

NOTES

COMMERCE CLAUSE RESTRAINTS ON STATE TAXATION OF ENERGY RESOURCES: A SUGGESTED FRAMEWORK FOR ANALYSIS

I. INTRODUCTION

Since the 1973 OPEC oil boycott, the nation has felt the pervasive effects of higher energy costs. The cost of energy has a dramatic impact on industry, the economy, and individuals' purchasing power.¹ When industry, legislatures, or foreign governments make a decision altering the cost of an energy resource, the nation is directly affected. As the price of energy surges upward, energy expenditures require a larger relative percentage of income.² Energy-rich states are increasing the cost of energy by levying taxes on production of their energy resources, even when produced predominantly for customers outside the taxing states.³ Consumers and utilities have recently challenged several of these state energy taxes on constitutional grounds.⁴ Because of the increased significance of energy resources, the manner in which the courts analyze and resolve these tax challenges is of paramount importance for the nation.

1. See U.S. DEP'T OF ENERGY, NATIONAL ENERGY PLAN II at 1-3, 16-19 (May 1979) [hereinafter cited as NEP II]; Serot, *The Energy Crisis and the U.S. Economy, 1973-1975*, in HOW ENERGY AFFECTS THE ECONOMY 7-20 (A. Askin ed. 1978). See generally J. DARMSTADTER, J. DUNKERLEY & J. ALTERMAN, HOW INDUSTRIAL SOCIETIES USE ENERGY: A COMPARATIVE ANALYSIS (1977); J. DUNKERLEY, TRENDS IN ENERGY USE IN INDUSTRIAL SOCIETIES: AN OVERVIEW (1980).

2. This statement presumes that demand for energy, regardless of the type, is fairly inelastic, at least in the short run. For a more thorough discussion of this matter, see notes 126-52 *infra* and accompanying text.

3. For a chart showing state severance taxes on coal, see Gillis, *A Tale of Two Minerals: Severance Taxes on Energy Resources in the United States*, in GROWTH AND CHANGE 60 (January 1979). For a chart showing state severance taxes on uranium, see *id.* at 62. For data showing coal's distribution in the United States, see U.S. DEP'T OF ENERGY, ENERGY DATA REPORT: BITUMINOUS AND SUBBITUMINOUS COAL AND LIGNITE DISTRIBUTION, CALENDAR YEAR 1979 (1980).

4. See, e.g., *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946 (1981) (plaintiffs unsuccessfully challenged Montana's severance tax on coal); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Maryland and other states successfully challenged Louisiana's tax on natural gas on commerce clause and supremacy clause grounds).

Commonwealth Edison Co. v. Montana,⁵ a recent challenge to a state energy tax, demonstrates the conflict between state and federal interests in such disputes. In *Commonwealth Edison* the plaintiffs challenged the constitutionality of Montana's Coal Severance Tax,⁶ which levied a charge on coal of up to thirty percent of the coal's contract value.⁷ Producers shipped as much as ninety percent of Montana's coal, more expensive because of the severance tax,⁸ to other states.⁹ Montana

5. 101 S. Ct. 2946 (1981).

6. See MONT. REV. CODES ANN. §§ 15-35-101 to -111 (Supp. 1981). The state imposed a severance tax on each ton of coal produced according to the following schedule:

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

Id. at 15-35-103.

7. More specifically, the value of the coal is determined by the "contract sales price." MONT. REV. CODES ANN. § 15-35-103 (Supp. 1981). At least 50% of the revenues generated by the tax were, since January 1, 1980, paid into a permanent trust fund for use of future Montana citizens. MONT. CONST. art. IX, § 5.

8. One commentator defined a severance tax as "a levy assessed at flat or graduated rates by a government on the privilege, process, or act of commercially severing or extracting natural resources from the soil or water, and measured by the physical amount or the gross or net value of the natural resources produced or sold." Lockner, *The Economic Effect of the Severance Tax on Decisions of the Mining Firm*, 4 NAT. RESOURCES J. 468, 469 (1965). In light of this definition, this Note uses the terms "severance tax" broadly to include production taxes, occupation taxes, gross (or net) receipts taxes and ad valorem property taxes measured by the gross (or net) value of the minerals produced. See H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 203, 352, 416 (4th ed. 1976).

9. See 101 S. Ct. at 2954. Montana coal is in high demand because The National Energy Plan II and several related federal acts expressly encourage the use of coal, especially the low-sulphur (and thus less polluting) coal found in the Northwest. See, e.g., Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, § 102(a)(2), 92 Stat. 3298; NEP II, *supra* note 1, at 9, 100-03. For a general summary of the relevant Congressional actions, see U.S. DEP'T OF ENERGY, THE NATIONAL ENERGY ACT (1978) (reference information from the Department of Energy Office of Public Affairs). Montana and Wyoming control 68% of the nation's low-sulphur coal reserves. See *Proposed Amendments to the Powerplant and Industrial Fuel Use Act of 1978: Hearings on H.R. 6625, H.R. 6654, and H.R. 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 274-75 (1980)* (Statement of Irwin M. Stelzer) [hereinafter cited as *Hearings*]. "Together with Wyoming, Montana supplied

asserted that the tax was justifiable on several grounds. First, the state asserted that funding was necessary to finance governmental involvement in the areas impacted by the coal mining industry. Second, Montana claimed that revenue was needed to prepare for economic depression in the mining area once the mining ceased.¹⁰ The plaintiffs contended, *inter alia*,¹¹ that because nonresidents shouldered the burden of the tax's disproportionately high rate, the tax violated the commerce clause¹² of the United States Constitution. The trial court¹³ dismissed the complaint before trial on the merits and held as a matter of law that the coal severance tax did not violate the commerce clause. The Montana Supreme Court affirmed the lower court decision.¹⁴ The United States Supreme Court, in a split decision,¹⁵ ruled that Mon-

10% of the United States' demand for coal in 1977; it is estimated that Montana and Wyoming will supply 33% of the Nation's coal by 1990." 101 S. Ct. at 2965 n.2 (Blackmun, J., dissenting) (citing *Hearings, supra*, at 22 (statement of Rep. Bruce F. Vento)).

10. Montana provided several other justifications for the tax. See *Hearings, supra* note 9, at 232-33 (reprinting prepared statement of Mont. State Senator Thomas E. Towe, Chief Sponsor of Montana Coal Tax Law); Towe, *Memorandum: Explanation of Reasons for Montana's Coal Tax* 2-3 (date not ascertainable) (on file with the *Washington University Law Quarterly*). For an explanation of the tax's purposes, see Brief Amicus Curiae of the North Dakota State Tax Commissioner at 3, *Commonwealth Edison Co. v. Montana*, ___ Mont. ___, 615 P.2d 847 (1980). One student commentator explained Montana's justifications as follows:

Montana justifies its severance tax on three grounds. First, Montana contends that it may share in the profits from resources leaving the State. Fearing exploitation of its mineral resources and seeking financial security, Montana has opted for short-term monetary benefits. Second, although artificially high coal prices will decrease production in the short term and may inhibit contracting and decrease total tax revenues over the long term, the unmined coal will be preserved as a source of revenue for future generations. Third, the severance tax ensures that Montana will not be destroyed in the coal rush. As utility companies shun the highly taxed Montana coal, the ecological balance of the State and the lifestyle of its citizenry should be preserved.

Note, *The Increasing Conflict Between State Coal Severance Taxation and Federal Energy Policy*, 54 TEX. L. REV. 675, 676-77 (1979).

11. Plaintiffs made several supremacy clause claims. See Reply Brief of Plaintiffs-Appellants at 20-27, 101 S. Ct. 2946 (1981); Jurisdictional Statement at 22-26, 101 S. Ct. 2946 (1981); Brief Amicus Curiae of the State of Texas in Support of Jurisdictional Statement at 1-7, 101 S. Ct. 2946 (1981); Brief of Plaintiffs-Appellants at 57-89, *Commonwealth Edison Co. v. Montana*, ___ Mont. ___, 615 P.2d 847 (1980).

12. "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" U.S. CONST. art. I, § 8, cl. 3.

The commerce clause is a means to engender national economic unity by prohibiting states from conducting reprisals against other states. Further, it promotes federal uniformity. See *Smith v. Turner*, 48 U.S. (7 How.) 283, 394 (1849); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 481-94 (1941).

13. *Commonwealth Edison Co. v. Montana*, No. 42657 (Mont. 1st Jud. Dist. July 27, 1979).

14. *Commonwealth Edison Co. v. Montana*, ___ Mont. at ___, 615 P.2d at 848-58.

15. 101 S. Ct. 2946 (1981). Justice Marshall wrote for the majority and Justice White con-

tana's tax did not offend the commerce clause.¹⁶

Part II of this Note sets out the analytical framework established by the judiciary for determining the constitutionality of state taxes challenged on commerce clause grounds.¹⁷ Part III discusses and analyzes the *Commonwealth Edison* decision. In Part IV, this Note suggests that, in light of the critical role energy now plays in society, courts should modify their approach to commerce clause challenges of state energy taxes. Part V focuses on alternative methods for regulation of state exploitation of the nation's energy predicament.

II. THE COMMERCE CLAUSE FRAMEWORK

A. *The Relationship Between State Tax Case Analysis and State Regulation Case Analysis*

Whether in the form of regulations or taxes, state legislative actions that affect interstate commerce are subject to the commerce clause.¹⁸

curred separately, *id.* at 2964 (White, J., concurring), in the majority's result. Justice Blackmun dissented, joined by Justices Powell and Stevens. *Id.* (Blackmun, J., dissenting).

16. *Id.* at 2952, 2960.

17. The scope of this Note is limited to commerce clause issues. The constitutional issues involved in state energy tax challenges, however, are numerous. *See generally* C. DUMARS & L. BROWN, *LEGAL ISSUES IN STATE TAXATION OF ENERGY DEVELOPMENT* 1 (1979); Van Baalen, *Mineral Export Legislation—Can It Withstand Preemption and Commerce Clause Challenges?*, 12 *LAND & WATER L. REV.* 131 (1977); Note, *The Effect and Validity of State Taxation of Energy Resources*, 58 *WASH. U.L.Q.* 345 (1980); Comment, *Constitutional Limitations on State Severance Taxes*, 20 *NAT. RESOURCES J.* 887 (1980).

18. *See* 101 S. Ct. 2946 (1981) (Montana's severance tax on coal affects interstate commerce); *McClain v. Real Estate Bd. of New Orleans*, 442 U.S. 232 (1980) (real estate sales within a state affect commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (federal civil rights regulations apply to hotels because racial discrimination affected interstate travel of black persons); *Howell Chevrolet Co. v. NLRB*, 346 U.S. 482 (1953) (employment relationships in single state enterprises arguably affect commerce); *North Am. Co. v. SEC*, 327 U.S. 686 (1946) (federal securities laws can apply to intrastate activities that affect commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal wheat marketing scheme imposing requirements on intrastate farmers upheld because total supply of wheat affects market price); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (manufacturing affects commerce). *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 236-37 (1978); note 87 *infra* and accompanying text.

Although many of these cases concern the positive power of Congress to reach intrastate activities under the commerce clause, the cases involving the negative implications of the commerce clause power to restrict state activity rest on the same doctrine. The commerce clause has equal power in both its positive and negative aspects. *See, e.g.*, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38-39 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978). "[T]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

The judiciary's analytical approach to resolution of commerce clause challenges to state regulations and taxes has evolved significantly during the past one hundred and fifty years.¹⁹ The doctrinal basis of judi-

19. In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), Chief Justice Marshall declared that the commerce clause impliedly prohibits all state taxation of interstate commerce. *Id.* at 448-49. Marshall relied on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in reaching his decision. 25 U.S. (12 Wheat.) at 449. The prevailing view after the 1827 *Brown* decision was that the commerce clause vested the federal government with the exclusive power to regulate interstate commerce. This exclusive federal power to regulate interstate commerce did not, however, prevent states from exercising their police power over local matters such as safety, health and morality. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); P. HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* 23 (1953). Courts distinguished between permissible state police power enactments that affected commerce and impermissible state regulations on interstate commerce. See *id.* at 23. Under this view, activities involved in interstate commerce were immune from state taxation. See J. HELLERSTEIN & W. HELLERSTEIN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 239-41 (4th ed. 1978). For a discussion of the early tax cases, see *Brown*, *State Taxation of Interstate Commerce, and Federal and State Taxation in Inter-governmental Relations 1930-32*, 81 U. PA. L. REV. 247 (1933); Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (Pts. II, III), 31 HARV. L. REV. 572, 721 (1918).

Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), was the next case to affect significantly commerce clause doctrine. In *Cooley* the United States Supreme Court established a long-followed principle regarding the division of power of federal and state regulation of interstate commerce. The *Cooley* Court divided the possible subjects of regulation into two classes: 1) subjects national in character, which required uniform rules of regulation and were exclusively under Congress' power; and 2) subjects local in character, which required diversity of regulation and were concurrently under the power of the states and the federal government. 53 U.S. (12 How.) at 319. See P. HARTMAN, *supra*, at 24-25. The Court first applied the *Cooley* doctrine to a tax situation in 1867 in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 42 (1867). The *Crandall* Court struck down a state tax levied on railroad and stagecoach companies' passengers, reasoning that the tax fell on interstate commerce. *Id.* at 44-49. The Court also applied the *Cooley* doctrine to strike down taxes in *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887), and *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885).

From the 1880s to the 1930s the framework for analyzing commerce clause challenges evolved into two unclear lines of cases from *Cooley's* distinction between exclusive and concurrent power. The Court, relying either implicitly or explicitly on the *Cooley* doctrine, consistently immunized interstate commerce from state taxation because the power of Congress over taxation was exclusive. See *Minnesota v. Blasius*, 290 U.S. 1, 9 (1933); *Helson and Randolph v. Kentucky*, 279 U.S. 245, 252 (1929); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 562 (1925); *Kansas City, F. S. & M. Ry. v. Botkin*, 240 U.S. 227, 231 (1916); *Stockard v. Morgan*, 185 U.S. 27, 37 (1902); *Brennan v. Titusville*, 153 U.S. 289, 308 (1894); *Crutcher v. Kentucky*, 141 U.S. 47, 58-59 (1891); *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 497 (1887). The Court also looked to the *Cooley* distinction when resolving challenges to state regulations. Courts invalidated regulations imposed on subjects national in character, but validated those on subjects local in character. See, e.g., *California v. Thompson*, 313 U.S. 109, 113 (1941); *Minnesota Rate Cases*, 230 U.S. 352, 399-400 (1913); *Leisy v. Hardin*, 135 U.S. 100, 108-09 (1890). The *Cooley* concurrent power doctrine thus applied to regulatory measures while the exclusive power doctrine applied to tax measures. This dual standard allowed states to restrict commerce more by regulation under the police power than by the taxing power. See P. HARTMAN, *supra*, at 31. For a more thorough explanation of these matters, see *id.* at 23-31.

cial analysis in state tax challenges originated in cases challenging state regulations.²⁰ Despite this similarity of origin, the analytical framework for determining the constitutionality of state taxes developed separately from the framework for state regulation challenges. Two distinct but related lines of cases developed: state tax cases²¹ and state regulation cases.²² The ultimate question in both lines of cases is

20. See note 19 *supra*.

21. See notes 26-85 *infra* and accompanying text.

22. Courts resolving commerce clause challenges of state regulations look to whether the regulation discriminates against interstate commerce or unduly burdens interstate commerce. A state may not single out nonresidents and place them at a disadvantage to residents solely because of nonresident status. Facial discrimination is a ground for automatic invalidation. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), a New Jersey statute prohibited importation of garbage for disposal. *Id.* at 618-19. The Supreme Court invalidated the state regulation without determining New Jersey's ultimate purpose in enacting the statute. *Id.* at 626-27. When a state's legislative objectives are credibly advanced and no patent discrimination against interstate commerce exists, the Court applies a more flexible balancing test:

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 interstate activities.

Id. at 624 (citations omitted).

In contrast to facial discrimination, underlying discrimination is a more difficult issue to resolve. For cases discussing the discrimination issue, see *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Great Atl. & Pac. Tea Co. v. Cottrell*, 425 U.S. 366 (1976); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

If a regulation creates an undue burden on interstate commerce, a court may invalidate it. For cases discussing burdens on interstate commerce, see *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). A burden, however, does not necessarily constitute a constitutional infirmity. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); Van Baalen, *supra* note 17, at 144 (citing Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 451 (1951)). If a court does find a burden, then it must ask whether there is an undue, and thus impermissible, burden on interstate commerce. See Van Baalen, *supra* note 17, at 169.

A state may justify a burdensome state regulation if the action protects a legitimate state interest. See *Parker v. Brown*, 317 U.S. 341 (1943); *Milk Control Bd. v. Eisenberg Farm Prod.*, 306 U.S. 346 (1939); G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 343-44 (9th ed. 1975); Van Baalen, *supra* note 17, at 144-45. Whether a state imposed burden on interstate commerce is justified by a legitimate state interest is determined by balancing the federal and state interests involved. The judiciary has the task of balancing the competing interests to determine the constitutionality of the state regulation. See L. TRIBE, *supra* note 18, at 340 & n.2; Van Baalen, *supra* note 17, at 161; Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1774 n.72 (1974).

One significant factor a court must consider is the state's purpose for its exercise of power. If the purpose of the regulation is improper, then the court will strike down the regulation as repug-

whether the challenged state action discriminates against or unduly burdens interstate commerce.²³ Consequently, the two lines of cases overlap.²⁴ Courts faced with a decision concerning one line of cases, therefore, often relied on precedent from the other.²⁵

B. *The State Tax Line of Cases*

The analytical framework for state tax challenges differs subtly from that used in state regulation analysis. Despite the similarity of the general issues raised in the two types of cases, courts resolve state tax challenges by relying predominantly on state tax cases.²⁶

1. *The Changing Interpretations of the States' Power to Tax Interstate Commerce*

The Supreme Court's approach to commerce clause challenges of

nant to the commerce clause. Courts grant great weight to regulations purporting a legitimate state interest. See *L. TRIBE, supra* note 18, at 340-42. Promoting or protecting the interests of health, safety or the environment have the most weight, usually tipping the balance toward upholding the regulation. See *Van Baalen, supra* note 17, at 155-69; Note, *supra*, at 1773. Courts recognize promotion of the economic interests of the state as a legitimate state interest. Economic interests, however, do not have as much weight as other legitimate state interests. See *L. TRIBE, supra*, at 340 & n.2; *Van Baalen, supra* note 17, at 161; Note, *supra*, at 1774 n.72.

Finding a legitimate state interest underlying a regulation does not necessarily end the inquiry into the state's purpose. Often a regulation may have both a legitimate purpose and an illegitimate or improper purpose. The law is unclear as to what the courts should do upon finding a regulation with both a legitimate and illegitimate purpose. When the challenger of a tax can demonstrate a less burdensome alternative for achieving the state's goal, a reasonable approach for the court is to factor the knowledge of the existence of a less burdensome alternative into the balancing process.

23. Compare *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 276-81 (1978) (burden issue in a state tax case) and *id.* at 277 n.12 (discrimination issue in a state tax case) with *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (burden issue in a state regulation case) and *id.* (discrimination issue in state regulation case). See generally *Van Baalen, supra* note 17, at 145.

24. The cases also overlap because taxes can operate as regulations. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 365 (1819); *National Carriers' Conference Comm. v. Hefferman*, 454 F. Supp. 914, 917 (D. Conn. 1978). The general commerce clause framework for analyzing state regulations sheds light on the more specific framework developed in the state tax line of cases.

25. The following regulation challenges cite state tax cases: *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The following tax challenges cite state regulation cases: *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977); *Evansville Airport v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64 (1963); *Nippert v. Richmond*, 327 U.S. 416 (1946).

26. See notes 27-85 *infra* and accompanying text.

state taxes has shifted numerous times, spawning much confusion.²⁷ For over a hundred years the Court interpreted the commerce clause as immunizing interstate activities from state taxation.²⁸ The Court reaffirmed taxation immunity for activities involved in interstate commerce as late as 1946 in *Freeman v. Hewit*.²⁹ In *Freeman* Justice Frankfurter explained that a state may not exercise its power in a manner that impedes the free flow of trade between states.³⁰ Justice Frankfurter stated that this proscription applies regardless of whether the state subjects local commerce to the same encumbrance.³¹ He concluded that the

27. "[The Supreme] Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. As was said in *Miller Bros. Co. v. Maryland*, 347, U.S. 340, 344 (1954), the decisions have been 'not always clear . . . consistent or reconcilable.'" *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959).

28. The immunity concept began with *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), and ended with *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). See notes 19-20 *supra* and accompanying text; notes 35-44 *infra* and accompanying text. The extent of the immunity varied significantly during this period. *Brown* declared that all state taxation of interstate activity was impermissible. As states began needing more revenue, the Court discarded the rigid, formalistic approach that disallowed state taxation of interstate commerce and instead adopted the direct-indirect test for determining the constitutionality of a particular state tax. See Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?*, 4 VAND. L. REV. 496, 497-506 (1951); Comment, *State Taxation of Interstate Business: A More Liberal Trend*, 35 U. LA. L. REV. 304, 306 (1975). See generally P. HARTMAN, *supra* note 19, at 28-33. The direct-indirect approach permitted state taxes indirectly affecting or burdening interstate commerce but invalidated state taxes directly imposing a burden on interstate commerce. See *id.* at 28-29. Compare *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888) (invalidating a state tax imposed directly on interstate commerce) with *Postal Tel-Cable Co. v. City of Richmond*, 249 U.S. 252, 261 (1919) (validating a local tax on an intrastate aspect of a company doing both interstate and intrastate business). In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the force of the immunity doctrine decreased significantly because the Court permitted a fairly apportioned tax on interstate commerce to stand. The Court, however, shifted back to the direct-indirect test in *Freeman v. Hewit*, 329 U.S. 249 (1946). See notes 29-33 *infra* and accompanying text. For further discussion of the early development of state tax analysis under the commerce clause, see P. HARTMAN, *supra* note 19, at 21-48; Comment, *State Taxation of Interstate Business: An End To The Privilege Tax Immunity*, 29 U. FLA. L. REV. 752, 753-54 (1977).

29. 329 U.S. 249 (1946).

30. *Id.* at 252.

31. *Id.* at 254. One commentator wrote as follows:

The infirmity of the tax, according to *Freeman*, was simply the "direct" bearing and "incidence" of the tax on interstate commerce alone *Freeman* resurrected the judicially declared doctrine that the commerce clause "created an area of trade free from interference by the States," and that it "is immaterial that local commerce is subjected to a similar encumbrance."

P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 78 (1981) (footnotes omitted).

commerce clause prohibits a direct tax on interstate commerce.³² Under this approach, states could tax activities indirectly involved in interstate commerce, but could not tax activities directly involved in interstate commerce.³³

Analysis shows that the formalistic direct-indirect distinction is unsatisfactory as a means to determine which activities a state may tax. Assume two corporations engaging in the same line of business compete even though one may be involved strictly in intrastate commerce while the other is directly involved in interstate commerce. The *Freeman* direct-indirect approach prevents the state from taxing the interstate business. Thus local business, forced to shoulder an additional tax burden, competes at a disadvantage relative to its tax-immune competitor.³⁴

In contrast to the direct-indirect test, the Court has also supported the proposition that interstate commerce must pay its way.³⁵ Under this approach, the state may tax interstate commerce if the tax is levied on activities transacted within the taxing state.³⁶ Adhering to this view, the Supreme Court in *Northwestern States Portland Cement Co. v. Minnesota*³⁷ significantly reduced the tax-immune status of interstate commerce.³⁸ The *Northwestern* Court upheld a state net income tax that was properly apportioned³⁹ to the local activities of a foreign corpora-

32. 329 U.S. at 256-57.

33. See generally P. HARTMAN, *supra* note 31, at 76-81.

34. See P. HARTMAN, *supra* note 19, at 33.

35. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *New Jersey Bell Tel. Co. v. State Bd. of Taxes*, 280 U.S. 338, 351 (1930) (Holmes, J., dissenting); *Di Santo v. Pennsylvania*, 273 U.S. 34, 43 (1927) (Stone, J., dissenting). Although these cases were decided before *Freeman*, they are cited merely to contrast differing approaches to commerce clause interpretations. These differing approaches shifted with various Courts. See P. HARTMAN, *supra* note 19, at 41-48.

36. Justice Stone explained: "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938), *quoted in* P. HARTMAN, *supra* note 31, at 66.

37. 358 U.S. 450 (1959).

38. See J. HELLERSTEIN & W. HELLERSTEIN, *supra* note 19, at 246-49.

39. Apportionment refers to the method in which states divide a multi-state business' tax base by formula. See *id.* at 397 n.9. For discussion of apportionment, see Conlon, *The Apportionment of Multi-State Business Income: The NCCUSL Division of Income Act*, 12 TAX EXECUTIVE 220 (1960); Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of the Unitary Business*, 21 NAT'L TAX J. 487 (1968); Silverstein, *Problems of Apportionment in Taxation of Multistate Business*, 4 TAX L. REV. 207 (1949).

tion engaged in interstate commerce.⁴⁰ After *Northwestern*, interstate activity was no longer immune from state taxation merely because of involvement in interstate commerce. Permitting apportioned taxes on interstate businesses destroyed the citadel of tax immunity for interstate businesses.⁴¹

The *Northwestern* Court, while upholding a net income tax on interstate commerce, also reaffirmed an earlier decision that prohibited a state from levying a tax on the privilege of engaging in interstate commerce.⁴² Although the *Northwestern* decision indicated that interstate commerce was clearly taxable in some situations, exactly what aspects of interstate commerce were taxable was left unresolved.⁴³ After *Northwestern*, the constitutionality of such taxes often depended on tenuous distinctions, such as the label the state attached to the tax. If the legislative draftsmen gave a proper label to the tax, then the state could levy on the interstate activity.⁴⁴

In *Spector Motor Service, Inc. v. O'Connor*⁴⁵ the Supreme Court heard a challenge to a state tax on the privilege of doing business in the taxing state.⁴⁶ Connecticut measured the tax by the net income allo-

40. 358 U.S. at 452. Before validating the tax, the Court required the state to show that the tax was nondiscriminatory and that a nexus between the taxed activity and the taxing state existed.

41. See Comment, *State Taxation of Interstate Business: An End To The Privilege Tax Immunity*, *supra* note 28, at 755-56. As courts made interstate business pay its own way, apportionment "became one of the keys to validation of State taxes." J. HELLERSTEIN & W. HELLERSTEIN, *supra* note 19, at 243.

42. 358 U.S. at 458. The *Northwestern* Court reaffirmed *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951). See notes 45-58 *infra* and accompanying text.

43. See Hellerstein, *State Taxation And The Supreme Court: Toward A More Unified Approach To Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1442-43 (1977); Hellerstein, *State Taxation Under The Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335, 338 (1976).

44. In *Colonial Pipeline, Inc. v. Triangle*, 421 U.S. 100 (1975), the Court upheld a state tax on the privilege of doing business in corporate form. The Court distinguished this tax from the forbidden levy on the privilege of doing business which had previously been disallowed by a Louisiana State court. *Colonial Pipeline Co. v. Mouton*, 228 So. 2d 718 (La. Ct. App. 1969). The United States Supreme Court permitted the Louisiana legislature, by changing a few words in the statute, to levy the tax on the privilege of doing business in corporate form. Dissatisfied with the Court's distinction between doing business and doing business in corporate form, Justice Blackmun described the Court's analysis as "taxation by semantics." *Id.* at 115 (Blackmun, J., concurring). See notes 122-25 *infra* and accompanying text.

45. 340 U.S. 602 (1951).

46. The state imposed the tax on the privilege of doing business within the state. 340 U.S. at 603. Connecticut attempted to tax a trucking corporation engaged exclusively in interstate commerce. *Id.* The statute and amendments in question are CONN. GEN. STAT. § 418c (Cum. Supp. 1935), CONN. GEN. STAT. § 354e (Cum. Supp. 1939), and CONN. GEN. STAT. §§ 1896-1921 (1949).

cated to the state, a method very similar to that used in *Northwestern*.⁴⁷ The *Spector* Court, however, held that the commerce clause precludes states from taxing the privilege of engaging in an exclusively interstate business, even if the tax is fairly apportioned.⁴⁸ The distinction engendered in *Spector* is best demonstrated by the 1954 case of *Railway Express Agency, Inc. v. Virginia*⁴⁹ (*Railway I*) and the 1959 case of *Railway Express Agency, Inc. v. Virginia (Railway II)*.⁵⁰ Plaintiffs in *Railway I* challenged a Virginia annual license tax upon gross receipts⁵¹ earned in the state by an interstate business. The Court struck down the tax, which was expressly levied on the privilege of doing business in the state.⁵² The Virginia legislature then redrafted the statute, eliminating the word privilege, but in all other respects retaining the same taxing measure.⁵³ In *Railway II* the United States Supreme Court, asserting that legislative draftsmanship can determine constitutionality,⁵⁴ upheld the reworded statute even though its practical effect was the same as the tax in *Railway I*.⁵⁵ The Supreme Court finally rejected this line of reasoning in *Complete Auto Transit, Inc. v. Brady*⁵⁶ by overruling

47. *Northwestern* involved a Minnesota tax levied "on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing State when those activities are exclusively in furtherance of interstate commerce." 358 U.S. at 452.

48. 340 U.S. at 609. "The constitutional infirmity of [a state tax upon the privilege of carrying on a business exclusively interstate in character] persists no matter how fairly it is apportioned to business done within the state." *Id.* (citations omitted).

49. 347 U.S. 359 (1954).

50. 358 U.S. 434 (1959).

51. A gross receipts tax, in contrast to a tax on the net earnings of a business, is levied on the entire earnings of a business without any deductions. *Accord*, BALLENTINE'S LAW DICTIONARY 537 (3d ed. 1969).

52. 347 U.S. at 369. The Court stated: "[T]he fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue . . ." The Court then noted that gross receipts are not a sound measure of a business' true profits. *Id.* at 367.

53. See Comment, *State Taxation of Interstate Business: An End to the Privilege Tax Immunity*, *supra* note 28, at 755 n.43. Compare VA. CODE §§ 58-546 to -547 (1950) with 1956 Va. Acts ch. 612 (codified in VA. CODE §§ 58-546 to -555) (*repealed* 1972).

54. "One must comprehend . . . the difference between the use of magic words or labels validating an otherwise invalid tax and their use to disable an otherwise constitutional levy. The latter this Court has said may sometimes be done." 358 U.S. at 441 (citations omitted).

55. The tax in *Railway I* was a "privilege tax" based on gross receipts; the tax in *Railway II*, which the Court upheld, was a "franchise tax" based on gross receipts. The state applied both taxes to the same parties and measured both taxes by gross receipts. 358 U.S. at 435-36. See note 53 *supra*.

56. 430 U.S. 274 (1977).

Spector.⁵⁷ The *Complete Auto* Court, describing *Spector* as merely a trap for the unwary draftsman, emphasized that courts must analyze the economic realities of a tax's practical effect in order to determine its constitutionality.⁵⁸

2. *The Complete Auto Framework*

Complete Auto set down a four-part test that a state tax must satisfy to withstand a commerce clause challenge.⁵⁹ The *Complete Auto* Court, in a unanimous decision, explained that a state tax does not offend the commerce clause if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to services provided by the State."⁶⁰ State tax challenges subsequent to *Complete Auto* have followed and supported this four-step analysis.⁶¹

Courts and commentators have frequently addressed the first three of these four tests.⁶² Whether a business has a nexus with the taxing state is a due process question. A state cannot levy a tax on a business unless that business carries on some activity within the taxing state.⁶³ In addi-

57. *Id.* at 288-89.

58. *Id.* at 284-89. The Court explained:

There was no real economic difference between the statutes in *Railway I* and *Railway II*. The Court long since had recognized that interstate commerce may be made to pay its way. Yet under the *Spector* rule, the economic realities in *Railway I* became irrelevant. The *Spector* rule had come to operate only as a rule of draftsmanship, and served only to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause.

Id. at 284-85. Justice Blackmun, writing for the Court, concluded that "[t]here is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether a tax produces a forbidden effect." *Id.* at 288.

59. For discussion of *Complete Auto*, see Comment, *State Taxation of Interstate Business: An End to the Privilege Tax Immunity*, *supra* note 28; 19 B.C.L. REV. 312 (1978); 7 CAPITAL U.L. REV. 143 (1977); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 72-83 (1977).

60. 430 U.S. at 279.

61. *See, e.g.*, *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 227-28 (1980); *Mobile Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980).

62. *See* notes 63-67 *infra* and accompanying text.

63. Quite simply, "[t]he requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State . . ." *Mobile Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 436-37 (citing *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435, 444-45 (1940)). The due process clause of the fourteenth amendment requires that a state tax have a "minimal connection" or "nexus" with the interstate activities and the taxing state. *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. at 219-20. For a discussion of the nexus requirement, see 28 DEPAUL L. REV. 205, 211-16 (1978).

tion, a state must fairly apportion its tax. An apportionment formula estimates how much of a corporation's earnings are derived from doing business in the taxing state. The state thus taxes the percentage of a corporation's total income that results from doing business in that state.⁶⁴ A tax is fairly apportioned if the formula roughly approximates the amount of the taxpayer's business income that is properly attributable to the taxing state.⁶⁵ Under the discrimination part of the test, like the discrimination analysis found in the state regulation cases,⁶⁶ a state may not place nonresidents at a disadvantage in relation to residents merely because of nonresident status.⁶⁷ The fourth criterion—that a tax must bear a fair relation to the services provided—⁶⁸ has not received as much judicial attention as the other three prongs of the *Complete Auto* test.

3. *The Fairly Related Requirement*

Although interstate commerce must pay its own way, a state's levy must reasonably approximate the taxed activity's cost to the state.⁶⁹

64. A fairly apportioned tax has a rational relationship between the income attributed to the state and the intrastate values of the enterprise. See *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 217-20 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-73 (1978); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967). A state may not levy a tax that is "out of all appropriate proportion to the business transacted by the [taxed party] in that State." *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931). For further discussion of tax apportionment, see Cox, *The NCCUSL Uniform Apportionment Formula*, 42 TAXES 530 (1964); Goldstein, *Allocation of Income for Purposes of Corporate Taxation*, 1 TAX L. REV. 149 (1946); Hartman, *State Taxation of Corporate Income from a Multistate Business*, 13 VAND. L. REV. 21 (1959); Hellerstein, *supra* note 39.

65. See note 64 *supra*.

66. See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72-75 (1963); note 22 *supra* and accompanying text. In reaching its decision whether the tax discriminated against interstate commerce, the *Halliburton* Court relied on various state regulation cases. 373 U.S. at 72-75. The Supreme Court has recently invalidated a state tax on discrimination grounds. *Maryland v. Louisiana*, 451 U.S. 725, 753-60 (1981). In *Maryland* the Court explained that "[o]ne of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" 451 U.S. at 754 (citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)). See generally Hellerstein, *State Tax Discrimination Against Out-of-Staters*, 30 NAT'L TAX J. 113 (1977).

67. See note 66 *supra*.

68. See note 60 *supra* and accompanying text; notes 69-79 *infra* and accompanying text.

69. *Accord*, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978). See *Massachusetts v. United States*, 435 U.S. 444 (1978).

The tax, however, must not be a gross overreaching.⁷⁰ Analysis of a tax's relation to services is usually couched in due process terms.⁷¹ Courts typically separate due process and commerce clause issues in tax cases.⁷² Due process analysis focuses on the nexus requirement. Once the Supreme Court finds a nexus, the due process analysis is nearly completed. In recent cases, the Court has finished the due process analysis by resolving the "fairly related" question without critically examining the issue.⁷³

Prior to *Commonwealth Edison*, courts had clearly established that resolution of a fairly related issue necessitates a factual inquiry.⁷⁴ In

70. See *Norfolk & W. Ry. Co. v. Tax Comm'n*, 390 U.S. 317, 326 (1968); *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 151 (1936).

71. The due process clause requires that a taxpayer's "income attributed to the State for tax purposes . . . be rationally related to 'values connected with the taxing state.'" *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1980) (citing *Norfolk & W. Ry. Co. v. Tax Comm'n*, 390 U.S. 317, 325 (1968)). *Accord*, *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980) (citations omitted).

72. In *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980), for example, the Court analyzed the due process issues in section II of the opinion, *id.* at 219-27, and the commerce clause issues in section III of the opinion, *id.* at 227-30. *Cf.* *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-49 (due process discussed in section II of the Court's opinion while the commerce clause is discussed in section III). In contrast, Justice Marshall in *Commonwealth Edison* mixed these two constitutional concepts together. 101 S.Ct. at 2956-57.

73. In *Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the Court responded to the fairly related requirement with only the following: "The tax . . . is 'fairly related to the services provided by' California, services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society." *Id.* at 445. In a state tax challenge a year before *Japan Lines*, the Court stated that the challenger proved no facts suggesting that the tax was not fairly related to services and protection provided by this state. *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750-51 (1978). The Court's statement implied that a factual record is needed to determine the fairly related issue. Until *Commonwealth Edison*, Supreme Court decisions following *Complete Auto* had not critically analyzed the fairly related question because it was not at issue in those cases. In two recent cases the Supreme Court, for example, devoted less time to the fairly related question than it did in *Japan Lines*. See *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). *Exxon* merely deferred to *Japan Lines'* response to the matter. 447 U.S. at 228.

74. See *Evansville Airport v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (factual inquiry into use and service charge on airline passengers using the airport); *Capital Greyhound Lines v. Brice*, 339 U.S. 542 (1950) (factual inquiry into excessiveness of Maryland tax on all common carriers transporting passengers over Maryland roads); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) (factual inquiry into California fee on commercially caravanning cars into the state); *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72 (1939) (factual inquiry into the excessiveness of a Georgia maintenance tax on interstate commerce); *Ingels v. Morf*, 300 U.S. 290 (1937) (factual inquiry into California fee on commercially caravanning cars into the state).

In addition to highway and public facility taxes, courts have considered the amount of the tax in

Evansville Airport v. Delta Airlines, Inc.,⁷⁵ for example, the Supreme Court addressed the fairly related question in detail. The Court looked at a full factual record to determine the constitutionality of a state "user" tax levied on an airport's passengers.⁷⁶ After examining the facts, the Court held that the tax was a reasonable estimate of the public expenditure.⁷⁷

Recently, however, states have justified their taxes by asserting that the tax is for the privilege of doing business in a civilized society.⁷⁸ A state using this argument purports to tax for providing police and fire protection, the benefits of a trained workforce, and other advantages of a civilized society. Prior to *Commonwealth Edison*, the Supreme Court, treating the argument as talismanic, ended the fairly related inquiry once the state asserted the civilized society argument.⁷⁹

4. Complete Auto and Other State Tax Doctrine

Although *Complete Auto* synthesized miscellaneous state tax doctrines into a workable checklist, the four tests did not incorporate all

determining the constitutionality of certain capital stock franchise taxes. Professor Hartman has stated:

There are a few types of exactions where the Court has considered the *amount* of the tax as a factor in resolving the constitutional issue. In a number of capital stock franchise taxes, the amount of the tax has been a "material factor" in determining the constitutionality of the tax, both on commerce and due process clause grounds.

P. HARTMAN, *supra* note 31, at 31 (footnote omitted).

75. 405 U.S. 707 (1972).

76. *Id.* at 716-17. As the Court in *Evansville* stated:

Thus, while state or local tolls must reflect a 'uniform, fair and practical standard' relating to public expenditures, it is the *amount of the tax*, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of *use* or *privilege for use*, as was that before us in *Capital Greyhound*, [399 U.S. 542 (1950)] . . . it will pass constitutional muster

405 U.S. at 716-17 (emphasis added).

77. 405 U.S. at 720.

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 probably will be extended in future cases to the Court's evaluation of state taxes on the privilege of engaging in interstate commerce.

19 B.C.L. REV. 312, 324 (1978) (footnote omitted).

78. See note 73 *supra*.

79. See *id.* The *Commonwealth Edison* majority, although discussing the fairly related question in more depth than past cases, was nevertheless unduly influenced by talismanic labels. See notes 122-25 *infra* and accompanying text.

state tax doctrines relevant to determining constitutionality. The long-established multiple burden doctrine,⁸⁰ although a corollary of the *Complete Auto* apportionment requirement, is not specifically included in the *Complete Auto* tests.⁸¹ Under the multiple burden doctrine, a state tax is invalid if it subjects interstate commerce to multiple inconsistent taxes not borne by local commerce. Two cases decided after *Complete Auto* dealt extensively with the multiple burden doctrine.⁸²

The Supreme Court has subjected the field of state taxation to many different doctrinal approaches.⁸³ A significant and current Supreme Court trend is to look at the practical effect of a challenged state tax, rather than to determine constitutionality on the basis of the label a state may give to the tax.⁸⁴ In *Commonwealth Edison*, however, the

80. See J. HELLERSTEIN & W. HELLERSTEIN, *supra* note 19, at 242-44; P. HARTMAN, *supra* note 19, at 33-40. See also Barrett, *supra* note 28. The Hellersteins explained the multiple tax doctrine in their textbook:

[Justice Stone] swept away the traditional view that under the Commerce Clause "interstate commerce may not be taxed at all" and that the Commerce Clause created an area of trade free of State taxation. In its place, he erected the multiple taxation doctrine, under which interstate businesses were no longer immune from tax merely because the levy was imposed on interstate commerce or on the receipts from the commerce. Instead, such levies would be invalidated only if the Court thought that they subjected interstate commerce to a risk of multiple taxation not borne by local commerce.

J. HELLERSTEIN & W. HELLERSTEIN, *supra* note 19, at 243 (citations omitted). Multiple inconsistent taxation may cause unconstitutional multiple burdens on interstate commerce.

81. Although the multiple burden doctrine is related to the apportionment prong of the *Complete Auto* test, analysis of this doctrine is distinct from analysis used to ascertain the validity of apportionment formulae. See notes 64-65 and accompanying text. Compare *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 271-75 (1978) (apportionment formula discussion) with *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 228-29 (1980) (multiple burden doctrine discussion).

In addition, Professor Hartman has explained that in *Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the Court considered two additional constitutional matters after going through *Complete Auto*'s four steps. First, whether the state's tax, notwithstanding its apportionment, created a substantial risk of international tax multiplication, 441 U.S. at 446, 451, and, second, whether the tax prevented the federal government from "speaking with one voice when regulating commercial relations with foreign governments." *Id.* at 451. P. HARTMAN, *supra* note 31, at 96 (quoting 441 U.S. at 448, 451).

82. See *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. at 228-29; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 443-46. These two cases do not clarify exactly when the Supreme Court will apply the multiple burden doctrine in the future.

83. See notes 11 & 27-51 *supra* and accompanying text.

84. See *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) ("[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of a State's tax scheme"); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 227-28 (1980) (the Court is to examine the "practical effect" of a tax in determining constitutionality under the commerce clause); *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. at 750 (constitutionality of a state tax under the commerce clause "depends upon the practical effect of the exaction"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 281 (the Court has "moved toward a standard

Court retreated from this approach.⁸⁵

III. COMMONWEALTH EDISON

A. *The Majority's Approach*

After deciding that Montana's Coal Severance Tax⁸⁶ was subject to commerce clause scrutiny,⁸⁷ the *Commonwealth Edison* Court held that

of permissibility of state taxation based upon actual effect [of the tax] rather than its legal terminology").

85. Except for *Commonwealth Edison*, the Supreme Court, by overruling several cases recently, has manifested its willingness to scrutinize the practical effect of a tax. See *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. at 750 (overruling *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937)); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-89 (1977) (overruling *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951)); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 279 (1976) (overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872)). See generally Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach To Constitutional Adjudication?*, *supra* note 43, at 1427, 1451-52 (1977). See also note 106 *infra*.

86. See note 6 *supra* and accompanying text.

87. 101 S.Ct. 2946, 2953 (1981). Three leading cases, decided over fifty years ago, set down a long-followed precedent: severance taxes are levied on a local activity and thus are out of reach of the commerce clause power. See *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 285-288 & n.* (1927) (upholding a West Virginia privilege tax measured on the gross proceeds of specified natural resources mined or produced within the state, "regardless of the place of sale or the fact that deliveries may be made to points outside the State"); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 176-79 (1923) (holding a Minnesota occupation tax measured by a percentage of the value of iron ore mined or produced is not a tax on interstate commerce even when the ore is continuously shipped to other states immediately after it is mined); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 260-61 (1922) (upholding a Pennsylvania ad valorem tax on anthracite coal prepared for market, even when the coal is to be exported to other states). Rejecting a commerce clause challenge to the severance tax in *Heisler*, the court reasoned that mining is not subject to commerce clause restraints because mining is a local activity and not "in" interstate commerce. 260 U.S. at 258-61. Within five years of *Heisler*, the United States Supreme Court held similar taxes valid by applying the mechanical distinction used in *Heisler* that if an activity is not in interstate commerce at the time the state tax is levied, then the state's taxing right is not limited by the commerce clause. For a discussion of *Heisler*, its progeny and its faults, see Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 NAT'L TAX J. 245, 247-48 (1978).

Heisler's rationale was consistent with the commerce clause framework that had developed at the time of the decision. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), set out the now-discredited local activity-national activity distinction, 53 U.S. (12 How.) at 319-21. Under this commerce clause fiat, activities national in nature are subject to Congressional or dormant commerce clause power. If the activity, however, is local in nature, the state has exclusive power over the activity. *Id.* The Court, attempting to reach intrastate activities, formulated the "current of commerce" theory in *Swift & Co. v. United States*, 196 U.S. 375 (1905). *Swift* intimated that local activities are subject to commerce clause constraints if they are "in" commerce or are an integral part of the "current of commerce." 196 U.S. at 398-99. The *Heisler* rationale paralleled *Swift's* mechanical distinction between activities "in" commerce and those not yet "in" commerce.

In 1937, however, the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1

the tax was not repugnant to the commerce clause.⁸⁸ In upholding the constitutionality of the tax, Justice Marshall focused on the four-part *Complete Auto* test.⁸⁹ The significant issues in *Commonwealth Edison* involved *Complete Auto*'s third prong, the proscription of discriminatory taxes,⁹⁰ and fourth prong, the fairly related requirement.⁹¹

The appellants asserted that because ninety percent⁹² of Montana's coal is shipped to other states, the ultimate burden of the tax was shifted to consumers in those states.⁹³ The tax, then, as a practical matter, operated as a discriminatory burden on non-Montana citizens.⁹⁴ Justice Marshall disagreed and distinguished the Montana tax from those cases involving facial discrimination.⁹⁵ He explained that the tax did not discriminate because Montana taxed the amount of coal mined, without any distinction regarding in-state and out-of-state consumers.⁹⁶

(1937), shifted the emphasis of commerce clause inquiries from a stream of commerce approach to an approach analyzing the effect of the activity on commerce. If a state action has a substantial effect on interstate commerce, a court should apply commerce clause analysis to determine constitutionality. 301 U.S. at 37. This approach greatly expanded the reach of the commerce clause into intrastate activities. The substantially affecting test, *see* 301 U.S. at 31-32, is the modern test for determining the applicability of commerce clause restraints and makes any activity that substantially affects commerce subject to commerce clause scrutiny. *See* note 18 *supra* and accompanying text.

In *Commonwealth Edison* the appellee, Montana, argued that *Heisler* and its progeny precluded the severance tax from commerce clause scrutiny. *See* Motion to Dismiss or Affirm 6-12, 101 S.Ct. 2946 (1981). The *Commonwealth Edison* Court, recognizing that the "affecting commerce" test was the appropriate approach, declared that state "taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry." 101 S. Ct. at 2953.

88. 101 S. Ct. at 2960.

89. 101 S. Ct. at 2953.

90. *See id.* at 2954-55; notes 66-67 *supra* and accompanying text.

91. 101 S. Ct. at 2955-60; notes 68-79 *supra* and accompanying text.

92. 101 S. Ct. at 2954. Justice Blackmun, in dissent, noted that allegedly as much as 90% of Montana's mined coal "is exported to other states pursuant to long-term purchase contracts with out-of-state utilities." *Id.* at 2965 (Blackmun, J., dissenting).

93. *See* Jurisdictional Statement at 13, 21-22, 101 S. Ct. 2946 (1981). Appellants argued that the tax "was designed to shift billions of dollars to Montana directly from the citizens of [other] states by the end of the century . . ." *Id.* at 13.

94. *Id.* at 21-22.

95. 101 S. Ct. at 2954.

96. *Id.* Justice Marshall looked only for overt, facial discrimination. Only a few weeks before deciding *Commonwealth Edison*, the Supreme Court stated that "[i]n each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)). *See* note 22 *supra*; notes 105-11 *infra* and accompanying text.

Appellants also claimed that Montana's severance tax was not fairly related to the services provided by the state, as required by the fourth part of the *Complete Auto* test.⁹⁷ They specifically argued that the trial court should have granted them an opportunity to establish a full factual record to show that the tax was not fairly related to Montana's additional costs incurred because of coal mining.⁹⁸ By rejecting this contention the majority in essence held that a taxing state, whose tax satisfies the first three *Complete Auto* prongs, may tax interstate commerce at any rate it so chooses, unrestricted by the commerce clause.⁹⁹

Justice Marshall explained that a general revenue tax,¹⁰⁰ such as the Montana tax in question, was not a means of reimbursement for the specific benefits the state has provided.¹⁰¹ Unlike user taxes,¹⁰² a tax imposed for the overall support of the state government helps defray the costs of general, rather than specific, benefits the state provides, such as police and fire protection, a trained work force, and the advantages of a civilized society.¹⁰³ Under the majority's approach, the rate of a tax on interstate commerce is thus not subject to judicial scrutiny if

97. 101 S. Ct. at 2955.

98. *Id.* Jurisdictional Statement at 20-21, 101 S. Ct. 2946 (1981); Reply Brief of Plaintiffs-Appellants at 14-17, 101 S. Ct. 2946 (1981).

99. "The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." 101 S. Ct. at 2959.

100. Taxes are either general, that is, imposed for the raising of a revenue for the support of the government and for public purposes generally, or they are special or local, that is, for the benefit of a specific governmental function. 27 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 581 (2d ed. D. Garland & L. McGehee eds. 1904). *Accord*, BLACK'S LAW DICTIONARY 617 (5th ed. 1979).

101. Justice Marshall noted the following:

[T]he linchpin of appellants' contention is the incorrect assumption that the amount of state taxes that may be levied on an activity connected to interstate commerce is limited by the costs incurred by the State on account of that activity. Only then does it make sense to advocate judicial examination of the relationship between taxes paid and benefits provided. But as we have previously noted, see *supra*, at 2957, interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct "benefit." In such circumstances, absent an equal protection challenge (which appellants do not raise), and unless a court is to second-guess legislative decisions about the amount or disposition of tax revenues, it is difficult to see how the court is to go about comparing costs and benefits in order to decide whether the tax burden on an activity connected to interstate commerce is excessive.

101 S. Ct. at 2959 n.16 (emphasis in original).

102. Justice Marshall distinguished, without in-depth analysis, the line of cases involving "user" taxes on highways and public facilities. 101 S. Ct. at 2956. In this line of cases, the Court did determine the tax's relation to benefits provided. See note 74 *supra*.

103. 101 S. Ct. at 2955-60.

the taxing state satisfies the first three parts of the *Complete Auto* approach, deems its tax a general revenue tax, and asserts that the taxpayer enjoyed the benefits of a civilized society.¹⁰⁴

B. *Analysis*

In his analysis of the *Complete Auto* test's third prong, Justice Marshall, having found no facial discrimination, declared that no discrimination existed at all.¹⁰⁵ This approach, however, contravenes the Court's recent approach of looking at the practical effect of a tax.¹⁰⁶ If the Court were really willing to look at the practical effect of the Montana tax, then it would have scrutinized for less blatant, underlying forms of discrimination.¹⁰⁷

Courts are well aware that discrimination can take place in unique ways.¹⁰⁸ As the dissent correctly pointed out, a state tax tailored to fall on interstate commerce must receive careful judicial scrutiny.¹⁰⁹ Examination of the Montana Coal Severance Tax legislative history reveals a tailored tax and a taxing scheme arguably conceived with an illegitimate purpose.¹¹⁰

104. *Id.*

105. See note 96 *supra* and accompanying text.

106. The *Commonwealth Edison* majority even asserted that they were to look at the practical effects of the tax. 101 S. Ct. at 2953. In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), the Court refused to look at an Iowa tax's practical effect, despite the wishes of Justice Powell. *Id.* at 288-89 (Powell, J., dissenting). *Moorman* involved a challenge to a state apportionment formula that differed from the type of formula used in other states. See *id.* at 269-71 & n.3; notes 64-65 *supra* and accompanying text. *Moorman* is easily distinguishable from *Commonwealth Edison*, as the tailored discrimination in *Commonwealth Edison* is eminently more egregious than that in the *Moorman* case. Therefore, *Moorman* lends no support to the *Commonwealth Edison* majority's untenable approach, which involved a failure to consider the practical effect of a tailored tax.

107. The Supreme Court has invalidated state actions when the practical effect of the state action operates discriminatively. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). In *Dean Milk* an ordinance on milk inspections and sales applied to the municipality's residents and nonresidents alike. The Court nevertheless found the ordinance discriminatory and noted that: "[i]t is immaterial that Wisconsin milk from outside the Madison area is subject to the same proscription as that moving in interstate commerce." 340 U.S. at 354 n.4.

108. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (de facto discrimination in the operation of a hiring procedure); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (purposeful discrimination in redefining city boundaries); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discrimination in the administration of an ordinance).

109. 101 S. Ct. at 2964-65 (Blackmun, J., dissenting). See notes 110-12 *infra* and accompanying text.

110. Montana recognized that the tax would shift a large burden onto nonresidents. See *Towe*, *supra* note 10, at 4.

Most of Montana's coal is shipped out of state to power plants and utility companies in

Heightening the level of scrutiny for a tailored tax is consistent with the well-established doctrine that a court should carefully analyze any state legislative action when the burden falls predominantly on nonresidents.¹¹¹ The rationale for this doctrine is that nonresidents do not have access to the political checks available to residents. The legislative process is the usual political check to undesirable state action. Res-

the Midwest. In reviewing the contracts between the coal companies and the utility companies who purchase the coal, all of the contracts that were shown to our Legislative Committee contain an escalation clause for taxes. In other words, the local companies simply add the additional taxes to their bill, and the entire cost is passed on to the purchasers in the Midwest or elsewhere. Because most of the purchasers are regulated utility companies, it is reasonable to assume these companies will, in turn, pass on their extra costs to their customers.

Id. "[The tax revenue] is used and needed for the general operation of State Government." *Id.* at 1. State Senator Thomas E. Towe was Chief Sponsor of the Montana Coal Tax Law, 1975. See *Hearings, supra* note 9, at 232.

Vice Chairman of the Montana House Taxation Committee, Representative Ora Halvorson said that "[i]n the energy crunch today, Montanans should remember that the Arabs have the oil but Montana has the coal . . ." *Kalispell Representative Says Coal Tax Too Low*, Missoulian, Jan. 11, 1975. Rep. Halvorson's statement suggests that a purpose of the tax was to exploit the energy situation in the country.

One commentator believes that, as a factual matter, Montana and the other Northwestern states possess enough of the supply of low-sulphur coal to cause the shifting effect of the burden of the tax onto coal importers. Gillis, *supra* note 3, at 63. For a thorough, technical explanation of tax exportation, see Shelton & Morgan, *Resource Taxation, Tax Exportation and Regional Energy Policies*, 17 NAT. RESOURCES J. 261 (1977).

Interestingly, in 1979 Montana passed legislation providing property and income tax relief for state residents. See MONT. CODE ANN. §§ 15-35-101 to -111 (1981). Allegedly, almost 20% of Montana's total tax revenue comes from the severance tax. 101 S. Ct. at 2966 (Blackmun, J., dissenting) (citing Transcript of Oral Argument at 31, 101 S. Ct. 2946 (1981)).

111. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), Mr. Justice Stone provided a justification for use of more rigorous judicial scrutiny in some situations. His now famous "footnote 4" stated as follows:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (citations omitted). Soon after *Carolene Products*, Justice Stone applied the "footnote 4" rationale to a state taxation challenge. "[T]o the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940).

idents displeased with a state regulation or tax can exercise their political power to effect change. To assume, however, that state legislators will consider the needs of nonconstituents as well is unrealistic. Nonresidents, consequently, have no political recourse in the taxing state. The courts thus provide the only restraint to whatever tax burdens a state may levy on nonresidents.¹¹²

Ninety percent of the Montana severance tax burden ultimately fell on out-of-state consumers.¹¹³ If the *Commonwealth Edison* majority had given more weight to the practical effect of the tax, the Court would have found that by exporting the burden of the tax to nonresidents, it operated as a discriminatory burden.¹¹⁴ Because the indicia of tailoring were present,¹¹⁵ the Court, at a minimum, should have more carefully scrutinized the tax. At the least, the appropriate level of scrutiny mandated the development of a full factual record.¹¹⁶

Despite the reasons to scrutinize the tax carefully, the majority affirmed the trial court decision that the tax, as a matter of law, was fairly related to the services provided by the state.¹¹⁷ Justice Marshall im-

112. If the political process cannot function properly, then the judiciary must be more willing to exert its power. See note 111 *supra*.

113. See note 92 *supra* and accompanying text.

114. See note 110 *supra* and accompanying text. The dissent in *Commonwealth Edison* did not make factual conclusions about the tax's effects. 101 S. Ct. 2946, 2966-67 & n.7 (1981). They merely contended that the plaintiffs were entitled to an opportunity to have a trial on the merits. *Id.* at 2964-65.

115. See note 110 *supra* and accompanying text.

116. See note 74 *supra*.

117. See 101 S. Ct. at 2955-60. Justice Marshall expressed concern about the evidentiary tasks that might ensue if the plaintiffs were allowed the opportunity to prove their factual allegations.

[I]t is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process.

Id. at 2959. Despite Justice Marshall's fears about evidentiary problems, much of the relevant factual information was readily ascertainable. Montana monitors governmental expenses in the coal impact areas. See generally R. Robinson, *Memorandum: Coal Impact and Coal Board Grants* (Sept. 20, 1977) (from the Office of the Legislative Fiscal Analyst to the Legislative Finance Committee) (on file with the *Washington University Law Quarterly*). Montana has a Coal Board which grants funds from the severance tax to the impacted areas. *Id.* at 6. "Grants are made by the coal board 'to local government units and state agencies to assist local governmental units in meeting the local impact of coal development by enabling them to adequately provide governmental services and facilities which are needed as a direct consequence of coal development.'" *Id.* Montana keeps meticulous records of requests and grants concerning the impacted areas. Montana's

plied that the required relation to services provided by a state is not a function of the specific services provided by the state to the taxpayer.¹¹⁸ The fourth prong of the test, he explained, pertains to the measure¹¹⁹ and not the rate¹²⁰ of a tax. An improper tax measure, however, would have problems satisfying *Complete Auto's* first prong, the nexus requirement, or the second prong, the fair apportionment requirement. The majority, by treating any tax rate as constitutional so long as the first three prongs of the test are met, thus rendered the fourth prong—the fairly related requirement—meaningless.¹²¹ After *Commonwealth Edison*, the fourth prong, despite no apparent ambiguity in its wording, has negligible independent significance in determining the constitutionality of a state tax.

In several pre-*Commonwealth Edison* decisions the Supreme Court looked to the practical effect of the state's tax scheme, rather than the label applied to the tax.¹²² After *Commonwealth Edison*, however,

records of governmental costs include, for example: school systems; water treatment, storage and distribution; sewage collection, treatment and disposal; jail facilities; road grader; dump truck; backhoe and sewer cleaner; patrol car; garbage truck; law clerk; replace water pipeline; pedestrian overpass; street sweeper; motor patrol; community nurse's salary; bookmobile and library; airport improvements; fire truck; road maintenance equipment; teacher housing; solid wastes systems improvements; and, expansion of the courthouse. See Cohea, *Memorandum: Coal Board Grants 40-51* (January 11, 1978) (from Montana Legislative Council Staff Researcher to Coal Tax Oversight Committee) (on file with the *Washington University Law Quarterly*). With such extensive records on governmental expenditures in the coal impact areas, denying plaintiffs an opportunity to prove that Montana's tax was not fairly related to services provided is anomalous.

Furthermore, the impact areas may not need the state's support.

[W]ith few exceptions, the impacted units have the means to finance the required expenses without state support. The coal area is characterized by some of the lowest mill levies in the state and has been blessed by mushrooming property valuations.

This analysis would indicate that the need for state supported local impact grants may be much less than originally anticipated by the legislature.

R. Robinson, *supra*, at 25. Not surprisingly, several commentators have accused Montana of "OPEC-like revenue maximization." 101 S. Ct. at 2967 (Blackmun, J., dissenting) (commentators cited therein).

118. 101 S. Ct. at 2955-60.

119. The majority viewed the fourth prong as referring to the measure of a tax, not the rate or amount. 101 S. Ct. at 2958. Justice Marshall, by ignoring the amount of a tax, construed its validity as turning on whether the tax is proportional rather than fixed at a flat rate. See 101 S. Ct. at 2968 (Blackmun, J., dissenting).

120. Justice Marshall refused to examine the rate of the tax. 101 S. Ct. at 2959-60.

121. After *Commonwealth Edison* the fairly related requirement is meaningless because its only remaining significance concerns the nexus or apportionment requirements. See 101 S. Ct. at 2968 (Blackmun, J., dissenting). Any tax with nexus or apportionment problems, however, will not pass muster under *Complete Auto's* first or second precepts. The Court will consequently strike down a tax before reaching the fourth prong.

122. See notes 84-85 *supra* and accompanying text.

courts may resolve challenges regarding the fair relation of a tax to state services by adhering to talismanic labels. The state, after meeting the first three prongs of the *Complete Auto* test, need only describe the tax as a general revenue tax and assert that the tax is compensation to the state for having provided the taxpayer with the benefits of a civilized society. Courts presumably will not give future state tax challengers an opportunity to demonstrate that the tax, even when manifestly disproportionate to the services provided, is not related to the benefits provided by the taxing state.¹²³ States with informed draftsmen can now make any tax rate constitutional by merely giving the tax the proper labels. As to the fairly related inquiry, *Commonwealth Edison's* result is untenable. A state may now constitutionally tax at a rate of one hundred percent, or even one thousand percent, of the value of the taxed good.¹²⁴ Justice Blackmun, writing a cogent dissent, correctly stated that the majority emasculated the fourth prong of the *Complete Auto* test.¹²⁵

IV. A SUGGESTED COMMERCE CLAUSE FRAMEWORK FOR ANALYZING STATE ENERGY TAX CHALLENGES

A. *The Actual Burden of State Taxes on Energy Resources*

The burden caused by state energy taxes is not accurately reflected by simply examining the extent to which the levy decreases the movement of the taxed resource in interstate commerce.¹²⁶ The significance of a state's energy tax is manifested by the effect it has on the nation's economy.¹²⁷ Economic analysis reveals that state taxes on energy resources affect the entire nation.

123. "[T]he Court implicitly ratifies Montana's contention that it is free to tax this coal at 100% or even 1000% of value should it choose to do so." 101 S. Ct. at 2968 (Blackmun, J., dissenting).

124. *Id.* (Blackmun, J., dissenting). Justice Blackmun's point, although well made, is hyperbolic because such a high "tax" would be a "taking," not a tax. *See* U.S. CONST. amend. V; amend. XIV, § 1.

125. *Id.* Justice Marshall's approach promotes the Balkanization of the states, a result directly contrary to the purpose of the commerce clause. *See* note 12 *supra*.

126. A burden on interstate commerce is typically revealed by showing that an interstate activity slowed down as a result of the state action. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 252-56 (1978). In *Commonwealth Edison*, however, the exporting of coal, the "activity," increased in Montana after the tax was imposed. *See* *Commonwealth Edison Co. v. Montana*, ___ Mont. ___, 615 P.2d 847, 849-50 (1980). Despite this increase in the taxed activity, a burden of interstate commerce arguably still existed. *See* notes 127-52 *infra* and accompanying text.

127. *See* notes 128-52 *infra* and accompanying text.

Energy is vital to a developed, industrial nation.¹²⁸ Many aspects of modern society, such as industry,¹²⁹ transportation,¹³⁰ and heat,¹³¹ are heavily dependent on energy. A state tax that directly affects the price or allocation of an item basic to the nation's economic well being may constitute an undue burden on interstate commerce.¹³²

A tax raises the price of a good for a consumer. If a consumer continues to buy the same quantity of a taxed good, a greater percentage of the consumer's real disposable income is spent on the taxed good and less is available for spending on other goods and services.¹³³ This reduction in consumption and spending occurs when an energy resource is taxed by a state exporting a large percentage of the taxed resource.¹³⁴ The aggregate consumption in the nation consequently moves downward as consumers pay more of their disposable income to obtain the taxed good.¹³⁵ This decline causes a lower equilibrium level of net national product.¹³⁶ In noneconomic terms, the nation is producing and consuming at an inefficient level—at a level lower than the nation's capacity given its quantity of capital, labor, and technology. When a tax has this dampening effect on the economy, commerce slows down.¹³⁷ Because less money is available for purchasing goods, movement of goods in interstate commerce is reduced.

128. See generally A. ASKIN, *HOW ENERGY AFFECTS THE ECONOMY* (1978); H. BUCKNELL, *ENERGY AND THE NATIONAL DEFENSE* (1981); N. KANNAN, *ENERGY, ECONOMIC GROWTH, AND EQUITY IN THE UNITED STATES* (1979); H. MERKLEIN & W. HARDY, *ENERGY ECONOMICS* (1977); M. SLESSER, *ENERGY IN THE ECONOMY* (1978); *ENERGY AND SECURITY* (G. Treverton ed. 1980). See also note 1 *supra*.

129. See J. DARMSTADTER, J. DUNKERLY & J. ALTERMAN, *supra* note 1, at 101-40; N. KANNAN, *supra* note 128, at 149-59; M. SLESSER, *supra* note 128, at 44-58. See also note 1 *supra*.

130. See J. DARMSTADTER, J. DUNKERLY & J. ALTERMAN, *supra* note 1, at 70-100.

131. See *id.* at 36-61.

132. A state tax does not necessarily impose a significant burden on the nation's commerce. See notes 138-40 *infra* and accompanying text.

133. If, at this point, consumers attempt to purchase as many goods and services as they previously did, an inflationary trend develops. See notes 144-45 *infra* and accompanying text. If, however, the purchaser spends only within his means, a dampening occurs from the increased energy cost. See notes 135-37 *infra* and accompanying text.

134. If the state taxed a good that the state did not export on a large scale, then the tax would produce only slight economic effects on the nation.

135. If this reduction in consumption does not occur, inflation results. See notes 144-45 *infra* and accompanying text.

136. The most basic definition of net national product is the total money value of private (non-governmental) consumption expenditures in the nation. See P. SAMUELSON, *ECONOMICS* 181 & n.2 (9th ed. 1973).

137. This Note uses "economy" and "commerce" synonymously in some situations. Any activity affecting commerce must—a fortiori—affect interstate commerce.

The effects of a price increase in a given natural resource depend upon the willingness and capabilities of consumers to shift to alternative resources.¹³⁸ A price increase in an elastic¹³⁹ good results in a reallocation of consumer purchasing, whereas a change in price of an inelastic¹⁴⁰ good does not produce a shift to other alternatives.

If coal is elastic, then an increase in the price of coal may cause consumers to shift to oil.¹⁴¹ In the United States, this shift would require increased oil imports. Because the price of imported oil has increased significantly,¹⁴² higher coal costs force consumers to pay more for energy, regardless of whether they switch to oil or continue to use coal. Consumers would then have to allocate a greater percentage of their disposable income to energy. The result is a general dampening of the economy.¹⁴³ Arguably, then, a tax on an energy resource may burden commerce if demand for the resource is elastic.

An increase in the general cost of energy leads to inflation because a greater percentage of disposable income is then spent on energy costs.¹⁴⁴ The demand for money will increase as people attempt to purchase as many goods as they purchased before the increase in the cost of energy. As monetary authorities increase the money supply to meet this increased demand, the aggregate level of prices will rise.¹⁴⁵

138. For an explanation of the substitute goods concept, see P. SAMUELSON, *supra* note 136, at 430-31.

139. A good is elastic if the demand for the good is responsive to a change in its price. For a more technical definition of elastic, see R. LIPSEY & P. STEINER, *ECONOMICS* 80-91 (3d ed. 1972); P. SAMUELSON, *supra* note 136, at 379-81.

140. If a change in price has no effect on demand for a good, its demand is inelastic. For a more technical definition of inelastic, see R. LIPSEY & P. STEINER, *supra* note 139, at 80-91; P. SAMUELSON, *supra* note 136, at 379-81, 435.

141. This shift is premised on the substitutability of coal for oil.

142. See NEP II, *supra* note 1, at 15-21. In 1979 alone, oil prices rose over twenty percent. *Id.* at 15-16.

143. See notes 133-37 *supra* and accompanying text. This shifting effect caused by a tax on an elastic good also harms the efficiency of the nation's production and consumption. Anytime consumers are forced to shift to more expensive alternative goods, a corresponding shift occurs away from the optimum allocation of goods. "Insofar as a tax makes interstate commerce more expensive, it tends to alter the scheme of production and trade from that which would be established by other economic forces, reducing the output and discouraging the expansion of efficient out-of-state producers." *Developments In The Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 957, 969 (1962) [hereinafter cited as *Developments*].

144. This behavior occurs only if consumers continue to attempt to purchase as many goods and services as before the state imposed the tax.

145. See U.S. DEP'T OF ENERGY, NATIONAL ENERGY PLAN II APPENDIX C: ENERGY AND THE ECONOMY 9 (1979) (hereinafter NEP II APPENDIX C). In theory, when consumers spend a higher percentage of disposable income on one good, the economy adjusts by forcing the price of

A shift resulting in increased oil imports causes additional problems of its own. Any increase in oil consumption causes more dependence on unstable oil-exporting nations, a politically undesirable development.¹⁴⁶ Importing more oil also leads to inflation. A chain of events produces this inflationary effect. First, increased purchases of expensive imported oil raises the bill of the United States for oil imports. This and other factors cause an excess supply of dollars in foreign exchange markets. The dollar in turn depreciates in value because this increased supply is greater than demand. As the value of the dollar decreases in foreign markets, all imports become more expensive. Paying more dollars for all imported goods then contributes to inflation.¹⁴⁷

If coal is inelastic, the consumers will continue to purchase the same pre-tax quantity, despite the increased cost.¹⁴⁸ Individuals will then spend a greater percentage of their disposable income on energy, just as if they had switched to oil. This necessarily leaves less real money available for consuming other goods and services and adversely affects the general economy. The tax on coal thus serves to lower the nation's production and consumption and reduce the country's standard of living.¹⁴⁹

Regardless of whether demand for an energy resource is elastic or inelastic, a high state tax on an energy resource has serious national economic consequences.¹⁵⁰ An activity that either reduces the nation's aggregate consumption and production or contributes to inflation is clearly a burden on commerce. Energy is vital to commerce.¹⁵¹ Without an adequate justification,¹⁵² state-imposed economic action that di-

other goods to decrease. As a practical matter, however, this does not always work because prices and especially wages are "sticky" as to downward movement. When prices do not adjust downward and one good is relatively more expensive, consumers do not reduce consumption and inflation results.

146. See NEP II, *supra* note 1, at 21-22.

147. See NEP II, *supra* note 1, at 19-21, 158-60.

148. See note 140 *supra* and accompanying text.

149. For a more thorough explanation of the economic effects stemming from a reduction in consumers' real disposable income, see notes 133-37 *supra* and accompanying text. Another problem occurs from taxing an inelastic resource that is produced predominantly for exporting to other states. The problem concerns the constitutionality of "tax exportation." See *Developments, supra* note 143, at 968-71; note 110 *supra*.

150. See notes 141-47 *supra* and accompanying text (elastic); notes 148-49 *supra* and accompanying text (inelastic).

151. See note 128 *supra*.

152. Adequate justifications are similar to legitimate purposes. A tax, for example, that operates to reimburse the state for services provided is adequately justified.

rectly burdens commerce is repugnant to the commerce clause.

B. *A Proposal for Commerce Clause Analysis*

An important premise of the proposed analytical framework is that because interstate commerce must pay its own way,¹⁵³ a state may exact a tax which reasonably estimates the state's cost in providing any related services.¹⁵⁴ Flowing from this premise, the proposal is simply that courts construe any tax on a good involved in interstate commerce as an undue burden to the extent that the amount of the levy is greater than the cost to the taxing state.¹⁵⁵ The proposal is nothing more than a corollary of the plain language in the *Complete Auto* fairly related test. To make a fairly related determination, which courts have recently been reluctant to do,¹⁵⁶ would require development of a full factual record. This process is admittedly time consuming, but by no means an impossible task.¹⁵⁷ The proposal, then, requires that courts shoulder the task of making factual determinations regarding the cost of the services provided by a state that taxes an energy resource taken from within its boundaries. Because the task is large, requiring the courts to make a factual determination in every state tax challenge case is impractical. Energy resource taxation, however, presents a different situation. Few matters are as important as energy to an industrial nation. Because a state tax on an energy resource may have such significant and pervasive effects on the nation,¹⁵⁸ the judiciary should decide the fairly related question on the basis of facts in situations involving challenges to state energy taxes. In energy tax disputes, courts should not stop the fairly related inquiry as soon as a state asserts the benefits of a civilized society justification.¹⁵⁹ The amount by which an inter-

153. See, e.g., *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). See also note 69 *supra* and accompanying text.

154. See notes 60 & 69 *supra* and accompanying text.

155. For a discussion of a cost-based approach to state taxation of energy resources, see Comment, *An Outline For Development of Cost-Based State Severance Taxes*, 20 NAT. RESOURCES J. 913 (1980).

156. See note 73 *supra* and accompanying text.

157. The court must determine whether the state has any reasonable basis for its judgment that the tax is necessary to compensate the state for particular costs resulting from the taxed activity. "[T]he task is likely to prove to be a formidable one, but its difficulty does not excuse our failure to undertake it." 101 S. Ct. at 2972 (Blackmun, J., dissenting).

158. See notes 1 & 128 *supra* and accompanying text.

159. See notes 78-79 *supra* and accompanying text. The analysis proposed in this Note is

state activity increases these costs is a finite, ascertainable amount.¹⁶⁰ When the amount of the tax is greater than the services provided by the state, courts should construe the tax as an undue burden on the nation, thus violating the commerce clause.¹⁶¹

If a court gives substantive meaning to the fairly related issue, that court must develop a full factual record to reveal the cost of the services provided by the taxing state.¹⁶² As with many evidentiary battles, the final outcome may depend significantly on the allocation of the burdens of proof. In state tax challenges, the burden of demonstrating the unconstitutionality of a tax rests on the challenger.¹⁶³

In various circumstances, however, shifting the burden from one party onto an adversary is a reasonable action for a court.¹⁶⁴ Shifting the burden is prudent when social and economic circumstances change.¹⁶⁵ The increased significance of energy for the nation justifies a shifting of the burden onto the taxing state.¹⁶⁶

limited to situations involving state taxes on energy resources when such resources are involved in interstate commerce.

160. See note 69 *supra* and accompanying text.

161. Thus any unjustified tax impinging on interstate commerce is invalid. The court can reach this conclusion by balancing in the same manner as the state regulation cases involving state-imposed burdens. See note 22 *supra* and accompanying text.

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.

19 B.C.L. REV. 312, 325 (1978).

As to energy taxes, this Note proposes the use of some form of heightened judicial scrutiny because of the increased significance of energy. For a discussion of the heightened scrutiny applied to state taxation of foreign commerce, see Comment, *The Negative Commerce Clause—A Strict Test For State Taxation Of Foreign Commerce: Japan Line, Ltd. v. County of Los Angeles*, 13 N.Y.U. J. INT'L L. & POL. 135 (1980).

162. See C. DUMARS & L. BROWN, *supra* note 17, at 81-114 (describing a method for acquiring a factual record); Comment, *Constitutional Limitations On State Severance Taxes*, 20 NAT. RESOURCES J. 887, 910-11 (1980) (concluding a factual record is essential in cases such as *Commonwealth Edison*). See also notes 74-77 *supra* and accompanying text.

163. See *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 221-22 (1980) (the complainant has the distinct burden of showing by "clear and cogent evidence" that it results in extra-territorial values being taxed).

164. See C. McCORMICK, *LAW OF EVIDENCE* 806-07 (2d ed. E. Cleary 1972).

165. *Id.* at 807.

166. *Id.* In terms of the proposed analysis, this shift in the burden requires a state to show that its tax is a reasonable estimate of the services provided to the taxed enterprise. Any amount of the tax above the state's cost is an undue burden on interstate commerce, thus invalidating the tax. For further discussion of a cost-based energy tax, see Comment, *supra* note 155.

Another accepted reason for shifting the burden of proof is one party's superior access to the proof.¹⁶⁷ If a state's records and statistics on matters relevant to a cost determination are not reasonably accessible, then a court is further justified in requiring the state to prove that the tax reasonably estimates the cost to the state of services provided.

C. *Commonwealth Edison Revisited Under the Suggested Commerce Clause Framework*

The *Commonwealth Edison* Court, asserting that the rate of a tax is not a matter for the courts to analyze,¹⁶⁸ held, as a matter of law, that the severance tax was fairly related to the governmental services Montana provides.¹⁶⁹ The Court did not permit a factual showing that the tax was actually related to Montana's costs.

Under the suggested analytical framework, courts would not decide the fairly related issue as a matter of law in cases involving taxes on energy resources. A court would, at a minimum, permit the challenger to demonstrate that the tax is not fairly related to the services provided.¹⁷⁰ A court could go still further and force the state to justify the amount of its tax in terms of actual costs incurred as a result of the energy-related activity.¹⁷¹ Under the proposed approach, if the factual record revealed that the Montana severance tax, for example, reasonably approximated the services provided by Montana, then the tax would be valid. If, however, the factual examination revealed that the amount of the tax exceeded the costs to Montana, then the tax would be unconstitutional as an undue burden on interstate commerce.¹⁷²

V. ALTERNATIVE METHODS OF LIMITING STATE ENERGY TAXES

Commerce clause constraints are not the only way to limit the

167. See C. McCORMICK, *supra* note 164, at 806-07.

168. 101 S. Ct. 2946, 2952, 2960 (1981).

169. See note 117 *supra* and accompanying text.

170. As national demand for coal increased, Montana experienced a large growth in population in communities near the mining areas. The increased population affected local school districts. The effects of this and other problems associated with the coal-related growth boom are closely watched by the state. Montana has a Coal Board specially created to aid in funding coal-impacted areas. Montana, which monitors the impact of the coal industry, has the data necessary for determining the cost of the services provided by the state. See, e.g., Cohea, *supra* note 117; R. Robinson, *supra* note 117, at 12.

171. See notes 164-67 *supra* and accompanying text.

172. See note 161 *supra* and accompanying text.

amount a state taxes its energy resources. Various legislative alternatives are also available. The House of Representatives is currently reviewing a bill designed to limit state severance taxes on coal.¹⁷³ The bill mandates that state severance taxes not exceed a rate of twelve and a half percent of the value of coal extracted in a given year for use in any powerplant or major fuel-burning installation and prepared for transportation in interstate commerce.¹⁷⁴ Congressional imposition of this ceiling on severance taxes is unlikely to meet any serious constitutional challenges.¹⁷⁵

173. Actually, not one but three nearly identical bills are receiving legislative attention. Because they are in essence the same proposal, the bills are treated as "a" bill in the text of this Note. The bills are: H.R. 6625, 96th Cong., 2d Sess. (1980); H.R. 6654, 96th Cong., 2d Sess. (1980); and H.R. 7163, 96th Cong., 2d Sess. (1980). The proposal reads as follows:

A BILL

To further the objectives of national energy policy of conserving oil and natural gas through removing excessive burdens on production of coal.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that, in order to alleviate the national energy emergency, reduce national dependence on petroleum imports, encourage the highest and best use of domestic petroleum and natural gas, and enhance interstate commerce by promoting increased reliance on our national reserves of coal for the generation of electricity and power, it is necessary to remove excessive burdens on production of coal used in powerplants and major fuel-burning installations.

SEC. 2. The Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8301 et seq.) is amended by adding immediately following section 807 the following new section: "SEC. 808. COAL FOR POWERPLANT AND INDUSTRIAL CONVERSION.

"(a) Notwithstanding any other provision of State or Federal law, with respect to any coal which is destined for shipment in interstate commerce for use in any powerplant or major fuel-burning installation, the sum of all severance taxes or fees, in respect of any fiscal year, levied upon or collected from any taxpayer, by a State or any political subdivision thereof on such coal or on any improvements or other rights, property, or assets produced, owned, or utilized in connection with the production of such coal shall not exceed a total of 12½ per centum of the value of such coal produced during such fiscal year at the time it has been extracted and prepared for transportation free on board the production site, exclusive of all State and local taxes and fees.

"(b) For purposes of subsection (a), 'severance taxes or fees' include any tax or fee, by whatever name called, levied or collected upon coal or upon any improvements or other rights, property, or assets produced, owned, or utilized in connection with the production of coal except for income, sales, property or other similar taxes or fees of general application which are not disproportionately imposed thereon."

H.R. 6654, 96th Cong., 2d Sess., reprinted in *Coal Severance Taxes: Hearings on H.R. 6625, H.R. 6654, and H.R. 7163 Before the Subcomm. on Energy and Power of the Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 6-8 (1980) [hereinafter cited as *Coal Severance Tax Hearings*]. The 97th Congress has reintroduced this bill under a different number. H.R. 4841, 97th Cong., 1st Sess. (1981).

174. *Id.*

175. Congress' power under the commerce clause is extremely broad. See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (federal requirements imposed under commerce clause power applied to out of the way Birmingham restaurant because it used meat which had been moved in interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (hotels and motels

The greatest advantage of the proposed twelve and a half percent limitation is simplicity. A federally imposed tax ceiling allows the judiciary to avoid a time consuming determination of whether a tax is fairly related to services provided by the state. The proposed tax ceiling also serves the main purpose of restraining a state's energy taxing power and prevents any state severance tax on coal from reaching outrageously high rates.

This simplicity, however, also leads to the bill's primary disadvantage—inefficiency. Setting an inflexible rate of taxation risks forcing a coal exporting state to absorb governmental costs properly attributable to nonresident coal consumers.¹⁷⁶ The state's actual costs might exceed the amount of revenues obtainable with a twelve and a half percent tax. Residents of coal exporting states should not have to pay for coal shipped to nonresidents. If a state needs more than a twelve and a half percent tax rate to recoup the legitimate¹⁷⁷ costs incurred as a result of the coal industry's impact, then the proposed bill would lead to an inequitable situation.

While an unfairly low rate in some situations, the twelve and a half percent rate is too high in other situations. In some states, a twelve and a half percent tax rate arguably exceeds the rate necessary for the state to recoup its costs stemming from the coal industry.¹⁷⁸ Enactment of the proposed bill will render the fairly related issue moot for severance

affect interstate travel and are thus subject to federal regulation under the commerce clause); *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal regulation of crops applied to a local farmer); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (upheld federal fixing of minimum prices to be paid to milk producers in Chicago). An argument to restrain Congress' action in this area may arise from *National League of Cities v. Usery*, 426 U.S. 833 (1976). The chances of success with such an argument are left to speculation. For discussion of intergovernmental taxation immunities, see Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 290-91 (1977); Hellerstein, *supra* note 87, at 252-53.

176. Clearly, interstate commerce must pay its way. See note 153 *supra* and accompanying text.

177. North Dakota, for example, may eventually have actual costs exceeding the amount of revenues obtainable with a 12½% limit. Because North Dakota generates electricity for export in addition to mining, special costs are incurred. The generating plants release sulphur dioxide into the air and use large amounts of the state's scarce water supply. Added to the existing costs associated with coal mining itself, these special costs may place North Dakota in an incongruous situation if recouping its costs are limited to a 12½% rate. See Brief Amicus Curiae of The North Dakota State Tax Commissioner at 6, *Commonwealth Edison Co. v. Montana*, ___ Mont. ___, 615 P.2d 847 (1980).

178. One researcher concluded that Montana could recoup all of her costs by other existing taxes and restrictions. See *Coal Severance Tax Hearings*, *supra* note 173, at 274-75, 296 (statement of Irwin M. Stelzer).

taxes up to twelve and a half percent.¹⁷⁹ A simple illustration reveals the harm of legislatively abrogating the need for a state to set its tax in relation to services provided. Under the proposed bill a state that actually needs only a small tax to recoup its costs can nevertheless tax up to twelve and a half percent without any judicial interference on commerce clause grounds. If such a state exports a large percentage of coal produced within its boundaries, then the nation unnecessarily suffers the adverse effects associated with higher energy costs.¹⁸⁰ The proposed bill, in an effort to prevent unnecessarily high severance tax rates, may thus permit and even encourage these unnecessarily burdensome rates.

A much more accurate and efficient legislative alternative would be to create an agency to regulate the rate of coal taxation. An agency is the ideal entity for accurately determining the cost to a state of the coal industry's activity.¹⁸¹ The majority of the country's low-sulphur coal, however, exists in only a few states.¹⁸² Creating a federal agency solely to monitor the coal-related costs incurred by these few states is bureaucratic overkill, inconsistent with the growing intolerance of excessive federal agency regulation.¹⁸³

VI. CONCLUSION

Energy is of such great importance to the nation that states should not be allowed to tax energy resources at any rate they desire. A state levy must reasonably approximate the actual governmental costs arising from the intrastate aspects of the interstate activity.¹⁸⁴ Because increased energy costs have a major impact on the nation,¹⁸⁵ states must not tax energy resources at an unjustified rate.¹⁸⁶ The national significance of energy should compel the courts to shoulder the task of making a full factual inquiry into whether a state tax fairly relates to the services provided by the state. In addition, courts hearing challenges to energy taxes should shift the burden onto the taxing state to prove that

179. Rates up to 12½% would have Congressional approval.

180. See notes 128-52 *supra* and accompanying text.

181. W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 3-5 (7th ed. 1979).

182. See Van Baalen, *supra* note 17, at 133.

183. See W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 181, at 79-80.

184. See note 69 *supra* and accompanying text.

185. See notes 128-52 *supra* and accompanying text.

186. See notes 70, 155 & 161 *supra* and accompanying text.

the tax approximates the state's costs.¹⁸⁷ If the Supreme Court in *Commonwealth Edison* had given substance to the *Complete Auto* fairly related requirement, the commerce clause would have prevented energy-rich states from taxing at rates that unjustifiably burden interstate commerce and the nation. If the judiciary continues to refuse to give effect to the commerce clause, Congress may have to act to rectify the situation. The recently proposed bill¹⁸⁸ setting an inflexible severance tax ceiling suffers from oversimplification. Residents of states with legitimate coal-related costs greater than the amount recoverable with a twelve and a half percent tax will absorb part of the costs for nonresidents' coal. The proposed legislation also permits a state with relatively low coal-related governmental costs to tax at a rate of up to twelve and a half percent without fear that the judiciary will scrutinize the fairness of the rate. The bill could thus protect—not prevent—unjustifiable and unnecessary burdens on interstate commerce and the nation. The legislative alternative of establishing an agency to monitor states' coal-related expenditures and corresponding tax rates would provide the most accurate method of determining fair rates. Creating a new agency, however, requires unnecessary growth of federal bureaucracy.¹⁸⁹ Commerce clause scrutiny by the judiciary is the most functional method of preventing energy-rich states from exploiting their resources at the expense of the nation as a whole.¹⁹⁰ In matters concerning the commerce clause, the judiciary is the "final arbiter of the competing demands of state and national interests."¹⁹¹

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187. See notes 164-67 *supra* and accompanying text.

188. See note 173 *supra*.

189. See note 183 *supra* and accompanying text.

190. The problems that would be caused by enactment of the proposed bill or the creation of an agency would result in significantly greater problems than requiring courts to make factual records, something they do on a daily basis.

191. *Japan Lines, Inc. v. County of Los Angeles*, 441 U.S. 434, 445 (1979).