

THE COMMERCE POWER: AN INSTRUMENT OF FEDERALISM

ALBERT S. ABEL*

It may seem strange to think of a purely commercial power as one of the foundations of democratic institutions. But in my judgment this is just what the commerce clause has turned out to be. It is inherently a federal device.—*A Declaration of Legal Faith.*

A consistent conception of the Constitution in integral relationship with other legal, social, and political phenomena, a long span of years to expound that conception, and the possession of high intellectual powers, have twice in our history combined to produce majestic constructions, in the constitutional universes of Marshall and Holmes. Briefer terms of judicial service perforce prevent the full exposition, perhaps the full development, of any such impressive fabric, leaving at best sketches and fragments of the grand design. Even they, however, have sufficed some few great judges to shape enduringly the course of constitutional thinking. Thus, the *Cooley* case¹ is a monument to Curtis and the *Palko* case² to Cardozo. With a length of judicial service almost identical with Curtis and Cardozo,³ Rutledge accomplished certainly no less than they. Leaving to other writers in this symposium the task of appraising his constitutional contributions in areas other than the commerce clause, I venture to believe that, if his commerce clause insights were his sole claim to remembrance, they still would entitle him to a very high rank among American judges. What those insights were and how they support that belief, this article will undertake to show.

Rutledge's opinions—for the court, concurring, and dissenting—are naturally the best evidence of his understanding of the clause.⁴ No doubt significance attaches also to judicial votes; but, like denials of certiorari,⁵ they are equivocal guides to elusive conclusions. They may possibly indicate an unreserved adoption of every nuance of the opinion in which one joins; more often judicial votes denote a general agreement with the opinion as a rough approximation to correctness considering it accurate enough that—under current pressures of time, the corporate impulses of court or minority, and

* Professor of Law, West Virginia University; B.A. 1927, J.D. 1930, State University of Iowa; LL.M. 1937, S.J.D. 1943, Harvard University. Senior attorney OPA, Washington, D. C. 1942.

1. *Cooley v. Board of Port Wardens*, 12 How. 298 (U. S. 1851).

2. *Palko v. Connecticut*, 302 U. S. 319 (1937).

3. Curtis served from 1851 to 1857, Cardozo from 1932 to 1938. DOWLING, *CASES ON CONSTITUTIONAL LAW*, app. 1 (3d ed. 1946). Rutledge served from 1943 to 1949.

4. Only once, and then peripherally, did a situation with commerce clause ramifications claim his attention when he was on the Court of Appeals for the District of Columbia. See *Panitz v. District of Columbia*, 172 F.2d 61 (D.C. Cir. 1941).

5. For a recent full discussion of the sterility of denials of certiorari in the generation of inferences as to judicial views, see the opinion of Mr. Justice Frankfurter in *Maryland v. Baltimore Radio Show, Inc.*, 70 S. Ct. 252 (U. S. 1950).

the relative importance of the question involved as compared with others up for consideration—the marginal utility of a separate opinion is not deemed equal to the judicial cost involved. Joinder expressly “in the result” is somewhat more informative since it shows substantial disagreement with substantial parts of the reasoning; but even it serves rather to raise a question than to give an answer. Accordingly, exploration of his judicial activity will be addressed largely to his opinions; and reference to his votes, while not rigidly eschewed, will be made most sparingly unless he elsewhere shed retrospective light on their meaning. In addition to his judicial opinions, there is, of course, the series of lectures published in 1947 in book form under the title, *A Declaration of Legal Faith*.⁶ (Parenthetically, his choice of the commerce power as the subject for a lecture series, especially a series with such a title, may be suggestive of his notions of its relative interest and importance in our constitutional scheme.)⁷ This slender volume is not a mere paraphrase of his judicial utterances but supplements them as to matters upon which he had or took no occasion to express himself judicially.

I

We turn first to the National Affirmation—“The Congress shall have Power . . . to regulate Commerce . . . among the several States . . .”. In this, as compared with the negative implications operative upon the states, the solutions have been relatively easy. There has been concern with what is commerce, not so much with what is regulation . . . Largely the task has been done judicially of defining the reach of the federal legislative arm.⁸

The substantial scope of Congressional power under our Constitution with judicial review as its basic regulator is not settled by the permissive or prohibitory phrases which the Court formulates to define it. Judicial elaboration of what Congress has done is as pertinent as judicial declarations of what it may do. Analytically, of course, the former is not a part of the celestial mechanics of constitutional law at all but is only the dusty, earthy process of statutory construction. But, just as the eater’s concern is with the proof of the pudding and not of the recipe, so the citizen’s is with the substance of governmental command rather than with the propositions which sustain or defeat it. Interpretation and application of statutes passed in reliance on the commerce clause have been increasingly and, in all likelihood, will be almost exclusively the context in which the commerce clause in its federal aspect is presented for consideration. Whether constitutional law as a discipline continues to exclude such matters or is extended by analogy to embrace them is

6. RUTLEDGE, *A DECLARATION OF LEGAL FAITH* (1947).

7. “. . . the commerce clause is a uniquely federal instrument. More than any other provision it has had to do with clashes of federal and state power, the lines of their division and their reconciliation in the federal plan.” *Id.* at 33.

8. *Id.* at 38-39.

not very important. But the judicial approach to such problems does condition and control in fact the extent of power which Congress effectively possesses. For any individual Justice, the roots of Congressional power over commerce may be his constitutional conceptions but the fruits are the applications accorded to exercises of the power. Both must be examined to know his views of the living organism.

Congressional statutes passed under the commerce clause were not, for Rutledge, conveyancers' instruments to be scanned with a jealous eye and given a niggardly application. In case after case, with statutes and issues the most various, he went on record as favoring that one of the alternative constructions which gave the more extended operation to what Congress had tried to do and had done,⁹ and, on occasion, he categorically supported that approach.¹⁰ In the same spirit, his impulse was in general to support the substantive interpretations and the procedural techniques established by the administrative officials or agencies to whom power was delegated under such statutes.¹¹ Yet he recognized a retained power and duty in the Court of examining the record to see whether the administrative determination was supported by the facts there appearing and, if not so supported, of setting the determination aside.¹²

9. *Urie v. Thompson*, 337 U. S. 163 (1949) (FELA, not confined to injuries inflicted by accidental means but extended to silicosis); *United States v. Sullivan*, 332 U. S. 689, 698 (1948) (concurring opinion, Pure Food, Drugs, and Cosmetic Act, retail resale after interstate movement ended); *United States v. Yellow Cab Co.*, 332 U. S. 218, 234 (1947) (noting concurrence in portions of opinion holding conduct subject to Sherman Act and dissent from portion of opinion holding local taxicab operation in Chicago not to be); *United States v. Silk*, 331 U. S. 704, 719 (1947) (concurring opinion, Social Security Act coverage); *Levinson v. Spector Motor Co.*, 330 U. S. 649, 685 (1947) (dissenting opinion, FLSA coverage); *United States v. Sheridan*, 329 U. S. 379 (1946) (National Stolen Property Act); *Hartford-Empire Co. v. United States*, 323 U. S. 386, 438 (1945) (partially dissenting opinion, Sherman Act); *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111 (1944) (NLRA, coverage); *Midstate Horticultural Co. v. Pennsylvania R. R.*, 320 U. S. 336 (1943) (Interstate Commerce Act, waiver of statute of limitations by agreement); *Owens v. Union Pacific R. R.*, 319 U. S. 715 (1943) (assumption of risk as defense under amended FELA); *Direct Sales Co. v. United States*, 319 U. S. 703 (1943) (Harrison Anti-Narcotic Act, relevance and sufficiency of evidence).

10. *See, e.g.*, *United States v. Silk*, 331 U. S. 704, 721 (1947).

11. *SEC v. Central-Illinois Securities Corp.*, 338 U. S. 96 (1949); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946); *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946); *United States v. New York Telephone Co.*, 326 U. S. 638 (1946); *May Department Stores Co. v. NLRB*, 326 U. S. 376, 393 (1945) (concurring in part); *Barrett Line, Inc. v. United States*, 326 U. S. 179 (1945); *Inland Empire District Council v. Millis*, 325 U. S. 687 (1945); *Gemsco, Inc. v. Walling*, 324 U. S. 244 (1945); *Addison v. Holly Hill Fruit Products Co.*, 322 U. S. 607, 625 (1944) (dissenting opinion); *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944); *cf. NLRB v. Crompton-Highland Mills, Inc.*, 337 U. S. 217 (1949) (noting partial concurrence but voting to enforce NLRB order without modification made by majority.); *United States v. American Union Transport, Inc.*, 327 U. S. 416 (1946) (foreign commerce).

12. *May Department Stores Co. v. NLRB*, 326 U. S. 376, 393 (1945) (concurring opinion); *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678, 688 (1944) (dissenting opinion); *Eastern-Central Motor Carriers' Ass'n v. United States*, 321 U. S. 194 (1943);

As manifestations of his attitude toward administrative action, these decisions are considered elsewhere; as manifestations of a judicial response to the system of controls over interstate commerce deemed appropriate by Congress, they are noted here. Formulae of statutory construction were not of compelling force. Neither in the common law connotations of words and phrases used,¹³ nor in their literal meaning,¹⁴ nor yet in the Court's own prior interpretations (alone or buttressed by statements about the silence of Congress)¹⁵ did he find ready-made solutions for the problems involved in determining how far the reach of particular enactments went.

Instead, his principal criterion, alluded to recurrently in his opinions,¹⁶ was the purpose which the statute was meant to promote. Reference to the intention of the legislature is of course a commonplace of judicial discourse—sometimes as a polite verbal bow, analogous to references in another context to the testator's intent and equally unrelated to any genuine interest in genuine desire; sometimes as a handy device for selectively rummaging through the ambiguities of legislative history. But this "legislative intention" was not all that was contemplated by insistence on seeking the statute's purposes. Nor does the doctrine of *Heydon's Case*,¹⁷ with its focus on the mischief and defect in the prior law and the legislative remedy provided together with the reason therefor, fully comprehend the notion of the statutory purpose as conceived in this connection. Rutledge thought in more positive terms. As he saw it, Congress, acting under the commerce clause, was neither engaged in doing literary exercises for the Court to parse nor in fitting secondary patches to an existing primary fabric. It was prescribing programs of government control for the achievement of social, economic, or industrial ends appreciably related to interstate commerce. The Court's job was to treat the statute as a blue-

cf. *United States v. Seatrains Lines*, 329 U. S. 424, 433 (1947) (noting concurrence "in the result"); *see* *United States v. Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536 (1946).

13. *United States v. Silk*, 331 U. S. 704, 719 (1947) (concurring, rejecting common law "control" test of employer-employee relationship for purposes of Social Security Act); *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 122-124 (1944) (stressing diversity of state common law rules as basis for non-acceptance in determining master-servant relationship under NLRA); *Midstate Horticultural Co. v. Pennsylvania R. R.*, 320 U. S. 356, 360 (1943) (rejecting right-remedy rationale of statutes of limitation as ground of decision).

14. *Levinson v. Spector Motor Co.*, 330 U. S. 649, 689 (1947) (dissenting opinion); *Addison v. Holly Hill Fruit Products Co.*, 322 U. S. 607, 637 (1944) (dissenting opinion).

15. *United States v. South Buffalo Ry.*, 333 U. S. 771, 785 (1948) (dissenting); *but cf.* *Walling v. Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 26 (1947) (concurring on ground that arrangements between parties had been entered into in reliance on *Walling v. Belo Corp.*); *Cleveland v. United States*, 329 U. S. 14, 21 (1946) (questioning validity of concept of Congressional acquiescence by inaction but concurring solely on the authority of *Caminetti v. United States*).

16. *See, e.g.*, *Urie v. Thompson*, 337 U. S. 163, 180-181 (1949); *Levinson v. Spector Motor Co.*, 330 U. S. 659, 689 (1947) (dissenting opinion). Similar phrasing crops up in nearly every one of Rutledge's opinions in this area.

17. 3 Co. 7a, 76 Eng. Rep. 637 (Ex. 1584).

print, the composite facts as raw materials, and to fashion the legal finished product which the draftsmen had envisaged. To change metaphors, the Court was dealing with a corpus, not with *disjecta membra*. Particular applications were not particularly determinable detail by detail. The search was rather for a rounded program, a statutory policy and purpose. This being discovered, the question became one of whether the case at hand fell within the ambit of that program.

Infrequently this approach led to over-refined, perhaps even tortured, analysis of the facts.¹⁸ More characteristically, it produced comprehensive, penetrating, Brandeis-like explorations of complex data—marketing practices in the beet sugar industry,¹⁹ the various pattern of production of processed agricultural commodities,²⁰ the institutional peculiarities of newspaper distribution²¹—developing aspects of the case at hand which brought it within the statutory policy.

There was no like articulation of the process by which that policy itself was discovered. It emerged as an intuitive appraisal, reasonable but obscure in its foundations. Therein lies perhaps the chief defect and the chief danger of Rutledge's method as a tool for use by others with less robust common sense and more specialized sympathies than he; though it may well be that in law, as in chemistry, what is organic cannot be crystallized without loss of its vitality. But with him the method worked. It may be said, in the light of his dissent in *Hartford-Empire Co. v. United States*,²² that, in adjusting legislation resting on the commerce power and that based on other constitutional grants (in that case the patent clause) he tended to find greater force and vitality in the former, on the ground that the exercise of the commerce power was an expression of a general, that of the patent power merely of a special policy. And from the dissent in *Levinson v. Spector Motor Service*,²³ it appears that, in accommodating provisions of different statutes, both enacted under the commerce clause, the accommodation was to be made "in a manner which will give to each its maximum effect"²⁴ and the affirmative operation of one should not be curbed by the latent potential of the other except as that was clearly directed.

The dominant attitudes which appear from a survey of Rutledge's performance in construing commerce clause legislation are thus two: the attitude of integration, of stressing the *ensemble*, of disinclination to look to dissociated fragments; and the attitude of affirmation, of concern with the postive

18. *United States v. Sullivan*, 332 U. S. 689, 698 (1948) (concurring opinion).

19. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219 (1948).

20. *Addison v. Holly Hill Fruit Products Co.*, 322 U. S. 607, 625 (1944) (dissenting opinion).

21. *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111 (1944).

22. 323 U. S. 386, 438 (1945).

23. 330 U. S. 649, 685 (1947).

24. *Id.* at 691.

achievement of a dynamic program. Such attitudes were natural and even inevitable for one who viewed the commerce clause as a grant of federal power.²⁵

The commerce power is not unlimited. Extrinsic limitations arise from other parts of the Constitution, specifically from the Due Process Clause,²⁶ but there are also intrinsic limitations having some sort of ill-defined relation with the position of the states in our federal system.²⁷ Whatever these latter may be, however, so far as the federal government is concerned, the clause constitutes a "positive affirmation . . . of power."²⁸ For a long time the power was unchallenged and virtually unexercised, because its very existence under the circumstances of the times sufficed. There was no need for more than casual regulation;²⁹ but "economic change" induced "increasing scope and variety of federal legislation."³⁰ Momentous increases in industrialization, mechanization, and concentration of economic enterprise accompanied the growth of the nation and brought Congressional legislation under the commerce power.³¹ "A democratic nation must have a government endowed with powers sufficient to meet its external and internal needs. These today necessarily must be large."³² The power over interstate commerce is then a dependent variable, a function of our economic life, not a historical or juristic constant. The grant is a grant and confers authority as great as the need for regulation, whatever that may be. The pressure of events generated federal regulation and justified the regulation which it generated. At one time, the formula might be possession of power "necessary and proper" to render effective the granted power over commerce, at another that of "affecting" commerce.³³ The important thing to Rutledge was not a nice doctrinal analysis or a precise definition, neither of which he ever systematically attempted,³⁴ but the synchronization of governmental power with economic life.

25. This view was expounded judicially in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219 (1948), and extrajudicially in *A DECLARATION OF LEGAL FAITH*.

26. RUTLEDGE, *op. cit. supra* 43.

27. Compare ". . . [O]ther limits are dictated by considerations affecting the necessary and appropriate scope for play of state rather than federal power," *ibid.*, with "This does not mean that state power is a limitation upon federal power within the federal sphere. . . It does mean that, wherever the farthest boundary of the power of Congress may go, that line provides a limit induced by the incidence of state power at that point." *Id.* at 34 n.6 This attempted correlation of state and federal power is somewhat perplexing.

28. *Id.* at 33.

29. *Id.* at 31.

30. *Id.* at 42; *cf.* *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 415 (1946).

31. RUTLEDGE, *op. cit. supra* 31.

32. *Id.* at 76.

33. The two doctrines were after all broadly equivalent. Compare *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 232 n.11 (1948) with *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 423 (1946).

34. "We do not yet know how to define commerce with broadly inclusive words of precision. We only know how to chip out the definition bit by bit." RUTLEDGE, *op. cit. supra* 36. "Larger emphasis is put on scrutiny of particular facts and concrete conse-

"The vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect. . . ." ³⁵ The evolution of judicial doctrine as to federal regulation of interstate commerce was disfigured by the *Knight* case,³⁶ with its "artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce,' without regard to their economic continuity, the effect of the former two upon the latter, and the varying methods by which the several processes are organized, related, and carried on."³⁷ That decision had substantially nullifying effects for coverage of "the [commerce] clause" as well as of "the [Sherman] Act."³⁸ It so hampered effective Congressional regulation of interstate commerce that it carried the seeds of its own destruction.³⁹ Its suggestion of a complete dichotomy between local activity and interstate commerce was contradicted by the decision in the *Shreveport Rate Cases*,⁴⁰ regarded by Rutledge as one of the two or three conspicuous landmarks in the development of commerce clause doctrine.⁴¹ *Shreveport* dealt specifically with the transportation aspect of interstate commerce but had a significance transcending transportation enterprise.⁴² ". . . [T]he decision substituted judgment as to practical impeding effects upon . . . commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action."⁴³ For a matter of decades, the disjunctive principle of the *Knight* case and the conjunctive notions of *Shreveport* competed for judicial acceptance, with the latter ultimately triumphing and fixing the shape of Congressional power over commerce.⁴⁴ The *Knight* conception of emphasizing the

quences, with an eye on their practical bearings. . . Correspondingly, less stress, though in my opinion still too much, is placed upon large generalizations and dogmatisms inherited from levels of debate time has lowered." *Id.* at 70.

35. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 238 (1948).

36. *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895).

37. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 229 (1948).

38. *Ibid.*

39. . . . [H]ad its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219, 230 (1948).

40. *Houston, E. & W. T. Ry. v. United States*, 234 U. S. 342 (1914).

41. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 232 (1948); RUTLEDGE, *op. cit. supra* 42.

42. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 232 n.11 (1948).

43. *Id.* at 233.

44. RUTLEDGE, *op. cit. supra* 42-43.

several links and not the whole chain is "no longer effective to restrict . . . Congress' power."⁴⁵

"It [is] necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands [are] effective."⁴⁶ "It is the effect upon commerce, not the moment when its cause arises" which is relevant.⁴⁷ "The inquiry whether the restraint occurs in one phase or another, interstate or intrastate, is now merely a preliminary step except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented."⁴⁸ Nor need the individual transaction or occurrence from which the case arises separately have appreciable independent effect on interstate enterprise if it is a member of a class which does have an interstate commerce impact.⁴⁹ The total pattern and not the isolated circumstance is the determinant of Congressional power.

So Rutledge's practice and theory were reciprocally consistent. Again, we see the conviction that the clause is to be given a positive content and operation, is to be read as a full authority to Congress to exercise oversight of the nation's economic life coextensive with the national interest.⁵⁰ And again there is the refusal to treat facts or events in business or industry as discrete phenomena, the regard for relationships and consequences. His exposition of the qualities of Congressional power over interstate commerce

45. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 229 (1948).

46. *Id.* at 232.

47. *Id.* at 234.

48. *Ibid.*

49. Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare may be exercised in individual cases without showing any specific effect upon interstate commerce; it is enough that the individual activity when multiplied into a general practice is subject to federal control or that it contains a threat to the interstate economy that requires preventive regulation.

Id. at 236.

50. The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce. On the contrary, it is, as Marshall declared in *Gibbons v. Ogden*, a grant to Congress of plenary and supreme authority over those subjects. The only limitation it places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make congressional regulation necessary or appropriate.

Prudential Insurance Co. v. Benjamin, 328 U. S. 408, 423 (1946). It is not to be inferred that Rutledge limited the clause to matters involving economic enterprise; indeed, the contrary appears from failure to suggest constitutional doubts in his special concurrence in *Cleveland v. United States*, 329 U. S. 14, 21 (1946), a case involving non-commercial movement between states; cf. *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186 (1946) (publishing business subject to Congressional control under the commerce clause).

The power to "regulate" was ample in his opinion to permit Congress to prohibit interstate commerce and to discriminate against it in favor of local commerce. See *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 434 (1946).

harmonizes perfectly with the interpretations which he gave to statutes passed in the exercise of that power.

II

. . . [C]leanly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven, at times highly variable. More often than not, in matters more governable by logic and less by experience, the business of negative implication is slippery. . . . That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation.⁵¹

The operation of the commerce clause as a potential limitation on state regulatory power has, for almost a century, presented mostly a question of the practical consequences and applications of a fairly well-settled theory (the companion but somewhat specialized development with regard to state taxation is reserved for separate treatment in a later section).⁵² The text of the clause makes no reference to state power and there is evidence that originally, except for the curbs provided by the supremacy clause,⁵³ in cases where Congress legislated, no independent hampering of state authority was understood to have arisen as a corollary of the grant of federal power over interstate commerce.⁵⁴ But a tradition—probably originating in some of Marshall's bold dicta in *Brown v. Maryland*⁵⁵ and matured by a concatenation of federally minded historiography, the outcome of the Civil War, the integrating economic and social impulses that have dominated the American scene, and its own uncritical repetition—is thoroughly established that one of the prime evils under the Articles of Confederation, and hence a barrier which the Constitution was principally devised to remove, was a body of obstructions which

51. *Id.* at 418.

52. See p. 517 *et seq. infra*.

53. U. S. CONST. ART. VI § 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

54. *Cf., e.g.*, Madison's letter of February 13, 1829, to J. C. Cabell, 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 478 (1911). See also, Abel, *The Commerce Clause in The Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 481 *et seq.* (1941).

55. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress.

12 Wheat. 419, 446 (U. S. 1827). The statement was made in connection with foreign commerce, in which context it seems strictly accurate; but it has been generalized so as to embrace interstate commerce and subsequently cited without observing the distinction.

the then laws of the states imposed on their reciprocal intercourse. The myth is by now a venerable one and probably, given the type of national civilization which we have evolved, as necessary as it is venerable.. Certainly it is one which Rutledge explicitly accepted⁵⁶ although, his genius not being ordinarily⁵⁷ antiquarian in cast but concerned rather with the present and future situations governed by decision, it is unlikely that he gave the argument controlling weight.⁵⁸ Whatever the basis, it is settled law that the commerce clause is, in one of Rutledge's favorite metaphors, a "two-edged instrument"⁵⁹ with effects upon the authority of the states as well as of Congress.

The fundamental doctrine as to the nature of those effects was spelled out as early as 1851 in the great case of *Cooley v. Board of Wardens*⁶⁰ where Curtis laid it down that not the nature of "the power" but the nature of the subjects of regulation determined the negative swath of the commerce clause, with some subjects national in nature requiring uniformity of regulation, and others local in nature requiring (since his time amended to read, "admitting of") diversity of regulation. As to the former, the states might not, even in the absence of federal action, prescribe rules applicable to interstate activities; as to the latter they might do so unless and until Congress enacted a controlling policy. Thus, the *Cooley* case solved the issue of the validity of state legislation in the absence of Congressional action. The solution has since remained essentially unchanged.

Where Congress has acted the theory of the law has been more murky and no formulation of doctrine yet proposed has received as nearly universal acceptance as the *Cooley* rule. By force of the supremacy clause, state regulations in conflict with Congressional action must of course give way, whether their subjects be local or national in nature. As to non-conflicting state regulations, there has emerged the concept of supersedure by Congressional occupancy of a field⁶¹ under which wholly consistent state legislation, whether supplemental⁶² or virtually parallel⁶³ to that of Congress, is devitalized by the

56. RUTLEDGE, *op. cit. supra* 25.

57. But see his refined analysis of the record in the *Cooley* case in support of the proposition that its doctrine as to state authority to regulate certain aspects of commerce applied alike to interstate and to foreign commerce. *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 38 n.19 (1948).

58. He supplemented it with the argument that limitation on state powers was not merely intended but necessary, *see Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 418 (1946), a somewhat doubtful proposition logically in view of the existence of the supremacy clause.

59. *Id.* at 417; Rutledge, *op. cit. supra* 33, 45.

60. 12 How. 299 (U. S. 1851).

61. This idea furnished the technical ground of decision in the very first case to come to the Supreme Court involving the commerce clause, *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824).

62. *E.g.*, *Kansas City Southern Ry. v. Van Zant*, 260 U. S. 459 (1923).

63. *E.g.*, *Southern Ry. v. Railroad Comm'rs*, 236 U. S. 439 (1915); *Erie R.R. v. New York*, 233 U. S. 671 (1914).

adoption of the latter. The concept may be applied even though the subject be one local in nature, and hence admitting of diversity, or, under some of the more extreme holdings, even though the Congressional regulation be the mere establishment in an agency of a general potential of supervision unexercised and not about to be exercised.⁶⁴ There has further emerged agreement that, whether the states' anterior and independent action would have been paralyzed by Congressional inaction (subject national in character) or by Congressional action (supersedure) when and so far as Congress manifests a willingness that the states may regulate the Court will not decree otherwise. Divergent rationalizations have attended this result because of difficulties as to how Congress can authorize what the Constitution denies, and consequently doubts have been expressed as to whether it is the Constitution or only the will of Congress implied from its silence which forbids state action and which accordingly the Court must construe.

A comprehensive view of state regulations impinging on interstate commerce must then embrace three major variants, marked by as many postulates as to Congress' conduct, each having its own difficulties of application. With the first variant, where Congress has not spoken, the law has been settled since the *Cooley* case; but the characterization of subjects as local in nature admitting of diversity or national in character and requiring uniformity calls for the threshing out of complex combinations of facts and policy. But this matter is one of diminishing importance as the list of matters on which Congress has not spoken dwindles toward extinction.⁶⁵ Finding Congressional legislation nearly or remotely related to the state regulation involved, we are confronted with the second variant, whose major problem is one of interpretation, the definition of the area of control which Congress has occupied and from which consequently it has, under the doctrine of supersedure, effected an ouster of the states. The third variant, where the federal statute speaks assentingly of state regulation, also incidentally presents issues of interpretation as to the areas approved for state action; but this has been the area where the statement of an adequate legal theory has been peculiarly troublesome. To the first, Rutledge contributed something; to the second, little; to the third, much.

*Robertson v. California*⁶⁶ raised questions as to the validity of two sections of the state code, one forbidding persons to act as insurance agents without having obtained a license, the other in substance penalizing the writing in California of policies with companies not admitted to do business there. In view of the state's policy not to admit mutual companies without prescribed reserves (with the exception of some which qualified under a "grandfather" clause) the effect of the act was to wholly exclude unqualified mutuals from

64. *E.g.*, *Oregon-Washington R.R. & N. Co. v. Washington*, 270 U. S. 87 (1926).

65. *Cf.* *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 413 n.8 (1946).

66. 328 U. S. 440 (1946).

the domestic California insurance market. Congress, restrained by constitutional limitations supposed to exist, from *Paul v. Virginia*⁶⁷ to *United States v. South-Eastern Underwriters Association*,⁶⁸ had abstained from legislating with respect to insurance until after the policy solicitation for which Robertson was indicted. The Court, excluding as a basis for support of the conviction the explicit acquiescence in state regulation thereafter expressed in the McCarran Act⁶⁹ in order to avoid possible *ex post facto* contentions which reliance on it might generate, dealt with the case on the basis of the validity of a state regulation in an area of Congressional silence, sustaining the statutes and the conviction for having written policies in California as agent for an unadmitted and inadmissible Arizona mutual.

*Bob-Lo Excursion Co. v. Michigan*⁷⁰ also involved a criminal prosecution and sustained application of a state criminal statute over objections of commerce clause invalidity. Indeed, the activities as to which Michigan was sustained in applying her statute were foreign, and not merely interstate commerce. It was a very special sort of foreign commerce, however, involving transportation of passengers to and from, and only to and from, a Canadian island which constituted in effect a recreational annex to the city of Detroit. Defendant's activities seem to have been limited to the conduct of the insular amusement park and the transportation by excursion steamer of pleasure seekers to partake of its delights. The statute, the Michigan Civil Rights Act, was of standard pattern, forbidding those engaged in the common callings (among whom the Michigan Supreme Court as a matter of state law placed defendant) to discriminate in service on grounds of race, creed, or color. In applying a company policy against negroes, under which Bob-Lo would not furnish them transportation from Detroit (nor, consequently, entertainment in Canada) passage was refused a negro member of a mixed group to whom a block of tickets had been sold. No federal or Canadian legislation bore on the matter of racial discrimination by carriers.

Rutledge's opinions for the Court in these two cases are the principal sources of information as to his attitude toward state regulation where Congress is silent. Doctrinally he adhered to the formula of the *Cooley* case, the significance of which he amply appreciated.⁷¹ Its twofold classification was for him not merely valid but operative to run a boundary line between the constitutionally permitted and the constitutionally prohibited, rather than

67. 8 Wall. 168 (U. S. 1868).

68. 322 U. S. 533 (1944).

69. 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-1015 (Supp. 1946).

70. 333 U. S. 28 (1948).

71. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 232 (1948); *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 38 (1948); Rutledge, *op. cit. supra* 58, 70.

just to establish a canon for construing the silence of Congress.⁷² Once a subject was determined to be national in character, the Constitution by its own force excluded the states from applying their regulations.⁷³

Acceptance of the *Cooley* formula did not eliminate the difficulties of judgment but only shifted them. The Court must still distinguish those subjects needing uniformity of regulation from those for which diversity was appropriate. He scorned the flabby evasion of labelling condemned statutes "regulations of commerce" and approved ones regulations "incidentally affecting" it.⁷⁴ He never resorted in commerce clause cases to the shimmering imprecisions of "police power" verbiage, but faced up to the proposition that the validity of a regulation of commerce was involved.⁷⁵

The guide Rutledge suggested is oddly reminiscent of the currently over-worked and severely mangled "clear-and-present-danger" test.⁷⁶ That test, deriving from a vastly different context, can hardly have been supposed to furnish analogies useful for detailed decision but it does indicate how strongly he felt that judicial reticence in the invalidation of regulations was in order. Such a view was congenial to his general premises—his agreement as to the usefulness of the states for carrying on experiments in regulation,⁷⁷ his awareness of the rebuffs which earlier Courts had received from earlier Congresses for proneness to conclude that uniformity of regulation was required,⁷⁸ his conviction that the trend of constitutional development was "toward sanctioning state regulation formerly regarded as inconsistent with Congress' unexercised power over commerce."⁷⁹ In this setting, the particulars of regulation were to be evaluated.

72. RUTLEDGE, *op. cit. supra* 54-62.

73. *Id.* at 66.

74. *Robertson v. California*, 328 U. S. 440, 448 (1946); RUTLEDGE, *op. cit. supra* 51 n.3.

75. *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 34 (1948); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U. S. 507, 512-513 (1947) (emphatically rejecting the mechanical test of reduction of gas pressure as end of interstate commerce on broken-package analogy); *cf. Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 426 (1946).

76. . . . [T]he dormancy of Congress' power still gives occasion . . . for the implied prohibition of the commerce clause to work. The exclusion, narrowing with the years, has come on the whole to require substantial danger, real or actually threatening, of creating the effects the clause was drawn to prevent.

Rutledge, *op. cit. supra* 72.

77. *Republic Gas Co. v. Oklahoma*, 334 U. S. 62, 96 (1948) (dissenting opinion): . . . [I]n considering the proper scope for state experimentation, it is important that we indulge every reasonable presumption in favor of the states' action. They should be free to improve their regulatory techniques as scientific knowledge advances, for here too experimentation is the life-blood of progress.

78. ". . . [S]ad experiences with judicial conceptions of the need for uniformity have made judges unwilling to jump too readily to the conclusion that this branch of the *Cooley* formula applies." RUTLEDGE, *op. cit. supra* 71.

79. *Id.* at 68.

Itemizing (not cataloguing) particulars deemed relevant to decision, he instanced "the degree of localization of the commerce involved: . . . the attenuating effects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or . . . actual probability of conflicting regulation by different sovereignties."⁸⁰ While an interstate or foreign commerce enterprise ought not be subjected to realized or gravely threatened clash of dissonant state regulations,⁸¹ the hypothetical possibility of inconsistent regulation is entitled to little weight.⁸² "The commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community."⁸³ The states may, for the protection of their people, bar entry of injurious matter, even by the licensing device, at least if transportation is not the activity to be licensed⁸⁴ (although, *quaere*, as to how far their control over egress parallels that over ingress);⁸⁵ but, even so, the differential consequences of the regulation upon the behavior of the regulated would seem to be regarded as relevant.⁸⁶ The prime factor, however, is the extent of the local incidence of the regulation.

So, *Bob-Lo Excursion Co. v. Michigan* was distinguishable from cases cited in argument therein because "None involved so completely and locally insulated a segment of foreign or interstate commerce. In none was the business affected merely an adjunct of a single locality or community as is the business done here so largely."⁸⁷ In *Robertson v. California*, it was of controlling importance that "appellant's activities were of a kind which vitally affect the welfare and security of the local community, the state, and their residents . . . They had in fact a highly 'special interest' in his localized pursuit of this phase of the . . . interstate . . . business . . . [A]ppellant's

80. *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 39 (1948).

81. *Id.* at 40-41 (distinguishing *Hall v. DeCuir* and *Morgan v. Virginia*).

82. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507 (1947); *cf.* *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 37 (1948).

83. *Robertson v. California*, 328 U. S. 440, 458 (1946).

84. *Ibid.*; but see *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 522-523 (1947):

State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests.

85. Rutledge's explicit concurrence in the opinion in *Toomer v. Witsell*, 334 U. S. 385, 409 (1948), insofar as regulatory aspects of South Carolina's legislation were involved with qualification confined to taxation aspects, suggests the query, which is consistent with the superior appreciation of the claims of the market state over the state of origin voiced by him in *Freeman v. Hewitt*, 329 U. S. 249, 259 (1946) (concurring opinion) and elsewhere.

86. *Cf.* *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 39 (1948): "And in none was a complete exclusion from passage made."

87. *Ibid.*

activities called in question were concentrated in the regulating state, although affecting or constituting interstate commerce."⁸⁸ If no substantial share of the instances governed by the regulation are of concern outside its citizen community, the state's claim to exercise control is hard to deny. Little, if any, importance attaches to the kind of local policies which the states seek to implement by the questioned controls; levels of rates and charges,⁸⁹ requirements of minimum standards of vocational competence and responsibility,⁹⁰ the stamping out of fraud⁹¹ and disease,⁹² and the furtherance of sociological ideals of community relations⁹³ are equally accepted as legitimate objects of state concern. It is rather the degree of local concentration that is of critical significance. Interstate enterprise so enmeshed with local activities that its exemption would jeopardize a whole regulatory structure which in its bearing upon most of the persons and transactions affected is purely local must share the common fate.⁹⁴ If it avoids federal regulation *de facto* by being so domesticated within the several states that the national interest is abstract and illusory and the only concrete concern a local one, it cannot simultaneously escape state regulation *de jure* under the *Cooley* doctrine.⁹⁵

It must be admitted that we do not get from a study of Rutledge's handling of the *Cooley* situation a clear doctrinal exegesis. The construction of one would have been repugnant to him with his conviction that determinations have varied and will vary in accordance with "continuing difference in policy and in judgment of effects."⁹⁶ Solution rests finally in judgment instead of reason. What Rutledge did contribute was clarification of some of the forces and the elements which influence judgment in areas where the Congressional power is dormant.

On the classical supersedure problem, the adjustment of cognate Congressional and state legislation where the former is mute as to the latter, he wrote no opinions either for the Court or otherwise. He did, of course, recognize that there was in every case, at least latently, a question of interpretation of extant federal statutes to determine whether their coverage embraced the matters affected by state legislation.⁹⁷ Further, he spoke

88. *Robertson v. California*, 328 U. S. 440, 449 (1946); *cf.* *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 522 (1947).

89. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 522 (1947).

90. *Robertson v. California*, 328 U. S. 440 (1946).

91. *Ibid.*

92. *Id.* at 459.

93. *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28 (1948).

94. *See Robertson v. California*, 328 U. S. 440, 459-460 (1946).

95. *See Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 522 (1947).

96. RUTLEDGE, *op. cit. supra* 72. ". . . (J)udges do not automatically agree upon what requires uniformity and what does not. Here too considerations of policy have swayed their judgments." RUTLEDGE, *op. cit. supra* 67.

97. *Id.* at 53 n.4.

emphatically in favor of curtailing the consequences of supersedure by not imputing to Congress a desire to occupy a field wide in extent, so as very nearly to confine the doctrine's operation to the essential inconsistency predicated by the supremacy clause.⁹⁸ Beyond that, we have nothing from him.⁹⁹

His major theoretical contribution to the law of regulation of commerce was in connection with programs of co-operative federal-state control. Occasionally the aspect of such programs presented for consideration involves interpretation and application of the substance of the federal statute, in which case Rutledge, in shaping his decision, took into account the co-operative purpose of the legislation and the consequences for the state policy which it was designed to render effectual.¹⁰⁰ The stock issue has had to do, however, with the extent to which and the grounds upon which state regulations will be given effect when favored with a Congressional blessing. "More and more . . . Congress and the states have come to work harmoniously, dovetailing their legislation in the regulation of commerce. And the notion has been put to rest, one may hope, that the commerce clause is itself . . . a limitation . . . upon a conjoined and consistent exercise of the powers of Congress and the states."¹⁰¹ ". . . [T]he decisions . . . in every instance thus far not later overturned,

98. The idea that Congress has 'occupied the field,' and thereby precluded legislation by the states, though not altogether eliminated, works within narrower confines. The search here is properly for irreconcilable inconsistency, with emphasis upon reconciliation wherever possible, in the place of earlier easy finding of occupancy. Real and inescapable conflict there must be, absent expression congressional preemption, when the basis for outlawing state action is conflict with Congress' declared policies within its field of primacy.

Id. at 70-71.

99. His votes do not tell much. Joinder in Frankfurter's dissent in *H. P. Hood & sons, Inc. v. DuMond*, 336 U. S. 525, 545 (1949), is consistent with a reluctance to read federal action as conflicting with state regulation. In the State Labor Relations Act cases—*LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18 (1949), *Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U. S. 301 (1949), and *A. F. of L. Local 232 v. Wisconsin Employment Relations Board*, 336 U. S. 245 (1949)—his notation of concurrence in the former two and joinder in dissent in the latter point in somewhat variant directions and, especially in the light of references in federal legislation to state laws, do not illuminate his attitude toward supersedure. His concurrence in the result in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 784 (1945), perhaps gets coloration from his citation of the case, in *Panhandle Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 521 (1947), for the proposition that "Congress has undoubted power to define the distribution of power over interstate commerce," suggesting that he accepted the superseding effect of the federal legislation which Chief Justice Stone so summarily rejected. See *Southern Pacific Co. v. Arizona*, *supra* at 766; but this is conjectural and, if true, indicates only that his reluctance to enlarge the field of Congressional occupancy was exceeded by his disinclination to find absence of a local interest. The differentiation by which, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 244 n.24 (1948), he saved the authority of *Parker v. Brown*, 317 U. S. 341 (1943), also presupposes that the operation of federal statutes may contain implied conditions allowing room for state action.

100. *United States v. Sheridan*, 329 U. S. 379 (1946).

101. RUTLEDGE, *op. cit. supra* 71.

have sustained co-ordinated action taken by Congress and the states in the regulation of commerce."¹⁰² *Panhandle Eastern Pipe Line Co. v. Public Service Commission*¹⁰³ was thus, in its result, an exemplar of an unbroken tradition.

Although this harmonious pattern of decision has made prediction easy, the reasoning supporting it has been beset by confusion and disagreement. There is no constitutional difficulty where the subject of regulation comes within the "local-diversity" branch of the *Cooley* formula since no one could seriously urge that Congressionally uttered approval blighted what would flourish if Congress were silent.¹⁰⁴ Nor is there, if the negative implications for state power are regarded as inferences from the silence of Congress rather than as limitations established by the Constitution, a construction of its silently expressed will. If Congress has regulated in any case, by action or by inaction, it may, by further speech, clarify or correct misunderstanding of its will—as readily where the intention is imputed from silence as where it is attributed to language. This silence-of-Congress approach, traceable to Taney, gets around the puzzle which is inherent in the Marshall notion that the Constitution by its own operation curtailed the regulatory power of the states,¹⁰⁵ as to how Congress can sanction what the very Constitution forbids. Efforts to find a solution in the divestiture theory¹⁰⁶ created a threat to the basic constitutional principle of judicial supremacy by suggesting that power resided in Congress to settle the scope and meaning of Constitutional terms in a sense contrary to that declared by the Court. While the Court has consistently acquiesced in Congressional revisions of its decisions which on commerce clause grounds denied state powers to regulate particular subjects,¹⁰⁷ it would be dangerous doctrine to do so on a ground which would undermine judicial review.

Yet Rutledge, because of other apprehended vices in the silence-of-Congress approach, rejected it.¹⁰⁸ Sensible of the difficulties alluded to, he

102. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 433 (1946).

103. 332 U. S. 507 (1947).

104. Rutledge got satisfaction from demonstration that state regulation was consonant with the direction of federal policy even in cases where, for purposes of decision, he found that the Congressional power was dormant and relief was given on the *Cooley* formula. Cf. *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 37 n.16 (1948); *Robertson v. California*, 328 U. S. 440, 462 (1946).

105. This analysis of the respective positions of Marshall and Taney is that which Rutledge accepted. RUTLEDGE, *op. cit. supra* 55-56.

106. See *In re Rahrer*, 140 U. S. 545, 562 (1891):

No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

See also *Whitfield v. Ohio*, 297 U. S. 431 (1936).

107. RUTLEDGE, *op. cit. supra* 63; *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 425 (1946).

108. RUTLEDGE, *op. cit. supra* 70. For an analysis of the objections to the doctrine, see RUTLEDGE, *op. cit. supra* 62-63.

examined afresh the operation of the commerce clause upon state and federal power.¹⁰⁹ The Constitution, he concluded, did affirmatively grant powers of regulation to Congress and did itself negatively subtract from the regulatory powers of the states¹¹⁰ but the grant and the restriction were not reciprocals.¹¹¹ The same commerce clause, which excluded the states from areas of regulation, conferred on Congress a power to regulate which was plenary in character and might be exercised in any manner and to any extent requisite for the effective exercise of control over commerce so long as not repugnant to other provisions of the Constitution.¹¹² Rutledge saw that the root of the difficulty about Congress' authorizing what the Constitution forbade was the assumption that the federal and state powers were strictly complementary, and, if the power bestowed on Congress was of a magnitude unrelated to the restrictions on the states, the logical necessity of regarding acquiescent federal statutes as a restoration of some portion of withdrawn power in defiance of the Constitution disappeared.¹¹³ His perception of the significance of this non-equivalence in the positive and negative consequences of the clause gave the answer to the riddle. Congress, when it sanctioned state regulations, was not giving to the states the power which the Constitution had denied them but was exercising its own constitutionally granted authority to regulate,¹¹⁴ its exercise taking the permissible form of a discretionary policy determination that the continuing adaptation and enforcement of controls in particular areas by the several states was the mode of regulation which it elected.¹¹⁵ Congress thus did not restore to the states powers of which they were constitutionally deprived. It only exercised the regulatory authority the Constitution gave it but exercised it by the creation of a potential which the states' regulations made kinetic. The

109. His ideas were not completely original as of course hardly any intellectual product is. Thus, Hughes' opinion in *Kentucky Whip & Collar Co. v. Illinois Central R. R.*, 299 U. S. 334 (1937), anticipates in considerable measure Rutledge's argument but obscures it by language squinting toward the notion that the subject of regulation involved was such as to admit of diversity under the *Cooley* formula and otherwise fails to probe the issues as acutely or to organize the explanation as regularly as Rutledge did.

110. RUTLEDGE, *op. cit. supra* 66.

111. . . . as the law has developed, the arc travelled by the negative pendulum has turned out not to be co-extensive with that in which the affirmative one oscillates. The scope of the prohibition is not correlative, in any of the basic implications, with the full reach of the positive power given to Congress.

Id. at 47.

112. See *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 423 (1946).

113. Rutledge, *op. cit. supra* 65; *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 423 (1946).

114. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507 (1947).

115. Since the states were exercising not a power given them by Congress but their own independently possessed powers, only made effective because Congress adopted as its policy the system of regulations enacted or to be enacted by the states, objection that a delegation of power by Congress to the states was involved was not tenable. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 440 (1946).

curve of commerce regulation was none the less a function of Congressional power because the equation contained a second variable.

Questions of interpretation and application inevitably remain as to whether Congress has reserved any phases of a subject for regulation by its own direct legislative prescriptions or whether it elects to have some phases regulated through the medium of recognized or approved state legislation. The references to Congressional purpose and policy, already noted as central to Rutledge's general process of construing federal statutes passed in exercise of the commerce power,¹¹⁶ are again relied on to furnish the guiding principle.¹¹⁷ Specifically he finds a policy to provide a comprehensive and unified system of regulation which will afford full scope for control to each regulating government,¹¹⁸ a concept akin to his idea that in the accommodation of federal statutes each is to be given room for maximum affirmative operation.¹¹⁹ If Congress moulded its permission to conform to anterior patterns of judicial decision, expressly limiting its own directives to matters theretofore held immune from state control, acceptance of its own clear definition of the field it proposed to occupy meant that state regulatory power was not to be displaced in any particular as to which it might have been exercised prior to the statute's adoption.¹²⁰ If the statute were more broadly conceived to remove any obstructions thought to flow from Congress' own power, whether dormant or exercised, all commerce clause limitations relevant to the action of either government acting singly were obviated.¹²¹ Convinced that Congress had in mind the creation of comprehensive and effective regulatory schemes and was not contemplating ineffective regulation at either level,¹²² Rutledge consistently

116. See p. 500 *et seq. supra*.

117. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507 (1947) (*passim*); *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 429-430 (1946).

118. Cases cited note 117 *supra*. This does not of course imply uniformity since Congress, in choosing to cast its regulation in this form, does it in evident recognition and contemplation of variances in the regulations of the states so that diversity of regulation from state to state is no objection. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946).

119. See note 23 *supra*.

120. See *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 519 (1947).

121. See *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 430-431 (1946).

122. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 520 (1947). In *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 247 (1947), Mr. Justice Frankfurter, in his dissent in which Rutledge joined, objected that "The Court displaces settled and fruitful State authority though it cannot replace it with federal authority." This regard for a practical and integrated program of co-ordinated state and federal regulation gives a consistency to the position of these two justices in this and the companion case of *Rice v. Chicago Board of Trade*, 331 U. S. 218 (1947) (unanimous opinion), which none of their associates can fully claim.

treated such legislation as enabling rather than disabling in operation.¹²³

The preference for a functional and positive approach which characterized his interpretation of the commerce power possessed and exercised by Congress is likewise uniformly and strongly manifest throughout the full range of questions raised under the commerce clause by state regulation.

III

Not the tax in a vacuum of words but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern.¹²⁴

Constructive as was Rutledge's contribution to discussion of the problems involved in the regulation, federal or state, of interstate commerce, his distinctive achievement—and the bulk of his judicial¹²⁵ exposition—relates to the meaning of the commerce clause as it affects the validity of state taxation. That is a subject which had been worked and reworked, now subtly, now crudely, with distinctions, some real, some spurious, suggested, rejected, followed, disregarded, misapplied, subdistinguished or reiterated, with busy inventiveness shown by the states in devising strange new taxes or refurbishing battered old ones. It is an area where old-fashioned legalism, economic and political pressures, and deductive logic serially, concurrently, and retroactively figured articulately or inarticulately in the process of decision; and the body of traditional law thereon is fearfully and wonderfully made.¹²⁶

"Subject" and "measure" had emerged as classifying concepts, with investigation and reconciliation clustering around questions of validity of the

123. Cf. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 307, 519 (1947):

It would be an exceedingly incongruous result if a statute so motivated, designed, and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to so in a manner making the state less capable of regulation than before the statute's adoption.

124. *Nippert v. Richmond*, 327 U. S. 416, 431 (1946).

125. Conversely, his extrajudicial exploration in *A DECLARATION OF LEGAL FAITH* makes almost no explicit reference to taxation. Beyond a passing query as to whether "regulation" embraces "taxation," left dangling, *id.* at 29, all that appears in incidental footnote mention of state taxation. See, e.g., *id.* at 58 n.15, and citation of taxation-of-commerce cases (often in connection with regulation of commerce cases). *Id.* at 71 n.33.

126. The course of development was charted by Powell, *Indirect Encroachment on Federal Authority by the Taxing Power of the States*, 31 HARV. L. REV. 321, 572, 721, 932 (1918), 32 HARV. L. REV. 234, 374, 634, 902 (1919), a series of articles some acquaintance with which is basic to any understanding of the field. Later developments are traced in Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617 (1939); Powell, *New Light on Gross Receipts Taxes—The Berwind White Case*, 53 HARV. L. REV. 909 (1940); Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253 (1940); Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 HARV. L. REV. 40 (1943); and Powell, *More Ado about Gross Receipts Taxes*, 60 HARV. L. REV. 501, 710 (1947).

measure, validity of the subject, and the capacity of the virtues of either to compensate for the vices of the other. Changes in state tax structures and in ways of doing business produced insistent doubt as to the congeniality of these concepts, at least as elaborated and crystallized, with an adequate state revenue system. Chief Justice Stone pioneered a new approach in his seminal opinion in *Western Live Stock v. Bureau of Revenue*¹²⁷ and underscored the shift in a series of later opinions, notably the much-discussed *McGoldrick v. Berwind-White Coal Mining Co.*¹²⁸ For the remaining period of Stone's service on the Court, cases regarding state taxation of interstate commerce were largely recognized as his province. Rutledge, usually in full accord with Stone in cases arising during their joint tenure,¹²⁹ in that period was assigned the writing of the opinion in only one such case, *Nippert v. Richmond*.¹³⁰ His contribution therefore followed Stone's in time as in spirit. Essentially, what he did was to work out systematically and explicitly the logical corollaries of Stone's original insights—with a sensitiveness to their import and significance even beyond that of Stone himself¹³¹—and to project their consequences into a complete new pattern of doctrine independent of, and successor to, the old "subject-measure" categories.

Although commerce clause and due process considerations cannot always be disentangled,¹³² one must from the outset clearly keep in mind the distinction between them. Interstate activities may conceivably though atypically be conducted wholly within the limits of one state,¹³³ but characteristically the situations involve a sequence of activities or an aggregate of dealings partly local and partly extrastate. The extraterritorial elements relevant to that branch of due process law having to do with attempted projections of state jurisdiction and control beyond the borders of the actor state inevitably link and have a tendency to blur due process and commerce clause notions and language. The possibility of confusion which, even in regulation cases,¹³⁴ must

127. 303 U. S. 250 (1938).

128. 309 U. S. 33 (1940).

129. Note his joinder in the Stone dissent in *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944).

130. 327 U. S. 416 (1946). Stone voted with the majority.

131. Rutledge's opinion, annexed as a concurrence to *International Harvester Co. v. Department of Treasury*, 322 U. S. 340 (1943), but simultaneously serving as a concurrence to the companion case of *General Trading Co. v. State Tax Commission*, 322 U. S. 335 (1943), and a dissent to the companion case of *McLeod v. Dilworth*, 322 U. S. 335 (1943), forcefully develops and applies the consequences of Stone's premises to a group of analogous situations; but it would appear that Stone himself concurred in the reasoning and the distinctions of the majority which are certainly less representative of, if indeed they are logically reconcilable with, his expressed general position as stated in other cases.

132. See *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 353 (1944) (concurring opinion).

133. Cf. *The Daniel Ball*, 10 Wall. 557 (U. S. 1871); *Galveston, H. & S. A. Ry. v. Texas*, 210 U. S. 217 (1908).

134. See, e.g., *Robertson v. California*, 328 U. S. 440, 461 (1946).

be guarded against by precise definition and independent treatment of the due process issue, has plagued and often beguiled the court in a body of cases of which the landmark *Western Union Telegraph Co. v. Kansas*¹³⁵ is perhaps typical.

His consciousness of the problem sharpened by judicial experience antedating his appointment to the Supreme Court,¹³⁶ Rutledge insisted on the proposition that at the threshold the distinction must be kept in view.¹³⁷ The question of a distinguishable local incident was relevant to both constitutional provisions; but it was diversely relevant. Absence of one was constitutionally fatal for due process reasons but its presence sufficed only to reach and not to settle issues of commerce clause validity.¹³⁸ Across how many states so ever the chain of interstate or foreign commerce might wind, each of the particular links has a local habitation and a name.¹³⁹ But whatever their individual aspects and however they might be particularized, they are still one

135. 216 U. S. 1 (1910).

136. *Panitz v. District of Columbia*, 122 F.2d 61 (D. C. Cir. 1941), involved a District of Columbia gross receipts tax applied to a Maryland dealer, licensed by the District but having no District office or resident representative, who supplied his District customers by mail. The tax was applied to the portion of his gross receipts attributable to District purchasers but was unapportioned between his business activities carried on in the District and those carried on in Maryland. Whatever commerce clause contentions might have been urged against this tax of Congressional derivation were deemed to have been set at rest by *Neild v. District of Columbia*, 110 F.2d 246 (D. C. Cir. 1940). Rutledge addressed himself to the issue of due process propriety, assuming the equivalence for the purpose of the Fifth and Fourteenth Amendments, stating that "The test now controlling under the due process clause of the Fourteenth Amendment is whether a tax imposed by a state bears a reasonable fiscal relation to the opportunities given to the nonresident business firms by the taxing jurisdiction." *Panitz v. District of Columbia*, *supra* at 64. In the instant case he found that the test was satisfied.

137. See *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 353 (1944) (concurring opinion).

138. It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separate "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 policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.

Nippert v. Richmond, 327 U. S. 416, 423 (1946); *Freeman v. Hewitt*, 329 U. S. 249, 275 (1946) (concurring opinion); *cf. International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 353 (1944) (concurring opinion).

139. "All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact." *Nippert v. Richmond*, 327 U. S. 416, 423 (1946); *Freeman v. Hewitt*, 329 U. S. 249, 267 (1946) (concurring opinion); *cf. International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 357 (1944) (concurring opinion).

with another components of interstate commerce. The validity of taxation should not depend upon a state's fortuitous specification of a formal "incident" which the Court had theretofore approved under other circumstances or its predictive ingenuity in designating one which might thereafter prove acceptable.¹⁴⁰ Differentiation among them on the basis that taxation expressly related to some is "directly on" interstate commerce while, if similarly related to others, it is "indirect" and bears merely on a "local incident" is spurious or at best artificial.¹⁴¹ "Interstate commerce as such" is all the "local incidents" together and it is "local incidents" which in appropriate collocation constitute interstate commerce as such. Their separation would be as unhealthy for interstate commerce as the execution of Solomon's judgment would have been for the infant. Rejection of that classical distinction between "direct" and "indirect" incidence of the tax on interstate commerce is therefore required.

The revolutionary consequence of that rejection, however, is that it virtually eliminates "subject," at least as heretofore understood, as a guide for deciding the commerce clause constitutionality of state taxation. A secondary consequence is to deprive "measure" of significance, since "subject" and "measure" were the poles which determined the lines of force and each without the other is only an empty word.

A remnant of the law as to "subject" Rutledge did recognize as surviving in that taxation may not, consistently with the Constitution, discriminate against interstate commerce¹⁴² by "lay[ing] a greater burden on the interstate business involved than on wholly intrastate business of the same sort"¹⁴³ or

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

International Harvester Co. v. Department of Treasury, 322 U. S. 340, 357 (1944).

141. Unless we are to return to the formalism of another day, neither the "directness" of the incidence of a tax "upon the commerce itself" nor the fact that its incidence is manipulated to rest upon some "local incident" of the interstate transaction can be used as a criterion or, many times, as a consideration of first importance in determining the validity of a state tax bearing upon or affecting interstate commerce. Not the words "direct" and "indirect" or "local incident" can fulfill the function of judgment in deciding whether the tax brings the forbidden results.

Freeman v. Hewit, 329 U. S. 249, 269 (1946).

142. *Nippert v. Richmond*, 327 U. S. 416, 425 (1946); *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 358 (1944); *cf. Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662, 668 (1949); *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U. S. 495, 501 (1947); *Freeman v. Hewit*, 329 U. S. 249, 264 (1946).

143. *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 351 (1944).

“segregat[ing] the interstate transaction for separate or special treatment.”¹⁴⁴ It was not verbal distinction or nominal assimilation that Rutledge had in mind but the probabilities attending the operation in fact of the tax.¹⁴⁵ Thus, the ultimate vice of the flat rate “drummers’ tax” disapproved in *Nippert v. Richmond* was that its lack of proportioning to the volume of business done, its location as a financial and psychological hurdle met not only before any business could be done but normally before it could even be estimated how much might be done, its imposition on a way of transacting business mostly resorted to by those whose sales were characteristically scattered, occasional, and small, combined to render it a type of tax peculiarly selective against and eminently discouraging to interstate dealers—a vice not eradicated by treating alike non-Virginians and all Virginians not established in Richmond. It discriminated—that is, created business charges which were likely to apply with peculiar frequency to interstate dealings and to few if any intrastate dealings—and it was bad because it discriminated.¹⁴⁶

Yet out-and-out discrimination was only a small province of the vast empire where “subject” and “measure” had reigned; and the task remained, once they were deposed, of establishing a new authority comparably comprehensive. As has been stated, Rutledge relied for that purpose on the consequences deriving from certain suggestions of Stone, by the latter most succinctly phrased perhaps in his recognition of “opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce.”¹⁴⁷ What interstate commerce could claim and all that it could claim under the commerce clause with reference to state taxation was to share the common lot.¹⁴⁸ Neither special privileges nor special perils were to attend it.

Elimination of privilege was easy. It flows almost automatically from discard of the law “subject” with its carving up into “local incidents” and its chimerical category of particulars where the tax was deemed to be imposed directly “on commerce itself.” Granted that the enterprise or activity taxed

144. *Ibid*; see *Freeman v. Hewit*, 329 U. S. 249, 276 (1946).

145. It is no answer . . . that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. . . . To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences. In that blindness lies the vice of the tax. . . . *Nippert v. Richmond*, 327 U. S. 416, 431 (1946).

146. Although the difference in tax load may not be sufficient actually to block or impede the free flow of interstate trade, discrimination alone, without regard to showing of further consequences, has been held consistently to be sufficient for outlawing the tax. *Freeman v. Hewit*, 329 U. S. 249, 277 (1946).

147. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 259 (1938)

148. *Cf. Freeman v. Hewit*, 329 U. S. 249, 276 (1946).

had sufficient factual links with the taxing jurisdiction to make it appropriate on due process grounds that it should contribute to that jurisdiction's upkeep, the designation of the particular aspect of it which should be the occasion for the tax (whatever its consequences for purposes of statutory construction and smooth tax administration) was immaterial to the issue of constitutional power. Yet, there was the ever-present limitation that the matter designated not cast special risks on interstate commerce because of its being interstate commerce.¹⁴⁹ Indeed, those enterprises which were neither seeking nor doing any local business so that under the older law of subject and measure they would have offered no tax handhold for the state¹⁵⁰ were no longer free commoners but must bear a share of the state's tax burden.¹⁵¹

Elimination of perils was harder. Something is accomplished by disallowance of discriminatory taxation but it is no guaranty against the piling of peculiar risks on interstate enterprise or activity that a particular tax treats it like all similar enterprises or activities within a given state. That is true because characteristically interstate commerce does not transpire within a given state and its peregrinations expose it to multiple risks where home-staying commerce which is like in kind encounters but a single risk.¹⁵²

"The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce."¹⁵³ ". . . Not all burdens upon commerce but only undue or discriminatory ones are forbidden."¹⁵⁴ ". . . Increasingly with the years emphasis has been placed upon practical consequences and effects, either actual or threatened, of questioned legislation to block or impede interstate commerce or place it at a practical disadvantage with the local trade."¹⁵⁵ "Validity of such a tax . . . should be determined by . . . whether those forbidden consequences would be produced, either through the actual incidence of multiple taxes laid by different states or by the threat of them, with resulting uncertainties producing the same impeding consequences."¹⁵⁶ To save a tax against commerce clause objections, it must,

149. See *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 352 (1944).

150. See, e.g., *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555 (1925).

151. *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662 (1949).

152. . . . [T]he state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.

International Harvester Co. v. Department of Treasury, 322 U. S. 340, 358 (1944).

153. *Ibid.*

154. *Nippert v. Richmond*, 327 U. S. 416, 425 (1946).

155. *Freeman v. Hewit*, 329 U. S. 249, 270 (1946).

156. *Id.* at 274.

therefore, be so framed as to be both non-discriminatory and defensible against the charge that under the circumstances it imposes on interstate commerce a grave hazard of cumulative tax demands placing it at a competitive disadvantage (which may, indeed, be regarded as one special form of discrimination).¹⁵⁷

Statutes which aim only at state participation along with other states in a fair division in taxable values of interstate enterprises or transactions to which they jointly contribute and those addressed to activities so uniquely localized within state borders that no other state could press a claim with reference to them contain inherent safeguards against cumulation which make out for them a prima facie case of commerce clause validity.

The former comprise the apportioned taxes. Rutledge inclined to find in apportionment a sufficient answer to assertions of commerce clause invalidity¹⁵⁸ and deemed its presence a sufficient reason to concur in sustaining the tax involved in *Memphis Natural Gas Co. v. Stone*¹⁵⁹ and, *pro tanto*, that in *Central Greyhound Lines, Inc. v. Mealey*¹⁶⁰ and its absence a controlling reason for invalidating that involved in *Freeman v. Hewit*.¹⁶¹ The states "have considerable latitude in the selection of fair methods of making apportionment"¹⁶² and he was agreeable to sustaining exactions proportioned fractionally to relevant business data, such as comparative mileage travelled within the state,¹⁶³ or capital used or invested within the state,¹⁶⁴ or provisions crediting arrangements abating the state's demand *pari passu* with the assertion of tax claims by other states having adequate relations to the transaction.¹⁶⁵ One may perhaps surmise that Rutledge recognized the possibility and even probability that variant schemes

157. "The cumulative tax burden is in effect discriminatory, involving in any practical view the exact effects of a single discriminatory tax." *Id.* at 277.

158. Apportionment in itself prevents taxation of extrastate "events" or portions of the business done, unless the apportionment is itself constitutionally invalid as not reflecting a sufficient approximation to what the state may be entitled, on the facts, to tax.

Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 97 n.5 (1948); *cf.* *International Harvester Co. v. Evatt*, 329 U. S. 416, 423 (1947) (concurring opinion); *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 360 (1944); *Panitz v. District of Columbia*, 122 F.2d 61 (D. C. Cir. 1941).

159. 335 U. S. 80, 96 (1948).

160. 334 U. S. 653 (1948). Rutledge noted only concurrence in the result, without opinion; but his later references to the case in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 97 (1948), and *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662, 667 (1949), indicate the ground of his concurrence.

161. 329 U. S. 249, 259 (1946).

162. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 97 n.7 (1948).

163. See *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653 (1948).

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

165. See *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 359 (1944). This opinion, serving as a concurrence not only for the case to which it is annexed but also for *General Trading Co. v. State Tax Commission*, 322 U. S. 335 (1944), notes that the Iowa statute there involved allowed credits against the Iowa use tax for sales taxes paid elsewhere and finds in that circumstance an ample support for the tax. *Cf.* *Freeman v. Hewit*, 329 U. S. 249, 280 and n.42 (1946).

of apportionment adopted by the several states would bear unevenly on interstate enterprises with the aggregate tax liability of some somewhat increased and that of others somewhat reduced in comparison with what would result were all tax structures uniform. He nevertheless felt that, with sheerly discriminatory taxes outlawed, the balance of gain or loss would be so difficult to project and so likely to average out, when applied to the varying particulars of the group of interstate enterprises and of state laws, as to quench any incentive a state might have to rig its apportionment. With undue burden the criterion,¹⁶⁶ accidental discrepancies of small magnitude would hardly be fatal although occasioned by the multistate range of the taxpayer's activity.

Of equivalent force in rebutting the threat and avoiding the invalidating consequences of multiplied exactions from interstate commerce is the element of exclusive control alluded to by Stone in *Western Live Stock v. Bureau of Revenue* in his observation that

The tax is not one which in form or substance can be repeated by 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 . . . occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers.¹⁶⁷

The principle was approved and applied by Rutledge in his opinion in *Interstate Oil Pipe Line Co. v. Stone*,¹⁶⁸ where a "privilege tax" measured by the taxpayer's gross revenues from transportation, all regarded for purposes of decision as being from interstate commerce,¹⁶⁹ was sustained over commerce clause objections despite lack of apportionment. The case presented one of those exceptional situations where the taxpayer's plant and activities were wholly within the state although devoted wholly to interstate commerce. Yet in two other opinions where logically he might have generalized the notion into a unifying principle, Rutledge failed to do so and rested his reasoning on traditional patterns of special doctrine. In *Independent Warehouses, Inc. v. Scheele*¹⁷⁰ a tax equivalent to, although in form not one on property in transit was sustained on the classical distinction between interruptions for transportation convenience and stoppage for an independent local advantage; exercise of the privilege of warehousing in transit was deemed under the circumstances

166. See notes 154, 152 *supra*.

167. 303 U. S. 250, 260 (1938).

168. 337 U. S. 662 (1949); *cf.* dissenting opinions by Stone in *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944), and of Douglas in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), in both of which Rutledge joined.

169. Burton's separate concurrence, *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 668-669 (1949), was based on the analysis that the transportation was in intra-state commerce.

170. 331 U. S. 70 (1947).

of the case an instance of the latter.¹⁷¹ In *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*¹⁷² a brace of flat rate privilege taxes, demanded in addition to uncontested gasoline taxes and motor vehicle license fees, were applied to a motor carrier for hire whose highway user in Montana was altogether for interstate business. The taxes were sustained by the orthodox recognition of public interests of substance crystallized in language of "privilege of using the highway." Especially after his critical re-examination of the predicates of settled doctrine in *Nippert v. Richmond*, his silence as to the unique taxing potential of New Jersey over New Jersey warehousing and of Montana for furnishing Montana highways—more, indeed, his failure to explore the implications of the exclusive control principle as a comprehensive concept uniting the "independent-local-advantage" and the "privilege-of-using-the-highway" cases, together with many others—is puzzling. No doubt a lax development of the principle might result in slipping back to the test of "local incident" and all the law of "subject" and "measure"; but surely discrimination in application could avoid that danger. Ordinarily, although not necessarily,¹⁷³ the idea would seem applicable to transportation rather than to trade; generally, and perhaps always, it seems relevant when the tax follows from individual activity within the unilateral competence of a single actor as contrasted with transactions, which presuppose dealings of two or more. But Rutledge did not explore the matter and this is not the place to do so. He did recognize the principle; and he did dispose of cases in a manner uniformly consistent with it though assigning more traditional grounds.

Without vitiating discrimination or curative apportionment or uniqueness of relationship, the problem of extracting replacement for the local-incident, subject-and-measure analysis from the "undue burden" criterion was posed in naked simplicity in cases of taxes upon a transfer of property by sale between states—variously styled "use" or "sales," "gross income" or "gross receipts" taxes. Due process wise, both the state of origin and the state of market had an interest adequate to sustain the tax.¹⁷⁴ Laying out of consideration the contingency of taxation by an intermediate or other third state (a matter which Rutledge never had occasion to consider systematically),¹⁷⁵ the potentiality of a second tax and hence the threat of an added burden on interstate

171. *Minnesota v. Blasius*, 290 U. S. 1 (1933), was relied upon as furnishing "the governing principles." See *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 72 (1947).

172. 332 U. S. 495 (1947).

173. See, e.g., *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938).

174. *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 356 (1944); cf. *Freeman v. Hewit*, 329 U. S. 249, 271-272 (1946).

175. See his express reservation of consideration of a hypothetical Illinois use tax on the Indiana sales falling under Class D in *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 362 (1944).

commerce because it is interstate is implicit in the situation.¹⁷⁶ The Court's initial decision to immunize such transactions, from start to finish, from state taxation even though tax multiplicity was not present but merely possible had the unhealthy result of discrimination against intrastate commerce, by totally relieving interstate dealings from tax costs paralleling those that equivalent intrastate business bore, and could not endure.¹⁷⁷ At the opposite extreme is the proposition, with some scattered judicial support¹⁷⁸ but never accepted as a basis for decision, that it was for Congress, rather than the Court, to provide any corrective and that even actual overlapping state taxes on interstate dealings should be sustained all the way round until and unless Congress acted. This suggestion Rutledge found inadmissible, not only because it would uproot too large a body of decisions requiring apportionment and indeed would seem to sanction taxes blatantly discriminating against interstate commerce but on more theoretical considerations as to the constitutional force of the negative implications of the commerce clause.¹⁷⁹

A middle ground must be found.

Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall, or what is the same thing, be required to give way to the other . . . or there must be apportionment.¹⁸⁰

It may be that the mere risk of double taxation would not have the same consequences, given always of course a sufficient due process connection with the taxing states, that actual double taxation has, or may have, for application of the commerce clause prohibition. Risk of course is not irrelevant to burden or to the clogging effect the rule against undue burden is intended to prevent.¹⁸¹

While

the bare unexercised power of another state does not produce . . . the invidious sort of barrier or impediment the commerce clause was designed to stop [but] only opens the way for them to be produced. This danger is not fanciful but real, more especially in a time when new sources of revenue constantly are being sought [and] accordingly . . . this door should not be opened.¹⁸²

176. *Id.* at 360.

177. *Freeman v. Hewit*, 329 U. S. 249, 275-276 (1946).

178. *See Nippert v. Richmond*, 327 U. S. 416, 435 (1946) (dissenting opinion of Douglas joined by Murphy); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 183 (1940) (Black, Frankfurter, and Douglas dissenting).

179. *Freeman v. Hewit*, 329 U. S. 249, 279; *cf. International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 360 (1944).

180. *Ibid.*

181. *Id.* at 361-362.

182. *Freeman v. Hewit*, 329 U. S. 249, 277 (1946). This statement is rather freely rearranged in punctuation and sequence of phrases without, it is believed, doing violence to its content.

Arguably, either state might be permitted to tax unless the tax policy of the other interested state demonstrated the actual presence, or a grave threat, of cumulation with no significance attaching to the mere potentiality of cumulation.¹⁸³ But "to require factual determination of forbidden effects in each case would be to invite costly litigation, make decision turn in some cases, perhaps many, on doubtful facts or conclusions, and encourage the enactment of legislation involving those consequences,"¹⁸⁴ so that practicalities of tax and of judicial administration are better served by a policy applying alike to situations of actual and contingent multiple taxes.

With the *coup de grace* given to the notions that neither state may in any event tax and that both may until Congress acts, and with dismissal of the suggestion that the fact of cumulative burden or a genuine threat of it is material, all that survives are the proposition that one and only one state may tax and the problem of selecting the one so privileged (saving always, of course, the mitigating effects of apportionment or crediting). To the proposition, Rutledge reluctantly¹⁸⁵ assented; and he indicated a leaning toward "vest[ing] the power to tax in the state of the market, subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination."¹⁸⁶ However, he was not finally and firmly committed to that choice.¹⁸⁷ There remain unsolved peripheral prob-

183. Cf. *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 360-362 (1944), in connection with the portion of the opinion representing a dissent to *McLeod v. Dilworth*, 322 U. S. 327 (1944).

184. *Freeman v. Hewit*, 329 U. S. 249, 279 (1946).

185. To deprive either state, whether of origin or of market, of the power to lay the tax, permitting the other to do so, has the vice of allowing one state to tax but denying this power to the other when neither may be as much affected by the deprivation as would be the one allowed to tax and, in any event, both may have equal or substantial due process connections with the transaction.

Id. at 278.

186. *Id.* at 279; see *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 361 (1944):

. . . in my opinion the choice should lie in favor of the state of market rather than the state of origin. The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character. If therefore choice has to be made, whether as a matter of exclusive power to tax or one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business.

187. In discussing *Freeman v. Hewit* with him, I questioned the preference for the state of market and suggested the superior interests of the state of origin, on the various grounds that its resources of materials and labor were incorporated in the commodity and often depleted to the extent of the transfer, that the tendency of the preference was to a further colonialization of producing regions of the country for the benefit of those

lems of adjustment in case of apportioned taxes¹⁸⁸ but the substitute for the old law of "local incidents" and "subject-measure" was formulated in all the essentials.

Discrimination, safeguarding by apportionment or exclusiveness of control, selection of a preferred state where more than one had adequate due process connections—these were the relevant subjects of inquiry. Special formulae once useful to harmonize results became vestigial and could be dispensed with—for example: taxation "measured by" elements immune as "subjects"¹⁸⁹ and "in lieu"-ness.¹⁹⁰ The test was undue burden. The particular verbalizations which the states happened to use in framing their tax statutes could be de-emphasized and choices among the swarm of "incidents" adequate for due process purposes were no longer constitutionally significant, so that "sales," "use," "gross income" taxes were all one for commerce clause purposes.¹⁹¹ The test was undue burden. Flat rate taxes not scaled to the volume of business were objectionable if applied under such circumstances as to place interstate activities at a relative disadvantage¹⁹² but were not invalid *per se* if unattended by such a consequence. The test was undue burden.¹⁹³

Rutledge's fundamental premise was that state taxation of interstate commerce is an aspect of regulation of interstate commerce; his ultimate goal (to which the concept of undue burden led) was its re-integration into that larger pattern. With the multiplication of precedents and the refinement of doctrine, the relationship had become not so much disavowed as disregarded. The impact of his opinions is to break down the compartmentalization, to rid the law of commerce taxation of its quirks and realign it with the law of com-

already favored historically by previous accumulation of capital (to an appreciable extent as a result of the Court's own prior decisions), and that the tax resources of the producing states were on balance apt to be more limited in quantity and variety than those of states of market. His answer was that the problem merited further consideration but that the preference expressed did not represent a holding and that the Court had not had the benefit of argument as to which state should be given the green light, a matter which could be definitely decided when it should be presented for decision.

188. See *Freeman v. Hewit*, 329 U. S. 249, 282 n.44 (1946).

189. *Id.* at 269.

190. *Ibid.*; *cf.* *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662, 667 n.7 (1949).

191. *Nippert v. Richmond*, 327 U. S. 416, 424 (1946); *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 349 (1944) (concurring and dissenting opinion); *cf.* *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 85 (1947) (equating property taxes on goods stored and a franchise tax on the storage). *But cf.* *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U. S. 495, 504-505 (1947) (recognizing the distinction between taxes on "the privilege of doing business" and those on "the privilege of using the highways" while cautioning against confusing "a tax for the privilege of using the highways with one the proceeds of which are necessarily devoted to maintaining them.").

192. *Nippert v. Richmond*, 327 U. S. 416 (1946).

193. *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U. S. 495 (1947).

merce regulation.¹⁹⁴ References to the assumed “purpose of the commerce clause,” the consideration impelling its adoption, to free national trade from state restrictions and barriers abound in his tax opinions.¹⁹⁵ The *Cooley* case is vouched in support of continuing state authority to tax even though the subject trenched upon is interstate commerce;¹⁹⁶ the doctrine that the commerce clause of itself imposes limitations upon state authority, with an account of that doctrine’s judicial development in regulation cases, is set forth in explanation of the source of constitutional limitations on state taxing power;¹⁹⁷ the rejection of the “exclusiveness of the power” approach proposed by Marshall in *Gibbons v. Ogden*¹⁹⁸ is adduced to show that interstate commerce is not a general sanctuary against state taxation.¹⁹⁹ Once more approached as simply one phase of commerce regulation, the attitudes and ideas generically applicable become specifically relevant in tax cases. Thus, implementation of taxation by the technique of licensing could not be protested by even a purely interstate commerce operator, if the tax was otherwise valid,²⁰⁰ any more than could licensing in connection with other regulation.²⁰¹ Congressional statutes were not to be read as having so pervasively occupied the field as to exclude the states by inference from taxation,²⁰² an illustration of the proposition that corollary state and federal regulations were to be so interpreted as to give to each the maximum capacity for operation.²⁰³ Congress, by express acquiescence, could permit the states to apply to interstate commerce programs of taxation which, had Congress remained silent, would have been cut down because of the negative implications from the commerce clause, and this even to the extent of discriminating against interstate commerce.²⁰⁴ The broad concern with the practical operation and effects of legislation,²⁰⁵ the distaste for separating and segregating the components of transactions,²⁰⁶ the penchant for an affirmative and positive approach, more

194. Their separate identities are completely merged by him at times as in the entire discussion in *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946), and in the footnote references used for supporting authority in A DECLARATION OF LEGAL FAITH.

195. See, e.g., *Freeman v. Hewit*, 329 U. S. 249, 263-264 (1946); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 98 (1948).

196. *Freeman v. Hewit*, 329 U. S. 249, 266 (1946).

197. *Id.* at 263; *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 418 (1946).

198. 9 Wheat. 1 (U. S. 1824).

199. *Freeman v. Hewit*, 329 U. S. 249, 261-262 (1946).

200. *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 86 (1947).

201. See note 84 *supra*.

202. See *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 85 (1947) (Interstate Commerce Act); cf. *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U. S. 495, 503 (1947) (federal aid to build highways).

203. See notes 98, 118 *supra*.

204. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946).

205. See, e.g., *Freeman v. Hewit*, 329 U. S. 249, 270 (1946); *Nippert v. Richmond*, 327 U. S. 416, 432 (1946).

206. See, e.g., *Nippert v. Richmond*, 327 U. S. 416, 423 (1946).

sensitive to the permissive than to the prohibitory possibilities of the commerce clause,²⁰⁷ faithfully reproduce, in tax cases, features observed as characteristic of his thinking about both Congressional and state regulation of interstate commerce.

As to the quality and validity of his contribution to the law of interstate commerce, this report has undertaken to furnish the data for judgment;²⁰⁸ evaluation must remain largely a personal matter conditioned upon the reader's prepossessions and private premises. Yet some conclusions may properly be ventured.

Without being strictly original, Rutledge's work in the field was vastly creative and perceptive; he understood the consequences of and the relationships between notions previously thrown out by others, notably Stone, and organized them into a viable body of doctrine to succeed one obsolescent, cumbersome, and dubiously serviceable. His expressed views are conspicuous for their internal consistency in respect both of logic and of policy; his restoration of taxation to the universe of commerce regulation, his placing them upon a platform of principles common not only to both but to Congressional regulation as well, and indeed to the interpretation of relevant statutes, are notable.

Those whose taste is for nice distinctions and theoretical refinements no doubt will think his approach too blunt and indiscriminating. It is clear that Rutledge's way of understanding the Constitution was in the spirit of equity rather than of the strict law. Some loss of precision there is. A resulting increased possibility for error there is if application devolves upon mediocre judges who need fixed mechanical dogmas, but there is the compensating possibility for continuous adaptation of the constitutional scheme to changes in American life, at the hands of great and sensitive justices. Those whose interests or whose temperaments persuade them to a restrictive and negative view of the functions of government will be in fundamental disagreement with his reading of the clause primarily to find permissions and not limitations; but here we leave the realm of reason for that of emotion and comment on an intellectual plane would be futile. It may, I think, justly be objected that his recurrent argument from the original purpose and function of the commerce clause accords better with juristic folklore than with history;²⁰⁹ but the argument was not after all central to his position. As one who thought, like Holmes, that "continuity with the past is only a necessity, not a duty,"²¹⁰ he

207. See, e.g., *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 96 (1948).

208. Quotations have been utilized somewhat more freely than is customary in both the text and the footnotes as a means of imparting familiarity with the very tone and texture of Rutledge's thinking.

209. Abel, *Commerce Regulations Before Gibbons v. Ogden: Trade and Traffic*, 14 BROOKLYN L. REV. 215, 243 (1948).

210. HOLMES, *Law in Science and Science in Law* in COLLECTED LEGAL PAPERS 211 (1920).

would have felt that the necessity, and so the relevance, of history, whatever its content, must yield to the more urgent necessities of social ordering in the present and foreseeable future created by emerging industrial and institutional phenomena of which he was powerfully, almost painfully, conscious.²¹¹

What are the prospects that his opinions will abidingly influence commerce clause thinking? Put otherwise, how far are they "the law?" In his life time, his thinking outran the positions to which the Court had advanced so that, while he wrote regulation of commerce and even, where nothing much hinged on major premises, tax opinions for the Court, his penetrating expositions in the critical *International Harvester* and *Freeman* cases were individual concurrences in which none of his associates joined. Near the very end, in *Interstate Oil Pipe Line Co. v. Stone*, he had won three of his associates²¹² to agreement to an opinion whose essential premises were those of *International Harvester* and *Freeman*; but the concurrence of Burton, grounded on quite alien and in fact opposing reasoning, was required for the affirmance. Thus for most of his judicial service his views were individual and he never did procure their adoption by a majority. Nor is there any sign in the opinions of the past term that they have won converts. *Federal Power Commission v. East Ohio Gas Co.*,²¹³ while not irreconcilable, seems out of harmony with the *Panhandle Eastern Pipe Line* case; and the discussion in the one case on state taxation, *Capitol Greyhound Lines v. Brice*,²¹⁴ is channeled in terms of specialized precedents which obviate any consideration of basic postulates. The longer future may tell another story. Rutledge was fond of observing and commenting on the drift of decision.²¹⁵ He was as well both deliberately attentive and uncommonly sensitive to the direction and particularities of change in the institutional framework of American life, accommodation to which is the condition of survival of constitutional doctrine in common with other intellectual constructs. If, like the House of Lords, the Supreme Court has only a suspensive veto with the postponed decision finally made elsewhere and if, as is very possible, Rutledge appraised accurately the developing pattern of relationships between our political and our economic and social institutions, we have, in his opinions, the commerce clause law of tomorrow or the day after. Should that be true, let his opinions then be remembered as prophetic of what the law was to become.

211. See Rutledge, Book Review, 28 Iowa L. Rev. 174, 176 (1942).

212. Black, Douglas, and Murphy.

213. 70 Sup. Ct. 266 (1950).

214. 70 Sup. Ct. 806 (1950).

215. See, e.g., *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 420 (1946); *Freeman v. Hewitt*, 329 U. S. 249, 272-273 (1946).