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STATE TAXATION OF INTERSTATE COMMERCE:
"It is a Question of Power"*

Michael Jenkins** and Paul Hribernick***

"Doctrinal dissarray" has characterized adjudications of state taxes imposed upon interstate commerce. The disarray came to a happy end with Complete Auto Transit, Inc. v. Brady's* imposing a test of functional economic realism on Commerce Clause cases. The approach in Complete Auto was recently consolidated in Commonwealth Edison Co. v. Montana. These cases, plus a handful of recent related cases, demonstrate a quiet revolution in Commerce Clause decisions, a revolution that finally holds a promise of predictability and consistent doctrine in Commerce Clause interpretation.

SOURCES OF DOCTRINAL DISARRAY

As regards both state regulation and state taxation of interstate commerce, the seeming inconsistency among the cases and the lack of analytical thread that connects them can be traced to a primary conflict that the founding fathers faced in drafting the Constitution: "The centrifugal, isolating or hostile forces of localism"* versus the "centralizing forces of nationhood and union.** The Commerce

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* The License Cases, 46 U.S. (5 How.) 504, 583 (1847).
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3. L. Tribe, supra note 1, at § 6-14.
5. See text accompanying notes 106-54, infra.
8. L. Tribe, supra note 1, at § 6-1.
Clause\(^9\) did not of itself provide a solution, but in unmistakable language\(^9\) permitted Congress to so provide. The Commerce Clause did not, by its terms, disable states from regulating commerce except to the extent that doing so either conflicted with Congress' exercise of its grant\(^11\) or else conflicted with explicit related constitutional limitations on state power.\(^12\)

The limitation on state interference with interstate commerce derived not from the Constitution's own words but instead from its negative implications,\(^16\) characterized as "these great silences of the Constitution." The federalism/localism conflict most often expressed itself in cases involving regulations that arguably impinged on interstate commerce.\(^18\) State taxes attacked as violating the Commerce Clause were either upheld or struck down on other constitutional grounds\(^16\) until *Case of the State Freight Tax*\(^17\) was decided in 1872. Since Congress has only recently spoken in the area of state taxation affecting interstate commerce,\(^18\) the federalism/localism debate has continued to rage. As no doctrinal approach emerged victorious, widely divergent opinions have been the norm, rather than the exception;\(^19\) and the individual justices have adjusted doctrine to accommodate judicial experience.\(^20\)

In the slow evolution of Commerce Clause analysis over the last 150 years, two basic analytical frameworks have dominated Commerce Clause thinking. In 1824 in *Gibbons v. Ogden*,\(^21\) Chief Justice John

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10. The Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . " Id.
11. U.S. Const. art. VI, cl. 2.
17. 82 U.S. (15 Wall.) 232 (1872).
Marshall announced his classic translation that the Commerce Clause not only grants the Federal Congress power to control interstate and foreign commerce, but simultaneously acts as a barrier to state legislation in the same sphere. The idea that the Commerce Clause has a mirror image that serves to limit the ability of the various states to tax and regulate commerce has represented the main stream of thought in the Court's subsequent and frequent considerations of the Commerce Clause. In 1847, Marshall's successor, Chief Justice Roger Taney, writing in a concurring opinion, thrust forward his view of Commerce Clause analysis which denied the existence of the so-called "negative implication" restraints on state taxing authority. Taney's postulation, while having served as a loyal opposition, has never garnered the necessary popularity to become the majority view of the Court. However, it periodically resurfaces with considerable strength throughout the history of Commerce Clause cases, particularly when dogged application of the Marshall view leads toward an absurd result.

THE MARSHALL THEOREM

_**Gibbons v. Ogden**_ involved a grant by the New York legislature of the exclusive right of steamboat navigation in the state to

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22. See text accompanying notes 39-44, infra.
24. See Sholley, supra note 13, at 556.
25. See text accompanying notes 45-67, infra.
26. While the outcome of the decisions in _The License Cases_, 46 U.S. (5 How.) 504 (1847), and _State Tax on Railway Gross Receipts_, 82 U.S. (15 Wall.) 284 (1872), indicates that the Taney analysis may have been applied, the opinions do not bear this out. In the former case, the nebulous opinions of Justices McLean, Catron, Woodbury and Grier all appear to classify the state alcohol restrictions not as regulations of commerce, but rather as legitimate acts of state police power sanctioned by Chief Justice Marshall in _Brown v. Maryland_. Apparently unable to make up his mind, Justice Nelson concurred with both Chief Justice Taney and Justice Catron. In the latter case, Justice Strong unequivocally stated that the tax was not "directly" on interstate commerce, 82 U.S. (15 Wall.) at 294. Rather, he concluded that the tax had been mixed with "the general mass of the company's property." _Id._ at 295. He then referred to Chief Justice Marshall's approval of state taxation of a company's general mass of property in _Brown v. Maryland_, 25 U.S. (12 Wheat.) 419 (1827). _Cooley v. Board of Wardens_ cannot be cited as a victory for the Taney position. Even though some of the language of the case mirrors the Taney analysis, the overriding test in _Cooley_ is whether the activity is local or national in character. The effect of the case was to continue the process, tacitly approved in _Brown v. Maryland_, of defining exceptions to the exclusive power of Congress over commerce on a case-by-case basis. This cannot be reconciled with Taney's position that the states are free to act until Congress indicates otherwise.
Messrs. Robert Livingston and Robert Fulton. Contrary to this exclusive privilege, Gibbons operated two steamboats in New York waters and Ogden (who had been assigned the privilege) sued for injunctive relief. Among other grounds, Gibbons defended on the theory that, because his boats were federally registered, the action of the legislature of New York which denied him access to New York waters was repugnant to federal power under the Commerce Clause. This setting provided the Chief Justice with a perfect opportunity to address the relationship between federal and state power as dictated by the Commerce Clause of the Constitution at the very beginning of the industrial age.

While conceding that the "sole question" for review was whether a "State [can] regulate commerce with foreign nations and among the States, while Congress is regulating it," Marshall felt compelled to explain what he viewed as the basic premise of the Commerce Clause in order to conclusively "demonstrate propositions which may have been thought axioms." First, Marshall expressed his opinion that, even though the general government was a government of enumerated powers, the founders intended it to have great enough power to overcome the limitations of the Articles of Confederation, especially in the area of interstate commerce. Noting that the "embarrassing and destructive" discrimination and retaliation among the independent states was one of the principal reasons for the failure of the Articles of Confederation, and stressing the fundamental difference between the loosely-banded league under the Articles and the union under the Constitution, Marshall emphasized that the Constitution gave Congress the power "to make all laws which shall be necessary and proper" to give effect to the document and the new union. He argued that such an expansive grant of general power to Congress would be inconsistent with a narrow construction of the power of Congress over interstate and foreign commerce. Next, Marshall proceeded to examine the nature of the activities which the founders intended to encompass when they refer-

28. Gibbons also argued that the grant violated the constitutional authorization to Congress for the progress of science and the useful arts. U.S. Const. art. I, § 8, cl. 8.
29. Act of Feb. 18, 1793, ch. 40, 1 Stat. 305. This Act provided for the licensing of ships engaged in the coastal trade and fisheries.
31. Id. at 221.
32. See argument of Mr. Webster, id. at 11.
34. 22 U.S. (9 Wheat.) at 187 (quoting U.S. Const. art I, § 8, cl. 18).
red to "Commerce." "Undoubtedly, [it] is traffic but it is something more: it is intercourse." Such commerce by all common understanding must include "every species of commercial intercourse" including navigation. Furthermore, the power of Congress over commerce among the states cannot respect the jurisdictional lines of the states, but must pass into the interior of the states or it is a "very useless power." He concluded that Congress was clearly intended to have power over a wide range of business activities, both inside and outside of the states.

Finally, Marshall turned his inquiry to the nature of the commerce power. In response to the argument of counsel for the respondent that, where it can be done without violating the plain letter of the Constitution, it is highly important to find that all powers of the federal government are held concurrently with the states, Marshall echoed favorably the argument of the appellant in stating that "full power to regulate a particular subject, implies the whole power and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it." He concluded that the power over commerce granted to the federal government, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

Gibbons v. Ogden received substantial reinforcement three years later in Brown v. Maryland. This case involved a state license tax imposed on importers who wished to sell their goods. In striking down the tax as incompatible with the Commerce Clause, Marshall dismissed the suggestion of counsel for Maryland that to void this law would impair the taxing power of the states. "We admit this power [of the states to tax] to be sacred; but cannot admit that it may be used so as to obstruct the free course of the power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat a power to regulate commerce." Under the Marshall formulation, the grant of power over commerce to Congress

35. Id. at 189.
36. Id. at 193.
37. Id. at 190.
38. Id. at 195.
39. Id. at 198. See the argument of Mr. Webster, id. at 13-14.
40. 25 U.S. (12 Wheat.) 419 (1827).
41. The case of Maryland was argued by Mr.—later Chief Justice—Roger Taney.
42. 25 U.S. (12 Wheat.) at 448.
was so complete that it superseded the taxing power which the Constitution had unquestionably reserved to the states.\textsuperscript{43}

The result of the holdings in \textit{Gibbons v. Ogden} and \textit{Brown v. Maryland} was to transform an undefined grant of power to Congress into an exclusive power in Congress over interstate commerce. If pushed to its logical conclusion, the Marshall view of the Commerce Clause grants power to the Supreme Court, at the expense of the several states, to limit state taxing and regulatory authority over commerce when Congress has not already enacted limits.\textsuperscript{44}

\textbf{THE TANEY THEOREM}

Opposed to the notion that the Constitution granted exclusive power over interstate commerce to Congress and simultaneously limited state taxing and regulatory authority by negative implication, Chief Justice Roger Taney offered an alternative explanation of the Commerce Clause\textsuperscript{45} in \textit{The License Cases}.\textsuperscript{46} The three License Cases involved similar attempts by Massachusetts,\textsuperscript{47} New Hampshire,\textsuperscript{48} and Rhode Island\textsuperscript{49} to discourage use of spirits by prohibiting small sales to individuals or by requiring sellers to obtain a license.\textsuperscript{50} Among other defenses, each of the defendants claimed that the statute under which he was prosecuted was void because it conflicted with the undivided power of Congress over interstate commerce granted by the Commerce Clause. In affirming the convictions of all three defendants, the Court offered nine separate opin-

\begin{itemize}
\item[43.] See Sholley, \textit{supra} note 13, at 572-73, for a discussion of the implicit right of the states to tax.
\item[44.] F. Frankfurter, \textit{supra} note 15, at 18.
\item[45.] The first manifestation of the Taney position involved state legislation concerning the same steamboat monopoly ultimately ruled on in \textit{Gibbons v. Ogden}. Chief Justice Kent of the New York Court of Errors determined that the Fulton/Livingston monopoly was not void against the exclusive power of Congress in \textit{Livingston v. Van Ingen}, 9 Johns. 507 (1812). Later, Kent (now Chancellor) passed on the same question in \textit{Ogden v. Gibbons}, 4 Johns. Ch. (N.Y.) 150 (1819). The reasoning in these cases corresponds closely with Taney's opinion in \textit{The License Cases}. See generally Sholley, \textit{supra} note 13.
\item[46.] 46 U.S. (5 How.) 504 (1847).
\item[47.] Thurlow v. Massachusetts, \textit{id.} at 505.
\item[48.] Peirce v. New Hampshire, \textit{id.} at 554.
\item[49.] Fletcher v. Rhode Island, \textit{id.} at 540.
\item[50.] The Massachusetts law proscribed a minimum sale of twenty-eight gallons. Rhode Island prohibited any sale less than ten gallons. \textit{id.} at 505, 541.
\item[51.] Whereas Massachusetts and New Hampshire required the sellers to obtain a license, Rhode Island did not. \textit{id.} at 505, 541, 554.
\end{itemize}
ions, but the true rationale for the decision is found in Justice Taney's well-reasoned opinion. Taney held that, in the absence of congressional action, the states may exercise legislative power over matters of foreign and interstate commerce unlimited by any negative implications of the Commerce Clause.

Whereas Marshall began his inquiry by examining the constitutional basis for federal power, Taney focused on the states' power to act: "[A]re the States absolutely prohibited by the Constitution from making any regulations of foreign commerce?" Expressed differently, the issue was "whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws on the subject null and void." Taney concluded that a grant of power to Congress, by its own force, does not negate state power by implication. It is, he said,

very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition on the exercise of any power over the same subject by the States . . . , and such regulations [as may be passed by the states concerning safety, health, citizenry, or port operation] are valid unless they come in conflict with a law of Congress.

Taney cites a Marshall opinion, *Willson v. Black Bird Creek Marsh Co.*, as an example of a state exercising its power in the absence of congressional action. That case, decided after *Gibbons v. Ogden*, held that a state, to protect the health of its citizens, could drain a navigable waterway even though such action would prevent continuing use of that waterway in foreign or interstate trade. Taney framed the entire constitutional issue in Commerce Clause cases as being one of presence or absence of power. If a state could act, it was because the state possessed the power to act. Therefore, in


53. 46 U.S. (5 How.) at 583. Taney felt that the classification scheme sanctioned by Marshall (see text accompanying notes 68-73, infra) ultimately reverts to an examination of the states' motives in passing legislation. Taney felt the only proper inquiry in a Commerce Clause case was whether the state had the power to act.

54. Id. at 578.

55. Id. at 579.

56. 27 U.S. (2 Pet.) 245 (1829).
Black Bird Creek Marsh Co., the Court could only approve the state action if the state inherently possessed the power to act. It was of no consequence that the state acted for the protection of its citizenry. "[T]he object and motive of the State are of no importance, and cannot influence the decision. It is a question of power." To further emphasize that a bare grant of power to Congress does not destroy state power to legislate on the same subject, Taney pointed to two earlier decisions of the Marshall Court, Houston v. Moore and Sturges v. Crowninshield. In Houston, a Pennsylvania law made any member of the state militia who refused to serve when called upon to do so by the President of the United States subject to trial by a state court martial and liable for any penalties prescribed by Congress. The defendant Houston argued that his prosecution by the state under this law was of no event because the law was void in the face of the constitutional grant to Congress to "provide for the Calling forth of the Militia." The Marshall Court quickly disposed of this argument, calling it "a branch of the exploded doctrine that within the scope in which Congress may legislate, the states shall not legislate." In Crowninshield, the issue was whether New York could constitutionally adopt a bankruptcy law in light of the constitutional grant of power to Congress to establish "uniform laws on the subject of Bankruptcies throughout the United States." Even though it struck down the statute on other grounds, the Court concluded, in an opinion by Chief Justice Marshall, that states can address the bankruptcy question provided that any laws enacted

57. Taney argued that if the grant of commerce power to Congress was indeed exclusive, then the state had no power to enact any regulations, including the police power regulations that Marshall alluded to in Gibbons v. Ogden and later sanctioned in Brown v. Maryland and Willson v. Black Bird Creek Marsh Co. Taney argued that Marshall's position (that the federal government had exclusive power but the state could still act) was inherently contradictory. Either the states possessed the power or they did not. Furthermore, if the Constitution prohibited power to the states as Marshall claimed, Congress is powerless to give it back. Therefore, if the states can act, as Marshall stated they can in Willson v. Black Bird Creek Marsh Co., they must inherently possess the power that Marshall would deny them in Gibbons v. Ogden. 46 U.S. (5 How.) at 583-84.

58. Id.
60. 17 U.S. (4 Wheat.) 122 (1819).
62. 18 U.S. (5 Wheat.) at 45 (Johnson, J., concurring in result).
64. The Court found the law to violate the prohibition against the impairment of contracts. 17 U.S. (4 Wheat.) at 208. See U.S. CONST. art. I, § 10, cl. 1.
do not conflict with prior actions of Congress. Taney argued that for Marshall to later declare, in *Gibbons v. Ogden*, that the commerce power is exclusively for Congress, was totally inconsistent with the logic of the earlier well-reasoned opinions.

Because the Constitution does not strip the states of their inherent power, the keys to controlling state taxes and regulations of commerce under the Taney view are, first, an active Congress making regulations pertaining to commerce, and second, rigorous application of the Supremacy Clause to strike down state actions that conflict with those of Congress. Taney argued that, if a grant of power to Congress is of its own force sufficient to prohibit state action, the Supremacy Clause is surplusage. Taney was unwilling to charge the framers of the Constitution with such lax drafting.

The Taney view of the Commerce Clause as evidenced by the holding of *The License Cases* is that Congress does not have exclusive power over interstate commerce; rather, that power is concurrent with the several states until Congress—which concededly is vested with supreme power—acts to curtail state power. Under this reading of the Commerce Clause, if Congress fails to use its supreme power, the power of the state is maximized while the power of the Court to limit state taxation and regulation of commerce is minimized.

**THE SUBJECT MATTER TEST**

In the years following *Brown v. Maryland*, the Court perceived that exclusive federal power over commerce necessarily conflicted with the legitimate interest of the states to regulate the day-to-day

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65. Marshall’s argument in *Crowninshield* appears to be the perfect restatement of Taney’s position: “It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States.” 17 U.S. (4 Wheat.) at 196. However, in fairness to Marshall, it must be pointed out that he viewed the bankruptcy provision of the Constitution as a special case. Id. at 193-94. But Marshall’s perception of the special nature of the bankruptcy provisions does not change the fact that the Bankruptcy Clause purports to grant power to Congress in the same manner as does the Commerce Clause. In fact, it is arguably a stronger grant of power than the Commerce Clause because the provision specifically commands that bankruptcy laws be uniform throughout the United States. See U.S. Const. art. I, § 8, cl. 4. The Commerce Clause contains no such demand of uniformity, but Marshall’s opinion in *Gibbons v. Ogden* seems to require it by implication.


68. 25 U.S. (12 Wheat.) 419 (1827).
affairs of its citizens and to raise revenue through taxation. The decisions of the Court began to reflect and respond to this realization. In Willson v. Black Bird Creek Marsh Co., even Chief Justice Marshall recognized that not all state actions affecting commerce are repugnant to the Constitution. In that case, Marshall concluded that there was no conflict between the state action at issue and the Commerce Clause because measures calculated to protect the health of the citizenry do not conflict with the powers of the federal government and therefore are "undoubtedly . . . reserved to the States." Marshall's brief decision opened the door for the Court, in Cooley v. Board of Wardens, to rethink the exclusive nature of federal power under the Commerce Clause and to begin a process of defining a limited universe of state activities which by their nature could brush against the commerce power and yet survive.

Cooley involved a Pennsylvania law which required ships in state waters to take a local pilot or pay one-half of the pilot's fee into a special fund if they chose not to employ a pilot. Conceding that navigation is commerce and that regulation of pilots by a state is a regulation of commerce, the Court posed the question of whether "the grant of the commercial power to Congress . . . per se deprives the States of all power to regulate pilots." The Court concluded that the exclusive domain of Congress includes only those subjects national in nature. Because the nature of the commerce power is defined by the nature of the subject, it was necessary for the Court to examine the subject matter of the tax or regulation enacted by the state. If the subject matter of the state action is local in nature, the state may act. If the subject is national in nature, the Commerce Clause prohibits state action.

The importance of the Cooley decision was not so much that it provided the national/local subject matter distinction, but rather that it legitimized case-by-case examination of state taxes and regulations to determine whether they violated the Commerce Clause rather than assuming that violations existed.

69. 27 U.S. (2 Pet.) 245 (1829).
70. Id. at 250.
71. 53 U.S. (12 How.) 299 (1851).
72. Id. at 318.
73. The Court determined that pilotage was essentially a local concern because of the Act of August 7, 1789, 1 Stat. 54, which declared that regulation of pilots and harbors should conform to the regulations of the states. However, the Court was careful to point out that Congress could not empower the states to take an action prohibited to them by the Constitution. See note 57, supra. See also note 28, supra.
THE DIRECT/INDIRECT EFFECTS TEST

No longer constrained by the inflexible prohibition on state actions, the Court was free to pick and choose among the cases, upholding state actions which it deemed local in nature and striking down those it found to be national in nature. With the post-Civil War surge in the importance of the national interest, the Court increasingly narrowed the number of instances in which it would approve state taxes that touched interstate commerce. From an innocuous start, a new test appeared in the Court: if the state action directly burdened commerce, it was void; if the state action only indirectly touched commerce, the tax or regulation was upheld. The advent of the direct/indirect test provided ultimate flexibility and the Court experimented with many of the concepts used in later Commerce Clause cases, but their decisions were always based on some interpretation of the direct or indirect effect of the state tax on interstate commerce. The true significance of the direct/indirect test was that it served to increase the power of the Court relative to that of the states. Because the constitutionality of particular state enactments depended on a case-by-case judgment call, the Court held the balance of power between the taxing authority of state legislatures and the federal interest of free-flowing commerce and, to a limited extent, could control the direction and development of interstate commerce.

THE COMMERCE PER SE TEST

While the direct/indirect test evolved, the Court designated several activities which were so innately tied to commerce between the states that any attempt to regulate or tax them would be voided. These cases trace back to the reasoning in *Welton v.

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76. *See *Sherlock v. Alling, 93 U.S. 99 (1876), holding that an interstate carrier can be liable under a state wrongful death act.


79. *See Sholley, supra note 18, at 582.
where the Court held that inaction by Congress was a declaration that a particular area of commerce should be free and untrammelled.84 Expanding on this idea, the Court concluded that certain businesses were so completely interstate in nature that the Commerce Clause prohibited any state action. Such businesses included traveling salesmen,83 steamship companies,84 mail order companies,85 foreign express companies,86 and stevedoring companies.87 An interesting corollary to the commerce per se rule was the Court’s declaration that certain activities could never be in interstate commerce and therefore were always subject to state taxation. Included in this category were taxes on the severance of minerals88 and taxes on goods whose transportation in interstate commerce had been interrupted.89

REASSESSING THE COMMERCE CLAUSE

Flexibility was both the beauty and the major drawback of the direct/indirect test. The flexibility of the test allowed the Court to completely change the direction of Commerce Clause cases in the 1930’s and later helped facilitate a reassessment of the test itself. The disadvantage of the direct/indirect test is that it did not lead to consistent or well-reasoned results. The onset of the Great Depression caused states to search for new sources of revenue. In response to adventurous state taxing initiatives, the Court slowly began to enlarge the areas of commerce in which the states would be permitted to tax. In enlarging the states’ freedom to tax on a case-by-case basis, the Court simultaneously began to narrow its own power of review. The first such case was Western Live Stock v. Bureau of Revenue,90 in which the court validated a New Mexico tax on the privilege to publish newspapers. Applying the direct/indirect test,
the Court found only a remote burden on interstate commerce and concluded that "even interstate business must pay its way."\(^91\)

But a new permissiveness toward state taxation did not free the Court from the "metaphysical reasoning"\(^92\) that had traditionally plagued Commerce Clause analysis. Indeed, during this period the Court used the direct/indirect test to announce several cases unparalleled in their abused logic and absurd reasoning.\(^93\) During the same time, Justice Rutledge forcefully argued for an overhaul of the direct/indirect test. Concurring in *Freeman v. Hewit*,\(^94\) Rutledge argued that it is not the directness of the tax that the Commerce Clause is concerned with, but rather the consequences of the tax; the discriminatory multiple burdens of state taxation were the evil that the Commerce Clause was intended to address. Rutledge reasoned that if a state had jurisdiction to tax and had taxed fairly so that no multiple burdens were created, the tax was not repugnant to the Commerce Clause.

Echoing Rutledge, Justice Black's approach in Commerce Clause cases paralleled his literalist approach in first amendment cases: "The interests of interstate commerce will best be fostered, preserved and protected—in the absence of direct regulation by the Congress—by leaving those engaged in it in the various States subject to the ordinary and non-discriminatory taxes of the States from which they received governmental protection."\(^95\)

Arrayed against this approach was Frankfurter's argument that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States,"\(^96\) even if doing so put local business at a competitive disadvantage with interstate commerce because of the former's being obliged to carry the latter's burden of state taxation.\(^97\) The justification for this burden, according to Frankfurter, was that "whatever disadvantages may accrue to the separate States from making of the United States a free-trade ter-

\(^91\) Id. at 254 (citing Postal Telephone-Cable Co. v. Richmond, 249 U.S. 252, 259 (1919)).
\(^94\) 329 U.S. 249 (1946).
\(^96\) *McLeod v. J.E. Dilworth Co.*, 332 U.S. at 330 (Frankfurter, J.).
\(^97\) Id. at 334-35 (Douglas, J., dissenting).
ritory are far outweighed by the advantages not only to the United States as a Nation, but to the component States."\(^98\)

Thus the federalism/localism debate continued, each side adhering to a definite policy argument that went far beyond the formulations of Marshall and Taney. Until the mid-1970's, neither side of the debate was able to muster sufficient support to establish predictability in interstate commerce taxation cases. As the facts shifted imperceptibly, so did the constitutional validity of the taxes. Even though the Court increasingly, over Frankfurter's objections,\(^99\) viewed interstate commerce as having to "pay its own way,"\(^100\) efforts to reconcile this shift with the direct/indirect test led to questionable distinctions,\(^101\) and constitutional adjudication by draftsman-ship.\(^102\)

After some false starts,\(^103\) the composition of the Court finally permitted a consensus based on economic reality.\(^104\) This in turn has permitted the development of clear doctrine in interstate commerce taxation.\(^105\) The remainder of this article deals with the Court's new doctrine in Commerce Clause state taxation cases.

**NEW DOCTRINE**

In 1959, the Supreme Court handed down its celebrated *Northwestern States Portland Cement Co. v. Minnesota*\(^106\) decision. That

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99. *Id.*
100. Western Live Stock v. Bureau of Revenue, 303 U.S. at 254.
101. 358 U.S. at 463-64 (distinguishing Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951)).
102. See note 19, supra.
case ruled that a state constitutionally could impose a non-discriminatory, fairly apportioned net income tax on a foreign corporation doing exclusively interstate commerce in the state. The significance of Northwestern Cement is that it validated a tax on what was admittedly interstate commerce, thus signalling a shift from the previously dominant Frankfurter view that any taxation of trade in interstate commerce is per se invalid. The case went no further, however, even though it did premise its decision on the fact that the tax was not discriminatory, was properly apportioned, and was connected to the corporation's activities in the state. Despite an obvious inconsistency, Spector Motor Service, Inc. v. O'Connor and earlier cases, which had relied on the direct/indirect effects test, were simply distinguished rather than overruled.

In 1964, a closely divided Court took the surprising step of validating a state tax on the unapportioned gross receipts earned within a state in General Motors Corp. v. Washington. Gross receipts taxes have attracted Supreme Court scrutiny because of the difficulty in assessing the fairness of such a tax. Gross receipts do not necessarily relate to the income or profitability of an interstate corporation, but instead measure only in-state sales. If there are limited in-state expenses, as with overhead and employee salaries, then a tax based solely on in-state receipts may not bear proportionally on expenses incurred by the corporation in making those sales. An in-state corporation's taxes would necessarily reflect its only real income, so it is probable that the foreign corporation would bear a heavier tax burden.

While both of these decisions were surprising, each could be dismissed as another of the routine aberrations in Commerce Clause litigation. But in 1975 the Supreme Court, with Justice Douglas writing, decided Standard Pressed Steel Co. v. Department of Revenue. The Court validated the Washington state tax on the gross sales receipts of an interstate manufacturer for goods sold to an in-state manufacturer. The former's sole connection with the state, besides the income it earned from its sales, consisted of one

107. 358 U.S. at 462 (citing Central Greyhound Lines v. Mealy, 334 U.S. 653 (1948)).
108. 340 U.S. 602 (1951). Spector went to the utmost effort to justify permitting its decision to turn on the vagaries of language, rather than actual burden, in state tax laws. The 6-3 decision would permit only those tax laws which taxed through "constitutional channels." Id. at 608.
109. 358 U.S. at 463-64.
111. 419 U.S. 560 (1975).
employee living in the state who consulted with the in-state business. The petitioner corporation claimed a lack of sufficient contacts, under both the Due Process Clause and the Commerce Clause, to justify the imposition of the sales tax. With regard to the Due Process claim, the Court said merely, "We think the question in the context of the present case verges on the frivolous." In its Commerce Clause "nexus" analysis, the Court distinguished Norton Co. v. Department of Revenue,113 which had indicated that an interstate business with only an agent in-state, taxed only on orders mailed directly, could not validly be taxed in the state in which the orders were paid. The unanimous Standard Pressed Steel Court instead relied on General Motors Corp. v. Washington,114 for a proposition not part of the case's holding. There, a closely divided Court had said that the taxpayer business would have to prove multiplicity of tax burdens in order for the Court to invalidate a tax. Apportionment of a tax by income would cure any problem of multiple burdens. The sales receipts tax in Standard Pressed Steel, the Court said, was "apportioned exactly to the activities taxed, all of which were interstate."115 The effect of this analysis was, first, to imply that making the sale is itself a sufficient nexus to justify application of the tax, and second, to eliminate consideration of whether the tax was indirectly imposed on any out-of-state activities.

Colonial Pipeline Co. v. Traigle,116 decided the same year as Standard Pressed Steel, upheld a tax on the "qualification" to do business in Louisiana. In so doing, the Court continued moving away from the concept of free trade and the distinction between direct and indirect burdens. The business conducted in Louisiana by the Delaware corporation consisted of operating and maintaining a pipeline which ran across the state. No sales or interruptions in the flow of natural gas were made in Louisiana. No portion of the corporation's income was earned in Louisiana. Again, relying on the closely-divided General Motors Corp. v. Washington case, the Supreme Court said that the validity of the tax depended upon whether the state was exerting a "constitutionally fair demand for that aspect to which it bears a special relation . . . ; in other words . . . , 'whether the State has exerted its power in proper proportion to [the taxpayer's] activities in the State.'"117 The Court then quoted

112. Id. at 562.
114. 377 U.S. 436, cited at 419 U.S. at 563.
115. 419 U.S. at 563.
117. Id. at 109 (citing General Motors Corp. v. Washington, 377 U.S. at 440-41).
a proposition that could be found in any number of cases, that the validity of a tax rests upon "whether the state has given anything for which it can ask return." The Court cited this proposition as the "controlling test." The Court again relied on General Motors Corp. v. Washington, rather than simply affirming the tax on the authority of the 1948 decision in Memphis Natural Gas Co. v. Stone. Memphis Natural Gas, while factually identical to Colonial Pipeline, was an equivocal plurality decision, and was notable primarily for the concurring discussion of Justice Rutledge. Rutledge would have validated the tax in Memphis Natural Gas because it was connected to the state so that the state had "jurisdiction to tax," was not discriminatorily imposed on interstate business, and was fairly apportioned. Blackmun's concurrence in Colonial Pipeline would have preferred to rely on Rutledge's three-part test and would have discarded the weight of Spector, but the majority opinion still refused to do more than distinguish Spector.

The decision in Standard Pressed Steel and Colonial Pipeline are not remarkable for their analyses, but rather for the direction that they indicated the Court had taken. Standard Pressed Steel, decided unanimously, relied on a five-to-four decision, and Colonial Pipeline had but one dissent. Both of the cases dealt with issues that had sharply divided the Court in the past. Besides indicating the Court's probable direction, the cases taken together demonstrate that a state need discover only some kind of business presence in order to demonstrate a "nexus" so as to possess "jurisdiction to tax."

Although not a Commerce Clause case, Michelin Tire Corp. v. Wages served as a dramatic announcement that the Supreme Court had taken an unmistakable direction in assessing the right of states to tax commerce. In Michelin, the Supreme Court overturned a century of cases dealing with a state's right to tax goods under the Import-Export Clauses. The Court expressly overturned Low v. Austin, announcing that it was returning to the origin of Low's "original package" doctrine, to determine the grounds upon which
Brown v. Maryland had been decided. By returning to Brown v. Maryland, the Court ignored the usual question of whether the foreign goods had retained their status as imports. The Court instead looked to the question of whether the tax prevented the federal government from "speaking with one voice" in the arena of international commerce. The Michelin Court focused on whether the ad valorem property tax was discriminatorily laid upon goods because they were imports. The tax was held to be nondiscriminatory and to not impose a burden on foreign commerce.

In line with its emerging philosophy toward state taxation, in 1977 the Court finally overruled Spector in Complete Auto Transit, Inc. v. Brady. Complete Auto held that a Mississippi tax on the "privilege of doing business" within the state levied on a business in interstate commerce was valid. Blackmun's unanimous opinion alluded to the absurd results created by adherence to the direct/indirect effects test for Commerce Clause analysis. The Complete Auto test for assessing the validity of a state's tax on interstate commerce was explicit: first, whether the state has a sufficient nexus with the business taxed; second, whether the tax discriminates against interstate commerce; third, whether the tax is fairly apportioned; and fourth, whether the tax is reasonably related to services provided by the state. The first three of these tests had surfaced a number of times in the Supreme Court's decisions, most notably in Justice Rutledge's Memphis Gas concurrence and more recently in Northwestern Cement. The significance of the adoption of the test is that Spector was overruled and the direct/indirect effects test was discarded. By discarding the test which sought to determine whether a tax was imposed directly on interstate commerce, the Court denied the distinction as a per se basis for validating or invalidating a state tax.

The fourth prong of the Complete Auto test, that the tax be reasonably related to services provided by the state, first appeared
in *Glouster Ferry Co. v. Pennsylvania*, but had not been a part of any of the recent decisions. Under close scrutiny the fourth prong of the test appears to be an amplification of the nexus requirement. The relationship of the first and fourth prongs of the *Complete Auto* test was addressed in *National Geographic Society v. California Board of Equalization*. That case addressed the validity of California's use tax on interstate retailers applied in lieu of its in-state sales tax. The only physical contacts between the Society and the state were two offices which solicited mail order magazine sales in the state. The two offices were not related to the Society's income that resulted from its retail sales of maps, atlases, globes, and books in the state. Nonetheless, the Supreme Court held that the Society's continuous presence in California in the two offices provided the requisite nexus since those two offices, without regard to the nature of their activities, availed themselves of local services that justified the imposition of the state taxes. Thus the nexus requirement demands a more specific relationship than the generation of income within the state to the interstate business; nexus instead demands that the state somehow provide a service to the business, a service which so far has been found to be present when there is at least one employee in the state. By trying the nexus prong to a consideration of how the state provides benefits to an interstate business so as to justify its tax, the Court blurs the distinction between the first and fourth prongs by enlarging the former to encompass the latter.

The following year, in *Department of Revenue v. Association of Washington Stevedoring Cos.*, the Court underscored its analytical shift by overruling *Puget Sound Stevedoring Co. v. State Tax Commission* and a long line of earlier cases. These cases had said that stevedoring is an inextricable part of interstate commerce, and thus was not susceptible to state taxation. *Association of Washington Stevedoring* discarded any per se rule of what is commerce. With this decision, the Court finally ended its vacillation in selecting a test to determine what is interstate commerce by refusing to consider the question. In response to the charge that *Association of

133. 114 U.S. 196 (1885). The test was mentioned as an argument, but was not relied upon as part of the decision.
137. 302 U.S. 90 (1937).
138. 435 U.S. at 750-51.
Washington Stevedoring effected a fundamental change in the law, the Court said explicitly that Complete Auto has effected the change. Flying in the face of any free trade notions, the Court said,

[the Commerce Clause does not state a prohibition, it merely grants specific powers to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court. If Congress prefers less disruption of interstate commerce, it will act.]

Also in 1978, the Court addressed the meaning of the third prong of the Complete Auto test, that taxes be fairly apportioned. In Moor-man Manufacturing Co. v. Bair, the Court validated a "single factor formula" for apportioning interstate commerce income for state tax purposes. Iowa's apportionment, based on sales only, had been contested as violating the apportionment requirement because measurement by that factor alone was used only in Iowa, while all forty-four other states that taxed such interstate commerce employed a more sensitive formula that would account for the business' real expenses. As Justice Powell noted in his dissent, the logical effect of one state's using the single factor formula while other states used a more accurate measure was that interstate businesses selling in Iowa necessarily would have a total higher tax payment than local businesses. Powell insisted that, while this is not a due process violation because there was no showing that the apportionment was "out of all appropriate proportion" to the business transacted, the method of apportionment, however, does result in discrimination against interstate commerce. He would have balanced the state's interest in taxing against the "constitutional preference for an open economy," demonstrating that Frankfurter's notion of a free economy had not died. The majority nonetheless refused to consider whether the type of apportionment resulted in discrimination. The majority stated,

The only conceivable constitutional basis for invalidating the Iowa statute would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the state. If the Constitution were read to mandate such precision in interstate

139. Id. at 749. The Court cited Cooley and Gibbons v. Ogden.
141. Id. at 287. The majority opinion refused to acknowledge that the apportionment method arguably leads to a discriminatory tax burden. Instead, the Court implied that the fair apportionment requirement is not met only when a petitioner can establish "the essential factual predicate for a claim of duplicative taxation." Id. at 276.
142. Id. at 289.
taxation, the consequences would extend far beyond this case and would require extensive judicial lawmaking. 143

In essence, the Court said that the Supreme Court is not an appropriate forum for deciding such issues, but that such issues should be addressed by Congress.

In Mobil Oil Corp. v. Commissioner of Taxes, 144 the Supreme Court validated a corporate income tax levied on the substantial dividend income of a corporation's subsidiaries and affiliates, most of which were entirely foreign to the state. Vermont's tax was assessed on Mobil's entire income apportioned by the percentage of its wholesale and retail sales in Vermont. In response to Mobil's question of whether the tax could apply to income earned on activities that had no connection with the taxing state, the Court said that the Due Process Clause was not violated, since Mobil's marketing and sales in Vermont constituted a sufficient nexus, and because Mobil had failed to prove that its foreign sources of income were not business activities related to its in-state income. The Court said that the Commerce Clause likewise was not violated, because the tax bore a relationship to the benefits conferred to Mobil by the taxing state. Vermont's taxing interests were not overridden by any interest possessed by New York, Mobil's state of domicile. Finally, the Court said that Mobil failed to prove a multiplicity of tax burdens on its interstate business.

The Court noted that "the linchpin of apportionability in the field of state income taxation is the unitary business principle." 145 Thus, "dividends from subsidiaries and affiliates reflect income derived from a functionally integrated enterprise." 146 The Court refused to accept a "single situs" argument that any tax obligation on unconnected interstate income be allocated to the domicile of the corporation. Tax allocation is not required, the Court said, merely because the business income of a unitary business is derived from several states. Citing Wisconsin v. J.C. Penney, 147 the Court said,

The requisite "nexus" is supplied if the corporation avails itself of the "substantial privilege of carrying on business within the state," and "the fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus be-

143. Id. at 278.
145. Id. at 439.
146. Id. at 440.
147. 311 U.S. 435, 444 (1940).
between such a tax and transactions within a state for which the tax is an exaction."

Exxon Corp. v. Department of Revenue followed Mobile Oil by refusing to accept Exxon's argument that its three functional units, which are essentially in competition with each other, should have separate tax liability allocations. The Supreme Court instead cited, as a sufficient basis to meet its fair apportionment requirement, "a rational relationship between income attributed to the State and the interstate values of the enterprise." The effect, then, of Mobil Oil and Exxon is to collapse the apportionability requirement into a bare nexus requirement. Further, the Court again rejected the argument of a possible multiple burden by requiring the corporation to show not merely the risk of, but the actual presence of, multiple taxation.

Maryland v. Louisiana, decided in 1981, addressed the second prong of the Complete Auto test: the requirement that a tax not discriminate against interstate commerce. Interestingly, Maryland v. Louisiana could have been decided solely on the tax's violation of the Supremacy Clause, but the Court insisted on addressing how the tax violated the Commerce Clause as well. The tax discriminated against interstate commerce in favor of local gas producers, the Court said, by setting up a system of tax credits and exclusions whereby the intrastate users of the gas were not burdened by the tax, while out-of-state consumers would bear the cost of the tax. The Supreme Court refused Louisiana's argument that discrimination was justified as "compensation," stating that Louisiana had no interest in being compensated for the severance of resources in federal outer continental shelf lands.

The significance of Maryland v. Louisiana for Commerce Clause analysis is that it demonstrated that there are limits of Supreme Court deference to state taxation legislation. The clear trend in the cases had been to permit broad state discretion in forcing interstate commerce to "pay its own way." While apportionability and nexus had collapsed into a minimum contacts-type test, and while the Court refused to mandate particular methods of apportionment even

148. 445 U.S. at 437.
149. 447 U.S. 207 (1980).
150. Id. at 219-20.
152. Id. at 2130-32.
153. Id. at 2135.
where the state method employed resulted in some discrimination of interstate business, the case strongly implies that the Court will refuse to validate a tax scheme which intentionally imposes a discriminatory burden on out-of-state consumers.\(^\text{154}\)

Also in 1981, the Supreme Court concluded its analysis of the four-prong test with a study of the fourth prong in *Commonwealth Edison Co. v. Montana*.\(^\text{155}\) That case validated Montana's tax imposed on the contract sales price of coal severed from the land in Montana, including coal taken from federal lands. The tax varied, but could reach a rate as high as thirty percent of the sales price. Approximately ninety percent of the coal was shipped in interstate commerce. The Court first explicitly disapproved of *Heisler v. Thomas Colliery Co.*,\(^\text{156}\) which had indicated that goods not in the stream of commerce were immune from Commerce Clause scrutiny. The Court then looked to *Complete Auto's* third prong, discrimination, and fourth prong, reasonable relationship to services, to determine if the tax violated the Commerce Clause. Even though ninety percent of the coal left the state, since the tax was computed at the same rate regardless of its destination, the Court said that it was not discriminatorily levied.\(^\text{157}\) The Court then finessed the "reasonably related to services" prong of *Complete Auto* by stating merely that the "measure" of the tax, rather that the tax itself, must be fairly related to the services provided by the state.\(^\text{158}\) Justice Marshall's opinion emphasized the word "measure," but failed to explain how

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\(^{154}\) The discrimination the Court found to be present in *Maryland v. Louisiana* seems, in principle, no more onerous than, for instance, a facially neutral apportionment formula that has a discriminatory effect. See note 140, supra. The distinction between the cases, however, is twofold: First, the tax on sales of animal feed in *Moorman* affected primarily the profitability of the interstate business, and the business was able to pass along its tax costs to only a limited range of consumers. The Louisiana first use tax imposed a direct burden on all out-of-state consumers regardless of whether the business was situated in the state or out of it, and a large segment of the nation's consumers were affected. The second distinction is that the Louisiana tax intentionally affected the discrimination, even though the state legislature was able to articulate plausible reasons for the discrimination. See Hellerstein, supra note 6, at 620-26. Increasingly, intent has become the touchstone for discrimination cases. Cf. *City of Memphis v. Greene*, 101 S. Ct. 1584 (1981) (proof of racially discriminatory intent required under a thirteenth amendment claim); *Cannon v. University of Chicago*, 648 F. Supp. 1104, 1109 (1981) (proof of intent is required for a sex discrimination claim under Title IX), and may also be applicable to discrimination claims under the Commerce Clause.


\(^{156}\) *260 U.S. 245* (1922).

\(^{157}\) *101 S. Ct. at* 2954.

\(^{158}\) *Id.* at 2958.
this word avoided requiring a factual demonstration of the relationship between the tax income and the services provided by the state. Instead, Marshall said simply that the proper measure is or must be left to legislative determination.\textsuperscript{158} Finally, the Court considered, and rejected, arguments of whether the tax violated the Supremacy Clause by being in conflict with the Mineral Lands Leasing Act or certain conservation acts.\textsuperscript{159}

\textit{Montana} raises a few questions. The first is, while a thirty percent tax rate may not violate the Commerce Clause, at what point will the Court conclude that a tax rate which applies to goods going to out-of-state consumers discriminates against interstate commerce? As suggested at oral argument, a 1000 percent tax might provide enough out-of-state income to completely finance the cost of state government, so that the residents would happily live with the additional tax burden imposed on them. Would that result, if based on a facially neutral statute, be discriminatory? Must intentionality be present to invalidate a \textit{de facto} discriminatory tax? Furthermore, to what extent is a state entitled to be recompensed for its services? While interstate commerce must pay its own way, does that include the costs of environmental and aesthetic damages? And, of course, how are these “externalities” to be quantified, so as to properly assess the tax?\textsuperscript{160}

Part of the answer to those questions, according to \textit{Montana}, is that the fourth prong of the \textit{Complete Auto} test does not anticipate a judicial determination of the relationship of the tax and the benefits generated by the tax. “The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.”\textsuperscript{161} The determination may be at a state legislative level or, if Congress finds a conflict with federal interests, at the national legislative level.\textsuperscript{162} \textit{Montana}’s simple requirement, that “the measure of the tax must be reasonably related to the extent of the contact,”\textsuperscript{163} says in essence that the reasonably-related prong of \textit{Complete Auto}, like the fair apportionment prong, collapses into the nexus test.\textsuperscript{164}

\begin{itemize}
\item[159.] Id. at 2959.
\item[160.] Id. at 2960-64.
\item[161.] See Browde & DuMars, supra note 6, at 45-49.
\item[162.] 101 S. Ct. at 2959.
\item[163.] Id.
\item[164.] Id. at 2958.
\item[165.] See Hellerstein, supra note 6, at 611-20. Hellerstein notes a distinction between cases where states have imposed taxes “for specific state-provided facilities” as
Nonetheless, White’s concurrence and Blackmun’s, Stevens’, and Powell’s dissent reflect the Court’s reluctance to accept a thirty percent tax. Blackmun, the author of Complete Auto, argued that the fourth prong is the basis upon which a court can invalidate an onerous state tax. He would have permitted Commonwealth Edison to proceed to trial on the issue of “reasonable relationship,” because this tax appears to do “what the Commerce Clause was meant to end.” Further, Blackmun demonstrated how peculiarly susceptible to “tailoring” that a tax on natural resources can be and how this tailoring can lead to discrimination. His dissent must surely pose the issue of establishing the rational limits at which states may tax interstate commerce even where Congress has not acted.

CONCLUSION

With Montana, the Court has completed its investigation of each of the four prongs to the Complete Auto test. Rather than underscoring or defining Complete Auto, the cases instead cast doubt on the continuing vitality of the test. The Court’s marked tendency has been to collapse the four prongs into a discussion of nexus and discrimination. That these are the primary elements of a fourteenth amendment Due Process and Equal Protection inquiry cannot be overlooked.

If indeed Complete Auto and the subsequent cases impose a Due Process test on state taxation of interstate commerce, then the Court has returned to the Taney theorem, that a state is precluded opposed to general revenue taxes for “broad governmental purposes.” Id. In the first instance, it is possible to measure the value received, so that the courts may validly attempt a comparison. See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972). In the latter instance, a court simply is not institutionally prepared to measure society’s costs and to apportion the payment of those costs. Hellerstein quotes Judge Hans Linde of the Oregon Supreme Court:

It is not clear whether or how the “fair relation to state services” can serve as a test independent from nexus. There are occasional perfunctory references to police and fire protection . . . . But . . . [i]n practical economic terms, when a state provides the organized legal system and other social machinery for conducting purchases, sales, or other economic activities in its market, it surely protects and serves whatever interest of the taxpayer suffices to constitute his required “nexus” for tax purposes.

Budget Rent-A-Car of Wash.-Ore., Inc. v. Multnomah County, 287 Or. 93, 597 P.2d 1232, 1239 n.6 (1979).

166. 101 S. Ct. at 2972 (Blackmun, J., dissenting), echoing Holmes’ oft-quoted phrase in Law and the Court, in COLLECTED LEGAL PAPERS 291, 296 (1920). Blackmun’s carefully selected language in the Montana dissent indicates that some members of the Court still maintain Chief Justice Marshall’s and Justice Frankfurter’s concern for free trade federalism.
from taxing interstate commerce only if Congress has acted. Commerce Clause analysis thus has become Supremacy Clause analysis as modified by the fourteenth amendment. If the Taney theorem supported by the fourteenth amendment becomes settled Commerce Clause analysis, then the Court will have finally returned to constitutionally defensible roots, as well as to predictable doctrine. The Burger Court, so often criticized for its lack of doctrinal consistency, has apparently succeeded where its predecessors had failed in sweeping away the inconsistencies of trying to balance—and then justify—the competing interests of federalism.

SUMMARY

An analysis of the Commerce Clause must originate with the conflicting interpretations offered by Chief Justices Marshall and Taney. Marshall viewed the clause as an exclusive grant of power to Congress, but sanctioned the judicial exception of certain classes of activities from that exclusive sphere. Taney's view would have minimized the importance of the judiciary by emphasizing the power of Congress. According to his view, the states are not prohibited from taxing and regulating interstate commerce unless Congress intervenes.

With the decision in Cooley, the Court enthusiastically embraced its power of exception as promulgated by Marshall. The Taney view of limited judicial power was cast aside by an activist Court, and was replaced by a flexible case-by-case approach in determining whether state intrusions into the commercial area were either local or national in character or had a direct or indirect effect on interstate trade.

The dissents of Rutledge and Black, and later the decision in Northwestern Cement, signaled dissatisfaction with the judicially imposed flexibility of Commerce Clause analysis. Finally, in Complete Auto, the Court abandoned the madcap tradition of the direct/indirect effects test in favor of a four-pronged test of functional economic realism.

The Complete Auto test held out the promise of order in the Court's disposition of Commerce Clause cases. But in the five years since its adoption, the Court has issued decisions which indicate a further adjustment in the Court's Commerce Clause analysis.

167. Taney, of course, served on the Court prior to the adoption of the fourteenth amendment.
Moorman Manufacturing, Exxon, Mobil Oil, and Maryland v. Louisiana all indicate strongly that the operative test of Commerce Clause analysis—despite the formal existence of a four-pronged test—is a combination of nexus and discrimination inquiry—essentially a Due Process analysis. Additionally, the reluctance of the Court in Montana to pursue the fourth prong of the Complete Auto test, and to require a factual inquiry as suggested by the dissent, is further evidence of the Court’s direction in Commerce Clause analysis.

Mindful of Professor Hellerstein’s warning against generalizations in Commerce Clause cases, it nonetheless appears that the Court may be returning to an analytic framework that approximates the Supremacy Clause simplicity ardently propounded by Chief Justice Taney. If the Court continues along its present path, its substantive Commerce Clause inquiry will be limited to nexus and discrimination issues. If the state action passes this inspection, the Court’s remaining function will be to satisfy the Supremacy Clause inquiry of whether Congress has acted in the field. If the Court’s analysis reaches this point, it finally will have embraced the Taney proposition that Commerce Clause analysis is solely a question of whether a state has the power to act.

168. Hellerstein, supra note 6, 75 Mich. L. Rev. at 1427.
169. The authors leave open the inquiry of whether nexus and discrimination issues are solely a due process inquiry, or whether the issues have an independent meaning for Commerce Clause analysis. See, e.g., Wisconsin v. J.C. Penney Co., discussed at note 147, supra; Moorman Mfg. Co. v. Bair, discussed at note 140, supra.