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## Constitutional Law - Commerce Clause - State Taxation - Apportionment of Sales Taxes

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# Recent Decisions

CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE TAXATION—APPORTIONMENT OF SALES TAXES—The United States Supreme Court held that an unapportioned sales tax on the sale of tickets for interstate bus transportation services is not in violation of the “dormant” Commerce Clause of the United States Constitution.

*Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 115 S. Ct. 1331 (1995).

Oklahoma imposes an excise tax on the gross receipts of in-state sales of certain goods and services, including bus tickets purchased for interstate transportation services.<sup>1</sup> The tax is a component of the buyer’s purchase price; the seller collects and remits the tax to the state.<sup>2</sup> Jefferson Lines, Inc. (“Jefferson”) provided passenger bus services in Oklahoma from 1988 to 1990.<sup>3</sup> Jefferson collected and remitted the tax on passengers’ tickets that the company sold in Oklahoma for routes beginning and ending in Oklahoma.<sup>4</sup> Jefferson did not collect taxes on tickets sold in Oklahoma for travel originating in Oklahoma but destined to locations outside of the state.<sup>5</sup>

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1. *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1334 n.1 (1995). OKLA. STAT. tit. 68, § 1354(1) (Supp. 1988) provides in pertinent part: “There is hereby levied upon all sales . . . an excise tax of four percent of the gross receipts . . . of each sale of the following . . . (C) Transportation for hire to persons by common carriers, including . . . motor transportation companies . . . and other means of transportation for hire.” OKLA. STAT. tit. 68, § 1354(1) (Supp. 1988) (current version at OKLA. STAT. ANN. tit. 68, § 1354(1) (1995)).

2. *Jefferson Lines*, 115 S. Ct. at 1334.

3. *Id.* at 1335.

4. *Id.*

5. *Id.*

Jefferson filed for bankruptcy on October 27, 1989.<sup>6</sup> The Oklahoma Tax Commission (the "Commission") filed a proof of claims<sup>7</sup> in the United States Bankruptcy Court for Jefferson's failure to collect the tax.<sup>8</sup> Jefferson objected to the claims by arguing that Oklahoma's tax violated the Commerce Clause<sup>9</sup> because it subjected the company or its passengers to cumulative taxation by other states of passage on interstate routes.<sup>10</sup> Jefferson also asserted that the taxing statute allowed Oklahoma to collect a tax measured by the full price of the ticket sold even though a portion of the benefit from purchasing the ticket was derived outside of the state.<sup>11</sup>

The United States Bankruptcy Court decided in favor of Jefferson.<sup>12</sup> The United States District Court for the District of Minnesota and the Court of Appeals for the Eighth Circuit affirmed.<sup>13</sup> The court of appeals ruled for Jefferson based upon a previous United States Supreme Court decision which held that a state's unapportioned gross receipts tax imposed on tickets sold for interstate bus travel was in contra to the Commerce Clause.<sup>14</sup> The Supreme Court granted certiorari to address the issue of whether Oklahoma's imposition of a sales tax on the full purchase price of bus tickets for transportation services originating in Oklahoma and destined for other states

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6. *Id.*

7. *Jefferson Lines*, 115 S. Ct. at 1335. A proof of claims is defined as a "[s]tatement under oath filed in a bankruptcy proceeding by a creditor in which the creditor sets forth the amount owed and sufficient detail to identify the basis for the claim." BLACK'S LAW DICTIONARY 1215 (6th ed. 1990).

8. *Jefferson Lines*, 115 S. Ct. at 1335. Jefferson's failure to collect and remit the tax on its in-state sales to passengers on routes destined outside of Oklahoma was discovered during an audit by the Commission of Jefferson's sales tax returns. Brief for Petitioner at 4-5, *Jefferson Lines*, 115 S. Ct. 1331 (No. 93-1677). The Commission assessed a deficiency against Jefferson of \$46,659. *Id.*

9. *Jefferson Lines*, 115 S. Ct. at 1335. The Commerce Clause provides: "The Congress shall have [p]ower . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3.

10. *Jefferson Lines*, 115 S. Ct. at 1335.

11. *Id.*

12. *Id.*

13. *Oklahoma ex rel. Oklahoma Tax Comm'n v. 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).

14. *Jefferson Lines*, 15 F.3d at 92-93 (citing *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948)). See *infra* notes 102-09 and accompanying text for a discussion of *Central Greyhound*. "Gross receipts" taxes are imposed on the gross receipts from sales and are payable by the seller. *Jefferson Lines*, 115 S. Ct. at 1335 n.3 (citing P. HARTMAN, FEDERAL LIMITATION ON STATE AND LOCAL TAXATION § 8:1 (1981)).

was permissible under the Commerce Clause of the United States Constitution.<sup>15</sup>

The Supreme Court began its analysis with a review of the progression of jurisprudence in state taxation of interstate commerce<sup>16</sup> under the "dormant" Commerce Clause.<sup>17</sup> Justice Souter, writing for the Court,<sup>18</sup> explained that the term "dormant" Commerce Clause referred to the Court's judicial interpretation of the Commerce Clause that prohibits state taxation of interstate commerce in certain instances, even when Congress has remained silent on the issue.<sup>19</sup> The Court stated that after a period of doctrinal wavering, the modern view is that interstate commerce may be made to pay its just share of a state tax burden.<sup>20</sup> The Court identified a four-part test which permits state taxation of interstate commerce under the Commerce Clause when there is: (1) a "substantial nexus" between the activity taxed and the taxing state; (2) the tax is "fairly apportioned" to the activities in the taxing state; (3) the tax does not discriminate against interstate commerce to the benefit of intrastate commerce; and (4) the tax is fairly related to the benefits conferred upon the taxpayer by the taxing state.<sup>21</sup> The Court then assessed the constitutionality of Oklahoma's sales tax under the four-part test.<sup>22</sup>

The Court determined that ticket sales were taxable by the

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15. *Jefferson Lines*, 115 S. Ct. at 1334. "Sales taxes" are imposed on the gross receipts from sales and are payable by the buyer. *Id.* at 1335 n.3 (citing HARTMAN, *supra* note 14, § 10.1). The seller collects the sales tax imposed on the buyer and remits the taxes to the taxing body. *Id.*

16. *Id.* at 1335. Interstate commerce is defined as: "Traffic, intercourse, commercial trading, or transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another." BLACK'S LAW DICTIONARY 819 (6th ed. 1990). Conversely, intrastate commerce is defined as commerce within a state. *Id.* at 823.

17. *Jefferson Lines*, 115 S. Ct. at 1335-37.

18. *Id.* at 1334. Justice Souter was joined by Chief Justice Rehnquist, and Justices Stevens, Kennedy and Ginsburg. *Id.*

19. *Id.* at 1335.

20. *Id.* at 1337 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). The Court in *Complete Auto* sustained a franchise tax imposed on the privilege of engaging in interstate commerce. *Complete Auto*, 430 U.S. at 288-89. A franchise tax is defined as a tax on the right and privilege of conducting business as a corporate entity. BLACK'S LAW DICTIONARY 659 (6th ed. 1990).

21. *Jefferson Lines*, 115 S. Ct. at 1337 (citing *Complete Auto*, 430 U.S. at 279). A nexus requires that there be some minimum connection between the taxing state and the person or thing that a state seeks to tax. *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-11 (1960). The Supreme Court requires that a taxpayer maintain a physical presence within the taxing state to satisfy the Commerce Clause demands of substantial nexus before a state may impose an obligation to collect sales and use taxes. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

22. *Jefferson Lines*, 115 S. Ct. at 1337-46.

state because the act of purchasing a ticket in Oklahoma, coupled with the origination of services in Oklahoma, resulted in a sufficient nexus between the transaction and the State of Oklahoma.<sup>23</sup>

Having determined that the tax satisfied the nexus requirement, the Court then addressed the question of whether the tax at issue was fairly apportioned to ensure that Oklahoma taxed only its fair share of interstate commerce.<sup>24</sup> The Court indicated that fair apportionment in the taxation of interstate commerce required that a tax be both internally and externally consistent in order to ensure that interstate commerce is not placed at a disadvantage *vis-a-vis* intrastate commerce.<sup>25</sup> Justice Souter opined that Oklahoma's taxing scheme was internally consistent because only one state could impose a tax triggered by an in-state ticket sale for travel originating in the state of the sale.<sup>26</sup> The Court explained that no sale would be subject to multiple taxation because only one state may claim this combination of events on any particular ticket sale.<sup>27</sup>

The majority determined that Oklahoma's unapportioned tax on the sale of goods was externally consistent because the laws and amenities in the state of sale, Oklahoma, contributed to the culmination of the sale between the transacting parties.<sup>28</sup> The Court analogized the economic activities of a ticket sale and commencement of transportation services in Oklahoma with the delivery of goods within the taxing state upon their purchase for consumption.<sup>29</sup> The Court stated that there has never been a requirement that goods be consumed within the taxing state as

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23. *Id.* at 1338 (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988)).

24. *Id.*

25. *Id.* The internal and external consistency tests were developed in the majority opinion of Justice Brennan in *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). Internal consistency in an apportionment formula mandates that a state is prohibited from imposing a tax on interstate commerce, which if the identical taxing statute was hypothetically duplicated by every state would result in a risk of multiple taxation to which intrastate commerce would not be exposed. 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ¶ 4.08[1][a] (2d ed. 1993). External consistency requires that the revenue taxed by a state is proportionate to the business transacted in that state. *Id.* ¶ 4.08[1][b].

26. *Jefferson Lines*, 115 S. Ct. at 1338.

27. *Id.*

28. *Id.* at 1339. A sale of goods is considered a "discrete event facilitated by the laws and amenities of the place of sale." *Id.* Consistent with this view, the Court has held that sales taxes are properly levied upon the gross charge for the purchase, regardless of commerce outside of the taxing jurisdiction that was antecedent or subsequent to the sale. *Id.* (citing *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 (1940)).

29. *Id.* at 1339 (citing *Berwind-White*, 309 U.S. at 58).

a condition for taxing the entire sale.<sup>30</sup> Jefferson's contention that purchase or delivery of interstate transportation services was distinguishable from the delivery of goods for consumption within the taxing state was rejected by the Court.<sup>31</sup> Additionally, recent precedent supported the Court's view that a sale of interstate services could be taxed as a local event at the full purchase price.<sup>32</sup> Because Oklahoma's tax raised no greater risk of multiple taxation than unapportioned sales taxes that were previously determined constitutional, the Court concluded that a sales tax measured by the full value of a sale of interstate services was externally consistent.<sup>33</sup>

Justice Souter distinguished the precedent relied on by the lower courts in finding that the tax was unconstitutional based upon differences in the risk of multiple taxation and the identity of the taxpayer.<sup>34</sup> The distinction was founded on the basis that passengers could not be subject to multiple taxation because no other state could be the site of the agreement, the payment and delivery of some services, which comprised the taxable event for the majority.<sup>35</sup> The Court stated that Oklahoma's sales tax did not place interstate commerce at a disadvantage due to successive use<sup>36</sup> or gross receipts taxes potentially imposed by other states of passage.<sup>37</sup> Moreover, the Court reasoned that any subsequent state tax would have to comply with Commerce Clause requirements that demand equality in the treatment of

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30. *Id.* at 1341.

31. *Jefferson Lines*, 115 S. Ct. at 1341.

32. *Id.* at 1338 (citing *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989)). Illinois' telecommunications tax on the entire charge resulting from a customer's interstate telephone call sustained a Commerce Clause challenge where the call originated or terminated within the state and was billed or charged to an Illinois address. *Goldberg*, 488 U.S. at 262.

33. *Jefferson Lines*, 115 S. Ct. at 1344. Justice Souter stated: "There is thus no reason to leave the line of longstanding precedent and lose the simplicity of our general rule sustaining sales taxes measured by full value, simply to carve out an exception for the subcategory of sales of interstate transportation services." *Id.*

34. *Id.* at 1341 (citing *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948)). The Court in *Central Greyhound* held that New York's gross receipts tax violated the Commerce Clause because the seller's taxable gross receipts from interstate transportation services were unapportioned and exposed to taxes imposed by other states. *Central Greyhound*, 334 U.S. at 662-63.

35. *Jefferson Lines*, 115 S. Ct. at 1341.

36. *Id.* at 1343. A use tax is defined as a sales tax that is collectible by the seller where a purchaser is domiciled in another state. BLACK'S LAW DICTIONARY 1543 (6th ed. 1990). A use tax complements a sales tax by requiring the seller to collect a tax on property purchased in-state for use or consumption outside the state. *Id.* A use tax prevents tax avoidance on articles purchased in a taxing jurisdiction that does not levy a sales tax or that taxes at a rate lower than that imposed by the state in which the property is used or consumed. *Id.*

37. *Jefferson Lines*, 115 S. Ct. at 1342-43.

interstate and intrastate taxpayers.<sup>38</sup>

Additionally, Jefferson argued that the gross receipts should be apportioned on the basis of mileage because mileage would be feasible to apportion.<sup>39</sup> While the Court acknowledged the feasibility of apportioning the taxable receipts based upon mileage, it declined to require apportionment because Jefferson failed to show that Oklahoma's tax was disproportionate to the business transacted in the state.<sup>40</sup>

The Court next addressed the third prong of the test which requires that a state tax must not discriminate against interstate commerce.<sup>41</sup> Jefferson argued that Oklahoma's tax discriminated against interstate commerce by taxing a ticket purchase at the same four percent rate regardless of whether the ticket related to a wholly in-state route or to travel in which only a small portion of the trip was within Oklahoma.<sup>42</sup> The Court distinguished its holding in *American Trucking Ass'n v. Scheiner*<sup>43</sup> from the facts of *Jefferson Lines* because the tax in *American Trucking Ass'n* had been imposed upon the privilege of using state roads while engaged in interstate commerce; while in the case at bar the tax was imposed upon the buyer's freedom to enter into a sale that was facilitated by the state.<sup>44</sup> Because

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38. *Id.* Jefferson did not provide any evidence of successive taxes imposed on its interstate bus travel. *Id.* The risk of multiple sales or use taxation of property purchased or consumed in one state and brought into another state for consumption is largely eliminated by credits against the use tax for sales or use taxes paid to other states, or exemptions from the use tax for articles taxed in other states. HELLERSTEIN, *supra* note 25, ¶ 18.08[2]. Nearly every state that imposes a sales and use tax permits a credit or exemption against that state's tax for similar taxes paid to other states. *Id.* ¶ 18.08[1]. This results in a national taxing scheme under which the first state of use or purchase taxes the transactions. *Id.*

39. *Jefferson Lines*, 115 S. Ct. at 1343. *Cf.* *Goldberg v. Sweet*, 488 U.S. 252, 264-65 (1989) (rejecting the feasibility of apportioning gross receipts from interstate telephone calls based upon mileage due to insurmountable technological barriers in tracing the path of a telephone call created by the complexity of modern telecommunications). The Court in *Central Greyhound* stated that the revenues from interstate commerce could be fairly apportioned to each state based upon the ratio of miles traveled within the state in interstate commerce activities compared to the total mileage traveled in interstate commerce. *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662-63.

40. *Jefferson Lines*, 115 S. Ct. at 1343-44.

41. *Id.* at 1344.

42. *Id.* at 1345. Jefferson relied on the Court's decision in *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987). *Jefferson Lines*, 115 S. Ct. at 1345. In *American Trucking Ass'n*, the Court ruled that a flat tax on trucks for the privilege of using Pennsylvania's roads violated the Commerce Clause. *American Trucking Ass'n*, 483 U.S. at 290. The tax was unconstitutional because of the disproportionate tax burden imposed on out-of-state trucks compared to the tax per mile borne by local trucks. *Id.* The disproportionate burden occurred because the out-of-state trucks traveled less miles per year on Pennsylvania's highways than local trucks. *Id.*

43. 483 U.S. 266 (1987).

44. *Jefferson Lines*, 115 S. Ct. at 1345. *See supra* note 42 for a discussion of

Oklahoma facilitated sales of bus services equally for interstate and intrastate travelers, the state's sales tax was not considered discriminatory by the Court.<sup>45</sup> Miles traveled within the state were not seen by the majority as relevant to the value conferred by the state in simplifying a sales transaction.<sup>46</sup>

The fourth prong of the test demands a fair relation between the tax imposed and the benefits conferred upon the taxpayer by the state.<sup>47</sup> Jefferson argued that Oklahoma's tax did not fairly relate to the benefits conferred by the state because such benefits were realized only during the in-state portion of a trip.<sup>48</sup> The Court responded by stating that the Commerce Clause demands only a fair relation between the benefits conferred by a state and the tax imposed by it.<sup>49</sup> The Court explained that this criterion required only that there be a reasonable relationship between the measure of a tax and the taxpayer's presence or activities within the taxing state.<sup>50</sup> Further, the Court stated that interstate commerce may be made to contribute to governmental services provided by the state, such as police and fire protection, even if the taxpayer received no direct benefit from these services.<sup>51</sup> The Court concluded that a tax levied on a sale in a state and measured by the gross proceeds of services purchased was reasonably related to the activities in the state and was fairly related to the benefits conferred on the taxpayer by the state.<sup>52</sup>

The Supreme Court reversed the court of appeals and held that Oklahoma's sales tax on the unapportioned gross receipts from ticket purchases in Oklahoma for interstate transportation services was a tax on a sale wholly within Oklahoma and was not in violation of the "dormant" Commerce Clause.<sup>53</sup>

Justice Scalia authored a concurring opinion which called for an end to the use of the "eminently unhelpful" four-part test in "dormant" Commerce Clause jurisprudence.<sup>54</sup> For Justice

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*American Trucking Ass'n.*

45. *Jefferson Lines*, 115 S. Ct. at 1345.

46. *Id.* The Court reasoned that the subsequent movement of goods outside of the taxing state had no relationship to the benefits conferred upon the transacting parties by the state imposing a sales tax. *Id.* (citing *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986)).

47. *Id.*

48. *Id.*

49. *Id.* at 1345-46.

50. *Jefferson Lines*, 115 S. Ct. at 1346 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626, 629 (1981)).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* (Scalia, J., concurring). Justice Thomas joined in the concurrence. *Id.*



Scalia, the Oklahoma tax was in conformity with the Commerce Clause because it did not facially discriminate against interstate commerce.<sup>55</sup> He believed that Congress, acting under its Commerce Clause powers, should assess whether interstate commerce requires protection from certain nondiscriminatory state action.<sup>56</sup> According to Justice Scalia, the Court should not engage in such an assessment.<sup>57</sup>

Justice Breyer, writing for the dissent,<sup>58</sup> asserted that the Oklahoma tax at issue was analogous to an unapportioned tax imposed upon interstate transportation services which the Court had previously held unconstitutional.<sup>59</sup> Justice Breyer believed that the taxing scheme was an attempt to tax more than Oklahoma's fair share of the in-state component of the subject activity.<sup>60</sup> He further stated that the distinguishable result arising from the majority's characterization of a New York tax as a "gross receipts" tax and Oklahoma's tax as a "sales tax" ignored the practical economic similarities of both taxes.<sup>61</sup> The dissent asserted that the tax was imposed upon the transportation of passengers and not on the sale of a ticket.<sup>62</sup> Based upon this analysis, the dissent concluded that the tax was imposed upon interstate commerce itself and must be apportioned based upon the revenue which reasonably reflected Oklahoma's component of the interstate activity.<sup>63</sup>

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The concurring Justices stated that the *Complete Auto* four-part test should be abandoned by the Court. *Id.* See *supra* note 21 and accompanying text for the elements of the test.

55. *Jefferson Lines*, 115 S. Ct. at 1346. The concurring Justices believed that the issue of whether a state tax complies with the demands of the "negative" Commerce Clause should be limited to the Court's determination of whether the tax facially discriminates against interstate commerce. *Id.* While the Commerce Clause is an affirmative grant of power to Congress for the regulation of interstate commerce, the Court has stated that the Clause contains a negative sweep that acts as a boundary or limitation on a state's power to tax interstate commerce. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992).

56. *Jefferson Lines*, 115 S. Ct. at 1346.

57. *Id.*

58. *Id.* (Breyer, J., dissenting). Justice O'Connor joined in the dissent. *Id.*

59. *Id.* (citing *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948)).

60. *Id.* at 1349 (citing *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989)). Justice Breyer noted that while the majority relied in part upon *Goldberg* in its opinion, the *Goldberg* Court distinguished the result in that case from those cases requiring apportionment involving "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing state." *Id.* Resting on this distinction, Justice Breyer concluded that the Court's holding in *Goldberg*, permitting an unapportioned sales tax on interstate telephone service, did not modify the result in *Central Greyhound*. *Id.*

61. *Jefferson Lines*, 115 S. Ct. at 1348.

62. *Id.*

63. *Id.* at 1349 (citing *Goldberg*, 488 U.S. at 262).

In *Case of the State Freight Tax (Reading R.R. v. Pennsylvania)*,<sup>64</sup> the Supreme Court held that the Commerce Clause placed negative implications on a state's power to tax interstate commerce.<sup>65</sup> The issue facing the Court was whether Pennsylvania's tax on freight transported through the state in interstate commerce was in violation of the Commerce Clause.<sup>66</sup> The Court rejected the argument that the tax was compensatory for the use of the state's railroads, and the Court determined that a tax on freight tonnage transported among and between the states was a regulation of interstate commerce.<sup>67</sup> Justice Strong, writing for the majority, stated that Congress had the exclusive power to regulate those subjects demanding a national or uniform system of regulation.<sup>68</sup> Justice Strong considered the free passage of freight or merchandise between states to be of such vital importance as to demand singular regulation by Congress.<sup>69</sup> The majority expressed concern that if one state could directly tax the movement of goods or persons through the state, then each succeeding state of passage may also impose its own tax.<sup>70</sup> This potential for cumulative taxation and destruction of national commerce was of such importance that the Court deemed that it required exclusive legislation by Congress.<sup>71</sup> The Court held that a state cannot tax freight transported in interstate commerce because such power is exclusively vested in Congress.<sup>72</sup>

In *Western Live Stock v. Bureau of Revenue*,<sup>73</sup> a New Mexico statute imposed a franchise tax that was measured by a publisher's gross advertising receipts, including receipts from out-of-state customers.<sup>74</sup> The petitioner's, Western Live Stock, in-state business activities included preparing, editing and publishing a monthly trade journal.<sup>75</sup> The company's only office

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64. 82 U.S. (15 Wall.) 232 (1872).

65. *Case of the State Freight Tax*, 82 U.S. (15 Wall.) at 271-72.

66. *Id.* at 276. Pennsylvania imposed a specified rate of tax per ton of freight transported within the state. *Id.* at 273. A regulation of interstate commerce occurred because the tax applied to commodities shipped from outside of the state to points within the state, and the tax was assessed on freight shipped from inside of the state that was destined to points outside of Pennsylvania. *Id.* at 273-75.

67. *Id.* at 277-79.

68. *Id.* at 279-80 (citing *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851)).

69. *Id.* at 280.

70. *Case of the State Freight Tax*, 82 U.S. (15 Wall.) at 279.

71. *Id.* at 279-80.

72. *Id.* at 282.

73. 303 U.S. 250 (1938).

74. *Western Live Stock*, 303 U.S. at 251-52.

75. *Id.* at 252.

was located within New Mexico.<sup>76</sup> The company solicited advertising outside of the state and the circulation of its journal extended beyond New Mexico's borders.<sup>77</sup>

The Court addressed the issue of whether New Mexico's imposition of a franchise tax was in violation of the Commerce Clause because the tax was imposed on gross receipts from the sale of advertising space to advertisers in other states, and because the journal was circulated to subscribers within and without of New Mexico.<sup>78</sup> Justice Stone, writing for the majority, declared that interstate commerce must pay its fair share of state taxes imposed on business.<sup>79</sup> The Court noted that taxes previously held as unconstitutional had violated the Commerce Clause by placing interstate commerce at a risk of multiple taxation that local commerce did not face.<sup>80</sup> Gross receipts taxes on interstate commerce were identified as particularly susceptible to being in violation of the Commerce Clause.<sup>81</sup> However, the Court stated that fairly apportioned taxes on gross receipts were sustainable under the Commerce Clause.<sup>82</sup>

The Court concluded that the franchise tax was imposed on in-state rather than interstate business activities.<sup>83</sup> The Court stressed that the preparation, printing and publishing of the advertisements occurred in-state, resulting in a tax on local commerce.<sup>84</sup> Any value on advertising rates attributable to interstate distribution of the journal was considered to be too remote by the Court in determining whether the tax excessively burdened interstate commerce.<sup>85</sup> Furthermore, the Court found that there was no risk of multiple taxation because the tax was

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76. *Id.*

77. *Id.* at 252-53.

78. *Id.* at 254.

79. *Western Live Stock*, 303 U.S. at 254. For Justice Stone, the function of the Commerce Clause was not to immunize interstate commerce from state taxation rather, the Commerce Clause permitted a fairly apportioned state tax on interstate commerce. *Id.* at 254-55.

80. *Id.* at 255-56. The Court cited the following cases which held that state taxes on interstate commerce were unconstitutional because of an impermissible risk of multiple state taxation: *Fargo v. Stevens*, 121 U.S. 230 (1887), *Philadelphia & S. Mail S.S. v. Pennsylvania*, 122 U.S. 326 (1887), *Galveston, H. & S.A. Ry. v. Texas*, 210 U.S. 217 (1908), *Meyer v. Wells Fargo & Co.*, 223 U.S. 298 (1912), *Crew Live-stock Co. v. Tax Comm'n*, 297 U.S. 650 (1936) and *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872). *Western Live Stock*, 303 U.S. at 255-56.

81. *Western Live Stock*, 303 U.S. at 255.

82. *Id.* at 256.

83. *Id.* at 258.

84. *Id.*

85. *Id.* at 259.

imposed on advertising rates, and the activities relating to advertising were purely local to New Mexico.<sup>86</sup> The Court held that New Mexico's franchise tax statute did not pose a threat of multiple taxation on interstate commerce and therefore was not in violation of the Commerce Clause.<sup>87</sup>

In *McGoldrick v. Berwind-White Coal Mining Co.*,<sup>88</sup> the Court was confronted with the issue of whether a New York City sales tax statute was in violation of the Commerce Clause.<sup>89</sup> The tax was levied against a buyer on the gross sales price of tangible goods moved in interstate commerce, but transferred to the buyer for consumption within New York City limits.<sup>90</sup> The respondent, Berwind-White, a Pennsylvania coal mining company, maintained a New York City sales office and entered into contracts with customers in New York City.<sup>91</sup> Coal was mined in Pennsylvania and delivered interstate via rail and barge to Berwind-White's New York City customers.<sup>92</sup> Berwind-White transferred possession of the coal to its customers within the city limits.<sup>93</sup>

The Court acknowledged that concurrent taxing power existed between Congress and the several states.<sup>94</sup> The Court stated that judicial interpretation of state taxing power under the Commerce Clause had prohibited taxing statutes that placed interstate commerce at a disadvantage with intrastate commerce.<sup>95</sup> However, the Court noted that the Commerce

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86. *Western Live Stock*, 303 U.S. at 260.

87. *Id.* at 260-61.

88. 309 U.S. 33 (1940).

89. *Berwind-White*, 309 U.S. at 41.

90. *Id.* The tax was predicated on the transfer of title or possession of the tangible goods within the state, or where the parties consummated an agreement within the state for the transfer of the goods. *Id.* at 43-44.

91. *Id.* at 44.

92. *Id.*

93. *Id.*

94. *Berwind-White*, 309 U.S. at 45. The Court discussed that the Commerce Clause did not preempt state taxation on interstate commerce. *Id.* However, Supreme Court decisions recognized that the power conferred upon Congress to regulate interstate commerce limited a state's ability to regulate interstate commerce. *Id.*

95. *Id.* The Court cited numerous cases where state taxes had a discriminatory effect in interstate commerce including the following: *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910) (holding that a license tax imposed on a multistate corporation's entire capital stock value violated the Commerce Clause), *Leloup v. Mobile*, 127 U.S. 640 (1888) (holding that a privilege tax measured by a percentage of gross receipts, including activities in interstate commerce was in violation of the Commerce Clause), *McCall v. California*, 136 U.S. 104 (1890) (holding that a fixed sum license fee imposed on the privilege of engaging in interstate commerce activities violated the Commerce Clause) and the *Case of State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872) (holding that state taxation of articles in the stream of interstate commerce violated the Commerce Clause). *Berwind-White*, 309 U.S. at 46-48.

Clause was not intended to protect interstate commerce from its fair share of state tax burden arising from interstate business operations.<sup>96</sup> The Court opined that the present tax did not discriminate against interstate commerce because the tax was levied on every transfer in the state in which goods were purchased for consumption.<sup>97</sup> Since the tax was imposed equally on interstate and intrastate commerce, the Court determined that New York's taxing power did not infringe upon the Commerce Clause.<sup>98</sup>

The Court refuted Berwind-White's argument that the tax at issue was unconstitutional because it was imposed upon gross proceeds and was related to commerce within and without New York.<sup>99</sup> The Court reasoned that this was an attempt to tax a local activity consisting of the delivery of purchased goods in the state of consumption, rather than a tax on commerce beyond New York.<sup>100</sup> The taxing statute was upheld by the Court as a local activity within the state's taxing power.<sup>101</sup>

In *Central Greyhound Lines, Inc. v. Mealey*,<sup>102</sup> New York taxed the entire gross receipts from the petitioner's, Central Greyhound, sale of bus services provided to passengers in interstate commerce.<sup>103</sup> Central Greyhound argued that the Commerce Clause prohibited a state tax on the entire gross receipts from the transportation of passengers in interstate commerce.<sup>104</sup> The Court indicated that the record was devoid of any evidence indicating actual multiple taxation on the gross receipts from interstate commerce.<sup>105</sup> Nonetheless, the Court held that an unapportioned gross receipts tax discriminates against interstate commerce, regardless of whether multiple taxation of receipts from interstate commerce actually

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96. *Berwind-White*, 309 U.S. at 46 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

97. *Id.* at 48-49.

98. *Id.* at 49-50.

99. *Id.* at 57.

100. *Id.* at 58.

101. *Berwind-White*, 309 U.S. at 58.

102. 334 U.S. 653 (1948).

103. *Central Greyhound*, 334 U.S. at 660. The tax at issue was levied on gross receipts from bus routes that began and were destined to locations in New York. *Id.* at 664 (Murphy, J., dissenting). The routes required travel through Pennsylvania and New Jersey before reaching a New York destination. *Id.* at 665. The majority noted that such travel was interstate commerce because the routes commenced in a state and included travel through another state. *Id.* at 660. New York did not tax receipts from routes originating in New York and destined outside of the state. *Id.* at 665 (Murphy, J., dissenting).

104. *Id.* at 654.

105. *Id.* at 662.

occurred.<sup>106</sup> However, the Court found that the New York tax statute could be upheld if it was fairly apportioned based upon the mileage traveled within New York as compared to the total mileage of all interstate routes.<sup>107</sup> The majority stated that such an apportionment would result in the assessment of a tax fairly apportioned based upon intrastate commerce.<sup>108</sup> The Court also stated that an apportionment based upon mileage was not burdensome.<sup>109</sup>

In *Complete Auto Transit, Inc. v. Brady*,<sup>110</sup> the Court was faced with the issue of whether state taxation on the privilege of engaging in interstate commerce was in violation of the Commerce Clause.<sup>111</sup> Justice Blackmun, writing for a unanimous Court, considered the wisdom of two divergent philosophies concerning state taxation of interstate commerce — the “free trade” approach and the “multiple taxation” doctrine.<sup>112</sup> The free trade approach considered the Commerce Clause to be a safe haven that forbade state taxation on interstate commerce because taxing was an impediment to the free flow of trade between the states.<sup>113</sup> The multiple taxation doctrine, espoused by Justice Stone in *Western Live Stock*, recognized that the Commerce Clause did not relieve interstate commerce from its fair share of the state tax burden.<sup>114</sup>

The petitioner, Complete Auto, transported new automobiles within Mississippi to Mississippi automobile dealers.<sup>115</sup> The

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106. *Id.* at 663 (citing *Freeman v. Hewit*, 329 U.S. 249, 256 (1946)).

107. *Id.* The statute at issue permitted apportionment consistent with the Court's opinion. *Id.* at 663-64.

108. *Central Greyhound*, 334 U.S. at 663 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255 (1938)).

109. *Id.*

110. 430 U.S. 274 (1977).

111. *Complete Auto*, 430 U.S. at 274.

112. *Id.* at 278-79.

113. *Id.* at 278 n.7 (citing *Freeman v. Hewit*, 329 U.S. 249 (1946)). The free trade approach was a reversion by the Court to an earlier tax doctrine that declared a direct tax on interstate commerce unconstitutional under the Commerce Clause. *Id.* The Court subsequently narrowed its interpretation to prohibiting state taxes on the privilege of conducting interstate commerce. See *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), *overruled by Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-89). The majority in *Freeman* categorized the tax in *Berwind-White* as a consumption tax which was distinguished from a direct tax on interstate commerce that was unconstitutional under the free trade approach. *Freeman*, 329 U.S. at 257.

114. *Complete Auto*, 430 U.S. at 279 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938)). The multiple taxation doctrine was embraced as a practical rather than a formal analysis of the constitutionality of state taxation under the Commerce Clause. *Id.*

115. *Id.* at 276. The automobiles were shipped by General Motors from Michigan to Mississippi, where Complete Auto received the automobiles and delivered them in-state to dealers. *Id.*

Court decided that Complete Auto's transportation activities were part of interstate commerce that involved the transportation of the automobiles from outside of Mississippi to Mississippi dealers.<sup>116</sup> Mississippi taxed the privilege of doing business within the state by levying a five percent tax on the gross income resulting from transportation of property beginning and ending in the state.<sup>117</sup> Complete Auto argued that Mississippi's tax violated the Commerce Clause based upon the Court's precedent that prohibited state taxation on the privilege of engaging in interstate commerce.<sup>118</sup>

In rejecting the view prohibiting state tax on the privilege of conducting interstate commerce, the Court overruled *Spector Motor Service v. O'Connor*.<sup>119</sup> The Court criticized the *Spector* decision as a labeling or formal approach that ignored the economic reality of the tax imposed by the state.<sup>120</sup> The Court noted that *Spector* and subsequent decisions of the Court had produced conflicting constitutional results for economically similar state taxes.<sup>121</sup> The Court stated that the differing results were attributable to the title given to the tax by the state legislature.<sup>122</sup>

Three times in the course of the opinion, Justice Blackmun stated that a tax statute may be sustained against a Commerce Clause challenge where the activity taxed has a "sufficient nexus" to the taxing state; is "fairly apportioned" to the business activity in the state; is fairly related to the benefits provided by the taxing state to the taxpayer; and does not discriminate against interstate commerce to the advantage of intrastate commerce.<sup>123</sup> The Court considered this to be a practical rather than a formal analysis in resolving the constitutionality of a state's tax on interstate commerce.<sup>124</sup> Mississippi's taxing statute was upheld as being non-violative of the Commerce

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116. *Id.* at 276 n.4.

117. *Id.* at 275.

118. *Id.* at 277-78 (citing *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1991), overruled by *Complete Auto Transit, Inc v. Brady*, 430 U.S. 274, 288-89 and *Freeman v. Hewit*, 329 U.S. 249 (1946)).

119. *Complete Auto*, 430 U.S. at 288-89.

120. *Id.* at 278-80.

121. *Id.* at 284.

122. *Id.* at 284-85. *Compare* *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954) ("Railway Express I") (declaring a statute imposing a tax on gross receipts for the "privilege" of doing business in a state unconstitutional) *with* *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959) ("Railway Express II") (upholding a statute imposing a "franchise tax on intangible property" measured by gross receipts).

123. *Complete Auto*, 430 U.S. at 278-79, 287.

124. *Id.* at 279.

Clause because the taxpayer's only challenge to its constitutionality rested on formal rather than substantive violations of the Commerce Clause.<sup>125</sup>

In *Wardair Canada, Inc. v. Florida Department of Revenue*,<sup>126</sup> the Court considered whether the Foreign Commerce Clause<sup>127</sup> prohibited Florida from taxing the sales price of fuel purchased in Florida by a Canadian airline and consumed in exclusively foreign commerce.<sup>128</sup>

The petitioner, Wardair Canada, Inc. ("Wardair"), operated flight routes to and from the United States.<sup>129</sup> A Florida statute imposed a sales tax of five percent on a stipulated price per gallon of fuel purchased in-state.<sup>130</sup> The tax was assessed on the entire sales price even though the fuel was consumed in commerce outside of the state.<sup>131</sup> Wardair objected that the taxing statute was in violation of the Commerce Clause because it was assessed upon foreign airlines engaged in exclusively foreign commerce.<sup>132</sup> The Court characterized Wardair's challenge as an attempt to persuade the Court that Congress preempted state regulation of international aviation by enacting the Federal Aviation Act.<sup>133</sup>

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125. *Id.* at 289. The taxpayer's argument rested solely with the Court's decisions that declared privilege taxes unconstitutional if the in-state activities were part of interstate commerce conducted by the taxpayer. *Id.* There was no assertion that Mississippi's tax violated any prong of the four part test sustaining the constitutionality of a tax on interstate commerce activities emanating from the Court's opinion. *Id.* at 287.

126. 477 U.S. 1 (1986).

127. *Wardair*, 477 U.S. at 3. The Foreign Commerce Clause is the power delegated to Congress under the Commerce Clause to regulate all commercial intercourse between the United States and foreign countries. See BLACK'S LAW DICTIONARY 269 (6th ed. 1990).

128. *Wardair*, 477 U.S. at 3.

129. *Id.*

130. *Id.* at 3-4. The tax statute imposed a tax on the consumer of motor and special fuels at five percent of the established sales price of \$1.148 per gallon. FLA. STAT. ANN. § 212.62 (West 1985) (amended 1990).

131. *Wardair*, 477 U.S. at 4.

132. *Id.*

133. *Id.* at 5-6. The Court stated that under the Supremacy Clause, the federal government may displace state law through the exercise of congressional power granted under the Constitution. *Id.* at 6. The Court provided that preemption may occur if: (1) Congress expressly states its intention that federal legislation preempts state law; or (2) in congressional silence on preemption, and in absence of an actual conflict between federal and state law, the evidence indicates congressional intent to preempt a specific field regulated by state law. *Id.* at 6. Congressional legislation resulted in extensive regulation by the federal government over aviation travel. See Federal Aviation Act, 49 U.S.C. § 1301 (1988 & Supp. V 1993), repealed by Act of Pub. L. 103-272, § 7(b), 108 Stat. 1379 (1994). The Federal Aviation Act delegated the regulation of licensing, route service, fare rates, tariffs and other aspects of foreign air travel to agencies of the United States Government. *Wardair*, 477 U.S. at 6.



The Court's "dormant" Commerce Clause analysis concerned the determination of whether Florida's tax threatened the values protected by the Commerce Clause.<sup>134</sup> In matters of foreign commerce, the majority noted that states must not act to the detriment of the nation as a whole.<sup>135</sup> The Court reasoned that in assessing whether a state tax interferes with the federal government's authority to regulate foreign commerce, the tax must first satisfy the four-pronged test of *Complete Auto*.<sup>136</sup> Additionally, in resolving issues concerning the Foreign Commerce Clause, the Court's inquiry included a determination of whether the tax at issue created a substantial risk of multiple international taxation, as well as whether the tax interfered with the federal government's ability to speak with one voice in regulating foreign commerce.<sup>137</sup>

The Court indicated that Wardair conceded that Florida's tax satisfied the *Complete Auto* test.<sup>138</sup> Additionally, the Court stated that Wardair did not dispute the absence of any threat of multiple international taxation because the tax was imposed on a discrete transaction, the sale of fuel, which occurred only in the United States.<sup>139</sup> The Court then considered whether Florida's sales tax interfered with the federal government's ability to "speak with one voice" in regulating commercial relations with foreign governments.<sup>140</sup> The Court stated that its review of seventy bilateral aviation agreements failed to reveal any instances in which local taxes were prohibited on aviation fuel used by foreign airlines in foreign commerce.<sup>141</sup> The Court observed that a U.S.-Canadian Agreement prohibited "national duties and charges" on foreign carriers, and the Court considered the omission of any limitation on taxes by the political subdivisions of the two countries as a policy choice inherent in the agreement that permitted local taxation of aviation fuel.<sup>142</sup> The Court perceived that by negative implication, the United States Government had permitted state

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134. *Wardair*, 477 U.S. at 7.

135. *Id.* at 7-8.

136. *Id.* at 8. See *supra* note 21 and accompanying text for the elements of the test.

137. *Wardair*, 477 U.S. at 8.

138. *Id.*

139. *Id.* at 9.

140. *Id.*

141. *Id.* at 11.

142. *Wardair*, 477 U.S. at 11. The U.S.-Canadian Agreement is a bilateral agreement between the United States and Canadian Governments that regulated charter flights between the two countries. Nonscheduled Air Services Agreement, May 8, 1974, U.S.-Can., art. XII, 25 U.S.T. 787.

taxation of aviation fuel consumed by foreign carriers in international commerce.<sup>143</sup> The Court affirmed the judgment of the Supreme Court of Florida and held for the Department of Revenue.<sup>144</sup>

In *D.H. Holmes Co. v. McNamara*,<sup>145</sup> the Court faced the issue of whether Louisiana's use tax, assessed against goods purchased outside of Louisiana for use in the state, satisfied Commerce Clause scrutiny under the *Complete Auto* test.<sup>146</sup> The petitioner, D.H. Holmes Co. ("Holmes"), a Louisiana corporation that operated several department stores in the state, arranged for catalog mailings to its in-state customers by contracting with out-of-state vendors.<sup>147</sup> Holmes did not pay sales tax to the states where the catalogs were designed or shipped.<sup>148</sup> Louisiana assessed a use tax under a statute that imposed a tax on the gross retail cost of tangible property used or consumed in the state, but not sold in Louisiana.<sup>149</sup> The statute precluded multiple taxation of interstate commerce through a credit mechanism that reduced any use tax owed to Louisiana for sales taxes that were paid to other states upon the sale or use of the same goods.<sup>150</sup>

Chief Justice Rehnquist, writing the opinion for a unanimous Court, evaluated the constitutionality of Louisiana's use tax statute under the *Complete Auto* test.<sup>151</sup> The Court found that there was a substantial nexus between Holmes and the state

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143. *Wardair*, 477 U.S. at 12. The Federal Aviation Act expressly permitted sales and use taxes on the sale of goods and services in regulating air commerce. Federal Aviation Act, 49 U.S.C. § 1513(b) (1988 & Supp. V 1993), *repealed by* 103 Pub. L. 272, § 7(b), 108 Stat. 745 (1994). However, the Court concluded that this affirmative grant of state power was not dispositive to the preemption issue because of concerns that Congress did not consider whether such power would be exerted over foreign rather than domestic air carriers. *Wardair*, 477 U.S. at 6-7.

144. *Wardair*, 477 U.S. at 13.

145. 486 U.S. 24 (1988).

146. *D.H. Holmes*, 486 U.S. at 26. *See supra* note 21 and accompanying text for the elements of the test.

147. *D.H. Holmes*, 486 U.S. at 26.

148. *Id.*

149. *Id.* at 27. Louisiana's taxing statute imposed a three percent tax on all tangible personal property used in Louisiana. LA. REV. STAT. ANN. §§ 47:302, 47:321 (West Supp. 1990). A use tax compensates the state of consumption for goods that are purchased outside of the state but are used or consumed in the state. *D.H. Holmes* 486 U.S. at 27-28.

150. *D.H. Holmes*, 486 U.S. at 31. The statute provided that: "A credit against the use tax imposed by this Chapter shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible personal property in another State." LA. REV. STAT. ANN. § 303(A) (West 1990).

151. *D.H. Holmes*, 486 U.S. at 30. *See supra* note 21 and accompanying text for the elements of the test.

that allowed Louisiana to assess a use tax.<sup>152</sup> Holmes provided the mailing list of its customers for distribution; Holmes had significant in-state operations; and the catalogs were aimed at generating business from its Louisiana customers.<sup>153</sup> The Court considered the use tax to be fairly apportioned because Louisiana's taxing statute allowed for a credit against Louisiana's use tax for any similar taxes paid to other states relating to the same transaction.<sup>154</sup> Additionally, the Court noted that Louisiana did not tax Holmes on the value of the catalogs that were shipped to its customers residing outside of the state.<sup>155</sup> The Court held that the tax statute was not discriminatory against interstate commerce because the state's sales tax on goods purchased in-state was imposed at the same rate as the state's use tax assessed on residents purchasing goods outside of Louisiana for in-state consumption.<sup>156</sup> Chief Justice Rehnquist considered the tax fairly related to the benefits enjoyed by Holmes from the governmental and civic services provided by the state.<sup>157</sup> The Court held that Louisiana's use tax satisfied each prong of the *Complete Auto* test and the taxing statute was not in violation of the Commerce Clause.<sup>158</sup>

In *Goldberg v. Sweet*,<sup>159</sup> the petitioners, two Illinois residents, alleged that the Illinois Telecommunications Excise Tax Act (the "Act") was in violation of the Commerce Clause.<sup>160</sup> The petitioners claimed that the Illinois taxing statute subjected interstate commerce to multiple taxation because the tax was imposed upon the gross purchase price of interstate telecommunications services, rather than only the portion of the charge relating to the passage of electronic impulses through the State of Illinois.<sup>161</sup> The Act taxed all telecommunications services originating or terminating in Illinois and charged to an

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152. *D.H. Holmes*, 486 U.S. at 32.

153. *Id.* at 32-33.

154. *Id.* at 31.

155. *Id.* at 32.

156. *Id.*

157. *D.H. Holmes*, 486 U.S. at 32. The Court considered the tax fairly related to police and fire protection, mass transit, and maintenance services provided by the state that facilitated Holmes' sale of goods within the state. *Id.*

158. *Id.* at 34.

159. 488 U.S. 252 (1989).

160. *Goldberg*, 488 U.S. at 257. The Act stated: "A tax is imposed upon the act or privilege of originating in this State or receiving in this State interstate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person." ILL. ANN. STAT. ch. 35, para. 630 § 4 (Smith-Hurd 1993).

161. *Goldberg*, 488 U.S. at 260.

Illinois service address, at five percent of the gross charge.<sup>162</sup> The tax applied equally to both interstate and intrastate telecommunications activity.<sup>163</sup> Taxpayers received a credit against the Illinois tax for any taxes paid to another state resulting from the same interstate call.<sup>164</sup> The tax was imposed on consumers and collected by telecommunication retailers.<sup>165</sup>

The Court applied the *Complete Auto* test in assessing whether Illinois' unapportioned tax on interstate telecommunications services satisfied the demands of the Commerce Clause.<sup>166</sup> The case revolved around the prong of the *Complete Auto* test requiring that a state tax be fairly apportioned.<sup>167</sup> Justice Marshall, writing for the majority, explained that the tax was internally consistent because only one state could potentially tax an interstate call where a taxing scheme required a charge to an in-state address before levying a tax.<sup>168</sup>

In addressing the external consistency of the tax, the Court recognized its precedent that permitted an unapportioned sales tax on the gross charge of a retail purchase, regardless of whether the retail purchase resulted from interstate activities.<sup>169</sup> The Court concluded that the Act did not pose an unacceptable risk of multiple taxation of interstate commerce because the operation of the credit provision for telecommunications taxes paid in other states prevented

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162. *Id.* at 256. The Court understood that an "Illinois service address" was an in-state address where the telephone number and equipment were located, regardless of where the call was billed or paid. *Id.* at 257. The Court provided an illustration: A noncollect call, originating in Illinois, is charged to an Illinois service address regardless of its destination or where the call is billed or paid; a noncollect call from another state to an Illinois number would be outside of the Act's reach because it would not be charged to an Illinois service address. *Id.* at 263 n.13. A collect call made from another state to an Illinois number would be charged to an Illinois service address. *Id.*

163. *Id.* at 264.

164. *Id.* at 256. The Act provides that:

To prevent actual multistate taxation of the act or privilege that is subject to taxation under this paragraph, any taxpayer, upon proof that the taxpayer has paid a tax in another State on such event, shall be allowed a credit against the tax imposed in this Section 4 to the extent of the amount of such tax properly due and paid in such other State.

ILL. ANN. STAT. ch. 35, para. 630 § 4 (Smith-Hurd 1993).

165. *Goldberg*, 488 U.S. at 256-57.

166. *Id.* at 259-60. See *supra* note 21 and accompanying text for the elements of the test.

167. *Goldberg*, 488 U.S. at 260.

168. *Id.* at 261. See *supra* note 25 for an explanation of "internal consistency."

169. *Goldberg*, 488 U.S. at 262 (citing *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940)).

multiple taxation.<sup>170</sup> In dictum the Court suggested that only two states had a "sufficient nexus" to tax a consumer's interstate call.<sup>171</sup> The Court reasoned that communication must have originated or terminated within a state in order for there to be a sufficient nexus between the transaction and the taxing state.<sup>172</sup> The Court stated that a risk of multiple taxation resulted from differences in state statutes under which a particular telephone call may be taxable by: (1) the state in which the call was billed or paid; and (2) the state where the call was charged to a service address.<sup>173</sup> However, the Act's credit mechanism prevented actual cumulative taxation on the telephone call.<sup>174</sup> The majority considered the mere passage of electronic signals through a state as an insufficient nexus between the state and the activity to allow taxation of the transaction.<sup>175</sup>

The Court also viewed a tax on the unapportioned purchase price as a pragmatic approach to state taxation.<sup>176</sup> This was considered to be true because of the virtual impossibility of tracing the precise transmission of impulses that resulted in a completed telephone call.<sup>177</sup> The technological complexity of telecommunications led the Court to conclude that geographical apportionment of the tax lacked feasibility.<sup>178</sup> The Court distinguished *Central Greyhound's* apportionment of receipts based upon miles traveled over identifiable routes within the taxing state on the basis that in *Goldberg* the inability to determine the precise path of communication transmissions made such an apportionment impractical.<sup>179</sup> The Court found that the tax did not discriminate against interstate commerce and the tax was fairly related to the activities within the

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170. *Id.* at 264 (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)). The relevant statutory language provided that in order to avoid cumulative state taxation, a credit was given against the Illinois tax upon proof that the taxpayer paid another state tax on the same telephone call. ILL. ANN. STAT. ch. 35, para. 630 § 4 (Smith-Hurd 1993).

171. *Goldberg*, 488 U.S. at 263.

172. *Id.*

173. *Id.*

174. *Id.* at 263-64. See *supra* note 164 for the relevant text of the Act.

175. *Goldberg*, 488 U.S. at 263.

176. *Id.* at 265.

177. *Id.* at 264-65. The Court stated that it was virtually impossible to trace the precise path of a completed telephone call because of the complexity involved in a computerized network consisting of billions of potential paths in transmitting electronic signals from one point to another. *Id.* at 255.

178. *Id.* at 264-65.

179. *Id.* at 264 (citing *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948)).

state.<sup>180</sup> The Court affirmed the Illinois Supreme Court and held that the Act was not in violation of the Commerce Clause.<sup>181</sup>

The Supreme Court has historically determined the constitutionality of statutes imposing taxes measured by gross proceeds by assessing whether the subject of the taxing statute faces a risk of multiple taxation as a result of the failure to apportion the gross receipts.<sup>182</sup> The Court has sustained an unapportioned gross receipts tax levied upon a seller's privilege of conducting commerce.<sup>183</sup> Additionally, the Court has sustained unapportioned sales taxes imposed on the purchaser of goods for consumption and measured by gross receipts.<sup>184</sup> The analogy between these cases rests with the Court's position that a tax measured by unapportioned gross receipts was fairly related to the taxing state due to the wholly local nature of the transaction.<sup>185</sup> Any interstate commerce associated with the transaction was considered by the Court as incidental to the local activities and beyond the reach of all but the taxing state.<sup>186</sup> As the majority in *Jefferson Lines* recognized, the sale of goods is viewed as a discrete event that is facilitated by the laws and amenities of the state in which the sale occurs.<sup>187</sup>

The Court in *Central Greyhound* required New York to apportion the taxable value of the state's gross receipts tax because of the risk of multiple taxation on the receipts from interstate bus routes of the company.<sup>188</sup> An impermissible risk of multiple taxation existed because New Jersey and Pennsylvania had a sufficient nexus to Central Greyhound's operations such that those states could extract their fair share of taxes by imposing taxes on the same gross receipts that New York sought to tax.<sup>189</sup> Furthermore, regardless of potential

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180. *Goldberg*, 488 U.S. at 266-67.

181. *Id.*

182. See, e.g., *Central Greyhound*, 334 U.S. at 662; *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938); *Western Live Stock*, 303 U.S. at 255.

183. See *Western Live Stock*, 303 U.S. at 259. See *supra* notes 73-87 and accompanying text for a discussion of *Western Live Stock*.

184. See *Wardair*, 477 U.S. at 12; *Berwind-White*, 309 U.S. at 58. See *supra* notes 126-144 and accompanying text for a discussion of *Wardair*. See *supra* notes 88-101 and accompanying text for a discussion of *Berwind-White*.

185. See *Berwind-White*, 309 U.S. at 58; *Western Live Stock*, 303 U.S. at 260.

186. See *Berwind-White*, 309 U.S. at 58; *Western Live Stock*, 303 U.S. at 260.

187. *Jefferson Lines*, 115 S. Ct. at 1339. See also *Wardair*, 477 U.S. at 9 (explaining that the purchase of airplane fuel for use in foreign commerce is a discrete transaction in one jurisdiction which precludes the risk of multiple taxation).

188. *Central Greyhound*, 334 U.S. at 662-63. See *supra* notes 102-09 and accompanying text for a discussion of *Central Greyhound*.

189. *Central Greyhound*, 334 U.S. at 662.

cumulative taxation, New York sought to tax a greater share of commerce than it was entitled to tax.<sup>190</sup> Analogizing the facts of *Central Greyhound* to those of *Jefferson Lines* leads to the conclusion that Oklahoma was attempting to unconstitutionally tax more than the in-state component of the value of passenger tickets by levying a tax measured by unapportioned gross receipts.<sup>191</sup> While the Court in *Jefferson Lines* distinguished the tax from *Central Greyhound* by characterizing it a sales tax, the constitutionality of the tax cannot be established on the basis of particular words or labels.<sup>192</sup>

The majority in *Jefferson Lines* reached the result that the unapportioned tax was not in violation of the Commerce Clause by virtually ignoring the economic reality of the subject transaction.<sup>193</sup> The Court failed to consider that interstate commerce significantly contributes to the value of the transaction taxed by Oklahoma. In crafting a rule that permitted an unapportioned sales tax on the purchase of tangible goods, the Court was consistent with the parties' objective of the sale—a delivery of the goods at a particular time and place. In *Jefferson Lines*, the buyer contracted with the seller to obtain transportation services from Oklahoma to another state.<sup>194</sup> The buyer's objective in the transaction was not to obtain dominion and control over the ticket's usage, but to obtain transportation services from Oklahoma to another state. This necessarily resulted in the tax being levied upon interstate commerce itself.<sup>195</sup> For example, if a passenger purchases a ticket for transit from Oklahoma to Minnesota, it is impossible to regard the passage through each successive state as merely incidental to the services rendered in Oklahoma. Such a conclusion should be necessary to sustain the Court's holding under a historical analysis of unapportioned taxes sustained by the Court.

The connection between the interstate transportation services provided and each state of passage along Jefferson Lines' bus routes created a risk that one or more of the states would seek to exact its fair share of taxes for the cost of providing governmental services that benefit Jefferson Lines and the company's passengers. The discussion of the Court's decisions

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190. *Id.* at 663.

191. *See id.*

192. *Complete Auto*, 430 U.S. at 288.

193. *Jefferson Lines*, 115 S. Ct. at 1348 (Breyer, J., dissenting).

194. *Id.* at 1335.

195. *Id.* at 1349 (Breyer, J., dissenting).

protecting against "successive taxation" hints that the majority recognized that Oklahoma's tax was an unapportioned tax on interstate commerce.<sup>196</sup> The majority suggested that the first state of purchase or use may rely upon the credit mechanism commonly found in sales and use tax statutes to avoid cumulative tax burdens.<sup>197</sup> While under present statutory schemes this may be true, there are risks of multiple taxation resulting from gaps in the credit provisions and taxing schemes that may arise in response to the Court's holding.<sup>198</sup> For instance, multiple taxation could arise on the subject transaction in *Jefferson Lines* if another state's statute imposed a sales tax on services performed within the state regardless of where the agreement or payment for the services occurred. It is the *risk* of discriminatory multiple taxation on interstate commerce that the Court must protect against by invoking the powers laden in the "dormant" Commerce Clause.<sup>199</sup> Additionally, Oklahoma's statute is void of a credit mechanism similar to Illinois' statute in *Goldberg* that avoided actual multiple taxation by allowing a credit against that state's tax for any taxes paid to another state resulting from the same transaction.<sup>200</sup> Absent a credit mechanism or apportionment of the measure of tax based upon the in-state component of the value of transportation services provided, the Court should have held that Oklahoma's tax did not fairly relate to the economic activity within the state.<sup>201</sup>

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196. *Id.* at 1341-44.

197. *Id.* at 1342-43.

198. The Court has never addressed the issue of whether a state must provide a credit against its use tax for sales tax paid to another state. *Williams v. Vermont*, 472 U.S. 14, 28 (1985). The Court's decision in *D.H. Holmes* suggests that the Court may eventually require a credit against a state's use tax for sales taxes paid in other states. However, the Court has never expressly held that such a credit mechanism is a constitutional requirement of fair apportionment. See *D.H. Holmes*, 486 U.S. at 31 (upholding Louisiana's use tax as fairly apportioned because the taxing statute provided for a credit against the state's use tax for sales taxes paid to other states).

199. "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." *Freeman v. Hewit*, 329 U.S. 249, 256 (1946).

200. See *supra* note 164 and the accompanying text for the language of the statute.

201. A conclusion that the tax should be measured by apportioned gross receipts would sustain any challenge to the feasibility of apportionment. An apportionment of the taxable gross receipts has been required based upon the ratio of mileage traveled within the taxing state compared to the total mileage of the route. *Central Greyhound*, 334 U.S. at 663. See also *Goldberg*, 488 U.S. at 264 (citing *Central Greyhound* for a possible apportionment formula based upon mileage traveled within the taxing power state where the business activities of the taxpayer consisted of large physical objects traveling over an identifiable route).



Furthermore, the rule of law emerging from *Jefferson Lines* creates uncertainty as to which state may impose a sales tax on a subject transaction in interstate commerce where the agreement, payment and partial delivery of the services does not coincide in one state.<sup>202</sup>

The Court's holding may appeal to both taxpayers and revenue authorities because it effectively results in an administrative convenience that arises from an unapportioned measure of tax. The decision results in a uniformity of an unapportioned sales tax on both the sale of tangible goods and certain services. There is perhaps a sense of practicality because states of subsequent passage have limited resources to enforce taxes against passengers that relate to the portion of services provided within their state.

The Supreme Court will have numerous opportunities to forge its jurisprudence concerning state taxes imposed upon services in interstate commerce. The reasons for this are twofold: (1) states are desperate to identify additional opportunities to expand their revenue base without raising tax rates; and (2) the continued emergence of a service-oriented U.S. economy. These factors may encourage the formation of a multistate compact that provides uniformity in sales and use taxation of interstate services.

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202. The Court reasoned that the passengers in *Jefferson Lines* could not be subject to multiple taxation because the taxable event consisting of the agreement, payment and partial delivery of the services could only occur in Oklahoma. *Jefferson Lines*, 115 S. Ct. at 1341.