TAXATION—CONSTITUTIONAL LAW—APPLICATION AND REJECTION OF PER SE UNCONSTITUTIONAL RULE AS APPLIED TO STATE TAXATION OF INTERSTATE COMMERCE—*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

In October, 1971 and again in December, 1972,[1] Complete Auto Transit, Inc., a Michigan corporation engaged in the interstate transportation of motor vehicles, was notified of tax assessments[2] based upon a Mississippi statute levying a sales tax on the "privilege of . . . doing business within th[e] state."[3] The corporation paid the tax under protest and then filed for a refund, contending that, since its business "was but one part of an interstate" operation, the application of the tax to its activities was unconstitutional under the commerce clause of the United States Constitution.[4] The trial court affirmed the assessments and Complete Auto Transit appealed to the Mississippi Supreme Court.[5] Relying upon the fact that the tax did not discriminate against interstate commerce, would not result in dupli-

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[1] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 276–77 (1977).

[2] Complete Auto Transit, Inc. v. Brady, 330 So. 2d 268, 269 (Miss. 1976), *aff'd*, 430 U.S. 274 (1977). Complete Auto Transit, operating under certification of the Interstate Commerce Commission, transported vehicles assembled by General Motors Corporation. *Id.* The vehicles were assembled in Georgia and shipped by rail into Mississippi where Complete Auto Transit took possession of and subsequently transported them to various dealerships located both within and without the state of Mississippi. *Id.* at 269–70.

[3] MISS. CODE ANN. § 27-65-13 (Cum. Supp. 1972) (originally codified at MISS. CODE ANN. § 10105 (1942)). This statute provided that:

> There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values . . . as provided in the following sections.

The section applicable to Complete Auto Transit provided for application of the tax to the operation of any "transportation of persons or property for compensation . . . between points within" Mississippi. MISS. CODE ANN. § 27-65-19(2) (Cum. Supp. 1972) (originally codified at MISS. CODE ANN. § 10109 (1942)). Although the United States Supreme Court in *Complete Auto Transit* allowed that this language could be construed to apply only to intrastate commerce, the Court observed that the state supreme court had considered the tax applicable "to both interstate and intrastate commerce." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 275 n.2 (1977).

It should be noted that the period for which Complete Auto Transit was assessed under the statute ran only from August, 1968 through July, 1972. *Id.* at 277. Effective August 1, 1972, section 27-65-19(2) was amended to exclude from its operation the transportation of property. 1972 MISS. LAWS, c. 506, § 2.

[4] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 277 (1977). The Constitution granted to Congress the power to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3.

[5] *See* Complete Auto Transit, Inc. v. Brady, 330 So. 2d 268, 269 (Miss. 1976), *aff'd*, 430 U.S. 274 (1977).

cate taxation and additionally noting that the corporation had derived sufficient benefit from the state to justify imposition of the tax, the Mississippi Supreme Court affirmed the judgment.[6]

The United States Supreme Court noted probable jurisdiction[7] and, in *Complete Auto Transit, Inc. v. Brady*,[8] unanimously affirmed the ruling of the state court, upholding the constitutionality of the tax as applied to the corporation.[9] In so doing, the Court overruled the decision[10] in *Spector Motor Service, Inc. v. O'Connor*[11] in which the Court had held that state taxation of the "privilege of carrying on exclusively interstate commerce" was per se unconstitutional.[12] Noting that the *Spector* rule lacked a viable "relationship to economic realities," the *Complete Auto Transit* Court reasoned that the emphasis placed on "the use of . . . particular words" tended to conceal the analysis of the actual effect of the tax on interstate commerce and therefore concluded that the rule should be discarded.[13]

The question of the limits of state taxation of interstate commerce has been probed by the Court since the early days of constitutional interpretation.[14] Although Chief Justice Marshall had recog-

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[6] Complete Auto Transit, Inc. v. Brady, 330 So. 2d 268, 270, 272 (Miss. 1976), *aff'd*, 430 U.S. 274 (1977). The court, relying upon Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948), reasoned that a state may generally tax those local aspects of interstate commerce "sufficiently separate from" activities outside the taxing state. *Id.* at 270; *see* notes 33–39 *infra* and accompanying text. The validity of the tax was to be measured by the possibility of "cumulative burdens on interstate commerce not borne by local commerce." 330 So. 2d at 270.

Analyzing previous decisions "arising in [Mississippi]" considered to have upheld similar levies, *id.* at 270–71, the court noted Complete Auto Transit's extensive activities in Mississippi as well as the "police protection and other . . . services" provided by the state. *Id.* at 272. Based on these considerations, the court concluded that the tax was valid, since it did not "discriminate against interstate commerce" and further found no potential for the "smother[ing] [of interstate commerce] by cumulative taxes of several states." *Id.* Significantly, the court made no mention of the possible application of Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). *See id.* at 268–72. The *Spector* decision was overruled by the United States Supreme Court in its affirmance of the Mississippi court's decision. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 289 (1977).

[7] Complete Auto Transit, Inc. v. Brady, 429 U.S. 813 (1976). Decisions of "the highest court of a State" which involve "the validity of a statute of any state on the ground of its being repugnant to the Constitution" are reviewable "[b]y appeal" in the United States Supreme Court when the state court "decision [was] in favor of [the statute's] validity." 28 U.S.C. § 1257(2) (1970).

[8] 430 U.S. 274 (1977).

[9] *Id.* at 289.

[10] *Id.*

[11] 340 U.S. 602 (1951). For a discussion of the *Spector* case, see notes 40–53 *infra* and accompanying text.

[12] 340 U.S. at 609–10.

[13] 430 U.S. at 279, 288–89 (1977).

[14] Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens,"*

nized the pervasive nature of congressional control over interstate commerce in his landmark opinion in *Gibbons v. Ogden*,[15] the Court soon acknowledged that states could exercise some authority over those aspects of interstate commerce which while within the scope of congressional power were not "in their nature national."[16] In *Cooley v. Board of Wardens*,[17] the Court prescribed an inquiry into the subject matter of the regulation and whether, as a practical matter, the federal interest in the freedom of interstate commerce required uniformity.[18] If so, any state regulation was prohibited even in the absence of explicit congressional action.[19] However, if, as in *Cooley*, the subject matter was such that a state's regulations would not

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or What Have You?, 4 VAND. L. REV. 496, 496 (1951). *See also* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959); Freeman v. Hewit, 329 U.S. 249, 251–52 (1946).

[15] 22 U.S. (9 Wheat.) 1 (1824). The dispute in *Gibbons* concerned the right of the plaintiff to navigate in the waters between New York and New Jersey in contravention of a New York statute which purported to confer exclusive navigation rights upon certain individuals. *Id.* at 2. Gibbons argued that, insofar as the New York law regulated the use of interstate waters, it was violative of the commerce clause of the Constitution. *Id.* at 2, 186; U.S. CONST. art. I, § 8, cl. 3. Speaking for the Court, Chief Justice Marshall included navigation within the meaning of commerce as used in the Constitution, *id.* at 189–93, and asserted that when a state attempts "to regulate commerce . . . among the several States, it is exercising the very power . . . granted to Congress." *Id.* at 199. The Court found "great force in [the] argument" that the power "'to regulate' implies . . . full power over the thing to be regulated, . . . exclud[ing], necessarily, the action of all others that would perform the same operation on the same thing." *Id.* at 209. While it was acknowledged that, in regulating its internal affairs, a state might enact laws which appeared to regulate commerce it was concluded that any such law which conflicted with legislation enacted by Congress would be invalid. *Id.* at 209–10. Based on this analysis the Court found the New York statute unconstitutional. *Id.* at 239–40.

Chief Justice Marshall's view—which asserted federal supremacy in the regulation of interstate commerce—was reiterated with regard to the states' taxing power in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 445–47 (1827). *See* P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE, 22–23 (1953).

[16] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851). In *Cooley*, the Court was confronted with the validity of a state statute regulating navigation pilotage. *Id.* at 311–12, 315. In upholding the statute, the Court recognized a distinction between aspects of commerce more properly regulated by local authorities and those which require a "uniform system" of regulation. *Id.* at 319. The Court concluded that the "regulation of pilots" was "local" in nature and as such was "best provided for, not by one system, . . . but by as many as the legislative discretion of the several States should deem applicable." *Id.*

[17] 53 U.S. (12 How.) 299 (1851).

[18] *Id.* at 318–19. The Court stated that "[t]he grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter." *Id.* at 318. The majority indicated that if the states were to be excluded, in the absence of federal legislation, it must be due to the national nature of the subject matter. *Id.* Absent such a subject, however, the Court concluded "that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States." *Id.* at 319.

[19] *Id.* at 318–19.

threaten the federal interests protected by the commerce clause, the states would be free to regulate in the absence of express congressional legislation.[20] Subsequently, the Court recognized that interstate commerce could legitimately be required to "'pay its way'" for the benefit derived from services rendered by the individual states.[21] This recognition, however, did not resolve the issue since the Supreme Court failed to reach a consensus as to a standard by which such levies were to be judged.[22]

Acknowledging the inconsistency of previous pronouncements,[23] the divided Court in *Freeman v. Hewit*[24] chose to frame its decision concerning the validity of an Indiana tax solely in terms of whether the tax operated directly upon interstate commerce.[25] Questions of possible duplication of the tax by other states, errors in apportionment or a demonstration of discriminatory operation were deemed unnecessary considerations in the context of "a direct tax."[26] Although the Court acknowledged the validity of a variety of taxing devices with similar economic bases, it found that the direct incidence of the tax upon interstate commerce sufficed to invalidate the levy in

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[20] *Id.* at 319–21.

[21] Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938) (quoting from Postal Tel. Cable Co. v. City of Richmond, 249 U.S. 252, 259 (1919)); *see* Galveston, H. & S.A. Ry. v. Texas, 210 U.S. 217, 225, 227 (1908); Postal Tel. Cable Co. v. Adams, 155 U.S. 688, 696 (1895); Ficklen v. Shelby County Taxing Dist., 145 U.S. 1, 24 (1892).

The Court in *Western Live Stock* indicated that the problem involved the reconciliation of "the practical needs of a taxing system . . . to the double demand that interstate business shall pay its way, and . . . at the same time . . . not be burdened with cumulative exactions." 303 U.S. at 258.

[22] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959); Barrett, *supra* note 14, at 496–97; Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline*, 62 VA. L. REV. 149, 149–50 (1976). Justice Frankfurter echoed these sentiments in Freeman v. Hewit, 329 U.S. 249 (1946), observing that "[t]he history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future." 329 U.S. at 252.

[23] Freeman v. Hewit, 329 U.S. 249, 252 (1946).

[24] 329 U.S. 249 (1946).

[25] *Id.* at 253–58. In *Freeman*, the trustee of an estate, a resident of Indiana, arranged for the sale of certain securities through an Indiana broker. *Id.* at 250. Although the sale was executed in New York, Indiana applied a one percent tax to the proceeds of the sale under a statute which taxed the income "of residents and domiciliaries." *Id.* at 250–51.

[26] *Id.* at 256–57; *see id.* at 259–60 (Rutledge, J., concurring). Rejecting the contention that the permissibility of the tax should depend upon whether another state had duplicated the tax, the Court noted that "[t]he immunities implicit in the Commerce Clause . . . can hardly be made to depend . . . on the shifting incidence of the varying tax laws of the various States." *Id.* at 256.

these circumstances.[27] Under this analysis, interstate commerce was entitled to a "free flow" through the state without the "imped[iment]" of state taxation directly incident to such trade.[28]

Concurring in *Freeman*, Justice Rutledge contended that the Court had reverted to a "long since repudiated" analysis.[29] Rather, it was more appropriate to inquire into the economic consequences,[30] jurisdictional ties[31] and possibilities of burdensome and cumulative taxation in assessing the validity of a state tax.[32]

Subsequent to *Freeman*, in *Memphis Natural Gas Co. v. Stone*,[33] the Court exhibited a further fragmentation, as to the mode of analysis to be utilized in judging the validity of a state levy.[34] In upholding the constitutionality of a Mississippi franchise tax, the Court advanced several possible justifications for its decision, including those advanced by Justice Rutledge in *Freeman*.[35] However, a

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[27] *Id.* at 255–57. Despite the recognized need for balancing a state's revenue requirements with "freedom for the national commerce," the Court nevertheless found a distinction between state taxation and regulations based upon "vital local interests" under the police power. *Id.* at 253. In contrast to such interests, the Court found that the denial of "a particular source of income because it taxes the very process of interstate commerce" was not fatal to "a State's ability to carry on its local function." *Id.* The Court recognized the "more threatening burden of" such a levy and suggested the need for stricter scrutiny "of a direct tax on [interstate] commerce." *Id.*

[28] *Id.* at 252. The Court indicated "that the Commerce Clause . . . by its own force created an area of trade free from interference by the States." *Id.* The Court indicated that a burden upon interstate commerce, whether due to state taxing powers or any other state powers, would not be tolerated to the extent that such a burden "impede[s] the free flow of trade between states." *Id.* at 252–53.

[29] *Id.* at 261–62, 265–66. Justice Rutledge not only claimed that the mode of analysis applied by the majority, under which Congress had the sole authority to tax interstate commerce had been abandoned, but also that a general "resurrection" of the theory would serve to invalidate an infinite number of state taxes previously held to be constitutional. *Id.* He also attacked the majority's discussion concerning the invalidity of tax applied "directly" upon interstate commerce, asserting that such a distinction is irrelevant as even an "indirect" tax is capable of producing "forbidden consequences." *Id.* at 267–70.

[30] *Id.* at 270.

[31] *Id.* at 271, 273.

[32] *Id.* at 272–74. In questioning the reasoning employed by the majority, Justice Rutledge contended that not only was the assessment of the constitutional validity of a statute too important a matter to be left to "labels or formulae," but "that increasingly with the years emphasis ha[d] been placed upon [the] practical consequences and effects" of a particular statute. *Id.* at 270. Additionally, he asserted that while the Court had at times looked to the language employed, greater emphasis had been placed upon the actual consequences of a tax in determining its constitutional validity. *Id.*

[33] 335 U.S. 80 (1948).

[34] *See id.* at 80–105.

[35] *Id.* at 93, 96. The opinion stated that the tax was on a "local activity" and, furthermore, was duly apportioned and did not place "an unreasonable burden" upon the taxpayer. *Id.* The Court also reasoned that the state was entitled to compensation for services provided to the taxpayer. *Id.* at 96.

plurality of the Court emphasized that the tax in question constituted a levy "'on the privilege of exercising corportate functions'" as opposed to a concededly impermissible tax on the privilege of doing business.[36] Justice Rutledge, again concurring, adhered primarily to the principles of his concurrence in *Freeman*.[37] The dissent, however, categorized the tax as one on the privilege of doing an interstate business and, consequently, found it invalid regardless of whether the economic impact was indiscernable from that of a constitutionally acceptable levy.[38]

The approach of the *Memphis Natural Gas* dissent—the appraisal of constitutional validity premised solely upon whether the tax was imposed upon the privilege of engaging in interstate commerce[39]—was adopted by the Court in *Spector Motor Service, Inc. v. O'Connor*.[40] Reminiscent of the approach taken in *Freeman*,[41] the *Spector* Court invalidated a Connecticut tax assessed on a corporation found to be engaged in an "exclusively interstate" business.[42] Conceding

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[36] *Id.* at 92–93 (quoting Southern Natural Gas Corp. v. Alabama, 301 U.S. 148, 153 (1937)). The Court relied upon a similar rationale in Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 109–14 (1975), in which a state tax was declared valid based upon the state's right to compensation for services rendered and the permissibility of taxing a company for "doing business . . . in the corporate form." 421 U.S. at 114. *See* Hellerstein, *supra* note 22, at 182–84. For a discussion of *Colonial Pipeline*, see notes 71–83 *infra* and accompanying text.

[37] 335 U.S. 96–99 (Rutledge, J., concurring); *see Freeman*, 329 U.S. at 259–83; notes 29–32 *supra* and accompanying text.

[38] 335 U.S. at 102–05 (Frankfurter, J., dissenting). Justice Frankfurter, who had written the majority opinion in *Freeman*, 329 U.S. at 250, asserted that the mere fact that a constitutionally acceptable tax could have been legitimately increased did not automatically legitimate every tax the state might have levied to collect the same amount. 335 U.S. at 104. It was also contended that the state had not provided any services for which it could receive compensation except those for which "subordinate taxing authorities, ha[d] already made exaction." *Id.* at 100. Based on these propositions, Justice Frankfurter found it "clear beyond peradventure that" the levy was "on the privilege of engaging in . . . interstate business" and hence violated the prohibitions of the commerce clause. *Id.* at 104.

[39] 335 U.S. at 99–105.

[40] 340 U.S. 602 (1951).

[41] *See Freeman*, 329 U.S. at 252–58; notes 25–28 *supra* and accompanying text.

[42] 340 U.S. at 603, 608. Spector was a corporation engaged in transporting freight between states. *Id.* at 607. A part of that business involved the utilization of two terminals in Connecticut for assembling the cargo into full truckloads. *Id.* The collection of freight at these terminals was found to be merely an integrated aspect of the entire interstate operation. *Id.*; Spector Motor Serv., Inc. v. Walsh, 135 Conn. 37, 44, 61 A.2d 89, 93 (1948). Additionally, Spector had been authorized by the Interstate Commerce Commission to operate an interstate trucking business and had registered as a foreign corporation in Connecticut. 340 U.S. at 606–07. The corporation had not, however, been authorized by the state to conduct its business on an intrastate basis. *Id.* at 607. The determination that Spector was engaged entirely in interstate commerce was crucial to the Court's decision since the majority allowed that a similar privilege tax could have been assessed on a mixed interstate and intrastate business. *Id.* at 609–10.

In writing for the Court in *Complete Auto Transit*, Justice Blackmun noted the factual

that the same tax could have been validly imposed through a number of other approaches, and that the tax "[did] not discriminate between interstate and intrastate commerce," the Court nevertheless contended that these factors were irrelevant if an improper "constitutional channel" had been utilized.[43] Consequently, although the Court agreed with the proposition that interstate commerce could validly be required to carry its share of the cost of state services,[44] it was noted that any tax upon "the privilege [of] engag[ing] in interstate commerce" impinged upon the congressional taxing power and thereby rendered the tax unconstitutional.[45] Apparently rejecting the approach taken by the plurality in *Memphis Natural Gas*,[46] the *Spector* Court further suggested the absolute nature of this prohibition by noting that "[t]he constitutional infirmity . . . persists no matter how fairly [the tax] is apportioned."[47]

In contrast, the dissent in *Spector* contended that the statute had been "declared invalid simply because the State ha[d] verbally characterized it as a levy on the privilege of doing business within its borders."[48] Finding that the levy met all "practical test[s] of fairness and propriety,"[49] the dissent maintained that the previously recog-

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similarity between *Spector* and the case at bar. *See* 430 U.S. at 283–84. For a discussion of the facts in *Complete Auto Transit*, see notes 1–6 *supra* & 85–88 *infra* and accompanying text.

[43] 340 U.S. at 607–09. The Court suggested, for example, that the tax would have been valid had it been levied as compensation for the use of the state's highways or as an ad valorem property tax. *See id.* at 607, 609. Those taxes, which were based upon activities subject to the sovereign authority exercised by a state, were to be tested by the reasonableness and nondiscriminatory nature of the tax. *Id.* at 609. It was, however, stated that such an inquiry was unnecessary if the state chose an improper form for its tax. *Id.* at 608–09.

[44] *See id.* at 608–10.

[45] *Id.* at 608, 610. Justice Burton reasoned that the states had, by virtue of the commerce clause, relinquished to Congress the sole power to tax interstate commerce. *Id.* at 608. Additionally, it was asserted that although the states retained extensive taxing power in certain areas, "the constitutional separation of . . . federal and state powers makes it essential that no state be permitted to exercise . . . those functions . . . delegated exclusively to Congress." *Id.* Finally, the Court relied upon what it deemed to be "long-established" legal authority refusing to sanction state taxation of "exclusively interstate commerce." *Id.* at 610.

[46] *See* 335 U.S. at 92–96; notes 34–36 *supra* and accompanying text.

[47] 340 U.S. at 609.

[48] *Id.* at 611. The dissent reasoned that such an approach had been taken merely because the Court had found no activities which could be categorized as intrastate. *Id.* As a result, the dissent concluded that the Court had utilized a different "standard" which ignored the fundamental practicalities of the tax. *Id.*

[49] *Id.* at 612. The dissent urged that, since the tax "ha[d] been clearly demonstrated" to be "nondiscriminatory, fairly apportioned and not an undue burden on interstate commerce," it afforded "adequate protection" to interstate commerce. *Id.* at 610, 614–15. It was suggested that it was more appropriate to inquire into "whether the State, in fact, provide[d] protection and services" or whether interstate commerce had been placed "at a competitive disadvantage." *Id.* at 611.

nized "competing demands of federal and state governmental spheres . . . required" flexibility in analyzing the validity of such state taxation.[50] Considering the benefits conferred by the state on the corporation, it was concluded "that there [was] no . . . warrant for cloaking a purely verbal standard with constitutional dignity."[51]

Although the majority in *Spector* disclaimed reliance upon purely semantic statutory differences,[52] subsequent holdings indicated that, under *Spector*, the particular statutory language used could be of decisive importance.[53] Illustrative of this result was the Court's handling of the *Railway Express* cases.[54] In *Railway Express Agency, Inc. v. Virginia (Railway Express I)*[55] the Court was confronted with the constitutionality of an ambiguously categorized Virginia tax assessed on an interstate express company.[56] Analyzing the operation of the tax, the Court rejected the state's attempted justification of the levy as a property or gross receipts tax.[57] The Court concluded that the tax was, in substance, "a privilege tax . . . that [could not] be applied to an exclusively interstate business."[58] Virginia subsequently

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[50] *Id.* at 613.

[51] *Id.* at 614.

[52] *Id.* at 608. The majority had specifically disavowed their reliance upon mere formalism by stating that the issue was "not a matter of labels." Rather, the Court asserted that "the incidence of the tax provide[d] the answer." *Id.*

[53] *Compare* Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954) (Railway Express I) (ambiguously characterized tax held invalid as privilege tax) *with* Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959) (Railway Express II) (amended statute characterized tax as franchise tax in going concern); *see* notes 54–63 *infra* and accompanying text.

[54] Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954).

[55] 347 U.S. 359 (1954).

[56] *Id.* at 363–64. The Court noted that the Virginia legislature had given the tax "a trinity of characterizations," variously categorizing the levy as "in addition to the 'property tax,'" as "'an annual license tax'" and finally as an assessment "'for the privilege of doing business in [the] State.'" *Id.*

[57] *Id.* at 363.

[58] *Id.* at 369. The majority's decision does not appear to be unjust in light of the relevant facts. Railway Express operated on both an interstate and intrastate basis in every state except Virginia. *Id.* at 360. The Virginia State Constitution prohibited "a foreign corporation [from] exercis[ing] any public service powers or functions." *Id.* As a result, "a separate Virginia subsidiary . . . was organized." *Id.* at 361. Virginia denied Railway Express the privilege of operating on an intrastate basis and at the same time attempted to tax the organization "'for the privilege of doing business.'" *Id.* at 361–63. The Supreme Court held that Virginia's attempted levy was unconstitutional. *Id.* at 369.

It is noteworthy that the majority disavowed the dissent's contention that the decision was based simply on the use of labels. *Id.* at 363, 370–72. The majority stated that "'[they were] concerned only with [the tax's] practical operation,'" *id.* at 363 (quoting Lawrence v. State Tax Comm'n, 286 U.S. 276, 280 (1932)), and that "'neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away [the

amended the statute, characterizing the tax as a franchise tax based upon going concern value.[59] Although the change lacked any appreciable economic significance,[60] in *Railway Express Agency, Inc. v. Virginia (Railway Express II)*[61] the Court upheld the validity of the tax viewing it as a property tax instead of a prohibited tax on the privilege of doing business.[62] Writing the plurality opinion, Justice Clark conceded the possibility that the Court could focus on "the use of magic words . . . to disable an otherwise constitutional levy."[63]

The *Spector* rule was further distinguished in *Northwestern Cement Co. v. Minnesota*,[64] decided the same day as *Railway Express II*, in which the Court validated a state net income tax assessed on interstate sales.[65] Although the validity of *Spector's* prohibition was conceded by the Court,[66] it was reasoned that a properly apportioned

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Court's] duty to consider its nature and effect,'" *id.* (quoting Galveston, H. & S.A. Ry. Co. v. Texas, 210 U.S. 217, 227 (1908)).

In contrast, Justice Clark, dissenting, argued that the constitutionality of a tax should be based upon factors other than the label given it by the legislature or the state's clairvoyance in determining which language the Supreme Court would find acceptable. *Id.* at 372. In criticizing the majority's approach, Justice Clark contended that the Court should not have rejected the constitutionally acceptable characterization given the tax by the highest court of Virginia. *Id.* at 370.

[59] 1956 Va. Acts, c.612 (codified at VA. CODE § 58-546 & 547 (1963)).

[60] Railway Express Agency, Inc. v. Virginia, 358 U.S. 434, 446 (1959) (Brennan, J., concurring).

[61] 358 U.S. 434 (1959).

[62] *Id.* at 440, 445. Relying upon the Virginia supreme court of appeals' construction of the reworded statute as a franchise tax applied to "intangible [property] or 'going concern' value," Railway Express Agency, Inc. v. Virginia, 199 Va. 589, 596, 100 S.E.2d 785, 791 (1957), the Court upheld the tax as not barred by the restrictions of the commerce clause. 358 U.S. at 440–42. The Supreme Court rejected appellant's additional argument that the amount of the tax was calculated in such a manner as to violate due process. *Id.* at 443. Since the Express Company had failed to furnish a statement of gross receipts as was required by the tax statute, the Court required "an affirmative showing" that the method of calculation was "palpably unreasonable," a burden the company was unable to sustain. *Id.* at 436, 443.

[63] *Id.* at 441. Although it was maintained that the use by a state of particular labels would not cure an unconstitutional tax, Justice Clark allowed that the converse—the invalidation of a legitimate tax on the basis of the label used—had been done in previous decisions by the Court. *Id.*

[64] 358 U.S. 450 (1959).

[65] *Id.* at 452. In discussing the validity of a net income tax as levied upon an interstate business, the Court held that such a tax would be a valid exercise of "state taxation [power] provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming [a] sufficient nexus to support the" tax. *Id.*

[66] *Id.* at 458. The Court stated that, even though previous holdings in the area of state taxation of interstate commerce had led to some confusion, certain principles were beyond dispute. *Id.* Included in this category were the prohibitions against taxing "the 'privilege' of engaging in interstate commerce, . . . impos[ing] a tax which discriminates against interstate commerce . . . [and] subjecting interstate commerce to the burden of 'multiple taxation.'" *Id.* (citations omitted).

net income tax was nevertheless constitutionally acceptable.[67] The Court's analysis was based upon the contention that a levy of this type "afford[ed] [to the states] a valid 'constitutional channel'" for taxation affecting interstate commerce.[68] In contrast, the Court observed that *Spector* concerned a tax based upon "the privilege of doing business . . . had long been declared unavailable" as an incident of state taxation.[69] The Court did not discuss, however, whether such distinctions had any basis in actual economic or practical consequences.[70]

The Court's analysis in *Colonial Pipeline Co. v. Traigle*,[71] further illustrated the artificial approach engendered by the application of the *Spector* rule.[72] In that case, Louisiana had taxed a corporation operating an interstate pipeline "'for the privilege of carrying on or doing business . . . within [that] state.'"[73] A state appellate court, relying upon *Spector* had invalidated the tax after Colonial had challenged its validity.[74] Subsequently, the Louisiana legislature amended the statute to operate on the "doing of business . . . in a corporate form."[75] The Louisiana supreme court upheld this version

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[67] *Id.* at 458–59.

[68] *Id.* at 464. The Court distinguished between an invalid "privilege" tax and a valid tax, based upon income earned in interstate commerce, which was properly apportioned to the taxing state, did not discriminate against interstate commerce and was "'reasonably related to the powers of the State.'" *Id.* at 462–64 (quoting *Spector Motor Service*, 340 U.S. at 609 (1951)). The Court declined to discuss the possibility that statutes based upon net income derived from interstate operations might not always be properly apportioned and could lead to multiple taxation since the issue had not been raised. *Id.* at 462–63.

[69] *Id.* at 464.

[70] *See id.* at 452–65.

[71] 421 U.S. 100 (1975).

[72] *See id.* at 114–15 (Blackmun, J., concurring); Hellerstein, *supra* note 22, at 185–86; Note, *Pipelines, Privileges and Labels:* Colonial Pipeline Co. v. Traigle, 70 NW. U.L. REV. 835, 856–58 (1976).

[73] 421 U.S. at 101–02 (quoting LA. REV. STAT. ANN. § 47:601 (West 1950) (current version at LA. REV. STAT. ANN. § 47:601 (West Cum. Supp. 1977)). Colonial Pipeline, a Delaware corporation, operated an interstate pipeline with approximately 258 miles of the line located within Louisiana. *Id.* Although approximately 25–30 people were employed to maintain the pipeline, Colonial had no offices and no other personnel in the state during the years in question. *Id.* at 102. Furthermore, Colonial had no intrastate business in Louisiana. *Id.*

[74] Colonial Pipeline Co. v. Mouton, 228 So. 2d 718, 721, 723 (La. Ct. of App. 1969), *cert. denied*, 255 La. 474, 231 So. 2d 393 (1970). The statute read, in pertinent part: "[t]he tax levied herein is due and payable for the *privilege* of carrying on or doing business." LA. REV. STAT. ANN. § 47:601 (West 1950) (current version at LA. REV. STAT. ANN. § 47:601 (West Cum. Supp. 1977)) (emphasis added). Based upon that language, the Louisiana appeals court had held the statute to be in violation of the commerce clause, as interpreted by *Spector* and, as such, could not be applied to businesses engaged entirely in interstate commerce. *See* 228 So. 2d at 723.

[75] Act of July 13, 1970, 1970 La. Acts 856, No. 325, § 1 (codified at LA. REV. STAT. ANN. § 47:601(1) (West Cum. Supp. 1977)).

of the tax[76] and the United States Supreme Court affirmed,[77] reasoning that Louisiana conferred "powers, privileges, and benefits" adequate to support the tax.[78] The Court distinguished *Spector* concluding that, rather than operating on the privilege of doing business, the statute was "related to . . . activities within the State in the corporate form."[79]

In concurring, Justice Blackmun contended that the distinction employed by the majority "ma[de] little constitutional sense—and certainly no practical sense."[80] Justice Blackmun argued that the Court's previous opinions in this area had not been as "plain [or as] analytically consistent as the [majority's] opinion" had suggested and that prior opinions afforded little certainty as to which taxing statutes would be valid under the commerce clause.[81] Due to the inconsistency of the views expressed in cases such as *Memphis Natural Gas* and *Spector*, he urged that one of the lines of precedent be expressly followed.[82] Asserting that it was difficult to reconcile the *Colonial* decision with *Spector*, Justice Blackmun argued that *Spector* should have been overruled.[83]

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[76] Colonial Pipeline Co. v. Agerton, 289 So. 2d 93, 101 (La. 1974). An assessment upon Colonial under the new statute was challenged by the company as violative of the commerce clause. *Id.* at 94, 96. The Louisiana court of appeals accepted this contention, holding that the amendment did not affect the incidence of the tax and, therefore, the new statute was also unconstitutional. Colonial Pipeline Co. v. Agerton, 275 So. 2d 834, 837–38 (La. Ct. of App. 1973), *rev'd*, 289 So. 2d 93 (La. 1974). The state supreme court reversed, holding "that the local incident taxed [was] the *form of doing business* rather than the business done by [the] corporation," and therefore the statute was valid under the commerce clause. 289 So. 2d at 100–01 (emphasis in original). The Louisiana supreme court based its opinion on several factors: the nondiscriminatory nature of the tax; the existence of a sufficient nexus between the taxpayer and the taxing state; the finding that the tax was duly proportioned; and the validity of the local incidence of the tax. *Id.*

[77] 421 U.S. at 101.

[78] *Id.* at 109.

[79] *Id.* at 112–14. As a further justification for the statute's constitutional validity the Court noted that the tax was "a fairly apportioned and nondiscriminatory means of requiring [Colonial] to pay its just share of the cost of state government." *Id.* at 114.

The Court drew support for its analysis from the *Memphis Natural Gas* case 421 U.S. at 109–11; *see* notes 33–38 *supra* and accompanying text. Comparing the fact pattern in *Memphis Natural Gas* to that of *Colonial Pipeline*, 421 U.S. at 109–10, the Court found that in each case a franchise tax had been imposed upon an exclusively interstate operation with a pipeline running through the taxing state. *Id.* at 101–02, 110. Additionally, the Court noted that both state supreme courts had upheld the taxes on the basis of benefits provided by the taxing states. *Id.* at 110; *see* Hellerstein, *supra* note 22, at 182–83, Note, *supra* note 72, at 852.

[80] 421 U.S. at 115 (Blackmun, J., concurring).

[81] *Id.* at 114–15.

[82] *Id.* at 115.

[83] *Id.* at 114–15. Justice Blackmun contended that to distinguish between "the conduct[ing] of business in interstate commerce [and] . . . the conduct[ing] of business in interstate com-

In an opinion by Justice Blackmun, the Court in *Complete Auto Transit* adopted this viewpoint and formally overruled *Spector*.[84] The Court noted the similarity between *Spector* and *Complete Auto Transit* in both the statutory language and the factual context presented.[85] Additionally, the Court emphasized that the tax was not claimed to be discriminatory, "unfairly apportioned," "unrelated to" the benefits derived by the taxpayer or lacking "a sufficient nexus" between the tax and the activity.[86] Conceding that the *Spector* rule had some "abstract" validity,[87] the Court nevertheless reaffirmed the proposition that the commerce clause was not intended "'to relieve . . . interstate commerce from [its] just share of state tax[es].'"[88]

Finding a trend "toward a standard of permissibility . . . based upon . . . actual effect," the Court analyzed the *Spector* doctrine in terms of its practical consequences.[89] Reasoning that the *Spector* doctrine would have been inapplicable had the state branded the tax

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merce 'in a corporate form'" as the incidence of a taxing statute was "taxation by semantics." *Id.* at 115–16. In his dissent, Justice Stewart also viewed the distinction as "specious" and additionally noted that, until formally overruled, *Spector* still had precedential value and required invalidation of the tax in question. *Id.* at 116.

[84] 430 U.S. at 274, 289.

[85] *Id.* at 287. In both cases, the taxpayer had been engaged solely in interstate commerce and the tax in question had been levied upon "'the privilege of . . . doing business' in Mississippi." *Id.* (quoting MISS. CODE ANN. § 27-65-13 (1972) (originally codified at MISS. CODE ANN. § 10105 (1942)). For a discussion of the facts of *Spector*, see note 42 *supra* and accompanying text.

[86] 430 U.S. at 277–78, 287. Complete Auto Transit had challenged the validity of the tax, in accordance with *Spector*, solely on the basis that the tax was imposed on the privilege of engaging in interstate commerce. *Id.* at 278.

[87] *Id.* at 288 & n.15; *see* notes 111–112 *infra* and accompanying text. Justice Blackmun discussed the "Free Flow" concept of interstate commerce enunciated in *Freeman*, reasoning that such analysis could have been "the keystone of a movement toward absolute immunity of interstate commerce from state taxation." 430 U.S. at 281. For a discussion of *Freeman*, see notes 24–32 *supra* and accompanying text. However, it was asserted that such a trend would have been in conflict with the Court's frequent holdings that interstate commerce could be required to compensate individual states for the services they had rendered. *Id.* at n.11.

[88] 430 U.S. at 288 (quoting *Colonial Pipeline*, 421 U.S. at 108).

[89] *Id.* at 281, 283–87. In analyzing the theory underlying *Spector*, the Court noted that since the "rule look[ed] only to the fact that the incidence of the tax [was] the 'privilege of doing business' . . . [the rule] deem[ed] irrelevant any consideration of the practical effect of the tax." *Id.* at 278. The Court then discussed several decisions which had utilized an approach based upon the "practical effect" of the tax in question. *Id.* at 279. *See, e.g., Colonial Pipeline*, 421 U.S. 113–14; General Motors Corp. v. Washington, 377 U.S. 436, 440–41, 446–49 (1964); *Northwestern States Portland Cement*, 358 U.S. at 461–65 (1959); *Memphis Gas*, 335 U.S. at 93, 96. The *Complete Auto Transit* opinion noted that this approach had been utilized in approving taxes that had "avoided running afoul" of *Spector* but had, nevertheless, refused to overrule that case. 430 U.S. at 279. Thus, the Court concluded that "[u]nder the present state of the law" the prohibition of Spector "has no relationship to economic realities." *Id.*

differently,[90] the Court concluded that the use of a particular label signified no intrinsic economic distinctions.[91] Rather, reliance upon such "formalism" was found only to impede the inquiry into any "forbidden effect" incident to the application of the tax.[92] Based upon this analysis, the Court held that a state tax upon the privilege of engaging in an interstate business no longer merited the classification of "per se unconstitutional[ity]."[93] Although the Court concluded that a "privilege" tax will no longer be considered "per se unconstitutional," it was conceded that, due to the dangers inherent in such a tax, a "careful scrutiny [should be utilized by] the courts to determine whether it produces a forbidden effect on interstate commerce."[94]

It should be noted that the *Spector* decision was both a departure from the traditional federal interest analysis prescribed in the commerce clause context by *Cooley*[95] as well as in sharp contrast to the approach exemplified by *Memphis Gas*.[96] A blanket prohibition on state "privilege" taxation eschews inquiry into whether the tax impinges on an interest "in [its] nature national."[97] Although results were inconsistent and modes of analysis varied,[98] decisions in the context of state taxation of interstate commerce, such as *Memphis Gas*, had identified those considerations which, as a practical matter, implicated the federal interest in the free flow of commerce.[99] To the extent that *Spector* had abandoned this approach, it represented a divergence from the pragmatism expressed in *Cooley*.[100] It has been suggested by some courts that at the root of the intractability of the problem of state taxation of interstate commerce[101] has been a failure

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[90] *Id.* at 288.

[91] *Id.*

[92] *Id.*

[93] *See id.* at 288–89.

[94] *Id.* at 288 n.15.

[95] *See Cooley*, 53 U.S. at 319; notes 17–20 *supra* and 97 *infra* and accompanying text.

[96] *See* 335 U.S. at 87–88, 93, 96; note 35 *supra* and accompanying text.

[97] *See Cooley*, 53 U.S. at 319.

[98] *Compare Freeman*, 329 U.S. at 252–53, 255–57 (basis for attack was whether or not tax was "direct" or "indirect" levy on interstate commerce) *with Memphis Natural Gas*, 335 U.S. at 87–88 (held impermissible to base a tax on the privilege of doing interstate business). *See* note 22 *supra* and accompanying text.

[99] *See Memphis Natural Gas*, 335 U.S. at 87–88; *Freeman*, 329 U.S. at 261–62, 270–74 (Rutledge, J., concurring).

[100] *Compare Cooley*, 53 U.S. at 315–21 (local regulation of harbor pilotage upheld as not violative of commerce clause), *with Spector Motor Service*, 340 U.S. at 607–10 (taxation of interstate trucking line held per se unconstitutional).

[101] *See, e.g., Colonial Pipeline*, 421 U.S. at 101 (tax levied on "the privilege of doing business" in the corporate form upheld); *Northwestern Cement*, 358 U.S. at 457–58 (properly appor-

to analyze the question precisely in terms of whether federalism demanded the predominance of federal interests with regard to a given tax.[102]

Although the decision in *Complete Auto Transit* eliminates an unrealistic approach to the problem of state taxation of interstate commerce,[103] the Court offered no original modes of analysis for the evaluation of a given tax.[104] The *Spector* Court had limited its holding to purely interstate businesses.[105] In all other cases, the Court suggested that a practical analysis of the tax was to be utilized.[106] Therefore, by overruling *Spector*, the *Complete Auto Transit* Court extended this pragmatic approach to cases involving purely interstate business.[107] Thus, the Court in *Complete Auto Transit* substantially reaffirmed an approach developed in prior cases.[108] This approach mandates that, in order to survive a commerce clause challenge, a tax must be nondiscriminatory, fairly apportioned, sufficiently connected with the benefit derived from the state by the taxpayer and must be assessed upon a taxpayer with an adequate nexus to the taxing state.[109] Nothing in this case is indicative of an approach intended to grant a carte blanche to the states in their taxation of interstate commerce.[110] The Court was careful to note, for example, that a "tailored tax," such as one incident to the privilege of conducting an interstate business, might require stricter judicial scrutiny.[111] The Court in *Complete Auto Transit* suggested that taxes of this type present an "increased danger" of a "forbidden effect" upon interstate

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tioned net income tax on interstate sales upheld as valid constitutional channel); *Freeman*, 329 U.S. at 252 ("direct" tax upon interstate commerce held invalid); Barrett, *supra* note 14 at 496–97.

[102] *See Colonial Pipeline*, 421 U.S. at 115–16 (Blackmun, J., concurring); *Spector Motor Service*, 340 U.S. at 613 (Clark, J., dissenting). Characterizing *Spector* as an "aberration" Justice Blackmun alluded to the "realities of" the federal-state relationship and reasoned that "the ability of our States and of the Federal Government to coexist have matured" to the point where economically fair state taxes should be approved "in the absence of congressional proscription." 421 U.S. at 115–16.

[103] 430 U.S. at 287–89. *See* Hellerstein, *supra* note 22, at 179–80, 185–88; Note, *supra* note 72, at 854–57.

[104] *See* 430 U.S. at 277–78, 287–89.

[105] 340 U.S. at 609–10.

[106] *See id.* at 610.

[107] *See* 430 U.S. at 278, 287–89.

[108] *See id.* at 278–287.

[109] *Id.* at 277–78, 287; *see* 421 U.S. at 115–16 (Blackmun, J., concurring); 358 U.S. at 457–58; 335 U.S. at 87–88.

[110] *See* 430 U.S. at 274–289.

[111] *Id.* at 288–89 n. 15.

commerce.[112] Under the *Complete Auto Transit* case, however, such taxes are no longer "per se unconstitutional."[113] Rather, the standards developed for judging the adequacy of state taxes which were not directly levied upon the "privilege" of conducting such business remain applicable in those cases.[114]

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[112] *Id.* The Court, however, indicated that "privilege" taxes were not unique in this regard and that property and income taxes could be used discriminatorily as well. *Id.*

[113] *Id.* at 288–89.

[114] *See* note 109 *supra* and accompanying text.