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State Taxation on the Privilege of Doing Interstate Business: Complete Auto Transit, Inc. v. Brady

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CASENOTES

State Taxation on the Privilege of Doing Interstate Business: *Complete Auto Transit, Inc. v. Brady*[1]—Complete Auto Transit, Inc. (Complete Auto) is a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation. In April, 1973, Complete Auto sought a refund in state court of taxes assessed by the State of Mississippi on the gross income derived from Complete Auto's transporting motor vehicles from Jackson, Mississippi to other points within the state.[2] The Mississippi statutes under which the assessment was brought required the collection of "privilege taxes for the privilege of engaging or continuing in business or doing business" within the state.[3]

Complete Auto contended that the state's assessment was a tax on Complete Auto's privilege of engaging in interstate commerce and that the tax thus violated the federal commerce clause.[4] The Mississippi lower court sustained the assessments[5] and the Mississippi Supreme Court affirmed.[6]

The United States Supreme Court unanimously affirmed the Mississippi decision and HELD: A state tax imposed explicitly on the privilege of engaging in interstate commerce within the state is not a per se violation of the commerce clause of the federal Constitution.[7] In reaching this decision the Court overruled *Spector Motor Services, Inc. v. O'Connor*[8] which embodied the longstanding per se rule against state taxation of the federal privilege of doing business in interstate commerce.[9]

Although Complete Auto's only objection to the Mississippi tax was grounded in the *Spector* rule[10], the Court, in striking down the rule, nevertheless suggested four criteria by which the Court in future cases would assess the constitutionality of any state tax on interstate commerce. According to the *Complete Auto* Court, a state tax may be applied only to activities which have a substantial nexus with the taxing state; the tax assessment must be fairly apportioned to the amount of the taxpayer's business done within the taxing state; the tax may not discriminate against interstate commerce vis à vis intrastate commerce, and the tax must be fairly related to the services provided by the state.[11]

The significance of the *Complete Auto* decision lies in the Court's rejection of a per se rule, whereby the privilege of doing interstate business was afforded absolute immunity from state taxation, in favor of the more pragmatic four-part test. In rejecting this per se approach the Court has taken a significant conceptual step by permitting the individual states to tax the privilege of engaging in interstate commerce, a privilege which until now had been considered to be within the exclusive province of the federal

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[1] 430 U.S. 274 (1977).

[2] A total assessment of $165,151.48 had been paid by Complete Auto. *Id.* at 277.

[3] Miss. Code Ann. § 10105 (1942) current version at Miss. Code Ann. § 27-65-13 (1972).

[4] The commerce clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

[5] The lower court opinion is unreported. 430 U.S. at 277.

[6] 330 So. 2d 268, 272 (Miss. 1976).

[7] 430 U.S. at 289.

[8] 340 U.S. 602 (1951).

[9] *Id.* at 611.

[10] 430 U.S. at 278-9, 287.

[11] *Id.* at 277-78, 279, 287. See text at notes 55-90 *infra*.

government to grant or withhold. As a result the *Complete Auto* opinion evinces a movement toward a balancing approach to solving questions of state taxation of interstate commerce, an approach in line with other recent cases involving federal-state relationships.[12] The *Complete Auto* decision thus reflects the Court's belief that in order for the federal government and the states to co-exist within a mature federal system, interstate commerce, as a practical matter, must "pay its way."[13]

This note will briefly trace the history of the Supreme Court's decisions concerning the constitutionality of state taxation of interstate commerce. The Court's holding in *Complete Auto* will then be discussed in light of this background. Particular attention will be given to the *Complete Auto* Court's rejection of the per se approach previously employed by the Court in determining the validity of state tax statutes alleged to violate the commerce clause. Next, the four criteria of the test suggested by the *Complete Auto* Court for determining the constitutionality of a state tax statute will be discussed in the light of their historical and doctrinal underpinnings. Based on an analysis of these criteria, it will be submitted that the *Complete Auto* opinion is consistent not only with the Court's balancing approach to assessing the constitutionality of state regulatory statutes affecting interstate commerce but also with the Court's recently enunciated view concerning the respective limits of federal and state constitutional power in general.

I. IMMUNITY OF INTERSTATE COMMERCE FROM STATE TAXATION

The divergent views of the Court in *Spector* and *Complete Auto* on the question whether the privilege of engaging in interstate commerce is a proper subject for state taxation reflect a longstanding dispute respecting the proper impact of the commerce clause on state power generally to tax interstate commerce. The approach taken initially by the Supreme Court afforded every aspect of interstate commerce absolute immunity from state taxation.[14] This approach was founded upon a broad view of federal power under the commerce clause. It was believed that the purpose of the commerce clause was to grant Congress the plenary power to regulate and to protect interstate commerce and therefore by necessary implication the commerce clause restrained state interference with interstate commerce. Accordingly, based on the premise that "the power to tax is the power to destroy,"[15] it was established that the states could not tax any aspect of interstate commerce.[16]

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[12] *See, e.g.*, Juidice v. Vail,—U.S.—, 97 S. Ct. 1211 (1977); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); National League of Cities v. Usery, 426 U.S. 833 (1976). *See also* Note, *Constitutional Law–Commerce Clause–The Reaffirmation of State Sovereignty as a Fundamental Tenet of Constitutional Federalism*–National League of Cities v. Usery, 18 B.C. IND. AND COM. L. REV. 736 (1976) (hereinafter *Constitutional Federalism*).

[13] 430 U.S. at 288 n. 15. Justice Clarke apparently coined the phrase "pay its way" in Postal Tel. Cable Co. v. City of Richmond, 249 U.S. 253, 259 (1919).

[14] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448-49 (1827), *citing* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See* Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888) ("No State has the right to lay a tax on interstate commerce in any form . . . .")

[15] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

[16] The doctrine that the states have no power to tax interstate commerce rests primarily on Chief Justice Marshall's conception of constitutional federalism in the landmark 1819 case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, Justice Marshall,

Despite these early dogmatic pronouncements, the Court struggled with this absolute approach to constitutional federalism and, at times, gave effect to the states' inherent power to tax activities utilizing state services, including activities which involved interstate commerce. For example in the 1938 case of *Western Live Stock v. Bureau of Revenue*[17] the Court upheld a state tax on the local publication of a journal with an interstate circulation. The Court reasoned that a state tax statute should be upheld so long as it does not create the danger that the same incidents of the tax could be subject to taxation by other states thereby creating a multiple tax burden on an interstate operation.[18] This approach was a pragmatic one for it involved the Court in an examination of the actual economic effects of the taxes.[19]

The Court in *Western Live Stock* and its immediate progeny[20] apparently abandoned the prior concept that any state taxing statute increasing the cost of interstate commerce was an invalid interference with that commerce, following instead the practical philosophy that interstate businesses should bear their just share of the tax burden.[21] Soon, however, the Court

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while acknowledging that states have the authority concurrently with the federal government to tax business activities, nevertheless construed the commerce clause as mandating to Congress supreme authority over interstate commerce. *Id.* at 436. One consequence of Marshall's view of constitutional federalism was the rule that the states were absolutely forbidden to tax the operations of a federal instrumentality established by Congress pursuant to its commerce authority. *Id.* at 436-37. This conclusion, Marshall contended, was a necessary corollary to the fact that "the power to tax is the power to destroy." *Id.* at 431.

Later, in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), a case involving the constitutionality of a Maryland statute requiring all importers and wholesalers of foreign articles to secure a fifty dollar license, Justice Marshall reasoned that the rationale of *McCulloch* was "entirely applicable" to state taxation of private enterprises engaged in interstate commerce. *Id.* at 449. Thus, holding the Maryland statute unconstitutional, Justice Marshall stated:

> We admit this power [of a State to tax its own citizens on their property within its territory] to be sacred. . . . We cannot admit that it may be used so as to obstruct or defeat [Congress'] power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme.

Id. at 448.

[17] 303 U.S. 250 (1938).

[18] *Id.* at 255-57. In *Western Live Stock* Justice Stone explained the distinction between a tax which merely adds an expense to interstate commerce, and in a sense burdens commerce, and a tax which is capable of being duplicated by other states:

> Local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed or added to with equal right by every State which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. The multiplication of state taxes measured by the gross receipts would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove.

Id. at 255-56 (citations omitted).

[19] *See id.* at 257-58.

[20] *See, e.g.*, Southern Pac. Co. v. Gallagher, 306 U.S. 167, 174-75 (1939); Gwinn, White and Prince v. Henneford, 305 U.S. 434, 439 (1939); Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).

[21] *See, e.g.*, Coverdale v. Arkansas-Louisiana Pipe Line Co., 313 U.S. 604, 612-13 (1938), *citing Western Live Stock*, 303 U.S. at 254-55.

reverted to a more restrictive approach. In the 1946 case of *Freeman v. Hewitt*,[22] the Court ruled that an Indiana sales tax on the out-of-state sale of securities was per se unconstitutional because it was laid "directly on" and "on the very processes of" interstate commerce.[23] This per se approach which emphasized the form of the tax rather than its economic effect apparently was grounded in the original conception that the commerce clause provides absolute immunity for interstate commerce from state taxation.[24] Thus, the decision in *Freeman*, when contrasted with *Western Live Stock*, is indicative of a tension between the underlying theory that the commerce clause dictates an absolute immunity of interstate commerce from state taxation and the policy that interstate commerce must "pay its way."

The increasing prevalence of this latter policy was reflected in subsequent decisions as the Court began to restrict the per se approach of *Freeman* to one which invalidated only those state taxes which taxed the privilege of doing interstate business.[25] The 1951 case of *Spector Motor Services, Inc. v. O'Connor*[26] marks the modern pinnacle of this per se approach by which state taxes were invalidated because of a particular phraseology rather than because of deleterious effects of the tax on interstate commerce. The taxpayer in *Spector* was a Missouri corporation engaged exclusively in interstate trucking, with some of its shipments either originating or ending within the State of Connecticut. Connecticut levied on the corporation a "tax upon its franchise for the privilege of carrying on or doing business within the state measured by apportioned net income."[27] The

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[22] 329 U.S. 249 (1946).

[23] *Id.* at 253-54, 259. Justice Frankfurter, writing for the majority, summarized the underlying philosophy of the Court during this period as follows:

> The Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . . This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance.

Id. at 252.

[24] *See* 430 U.S. at 281 n.11.

[25] *See, e.g.*, Memphis Gas Co. v. Stone, 335 U.S. 80 (1948). In *Memphis Gas*, a Delaware corporation ran a gas pipeline through several states, 135 miles of which was in Mississippi. Although the corporation did no intrastate commerce in Mississippi, the State of Mississippi levied a "franchise or excise tax" upon the "value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by [a corporation] within this State." MISS. CODE ANN. § 9313 (1942). In upholding the tax, the Supreme Court drew a distinction between a state statute which taxes interstate businesses for "the privilege of doing interstate business within the State" and one which taxes "the privilege of exercising corporate functions within the State." While the former tax would be prohibited by the commerce clause, the latter would suffer no constitutional infirmity. 335 U.S. at 89-93. The Court's emphasis on phraseology was highlighted by the dissenting opinion in *Memphis Gas* which maintained that the tax in question was an unconstitutional "privilege" tax, while at the same time noting that the state could constitutionally extract the same revenues merely by increasing the valid property taxes. *Id.* at 99-105 (Frankfurter, J., dissenting).

[26] 340 U.S. 603 (1951).

[27] *Id.* at 603 n.1.

United States Supreme Court held the tax invalid, stating that any tax on the "privilege" of doing business is per se unconstitutional if applied against what is exclusively interstate commerce.[28]

Thus, despite the shift toward a practical approach as evidenced by *Western Live Stock, Spector* made it clear that the Court still was prepared to invalidate a tax solely because the subject of that tax was the privilege of engaging in interstate commerce, without regard to the practical economic effects of the tax and with no consideration of the revenue needs of the taxing state.[29] Apparently, this reaffirmation of the privilege tax immunity by the *Spector* Court reflected its perception of the balance of federal and state power under the commerce clause, for the Court stated its rationale for the privilege tax immunity as follows:

> Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power "To regulate Commerce ... among the several States." ... [T]he constitutional separation of the federal and state powers makes it essential that no State be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress.[30]

Although the *Spector* Court had ostensibly reaffirmed the absolute privilege tax immunity as well as the perception of constitutional federalism in which it was grounded, the Court quickly proceeded to limit the effective operation of the *Spector* rule.[31] By 1975, the *Spector* rule had been re-

[28] *Id.* at 609-10. *See, e.g.*, Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 216-18 (1925); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 562 (1925); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891). The Court in *Crutcher* explained that the privilege of engaging in interstate commerce is immune from state taxation because "to carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States". 141 U.S. at 57. *But see* Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 666-67 (1949). In *Interstate Oil* the Supreme Court in a plurality opinion upheld the assessment of a tax on the privilege of transporting oil within the State of Mississippi. Four Justices of the plurality voted to sustain the tax as a tax on the privilege of engaging in interstate commerce. 337 U.S. at 666.

[29] This disregard for practical economic considerations is evident in the following statement from the Court's opinion:

> Neither the amount of the tax nor its computation need be considered by us in view of our disposition of the case. The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for protection given by the State.

340 U.S. at 607.

[30] *Id.* at 608, *citing McCulloch*, 17 U.S. (4 Wheat.) 316, 425-37 (1819).

[31] *Compare* Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 360-69 (1954) (Virginia statute establishing a tax measured by gross receipts earned in the state and imposed on interstate express company for privilege of doing business in Virginia held unconstitutional) *with* Railway Express Agency, Inc. v. Virginia, 358 U.S. 434, 435-43 (1959) (re-drafted Virginia statute levying a "franchise tax" on "intangible property" owned in the state in the form of "going concern value" also measured by the same gross receipts upheld because its nominal subject was no longer the privilege of engaging in interstate commerce).

duced to "a rule of words rather than a rule of substance,"[32] as demonstrated by the case of *Colonial Pipeline Co. v. Traigle.*[33] Colonial Pipeline was a Delaware Corporation which owned and maintained an interstate pipeline, a portion of which ran through Louisiana. Although Colonial Pipeline did no intrastate petroleum business within the state,[34] Louisiana imposed a franchise tax for "the privilege of carrying on or doing business" in the state.[35] After Colonial Pipeline succeeded in invalidating the tax in the state courts as a violation of the *Spector* rule,[36] the Louisiana Legislature redrafted the statute to levy the tax on the "qualification to carry on or to do business within this state in a corporate form."[37] Colonial Pipeline again challenged the tax but this time the Louisiana Supreme Court upheld the validity of the tax.[38] The United States Supreme Court affirmed the Louisiana decision, focusing on the economic effects of the tax, and noting that the controlling test was whether the state has exerted its power in proper proportion to appellant's "enjoyment of the opportunities and protections which the state has afforded. . . ."[39] The Court distinguished *Spector* on the narrow ground that *Spector* had involved a tax on the privilege of carrying on interstate commerce whereas the Louisiana tax was related only to the company's activities within the state in the corporate form.[40]

Justice Blackmun, although concurring in the decision, found *Spector* and *Colonial* essentially irreconcilable and dependent on distinctions far too fine to be readily understood by taxpayers or even lawyers attempting to draft constitutional taxing statutes.[41] Thus he declared that "[t]he Court should face the issue and make the choice . . . [preferably] against *Spector.*"[42]

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[32] 430 U.S. at 286.

[33] 421 U.S. 100 (1975).

[34] *Id.* at 102.

[35] LA. REV. STAT. ANN. § 47-601 (West 1958).

[36] Colonial Pipeline Co. v. Mouton, 228 So. 2d 718 (La. App. 1969), *writ denied,* 255 La. 474, 231 So. 2d 393 (1970).

[37] 421 U.S. at 103.

[38] Colonial Pipeline Co. v. Agerton, 289 So. 2d 93, 101 (La. 1974).

[39] 421 U.S. at 109, *citing* General Motors Corp. v. Washington, 377 U.S. 436, 440-41 (1964).

[40] 421 U.S. at 112-14.

[41] *Id.* at 114. For the criticisms of the scholars on the reigning confusion over state taxation of intersate commerce, see Barret, *State Taxation of Interstate Commerce - "Direct Burdens", "Multiple Burdens", or What Have You?* 4 VAND. L. REV. 496, 515-29 (1951); Hartman, *State Taxation of Interstate Commerce: A Survey and Appraisal,* 46 VA. L. REV. 1051, 1082-86 (1960); Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach,* 1953 WASH. U.L.Q. 233 (1953); Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term,* Standard Pressed Steel *and* Colonial Pipeline, 62 VA. L. REV. 149, 177-88 (1975); Note, *State Taxation of Interstate Commerce:* Roadway Express, *the Diminishing Privilege Tax Immunity, and the Movement Toward Uniformity in Apportionment,* 36 U. CHI. L. REV. 186, 187-88 (1961); Note, *Pipelines, Privileges and Labels:* Colonial Pipeline Co. v. Traigle, 70 N.W.U.L. REV. 835, 845-55 (1976).

For the judiciary's confusion over the Supreme Court's position on state taxation of interstate commerce, see, e.g., Freeman v. Hewitt, 329 U.S. 249, 252 (1946) ("The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future."); Roy Stone Transfer Corp. v. Messner, 377 Pa. 243, 244, 103 A. 2d 700, 705 (1954).

[42] 421 U.S. at 114-16 (Blackmun, J., concurring).

II. *Complete Auto:* THE DEATH OF THE *Spector* RULE

Because Complete Auto's challenge to the Mississippi taxing statute was based on a violation of the *Spector* rule forbidding state taxes on the privilege of engaging in interstate commerce,[43] the Supreme Court in *Complete Auto* was presented with an opportunity to respond to Blackmun's challenge.

The *Complete Auto* Court's response, written by Justice Blackmun himself, simply recounted the recent history of the *Spector* rule, pointing out that its doctrinal basis as well as its practical significance had been eroded.[44] The Court first noted that the basis of the rule was the "underlying philosophy that interstate commerce should enjoy a[n] . . . immunity from state taxation."[45] The Court then contrasted this view with the approach of *Western Live Stock* and subsequent cases which, in evaluating a state tax statute, considered the practical economic consequences of the tax on interstate businesses.[46] Under this approach, the Court was not concerned with the "formal language of a tax statute"[47] but instead was concerned that interstate commerce bear its "just share of the tax burden."[48]

In addition to announcing its preference for the pragmatic analysis of *Western Live Stock,* the Court indicated two ways in which the operation of the *Spector* rule had been unsatisfactory. First, the Court noted that the rule ignored the practical effect of the tax and focused exclusively on the formal language of the taxing statute, striking down only those "in which 'the incidence' of the tax is the 'privilege of doing business.' "[49] Second, when state taxing statutes involving interstate commerce avoided a particular phraseology, the Supreme Court in cases subsequent to *Spector* had eschewed the *Spector* rule and actually had employed a practical analysis similar to the one advanced in *Western Live Stock* to assess the constitutionality of the statute.[50] The existence of the anomolous *Spector* rule, the *Complete Auto* Court explained, had merely prevented an extension of this practical analysis to state statutes taxing interstate businesses for the privilege of doing business within the state.[51] Thus the Court believed that post-*Spector* case law had demonstrated not only that the *Spector* rule was at odds with the modern practical outlook of the Court but also that it had actually lost its effectiveness as anything more than "a rule of draftsmanship."[52] Accordingly, the Court made the choice in favor of extending the practical analysis to privilege taxes and consequently overruled *Spector.*[53] Because Complete Auto's only objection to the Mississippi tax had been that it violated the *Spector* rule, the Supreme Court affirmed the Mississippi decision and upheld the tax.

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[43] 430 U.S. at 278-79, 287.
[44] *Id.* at 285.
[45] *Id.* at 278, *citing* Freeman v. Hewitt, 329 U.S. 249, 252 (1946).
[46] 430 U.S. at 279 n.8.
[47] *Id.* at 279.
[48] *Western Live Stock,* 303 U.S. at 254.
[49] 430 U.S. at 278.
[50] *Id.* at 279.
[51] *Id.*
[52] 430 U.S. at 281.
[53] *Id.* at 288-89.

III. THE FOUR-PART TEST OUTLINED IN *Complete Auto*

The *Complete Auto* opinion, while lifting the formal barriers to state taxation of interstate commerce, does not grant the states free reign to oppress interstate commerce. On the contrary, in line with the reasoning of *Western Live Stock,* the Court indicated that under the commerce clause, states cannot excessively burden interstate commerce with cumulative taxes or discriminate against interstate commerce in favor of local trade.[54] In accordance with these principles, the *Complete Auto* Court indicated that the constitutionality of state taxes on interstate commerce should be evaluated by application of a four-part test.[55] In order to be constitutionally valid under this test, a state tax must be applied to an activity that has a substantial nexus with the taxing state; must not discriminate against interstate commerce; must be fairly apportioned; and must be fairly related to the services provided by the state.[56]

This test does not represent an innovation of the *Complete Auto* Court; rather it is derived from an amalgam of prior decisions on state taxing statutes.[57] Each of the four criteria have their own particular constitutional and judicial foundations. Each of these requirements will be discussed in turn.

The first requirement, that there must be a substantial nexus between the activity taxed and the taxing state, is not grounded in the commerce clause but rather in the due process clause of the fourteenth amendment.[58] The constitutional rationale for this nexus requirement is that if, under our federal system a state were to tax interstate activities occurring *wholly* outside its borders and hence outside its jurisdiction, the state would be taking property without due process of law.[59]

A line of Supreme Court cases has attenuated this due process "nexus" requirement by lessening the extent of the connection required between a particular activity and a given state in order to render that activity

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[54] *Id.* at 279.

[55] Although this test was enunciated in the context of a decision concerning a state tax on the privilege of doing interstate business, the *Complete Auto* Court gave no indication that the application of this test is to be confined to the privilege tax area. The Court explained that this kind of practical analysis has been applied by the Supreme Court over the years in approving many types of state taxes on interstate business. *Id.* at 279. Moreover, the Court cited a number of cases which did not concern privilege taxes as authority for this test, *id.* at 278 n. 6, 279 n. 8, indicating that the Court views this test as a proper approach to assessing the constitutionality of all state taxes affecting interstate commerce.

[56] *Id.* at 277-78, 279, 287.

[57] *See, e.g.,* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 96-7 (1948) (Rutledge, J., concurring); Freeman v. Hewitt 329 U.S. 249, 271, 276-77 (1946) (Rutledge, J., concurring).

[58] *See* Great Atl. and Pac. Tea Co. v. Grosjean, 301 U.S. 412 (1937) where the Court stated: "[The] State may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another State derived from the laws of that State and therein exercised and enjoyed." *Id.* at 424.

[59] *See, e.g.,* Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1953) ("[D]ue process requires some definite link, some minimum connection, between a State and the person; property or transaction it seeks to tax."); International Harvester Co. v. Department of Treasury, 322 U.S. 340, 351-57 (Rutledge, J., concurring).

taxable by the state.[60] The most recent of these cases preceding *Complete Auto* was *Standard Pressed Steel Co. v. Department of Revenue.*[61] In that case, a Pennsylvania manufacturer challenged the constitutionality of the Washington business and occupation tax which was levied on the gross receipts from the sales of goods in the State of Washington.[62] The taxpayer pointed out that it had only one employee in the state, an engineer whose office was in his Washington home. The primary responsibility of this employee was to consult with the Washington-based customer regarding its anticipated needs for the taxpayer's product; but he did not take any purchase orders from the customer.[63] Despite the absence of a direct relationship between the engineer's duties and the taxpayer's interstate sales in Washington, the Court found the taxpayer's business activities in Washington sufficient to sustain the tax.[64]

This trend toward lessening the "nexus" requirement, typified by the *Pressed Steel* case, continued in *National Geographic Society v. California Board of Equalization,*[65] a decision rendered shortly after *Complete Auto.* In *National Geographic,* the Court held that the continuous presence in California of two Society offices provided a sufficient "nexus" between the Society and the state to justify imposition of a tax on the Society's mail order sales from the District of Columbia to California residents. The fact that the offices' activities were unrelated to the Society's mail order business initiated entirely in Washington, D.C.[66] did not persuade the Court that the "nexus" was too thin. Viewed together, then, *Pressed Steel* and *National Geographic* imply that while the "nexus" requirement remains operative, it is being minimized thereby increasing the states' jurisdiction to tax.[67] The increase

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[60] *See, e.g.,* National Geographic Soc. v. California Board of Equalization, 430 U.S. 551 (1977); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Norton Co. v. Department of Revenue, 340 U.S. 534 (1951); Wisconsin v. J.C. Penney,. 311 U.S. 435 (1940). *See also* Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term:* Standard Pressed Steel *and* Colonial Pipeline, 62 VA. L. REV. 149 (1975).

[61] 419 U.S. 560 (1975).

[62] *Id.* at 561-62.

[63] *Id.* at 561.

[64] *Id.* at 563-64, *citing* General Motors Corp. v. Washington, 377 U.S. 436, 447 (1964) where the Court upheld a similar tax because the taxpayer's activities within the state were extensive and included solicitation of sales.

[65] 430 U.S. 551 (1977).

[66] *Id.* at 560-61.

[67] The concept of state jurisdiction to tax is closely analogous to the concept of personal judicial jurisdiction over individuals and corporations, the parameters of which are also set by the due process clause of the fourteenth amendment. Pennoyer v. Neff, 95 U.S. 714, 722 (1877). Both the concept of personal judicial jurisdiction and the concept of jurisdiction to tax are concerned with the limits on the reach of individual state sovereignty within our federal system. The standards for each of these kinds of state jurisdiction have had a similar development. At present, personal judicial jurisdiction can be obtained only over a defendant who has "certain minimum contacts" with the forum state, International Shoe Co. v. Washington, 326 U.S. 310, 326 (1945), so as to make the requirement of defending a suit in that state "reasonable in the context of our federal system of government." *Id.* at 317. *See also* Hanson v. Denckla, 357 U.S. 235, 250 (1957) where the Court stated that ". . . it is a mistake to assume that [the] trend [of expanding personal jurisdiction over nonresidents] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . [These restrictions] are a consequence of territorial limitations on the power of the respective States." For a thorough review of the Supreme Court case law on judicial jurisdiction see Shaffer v. Heitner, —U.S.—, 97 S. Ct. 2569, 2576-87 (1977).

in state sovereignty which is represented by this lessening of the nexus requirement[68] is consistent with the view of constitutional federalism reflected by the *Complete Auto* decision—that the states have the power to require interstate businesses to pay for benefits and services they receive from the individual states.

The second requirement outlined by the *Complete Auto* Court for sustaining the validity of a state tax imposed on interstate commerce is that the tax must be fairly apportioned to the activity carried on within the taxing state. This test was advocated by the Court in *Western Live Stock*[69] which drew on several older cases in concluding that "[t]axation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state . . . and in other cases has been rejected because the apportionment was found to be inadequate or unfair."[70] A fairly apportioned tax is one which is applied only to the percentage of a business's activities which occurs within the taxing state.[71] When an interstate business' tax base is apportioned properly, each state will receive its fair share of interstate business tax revenues without subjecting the business to multiple tax burdens.[72] The proper apportionment formula precludes any given state from taxing that particular share of taxed interstate revenue which is attributable to any other state.[73] Therefore, the apportionment requirement reflects the view that while the individual states have the power to tax the operation of interstate busi-

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[68] *See National Geographic*, 430 U.S. at 562-63 (Blackmun, J., concurring). Justice Blackmun points out that *National Geographic* is in fact a departure from the more stringent "nexus" requirement in Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954).

In light of these recent developments the states can be expected to test the limits of this requirement. For example, the nexus requirement probably will remain an effective limitation on the reach of the state taxing power in the interstate mail order sales cases. The Court in *National Geographic* established that a state does not have jurisdiction to tax an out-of-state mail order business whose *only* contact with the state is mail order sales. 430 U.S. at 559. However, it appears that the states may be able to extend further their taxing power over sales of out-of-state goods which are transported into the taxing State either by the seller's carrier or by common carrier. The act of transporting the goods into a given state may constitute a sufficient nexus with the state to satisfy the due process requirement for a sales tax on such goods. *See id.* at 562-63 (Blackmun, J., concurring).

[69] 303 U.S. at 256. *See also* Spector Motor Services Inc. v. O'Connor, 340 U.S. 602, 610 (1951) (Clark, J., dissenting); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 96-7 (1948) (Rutledge, J., concurring).

[70] 303 U.S. at 256.

[71] For an example of an apportionment scheme which was approved by the Supreme Court, see Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 453-54 (1959). Minnesota had used three ratios to arrive at the fraction of net income taxable under its laws: 1) the ratio of the taxpayer's sales assignable to Minnesota during the year to its total sales made everywhere during that year; 2) the ratio of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in business that year wherever situated: 3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business in the like period. MINN. STAT. § 290.19 (1945).

For an example of an apportionment scheme which was invalidated by the Court, see Norfolk & Western Ry. v. Missouri State Tax Comm., 390 U.S. 317 (1968) (Missouri statute measuring value of railroad's rolling stock, for purposes of taxation by the state, according to the ratio of miles operated in Missouri to the railroad's total road mileage held to result in an assessment which grossly exceeded the value of taxpayer's rolling stock in Missouri, in violation of the due process and commerce clauses).

[72] *See Western Live Stock*, 303 U.S. at 256.

[73] *See Standard Pressed Steel*, 419 U.S. at 564.

nesses, the commerce clause requires that these businesses be protected from economic disadvantages which could result solely because they operate in more than one state.

The third requisite for sustaining the constitutionality of a state tax imposed on interstate commerce is that it must not discriminate against interstate commerce in favor of local trade. This prohibition on discrimination has been such a constant throughout the history of commerce clause litigation that the Supreme Court has recently characterized it as one of the "firm peaks of decision which remain unquestioned."[74] Discrimination in this context refers to any means by which a state may attempt to give a competitive advantage to local business relative to interstate business.[75] Hence, a statute which effectively places different burdens upon interstate and local trade is unconstitutional. This is so whether these different burdens appear on the face of the statute or whether the statute purports to treat equally local and interstate commerce but in actual operation puts interstate commerce at a competitive disadvantage.[76]

The most recent pronoucement of the theory behind the nondiscrimination stricture was made in the Supreme Court's 1977 decision in *Boston Stock Exchange v. State Tax Commission*.[77] In that case, the Court invalidated a New York statute providing for a higher tax rate on transactions involving an out-of-state sale of securities than on most transactions involving an in-state sale. The Court explained the constitutional rationale for the decision as follows: "Permitting the individual states to enact laws that favor local enterprises at the expense of out-of-state business 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Commerce Clause protects."[78]

The rationale employed by the Court in invalidating the tax involved in *Boston Stock Exchange* underscores the importance of maintaining this prohibition on discrimination in light of the relaxation of other constitutional limitations on the states' power to tax interstate commerce. If the states are to co-exist within a mature federal system in which their power to tax interstate commerce is recognized, then the need for national economic unity dictates that the commerce clause be read to prohibit the several states from favoring local businesses at the expense of interstate commerce.[79]

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[74] Boston Stock Exch. v. State Tax Comm., 429 U.S. 318, 329 (1977).

[75] *Id.* A primitive method of discrimination was to make the tax applicable only to interstate business, exempting local goods or activities. *See, e.g.*, I.M. Darrell & Son Co. v. Memphis, 208 U.S. 113, 113 (1908). Another type of unconstitutional discrimination involves applying a higher rate of taxation to out-of-state businesses than to domestic businesses. *See, e.g.*, Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U.S. 389, 394-95 (1952) (unlicensed out-of-state laundry was taxed fifty dollars per truck for the privilege of conducting intrastate activities whereas laundries licensed in the state were taxed only eight dollars per truck).

[76] *See generally Developments in the Law–State Taxation*, 75 HARV. L. REV. 953, 962-64 (1962).

[77] 429 U.S. 31 (1977).

[78] *Id.* at 329, *citing* Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

[79] The elimination of interstate trade barriers and economic warfare between the states was one of the main reasons for the abandonment of the Articles of Confederation and the adoption of the federal Constitution which granted to Congress the power to control interstate commerce. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 10, 11 (1824).

The final requirement set forth by the *Complete Auto* Court for sustaining a state tax imposed upon interstate commerce is that the tax must be "fairly related to the services provided by the taxing State."[80] The Supreme Court has alluded to this requirement in several recent cases other than *Complete Auto*. However, since the fair relationship test was not actually applied in any of these cases, its function and scope remain unclear.[81] An examination of the Supreme Court's traditional treatment of state taxes for the use of public facilities provides some insight into the potential operation of the fair relationship test. The Court has long recognized that the states must be allowed to exact reasonable fees from both local and interstate businesses which use facilities provided by the states such as highways[82] and airports.[83] The amount of such "use taxes" is limited by the commerce clause to that which is necessary to compensate the state for the benefits it provides to interstate businesses.[84] The recent Supreme Court case of *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,[85] demonstrates this principle. In *Evansville*, the Court stated that a use tax for the use of an airport must not be "excessive in comparison with the governmental benefit conferred."[86] The Evansville Airport Authority taxed

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[80] *Complete Auto*, 430 U.S. at 277-78, 279, 287.

[81] *See, e.g.*, National Geographic Soc. v. California Board of Equalization, 430 U.S. 551, 558 (1977); Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 562 (1974); Wisconsin v. J.C. Penney, 311 U.S. 435,444 (1940).

These cases actually concerned the issue of whether the corporation which was being subjected to taxation was engaged in activities which had a sufficient connection with the taxing state to satisfy the due process clause. The Court, however, often has blurred the distinction between the "nexus" requirement and the requirement that the tax be fairly related to the benefits and services provided by the taxing state. This confusion was demonstrated in *J. C. Penney* where the Court made the following statement:

> [T]he sole constitutional test for a case like the present one, . . . is whether property was taken without due process of law or, if paraphrase we must, whether the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given by the State . . . the fact that a tax is contingent upon events brought to pass without a State does not destroy the "nexus" between such a tax and transactions within a State for which the tax is an exaction.

311 U.S. at 444-45.

In contrast, the Court in the *Complete Auto* case has taken care to separate the nexus requirement and the "fair relationship" requirement and to state them distinctly, even though the *Complete Auto* case itself did not involve a challenge to the Mississippi tax on either "nexus" or "fair relationship" grounds. 430 U.S. at 287. The Court's separate delineation of the fair relationship requirement is an indication that in future cases the facts which demonstrate a nexus between the taxing state and the interstate business sufficient to satisfy the due process requirement will not necessarily demonstrate that the taxing state renders services to the business which can serve fairly as a *quid pro quo* for the tax levied on that business. Instead, the fair relationship test probably will operate independently and a challenger of a state tax should be given the opportunity to prove to the Court that the tax is excessive in comparison with the governmental benefit conferred.

[82] *See, e.g.*, Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950); Hendrick v. Maryland, 235 U.S. 610 (1915); Huse v. Glover, 119 U.S. 543 (1886).

[83] *See, e.g.*, Evansville-Vanderburgh Airport Auth. District v. Delta Airlines, Inc., 405 U.S. 707 (1972).

[84] *See, e.g.*, Ingles v. Morf, 300 U.S. 290, 294 (1937); Morf v. Bingham, 298 U.S. 407, 410 (1936); Interstate Transit Inc. v. Lindsay, 283 U.S. 183, 185-86 (1931).

[85] 405 U.S. 707 (1972).

[86] *Id.* at 717. At a later point in *Evansville* the Court states ". . . the airlines [taxpayers] have not shown these fees to be excessive in relation to *costs incurred* by the taxing authorities." *Id.* at 719 (emphasis added). Thus the Court is ambiguous as to whether the reasonableness of

airlines one dollar per person emplaning commercial aircraft and used the tax revenue for the maintenance and improvement of the airport.[87] In evaluating the constitutionality of this tax the Court examined evidence which indicated that the tax was needed to supplement operating revenues utilized for capital improvements at the airport. On the basis of this evidence, the Court concluded that the tax was not excessive in comparison with the governmental benefit conferred.[88]

The Court's application of this "governmental benefits" test in the *Evansville* case indicates that it will assess the facts to determine whether a state use tax upon air carriers is excessive in relation to the benefits conferred. Because of the similarity between this governmental benefits test and the fair relationship test enunciated in *Complete Auto* and because of the essential similarity between a use tax for the use of facilities provided by the state and a privilege tax for the privilege of using the facilities, the same type of factual inquiry[89] probably will be extended in future cases to the Court's evaluation of state taxes on the privilege of engaging in interstate commerce. Hence it appears that the Court will balance the amount of the tax[90] on an interstate business against the benefit conferred upon the business by the taxing state to determine whether the tax is a permissible exaction under the commerce clause. Such a balancing approach is consistent with the *Complete Auto* Court's rejection of the per se approach to assessing the constitutionality of state taxes on the privilege of doing business in interstate commerce which had been prevalent in prior decisions such as *Freeman* and *Spector*.[91]

In view of the removal of the privilege tax immunity the states can be expected to test the limits of their taxing power by increasing the amounts of taxes levied on interstate businesses. In future challenges to these taxes the Supreme Court through the application of the *Complete Auto* test will be able to evaluate the validity of the taxes under the commerce clause on a case by case basis. In using this approach, the Court will be focusing on the actual effects of a tax on interstate commerce as compared with the practical needs of the taxing state.[92]

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the amount of a tax is to be determined in relationship to the value of the benefit conferred on the taxpayer by the taxing authority or in relationship to the costs incurred by the state in providing the benefit.

The *Complete Auto* opinion unfortunately perpetuates this ambiguity. On one hand, the *Complete Auto* Court states that the tax should be "fairly related to the services provided by the State." 430 U.S. at 279. This language seems to imply that the relevant consideration is the cost incurred by the taxing state. On the other hand, the Court also states that a tax should be "fairly related to benefits provided the taxpayer," *id.* at 287, implying that the relevant consideration is the value of the benefit conferred on the taxpayer. Since no "fair relationship" issue was actually before the Court in *Complete Auto* the clarification of this ambiguity must await future application of the test.

[87] The Court in *Evansville* also upheld a similar New Hampshire tax. *See* Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm., 111 N.H. 5, 273 A. 2d 676 (1971), *consolidated and aff'd, Evansville,* 405 U.S. at 711.

[88] 405 U.S. at 717-20.

[89] *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945) ("State laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgement.").

[90] It should be noted that the due process clause ordinarily does not limit the amount of a state tax unless the tax is found to be a confiscation of property. *See* A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934).

[91] *See* 430 U.S. at 288.

[92] *See id.* at 288 n. 15.

IV. THE BALANCE OF FEDERAL AND STATE POWERS UNDER THE COMMERCE CLAUSE

Since *Complete Auto* has shifted the focus of the examination of state taxes on interstate commerce from a per se approach to a balancing approach, the law respecting commerce clause limitations applicable to state tax schemes is now consistent with the approach employed by the Court in determining the validity of state statutes regulating interstate commerce.[93] In assessing the constitutionality of state regulatory statutes the Supreme Court first determines if Congress has acted to preclude the states from regulating the particular aspect of commerce which the state statute affects.[94] If Congress has not so acted, the Court employs a "balancing approach" in which it balances the burdens on interstate commerce caused by the regulation against the benefit that actually accrues to the state.[95]

These doctrinal developments, however, were not generally applied in the field of state taxation of interstate commerce, particularly with respect to privilege taxes. Although state regulatory statutes affecting interstate commerce were permitted if not excessively burdensome or preempted by Congressional regulation, state tax statutes affecting the privilege of doing interstate commerce were not subjected to a similar analysis. This analytical inconsistency resulted from conflicting theories. On one hand, the concurrent power of the states to tax along with the federal government was thought to be indispensable to the states' existence within the federal system.[96] On the other hand, it was early established that the power to tax is capable of destroying interstate commerce,[97] necessitating that the federal

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[93] In the historic case of Cooley v. Board of Wardens, 53 U.S. (12 How.) 143 (1851) the Supreme Court considered the constitutionality of a Pennsylvania statute which required ships coming into Pennsylvania harbors to utilize a local pilot. The majority of the Court found that this assertion by the state of power over navigation constituted a regulation of interstate commerce. Nevertheless, the Court upheld the statute, thereby clearly establishing that the federal commerce power is not absolutely exclusive of any state power to regulate interstate commerce. *Id.* at 151-52.

[94] *See id.* at 153 ("[U]ntil Congress should find it necessary to exert its commerce power, it should be left to the states.").

[95] *See, e.g.,* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). The Court in *Pike* succinctly explained the general rule for determining the validity of state regulatory statutes affecting interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on state activities . . . [T]he Court has candidly undertaken a balancing approach in resolving these issues . . . .

Id. at 142 (citations omitted).

See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 804 (1976); Great A. & P. Tea Co. v. Cottrell, 424 U.S. 366, 376 (1976); Allenburg Cotton Co., Inc. v. Pittman, 419 U.S. 20, 38-39 (1974) (Rehnquist, J., dissenting); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[96] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 10 (1824). *See Spector*, 348 U.S. at 608.

[97] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). *Accord,* Freeman v. Hewitt, 329 U.S. 249, 253 (1946).

privilege of carrying on exclusively interstate commerce be free from state taxation.[98] The inherent conflict between these two concepts has made it difficult for the Supreme Court to reconcile the state taxing power with the implicit limitations upon that power imposed by the federal commerce clause.[99]

The results of recent cases such as *Colonial Pipeline,* in which the Court applied a practical analysis, [100] evince a recognition on the part of the Court that state taxing power should be treated similarly to state regulatory power under the commerce clause.[101] Only the archaic privilege tax immunity has impeded the Court's development of a unitary theory of state and federal power under the commerce clause in recent years. *Complete Auto,* by bringing the analysis of state privilege taxes into line with the analysis of state regulatory statutes, has eliminated the final remnant of the archaic dictum that "the power to tax is the power to destroy."[102] In so doing, the Supreme Court has suggested a mode of analysis consonant with the Court's perception of constitutional federalism as a balancing approach to the co-existence of the state and federal governments.[103] The approach suggested in *Complete Auto* balances the competing interests of the federal government in maintaining its exclusive power over interstate commerce and of the states in collecting taxes from interstate commerce in order to meet fiscal requirements.

The conception of constitutional federalism that underlies the present extension to the states of the power to tax the privilege of engaging in interstate commerce is one which evinces a greater sensitivity to the legitimate interests of the state governments. This increased recognition of state sovereignty is not surprising when viewed in the light of the recent landmark decision of *National League of Cities v. Usery.*[104] The Supreme Court in

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[98] *Spector,* 340 U.S. at 610.

[99] *See Freeman,* 329 U.S. at 251.

[100] See text at notes 32-43 *supra.*

[101] The restrictive approach to state tax statutes is based on the premise that tax statutes are likely to have a greater adverse effect upon interstate commerce than would regulatory statutes and, therefore, the states should be prohibited from taxing interstate commerce. *Freeman,* 329 U.S. at 253. Although this premise was founded upon Chief Justice Marshall's view of the destructive power of state taxation in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 1819), the *Complete Auto* decision evinces a recognition that the Supreme Court is capable of checking that destructive power short of absolutely prohibiting it.

Justice Holmes in a famous dissent in Panhandle Oil Co. v. Knox, 277 U.S. 218 (1928), foreshadowed the result in *Complete Auto* when he declared:

> It seems to me that the State Court was right [in upholding a Mississippi tax on the privilege of engaging in interstate commerce in the state]. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits.

Id. at 233.

[102] *McCulloch,* 17 U.S. (4 Wheat.) 316, 431 (1819).

[103] *See Constitutional Federalism, supra* note 12, at 780-81.

[104] 426 U.S. 833 (1976).

National League of Cities struck down an amendment to the Fair Labor Standards Act which would have regulated the wages and hours of almost all state and municipal employees.[105] The Court stated that the federal government must not be permitted through the active exercise of federal commerce regulations to displace "the states' freedom to structure integral operation in areas of traditional governmental functions."[106]. *National League of Cities* indicates that the Court will test the validity of a federal regulation found to interfere with traditional state governmental functions by balancing the importance of the federal interest which the regulation promotes against the nature and degree of impact which it has upon the states' interests.[107]

Although the *Complete Auto* Court was concerned with the limits of state power under the commerce clause and *National League of Cities* concerned the limits of federal power under that same clause, the balancing approach suggested in *Complete Auto* appears to be consistent with the general tenets of federalism enunciated in *National League of Cities.*[108] This consistency is apparent in *Complete Auto* since the *Complete Auto* Court, while recognizing the states' right to tax the privilege of doing interstate business, does not ignore the interests of the federal government in protecting interstate commerce. Rather, the Court places restraints upon the states' power to tax the privilege of doing interstate commerce in the form of the four-part test which limits the ability of the states to disrupt excessively the smooth flow of national commerce.[109] This test, which is based upon economic realities rather than upon formal or semantic precepts, permits the Court to examine the actual economic effects of any tax that is being challenged and should allow the Court, as the final arbiter, to continue to hold the balance between the interests of the state and Federal governments.[110]

The *Complete Auto* Court, by replacing the per se rule against state privilege taxes on interstate commerce with a balancing approach, has

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[105] *Id.* at 836.

[106] *Id.* at 852. In striking down the amendments, the Court declared that the federal government cannot overreach the bounds of federalism by employing the commerce clause to "devour the essentials of state sovereignty." *Id.* at 855, *quoting* Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting). More specifically, the Court stated that Congress is not permitted to abrogate the states' power over " 'functions essential to the separate and independent existence of the states.' " 426 U.S. at 845, *quoting* Coyle v. Oklahoma, 221 U.S. 559, 580 (1911).

[107] *See National League of Cities,* 426 U.S. at 856 (Blackmun, J., concurring); *id.* at 872 (Brennan, J., dissenting). *See also Constitutional Federalism, supra* note 12, at 778-82.

[108] *See also* Younger v. Harris, 401 U.S. 37 (1971), wherein the Court stated:

> What the concept [of Federalism] does present is sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states.

Id. at 44.

[109] See text at notes 55-90 *supra.*

[110] One of the salutary effects of the *Complete Auto* decision should be that interstate commerce now will not enjoy any special tax immunity which would make local industry suffer a competitive disadvantage. *See* International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349 (1944) where the Court recognized the necessity of equal tax treatment for local and interstate businesses.

taken the step of establishing a new conceptual framework for its decisions on state taxation of interstate commerce. The *Complete Auto* Court has explicitly overruled the doctrine of the *Spector* case in a unanimous decision,[111] thereby implicitly rejecting the absolute immunity philosophy.[112] The historical tension between the constitutional theory that interstate commerce enjoys an absolute immunity from state taxation and the practical policy that interstate businesses should bear their just share of the tax burden now has been resolved fully by the elimination of the privilege tax immunity—the last vestige of the original absolute immunity theory. As a result the Supreme Court will no longer have to reconcile any state tax which reaches revenues from interstate commerce with the doctrine that the commerce clause requires an absolute immunity of interstate commerce from state taxation. For these reasons the *Complete Auto* decision stands on a firmer conceptual basis than previous cases such as *Western Live Stock* in which the Court had given effect to the power of a state to tax interstate commerce. The consistency of this new conceptual framework established in *Complete Auto* with the Court's historical approach toward commerce clause limitations on state regulatory statutes[113] and with the Court's recent pronouncements on constitutional federalism[114] indicates that the Court should not deviate from these concepts in the foreseeable future.

CONCLUSION

In holding that a state may tax the privilege of engaging in interstate commerce the Court in *Complete Auto* has abandoned the archaic per se approach to the assessment of such taxes and has replaced that approach with a pragmatic four-part test. By repudiating eroded constitutional dogma concerning the immunity of interstate commerce from state taxation the Court has clarified its position with respect to all state taxes on interstate business. The Court's approach to such state taxes is now consistent with the traditional balancing approach to state regulation of interstate commerce. In sum, *Complete Auto* should result in greater predictability, more forthright reasoning and a de-emphasis of restrictive formalistic rules as a controlling factor in the Court's decisions on the propriety of state taxing statutes affecting interstate commerce. In future challenges to such statutes, the Court should evaluate the practical effects of the tax in order to maintain the delicate balance between competing national and state interests in a way that comports with the Court's current perception of constitutional federalism.

BRANDON F. WHITE

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[111] *Complete Auto*, 430 U.S. at 288-89.
[112] *Id.* at 288 n.15.
[113] See text at notes 93-103 *supra*.
[114] See text at notes 104-107 *supra*.