-discrimination and consistency with acts of Congress.

(2) Assuming for purposes of argument that the prevention of cumulative burdens is within the Court's power, taxes such as those on gross receipts by the seller's state should not be struck down on the mere possibility that other states may tax them also. "It would seem to be time enough to consider it when appellant or some other taxpayer is actually subjected to 'multiple taxation.'" [49]

(3) The cumulative burdens doctrine should be thrown out bodily since the Court has no power to prevent such burdens.

> "A business engaging in activities in two or more States should bear its part of the tax burdens of each. If valid, non-discriminatory taxes imposed in these States create 'multiple' burdens, such 'burdens' result from the political subdivisions created by our form of government. They are the price paid for governmental protection and maintenance in all States where the taxpayer does business." [50]

For all the Court knows, it might be a wise policy to allow each state in which an interstate business operates to apply a non-discriminatory gross receipts tax without apportionment.

(4) The Court should not attempt to force any apportionment theory on state taxation of interstate commerce.

(5) State taxes, with the two indicated limitations, should be uniformly upheld until Congress makes a comprehensive survey of the entire national situation and in one fell swoop plots out the relationship of the states and the federal government as regards taxation of interstate commerce.

> "Unconfined by 'the narrow scope of judicial proceedings' Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union." [51]

[49] Justice Black dissenting in Gwin, White & Prince v. Henneford, 305 U. S. 434 at 445, 59 S. Ct. 325 (1939).

[50] Ibid., 305 U. S. at 448. Justice Black's views are further set out in his dissent in Adams Mfg. Co. v. Storen, 304 U. S. 307 at 316, 58 S. Ct. 913 (1938).

[51] Justices Black, Frankfurter, and Douglas dissenting in McCarroll v. Dixie Greyhound Lines, Inc., (U. S. 1940) 60 S. Ct. 504 at 510, noted in 38 MICH. L. REV. 928 (1940).

In accord with their theory, the framers have dissented in all recent cases holding non-discriminatory state taxes invalid.[52] They have concurred in decisions upholding state taxes on traditional theories, such as the *Berwind-White* case. "We did not thereby approve the desirability of such state regulations. It is not for us to approve or disapprove."[53] However, their theory has not been adopted by the majority of the Court as yet.

There is much to be said for this laissez-faire attitude. It is realistic and honest and challenging. Yet there are certain inherent inconsistencies and weaknesses. There is a conflict, for example, between the ideas that Congress has the sole and exclusive power to regulate interstate commerce and that the states may regulate and burden that commerce in the absence of Congressional legislation and in a non-discriminatory manner. If Congress has *sole* power to regulate, any state action would be invalid. Justice Frankfurter intimated the converse of such logic recently in concurring in *Newark Fire Insurance Co. v. State Board of Tax Appeals*,[54] upholding a state intangibles tax: "Especially important is it to abstain from intervention within the autonomous area of the [state] legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies." However, the proponents may mean that a state law regulates interstate commerce only if it is discriminatory or inconsistent with a national statute. But that would be unrealistic, to say the least.

Of graver importance is the idea of upholding with wild abandon all non-discriminatory, non-conflicting state taxes and waiting for an omniscient Congress, sitting in detachment on Mount Olympus, to bring some semblance of order to it all. This clearly is an assertion of the impotence of the Court to meet a difficult problem. This abrogation of power based on an attitude of defeatism raises serious questions. There certainly can be no dispute over the desirability of Congressional legislation in the area of interstate trade barriers.[55] But the popular and growing concept of legislative supremacy should not serve to confuse the function of the judiciary in those instances where the legislature has not acted. The very vagueness of the commerce clause, in the

[52] Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913 (1938); Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939); McCarroll v. Dixie Greyhound Lines, Inc., (U. S. 1940) 60 S. Ct. 504.

[53] Justices Black, Frankfurter, and Douglas dissenting in McCarroll v. Dixie Greyhound Lines, Inc., (U. S. 1940) 60 S. Ct. 504 at 509.

[54] 307 U. S. 313 at 324, 59 S. Ct. 918 (1939).

[55] Chief Justice Hughes, dissenting in the Berwind-White case, 309 U. S. 33 at 69, advocated Congressional action for the final solution.

absence of legislative or judicial construction, invites a multitude of conflicting trade barriers and discriminations against interstate commerce. And for either the Court or Congress to wait on the other to act increases these dangers to the national economy. Action by one of these bodies is necessary. The dissenting three do not hesitate to tackle the difficult tasks of deciding when state taxation is discriminatory and of interpreting any legislation that Congress has passed or may pass in the future in this field. For the Court, in the absence of Congressional action, to work out a rational scheme on the basis of economically sound doctrines would not seem to be beyond the realm of possibilities. It must be granted that the judicial process, with its slow inclusion and exclusion and with its adherence to precedents, is not the best means of attaining the desired result. But this process does offer the advantage of being an expedient remedy in the face of an emergency. To be sure, this means judicial legislation, but to admit this is to admit nothing more than that creativeness is an indispensable element of the judicial process in the field of constitutional law as well as in other fields of law.

From this survey, one thing is clear: at least some interstate sales may be taxed by the buyer's state.[56] Another prop has been removed from under the sagging doctrine that interstate sales may never be taxed directly by any state. But beyond this, the lines projecting into the future are blurred. Only certain general tendencies can be distinguished.

On one side of the picture is the traditional idea of clinging steadfastly to the immunity doctrine and striking down all sales, use, and gross receipts taxes on interstate transactions. At the other extreme is the forthright proposal of allowing states to tax interstate sales in any manner so long as there is no discrimination and no conflict with Congressional action. In the middle is the prevailing and conflicting concept of blindly acknowledging the immunity doctrine while destroying its essence by construction. Yet within this contradictory approach lies the germ of a more rational theory. By knocking out the dead wood of the immunity doctrine along with the parasitic cumulative burdens doctrine, the Court will be able to face economic realities and apply appropriate remedies while waiting for the far-away day when Congress finally expresses its will in comprehensive terms.

Eugene Gressman

[56] With the validation of the sales tax on at least some interstate sales, the basic reason for the adoption of the use tax disappears. The use tax has not proved very effective inasmuch as evasion is easy and only purchases of larger articles can be traced. The Berwind-White case also raises a question as to back taxes and penalties. Unless the taxing state makes some provision for this, serious difficulties and liabilities may arise.