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Form v. Substance: The Supreme Court Retreats Into Its Formalistic Shell in Oklahoma Tax Commission v. Jefferson Lines

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FORM V. SUBSTANCE: THE SUPREME COURT RETREATS INTO ITS FORMALISTIC SHELL IN *OKLAHOMA TAX COMMISSION V. JEFFERSON LINES*

I. INTRODUCTION

The Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States."[1] However, it says nothing about the protection of interstate commerce absent any affirmative action by Congress. The Supreme Court has consistently recognized implicit in the language of the Commerce Clause "a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."[2] In finding that states may constitutionally tax the local portion of interstate business transactions, the Court has held that "[i]t was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."[3] This concept is known as apportionment.

Apportionment, as it relates to taxation, is the assignment of the income of a business engaged in interstate commerce to specific states for income taxation.[4] Apportionment issues often center around "specific formulas for slicing a taxable pie" among the several states where a taxpayer's activities receive certain benefits.[5] It is not necessary that the taxpayer take advantage of the benefits. As long as they are available, the state is justified in burdening the local portion of the transaction.

From 1988 through 1990, Jefferson Lines, Inc., ("Jefferson") a

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1. U.S. CONST. art. I, § 8, cl. 3.

2. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1335 (1995); *see* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).

3. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

4. BLACK'S LAW DICTIONARY 100 (6th ed. 1990).

5. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1339.

Minnesota corporation, provided bus services in Oklahoma.[6] Oklahoma taxes the sale of transportation for hire, including both intrastate and interstate bus travel.[7] Under the Oklahoma statute, the buyers of the taxable services pay the taxes, which must be collected and then remitted to the state by the retailer.[8] Jefferson opposed the state tax and failed to remit to the Oklahoma Tax Commission nearly $47,000 in sales taxes, representing the tax on the portion of the travel outside of Oklahoma. On October 27, 1989, Jefferson filed for Chapter 11 bankruptcy protection, and the Oklahoma Tax Commission subsequently filed a proof of claims in bankruptcy court for the uncollected taxes on this interstate travel.[9] Jefferson objected to the claims arguing that the Oklahoma tax is unfairly apportioned and unduly burdens interstate commerce by allowing Oklahoma to tax the full purchase price of interstate bus tickets "even though some of that value [is derived] from bus travel through other states."[10] The bankruptcy court agreed as did the district court and the Court of Appeals for the Eighth Circuit.[11] The Eighth Circuit found that the United States Supreme Court's 1948 decision in *Central Greyhound Lines, Inc. v. Mealey*[12] was controlling and held that the Oklahoma tax at issue was indistinguishable from the unapportioned gross receipts tax struck down in *Central Greyhound*.[13]

The Eighth Circuit stated that the tax failed the apportion-

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6. *Id.* at 1335.

7. OKLA. STAT. tit. 68, § 1354(1)(C) (Supp. 1988). The statute provides in relevant part,

> There is hereby levied upon all sales . . . an excise tax of four percent (4%) or the gross receipts or gross proceeds of each sale of the following . . . (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines and other means of transportation for hire.

Id.

As a result of recent amendments, the statute currently charges an excise tax of four and one-half percent (4½%); OKLA. STAT. tit. 68, § 1354(1)(C) (Supp. 1996).

8. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1334.

9. *In re* Jefferson Lines, Inc., 15 F.3d 90 (8th Cir. 1994), *rev'd sub nom.* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995).

10. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1335.

11. *In re* Jefferson Lines, Inc., 15 F.3d 90 (8th Cir. 1994), *rev'd sub nom.* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995).

12. 334 U.S. 653 (198).

13. *In re Jefferson Lines, Inc.*, 15 F.3d at 93.

ment prong of the test in *Complete Auto Transit, Inc. v. Brady* and thus it was externally inconsistent.[14]

The question before the Supreme Court was whether an Oklahoma state tax on interstate bus travel was properly apportioned such "that [Oklahoma] taxes only its fair share of the interstate transaction" while not subjecting the taxpayer to multiple taxation for the same discrete sales event.[15] The Court also had to square its analysis under *Complete Auto* with its 1948 decision in *Central Greyhound*, a case very similar to the instant case.

The current test of a state tax's validity under the Commerce Clause is the four-prong test announced in 1977 by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*.[16] The Court, in considering the practical effect of a state tax, will sustain a tax against Commerce Clause challenge when the tax: 1) is applied to an activity with a substantial nexus to the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the taxing state.[17]

This casenote examines the Court's characterization in *Oklahoma Tax Commission v. Jefferson Lines, Inc.* of the sales tax at issue and the effect its decision will have on interstate commerce considering the risk of multiple taxation. Part II discusses the historical evolution of the Supreme Court's dormant Commerce Clause adjudication since 1938, with special emphasis given to the cases upon which the Supreme Court and the Eighth Circuit relied in reaching their conclusions. Part III introduces the facts and procedural history of *Oklahoma Tax Commission* and explains the reasoning of the Court and the dissent. Part IV analyzes the Court's conclusion that the unapportioned tax neither discriminates against interstate commerce nor creates the risk of multiple taxation. Finally Part V considers the future ramifications of the holding in light of the risk of multiple state taxation.

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14. *Id.* (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)). For a discussion of Internal Consistency, see infra notes 107-111 and accompanying text.

15. *Id.* at 1338 (quoting Goldberg v. Sweet, 488 U.S. 252, 260-61 (1989)).

16. 430 U.S. 274 (1977).

17. 430 U.S. at 279.

II. THE DORMANT COMMERCE CLAUSE REVISITED: THE HISTORICAL EVOLUTION OF STATE TAXATION OF INTERSTATE COMMERCE SINCE 1938

A. *Introduction*

Modern day emphasis on the practical considerations of a state tax can trace its roots to 1938 with the Supreme Court's decision in *Western Live Stock v. Bureau of Revenue*.[18] An extensive consideration of Commerce Clause adjudication prior to 1938 is beyond the scope of this casenote. However, a discussion of several Commerce Clause cases since 1938 will prove helpful in understanding both the present test for the validity of a state tax and the Court's analysis in *Oklahoma Tax Commission*. In considering the discussion of the cases that follow, bear in mind that the validity of any terminology must be tested by asking: "Does it convey any meaning to those who must use it? Does it show its reason on its face?"[19] The 1938 case, *Western Live Stock v. Bureau of Revenue*[20] marked a shift by the Court to a consideration of the practical effects of a tax instead of the usual application of a formal distinction or label in upholding or rejecting a tax.[21]

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18. 303 U.S. 250 (1938).

19. Allison Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 COLUM. L. REV. 211, 216 (1947) (citing K.N. Llewellyn, *On the Good, the True, the Beautiful in Law*, 9 U. CHI. L. REV. 224, 250 (1942) ("Only the rule which shows its reason on its face has ground to claim maximum chance of continuing effectiveness. . . .")).

20. 303 U.S. 250 (1938).

21. In its earliest stages, the Court viewed interstate commerce as wholly immune from state taxation in any form. Oklahoma Tax Comm'n v. Jefferson Lines, Inc. 115 S. Ct. 1331, 1336 (1995) (citing Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888)). The Court later narrowed this rule and distinguished between direct burdens on interstate commerce, which were prohibited, and indirect burdens which were not. *See e.g.*, Sanford v. Poe, 69 F. 546 (6th Cir. 1895), *aff'd sub. nom.* Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 220 (1897). This view gave way to a more formal approach under which the Court would invalidate a state tax that was measured by the gross receipts from interstate commerce. New Jersey Bell Telephone Co. v. State Bd. of Taxes and Assessments, 280 U.S. 338 (1930). This position would evolve into a more practical consideration of the effects of the tax on interstate commerce in 1938 with the Court's decision in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). The test became one of proper apportionment of interstate revenues between the distinct local operation of the business and the portion derived from interstate transactions, with a focus on the risk for multiple taxation. *Id.*

1. *Western Live Stock v. Bureau of Revenue*[22]

In *Western Live Stock*, New Mexico imposed a gross receipts tax on Western Live Stock, a company which prepared, edited and published a monthly livestock trade journal.[23] The journal had an interstate circulation and the company received a portion of its revenue from out of state advertisers.[24] Western Live Stock argued that the New Mexico tax offended the Commerce Clause because it was measured by gross receipts,[25] which were augmented by revenues from the interstate circulation of the journal.[26] In considering the Court's prior doctrine that gross receipts from interstate commerce may not be made the measure of a state tax, Justice Stone wrote that "[p]ractical rather than logical distinctions must be sought."[27] "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."[28] This clearly implied that a state may constitutionally tax a company conducting interstate business but the Court nevertheless continued the struggle to define the limits of interstate commerce for determining a taxpayer's "just share of the tax burden."[29]

In a marked retreat from the Court's pre-1938 reliance on formalistic distinctions, Justice Stone acknowledged the "double demand that interstate business should pay its way, and that

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22. 303 U.S. 250 (1938).
23. *Id.* at 252.
24. *Id.*
25. *Id.*

> There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against *gross receipts*, as follows: . . . I—At an amount equal to 2 per cent of the gross receipts of any person engaging or continuing in any of the following businesses: . . . Publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for advertising space).

Id. at n.1 (citing 1934 N.M. Laws ch. 7, § 201) (emphasis added).
26. *Id.* at 254.
27. *Id.* at 259.
28. *Id.* at 254.
29. *Id.*

at the same time it shall not be burdened by [multiple taxation]."[30] The Court further explained that the state may constitutionally tax the privilege of carrying on local business if the portion taxed is separate and distinct from the portion earned from interstate commerce.[31] Applying this standard, the Court found that the New Mexico tax both in form and in substance, properly taxed that portion of the local business that was separable from interstate commerce.[32] This concept of proper apportionment has arguably become the dominant consideration of all latter day dormant Commerce Clause adjudication. It seemed as if the formalistic distinctions relied on prior to *Western Live Stock* had been filed away once and for all.

2. *Freeman v. Hewit*[33]

In *Freeman v. Hewit,* however, the Court once again embraced the formal distinction between indirect and direct taxation.[34] In *Freeman*, Indiana imposed a tax upon the entire gross income of residents and domiciliaries and sought to apply this tax to income generated from the sale in New York of securities owned by an Indiana-based trust.[35] Justice Frankfurter, writing for five members of the Court, announced a blanket prohibition against any state taxation imposed directly on an interstate transaction.[36] A direct tax on interstate sales, even if fairly apportioned and nondiscriminatory, was held to be unconstitutional per se.[37]

Justice Rutledge, in a lengthy concurring opinion argued for a more pragmatic approach asserting that the true test for

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30. *Id.* at 258. The very next year the Court applied this prohibition against multiple taxation and invalidated an unapportioned gross receipts tax. *See* Gwin, White & Prince, Inc. v. Henneford, 304 U.S. 434, 439 (1939).

31. *Western Live Stock*, 303 U.S. at 258.

32. *Id.* at 261.

33. 329 U.S. 249 (1946).

34. *Id.* at 256. The Court invalidated an Indiana gross receipts tax because that particular application would impose a *direct* tax on interstate sales. *Id.*

35. *Id.* at 250-51.

36. *Id.* at 276-77.

37. *Id.* at 255; *see also* Dunham, *supra* note 19, at 215 ("If the tax is a 'direct tax upon' interstate commerce or a 'levy upon the very process of commerce' or a 'direct tax on interstate sales,' the Commerce Clause strikes down the tax however remote or insubstantial the interference with commerce.").

determining the validity of a tax is whether the tax has the "consequences for interstate trade intended to be outlawed by the Commerce Clause."[38] Justice Rutledge would find a state tax unconstitutional in three situations: 1) if the activity taxed lacks a sufficient nexus to the taxing state;[39] 2) if the tax discriminates against interstate commerce;[40] or 3) if the tax would subject the activity to multiple taxation.[41] In making use of the "expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."[42] The Court would continue this emphasis on labelling, reborn in *Freeman*, while considering the validity of a Connecticut tax on the privilege of doing interstate business within the state.[43]

3. *Spector Motor Service v. O'Connor*[44]

The prohibition against state taxation of the privilege of engaging in interstate commerce was reaffirmed in *Spector Motor Service v. O'Connor*.[45] Spector was a Missouri corporation engaged exclusively in interstate trucking with some of its interstate shipments either originating or terminating in Connecticut.[46] Connecticut imposed on every corporation "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state," measured by apportioned net income.[47] The state court of final jurisdiction explained the tax to the United States Supreme Court to help determine the "all-important operating incidence of the tax," which would be used

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38. *Freeman*, 329 U.S. at 267.
39. *Id.* at 271.
40. *Id.* at 274.
41. *Id.* at 276-77.
42. Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1926) (Stone, J., dissenting) *overruled by* California v. Thompson, 313 U.S. 109 (1941).
43. Ms. Dunham concluded her examination of *Freeman v. Hewit* with the correct premonition that since the Court provided little guidance by its decision in *Freeman* that the Court "will doubtless have an early opportunity to re-examine its [conclusions]." Dunham, *supra* note 19, at 226. Just one year later, the Court would decide *Central Greyhound Lines, Inc. v. Mealey* during the 1948 term, 334 U.S. 653 (1948).
44. 340 U.S. 602 (1951).
45. *Id.*
46. *Id.* at 603.
47. *Id.* at 603-04 n.1 (citing CONN. GEN. STAT. § 418(c) (Supp. 1935)).

to answer this constitutional question.[48] The Court, in a 6-3 decision written by Justice Burton, recognized that "where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate [portions]."[49] The Court went on to hold that the tax on the privilege of carrying on intrastate business was unconstitutional when applied to what is "exclusively interstate" commerce.[50]

The dissent by Justice Clark[51] chided the majority for declaring the statute unconstitutional "simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders."[52] Despite Justice Burton's declaration that "[i]t is not a matter of labels,"[53] the Court attached constitutional significance to the difference between a tax on business that was "exclusively interstate in character" and a constitutionally permissible tax on a taxpayer engaged in both interstate and intrastate business.[54] Thus, the *Spector* rule emerged: a state tax on the "privilege of doing business" is per se unconstitutional when it is applied to interstate commerce.[55] This rule, however, would be expressly overruled twenty-six years later by the Court in *Complete Auto Transit, Inc. v. Brady*.[56]

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48. *Id.* at 605-06. The Supreme Court of Errors for the State of Connecticut said that the tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state with net earnings used only to determine the amount due from each corporation. *Id.* at 606 (citing Spector Motor Services v. Walsh, 61 A.2d 89, 98-99 (Conn. 1948)).

49. *Id.* at 609-10.

50. *Id.* at 610.

51. Justice Clark was joined in his dissent by Justices Black and Douglas.

52. *Id.* at 611 (Clark, J. dissenting).

53. *Id.* at 608.

54. *Id.* at 609-10.

55. *Id.* at 609.

56. 430 U.S. 274, 288-89 (1977). "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Id.* at 288.

B. *Realism Overcomes Formalism:* Complete Auto Transit, Inc. v. Brady

The Court's answer to this perplexing maze of inconsistent and often competing decisions was its decision in *Complete Auto* highlighted by its enunciation of a four part test to apply in future dormant Commerce Clause cases involving state taxation of interstate commerce. In *Complete Auto*, Mississippi imposed a franchise tax on a motor carrier company engaged in transporting cars manufactured outside the state.[57] Complete Auto Transit challenged the tax on the ground that it was a tax on the privilege of engaging in interstate commerce.[58] In an opinion authored by Justice Blackmun, the Court rejected Complete Auto Transit's argument that a tax on the privilege of engaging in an activity in a state may not be applied to an activity that is part of interstate commerce.[59] The Court dispatched this argument because that position ignored the practical implications of the tax.[60] The Court noted that if Mississippi had characterized the tax as one on either net income or the going concern value of the business then it would be upheld.[61] Justice Blackmun correctly refused to commit the Court to making constitutional distinctions based on labels while ignoring the economic consequences of the tax.[62] The Court required a practical analysis of whether a tax affecting interstate commerce is "fairly apportioned."[63] The central purpose of apportionment is

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57. *Id.* at 275-76. The Mississippi statute states:

> There is hereby levied and assessed and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

MISS. CODE ANN. § 27-65-13 (1972).

58. *Id.* at 278.

59. *Id.* at 288-89.

60. *Id.* at 278.

61. *Id.* at 288.

62. *Id.*

63. *Id.* at 279, *quoted in* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981)). In *Commonwealth Edison Co.*, the Court made it clear that gross receipts taxes affecting interstate commerce were subject to the same "consistent and rational method of inquiry" it had applied to other taxes which focused on "the *practical effect* of a challenged tax." 453 U.S. at 615-16 (emphasis added).

to ensure that each state taxes only its fair share of an interstate transaction.[64]

In considering the practical effect, the Court established a four part test to determine whether a state tax offends the Commerce Clause. The Court will sustain the tax when it: (1) is applied to an activity with a substantial nexus within the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state.[65] The Court has further refined its definition of apportionment under the second prong of the *Complete Auto* test to include a consideration of "internal consistency" and "external consistency."[66] A discussion of these concepts is included in the introduction to *Oklahoma Tax Commission* discussed later in this casenote.[67]

C. *Stare decisis and* Central Greyhound Lines, Inc. v. Mealey

In *Oklahoma Tax Commission*, the lower courts relied on the Supreme Court's 1948 decision in *Central Greyhound Lines, Inc. v. Mealey*.[68] In *Central Greyhound*, New York levied an unapportioned gross receipts tax on a New York-based bus company which applied to all revenues, even though a large percentage was attributable to bus services rendered outside New York.[69] The Supreme Court found the tax invalid because it was not apportioned between interstate and intrastate revenues.[70] Justice Frankfurter, writing for five members of the Court, concluded that this unapportioned tax unfairly burdened interstate

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64. Goldberg v. Sweet, 488 U.S. 252, 260-61 (1989).

65. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

66. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987); Armco v. Hardesty, 467 U.S. 638 (1984); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983).

67. *See infra* part III.A.

68. 334 U.S. 653 (1948).

69. *Id.* at 660. New York imposed a tax on gross receipts for the entire mileage of the transportation services sold. That is, an unapportioned state tax on the gross receipts from ticket sales representing 57.47% of the miles in New York and also on the 42.53% outside of New York. *Id.* at 662.

70. "The vice of [the New York tax] is that it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the state, a part of every dollar received in such transactions.'" *Id.* at 663 (Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 297 (1917)).

commerce because revenue could be taxed both by states which gave protection and services to the taxpayer, as well as by a state that did not.[71]

Justice Frankfurter reasoned that if the New York tax was upheld, Central Greyhound would be subject to multiple taxation because Pennsylvania and New Jersey would also be entitled to tax the gross receipts of Central Greyhound.[72] These states would be entitled to this tax because 43% of the total mileage was within their borders and, during the time spent travelling within those borders, each state provided benefits and services to the bus line.[73] "[A]n unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'"[74] A state may only constitutionally tax the part of the receipts which is proportionate to the mileage travelled within the state. The Court held that the tax may be fairly apportioned on the basis of mileage travelled within the state and thus held the construction of the New York Tax Law unconstitutional.[75]

Justice Murphy wrote the dissenting opinion[76] challenging the majority's position that bus travel through neighboring states and ending in the same state is actually interstate commerce.[77] The dissent avoided the apportionment issue by rea-

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71. *Central Greyhound Lines, Inc.*, 334 U.S. at 662. In the instant case, New York provided services to Greyhound for just over half of its revenues while other states provided services for the remainder. Of these services, highways and police protection while travelling within the state are particularly important to interstate bus travel. These are significant services rendered by the state justifying the collection of a tax on the revenue derived from use of these services. "Neither [Pennsylvania and New Jersey's] interests nor their responsibilities are evaporated by the verbal device of attributing the entire transportation to New York." *Id.* at 660.

72. *Id.* at 662.

73. *Id.*

74. *Id.* at 663 (quoting Freeman v. Hewit, 329 U.S. 249, 253 (1946)).

75. *Id.* It is interesting to note that N.Y. TAX LAW § 186-a(2)(a) (Consol. 1978) specifically excludes "omnibuses having a seating capacity of more than seven persons. . . ." Presumably, this specific clause was added in response to the Court's 1948 decision in order to avoid the apportionment of interstate mileage travelled by commercial bus companies.

76. Justices Black and Douglas joined in Justice Murphy's dissenting opinion.

77. 334 U.S. at 664 (Murphy, J., dissenting). "[C]ommerce among the states is a practical rather than a technical legal conception.") *Id.* at 667 (construing Sunft & Co. v. United States, 196 U.S. 375, 398 (1905). Thus, he reasoned that a consideration of

soning that the transaction was inappropriately labelled by the majority as interstate commerce despite the fact that 42.53% of the transportation occurs outside New York.[78] Justice Murphy concluded that since the bus transportation was merely local commerce, New York was entitled to tax the total gross receipts.[79] The Court would later abandon the dissent's formalistic rationale in *Complete Auto Transit, Inc. v. Brady*,[80] but the Court refused to discard this line of reasoning completely and continued to answer Commerce Clause questions based on formal distinctions. The Court's rationale underlying apportionment of interstate transactions is no less appropriate today then it was in 1948. However, the nature of some transactions may preclude apportionment as the Court found in *Goldberg v. Sweet*.[81]

D. *Apportionment may be Administratively Impracticable:* Goldberg v. Sweet

Illinois imposed an excise tax of five percent of the unapportioned gross charge on the origination or receipt in Illinois of interstate telecommunications.[82] Thus, Illinois levied a tax on the gross charge of interstate telecommunications originating or terminating in Illinois and charged to an Illinois service address, regardless of where the telephone call was billed or paid.[83] The Tax Act provides a tax credit to any taxpayer who proves they have paid a tax in another state on the same telephone call which Illinois is seeking to tax.[84]

The Illinois trial court found that the tax violated the Commerce Clause because it created a "real risk of multiple taxa-

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the practical effects of a transaction precluded "indiscriminate application of the interstate label simply because state lines are crossed." *Id.*

78. *Id.* at 671.

79. *Id.*

80. 430 U.S. 274 (1977).

81. 488 U.S. 252 (1989).

82. ILL. REV. STAT. ch. 120, para. 2004 (1985), *quoted in* Goldberg v. Johnson, 512 N.E.2d 1262, 1265 (Ill. 1987), *aff'd sub nom.* Goldberg v. Sweet, 488 U.S. 252 (1989).

83. Goldberg v. Sweet, 488 U.S. 252, 256 (1989) (*citing* ILL REV. STAT. ch. 120, para. 2002, §§ 2(a)-(b) (1985)).

84. *Id.*

tion . . . [since] at least two taxing jurisdictions levy a tax similar to the instant tax . . . ."[85] The state supreme court reversed, finding that the tax did not offend the Commerce Clause and satisfied the four-prong *Complete Auto* test.[86] The United States Supreme Court affirmed, again applying the *Complete Auto* test, holding that the tax was externally consistent, thus satisfying the apportionment prong.[87] The Court further held that the tax did not discriminate against interstate commerce and was fairly related to the services which the state provided to taxpayers.[88] Writing for the Court, Justice Marshall acknowledged a slight risk of multiple taxation when the service address and the billing location of a taxpayer are in different states.[89] The Court reasoned, however, that this slight risk was insufficient to invalidate the tax and was adequately remedied by the credit provision in the Tax Act.[90]

The majority concluded that requiring an apportionment formula based on the mileage that the calls travelled in Illinois would be administratively impracticable.[91] Justice Marshall distinguished *Goldberg* from other apportionment cases, most notably from *Central Greyhound*, as dealing with the movement of "large physical objects over identifiable routes" where apportionment is practicable.[92] Justice Marshall implied that, but for the administrative and technological burdens associated with modern telecommunications, apportionment would be appropriate where a state attempts to tax the in-state portion of the telecommunication.[93]

Justices Stevens and O'Connor each filed separate opinions concurring in the judgment but refusing to join the majority position that a state may discriminate against its own residents

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85. Goldberg v. Johnson, 512 N.E.2d 1262, 1267 (Ill. 1987), *aff'd sub nom.* Goldberg v. Sweet, 488 U.S. 252 (1989).

86. *Id.* at 1268. The Illinois Supreme Court reasoned that although an unapportioned tax is constitutionally suspect because of the risk of multiple taxation, the credit provisions of the tax act adequately prevented this danger. *Id.* at 1267.

87. 488 U.S. at 252-53.

88. *Id.* at 267.

89. *Id.* at 263 & n.13.

90. *Id.* at 263-64; *see, e.g., id.* at 263 n.13.

91. *Id.* at 265.

92. *Id.* at 264; *see, e.g.*, Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1948).

93. *Goldberg*, 488 U.S. at 264-65.

by placing a heavier tax on those who engage in interstate commerce than those who merely engage in local commerce.[94] Justice Scalia, also concurring in the judgment, maintained his position that only state taxes which facially discriminate against interstate commerce violate the dormant Commerce Clause.[95]

In recent years, the Court has upheld every state tax that has faced an apportionment challenge.[96] During this same time period, the Court has struck down state taxes that facially discriminated against out-of-state businesses presumably because the Court, in adopting a more realist approach, believed there was a substantive difference between a sales tax and a use or excise tax.[97] This analysis is heightened by the presence of Justices Scalia, a true formalist, and Thomas, both of whom consistently hold that only facially discriminatory statutes are unconstitutional.[98] Thus, they would be inclined to find the Oklahoma tax constitutional because the Oklahoma statute does not facially discriminate against interstate commerce.

The Court, in its ongoing struggle between formalism and realism, therefore had to choose between the two competing theories in deciding *Oklahoma Tax Commission*. If it followed the formalist approach propounded by Justice Scalia, then the Court would certainly hold the tax constitutional. If, however, it found the tax substantively indistinguishable from the tax held unconstitutional in *Central Greyhound*,[99] then the Commerce Clause challenge would be sustained. This represents the realist approach, which includes a consideration of the economic effect of the tax while acknowledging that proper apportionment

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94. *Id.* at 268-70. Specifically, they refused to join the majority's statement that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Id.* at 266.

95. *Id.* at 271 (Scalia, J., concurring).

96. *See* Michael C. Wagner, Note, *Oklahoma Tax Commission v. Jefferson Lines: Commerce Clause Restraints on State Taxing Power*, 14 J.L. & COM. 277, 290 (Spring 1995).

97. *Id.* at 293.

98. *See, e.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1346 (1995) (Scalia, J., concurring in the judgment joined by Thomas, J.); Goldberg v. Sweet, 488 U.S. 252, 271 (1989) (Scalia, J., concurring in the judgment); Barclays Bank v. Franchise Tax Bd. 114 S. Ct. 2268, 2287 (1994) (Scalia, J. concurring).

99. 334 U.S. 653 (1948); *see supra* part II.D.

is administratively feasible when applied to the movement of "large physical objects over identifiable routes."[100]

III. *OKLAHOMA TAX COMMISSION V. JEFFERSON LINES, INC.*

A. *Introduction*

Before examining the decisions of the lower court and the Supreme Court in this case, a discussion of the refinements of the *Complete Auto* test may prove helpful. The Court in subsequent decisions added two concepts to its consideration of apportionment issues. The Court must also consider both the internal consistency and external consistency of the tax.

1. Internal Consistency

The Court originally defined internal consistency as the taxation formula such that, "if applied equally by every jurisdiction, it would result in no more than all of the 'unitary business' income being taxed."[101] The Court redefined this internal consistency test in *Goldberg v. Sweet* holding that "to be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result."[102] Internal consistency does not preclude multiple states from taxing the same transaction so long as the portion of the income taxed by each state is not taxed by another state. That is, internal consistency exists where an identical tax in every other state would "add no burden to interstate commerce that intrastate commerce would not also bear."[103]

This test creates a much stricter standard than that announced in *Complete Auto Transit*.[104] A failure of internal con-

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100. Goldberg v. Sweet, 488 U.S. 252, 264 (1989); *see, e.g., Central Greyhound Lines, Inc.*, 334 U.S. 653 (1948).

101. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

102. 488 U.S. 252, 261 (1989). Here, the Court held that Illinois' excise tax on interstate telephone calls was internally consistent.

103. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1338 (1995). This test asks nothing about the economic reality reflected by the tax, but simply looks to the structure of the tax at issue.

104. Amy M. Petragnani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1221 (1994).

sistency shows as a matter of law that a state tax unduly burdens interstate commerce and thus is in violation of the Commerce Clause.[105] Any other rule would mean that a state's particular tax laws would depend on "the shifting complexities of the tax codes of forty-nine other States, and the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated."[106] Thus, for example, the Court must determine whether the Oklahoma tax, if applied by every other state, would subject the interstate bus travel to multiple taxation. When considering the constitutionality of the apportionment of a tax, the analysis is not complete without a corresponding evaluation of external consistency.

2. External Consistency

Although internally consistent, a taxation formula may still unfairly burden taxpayers. The external consistency test considers the economic justification for the state's claim to the value taxed.[107] The Court asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.[108] It requires that "the [factors] used in the apportionment formula must actually reflect a reasonable sense of how income is generated."[109]

While the internal consistency test is relatively straightforward in its application, the external consistency test can pose difficulties depending on the facts of each case. The Court must "examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity."[110] This is essentially a practical inquiry and it is exactly this practical inquiry which the Court

105. *Id.*

106. Armco v. Hardesty, 467 U.S. 638, 638-39 (1984). The Court invalidated a West Virginia business and occupation tax measured by the gross receipts of the business. The tax was imposed on businesses for the privilege of doing business within the state.

107. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1338.

108. Goldberg v. Sweet, 488 U.S. 252, 262 (1989); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169-70 (1983).

109. *Container Corp. of Am.*, 463 U.S. at 169.

110. *Goldberg*, 488 U.S. at 262.

avoids in *Oklahoma Tax Commission* by labelling the tax a sales tax on the discrete sale of a service.[111]

B. *Facts and Procedural History*

Jefferson Lines is a Minnesota corporation that provides bus transportation service for both interstate and intrastate travel in the state of Oklahoma.[112] Jefferson Lines filed for bankruptcy under Chapter 11 in 1989.[113] Oklahoma state law imposes a tax of 4.5% on the gross receipts from the sale of several taxable events, including transportation for hire to persons by common carriers.[114] This law requires Jefferson Lines to collect and remit a tax measured by the gross sales price of every bus ticket sold in Oklahoma. The Oklahoma Tax Commission sought payment from Jefferson Lines for unpaid sales taxes on the gross price of interstate bus tickets sold in Oklahoma.[115] The Commission argued that the sale of a bus ticket is a purely local transaction justifying a sales tax on the ticket's value in the state where it is sold.[116]

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111. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1344.

112. *Id.* at 1335.

113. *In re* Jefferson Lines, Inc., 15 F.3d 90, 91 (8th Cir. 1994), *rev'd sub nom.* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995).

114. OKLA. STAT. tit. 68, § 1354 (Supp. 1996). The statute provides in pertinent part:

> (1) There is hereby levied upon all sales, not otherwise exempted in Oklahoma Sales Tax Code, Section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following:
>
> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

"Oklahoma is the only state to tax interstate transportation, a step other states have avoided, apparently because they regarded the practice as unconstitutional under [*Central Greyhound*]." *High Court Says States Can Tax Travel Tickets*, STAR-TRIB. Mpls.-St.Paul, Apr. 4, 1995, *available in* 1995 WL 3658295 [hereinafter *High Court*].

115. *In re Jefferson Lines, Inc.*, 15 F.3d at 91.

116. *Id.* at 92. The Commission explained "that the Oklahoma sales tax is based solely on the purchase price of the ticket, and that once the sale has occurred, the taxable event is complete." *Id.* at 92. However, the court of appeals rejected this argument because it taxed only the purchase of the ticket while ignoring the fact that the value of the ticket is derived from the use of it for transportation.

Jefferson had collected and remitted taxes for all intrastate bus tickets sold in Oklahoma,[117] but argued that the tax on its sales of interstate bus tickets imposed an undue burden on interstate commerce in violation of the Commerce Clause[118] by permitting Oklahoma to collect a percentage of the full purchase price of all tickets sold for interstate bus travel, even though some of that value is derived from travel through other states.[119] The bankruptcy court agreed with Jefferson, and both the district court and the Eighth Circuit Court of Appeals affirmed.[120] The bankruptcy court and the district court applied the four part test of *Complete Auto* and found that the statute was not fairly apportioned.[121] The Eighth Circuit Court of Appeals also found that the statute was not fairly apportioned under its own *Complete Auto* analysis.

C. *The Eighth Circuit Court of Appeals Decision*

The court of appeals relied on the Supreme Court's decision in *Central Greyhound* in finding that the tax violated the Commerce Clause.[122] The Eighth Circuit Court of Appeals held this tax to be indistinguishable from the unapportioned tax on gross receipts[123] from interstate bus travel struck down in *Central Greyhound*.[124] The court of appeals found the Oklahoma tax indistinguishable in terms of substantive effect from the New York tax held unconstitutional in 1948.[125] It further held

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117. Oklahoma Tax Comm'n v. Jefferson Lines, Inc. 115 S. Ct. 1331, 1135 (1995).

118. U.S. CONST art. I, § 8, cl. 3. "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several states . . . ."

119. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1335.

120. *In re Jefferson Lines, Inc.*, 15 F.3d at 91. The court of appeals refused to "separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance." The Eighth Circuit Court of Appeals retreated from the semantics of the *Spector* rule by focusing more on the economic realities of the tax instead of its draftsmanship. *Id.* at 92.

121. *Id.* at 91.

122. *Id.* at 92.

123. The Supreme Court acknowledged that it follows standard usage under which gross receipts taxes are on the gross receipts from sales payable by the seller, in contrast to sales taxes which are also levied on the gross receipts from sales but are payable by the buyer (although they are collected by the seller and remitted to the taxing entity). Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1335 n.3 (1995).

124. Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948).

125. *In re Jefferson Lines, Inc.*, 15 F.3d at 92-93.

that the Oklahoma tax failed the apportionment prong of the *Complete Auto* test because it was not externally consistent.[126]

Little discussion is necessary to determine that the sale of the bus ticket in Oklahoma and the intrastate bus transportation established Jefferson Line's sufficient nexus to Oklahoma, meeting the first prong of the *Complete Auto* test.[127] In considering apportionment, the second prong of the *Complete Auto* test, the Eighth Circuit found that the tax reached the entire amount of gross receipts from the sale of transportation outside its borders as well as receipts from the sale of transportation within its borders.[128] Thus, the tax does not reasonably reflect the in-state portion of the interstate activity being taxed, especially where the Supreme Court has held in the past that apportionment for bus travel is administratively feasible.[129] The court of appeals, citing *Goldberg v. Sweet* with approval, found that apportionment of the tax on the basis of miles travelled within a state is both administratively and technologically feasible.[130]

The court of appeals acknowledged that, in evaluating the tax, it must look beyond formalism and consider the practical and economic effect of the tax on interstate commerce.[131] The Oklahoma Tax Commission argued that the tax is externally consistent and does not need to be apportioned because the tax is on the sale of the ticket and is imposed only on the discrete local sales event.[132] In essence, the Commission proffered a formalistic argument, contending that only the actual purchase of a ticket is taxed and not the use of the ticket.[133] This argument fails most notably to consider the substance of the sale of an interstate bus ticket, which is the interstate transportation of passengers for hire. The court of appeals did not embrace the Commission's proffered formalistic distinction and refused to

126. *Id.*
127. 430 U.S. 274, 279 (1977).
128. *In re Jefferson Lines, Inc.*, 15 F.3d at 92.
129. Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948); *see also* Goldberg v. Sweet, 488 U.S. 252 (1989) (distinguishing apportionment of telecommunications from the apportionment of large physical objects over identifiable routes).
130. *In re Jefferson Lines, Inc.*, 15 F.3d at 93.
131. *Id.* at 92.
132. *Id.*
133. *Id.*

separate the sale of a piece of paper from the service which it represents.[134] Like the New York tax held unconstitutional in *Central Greyhound*, the court found that the Oklahoma tax is a direct burden on interstate commerce and the amount of the burden bears no relationship to the portion of the trip that occurs within the taxing state.[135] In reaching its decision, the court of appeals found it unnecessary to consider the remaining two prongs of the *Complete Auto* test because it concluded, as did the lower courts, that the tax was not fairly apportioned within the test of *Complete Auto*.[136]

D. *The Supreme Court's Majority Decision*[137]

In reversing the Eighth Circuit Court of Appeals, Justice Souter also applied the four-prong test of *Complete Auto*,[138] but found that Oklahoma's tax on the full price of a ticket for bus travel from Oklahoma to another state is consistent with the Commerce Clause.[139] Under the *Complete Auto* test, a tax will be sustained against a Commerce Clause challenge when "the tax is applied to an activity with a substantial nexus to the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[140]

As to the first prong of the test, the Court easily found, and Jefferson did not deny, Oklahoma's substantial nexus to the in-state portion of the bus service.[141] The majority seems content

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134. *Id.*

135. *Id.* at 93.

136. *Id.* The remaining two prongs of the *Complete Auto* test include a consideration of whether 1) the tax discriminates against interstate commerce and 2) the tax is fairly related to the services or benefits provided by the State. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

137. Justice Souter wrote the majority opinion, and Justice Scalia filed a separate opinion concurring in the judgment in which Justice Thomas joined. Justice Scalia refused to join Part II of Justice Souter's opinion applying the "four-part test" of *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977).

138. The four-part test of *Complete Auto* has been applied and refined in several other Supreme Court cases. *See, e.g.*, Goldberg v. Sweet, 488 U.S. 252 (1989) (tax on interstate telephone calls); D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) (use tax); Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983) (franchise tax).

139. U.S. CONST. art. I, § 8, cl. 3.

140. *Complete Auto Transit Co. Inc.*, 430 U.S. 279. *See supra* part II.B.

141. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1338 (1995).

to classify the sale of the ticket as the discrete sale of a taxable good instead of the sale of a service. "The completion of a sale of a service happens when the service is completed, whereas completion of a sale of goods happens when the goods are delivered."[142] It is well settled "that a sale of tangible goods has a sufficient nexus to the state in which the sale is consummated to be treated as a local transaction taxable by that state."[143] Jefferson argued, however, that the sale of the ticket is not merely the sale of a good. Jefferson contended that the sale of the bus ticket represented the sale of a right to service and that Oklahoma was only justified in taxing the portion of the service that took place within its borders.[144] This argument more appropriately applies to the issue of apportionment.

Justice Souter then approached the more difficult second prong of apportionment. The majority found the tax internally consistent,[145] notwithstanding the economic reality of the tax,[146] because the sale of a ticket is a discrete event subject to taxation in only one state.[147] Justice Souter concluded that sales of services with at least partial performance in the taxing state justify a state tax on the entire gross receipts.[148] Justice Souter distinguished the Court's holding in *Central Greyhound* by noting the identity of the taxpayer burdened by the relevant tax.[149] The tax at issue in *Central Greyhound* was imposed on the gross receipts of the seller corporation, while the Oklahoma tax was imposed on the buyer of each ticket as a percentage of the sales price.[150] Such taxes were collected by Jefferson and remitted to Oklahoma. Justice Souter reasoned that since the tax was on the discrete sales event in Oklahoma and some of the services were delivered in Oklahoma, no other state could claim to be the site of the same combination and thus the sale would not be subject to multiple taxation.[151] Justice Souter

142. Wagner, *supra* note 96, at 299.
143. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1338 (citing McGoldrick v. Berwind-Wind Coal Mining Co., 309 U.S. 33 (1940)).
144. *Id.* at 1335.
145. *See supra* notes 101-106 and accompanying text.
146. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1338.
147. *Id.*
148. *Id.* at 1340.
149. *Id.* at 1340-41.
150. *Id.* at 1340.
151. *Id.* at 1341.

explained that Jefferson had not given a set of facts that would subject either the corporation or its passengers to multiple taxation from either a successive sales tax or a discriminatory use tax.[152] The majority further rejected Jefferson's position favoring apportionment based on mileage and distinguished *Goldberg* stating that a particular apportionment formula need not be used simply because it is possible to use it.[153] Thus, the majority concluded that the Oklahoma tax is internally consistent.

Justice Souter began his discussion of external consistency by recalling the historical treatment of taxes classified as a sales tax.[154] He stated that interstate activity may be essential to a substantial portion of the value of the services, as in the sale of advertising and interstate circulation of the journal in *Western Live Stock*.[155] Further, the interstate component may be essential to performance of the services as in the instant case.[156] Justice Souter stated however, that sales with at least a partial performance in the taxing state justify that state's taxation of the transaction's entire gross receipts by the seller.[157] Jefferson argued that the sale of the services did not occur until delivery was made; that delivery is made by services provided over time and through space; and that a separate sale occurs at each moment of delivery or when each state's segment of transportation is completed.[158] The Court responded by saying that the sale was completed at the time of the combined events of payment for a ticket and its delivery for present commencement of the trip.[159] Thus, the majority concluded that the tax was externally consistent because it reaches only the activity taking place within Oklahoma.[160]

As to the third prong of the *Complete Auto* test, Justice Souter maintained that since only Oklahoma can tax the sale of transportation originating in Oklahoma and since it imposes the tax equally on both interstate and intrastate bus travel, the tax

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152. *Id.* at 1342-43.
153. *Id.* at 1343.
154. *Id.* at 1338.
155. 303 U.S. 250 (1938).
156. *See also* Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948).
157. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1340.
158. *Id.* at 1341.
159. *Id.*
160. *Id.* at 1344.

does not discriminate against interstate commerce.[161] The final prong of the *Complete Auto* test requires a fair relation between the tax and the benefits conferred upon the taxpayer by the state. Justice Souter rejected Jefferson's argument that the only benefits to the purchaser from the taxing state occur during the portion of the travel that occurs in Oklahoma.[162] Justice Souter explained that the state provides benefits and services, such as police and fire protection as well as access to Oklahoma courts, while the taxpayer is selling tickets inside Oklahoma.[163] In return, the state exacts a tax measured by the gross receipts of ticket sales.[164] In this way, interstate commerce is made to pay its fair share of state expenses by contributing to the costs of providing governmental services, including ones from which the taxpayer receives no direct benefit.[165]

Justice Scalia, with whom Justice Thomas joined, remained consistent with his opinion in *Goldberg.* He concurred in the judgment, reasoning that the Oklahoma tax is valid because it does not facially discriminate against interstate commerce.[166] He went on to comment that the four-part test of *Complete Auto* should be discarded and "immunization of interstate commerce" from discriminatory state action should be left to Congress.[167]

E. *The Dissent*

Justice Breyer, with whom Justice O'Connor joined, was unconvinced that this tax was distinguishable from the New

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161. *Id.* at 1346. *But see* American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987). The Court in *Scheiner* held that a flat tax on trucks for the privilege of using Pennsylvania's roads discriminated upon interstate travel by imposing a cost per mile on out-of-state trucks far exceeding the cost per mile borne by locally owned trucks. Justice Souter distinguished the tax in *Scheiner* because the tax in Oklahoma was based upon the purchase of the ticket and not upon the use of the State's roads. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1345.

162. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1345.

163. *Id.* at 1346.

164. Oklahoma Tax Comm'n, 115 S. Ct. at 1346.

165. *Id.* at 1346 (quoting Goldberg v. Sweet, 488 U.S. 252, 267 (1989)).

166. *Id.* (Scalia, J., concurring).

167. *Id.* Justice Scalia reasoned that the four-part test of *Complete Auto* espoused by the majority contained "imponderables," which he believes the Court should not undertake to decide. *Id.*

York tax held unconstitutional in *Central Greyhound Lines, Inc. v. Mealey*.[168] Justice Breyer argued that this tax is a not merely a tax on an object involved in interstate commerce. "Rather, it is a tax imposed upon interstate travel itself—the very essence of interstate commerce."[169] The crux of his argument is that there are only minor differences between the Oklahoma tax at issue and the New York tax found to offend the Commerce Clause.[170]

Justice Breyer made a compelling argument on the similarities between the statute at issue in Oklahoma and the New York tax statute held to violate the Commerce Clause in *Central Greyhound*. The language in both statutes is similar and the practical result of both is to tax gross receipts as measured by sales.[171] Justice Breyer argued that the majority, in characterizing the taxable event as a sale, ignored the economic reality of the transaction in favor of a more formalistic approach.[172] Justice Breyer noted further that the *Goldberg* Court carefully distinguished apportionment cases "where it [is] practicable to keep track of the distance actually travelled within the taxing State."[173] Justice Breyer concluded by reaffirming the principles of *Central Greyhound* "even if doing so requires different treatment for the inherently interstate service of interstate transportation, and denies the possibility of having a single, formal constitutional rule for all self-described 'sales taxes.'"[174] This suggestion is not without merit considering the ever-changing tax laws of both the individual States and the federal government.

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168. 334 U.S. 653 (1948).

169. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1349. "[I]t is a fairly obvious effort to tax more than 'that portion' of the 'interstate activity['s]' revenue 'which reasonably reflects the in-state component.'" *Id.* (quoting Goldberg v. Sweet, 488 U.S. 252, 262 (1989)).

170. *Id.* at 1347-48.

171. *Id.* at 1347-48; *see* OKLA. STAT. ANN., tit. 68, § 1354(1)(C) (Supp. 1995) (an "excise tax" of 4.5% on "the gross receipts or gross proceeds of each sale" made in Oklahoma); N.Y. TAX LAW § 186-a (Consol. 1994) (a 3 1/2% tax on the "receipts received . . . of any sale" in New York).

172. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1348.

173. *Id.* at 1349 (citing *Goldberg*, 488 U.S. at 264). Justice Marshall noted several previous Supreme Court cases where the Court endorsed apportionment formulas for trucks, cargo containers, motor carriers, oil pipelines, and buses. *See id.* at 264 n.14.

174. *Oklahoma Tax Comm'n*, 115 S. Ct. at 1349 (Breyer, J., dissenting).

IV. ANALYZING *OKLAHOMA TAX COMMISSION*

A. *Improper Characterization as a Sales Tax*

The majority gives an extended history of dormant Commerce Clause adjudication which is beyond the scope of this casenote, but the present state of the law is the four-part test of *Complete Auto* handed down by the Court in 1977.[175] *Complete Auto* expressly overruled the form over substance approach of *Spector Motor Service v. O'Connor*[176] where the Court categorically abandoned this latter-day formalism. However, by ignoring the economic reality of the Oklahoma tax and placing great weight on the characterization of the tax as a sales tax, the Court appears to revert to its pre-1977 formalistic approach. The majority attempts to distinguish the tax in *Central Greyhound* from the Oklahoma tax by "characteriz[ing] the former as a 'gross receipts tax' and the latter as a constitutionally distinguishable 'sales tax.'"[177] Justice Breyer points out that the difference is one of form rather than substance because Jefferson Lines is still responsible for submitting the same amount of tax to the state regardless of the label or the identity of the original burdened taxpayer.[178] As the court stated in *Complete Auto*, "[t]he reason for attaching constitutional significance to a semantic difference is difficult to discern."[179] This formalistic approach which ignores the economic substance of a transaction runs afoul of the Court's decision in *Complete Auto* and opens the door for further state taxes on interstate transportation. Indeed, beyond transportation services, this decision could encourage state governments to explore ways to tax professional

175. *See supra* part II.B.

176. Spector Motor Service v. O'Connor, 340 U.S. 602 (1951); *see supra* part II.A.3.

177. Oklahoma Tax Comm'n, 115 S. Ct. at 1348 (Breyer, J., dissenting) (quoting the majority).

178. *Id.*

179. *Complete Auto Transit*, 430 U.S. at 285 (expressly overruling Spector Motor Service v. O'Connor, 340 U.S. 602 (1951)). The Court previously relied on the state label to determine the constitutionality of a state tax. *Spector* distinguished between a tax on the privilege of doing business in a state measured by income derived from interstate commerce and a tax on the privilege of engaging in interstate commerce. The *Spector* Court relied more on draftsmanship than the economic substance of the tax and was overruled by *Complete Auto*.

services such as advertising, accounting, and legal representation[180] as well as sales taxes on interstate rail and airline travel.[181] Presently, Oklahoma is the only state to tax interstate transportation.[182]

B. *No Reliance on Established Precedent*

The lower courts relied, as did the dissent, on the Court's decision in *Central Greyhound* which is very similar to the instant case.[183] The majority fails to indicate that the holding in *Central Greyhound* is no longer good law, yet it dismisses the similarities through an unconvincing distinction between the identities of the taxpayers burdened by the taxing scheme.[184] On the other hand, Justice Breyer pointed out the similarities in the wording of the statutes, the activities in question, and most importantly, the practical effect of the tax on interstate commerce.[185] The majority is content to ignore both precedent and practical effect to reach its decision in *Oklahoma Tax Commission*. Because of its respect for precedent and a practical consideration of the tax's substantive effect, the dissent seems to be the better reasoned opinion.

C. *Effects on Interstate Commerce*

Justice Breyer correctly points out, and the majority seems to believe, that the activity Oklahoma intends to tax is the transportation of passengers for hire, not the privilege of selling tickets in Oklahoma.[186] Aside from the risks of multiple taxation discussed below,[187] the results of this tax discriminate against interstate activity by exacting more than their constitutionally fair share of the receipts which will subject the taxpayer to multiple taxation.[188] Justice Frankfurter would agree

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180. Paul M. Barrett, *Supreme Court Allows State Tax on Interstate Bus Transportation*, WALL ST. J., Apr. 4, 1995, at B7.

181. High Court, *supra* note 114.

182. *Id.*

183. Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948).

184. *See supra* notes 51-67 and accompanying text.

185. *See supra* notes 171-78 and accompanying text.

186. Oklahoma Tax Comm'n v. Jefferson Lines, 115 S. Ct. 1331, 1348 (1995).

187. *See infra* notes 189-95 and accompanying text.

188. The ticket price is a function of the mileage travelled, and the tax is a per-

that other states could hardly be denied the right to tax the portion of the gross receipts representing the portion of the bus travel which occurs in their state where they provide protection and benefits to the bus corporation.[189] Because state roads and highways will be burdened by this interstate transportation without a corresponding charge for the benefits conferred, it can be argued that the Oklahoma tax creates an undue burden on interstate commerce. This burden on the neighboring states could only be remedied by subjecting the taxpayer to multiple taxation by the burdened state.

D. *Risk of Multiple Taxation*

The Oklahoma tax does not contain a credit provision like the Illinois tax upheld in *Goldberg,*[190] and thus the Oklahoma tax is an unconstitutional burden on interstate commerce because it subjects the taxpayer to the risk of multiple taxation.[191] Addressing a tax similar to the credit provision in *Goldberg,* the Supreme Court in *D.H. Holmes Co. v. McNamara* held that Louisiana's use tax on a retailer's customers is fairly apportioned if the state "provides a credit against its use tax for sales taxes that have been paid in other states."[192] Jefferson correctly argued that there is a risk of multiple taxation because any other state through which a bus travels may impose

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centage of the ticket price. Thus, the greater the distance travelled, the higher the price of the ticket, as well as the tax paid. It seems that if interstate tickets cover greater mileage, and therefore cost more and have a higher tax, taxpayers pay more for services which they use less. The converse is true for local intrastate transportation. The majority avoids a consideration of the fair relation prong of the *Complete Auto* test, stating that a detailed accounting of the services and benefits rendered is unnecessary. *See* Goldberg v. Sweet, 488 U.S. 252, 267 (1989).

189. Central Greyhound v. Mealey, 334 U.S. 653, 662 (1948) (1948) ("If New Jersey and Pennsylvania could claim their right to make appropriately apportioned claims against that substantial part of the business of appellant to which they afford protection, we do not see how on principle and in precedent such a claim could be denied.") Suppose 25% of all interstate bus transportation originating in Oklahoma travelled in the state of Texas. While travelling in Texas, Oklahoma provides police and fire protection, as well as access to the courts and maintenance of the very roads upon which bus travel depends. Following the holding in *Central Greyhound,* Texas would be allowed to tax the 25% of the gross receipts which represents the cost of the services it provides to the bus corporation.

190. *Goldberg,* 488 U.S. 252 (1989).

191. *See* Western Live Stock v. Bureau of Revenue, 303 U.S. 546 (1938).

192. D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31 (1988).

a tax on the bus company for the use of its roads.[193] Professor Hellerstein, a noted authority on Commerce Clause adjudication concerning state taxation, argues that "the grant of a credit does not make the tax fairly apportioned and . . . credits are no more than a second-best alternative, compelled by administrative considerations, to the fair apportionment of a tax base."[194] In the instant case, the Oklahoma tax is devoid of a credit provision required by the Court in Illinois and Louisiana.[195] Further, the Court recognized and demonstrated that apportionment on the basis of mileage is administratively and technologically feasible.[196] However, because the Court cannot predict all the ways that states may attempt to tax such interstate transportation, it is compelled to inquire into the practical effects of the tax and avoid formalistic labelling. It is exactly this practical inquiry which the majority and Justices Scalia and Thomas have refused to conduct.

V. CONCLUSION

The Commerce Clause is the manifestation of the framer's intent to avoid the economic balkanization of the states. In *Complete Auto*, the Court set forth the current test to determine if a state tax conflicts with our framer's lofty goals. The *Complete Auto* decision not only pronounced a workable test, but also marked a shift by the Court to examine the practical effects of a state tax which burdens interstate commerce.

While Justices Scalia and Thomas would only hold a facially discriminatory statute unconstitutional, the remainder of the Court is content to apply the *Complete Auto* test to the Oklahoma tax. The majority retreated somewhat from the Court's shift in *Complete Auto* by mischaracterizing the tax as a sales tax while ignoring its substantive effects. The dissent and the lower courts seem to have correctly applied the Court's decision in *Central Greyhound*, and the majority is remiss in avoiding

193. Oklahoma Tax Comm'n v. Jefferson Lines, 115 S. Ct. 1331, 1335 (1995).

194. Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 186 (1988).

195. OKLA. STAT. ANN., tit. 68, § 1361(A) (Supp. 1995).

196. *Oklahoma Tax Comm'n*, 115 S. Ct. 1343; *see, e.g.*, Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948).

Central Greyhound's precedential value through a formalistic distinction. While apportionment may make our taxation system even more complicated, that is a matter for legislative grace and should not deter the Court from examining the economic reality of a tax.

Jason P. Livingston