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Constitutional Law - Commerce Clause - State Taxation of Interstate Commerce - Supremacy Clause

Comfrey Scott Ickes

Recent Decisions

CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE TAXATION OF INTERSTATE COMMERCE—SUPREMACY CLAUSE—The United States Supreme Court has upheld the constitutionality of the Montana coal severance tax finding that it does not violate the Commerce Clause and that it is not inconsistent with federal legislation.

Commonwealth Edison Company v. Montana, 453 U.S. 609 (1981).

In 1975 the state of Montana enacted a new tax schedule for its coal severance tax.[1] The new tax schedule provided for varying rates up to a maximum of 30% of the contract sales price.[2] In 1978, four Montana coal producers and eleven of their out-of-state utility company customers[3] filed an action in a Montana state court seeking $5.4 million in refunds and an injunction preventing further collection of the tax. They contended that the coal severance tax was unconstitutional because it violated both the commerce[4] and supremacy[5] clauses of the United States Constitution. The court, without receiving any evidence, upheld the tax.[6] On appeal, the Montana Supreme Court, relying on the decision of the United States Supreme Court in *Heisler v. Thomas Colliery Company*,[7]

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1. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 613 (1981).

2. MONT. CODE ANN. § 15-35-103 (1979) provides in pertinent part: "A severance tax is imposed on each ton of surface mined coal produced in the state [at a rate of] 30% of value [for coal with a] Heating quality [Btu per pound of coal] over 7,000. "Value" means the contract sales price." *Id.*

3. Montana exports 90% of its coal to other states under long-term purchase contracts with utilities such as the appellant, Commonwealth Edison Company. Under the contracts, costs of all state taxation are to be borne by the utilities who, through fuel cost adjustment clauses, will pass the tax onto their consumers. 453 U.S. at 617.

4. "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

5. "This Constitution and the laws of the United States . . . shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, cl. 2.

6. 453 U.S. at 613. The trial court's opinion was not reported.

7. 260 U.S. 245 (1922). *Heisler* upheld a severance tax levied by Pennsylvania on coal, [80%] of which was destined for interstate commerce. Pennsylvania was said to have a natural monopoly in anthracite coal and intended to exploit this position. A mechanical test was expressed whereunder any com-

affirmed[8] holding that the tax does not violate the commerce clause because the severance of coal is an intrastate activity which preceeds the coal's entry into interstate commerce. Alternatively, the Montana court held that as a matter of law, the tax complied with the four-part test announced by the Court in *Complete Auto Transit, Inc. v. Brady*.[9] The supremacy clause argument was similarly discarded because the appellants did not show the Montana coal severance tax statute to be in opposition with any federal law.[10]

After noting probable jurisdiction,[11] the Supreme Court of the United States affirmed.[12] The Court held that the tax did not violate the commerce clause because it satisfied the *Complete Auto Transit*[13] test for the constitutionality of state taxation of interstate commerce. The Court also held that the tax did not violate the supremacy clause because Congress had not pre-empted state severance taxes on coal, but rather had explicitly authorized the imposition of such taxes.[14]

Justice Marshall, delivering the opinion of the Court,[15] turned initially to the appellants' contention that the Montana Supreme Court erred in relying on the Court's decision in *Heisler* to conclude that the coal severance tax is not subject to the commerce clause.[16] While the Court agreed that the *Heisler* reasoning has

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modity was considered to be subject to state taxation while being produced because this was a local activity and subject to federal taxation once the commodity was sold or shipped to customers in another state. Thus, any mining with subsequent sale interstate was considered to be two separate and distinct activities. *Id.* at 259.

8. 615 P.2d 847 (Mont. 1980).

9. 430 U.S. 274 (1977). For a state tax to not be violative of the commerce clause, the four-part test of *Complete Auto* requires that the tax:

1. be applied to an activity with a substantial nexus with the taxing state,
2. be fairly apportioned,
3. not discriminate against interstate commerce, and
4. be fairly related to services provided by the state.

Id. at 287.

10. 615 P.2d 861 (Mont. 1980).

11. 449 U.S. 1033 (1980).

12. 453 U.S. 609 (1981).

13. *Id. See supra* note 9.

14. 453 U.S. at 631.

15. Chief Justice Burger and Justices Brennan, Stewart, and Rehnquist joined in the majority opinion. Justice White filed a separate concurrence. Justice Blackmun filed a dissent in which Justices Powell and Stevens joined.

16. *Id.* at 614. *See supra* note 8.

been undermined by more recent cases,[17] the Court refused to overrule *Heisler*.[18] Justice Marshall found no real distinction between the economic effect on interstate commerce of severance taxes and that of other state taxes that have been subjected to commerce clause scrutiny, and he acknowledged that states have a significant interest in exacting from interstate commerce its fair share of the cost of government.[19] Instead, the Court agreed with the appellants that the Montana tax must be evaluated under *Complete Auto Transit's* four-part test:[20] A state tax does not offend the commerce clause if (1) it is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and; (4) is fairly related to services provided by the state.[21]

The Court noted that the appellants, although not disputing that the tax satisfied the first two parts of the *Complete Auto Transit* test, argued that the Montana coal severance tax in invalid under both the third and fourth parts of the test.[22] The majority dismissed the appellants' assertion that the tax discriminated against interstate commerce solely because 90% of Montana's coal is shipped to other states and noted that the tax is computed at the same rate regardless of the final destination

17. *See* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977) (held unconstitutional a North Carolina statute burdening apples from out-of-state by a mandatory grading system); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (held unconstitutional an Arizona statute indirectly requiring Arizona grown cantaloupes to be packaged within Arizona); Nippert v. City of Richmond, 327 U.S. 416 (1946) (held unconstitutional a Richmond ordinance licensing requirement on solicitors as applied to interstate sales).

18. 453 U.S. at 617. Justice Marshall noted that *Heisler* was decided at a time when the commerce clause was thought to prohibit state taxation of interstate commerce. He observed that under this approach the distinction between interstate and intrastate commerce was crucial to the state's taxing power. Rejecting the notion that a state tax or regulation is immune from commerce clause scrutiny because it attaches only to an interstate activity and rejecting the position that state taxation of interstate commerce is per se invalid, Justice Marshall concluded that the Court's goal in reviewing commerce clause challenges to state taxes has been to establish a consistent and rational method of inquiry focusing on the practical effect of the challenged tax. *Id.*

19. *Id.* at 616. Consequently, he found the *Heisler* Court's concern that subjecting taxes on local activities to commerce clause scrutiny would result in a loss of state taxing authority no longer tenable. *Id.*

20. *Id.* at 617.

21. *Id.* (quoting *Complete Auto Transit*, 430 U.S. at 279.)

22. *Id.*

of the coal, thereby making its administration even-handed.[23] The majority observed that the claim that a state tax is discriminatory under the commerce clause if the burden falls more heavily on out-of-state customers was considered and rejected in *Heisler*[24] and that the acceptance of the appellants' argument would be a significant and unwarranted departure from precedent.[25]

The majority did not accept the appellants' argument that the commerce clause gives the residents of one state the right to a sister state's resources at reasonable rates.[26] Refusing to inject principles of antitrust law into the relations between states, Justice Marshall noted that the threshold question of whether a state enjoys a monopoly position that allows it to export its tax burdens would require complex factual inquiries that might make the Court's inquiry futile.[27]

Justice Marshall then stated that the appellants' assertion that the fourth prong of the *Complete Auto Transit* text invalidated the Montana coal severance tax because the tax is not fairly related to the additional costs that the state incurs from coal mining[28] revealed their complete misunderstanding of the nature the inquiry under the fourth prong of the *Complete Auto Transit* test.[29] After noting the Montana Supreme Court's finding that the coal severance tax is imposed for the general support of the government, the Court stated that it had previously held that states have considerable latitude in imposing general revenue

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23. *Id.* at 617-18. Thus, the Court concluded that this case did not involve different tax treatment for interstate commerce, a characteristic which was fatal to state taxes in other cases. *E.g.*, Maryland v. Louisana, 451 U.S. 725 (1981) (held unconstitutional a Louisana taxing statute effectively exempting local producers from the tax by means of tax credits); Lewis v. B. T. Investment Managers, Inc., 447 U.S. 27 (1980) (held unconstitutional a Florida statute banning out-of-state ownership of investment advisory service businesses operating within Florida); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (held unconstitutional a New Jersey statute prohibiting the use of New Jersey landfills for out-of-state garbage).

24. 453 U.S. at 618. *See Heisler*, 260 U.S. at 259.

25. 453 U.S. at 619.

26. *Id.*

27. *Id.* at n.8.

28. *Id.* at 620. The Court characterized the appellants' complaint as one about the rate of the tax because they sought an opportunity to show that the tax was not fairly related to the additional costs. *Id.* at 620-21.

29. *Id.* at 621.

taxes.[30] Similarly, the majority indicated that it had consistently rejected claims that the due process clause of the fourteenth amendment[31] is a barrier against unreasonable or unduly burdensome taxation.[32] Further, the Court concluded that the commerce clause does not divest the latitude afforded the states in taxation nor prohibit a state from requiring an activity connected to interstate commerce to contribute to the general cost of government services. Justice Marshall observed that to accept the appellants' position that interstate commerce can only be taxed for the cost attributable to its activities would place interstate commerce in a privileged position.[33] The majority concluded that, as in the instant case, where the tax is not discriminatory against interstate commerce and is apportioned to activities occurring within the state, the tax is constitutional.[34]

The Court rejected the appellants' assertion that the relevant inquiry under the fourth prong of *Complete Auto Transit* is the amount of the tax in relation to the value of benefits bestowed as measured by the costs that the state incurs on account of the taxpayer's activities.[35] Rather, the Court stated that the test is that first, the interstate business must have a substantial nexus with the state and that second, the measure of the tax must be reasonably related to the extent of the contact. Applying this test, the Court concluded that the Montana tax satisfies the fourth prong of *Complete Auto Transit*.[36] To accept the appellants' view, Justice Marshall reasoned, would require an inquiry into the appropriate rate or level of taxation, which is essentially a matter for legislative, not judicial, resolution.[37] Given the

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30. *Id.* at 622.

31. The fourteenth amendment provides in pertinent part: "[n]o state shall . . . make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

32. 453 U.S. at 622. *See, e.g.*, Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1934) (tax not unconstitutional under due process because it rendered a business unprofitable).

33. 453 U.S. at 623. The court asserted that the due process clause does not require that general revenue taxes be reasonably related to the value of services provided to that source of tax. *Id.* at 622.

34. *Id.* at 624-25. The Court noted that the depletion of Montana's coal diminishes the resource base thereby diminishing a future source of taxes and economic activity. *Id.* at 624.

35. *Id.* at 625. *See supra* note 33 and accompanying text.

36. 453 U.S. at 626.

37. *Id.* at 628.

numerous and competing economic, geographic, demographic, social, and political considerations, the majority doubted whether there would be any adequate legal test for setting such a level of taxation.[38] The Court observed that it is the role of state legislatures to set the rate of tax and then the role of Congress to determine if a particular tax is contrary to federal interests.[39]

The majority stated that when the measure of a tax is reasonably related to the taxpayer's activities in the state, the only benefit that the taxpayer is constitutionally entitled to is the enjoyment of the privileges of an organized society.[40] The Court also noted that a tax will be an unconstitutional burden on interstate commerce only when the measure of the tax bears no relationship to the taxpayer's presence or activities in a state. Because the Montana tax was assessed under a formula that related the tax liability to the value of the appellants' coal producing activities within the state, the Court held the Montana coal severance tax constitutional under the *Complete Auto Transit* test.[41]

Justice Marshall then turned to the appellants' argument that the Montana tax was invalid under the supremacy clause of the United States Constitution because it substantially frustrated the purposes of the Mineral Lands Leasing Acts of 1920 (1920 Act),[42] which provides that the economic rents paid by lessees for mining on federal land are to be divided between the federal government and the states according to a formula prescribed by the 1920 Act.[43] Examining the statute in its entirety, the Court concluded that the 1920 Act does not forbid an otherwise lawful severance tax.[44] The majority also rejected the appellants' argu-

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38. *Id.*

39. *Id.* Deferring to Congress was especially appropriate in this case because two bills, S. 178 and H.R. 1313, were introduced into the 97th Congress to limit the rate of state severance taxes. 453 U.S. at 628.

40. 453 U.S. at 628-29. (*quoting* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522 (1937).

41. 453 U.S. at 629.

42. *Id. See* 30 U.S.C. § 181 (1976).

43. 453 U.S. at 629-30. *See* 30 U.S.C. § 191 (1976) which provides that the receipts are to be divided as follows: 37.5% to the state; 52.5% to the reclamation fund created by the Reclamation Act of 1902, 43 U.S.C. § 191 (1976); and the remaining 10% to the U.S. Treasury as miscellaneous receipts.

44. 453 U.S. at 632. The Court noted that the Montana coal severance tax seemingly undercuts the 1920 Act by appropriating to Montana an unjust portion of the economic rents by taxing the federal lessee. However, the majority

ment that the Montana tax is not otherwise lawful because it frustrates the very purpose of the 1920 Act or the 1975 amendments to the 1920 Act.[45]

Lastly, the Court considered the appellants' contention that the Montana tax is unconstitutional because it substantially frustrates national energy policies.[46] Noting that the appellants were correct in observing that certain federal statutes have as their purpose encouraging the use of coal, the Court rejected the appellants' suggestion that such acts demonstrate the intent of Congress to preempt all state legislation which may have an adverse impact on the use of coal.[47] Justice Marshall observed that the only specific statutory provisions favoring the use of coal were in the Powerplant and Industrial Fuel Use Act of 1978 (PIFUA),[48] which prohibits new electric power plants or new major fuel-burning installations from using natural gas or petroleum as a primary energy source and prohibits existing facilities from using natural gas as a primary energy source after 1989.[49] The Court held, however, that PIFUA clearly contemplates the continued existence, not the preemption, of state severance taxes on coal by taking into account severance taxes in determining eligibility for environmental impact aid.[50]

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dismissed this argument by citing section 32 of the 1920 Act which provides in pertinent part:

> Nothing in this chapter should be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

30 U.S.C. § 189 (1976). The Court concluded that Congress expressly authorized the states to impose mineral severance taxes on federal lessees without imposing any limits on the amount of such taxes. 453 U.S. at 631.

45. 453 U.S. at 632. The House Report on the 1975 amendments to the 1920 Act mentions only Congressional intent to secure a fair return to the public. *Id.* (citing H.R. REP. NO. 681, 94th Cong., 1st Sess. 3 (1975)). Justice Marshall also noted that by definition, any state taxation of federal lessees reduces the economic rents accruing to the federal government so the appellants' argument would preclude any state taxes despite the explicit grant of taxing authority to the states by section 32. 453 U.S. at 632.

46. 453 U.S. at 633. *See* § 2(6) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201(6) (1976) and § 102(b)(3) of the Power Plant and Industrial Fuel Use Act of 1978 (PIFUA), 42 U.S.C. § 8301(b)(3) (1976 & Supp. III).

47. *Accord*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).

48. 42 U.S.C. § 8300 (1976 & Supp. III).

49. 42 U.S.C. §§ 8311(1), 8312(a) (1976 & Supp. III).

50. 453 U.S. at 635-36. *See* 42 U.S.C. § 8401(a)(2) (1976 & Supp. III).

Thus, the Court affirmed the Montana Supreme Court's judgment concluding that the appellants had failed to demonstrate that the Montana coal severance tax violated either the commerce or supremacy clauses and found that a trial was not necessary to resolve the issue of the constitutionality of the tax.[51]

Justice White joined in the majority opinion but at the same time expressed a concern that Montana's tax may in the long run prove to be an intolerable and unacceptable burden on interstate commerce.[52] He noted, however, that Congress has the power to protect interstate commerce from intolerable or even undesirable burdens and has not acted so far to prohibit such severance taxes.[53] Further, he observed that the executive branch had urged the Court in this case not to overturn the Montana tax.[54] As a result, Justice White chose to defer to the judgment of the other branches of the federal government.[55]

Justice Blackmun filed a dissenting opinion[56] in which he first noted that the Court in *Complete Auto Transit* had unanimously observed that a tailored tax must be carefully scrutinized by the courts to determine whether it produces a forbidden effect on interstate commerce.[57] Thus, Justice Blackmun would have remanded for a trial on the appellants' claim that the tax was tailored to single out interstate commerce and produce a forbidden effect on interstate commerce because it bore no relationship to services provided by the state.[58]

Justice Blackmun then observed that Montana has supplied an increasing amount of coal over the last few years.[59] He noted that the Montana legislature acknowledged that the coal severance tax rate was higher than that levied by any other

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51. 453 U.S. at 636-37.
52. *Id.* at 637 (White, J., concurring).
53. *Id. See supra* note 39.
54. 453 U.S. at 637 (White, J., concurring).
55. 453 U.S. at 638 (White, J., concurring).
56. *Id.* at 638 (Blackmun, J., dissenting). Justices Powell and Stevens joined in the dissent.
57. 430 U.S. at 288-89 n.15.
58. 453 U.S. at 638 (Blackmun, J., dissenting).
59. Montana has approximately 50% of all known United States low sulfur coal reserves, H.R. REP. NO. 1527, 96th Cong., 2d Sess. 6 (1980), and allegedly exports as much as 90% of the coal mined to out-of-state utilities. 453 U.S. at 639 (Blackmun, J., dissenting).

state on the coal industry[60] and that the coal reserves of Montana[61] were too large to cause new coal contracts to shift to Wyoming, which has a lower severance tax.[62] In light of these facts and Montana's realization that the tax would generate enormous revenues,[63] Justice Blackmun characterized the issue before the Court as whether the appellants were entitled to a trial on their claim that the Montana coal severance tax was borne by out-of-state consumers and was not reasonably related to the services that those customers receive from the state. Finding these claims to be substantial, Justice Blackmun asserted that the majority's refusal to acknowledge the claims stemmed from a misreading of prior cases.[64]

Justice Blackmun agreed with the majority's evaluating the Montana coal severance tax under the four part test of *Complete Auto Transit*, but felt that the majority emasculated the fourth part of the test by holding that the relevant inquiry is whether the measure of the tax is a fixed portion of the value of the coal mined.[65] According to the dissent, the Court's mechanical approach suggested that any tax which is proportional instead of a flat rate will not violate the commerce clause.[66] Justice Blackmun asserted that although interstate commerce need not be given a privileged position, the commerce clause requires that it not be unduly burdened. Excessive taxation on an activity such as the coal mining here, the dissent pointed out, while facially neutral,

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60. *Id.* at 640 n.4 (Blackmun, J., dissenting). Subcommittee on Fossil Fuel Taxation, Interim Study on Fossil Fuel Taxation 14 (1974).

61. 453 U.S. at 641 (Blackmun, J., dissenting). North Dakota has a severance tax similar to Montana and also has large coal reserves. *Id.* at 640.

62. *Id.* Indeed, the 1974 Montana Subcommittee on Fossil Fuel Taxation was directed by the Montana Legislature to investigate the feasibility and value of multi-state taxation of coal with the Dakotas and Wyoming and to contract and cooperate joining with these other states to achieve that end. *Id.* at n.5 (Blackmun, J., dissenting). House Resolution No. 45, 1974 Mont. Laws, p. 1620.

63. 453 U.S. at 641 (Blackmun, J., dissenting). The revenues became so large that, beginning in 1980, at least 50% of the severance tax was to be transferred and dedicated to a permanent trust fund which can only be appropriated by a three-fourths vote of the legislature. MONT. CONST. art IX, § 5.

64. 453 U.S. at 644 (Blackmun, J., dissenting).

65. *Id.* at 645 (Blackmun, J., dissenting). *See supra* note 9.

66. 453 U.S. at 645 (Blackmun, J., dissenting). Justice Blackmun asserted that the majority's approach suggested that Montana's coal severance tax would not violate the commerce clause even if it raised sufficient revenue to allow Montana to eliminate all other taxes upon its citizens. *Id.* at 646.

will not be alleviated by those political restraints which are normally exerted on legislation where it adversely affects interests within the state because the burden falls so heavily upon interstate commerce.[67]

The dissent admitted that a trial would require complex factual inquiries into whether economic conditions enable Montana to export the burden of its severance tax, but did not believe that such an inquiry was beyond judicial competence because the issues presented were no more difficult than those routinely dealt with in complex civil litigation.[68] If the tax is in fact a legitimate general revenue measure identical or roughly comparable to taxes imposed upon similar industries, Justice Blackmun proposed, a court's inquiry is at an end. However, if the tax singled out a particular interstate activity and charged it with a grossly disproportionate share of the general costs of government, the court must determine whether the legislature had a reasonable basis for concluding that the tax was necessary to compensate the state for the costs imposed by that activity.[69]

Justice Blackmun summarized by warning that taxes such as Montana's coal severance tax threaten to polarize the nation and cause the economic balkanization that the commerce clause was designed to remedy.[70] The dissent stated that it is the Court's role to interpret the Constitution to determine what the states may do when Congress does not exercise its power to regulate interstate commerce.[71] Because the courts should not abandon this role, Justice Blackmun would have remanded to allow the

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67. *Id.* at 649 (Blackmun, J., dissenting) *citing* McGoldrick v. Berwind-White Co., 309 U.S. 33, 46 n.2 (1940). According to the dissent, state severance taxes on minerals are particularly susceptible to being tailored to fall on interstate commerce and as such require a closer fit between the amount of tax and the services provided by the state under the fourth prong of *Complete Auto Transit*. 453 U.S. at 649-50 (Blackmun, J., dissenting).

68. *Id.* at 651 n.17 (Blackmun, J., dissenting).

69. *Id.* at 651-52 (Blackmun, J., dissenting).

70. *Id.* at 652 (Blackmun, J., dissenting) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).

71. *Id.* at 652-53 (Blackmun, J., dissenting). The dissent pointed out that the Governor of Montana in 1980 hearings before the Senate Committee on Energy and Natural Resources took the position that the reasonableness of the coal severance tax was a question most properly left to the court, not a congressional committee. *Id.* at 652-53 n.19 (Blackmun, J., dissenting).

appellants to prove their commerce clause claims and apply careful scrutiny to this tailored tax.[72]

Prior to 1938, the Supreme Court had held that the states could not tax interstate commerce or impose a franchise tax on a business selling only in interstate commerce even though the tax was fairly apportioned and nondiscriminatory.[73] However, in *Western Livestock v. Bureau of Revenue*,[74] decided in 1938, the Court upheld a privilege tax on a farm journal with interstate circulation because the tax was not one which could be repeated by other states to cause a cumulative burden on interstate commerce. The Court noted that "interstate business shall pay its way."[75]

Despite the *Western Live Stock* holding, the Court regressed into the old standard of interstate immunity from state taxation in 1946 in *Freeman v. Hewit*.[76] In *Freeman*, the Court stated that the fact that a tax was nondiscriminatory and fairly apportioned was irrelevant and found a direct tax on interstate commerce unconstitutional per se.[77] Justice Rutledge, concurring in *Freeman*, urged that the practical effects of a tax (possible cumulative burden) should be scrutinized rather than tax formal phrasing (a tax directly on interstate commerce).[78]

In spite of criticism that the *Freeman* Court was exalting form over substance and was not requiring interstate commerce to bear its just burden of taxes,[79] the Court reaffirmed its position in *Spector Motor Service v. O'Connor*[80] and enunciated a rule

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72. *Id.* at 653 (Blackmun, J., dissenting). The dissent agreed that the appellants' supremacy clause arguments were without merit. *Id.* at 653 n.21 (Blackmun, J., dissenting).

73. *E.g.*, Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925) (held unconstitutional a tax measured by percentages of corporate excess and net income).

74. 303 U.S. 250 (1938).

75. *Id.* at 260.

76. 329 U.S. 249 (1946). In *Freeman*, Indiana levied a gross receipts tax on sales which the court held unconstitutional as applied to sales of stock through the New York Stock Exchange because it was a direct burden on interstate commerce. *Id.*

77. *Id.* at 252.

78. *Id.* at 279.

79. *See*, P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE, 200-04 (1953); Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 COLUM. L. REV. 211 (1947).

80. 340 U.S. 602 (1951). Spector Motor carried freight, by truck, in in-

that any tax upon the privilege of engaging in interstate commerce would be invalidated.[81] However, the *Spector* rule was later held inapplicable to a tax on a business's net income from interstate commerce[82] even though the unconstitutional privilege tax in *Spector* was also measured by net income.[83] Thus, the Court found that the distinction between privilege taxes imposed on net income and net income taxes was crucial to the validity of the tax.[84]

The *Spector* rule was first questioned in Justice Blackmun's concurrence in *Colonial Pipeline v. Traigle*,[85] in which the Court upheld a tax payable for the qualification to carry on or do business in a corporate form.[86] He contended that the legal distinctions adopted by the Court were too formal and that the precise language emphasis of the *Spector* rule should give way to a more pragmatic approach.[87]

Two years later in *Complete Auto Transit, Inc. v. Brady*,[88] *Spector* was expressly overruled.[89] The Court held that the *Spector* rule failed to address the problems with which the commerce clause was concerned.[90] Justice Blackmun, author of the unanimous *Complete Auto Transit* opinion, formulated the four-

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terstate commerce. The Court held unconstitutional a Connecticut statute that required corporations carrying on business in the state to pay a franchise tax for the privilege of carrying on business in Connecticut. The tax was measured by the net income attributable to business transactions within the state.

81. *Id.* at 609.

82. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). Northwestern manufactured cement in Iowa and sold 48% of it in Minnesota through four salesmen who solicited orders there, working out of a small Minnesota office. The tax was a net income tax fairly apportioned by a three-factor formula based on intrastate sales, property, and payroll.

83. 340 U.S. 602 (1951).

84. W. Hellerstein, *State Taxation of Interstate Business and the Supreme Court*, 1974 Term: *Standard Pressed Steel and Colonial Pipeline*, 62 VA. L. REV. 178-79 (1976).

85. 421 U.S. 100 (1975). Colonial Pipeline did not engage in intrastate commerce in Louisana, the taxing state, but did own an interstate pipeline that ran through the state. The Court upheld Louisana's nondiscriminatory, fairly apportioned franchise tax.

86. *Id.* at 114.

87. *Id.* at 112 (Blackmun, J., concurring).

88. 430 U.S. 274 (1977). In *Complete Auto Transit*, a Mississippi tax on the privilege of doing business was upheld as applied to a new car carrier delivering out-of-state cars in Mississippi.

89. *Id.* at 288-89.

90. *Id.* at 288.

part test to determine the constitutionality of a state tax on interstate commerce.[91]

Even though *Complete Auto Transit* established the test for scrutinizing state taxation of interstate commerce, the third and fourth parts of the test were not in issue[92] and thus were left to be interpreted and applied in subsequent cases.[93] The interpretation of the fourth prong of *Complete Auto Transit* is the key in *Commonwealth Edison*. *Commonwealth Edison* reveals that the test is easily satisfied by the state because the "controlling question is whether the state has given anything for which it can ask return."[94] That language used by the Court to interpret the fourth prong was taken as a direct quote from a commerce clause case decided in 1940,[95] a time when the statutory language of the tax prevailed over its practical effects in deciding whether state taxation on interstate commerce was constitutional.[96]

The *Commonwealth Edison* Court however recognized *Complete Auto Transit's* denuciation of formalism and its emphasis on whether the tax produced a forbidden effect on interstate commerce,[97] and purported to follow it.[98] Thus, under *Complete Auto Transit* and the approach announced in *Commonwealth Edison*, a state tax on interstate commerce should be found to be unconstitutional if the forbidden effect of being unduly burdensome on interstate commerce is present regardless of whether the tax was proportionally burdensome to the extent of the contact.

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91. *Id.* at 279. *See supra* text accompanying note 9.

92. 430 U.S. at 287.

93. The Court did not interpret either the third or fourth parts of the *Complete Auto Transit* test in a subsequent state taxation of interstate commerce case, Department of Revenue of Washington v. Association of Washington Stevedoring Cos., 435 U.S. 732 (1978), where nothing in the record alleged that those parts were not satisfied.

94. 435 U.S. at 625 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)) where the Court upheld a Wisconsin tax on the privilege of declaring and receiving dividends out of Wisconsin earned income.

95. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940). *See supra* note 94.

96. *See* Freeman v. Hewit, 329 U.S. 249 (1946), (*see supra* notes 76 & 77 and accompanying text); Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), (*see supra* note 80 and accompanying text); and Justice Robert's dissent in Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) which accuses the majority of allowing a tax to be constitutional by using an assumed name for the tax.

97. 430 U.S. at 288.

98. 453 U.S. at 615.

The Court also warned in *Complete Auto Transit* that a tax tailored to single out interstate business must receive the careful scrutiny of the courts to determine whether it produced a forbidden effect on interstate commerce no matter how the effect was accomplished.[99] This careful scrutiny is lacking in *Commonwealth Edison* because it was decided without receiving any evidence on the practical effects of the tax.[100]

It would seem that the proper interpretation of the fourth part of the *Complete Auto Transit* test should come from Justice Blackmun, who wrote for the unanimous Court in *Complete Auto Transit*.[101] Justice Blackmun's dissent in *Commonwealth Edison* concluded that the majority emasculated the fourth part of the *Complete Auto Transit* test.[102] He would have remanded for a trial to apply careful scrutiny to this tax tailored to fall on interstate commerce which was held to be the proper standard of review for tailored taxes in *Complete Auto Transit*.[103]

Montana, upon retrial, could attempt to rebut the assertion that it is exploiting a monopoly position by contending, as the attorneys for Montana did in their brief, that Montana is being expolited due to its coal resources. Extensive mining in a state causes economic swings and leaves scars upon the land which must be remedied long after the coal companies have gone. This is consistent with Montana's transferring fifty percent of the severance tax to a trust fund for future use.[104] But a state cannot, under the Commerce clause, export its conservation of natural resources problems.[105] Hence, it seems that if the Court

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99. 430 U.S. at 288 n.15.

100. 453 U.S. at 613.

101. Justice Blackmun also wrote a concurring opinion in Colonial Pipeline v. Triagle, 421 U.S. 100, 114 (1975) (Blackmun, J., concurring), which urged the overruling of Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), that came two years later in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1974).

102. 453 U.S. 645 (Blackmun, J., dissenting).

103. *Id.* at 638 (Blackmun, J., dissenting) (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. at 288 n.15 (1977)).

104. 453 U.S. at 642.

105. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979) (Oklahoma statute attempting to stop the exportation of natural minnows held violative of the commerce clause), Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (purpose of the commerce clause was to make each state greater by the division of its resources, natural and created, with every other state, and those of every other state with it).

would have granted a retrial and heard the monopoly and unjust share of the tax burden argument of Commonwealth Edison, Montana could not have avoided appearing to have pursued a policy of OPEC-like revenue maximization.[106]

The dissent noted that because coal has a relatively high transportation cost due to its weight, alternative sources of supply can only come from an area comprised of a few states. Thus, when a state has a regional monopoly in coal and most of it is shipped out-of-state, mineral severance can be excessively taxed without causing a tax revolt within the state.[107] Recognizing that fact, the dissent concluded that such taxes are economically and politically analogous to transportation taxes exploiting geographical postion and thus violate the commerce clause.[108]

The Court appeared to quickly defer to state legislatures to set the rate of severance taxes and to Congress to limit the taxes if the taxes are an undue burden on interstate commerce. This deference can be justified in *Commonwealth Edison* because two bills were introduced into the 97th Congress to limit the rate of state severance taxes.[109] Should these bills not be passed, however, the Court might need to limit or distinguish *Commonwealth Edison* in future state taxation of interstate commerce cases in order to give redress to citizens of another state through taxes tailored to fall on interstate commerce.

The majority's interpretation of the fourth prong of the *Complete Auto Transit* test differed substantially from that of

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106. 453 U.S. at 643 (Blackmun, J., dissenting) (*quoting* R. NEHRING & B. ZYCHER WITH J. WHARTON, COAL DEVELOPMENT AND GOVERNMENT REGULATION IN THE NORTHERN GREAT PLAINS: A PRELIMINARY REPORT, 148 (1976)). The determination of whether Montana has a monopoly or oligopoly position in coal would require complex factual inquiries into such issues as the elasticity of demand and alternate sources of supply for coal, 453 U.S. at 619 n.8, a fact conceded by the dissent, *id.* at 651 (Blackmun, J., dissenting). However, the dissent contended that determining the existence of a monopoly is always a necessary step in anti-trust litigation and that the complexity of a question is hardly a suitable basis for refusing to adjudicate. *Id.* (citing Milwaukee v. Illinois, 451 U.S. 304 (1981)).

107. 453 U.S. at 650 (Blackmun, J., dissenting).

108. *Id.* (citing Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary* 67 YALE L.J. 219, 232 (1957)).

109. 453 U.S. at 628 n.18 (citing S. 178 and H.R. 1313). Although similar bills, S. 2695, H.R. 6625, and H.R. 6654, died in the 96th Congress, fourteen Congressmen jointly filed an amicus curiae brief supporting Montana which indicates a continuing Congressional interest in the bills.

Justice Blackmun, who pronounced the test as the author of the Court's opinion in *Complete Auto Transit*. Whether or not *Commonwealth Edison* represents a major shift in constitutional doctrine in the area of state taxation of interstate commerce will be seen in later cases applying the *Complete Auto Transit* four-prong test.

Comfrey Scott Ickes