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STATE TAXATION OF INTERSTATE COMMERCE

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INTRODUCTION

The United States Supreme Court has been confronted with numerous issues which require a reconciliation of the principle of maintaining free interstate trade and that requiring persons engaged in interstate commerce to bear their share of state taxation. In deciding these issues the Court has used various words to state and explain applicable legal tests.¹ To understand these tests the situations from which they were originated, as well as those in which they were applied, should be examined.

The classic test, which was originated in *Robbins v. Shelby County Taxing District*,² was deduced from a situation in which a Tennessee statute³ requiring all drummers to pay a license tax was applied to a drummer from Ohio. In holding the statute

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1. In attempting to establish uniformity in the law of this field, Mr. Justice Frankfurter in *Freeman v. Hewit*, 329 U.S. 249, 254 (1946), stated: The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things.

But see Justice William O. Douglas, *Stare Decisis*, 49 COL. L. REV. 735 (1949), in which the author develops the idea that the doctrine of stare decisis does not apply to constitutional law because each Justice must use his own interpretation of the Constitution to conform with the oath taken to support the Constitution.

2. 120 U.S. 489 (1887).

3. All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege and no license shall be issued for a longer period than three months.

Tenn. Stats., 1881, c. 96, § 16.

unconstitutional, Mr. Justice Bradley, delivering the opinion of the Supreme Court, stated:

Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. . . .⁴

A state, in other words, cannot use interstate commerce or any part thereof as a taxable event because the tax would conflict with the Congressional power to regulate interstate commerce.⁵ The taxable event must be determined in order to apply this rule and then classified as interstate or intrastate commerce.

The Tennessee statute made the privilege of offering for sale, or selling goods in Tennessee, the taxable event, and the Court recognized this fact. The process of selecting the taxable event from the wording or definitions of the statute was thus established. Classifying the taxable event, the Court stated:

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.⁶

The obvious method of avoiding the rule that interstate commerce could not be taxed was to tax an intrastate event. Missouri attempted to require a license of all peddlers who sold in the state goods grown, produced, or manufactured outside of the state. Although the Court could have classified the peddling of out of state goods interstate commerce and applied the taxable event rule, the Court chose, instead, to hold the tax invalid because it discriminated against interstate commerce.⁷

Discrimination against interstate commerce invalidated the tax irrespective of the classification of the taxable event. Even though the taxable event may be intrastate commerce, the tax could not discriminate against interstate commerce. A state, therefore, could not avoid the result of the rule that interstate commerce could not be taxed by placing a discriminatory tax on an intrastate event.

4. *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 497 (1887). Justices Field and Gray concurred in a dissenting opinion by Chief Justice Waite which was based on the theory that, if the license tax was valid as to Tennessee residents, but invalid as to nonresidents, a discrimination would exist which would conflict with the Privileges and Immunities Clause, U.S. CONST. Art. 14, § 1.

5. U.S. CONST. Art. I, § 8, clause 3, "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

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

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

The discrimination rule was applied by determining whether intrastate commerce was placed in a favorable economic position with relation to interstate commerce as a result of the tax. Since one purpose of the Commerce Clause was to prevent economic barriers between the states, the discrimination rule was a logical deduction from the Constitution. The discrimination rule, however, was not applicable to the factual situation in the *Robbins* case because the tax applied equally to intrastate and interstate drummers.

At the time of the *Robbins* case (1887), the people of the United States needed more consumer goods. Production of goods would be increased if markets were readily available. The Supreme Court knocked down a barrier to a market by establishing the rule that interstate commerce cannot be taxed and then classifying drumming as interstate commerce.⁸ The statement of the legal test and the process of determination of the taxable event were seemingly made rigid, but a complete definition of interstate commerce was not attempted. The Court could, therefore, use this flexible factor to accomplish the purpose of the Commerce Clause without being restricted to the extent it would have been had the Court attempted to make a rigid formula to determine the interstate-intrastate classification.⁹

THE TAXABLE EVENT TEST

With the advent of large scale industrialization came the economic cycle of prosperity and depression. States as well as individuals suffered the effects of the far-reaching depression, and both had to search for new methods to obtain income. To the states new forms of taxation seemed to be a possible answer.

The New York legislature, for example, authorized the City of New York to adopt and impose any tax within the city which the legislature would have power to impose, provided the proceeds of the tax were used exclusively for unemployment relief.¹⁰

8. For a discussion of the Supreme Court's interpretation of the Commerce Clause for the period 1850-90 in regard to state law affecting interstate commerce, see RIBBLE, *STATE AND NATIONAL POWER OVER COMMERCE* (1st ed. 1937).

9. For a complete discussion of cases in this field until 1918, see Powell, *Indirect Encroachment on Federal Authority By the Taxing Powers of the States* (in eight installments), 31 HARV. L. REV. 321, 572, 721, 932 (1918), and 32 HARV. L. REV. 234, 374, 634, 902 (1919).

10. N.Y. Laws 1933, c. 815, as amended N.Y. Laws 1934, c. 873.

Pursuant to this authorization, the city adopted a retail sales tax.¹¹

The validity of this tax when applied to goods shipped into the state was challenged on the ground that it conflicted with the Congressional power to regulate interstate commerce. The particular facts of the case, *McGoldrick v. Berwind-White Coal Mining Co.*,¹² involved a contract made in New York City for coal to be mined in Pennsylvania and shipped to the city for delivery. The price of the coal was subject to variations in mining and transportation costs. The issue was whether the sales tax, as applied to this transaction, was made illegal by the Commerce Clause. Mr. Justice Stone, answering the question in the negative for the Court, stated:

Its [the tax's] only relation to the commerce arises from 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.¹³

The rigid rule that the taxable event cannot be interstate commerce was applied, and the definition of the taxable event was taken from the tax ordinance—" . . . transfer of title or possession, or both . . ."¹⁴—but the flexible factor, the definition of interstate commerce, was again used to decide the issue.

The shipment of coal from Pennsylvania to New York was undoubtedly interstate commerce because the subject matter was commerce, and that subject matter was moved from one state to another state, but, according to the Court, the delivery of possession in New York was a separate event apart from the interstate commerce. This classification of delivery of possession as intrastate commerce, although difficult to foresee from the *Robbins* decision, was not completely inconsistent with other decisions under the Commerce Clause. The question, for example, whether Congress has the power to regulate an event at the end of the chain of interstate commerce was distinguishable from

11. City of N.Y., Local Law #24 (1934) (published as Local Law #25).

12. 309 U.S. 33 (1940).

13. *Id.* at 49. Justices McReynolds and Roberts joined with Chief Justice Hughes in his dissent, which contended that delivery was a necessary and inseparable part of the interstate commerce.

14. See note 10 *supra*.

the question whether the exercise of state power over such an event conflicted with the Commerce Clause.¹⁵

The inclusion of drumming in the chain of events constituting interstate commerce and the exclusion of delivery of possession to a purchaser seem difficult to reconcile from an analytical point of view, but the promotion of industry in 1887 and provision for unemployment relief in the depression of the 1930's were undoubtedly influencing factors. Although the taxable event test was stated as a rigid analytical test, economic factors influenced the Court in classifying particular events interstate or intrastate commerce.

After the initial Commerce Clause obstacle had been overcome by the retail sales tax, state sales taxes as applied to other factual situations arose.¹⁶ In *McLeod v. J. E. Dilworth Co.*,¹⁷ Arkansas attempted to impose a sales tax (unaccompanied by a compensating use tax) upon transactions which originated through orders taken in Arkansas by traveling salesmen and which became contracts by acceptance in Tennessee. Delivery of possession, according to the contract, was to be made in Tennessee. Mr. Justice Frankfurter, rendering the Court's opinion invalidating the tax, stated:

. . . in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transactions would be to project its power beyond its boundaries and to tax an interstate transaction.¹⁸

The taxable event was defined by the Arkansas statute as the transfer of title or possession.¹⁹ Title was transferred simul-

15. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

16. Numerous articles have been written on the relation of the sales tax to the Commerce Clause. For one of the latest and most complete, see *Snell, Sales Taxes and Interstate Commerce*, 27 TAX MAG. 37 (1949).

17. 322 U.S. 327 (1944).

18. *Id.* at 330. Justices Douglas and Black joined in Mr. Justice Murphy's dissent, which criticized the Court's opinion for drawing a distinction between a sales and use tax. *Id.* at 332. Mr. Justice Rutledge dissented on the ground that this case was not distinguishable from other sales and use tax cases in which the taxes had been held valid. The effect of the Arkansas tax and the other taxes which had been held valid was the same in that neither put an undue burden on interstate commerce. *Id.* at 349.

19. See *McLeod v. J. E. Dilworth Co.*, 205 Ark. 780, 171 S.W.2d 62

taneously with delivery of possession to the carrier in Tennessee; therefore, the Court held that the tax amounted to an attempt by Arkansas to exercise ". . . its powers beyond its boundaries and to tax an interstate transaction."²⁰

Even if the taxable event had occurred in Tennessee before interstate commerce began, Arkansas would have had no jurisdiction over the event because any attempted regulation or tax would have violated the Due Process Clause, U.S. Const. Amend. XIV,²¹ but Tennessee would have had the power to impose and collect a sales tax on that event because the event occurred within Tennessee's jurisdiction. In relying upon the Commerce Clause as well as the Due Process Clause, the Court was, in addition to holding the tax invalid as applied to the particular facts, thereby discouraging the imposition of a sales tax by the state of the seller.

The inclusion of delivery of possession from the seller to the carrier, as well as transfer of ownership in the chain of interstate commerce, was entirely consistent with the general trend of rendering a broad interpretation of the Commerce Clause,²² and also consistent with the decisions invalidating taxes levied upon transactions by the seller's state.²³ On the other hand, the inclusion of delivery of possession from the seller to the carrier in the chain of interstate events²⁴ and the exclusion of delivery of possession from the carrier to the buyer²⁵ were inconsistent when interstate commerce is viewed as a chain of physical events. Since the immediate result of the *McLeod* case could have been accomplished by relying upon the Due Process Clause alone, the Court must have used the Commerce Clause in the reasoning to accomplish another purpose, namely, to discourage the imposition of a tax upon the transaction by the seller's state. Since the buyer will bear the ultimate economic burden of the tax (as between the buyer and the seller), the buyer's state should receive the tax benefits. If both states were allowed to tax the

(1943), for the interpretation of the tax statutes, Ark. Acts 1937, No. 154, and Ark. Acts 1941, No. 386.

20. See note 18 *supra*.

21. *Railroad Co. v. Pennsylvania*, 15 Wall. 300 (U.S. 1873).

22. See note 15 *supra*.

23. *Freeman v. Hewit*, 329 U.S. 249 (1946); *Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938).

24. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944).

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

same transaction, interstate buying and selling of goods also obtainable from an intrastate seller would cease. This economic reason, then, was evidently the cause for the classification of delivery of possession from the seller to the carrier as interstate commerce—a holding inconsistent with the classification of delivery of possession from the carrier to the buyer as intrastate commerce in the *Berwind-White* decision.

The Court intimated that Arkansas could accomplish its desired result by adopting a compensation use tax to accompany the sales tax,²⁶ but the Court would not hold valid a sales tax as applied to the transaction involved, even though such a result would have been consistent with the policy of permitting taxation by the buyer's state.

Before consideration of a sales tax as affected by the Commerce Clause is concluded, the situation of a foreign buyer from a domestic seller should be mentioned. In addition to the Commerce Clause, the Constitutional Import-Export Clause²⁷ applied to most of these cases,²⁸ and thus distinguished these situations from the *Berwind-White* case. Since duties on exports were constitutionally prohibited and the goods were destined for immediate export, the sales tax was held invalid.²⁹ This result, of course, was obviously consistent with the policy of denying the power to tax interstate transactions to the seller's state.

Turning from the sales tax³⁰ to a gross receipts tax, the case

26. "Whatever might be the fate of such a [use] tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax. . . ." 322 U.S. 327, 330 (1944).

27. U.S. CONST. Art. I, § 10, clause 2:

No State shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

28. See *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947); *Richfield Oil Co. v. State Board of Equalization*, 329 U.S. 69 (1946); *McGoldrick v. Compagnie Generale Trans.*, 309 U.S. 430 (1940); *McGoldrick v. Gulf Oil Co.*, 309 U.S. 414 (1940); *Puget Sound Stevedoring Co. v. Tax Commission of State of Washington*, 302 U.S. 90 (1937).

29. *Richfield Oil Co. v. State Board of Equalization*, 329 U.S. 69 (1946).

30. For other recent Supreme Court cases involving sales and/or use taxes, see *General Trading Co. v. State Tax Commission of Iowa*, 322 U.S. 335 (1944); *Nelson v. Montgomery Ward & Co.* 312 U.S. 373 (1941); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70 (1940); *Southern Pac. v. Gallagher*, 306 U.S. 167 (1939); *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182 (1939);

of *Pudget Sound Stevedoring Co. v. Tax Commission of State of Washington*³¹ illustrates the three propositions under immediate consideration, namely, the application of the rule that no state can tax interstate commerce in determining the validity of the state tax, the definition of the taxable event, and the classification of the event as interstate or intrastate commerce. In this case the state gross receipts tax³² upon the privilege of engaging in business within the State of Washington, as applied to a stevedoring company which (a) loaded and unloaded cargo of vessels engaged in foreign and interstate commerce, and (b) furnished stevedores to shipowners or masters in order that they could load or unload the cargo, was unanimously held invalid as applied to (a) and valid as applied to (b).

Following the familiar rule that the taxable event cannot be interstate commerce and determining from the tax statute that the taxable event was the privilege of engaging in business in Washington, the Court, by Mr. Justice Cardozo, stated:

The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. . . . What is decisive is the nature of the act, not the person of the actor. . . .

The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject like business generally, to taxation by the state.³³

The taxable event was the privilege of engaging in business in Washington, and since the stevedoring company engaged in

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); and *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

31. 302 U.S. 90 (1937).

32. The Court described the tax in the following terms:

A statute of the State of Washington provides that for the privilege of engaging in business activities within the state a tax shall be payable by persons so engaged, payment to be made according to a designated measure. As to certain forms of business, as, for example, manufacturing and sales at retail or wholesale, the measure is a specially prescribed percentage of the value of the products or the gross receipts of sales. As to all other forms of business there is a general provision that the tax shall be equal to the gross income of the business multiplied by the rate of one half of one per cent. . . .

This general provision is broad enough to cover the business of a stevedore.

Id. at 91.

33. *Id.* at 94.

two different types of business, each type had to be classified separately. As Mr. Justice Cardozo said, "What is decisive is the nature of the act, not the person of the actor."³⁴

One type of business, the loading or unloading of the cargo of a ship, occurred at least one step closer to the middle of the chain of events than delivery of possession, which had been the borderline case in separating intrastate from interstate events;³⁵ therefore, the result of classifying loading and unloading as interstate or foreign commerce seemed reasonable. The position of the taxable event in the chain of interstate commerce was not a conclusive factor, but, nevertheless, the fact that it was closer to the center made it more difficult to separate from the other events. Just as the voyage aboard the ship and the trip via train or truck were physical links in the chain of interstate commerce, the loading and unloading, though generally not moving the cargo so great a distance as the ship, train, or truck, constituted an essential movement in the interstate commerce.

The furnishing of stevedores to the shipowner or master, on the other hand, was held to be intrastate commerce. Although the work of the stevedores was interstate commerce, the business of supplying the stevedores to shipowners or masters, which was quite analogous to that of an employment agency, was parallel to but outside the chain of interstate commerce. The supplying of stevedores was one step away on a horizontal plane from the point where loading and unloading appeared in the vertical interstate commerce line; therefore, this form of business was intrastate commerce.

The policy of permitting taxation by the buyer's state but denying this power to the seller's state was irrelevant in this case, in that the buyer and/or seller of the goods constituting the cargo of the vessel might or might not have been a Washington resident. The result of the case emphasized legal analysis over economic effect, since the economic burden of the tax on the business of loading and unloading would rest in exactly the same place as the tax on the business of supplying stevedores to the vessel; yet the latter was held valid and the former invalid.

Several of the cases arising under the Indiana gross income

34. *Ibid.*

35. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

tax statute³⁶ also serve to exemplify the concept of interstate commerce confronted by state taxation. In *Department of Treasury v. Wood Preserving Co.*,³⁷ the Baltimore and Ohio Railroad Company contracted with the Wood Preserving Company, a Delaware corporation, to furnish railroad ties and creosote them. Pursuant to the contract, the Wood Preserving Company, through its Indiana agents, arranged for local vendors to deliver the ties at a point in Indiana alongside the Baltimore and Ohio line where the railroad inspectors accepted or rejected the ties. The accepted ties were immediately shipped to a plant in Ohio where the Wood Preserving Company chemically treated them. The Wood Preserving Company paid the Indiana vendors for the accepted ties and billed the railroad separately for the ties and the treatment of the ties, but the Wood Preserving Company received payment for both bills in Pennsylvania. Chief Justice Hughes, rendering the opinion of the Court unanimously holding the income from the sale of the ties to the railroad by the Wood Preserving Company was subject to the Indiana tax, states:

These were local transactions,—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment.³⁸

The taxable event, according to the statute, was for residents of Indiana, the receipt of gross income, and for nonresidents, the receipts of "gross income derived from sources within the State of Indiana."³⁹ Although the Wood Preserving Company received payment in Pennsylvania, the right to receive this payment was derived from events which occurred in Indiana. If the mere

36. IND. ANN. STAT., c. 50, § 2 (Burns 1933):

There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided. 37. 313 U.S. 62 (1941).

38. *Id.* at 68.

39. See note 36 *supra*.

receipt of income was the taxable event, every nonresident could avoid the tax by arranging for payment outside of Indiana. The true taxable event, then, was the derivation of the right to receive the income.

After determining the taxable event, the question whether the right to receive the income was derived from interstate or intrastate commerce had to be answered. The chain of events beginning with the making of the contract and terminating with payment for the goods and services included arrangement with local vendors for delivery of the ties, inspection and acceptance by the railroad company, and shipment to Ohio for treatment. Although the Court did not expressly state that any part of this chain of events constituted interstate commerce, the Court did state that the sale from the Wood Preserving Company to the railroad was an intrastate (Indiana) event.

Neither the seller nor the buyer was an Indiana resident, but the sales contract, the offer and acceptance of the particular ties, was made in Indiana. The sales contract was not necessarily dependent upon the other events; in fact, it could have existed independently. The Court, therefore, classified the sales contract intrastate commerce. The basis for classification was the physical place of the happening of the offer and acceptance, and the relation of the completed contract to the other events.

If the offer to sell had been made in Indiana and the acceptance in another state, would the result have been different? In *Freeman v. Hewit*,⁴⁰ where such a question was presented, the taxpayer, an Indiana resident, had his local broker send via mail shares of stock to New York where a New York broker sold it on the stock exchange. The proceeds from the sale were returned through the channel through which the stock had been disposed of. The taxpayer, after paying the Indiana gross receipts tax on the proceeds of the transaction under protest, brought suit for recovery of the tax. The Court, concluding that the transaction was an interstate sale, held that not even the fact that there was an equal tax on intrastate (Indiana) sales kept the tax from being invalid.⁴¹

40. 329 U.S. 249 (1946).

41. Mr. Justice Frankfurter rendered the opinion of the Court, which applied the taxable event test and explained the multiple tax burden test as a mere fashion in judicial writing. (See note 1 *supra*). Mr. Justice Rutledge concurred in the result but contended that the doctrine of *Nippert*

The rule that interstate commerce cannot be taxed was applied. Since the taxpayer was an Indiana resident, the taxable event was the receipt of gross income. The acceptance in one state of an offer made in another state was classified interstate commerce. The receipt of income from the contract, which was interstate commerce, was, therefore, not taxable by Indiana because such a tax conflicted with the Commerce Clause. Although the Court did not state why the execution of the contract was interstate commerce, the fact that the physical sites of the happening of the offer (Indiana) and the acceptance (New York) were in two states was evidently the reason. The result of the case was distinguishable from the *Berwind-White* decision in that the taxable events of the two cases were entirely different.

The classification of the contract as interstate commerce was consistent with the *Wood Preserving Company* case and was, undoubtedly, the important factor influencing the Court to invalidate the tax, but, in addition, the policy of denying the power to tax a sale to the seller's state was thus continued.

THE MULTIPLE TAX BURDEN TEST

A variation from the taxable event test occurred in *Western Live Stock v. Bureau of Internal Revenue*,⁴² which involved the New Mexico gross receipts tax⁴³ on the privilege of engaging in

v. Richmond, 327 U.S. 416 (1946), should be followed and that the multiple tax burden test should invalidate the tax. 329 U.S. 249, 259. Mr. Justice Douglas, with whom Mr. Justice Murphy concurred, dissented on the ground that the Court's opinion confused a gross receipts tax on the Indiana resident was a gross receipts tax on the Indiana broker. They, in other words, thought that the taxable event was reasonably separable from the interstate commerce. *Id.* at 283. Mr. Justice Black dissented without rendering a written opinion, evidently following his formerly expressed view that the Commerce Clause alone does not invalidate state regulation of interstate commerce. (See note 51 *infra*). This extremely literal interpretation of the Constitution is explained and supported by Hellerstein and Hennefield, *State Taxation in a National Economy*, 54 HARV. L. REV. 949 (1941).

42. 303 U.S. 250 (1938).

43. N.M. STAT. ANN. c. 7, § 201 (1934):

There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

I.—At an amount equal to 2 per cent of the gross receipts of any person engaging or continuing in any of the following businesses:
 . . . publication of newspapers and magazines (but the gross receipts

business within the state. The owners of a magazine, *Western Live Stock*, which was published in New Mexico, but which derived advertising from outside New Mexico and maintained an interstate distribution, paid the tax under protest and brought suit for recovery of the sum paid. Mr. Justice Stone, speaking for the Court, after having applied the taxable event test and having concluded that the tax was valid, stated:

But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' [owners of *Western Live Stock*] New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by the other states in such manner as to lay an added burden on the interstate distribution of the magazine. . . . All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. . . .⁴⁴

Although the Court applied both the taxable event test and the new multiple tax burden test, the possible existence of the latter independent of the former presented a very important question. If, for example, each state should select a taxable event which was reasonably separable from the interstate commerce, each tax might be valid under the taxable event test and yet together the two taxes might constitute an invalid multiple tax burden. The new multiple tax burden test, in other words, might be a mere explanation of the taxable event test in that it could explain the interstate or intrastate classification of the taxable event, or it might be an economic formula.

The taxable event of the New Mexico gross receipts tax, as expressly stated in the statute, was the privilege of engaging in business in New Mexico, and as applied to newspapers and magazines the amount of the tax was expressly limited to a percentage of the receipts derived from the sale of advertising space.⁴⁵ The taxed privilege of engaging in business in New

of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space). . . .

44. 303 U.S. 250, 260 (1938). Justices McReynolds and Butler dissented without rendering a written opinion.

45. See note 43 *supra*.

Mexico did not include the contract for sale of advertising; it was merely the privilege of preparing, printing, and publishing the advertising matter and receiving payments that were taxed.⁴⁶ Had the taxable event been the contract, the result would have been inconsistent with the cases heretofore discussed.⁴⁷ Since the taxable event occurred wholly in New Mexico and was reasonably separable from the interstate advertising contracts and interstate distribution of the magazine, the Court concluded that the taxable event was intrastate commerce. The Court in effect viewed interstate commerce as a vertical line with the interstate contract for the sale of advertising and the interstate distribution of the magazine at two points in the vertical line, whereas the preparation, printing, and publication of the advertising matter were between these points but horizontally outside of the vertical line. Since the taxable event was not repeated beyond the borders of New Mexico, the taxable event was physically an intrastate event, and, in addition, no other state could impose a similar tax upon that event.

In any situation where application of the taxable event and multiple tax burden tests would produce the result that the tax was valid, the multiple burden test could be said to be merely a means of classifying the taxable event interstate or intrastate commerce.⁴⁸ If the conclusion from the application of both tests was that the tax was invalid, development of the multiple tax burden test as an independent rule would be a definite possibility. The taxable event would have to be an interstate event to reach such a conclusion under the taxable event test, and duplicate taxation would have to be a definite possibility under the multiple burden rule. The next step in establishing the multiple burden doctrine as an independent formula would require a loose interpretation of the possibility of duplicate taxation. If any tax which would ultimately fall upon the same taxpayer as the tax under consideration were considered a duplicate tax, an economic formula would be established. If the rule required that the taxable events of both taxes be one and the same in order to establish duplicate taxation, the taxable event would, of course,

46. *Ibid.*

47. Particularly, *Freeman v. Hewit*, 329 U.S. 249 (1946).

48. If the multiple burden test is assumed to be an economic formula, then, of course, the result of validity of a tax by applying both as independent tests is a possibility.

be physically interstate commerce, and thus, the multiple burden doctrine would be merely an incident of the taxable event test.

The court applied the multiple burden test in *J. D. Adams Manufacturing Co. v. Storen*,⁴⁹ and concluded that the tax involved was invalid. An Indiana manufacturing company, which sold its products in Indiana, other states, and foreign countries upon orders taken subject to approval at the Indiana home office, sought a declaratory judgment of the validity of the Indiana gross income tax statute⁵⁰ as applied to its business. The Court, holding the tax invalid as applied to receipts derived from interstate and foreign sales, said:

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the Commerce Clause forbids.⁵¹

The result of invalidity of the tax by application of the multiple tax burden test presented the potential development of an economic formula, but, nevertheless, the possibility of duplicate taxation could easily be explained in that the taxable event, receipts from sales, would possibly, as to interstate and foreign sales, be the same taxable event under the tax statute of another state. The result of the case was entirely consistent with those cases in which the taxable event test had been applied. The classification of the sales contract arising out of state orders accepted in Indiana as interstate commerce, and the use of receipt of income as the definition of the taxable event conformed absolutely with the previous decisions. The separation of interstate

49. 304 U.S. 307 (1938).

50. See note 36 *supra*.

51. 304 U.S. 307, 311 (1938). Mr. Justice Black, dissenting, stated: Interstate commerce constitutes a large part of the business of the nation. Until Congress, in the exercise of its plenary power over interstate commerce, fixes a different policy, it would appear desirable that the States should remain free to adopt tax systems imposing uniform and nondiscriminatory taxes upon interstate and intrastate business alike.

Id. at 327.

and intrastate commerce, in the result, even of itself, signified that there was some reliance upon the taxable event test.

The Court again applied the multiple tax burden test in *Coverdale v. Arkansas-Louisiana Pipe Line Co.*,⁵² and concluded that the Louisiana tax⁵³ on the privilege of generating electric power, as applied to a corporation operating an interstate gas pipe line and generating at a station in Louisiana electric power to be used to compress the gas to transmit through the interstate pipe line, was valid. Although the trial court also applied the multiple tax burden test and held the tax invalid, the Supreme Court reversed the trial court's decision because the test had not, in its opinion, been applied correctly. Mr. Justice Reed, delivering the opinion of the Court, said:

It was held by the District Court that this is a tax which may be levied by other states and so is invalid, and that a state's desire to save gas for its citizens may induce it to raise the privilege tax to prohibitory rates. It is true that each state through which a pipe line passes could lay a tax on the use of engines for the production of power but that would not be multiple taxation merely because interstate commerce is being done as discussed in *Western Live Stock v. Bureau of Revenue*. . . . It would not be a tax on the same activity, either in form or substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business. It would not be multiple taxation for each state to tax the booster station ad valorem as

52. 303 U. S. 604 (1938).

53. Mr. Justice Reed, rendering the opinion of the Court described the tax as follows:

Act No. 6 of the Regular Session of 1932 of the Louisiana Legislature, with certain qualifications and exceptions not material here, provides for a license tax to be paid by everyone engaged within the State in the business of manufacturing or generating electricity for heat, light or power, § 1, or of selling electricity not manufactured or generated by him or it, § 2. Section 3 provides that every person, firm, corporation, or association engaged within the State in any business, which uses in the conduct of that business electrical or mechanical power of more than ten horsepower and does not procure all the power from a taxpayer subject to §1 or § 2, shall be subject to the payment of an excise, license, or privilege tax of One Dollar (\$1.00) per annum for each horsepower of capacity of the machinery or apparatus known as the 'prime mover' or 'prime movers,' operated by such person, firm, corporation or association of persons, for the purpose of producing power for use in the conduct of such business or occupation: . . .

Id. at 605.

property. Neither is it prohibited multiple taxation to have the possibility of other privilege taxes on the production of power. It is length of line, not interstate commerce, which makes another tax possible.⁵⁴

Since the taxable event was the generation of electricity, and this event occurred wholly within Louisiana, the Court concluded that there was no possibility of duplicate taxation; therefore, the Louisiana tax was valid. The fact that the interstate pipe line might require other generating stations beyond Louisiana's borders where other states might impose similar taxes was said to be immaterial. However, even though the Court considered this fact immaterial, the taxpayer would have been affected economically the same as if two states taxed the same event. If another generating unit, on the other hand, had been located in Louisiana, this unit would have also been subject to the Louisiana tax.

Although the Court did not specifically apply the taxable event test, the Court stated that the tax did not interfere with interstate commerce. Separation of the taxable event (generation of power) from the interstate commerce (transmission of the gas in the interstate pipe line) was probably not so easy as separation of delivery of possession to a buyer from an interstate sale,⁵⁵ or the publication of a magazine from the advertisements derived from interstate commerce.⁵⁶ Although the Court's use of the multiple burden test, therefore, did not conform completely with the taxable event test, the Court, nevertheless, accomplished the same result without having to expressly separate the generation of power from the interstate commerce and classify that event as intrastate commerce.

The multiple tax burden test continued to exist as a buffer between the taxable event test and an economic test, with irregular boundaries between each. The case of *Joseph v. Carter & Weeks Stevedoring Co.*,⁵⁷ however, seemingly contained the final chapter in the history of the multiple tax burden doctrine.⁵⁸ The

54. *Id.* at 612. Mr. Justice McReynolds dissented, again without a written opinion.

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

56. *Western Live Stock v. Bureau of Internal Revenue*, 303 U.S. 250 (1938).

57. 330 U.S. 422 (1947).

58. The economic interpretation of the multiple tax doctrine was later embodied in the substantial effects test.

facts of this case were identical with that phase of the *Puget Sound Stevedoring Co.*⁵⁹ case which had been held invalid. In following that precedent the Court stated the applicable rule as follows:

. . . in the present case, the threat of a multiple burden, except in a few instances in the record of interstate, in distinction to foreign, commerce is absent. . . . We need consider only whether or not the loading and unloading is distinct enough from the commerce to permit the tax on the gross.⁶⁰

The Court concluded, of course, that the loading and unloading of cargo in vessels engaged in interstate and foreign commerce was not separable from that commerce; therefore, the tax was invalid.

Even though the threat of a multiple tax burden was absent, the tax was, nevertheless, invalid because the taxable event was interstate and foreign commerce. The taxable event test was used, and the multiple tax burden rule was seemingly discarded. The economic interpretation of this discarded test, however, was destined to appear in a new form.

THE SUBSTANTIAL EFFECTS TEST

As the Court was returning to the traditional statement of the taxable event rule, a reaction had developed and appeared in

59. 302 U.S. 90 (1937). The New York tax involved in the *Carter & Weeks* case provided:

Imposition of tax. a. For the privilege of carrying on or exercising for gain or profit within the City any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the City from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence. . . .

City of N.Y., Local Law § 78 (1940), § R, 41-2.0.

60. *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 429 (1947). Mr. Justice Reed, delivering the opinion of the Court, recognized that a possible multiple burden might arise from similar taxes for loading and unloading at the terminal points of the ship's voyage, but said that that would not be precisely the same taxable event. Justices Douglas, Murphy, and Rutledge thought that the multiple tax burden doctrine should be followed and concluded that in situations where the loading or unloading was interstate commerce the tax would be valid, but only Justices Douglas and Rutledge thought that U.S. CONST. Art. I, § 10, clause 2 (see note 27 *supra*), invalidated the tax as applied to foreign commerce. Mr. Justice Black dissented without rendering a written opinion. (See note 51 *supra*).

Nippert v. Richmond.⁶¹ An ordinance⁶² of the City of Richmond, Virginia, required all solicitors to obtain a license for the privilege of soliciting. Upon the refusal to obtain a license by one Nippert, whose residence was not disclosed by the evidence presented, but who solicited business in Richmond for an out of state concern, the Virginia courts convicted Nippert of a misdemeanor. The facts and ordinance involved were so similar to those of the *Robbins* case that counsel⁶³ for the city of Richmond, in order to convince the Court that the judgment of the state court should be affirmed, argued that the *Robbins* case had been impliedly overruled by recent Supreme Court decisions.⁶⁴ Since the Court refused to overrule the *Robbins* case and concluded that the tax was invalid, thus reversing the state court's decision, it would seem that the *Nippert* case would require very little explanation. However, in view of the reasoning followed by the Court in reaching this conclusion, further comment will be made. Mr. Justice Rutledge, delivering the opinion of the Court, spoke in the following terms:

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

61. 327 U.S. 416 (1946).

62. The tax provisions of the ordinance were:

[Upon] . . . —Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors . . . \$50.00 and one-half of one per centum of the gross earning, receipts, fees or commissions for the preceding license year in excess of \$1,000.00. Permit of Director of Public Safety required before license will be issued. . . .

Richmond City Code, c. 10, § 23.

63. Mr. Horace H. Edwards, of Richmond, Virginia. In 1949 he was an unsuccessful candidate for the Democratic nomination for governor. His political platform included adoption of a state sales tax.

64. *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944); *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

policy having reference to the substantial effects, actual or potential, of a particular tax in supporting or burdening unduly the commerce.⁶⁵

Even though the taxable event was a local incident, according to the rule stated, this fact alone did not make the tax valid. A local incident was necessary only for the purpose of complying with the due process requirement of the Fourteenth Amendment; therefore, a local incident was not necessary to comply with the Commerce Clause. Whether the local incident was interstate or intrastate commerce was immaterial. The important factor was the substantial effect, actual or potential, of the tax in burdening or suppressing the commerce.

Although the Court under the new rule did not have to define the limits of interstate commerce, the interstate commerce factor continued to exist. The result was that meticulous distinctions⁶⁶ might be eliminated but were replaced by a comparatively indefinite factor—potential or actual substantial effect of the tax. The Court, confronted with two opposing objectives, the encouragement of interstate commerce and making interstate commerce pay its proper share of state taxation, chose the former over the latter without jeopardizing the recent decisions permitting the state taxation.

The determination to make interstate commerce bear its proper share of state taxation was again expressed in strong terms in *Central Greyhound Lines v. Mealey*.⁶⁷ In that case the New York Tax Commission decided that the entire gross receipts of the Central Greyhound Lines derived from transportation between points within New York was subject to taxation by New York, even though 42.53 per cent of the bus route between the terminals was outside the state's boundaries. Mr. Justice Frankfurter, rendering the opinion of the Court, commented:

In a case like this nothing is gained, and clarity is lost, by not starting with recognition of the fact that it is interstate

65. *Nippert v. Richmond*, 327 U.S. 416, 423 (1946). Justices Douglas and Murphy dissented on the ground that since there was no discrimination against interstate commerce, therefore, the tax should be valid. Mr. Justice Black dissented without writing an opinion.

66. Mr. Justice Holmes, delivering the opinion of the Court in *Galveston, Harrisburg and San Antonio Ry. v. State of Texas*, 210 U.S. 217, 225 (1908), stated, "It being once admitted, as of course it must be, that not every law that effects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. . . ."

67. 334 U.S. 653 (1948).

commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.⁶⁸

Shortly thereafter, however, a retreat from the economic formula began and was evidenced by a dissenting opinion in *Memphis Natural Gas Co. v. Stone*.⁶⁹ The Memphis Natural Gas Company, a Delaware corporation which owned and operated an interstate gas line, maintained 135 miles of the interstate line and two compressing stations in the State of Mississippi. The corporation paid ad valorem taxes assessed against this property. When the State of Mississippi imposed, in addition to the ad valorem taxes, a franchise tax⁷⁰ for the privilege of doing

68. *Id.* at 661. Mr. Justice Frankfurter concluded, however, that New York was demanding more than its constitutional share, but he suggested that if the tax were apportioned to the mileage within New York, the tax would be valid. Justices Murphy, Black, and Douglas thought the tax should be valid because New York was taxing only receipts from intra-state commerce; the fact that the bus traveled an interstate route was merely incidental to the receipt of income from transportation between termini in New York. With respect to the measure of the tax, see *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939), where the tax base equaled outstanding capital stock plus surplus plus undivided profits plus outstanding bonds plus notes plus debentures minus those maturing in less than a year from date of issue, multiplied by, Texas gross receipts divided by total gross receipts, which was held valid; *International Harvester Co. v. Evett*, 329 U.S. 416 (1947), where the tax base equaled ($\frac{1}{2}$ issued capital stock multiplied by, value of all the taxpayer's Ohio property divided by total value of all taxpayer's property) plus ($\frac{1}{2}$ issued capital stock multiplied by, total value of business done in Ohio divided by total value of all business done), which was also held valid.

69. 335 U.S. 80 (1948). See Hellerstein, *State Franchise Taxation of Interstate Business*, 8 LAW. GUILD REV. 429 (1949), for a complete discussion of this case.

70. MISS. CODE ANN. § 9313 (1942):

There is hereby imposed . . . a franchise or excise tax upon every corporation . . . now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to \$1.50 for each \$1,000.00 or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the State of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence.

§ 9314:

For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or

business as a corporation in the state, the gas company instituted a proceeding to determine the validity of the franchise tax as applied to it. The gas company alleged, and Mississippi conceded, the truth of the following statement:

Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges in its interstate activity other than the protection afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the company wholly in interstate commerce.⁷¹

That counsel for the State of Mississippi may have thought that the taxable event test was a dead issue so far as the Commerce Clause was concerned is indicated by their concession of the above allegation, but at least four members of the Court did not agree with this conclusion. The Chief Justice (Vinson) and Justices Jackson and Burton concurred in a dissenting opinion by Mr. Justice Frankfurter, who concluded:

For we are all agreed that where the only 'local incident' is the fact of interstate commerce—that the interstate pipeline goes through Mississippi—the tax is necessarily a tax upon the privilege of doing interstate business. The Commerce Clause put an end to the power of the States to charge for that privilege.⁷²

Justices Douglas and Murphy concurred with Mr. Justice Reed in his opinion, which concluded that the Supreme Court was bound by the state court's interpretation of the statute. That interpretation construed the tax as:

. . . an exaction . . . as a recompense for . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this state.⁷³

country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state as hereinbefore defined, a franchise or excise tax equal to \$1.50 of each \$1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state.

71. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 83 (1948).

72. *Id.* at 102. The dissenting opinion concluded, of course, that the tax as applied to the facts at hand was invalid. *But see* *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948), where the Court's opinion was written by the same Justice.

73. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 84 (1948).

This opinion, in other words, interpreted the agreed statement to mean, "Your petitioner obtains no protection *in its interstate activity* from the State of Mississippi [etc.] . . . [Italics added.]"⁷⁴

In addition to thus applying the taxable event test, in which the taxable events determined by following the state court's interpretation of the statute, were classified intrastate commerce because these events occurred wholly in Mississippi and could not be taxed by another state, the opinion reasoned that the tax did not have an unconstitutional effect upon interstate commerce; therefore, the judgment of the state court should be affirmed. Mr. Justice Reed used the multiple tax burden and the substantial effect tests as means of classifying the taxable event, instead of using independent formulae. Mr. Justice Rutledge, the originator of the substantial effects test, concurred in Mr. Justice Reed's opinion but expressed his reservations as follows:

It may be that for the purposes of this case there is little more than a verbal difference in so regarding the tax and in looking at it as one not 'upon' the commerce, although affecting it, but as being laid upon 'incidents of the commerce' or 'taxable events' taking place in Mississippi which are regarded as being 'sufficiently separate from' the commerce, whether by reason of the apportionment or otherwise, to sustain the tax. To the extent that no greater difference is presently involved, I accept the Court's conclusions and its reasoning.

But the difference conceivably may be of large, indeed of controlling, importance for other cases. And, so far as this may be true, I am unable to revert to rationalizations which make merely verbal formulae without reflection of difference in substantive effects controlling in these matters.⁷⁵

Mr. Justice Black also concurred in Mr. Justice Reed's result but did not render a written opinion.⁷⁶

RETURN TO THE TAXABLE TEST

Mr. Justice Rutledge's anticipations became realities one year later when the case of *Interstate Oil Pipe Line Co. v. Stone*⁷⁷ was presented to the Court. The facts involved a Mississippi

74. See note 71 *supra*.

75. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 97 (1948).

76. See note 51 *supra*.

77. 337 U.S. 662 (1949). See Mendelson, *Recent Developments in State Power to Regulate and Tax Interstate Commerce*, 98 U. OF PA. L. REV. 57 (1949), for a treatment of the 1949 interpretation of the Commerce Clause by the Supreme Court.

annual tax⁷⁸ upon the privilege of operating an oil or gas pipe line. The Interstate Oil Pipe Line Company, another Delaware corporation, owned and operated oil pipe lines extending from various oil fields in Mississippi to railroads elsewhere in the State of Mississippi. The pipe line company received orders from out of state customers for oil, pumped the oil through the pipe lines, and acted as agent of the customer in shipping the oil via railroad, pursuant to the customer's instructions. The pipe line company, of course, contended that the tax conflicted with the Commerce Clause and was, therefore, invalid. Mr. Justice Rutledge deliver an opinion in which Justices Black, Douglas, and Murphy joined, upholding the validity of the tax in the following terms:

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. . . .

Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax.⁷⁹

The meaning of the economic interpretation of the multiple tax burden test, as well as the idea of preventing discrimination

78. MISS. CODE ANN. § 10105 (1942):

There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows (see sections following):

§ 10109: . . .

Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the state of Mississippi is prohibited from taxing under the Constitution of the United States of America. . . .

79. 337 U.S. 662, 666 (1949).

against interstate commerce, was thus included in the substantial effects doctrine. Although from the origin of the substantial effects test in the *Nippert* case an economic element had been the important component, this was the first occasion for the express inclusion of the discrimination rule in the substantial effects doctrine.⁸⁰

Mr. Justice Burton concurred in the result, but only because the tax was "on the privilege of operating a pipe line . . . in intrastate commerce."⁸¹

The remaining Justices, Reed, Frankfurter, Jackson, and the Chief Justice (Vinson) followed the taxable event test and interpreted the business involved to be of interstate character because the oil was physically within the stream of interstate commerce when it began to flow in the pipe.

Five Justices reverted completely to the taxable test, and four Justices advocated the substantial effects doctrine, but the majority bloc was divided in its definition of interstate commerce. The result advocated by the adherents of the economic test was thus accomplished.

With the Court in this divided approach to the problem, two vacancies occurred in the Court's membership. President Truman appointed Attorney General Clark and Federal District Judge Minton to fill, respectively, the offices vacated by the deaths of Justices Murphy and Rutledge. After a very short period, the new appointees received an opportunity to express their ideas concerning this problem.⁸²

A Missouri corporation engaged exclusively in interstate trucking contended that a Connecticut franchise tax⁸³ imposed, "for

80. The tax in the *Nippert* case applied to residents and non-residents alike; therefore, there was no question of discrimination against interstate commerce in favor of similar intrastate commerce. Any economic rule, nevertheless, would include a discrimination element; so, Mr. Justice Rutledge's present statement of the rule was a normal development.

81. 337 U.S. 662, 668 (1949).

82. *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). See also *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951).

83. CONN. REV. GEN. STAT. § 1897 (1949):

Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and every other corporation or association carrying on, or having the right to carry on, business in this state which is required to report to the collector of internal revenue for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax with exceptions not material here) . . . shall pay, annually, a tax

the privilege of carrying on or doing business within the state," conflicted with the Commerce Clause. Although the State Tax Commissioner admitted that the corporation was engaged exclusively in interstate commerce, he pointed out that the tax was computed at a nondiscriminatory rate on that part of the corporation's net income which was reasonably attributable to its business activities within the state. There was no escape from the problem by classification of the corporation's activities as intrastate.⁸⁴ The Court had to decide whether interstate commerce, as such, could be required by the state to pay its fair share of taxation. Mr. Justice Minton joined the Frankfurter, Reed, Jackson, Vinson, Burton bloc which applied the taxable event test and, obviously, concluded that the tax was invalid. Mr. Justice Clark, who agreed with Justices Black and Douglas, advocated the same ideas which his predecessor had proclaimed.

The majority opinion by Mr. Justice Burton, stated, "They [the states] delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce. . . ."⁸⁵

The taxable event test, *i.e.*, that the taxable event cannot be interstate commerce, was followed by six Justices, whereas the three dissenting Justices advocated the idea associated with the substantial effects test.

CONCLUSION

In spite of the many judicial opinions rendered throughout the past half century, the basic problem involved in state taxation of interstate commerce continues to exist. If the states tax intrastate commerce but are not allowed to tax similar interstate commerce, competitive intrastate commerce will be at a disadvantage. If each state, on the other hand, is allowed to select an

or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent. . . .

84. The Court stated:

The tax is not levied as compensation for the use of highways or collected in lieu of an ad valorem property tax. Those bases of taxation have been disclaimed by the highest court of the taxing State. It is not a fee for an inspection or a tax on sales or use. It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State. . . .

340 U.S. 602, 607 (1951).

85. *Id.* at 608.

event—one part of the interstate commerce—as a subject for taxation, the sum total of the state taxes will place interstate commerce at a disadvantage in relation to competitive intrastate commerce. How can competing interstate and intrastate commerce be taxed so that neither will be placed in an unfavorable position? The substantial effects and multiple tax burden tests recognize the nature of the problem as economic and attempt to solve it by weighing economic factors. The present majority bloc probably feels that adoption of the economic test might subject interstate commerce to more and greater state taxation and thus tend to place interstate commerce in an unfavorable relation to competitive intrastate commerce. They are willing to allow the states to tax small parts of interstate commerce when such events are classified intrastate commerce.⁸⁶ The Court, however, has not suggested a test to determine the interstate-intrastate classification of the event selected for taxation.

An attorney can not competently advise his client on problems in this field unless there is a Supreme Court precedent very similar to the problem involved. The present majority bloc would probably hasten to point out that an attorney would be in the same position if he were attempting to advise his client on the basis of the application of an economic test. In fact, the attorney would have more precedents on the resolving of the interstate-intrastate classification of the event taxed than he would have on the weighing of economic factors.

The value of having laws which can be interpreted by attorneys and advice rendered thereon which is a fairly accurate estimate of how the courts will hold is indeed important. But it is also important to maintain the proper balance between interstate and intrastate commerce. If the Court adopts a general criterion which might result in placing either interstate or intrastate commerce in an unfavorable position in relation to the other, it might result in the abolition of that type of commerce. This, of course, would hurt the nation or the state, and damage to either would constitute damage to both under our present form of government.

The Court is solving each case as it arises without establishing detailed principles to prevent future litigation, but in doing so

86. Or for such purposes as are listed in note 84 *supra*.

it is ever careful to tread slowly with the constant thought of preserving the constitutional relations between the states and the United States.⁸⁷

87. See, for example, cases involving use of the taxation power to accomplish purposes other than to raise revenue; *McCray v. United States*, 195 U.S. 27 (1904); *United States v. Doremus*, 249 U.S. 86 (1919); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hill v. Wallace*, 259 U.S. 44 (1922); *United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).