

REAFFIRMING REALIST ANALYSIS UNDER THE COMMERCE CLAUSE, *BARRINGER v.* *GRIFFES*, 1 F.3d 1331 (2d Cir. 1993)

The Framers of the Constitution created the Commerce Clause¹ to ensure an open national economy.² States may regulate or tax interstate commerce under the Commerce Clause³ so long as those regulations or taxes do not unreasonably burden the flow of interstate commerce.⁴ Virtually every state taxes goods as they flow

1. "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

2. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 404 (2d ed. 1988) (citing *THE FEDERALIST* Nos. 41, 42 (James Madison); 3 MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 547).

3. Beginning with *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), the Supreme Court found that, in addition to making federal regulation of interstate commerce superior to conflicting state regulations, the Commerce Clause imposes a negative limit on states' power to regulate interstate commerce. In *Cooley*, the Court established that states could regulate aspects of interstate commerce that were predominantly local in nature. *Id.* at 321. See generally TRIBE, *supra* note 2, at 406-08 (discussing the *Cooley* doctrine). In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Supreme Court clearly conferred to states the authority to tax interstate commerce, stating that "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 [the tax] increases the cost of doing the business." *Id.* at 254.

4. The Supreme Court reiterated its policy regarding state taxation of interstate commerce in *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977). The Court stated the principle behind the policy as "follow[ing] inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Id.* at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)). Discussing a New York tax on stock transfers, the Court stated: "While it is true that, absent an undue burden on interstate commerce, the Commerce Clause does not prohibit the States from taxing the transfer of property within the state, the tax may not discriminate on the basis of some interstate element." *Id.* at 332 n.12 (citing *International Harvester v. Department of Treasury*, 322 U.S. 340, 347-48 (1944)). The Court simplified this rule in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642, *reh'g denied*, 469 U.S. 912 (1984). "[A] state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state." *Id.*

through its borders.⁵ These states employ a system of sales and compensating use taxes.⁶ The Supreme Court finds state use taxes unconstitutional when the taxes impose a burden on interstate commerce rather than promote interstate equality.⁷ To avoid burdening interstate commerce, state legislatures often provide consumers with credits for sales and use taxes paid to other states on the same goods.⁸ Currently, the Supreme Court does not explicitly require

5. All states except Alaska, Delaware, Montana, New Hampshire, and Oregon impose general state sales and use taxes. State Tax Guide (CCH) ¶ 60-100 (Aug. 1993).

6. A "use tax" is defined as:

A tax on the use, consumption, or storage of tangible property, usually at the same rate as the sales tax, and levied for the purpose of preventing tax avoidance by the purchase of articles in a state or taxing jurisdiction which does not levy sales taxes or has a lower rate.

BLACK'S LAW DICTIONARY 1543 (6th ed. 1990).

The Supreme Court approved compensating use taxes in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937). "Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass of property within the state of destination." *Id.*

States originally employed compensating use taxes in the 1930s to ensure that consumers did not purchase goods in other states to avoid paying their home state's sales tax. Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405, 407 (1986) [hereinafter *Complementary Taxes*]. Because virtually every state now employs a general sales tax, this justification for use taxes carries less weight. Many states, however, impose special sales and use taxes on certain goods and services. See Lori A. Burkhart, *State Taxes and the Commerce Clause: Recent Rulings*, 126 PUB. UTIL. FORT. 44 (1990) (discussing state sales and use taxes effecting utilities); Jerome R. Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 VAND. L. REV. 961 (1986) (discussing problems raised by new state taxes).

7. See, e.g., *Haliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, *reh'g denied*, 374 U.S. 858 (1963) (invalidating Louisiana use tax that discriminated against interstate commerce because different rates applied to different parts of the production process for out-of-state and in-state manufacturers, thus subjecting out-of-state manufacturers to a higher tax). The *Haliburton* Court concluded that "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Id.* at 70.

8. See, e.g., *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); State Tax Guide (CCH) ¶ 60-100 (Aug. 1993) (indicating that most states provide such credits). Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington have adopted the Multistate Tax Compact as of April, 1992. State Tax Guide (CCH) ¶ 351 (Apr. 1992). The Compact provides that "[e]ach purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally im-

states to provide credits,⁹ but the Court encourages the use of credits because they prevent multiple taxation on interstate commerce.¹⁰ In *Barringer v. Griffes*,¹¹ the Second Circuit Court of Appeals held that Vermont's Motor Vehicle Sales and Use Tax,¹² which taxed a vehicle's use of the highways without allowing a credit for taxes paid in other states, violated the Commerce Clause.¹³

The Barringers, Connecticut residents, purchased an automobile in 1988 and paid Connecticut's sales tax on the purchase price.¹⁴ In 1990, the Barringers moved to Vermont and discovered that Vermont law¹⁵ required them to pay an additional tax assessed at a rate of four percent of their car's depreciated value.¹⁶ The Barringers

posed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof." MO. REV. STAT. § 32.200, art. V, § 1 (1986).

9. See *Williams v. Vermont*, 472 U.S. 14 (1985) (avoiding issue of whether reciprocal tax credits are mandatory). See *infra* notes 47-53 and accompanying text for a discussion of the Court's current doctrine regarding credits.

10. See, e.g., *Henneford*, 300 U.S. at 587. This concern underlies the internal consistency test. See *infra* notes 37-42 and accompanying text for a discussion of the internal consistency test.

11. 1 F.3d 1331 (2d Cir. 1993).

12. VT. STAT. ANN. tit. 32, § 8903 (Supp. 1992). See *infra* note 15 for the text of the statute.

13. *Barringer*, 1 F.3d at 1338-39.

14. *Id.* at 1332. The Barringers purchased a 1988 Mazda for \$14,769. Connecticut levied its sales tax at a rate of 7.5% of the purchase price of the car, equalling \$1,085. *Id.*

15. VT. STAT. ANN. tit. 32, § 8903 (Supp. 1992) provides:

(b) There is hereby imposed upon the use within this state a tax of five percent of the taxable cost of any pleasure car . . . [payable] by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid . . . Subsection (a) establishes a tax "upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be five percent of the taxable cost of any pleasure car . . ."

VT. STAT. ANN. tit. 32, § 8903(a) (Supp. 1992). The Barringers were subject to the earlier form of this statute, which imposed a 4% tax. *Barringer*, 1 F.3d at 1333.

16. The statute applies to "taxable cost." That amount is "not to exceed the average book value of the same make, type, model and year of manufacture as designated by the manufacturer and as shown in the official used car guide, National Automobile Dealers Association . . ." VT. STAT. ANN. tit. 32, § 8902(5)(B) (Supp. 1992). The Vermont Tax Commissioner required the Barringers to pay \$280 in taxes; 4% of the depreciated value of the automobile. *Barringer*, 1 F.3d at 1333.

asked the United States District Court for the District of Vermont¹⁷ to find that Vermont's motor vehicle use tax violated the United States Constitution.¹⁸ The district court¹⁹ held that the tax did not violate the Commerce Clause because it taxed only use within Vermont.²⁰ On appeal, the Second Circuit Court of Appeals reversed, holding that Vermont unfairly apportioned the tax by not providing a credit for taxes on the vehicle already paid to other states.²¹

The plaintiffs objected to the use tax because Vermont failed to grant them a credit for the Connecticut sales tax already paid on the automobile, similar to that given to residents who paid Vermont sales tax. *Id.*

17. *Barringer v. Griffes*, 801 F. Supp. 1282, 1283 (1992), *rev'd*, 1 F.3d 1331 (2d Cir. 1993).

18. Other individuals have challenged the constitutionality of the Vermont Motor Vehicle Use Tax. *See, e.g., Williams v. Vermont*, 472 U.S. 14 (1985). *See infra* notes 47-52 and accompanying text for a discussion of this case.

19. The procedural history of this case typifies the hurdles consumers face when challenging state taxes. The Barringers initially sought declaratory and injunctive relief in Vermont Superior Court. 1 F.3d at 1333. Michael Griffes, the Motor Vehicle Commissioner and defendant in this case, filed a motion to dismiss for lack of subject matter jurisdiction because the Barringers failed to pay the tax. *Id.* The Barringers then withdrew their state claim and refiled it in the Federal District Court for the District of Vermont under 42 U.S.C. § 1983 (1988). 801 F. Supp. at 1283. The Supreme Court permits taxpayers to recover § 1983 damages against states that tax them in violation of their constitutional rights. Walter Hellerstein, *Supreme Court Settles Some State Tax Issues While Creating Other Problems*, 75 J. TAX'N 180, 183-85 (1991). The district court, however, dismissed the Barringers' case, finding that it lacked jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341 (1988). 801 F. Supp. at 1283.

On appeal from that decision, the Second Circuit Court of Appeals held that "if there is a judicial remedy available to the Barringers in Vermont, it cannot fairly be said to be plain." *Barringer v. Griffes*, 964 F.2d 1278, 1284 (2d Cir. 1992). The court concluded that in light of earlier litigation concerning the Motor Vehicle Purchase and Use Tax in *Williams*, 472 U.S. 14 (1985), "a plain, speedy, and efficient remedy" could not be had as required by the Tax Injunction Act, 28 U.S.C. § 1341 (1988). *Barringer*, 964 F.2d at 1279-80. However, the court vacated the district court's finding of lack of jurisdiction and remanded the case for further proceedings. *Id.* at 1284.

20. 801 F. Supp. at 1286. The court held that:

Vermont's motor vehicle purchase and use tax does not tax interstate activity at all. The tax, calculated as a percentage of the "taxable cost" or depreciated value of the vehicle at the time of registration in Vermont, is on the use of the car in Vermont only, not in any other state.

Id.

21. 1 F.3d at 1339.

The Commerce Clause grants Congress the power to regulate interstate commerce.²² In addition, the Commerce Clause limits the states' power to regulate or tax interstate commerce, even when no superseding federal regulation exists.²³ Since the Supreme Court first announced this principle in the middle of the nineteenth century, the Court has treated state regulations and state taxes affecting interstate commerce separately.²⁴ Historically, the Court used a formalist analysis when considering challenges to state taxation. Under the formalist analysis, the Court focused on whether a tax applied to a forbidden subject, not whether the tax had a forbidden effect.²⁵

In *Henneford v. Silas Mason Co.*,²⁶ the Court first approved use taxes on goods brought into the state that had not been subject to greater or equal sales tax in another state.²⁷ The Court upheld the use tax after applying the formalist analysis because the tax applied to use of goods, not commercial transactions, and because the tax tended to foster interstate equality.²⁸

In *Complete Auto Transit v. Brady*,²⁹ the Supreme Court overruled the formalist approach and upheld a Mississippi tax levied on an interstate business's gross receipts from operations within the

22. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

23. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. *Id.* at 458 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

24. TRIBE, *supra* note 2, at 441. "Although decisions concerning the constitutional validity of state taxes affecting interstate commerce can be assessed in terms of an interest-balancing process similar to that employed in the judicial evaluation of state regulation, the Supreme Court has not usually organized its analysis in terms of such balancing." *Id.*

25. See TRIBE, *supra* note 2, at 441-42 (describing the Court's formalist analysis under *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951), which held that a state could tax the privilege of doing business).

26. 300 U.S. 577 (1937).

27. *Id.* at 584. "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." *Id.*

28. *Id.*

29. 430 U.S. 274, *reh'g denied*, 430 U.S. 976 (1977).

state.³⁰ In response to the taxpayer's Commerce Clause challenge, the Court developed a four part test to analyze state taxes.³¹ Under *Complete Auto Transit*, states: 1) may only tax activities with a "substantial nexus" to the taxing state;³² 2) must apportion the tax fairly; 3) may not discriminate against interstate commerce; and 4) may only tax in fair relation to the services provided.³³ In *Complete Auto Transit*, the Court allowed states to tax formerly forbidden subjects, thus expanding the realm of permissible state taxation.³⁴ In addition, the Court provided a framework to analyze state taxes which allegedly violate the Commerce Clause.³⁵

30. *Id.* at 289 (overruling *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951)). The Court justified overruling its own precedent by stating that:

There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned.

Id. at 288-89 (footnote omitted).

31. *Id.* at 279.

32. *Id.* In addition to the Commerce Clause, the Due Process Clause limits state taxing power to objects or events that meet what are essentially jurisdictional requirements. In *Northwestern States Portland Cement Co.*, the Court denied a due process challenge to a state's tax which impacted taxes on certain components of a foreign corporation's net income by saying that the tax only applied to income "which arises from its activities within the taxing state." 358 U.S. at 464. See also *Developments in the Law — Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 961 (1962) (describing Fourteenth Amendment limits on state taxation) [hereinafter *Developments*].

33. *Complete Auto Transit*, 430 U.S. at 279. The Court derived this test primarily from *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), which held that a state may tax the net income of a multi-state business provided the state properly apportioned the tax. *Id.* at 464-65.

34. Since 1977, the Supreme Court has applied the *Complete Auto Transit* test to uphold several state taxes. See, e.g., *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24 (1988) (permitting state use tax on mail order catalogs); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986) (upholding state tax on aviation fuel); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (upholding mineral severance tax), *reh'g denied*, 453 U.S. 927 (1981); *Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978) (upholding state business and occupation tax). For an analysis of one court's application of the *Complete Auto Transit* test, see Neil M. Robinson, Note, *Supreme Court Decisions in Taxation: 1987 Term — Complete Auto Transit Test Applied to State Use Tax: D. H. Holmes Co. v. McNamara*, 42 TAX LAW. 391 (1989).

35. See Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988) [hereinafter *State Taxation*] (describing the controversy over whether states

In *Container Corp. of America v. Franchise Tax Board*,³⁶ the Supreme Court developed the internal consistency test to evaluate the *Complete Auto Transit* test's second prong.³⁷ The internal consistency test requires the Court to hypothesize the impact on interstate commerce if all jurisdictions adopted similarly apportioned taxes.³⁸ This approach identifies state taxes which are not in proportion to a person's or business's activities in the state.³⁹ The test also eliminates any requirement that the taxpayer show actual multiple taxation.⁴⁰ While the test originated in the context of apportion-

must, in all cases, provide a credit to taxpayers for sales or use taxes paid to other states).

36. 463 U.S. 159 (1983).

37. See *id.* at 162 (upholding California's business income tax apportionment formula as applied to a corporation with foreign subsidiaries). The Court announced that internal consistency guides evaluation of apportionment formulas. See *id.* at 169 (explaining that "the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed").

38. *Id.* The Supreme Court has applied the *Container Corp.* internal consistency test to a wide range of state taxes. In *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court rebuffed the state's argument that the plaintiff must show actual discrimination. The Court held that:

[T]his is not the test. In *Container Corp. of America v. Franchise Tax Board*, . . . the Court noted that a tax must have "what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade.

Id. at 644. The Court interpreted *Container Corp.* to encompass a broad range of taxes, and then announced that "[a] tax that unfairly apportions income from other States is a form of discrimination against interstate commerce." *Id.*

The Court redefined the internal consistency test in a case involving a tax on interstate telephone calls. See *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (holding that "[t]o be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result"). See also *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987) (invalidating Pennsylvania's unapportioned taxes on interstate trucks); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) (applying *Complete Auto Transit*'s fourth factor, discrimination against interstate commerce).

39. *Container Corp.*, 463 U.S. at 169-71.

40. In *Armco*, the Court rejected West Virginia's assertion that the plaintiff must show actual discrimination. 467 U.S. at 644-45. The Court applied the internal consistency test because "[a]ny other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States . . ." *Id.*

ing an income tax on a unitary business, the Court now evaluates a variety of taxes using the internal consistency test.⁴¹

After the development of the internal consistency test in *Complete Auto Transit*, the Supreme Court decided whether a state may tax property use within its jurisdiction. In *Maryland v. Louisiana*,⁴² the Court struck down Louisiana's "first use" tax on outer continental shelf natural gas.⁴³ The Court found the statute unconstitutional because its system of credits discriminated against out-of-state consumers, despite statutory language suggesting that the tax promoted equality.⁴⁴

While the Supreme Court acknowledges that states may tax property use provided the tax meets constitutional requirements,⁴⁵ the Court has not mandated specific steps for states to meet these requirements.⁴⁶ In *Williams v. Vermont*,⁴⁷ the Court invalidated part of the Vermont Motor Vehicle Purchase and Use Tax⁴⁸ because it violated the Equal Protection Clause.⁴⁹ The Court discussed, but

41. See, e.g., *Goldberg v. Sweet*, 488 U.S. 252 (1988) (holding that Illinois's excise tax on interstate telephone calls was internally consistent); *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987) (invalidating Pennsylvania's lump sum annual tax on operating trucks in the state because that tax failed the internal consistency test). Some critics find this test unnecessary to evaluate "unapportioned levies" which would be invalid "under a straightforward application of the venerable fair apportionment requirement." See *State Taxation*, *supra* note 35, at 188.

42. 451 U.S. 725 (1981).

43. *Id.* at 760.

44. "The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. . . . However, the pattern of credits and exemptions . . . undeniably violates this principle of equality." *Id.* at 759.

45. See *supra* notes 32-43 and accompanying text for a description of these requirements.

46. See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (upholding Montana's controversial severance tax on low sulphur coal). The Court stated that "the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." *Id.* at 628 (footnote omitted).

47. 472 U.S. 14 (1985).

48. VT. STAT. ANN. tit. 32, § 8911(9) (Supp. 1992).

49. 472 U.S. at 27. In *Williams*, individuals who were new Vermont residents challenged a provision of the tax which allowed Vermont residents, but not those moving into Vermont, to receive a credit on sales taxes paid to other states where they had previously registered their vehicle. *Id.* at 16. The Supreme Court ruled that this provision violated the Privileges and Immunities Clause because the Court found "no relevant difference between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came

did not decide, whether a state must provide credits for sales or use taxes paid to other states.⁵⁰ The Court noted strong support from lower courts and commentators for requiring states to provide credits,⁵¹ but declined to rule on the issue because there was another clear ground for invalidating the tax.⁵² Thus, the Court in *Williams* did not decide whether states must offer credits for sales or use taxes paid to other states.

Absent Supreme Court precedent requiring credits, the Oklahoma Supreme Court, in *Cities Service Gas Co. v. Tax Commission*,⁵³ found the state's severance tax on natural gas fairly apportioned.⁵⁴ The court found no apportionment problem because only one state, Oklahoma, even had the power to tax the severance of gas.⁵⁵ Other courts have applied similar logic to the fair apportionment issue to conclude that no apportionment problem can arise when a state taxes an event unique to the state.⁵⁶

to Vermont after buying a car elsewhere." *Id.* at 27. See generally PAUL HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 1010 (1981 & Supp. 1992).

50. 472 U.S. at 21-22.

51. *Id.* at 22. The Court cited *Montgomery Ward & Co. v. State Bd. of Equalization*, 78 Cal. Rptr. 373, 391 (1969) (requiring a credit to avoid imposing a discriminatory burden on interstate commerce), *cert. denied*, 396 U.S. 1040 (1970); *Developments, supra* note 32, at 999-1000 (arguing that use taxes are invalid absent a credit); STATE TAXATION OF INTERSTATE COMMERCE, REPORT OF THE SPECIAL SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, H.R. REP. NO. 565, 89th Cong., 1st Sess. 835 (1965) (finding that credits prevent unfair burdening of interstate commerce). See also MULTISTATE TAX COMPACT, art. V, § 1 (reprinted in State Tax Guide (CCH) ¶ 351 (Apr. 1992)) (requiring member states to credit sales and use taxes paid to other states); *State Taxation, supra* note 35, at 160-61 (finding that the Supreme Court resolved the credit issue by adopting the internal consistency test).

52. *Williams*, 472 U.S. at 22. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937) (stating that "[W]e have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states."). See also *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 31 (1988) (finding a Louisiana taxing scheme fairly apportioned "for it provides a credit . . .").

53. 774 P.2d 468 (Okla.), *cert. denied*, 493 U.S. 854 (1989).

54. *Id.* at 473-74.

55. *Id.* at 473.

56. See *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176 (Mont.) (finding no potential for multiple taxation where the state levied tax on transmitting power within the state), *cert. denied*, 493 U.S. 1050 (1989); *Exxon Corp. v. Wyoming State Bd. of Equalization*, 783 P.2d 685 (Wyo. 1989) (holding tax fairly

In *Cole Bros. Circus, Inc. v. Huddleston*,⁵⁷ the Tennessee Court of Appeals upheld a state use tax as applied to the property of an itinerant circus.⁵⁸ The tax provided a credit for taxes paid to other states on the same property; therefore, the court felt no apportionment problem existed.⁵⁹ *Cole Bros. Circus* typifies a line of cases finding that there is no apportionment problem when a state provides a credit for similar taxes paid to other states.⁶⁰ However, those courts did not interpret the Commerce Clause as requiring states to provide sales tax credits to fairly apportion their taxes.⁶¹

apportioned when applied only to pipe installed and used in state), *cert. denied*, 495 U.S. 910 (1990).

At least one state supreme court misread Supreme Court precedent. *See* *Great Am. Airways v. Nevada State Tax Comm'n*, 705 P.2d 654, 657 (Nev. 1985) (holding that "We need not address [plaintiff's] concern that Nevada's taxing scheme may result in multiple taxation because [plaintiff's] failure to demonstrate actual multiple taxation is fatal to its assignment of error."), *cert. denied*, 479 U.S. 817 (1986). *See supra* notes 38-42 and accompanying text for a discussion of the Supreme Court's application of the internal consistency test.

57. No. 01-A-01-9301-CH00004, 1993 WL 190914 (Tenn. Ct. App. June 4, 1993).

58. *Id.* at *8.

59. *Id.* at *6. "Cole Bros.' argument in regard to apportionment of the use tax is likewise without merit. Tennessee law allows a credit against Tennessee tax liability for sales or use tax paid to another state. . . . In fact, the evidence is that Cole Bros. has been given credit for taxes paid in other states." *Id.*

60. *See also* *Tennessee Gas Pipeline v. Marx*, 594 So.2d 615, 618 (Miss. 1992) (concluding that because the state provided a credit, the use tax met the internal consistency requirement and the fair apportionment test); *C & P Tel. v. Comptroller*, 561 A.2d 1034, 1037 (Md. 1989) (stating that "We also find the Maryland use tax . . . fairly apportioned, for it provides a credit against the use tax for sales taxes that have been paid in other states."); *H.K. Porter Co. v. Commonwealth*, 534 A.2d 169, 171 (Pa. Commw. Ct. 1987) (upholding use tax on purchase of corporate aircraft as fairly apportioned because it provides a credit).

61. At least two courts elected to use a detailed balancing approach to state taxes. In *Associated Ind. of Mo. v. Director of Revenue*, No. 75089, 1993 WL 229402 (Mo. June 30, 1993), the Missouri Supreme Court upheld a state-wide use tax which may tax out-of-state goods at a higher rate in some areas due to varied local taxes. *Id.* at *10. The court found the tax was so low as to "not discriminate against interstate commerce in purpose or practical effect." *Id.* In *Consolidated Freightways v. Department of Revenue*, 477 N.W.2d 44 (Wis. 1991), the Wisconsin Supreme Court upheld a statute employing an apportionment formula that resulted in a 1.1% increase in the tax rate on a multistate business for a period of years. *Id.* at 51. The court approved the apportionment formula because it was a rough but reasonable approximation of the company's activities in the state. *Id.*

In *Barringer v. Griffes*,⁶² the Second Circuit found that the Vermont Motor Vehicle Purchase and Use Tax⁶³ failed to meet *Complete Auto Transit's* fair apportionment criterion because it did not provide a credit for sales taxes paid to other states.⁶⁴ The parties agreed that if the tax violated the Commerce Clause, it did so by failing to meet either the fair apportionment or discrimination prongs of the *Complete Auto Transit* test.⁶⁵ The court held the tax unfairly apportioned, rendering its analysis of the discrimination issue moot.⁶⁶

The court held that the fair apportionment prong requires a tax be fairly attributable to the taxed activity.⁶⁷ The court assailed the district court's conclusion that Vermont fairly apportioned the tax.⁶⁸ Instead, the court found that by apportioning the tax in relation to the value of the automobile, Vermont violated the Commerce Clause.⁶⁹ To determine if Vermont fairly apportioned the tax, the court applied the internal consistency test.⁷⁰ The court found the tax internally inconsistent⁷¹ and thus unfairly apportioned because

62. 1 F.3d 1331 (2d Cir. 1993).

63. VT. STAT. ANN. tit. 32, § 8903 (Supp. 1992). For the text of this statute, see *supra* note 15.

64. 1 F.3d at 1337.

65. *Id.* at 1335. The plaintiffs argued that the tax failed the fair apportionment test because "during the useful life of a vehicle transported interstate, it will be taxed more than a vehicle that remains instate." *Id.*

66. "While we need not decide this issue, we address it to highlight the negative effects of the tax." *Id.* at 1337. The court concluded that the tax discriminated because it "provid[ed] an advantage to local producers whose products effectively will cost less and make out-of-state purchases disadvantageous." *Id.* at 1337-38 (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

67. 1 F.3d at 1335. The court stated the issue as "whether [the] tax is fairly attributable to an activity carried on in the taxing state." *Id.* (citing Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 57 (1987)).

68. 1 F.3d at 1335.

69. The court stated that "[t]he perplexing question underlying this case—and for that matter all use tax cases—concerns the precise circumstances under which it will be fair for Vermont to apportion a tax on goods transported into the state based on the value of the goods." *Id.* at 1335-36.

70. See *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). See *supra* notes 36-41 and accompanying text for a discussion of *Container Corp.* and the internal consistency test.

71. 1 F.3d at 1337. The court used the internal consistency definition from *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989). See *supra* note 38 for the *Goldberg* definition.

the Vermont tax subjected automobiles like the Barringers' to multiple taxation without regard to actual use in the state.⁷²

While the Supreme Court failed to find sales tax credits constitutionally required,⁷³ the court in *Barringer* noted that such credits may enable a tax to meet Commerce Clause requirements.⁷⁴ Like the Supreme Court, the Second Circuit refused to decide that the Commerce Clause requires a credit.⁷⁵ The court found that because the Vermont tax subjected automobiles to multiple taxation,⁷⁶ the tax "heavily burden[ed]" interstate commerce, but still refused to require Vermont to provide credits.⁷⁷ While remarking that a credit would certainly cure the defect, the court declared that Vermont's legislature, not the court, must choose how to apportion the tax fairly.⁷⁸

Judge Van Graafeiland dissented,⁷⁹ contending that because the Vermont Legislature intended to tax automobile use to pay for upkeep of highways within the state,⁸⁰ no multiple taxation could re-

72. 1 F.3d at 1337. The court found that even if Vermont taxed depreciated value rather than purchase price, the tax still would constitute impermissible multiple taxation. *Id.*

73. The Court stated:

Although plaintiffs ask us to hold that a credit is affirmatively required if the statute is to be ruled constitutional, we decline this invitation to rechart our course because to adopt their suggestion would take us further from shore and give our holding a broader reach than necessary to decide this appeal.

Id.

74. *Id.* at 1336 (citing *Goldberg v. Sweet*, 488 U.S. 252, 265 (1989); *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 31 (1988); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 248-49 (1987); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937)).

75. *Id.* at 1337.

76. The court gave an example comparing the taxes paid on two \$10,000 cars, one bought in Vermont and the other bought out of state. The court concluded that "multiple taxation [of the interstate auto] still results . . . even when the use tax only taxes the auto's depreciated value," because that car's owner must pay more tax. 1 F.3d at 1337.

77. *Id.* at 1337. "Applying the [internal consistency] test demonstrates that if all the states employed Vermont's tax plan, an automobile registered in several states during its useful life would be taxed considerably more than a vehicle that spent its entire life in the same state." *Id.*

78. *Id.*

79. 1 F.3d at 1339 (Van Graafeiland, J., dissenting).

80. *See also* VT. STAT. ANN. tit. 32, § 8901 (Supp. 1992) (stating the purpose underlying the Motor Vehicle Purchase and Use Tax).

sult.⁸¹ He argued that the Vermont tax did not raise an apportionment issue because only Vermont may tax this use.⁸² Judge Van Graafeiland claimed, furthermore, that the majority improperly examined the method the state legislature chose to determine the tax rate.⁸³

The *Barringer* majority correctly applied the Supreme Court's current Commerce Clause doctrine.⁸⁴ Recent developments in the Supreme Court's treatment of state taxation suggest a definite shift toward a realist analysis,⁸⁵ exemplified by *Complete Auto Transit's* internal consistency test.⁸⁶ The court's method complied with recent Supreme Court state taxation decisions indicating that the Court now prefers to focus on a tax's actual impact rather than on the state's articulated purpose.⁸⁷ The *Barringer* court evaluated Vermont's tax using the internal consistency test⁸⁸ rather than examining the Vermont Legislature's stated purpose for the tax, and thereby advanced the realist approach to state taxation.

81. 1 F.3d at 1340 (Van Graafeiland, J., dissenting).

82. The majority and the dissent interpret apportionment differently. Judge Van Graafeiland defined the issue as whether the tax could possibly be levied by more than one state. *Id.* at 1340. The majority, however, focused the apportionment issue on whether the tax amount properly related to the taxpayer's activities in the taxing state. *Id.* at 1335.

83. 1 F.3d at 1340 (Van Graafeiland, J., dissenting). To support this proposition, Judge Van Graafeiland cited a footnote in *Williams* that contained a scathing derision of Vermont's choice to apportion the tax according to the automobile's value.

A nonrecurring use tax pegged to the value of the car is an exceedingly loosely tailored means to this end. The amount of such a payment has no relation to the extent of use, includes the irrelevant variable of the luxury value of the car, and fails to account for the possibility of the owner moving out of the State or selling the car during its useful life. Reliance on annual registration fees would provide a more accurate measure of current use and would seem to be more closely related to the stated purpose. However, appellants do not challenge the tax itself as an equal protection violation.

Williams, 472 U.S. at 25 n.9.

84. See *supra* notes 29-53 and accompanying text for a discussion of the Court's current doctrine.

85. In state taxation cases, the Supreme Court focuses on evaluating the tax's actual impact rather than its purpose. See *supra* notes 30-45 and accompanying text for a discussion of the cases which developed this realist analysis.

86. See TRIBE, *supra* note 2, at 441. See generally *Complementary Taxes*, *supra* note 6 (discussing the purpose of compensating use taxes in the 1930s).

87. See *supra* notes 38-41 and accompanying text for a discussion of cases focusing on a tax's actual impact.

88. *Barringer*, 1 F.3d at 1337.

Judge Van Graafeiland's dissent in *Barringer* followed an out-dated analysis of state taxation by focusing on Vermont's articulated purpose for the tax.⁸⁹ Judge Van Graafeiland quickly concluded that the tax could not burden interstate commerce because it only applied to highway use in Vermont, ignoring the tax's potential for discrimination.⁹⁰ He attacked the majority position by applying the standard of review applied to equal protection questions.⁹¹ Judge Van Graafeiland also mistakenly argued that the majority misapplied the internal consistency test, which he believed only applies in the unitary business area.⁹² Judge Van Graafeiland's problematic reasoning perpetuates an outmoded approach to state taxation of interstate commerce.

After the Supreme Court's decision in *Williams*, the Second Circuit's approach may have been the only way to prevent Vermont's continued discrimination. In *Williams*, the Supreme Court avoided the issue presented in *Barringer* because an egregious violation of the Equal Protection Clause allowed them to resolve the case.⁹³ This fact, along with the Supreme Court's earlier comments about Vermont's tax,⁹⁴ strongly suggest that the Supreme Court may agree with the *Barringer* majority.

With states increasingly expected to pay a larger share of government-mandated programs, the reasons underlying the Commerce Clause remain compelling. Courts must take steps to insure that states do not tax interstate commerce or goods moving through the state as a means of erecting trade barriers and improperly fostering home state business. Allowing states to tax interstate goods for such purposes would encourage enhanced competition between states,

89. *Id.* at 1341 (Van Graafeiland, J., dissenting).

90. *Id.* at 1340 (Van Graafeiland, J., dissenting).

91. *Id.* Judge Van Graafeiland cited a note in *Williams* that referred to the "reasonable basis" standard for reviewing classifications challenged under the Equal Protection Clause. *Williams*, 472 U.S. at 25 n.9.

92. 1 F.3d at 1339 (Van Graafeiland, J., dissenting) (citing *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991); *Exxon Corp. v. Department of Revenue of Wis.*, 447 U.S. 207, 229 (1980)). However, the test applies to a broad range of taxes. See *supra* note 41 and accompanying text for a discussion of these taxes.

93. "Once again, however, we find it unnecessary to reach this question. Whatever the general rule may be, to provide a credit only to those who were residents at the time they paid the sales tax to another State is an arbitrary distinction that violates the Equal Protection Clause." 472 U.S. at 22.

94. See *supra* note 83 for the Supreme Court's discussion of the Vermont tax.

while ignoring an international economic imperative that the United States become more competitive.

The Second Circuit reasonably extended current Supreme Court doctrine⁹⁵ by ruling that a tax which subjects property to multiple taxation for no other reason than that it came from another state violates the principles of the Commerce Clause. The Second Circuit carefully navigated the Commerce Clause doctrine's murky waters to successfully retain the best attributes of the emerging realist analysis.⁹⁶ If the Supreme Court follows the path the *Barringer* majority laid and mandates that states provide a credit to payers of that state's use taxes for all sales and use taxes paid to other states, it would resolve at least one nagging problem with the current, confusing state taxation doctrine.⁹⁷

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95. See *supra* notes 30-35 and accompanying text for a discussion of the *Complete Auto Transit* test.

96. See *supra* notes 30-42 and accompanying text for a discussion of the Supreme Court's realist approach to state taxation, exemplified by the internal consistency test.

97. *Complementary Taxes*, *supra* note 6, at 430.

* J.D. 1995, Washington University.

