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Justice Scalia and the Commerce Clause: Reflections of a State Tax Lawyer

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JUSTICE SCALIA AND THE COMMERCE CLAUSE: REFLECTIONS OF A STATE TAX LAWYER

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Being asked to examine Justice Scalia's views on the Supreme Court's dormant commerce clause jurisprudence is like being asked to examine the National Rifle Association's views on gun control. Justice Scalia's unabashed hostility to the doctrine that the commerce clause, by its own force, limits state power makes his lips an easy read. He has characterized the doctrine as "arbitrary, conclusory, and irreconcilable with the constitutional text."[1] In his eyes, the Court's commerce clause doctrine "lack[s] any clear theoretical underpinning,"[2] "takes us, self-consciously and avowedly, beyond the judicial role itself,"[3] and has spawned a "quagmire"[4] of case law reflecting "inherently unpredictable"[5] results. His explanation for the sorry state of the Court's commerce clause jurisprudence lies not only in the fact that its standards have been applied "poorly or inconsistently,"[6] but also "because [the commerce clause] requires us . . . to accommodate, like a legislature, the inevitably shifting variables of a national economy."[7]

Despite his dismay over the very existence of the Court's negative commerce clause doctrine, Justice Scalia has—at least up to now[8]—participated in debates over the substance of that doctrine. While his substantive views are unmistakably informed by his distaste for dormant commerce clause analysis, they nevertheless reveal a

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1 American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2344 (1990) (hereinafter *American Trucking Ass'ns II*) (Scalia, J., concurring in the judgment) (quoting D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 234 (1985)).

2 Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part).

3 *American Trucking Ass'ns II*, 110 S. Ct. at 2344 (Scalia, J., concurring in the judgment).

4 *Tyler Pipe Indus.*, 483 U.S. at 259 (Scalia, J., concurring in part and dissenting in part) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

5 *American Trucking Ass'ns II*, 110 S. Ct. at 2344 (Scalia, J., concurring in the judgment).

6 *Id.*

7 *Id.*

8 It is not entirely clear what Justice Scalia meant by a statement he made during the last days of the Court's 1990 term: "Given my disagreement with this Court's 'negative' Commerce Clause jurisprudence, . . . I will not apply 'negative' Commerce Clause decision theories to new matters coming before us . . ." *Id.* at 2345.

thoughtful consideration of a number of critical issues that will continue to command the Court's attention unless and until Justice Scalia can persuade four other Justices to jettison a century and a half of precedent.[9]

This paper considers Justice Scalia's substantive views of the restraints that the commerce clause imposes on state taxation. My purpose is to examine critically Justice Scalia's dormant or "negative" commerce clause analysis of the state tax issues on which he has opined and to draw from that examination some general conclusions about Justice Scalia's commerce clause jurisprudence.

I. COMMERCE CLAUSE RESTRAINTS ON STATE TAXATION: AN OVERVIEW[10]

It is a commonplace of modern commerce clause analysis that the Court, in delineating the implied limitations that the clause imposes on state legislation, is engaged in a delicate balancing of state and national interests. In *Pike v. Bruce Church, Inc.*,[11] the Court articulated the now familiar formulation of criteria by which it weighs national against local interests in adjudicating the validity of state regulations affecting interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.[12]

When addressing questions of state taxation, as distinguished from state regulation of interstate commerce, however, the Court has embraced a more specific set of criteria for determining the validity of

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[9] The Court has thus far rejected Justice Scalia's invitation to reexamine the Court's negative commerce clause doctrine. *See, e.g., American Trucking Ass'ns II*, 110 S. Ct. at 2334 n.1 (1990).

[10] The following discussion draws freely from Hellerstein, *State Taxation and the Supreme Court*, 1989 SUP. CT. REV. 223 and Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987).

[11] 397 U.S. 137 (1970).

[12] *Id.* at 142 (citations omitted).

state legislation than the somewhat open-ended balancing standard embodied in *Pike*. In *Complete Auto Transit v. Brady*,[13] the Court sought to "clear[] up the tangled underbrush of past cases"[14] by articulating a four-part test to govern the constitutionality of state taxes under the commerce clause. A tax must be applied to an activity that has a substantial nexus with the state; it must be fairly apportioned to activities carried on by the taxpayer in the state; it must not discriminate against interstate commerce; and it must be fairly related to services provided by the state. In opinions subsequent to *Complete Auto Transit*, the Court has faithfully adhered to this four-part test,[15] which it has characterized as a "consistent and rational method of inquiry" that looks to "the practical effect[s] of a challenged tax" on interstate commerce.[16]

A. *Nexus*

The nexus requirement reflects the fundamental notion that there must be "some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax."[17] In recent years, the Court has been quite indulgent with the states in finding the requisite nexus sufficient to justify the exercise of state tax power. The Court has sustained a state's power to impose a use tax on catalogs shipped from outside the state directly to the taxpayer's in-state customers;[18] to tax all the receipts derived by an out-of-state supplier from sales to an in-state purchaser on the basis of the supplier's single resident employee;[19] and to apply its fuel use tax to aviation fuel stored temporarily in the state prior to loading aboard aircraft for consumption in interstate flights.[20] And, while rejecting the notion that the "slightest presence" of an out-of-state vendor con-

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13 430 U.S. 274 (1977).

14 Spector Motor Serv. v. O'Connor, 340 U.S. 602, 612 (1951) (Clark, J., dissenting).

15 *See, e.g.*, Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66, 72-79 (1989); Goldberg v. Sweet, 488 U.S. 252, 257 (1989).

16 Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443 (1980).

17 Miller Bros. v. Maryland, 347 U.S. 340, 344-45 (1954). While *Miller Brothers* was decided under the due process clause, the nexus requirement has been incorporated into the Court's commerce clause doctrine. *See Complete Auto Transit*, 430 U.S. at 274.

18 D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988).

19 Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 562 (1975). For a detailed consideration of *Standard Pressed Steel* and the nexus issue it raised, see Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term:* Standard Pressed Steel *and* Colonial Pipeline, 62 VA. L. REV. 149 (1976). *See also* Tyler Pipe Indus. v Department of Revenue, 483 U.S. 232 (1987) (out-of-state wholesaler had taxable nexus with the state as a result of activities of independent contractors on its behalf).

20 United Air Lines v. Mahin, 410 U.S. 623 (1973).

stitutes a sufficient nexus to require the vendor to collect use taxes,[21] the Court has nevertheless sustained use tax collection liability on the basis of in-state activities that many would regard as insubstantial.[22]

B. *Apportionment*

The requirement that a state tax affecting interstate commerce be fairly apportioned to the taxpayer's activities in the taxing state is a venerable one.[23] It has acquired greater significance, however, as the Court's decisions have broadened the states' taxing powers. By abandoning the formal criteria that once created an irreducible zone of tax immunity for interstate commerce,[24] the Court's emphasis has shifted from the question whether interstate commerce may be taxed at all to the question whether interstate commerce is being made to bear its fair share—or more than its fair share—of the state tax burden. If a tax is fairly apportioned to the taxpayer's activities in the taxing state, there is no risk, at least in principle, that a tax will subject a taxpayer engaged in interstate commerce to more than its fair share of the tax burden and expose it to a risk of multiple taxation not borne by local commerce.

Most of the controversies involving the fair apportionment criterion have focused on the formulas that states employ to divide a multistate enterprise's tax base among the states. Over the years, the Court has sustained a wide variety of methods of apportioning an equally wide variety of tax bases among the states. The Court has approved formulas employing such factors as track mileage,[25] barge line mileage,[26] designated assets,[27] gross receipts,[28] property,[29] and payroll[30] for apportioning such tax bases as tangible personal property,[31] capital stock,[32] gross receipts,[33] and net income.[34] The Court

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21 National Geographic Soc'y v. State Bd. of Equalization, 430 U.S. 551, 556 (1977).

22 *See id.* (magazine employed four in-state employees at two offices to solicit advertising unrelated to mail-order sales on which tax was imposed); Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (company used ten independent contractors to make sales).

23 *See, e.g.*, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26 (1891); Maine v. Grand Trunk Ry., 142 U.S. 217, 228 (1891).

24 *See* Complete Auto Transit v. Brady, 430 U.S. 274 (1977); Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1441-46 (1977).

25 Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

26 Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

27 Bass, Ratcliff & Gretton v. State Tax Comm'n, 266 U.S. 271 (1924).

28 Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939).

29 Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

30 Butler Bros. v. McColgan, 315 U.S. 501 (1942).

31 Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900).

32 Western Union Tel. Co. v. Attorney General, 125 U.S. 530 (1888).

has suggested that a formula may be "inherently arbitrary,"[35] but not once has the Court held an apportionment formula unconstitutional on its face. Moreover, the Court has rarely invalidated the application of a state apportionment formula to a multistate business.[36]

C. *Discrimination*

The rule forbidding state taxes that discriminate against interstate commerce has been a central tenet of the Court's commerce clause doctrine ever since the Court invoked the commerce clause as the basis for invalidating a state tax more than a century ago.[37] Although the concept of discrimination is not self-defining and the Court has never precisely delineated the scope of the prohibition against discriminatory taxes, the essential meaning of discrimination as a criterion for adjudicating the constitutionality of state taxes affecting interstate commerce emerges unmistakably from the Court's numerous decisions addressing the issue: a tax that by its terms or operation imposes greater burdens on out-of-state goods, activities, or enterprises than on competing in-state goods, activities, or enterprises will be struck down as discriminatory under the commerce clause.

In contrast to the deference that the Court has accorded the states when confronted with allegations that a tax lacks sufficient nexus with, or is unfairly apportioned to, the taxing state, the Court has scrutinized claims that a tax discriminates against interstate commerce with considerable vigilance. In recent years, the Court has been quick to strike down state taxes that favor local over out-of-state products,[38] activities,[39] or enterprises.[40] Moreover, it has invalidated discriminatory levies whether or not the discrimination was inten-

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33 Maine v. Grand Trunk Ry., 142 U.S. 217 (1891).

34 Norfolk & W. Ry. v. North Carolina *ex rel.* Maxwell, 297 U.S. 682 (1936).

35 Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 121 (1920); Hans Rees' Sons, Inc. v. North Carolina *ex rel.* Maxwell, 283 U.S. 123, 133 (1931).

36 Only once in the past 50 years has the Court struck down the application of a state apportionment formula to a tax base that was, in principle, apportionable on constitututional grounds. Norfolk & W. Ry. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968). Although the Court struck down apportioned state income taxes in ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) and in F.W. Woolworth Co. v. Taxation and Revenue Dep't, 458 U.S. 354 (1982), it did so on the ground that the state could not constitutionally include certain income within the apportionable tax base.

37 *See* Welton v. Missouri, 91 U.S. 275 (1876).

38 Bacchus Imports v. Dias, 468 U.S. 263 (1984) (invalidating excise tax on liquor from which locally-produced beverages were exempt).

39 Westinghouse Elec. Corp. v. Tully, 466 U.S. 388 (1984) (invalidating income tax credit limited to corporations engaging in export-related activity in the state).

40 American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) (hereinafter *American Trucking Ass'ns I*) (invalidating flat highway taxes that imposed greater burdens on out-of-state than on in-state trucks).

tional.[41] Although the Court has occasionally sanctioned different treatment of interstate and local businesses,[42] its decisions strongly adhere to the principle that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' "[43]

D. *Fair Relation Between the Tax and the Services Provided by the State*

The first three prongs of the Court's contemporary commerce clause standard for adjudicating the validity of state taxes—substantial nexus, fair apportionment, and nondiscrimination—were familiar concepts deeply embedded in the Court's doctrine for years before *Complete Auto Transit* was handed down in 1977. By contrast, the fourth prong—the requirement that a tax be "fairly related to the services provided by the State"[44]—was an uncertain, if not unknown, quantity when the Court articulated it, along with the other three commerce clause criteria, in *Complete Auto Transit*. Read literally, the Court's language could have been taken as contemplating a detailed factual investigation into the specific benefits the state provided to the taxpayer to ascertain whether the value of the benefits bore a reasonable relationship to the amount of tax imposed. With the exception of cases involving state-imposed user charges,[45] however, no such detailed factual investigation had ever been required by the Court in determining the validity of a tax under the commerce clause. Moreover, language in several of its opinions following on the heels of *Complete Auto Transit* suggested that the "fairly related" standard would be satisfied so long as the state provided the taxpayer with "the benefits of a trained work force and the advantages of a civilized society."[46]

In *Commonwealth Edison Co. v. Montana*,[47] which considered a challenge to Montana's thirty percent coal severance tax, the Court lifted the shroud of uncertainty that had obscured the meaning of the

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41 Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963).

42 Dunbar-Stanley Studios v. Alabama, 393 U.S. 537 (1969) (higher effective tax on transient photographers than on fixed-location photographers).

43 Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)).

44 Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977).

45 *See, e.g.*, Evansville Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707 (1972).

46 Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979); *see also* Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734, 750-51 (1978).

47 453 U.S. 609 (1981).

"fairly related" test, making it clear that the test was not an invitation to judicial review of taxes for excessiveness. The Court held that the relevant inquiry under the "fairly related" test is whether the tax is reasonably related to the extent of the taxpayer's contact with the state, "since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.' "[48] Justice Blackmun, the author of *Complete Auto Transit*, vigorously dissented from the Court's view of the meaning of the "fairly related" test, asserting that the Court had "emasculated" the fourth prong and left it utterly without meaning.[49]

Cases following *Commonwealth Edison* vindicate Justice Blackmun's complaint. The "fairly related" test appears to have little independent significance as a limitation on state tax power. Any tax held to violate the "fairly related" test is likely to fail some other portion of the Court's commerce clause standard as well.[50] And it is hard to conceive of any tax that would satisfy the substantial nexus, fair apportionment, and nondiscrimination criteria that would not also satisfy the "fairly related" test.[51]

E. *"Internal Consistency"*

In conjunction with its four-prong commerce clause analysis derived from *Complete Auto Transit*, the Court has also evaluated commerce clause challenges to state taxes under the so-called internal consistency test. Prior to 1983, the Court had never uttered the phrase "internal consistency" in a state tax opinion.[52] Since that time, however, the Court has invoked the principle of "internal consistency" on five separate occasions in adjudicating the validity of state taxes under the commerce clause.[53] Because Justice Scalia has directed considerable fire at the doctrine which in his eyes "revolution-

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[48] *Id.* at 626 (quoting Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)).

[49] *Id.* at 645 (Blackmun, J., dissenting).

[50] Thus in *American Trucking Ass'ns I*, the only case in which the Court has invoked the "fairly related" test in striking down a state tax, the flat tax on trucks was also held to violate the commerce clause's nondiscrimination requirement.

[51] None exists to my knowledge.

[52] Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988). The following discussion draws freely from the cited article.

[53] Goldberg v. Sweet, 488 U.S. 252, 261 (1989); *American Trucking Ass'ns I*, 483 U.S. at 284; Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 232, 247 (1987); Armco, Inc. v. Hardesty, 467 U.S. 638, 644-45 (1984); Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169 (1983). Another case concerning the scope of the "internal consistency" doctrine is currently pending before the Court. Ford Motor Credit Corp. v. Department of Revenue, Docket No. 88-1847 (argued Nov. 6, 1990).

ize[s] the law of state taxation,"[54] it is appropriate to trace its development here.

The Supreme Court first suggested that the principle of "internal consistency" constrained state tax power in *Container Corp. of America v. Franchise Tax Board*.[55] In discussing the constitutional limitations on the states' power to tax the income of a multistate business, the Court observed that the due process and commerce clauses require the states to be "fair"[56] in applying apportionment formulas to determine how much of the enterprise's income they may tax. The Court then declared: "The first, and . . . obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed."[57]

Less than a year after *Container*, the Court attributed broader significance to the "internal consistency" doctrine in *Armco, Inc. v. Hardesty*.[58] In *Armco*, the Court considered a claim of state tax discrimination under West Virginia's Business and Occupation (B&O) tax.[59] The B&O tax was a broad-based excise upon the privilege of engaging in most business activity in the state, and it was measured by the gross receipts from the business. The tax was levied upon both manufacturing and wholesaling in the state. However, there was a "multiple activities" exemption that relieved manufacturers who were subject to the higher-rate manufacturing tax from liability for the wholesaling tax.

Armco, an out-of-state manufacturer engaged in wholesaling in West Virginia, charged that the levy discriminated against interstate commerce because it taxed out-of-state manufacturers who sold at wholesale in the state, while exempting in-state manufacturers who did the same. The Supreme Court agreed that the tax discriminated on its face against interstate commerce. The existence of a higher B&O tax on in-state manufacturers did not cure the discrimination because the manufacturing tax could not be viewed as substantially equivalent to the wholesaling tax. Furthermore, the Court did not saddle the taxpayer with the burden of demonstrating actual discrimination, i.e., the taxpayer was not required to show that it was disad-

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54 *Tyler Pipe*, 483 U.S. at 257.

55 463 U.S. 159 (1983).

56 *Id.* at 169.

57 *Id.*

58 467 U.S. 638 (1984).

59 West Virginia's B&O tax was rendered inoperative effective July 1, 1987. W. Va. Code §§ 11-13-2b, 2c (1987).

vantaged in comparison to an intrastate West Virginia manufacturer-wholesaler because it was in fact compelled to pay not only a wholesaling tax to West Virginia, but also a manufacturing tax to some other state. The Court, drawing on its analysis in *Container*, held that the tax would violate the commerce clause's bar against state tax discrimination so long as it lacked "internal consistency."

> A tax must have "what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade. In [*Container*], the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.[60]

Three years after its decision in *Armco*, the Court considered a related challenge to Washington's B&O tax in *Tyler Pipe Industries v. Washington State Department of Revenue*.[61] Like West Virginia, Washington imposed its B&O tax on the gross receipts from various business activities carried on in the state, including manufacturing and wholesaling. Like West Virginia, Washington had a "multiple activities" exemption which assured that taxpayers engaged in both manufacturing and wholesaling in the state would pay tax on only one activity. However, instead of exempting local manufacturer-wholesalers from the state's wholesaling tax, as West Virginia had done, Washington exempted local manufacturer-wholesalers from the state's manufacturing tax. In so doing, Washington avoided the problem of facial discrimination the Court had identified in *Armco*. Out-of-state manufacturers who made wholesale sales in Washington would pay the same tax on their wholesaling activities as would their Washington-based competitors who manufactured and wholesaled their products in the state.

In the Court's view, however, the absence of facial discrimination in the wholesaling portion of Washington's B&O tax did not eliminate the discriminatory character of the statute. Judged by the standard of "internal consistency," Washington's levy was as constitutionally infirm as West Virginia's. Just as the interstate manufacturer-wholesaler in *Armco* was put at a competitive disadvantage to the intrastate man-

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[60] *Armco*, 467 U.S. at 644-45 (brackets in original, quoting *Container Corp.*, 463 U.S. at 169) (citations omitted).

[61] 483 U.S. 232 (1987).

ufacturer-wholesaler on the assumption that every state had adopted West Virginia's taxing scheme, so the interstate manufacturer-wholesaler in *Tyler Pipe* was put at a competitive disadvantage to the intrastate manufacturer-wholesaler on the assumption that every state had adopted Washington's taxing scheme. In each instance the interstate manufacturer-wholesaler would pay both a manufacturing tax to the state of manufacture and a wholesaling tax to the state of sale whereas the intrastate manufacturer would pay but one tax—a manufacturing tax, under West Virginia's statute, and a wholesaling tax under Washington's. In short, the Court's conclusion that the Washington taxing scheme was the "practical equivalent"[62] of the West Virginia taxing scheme from the standpoint of "internal consistency" was fully justified. There was little doubt that if "internal consistency" were the test, Washington's tax failed it.

On the same day it rendered its decision in *Tyler Pipe*, the Supreme Court abandoned a half-century of precedent by invalidating Pennsylvania's lump sum annual taxes on the operation of trucks within the state in *American Trucking Associations, Inc. v. Scheiner (American Trucking Associations I)*.[63] The taxes at issue, an axle tax ranging from $72 to $180 per truck and a $25 identification marker fee, were imposed in addition to the annual registration fees and fuel consumption taxes that all states, including Pennsylvania, impose on the trucking industry.

The truckers attacked these levies under the commerce clause, saying that if Pennsylvania had the right to impose a flat tax on their operations, then every other state could do the same. The cumulative effect of such a regime would impose a crippling financial burden on interstate motor carriers. The Court's consideration of this argument gave it an opportunity to elaborate further on the "internal consistency" test to which it could now refer almost casually as a "test . . . we have applied in other contexts."[64] Although registration fees can be characterized as flat taxes imposed by every state, they nevertheless pass the "internal consistency" test because, as a result of reciprocity and apportionment provisions, they place the interstate carrier at no competitive disadvantage created by cumulative tax burdens.

> Under this test, even though the registration fee is assessed, as indeed it has been, by every jurisdiction, it causes no impermissible

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62 *Id.* at 241.

63 483 U.S. 266 (1987). In *American Trucking Ass'ns II*, 110 S. Ct. 2323 (1990), the Court held that the decision in *American Trucking Ass'ns I* should be given only limited retroactive effect. *See* Hellerstein, *Preliminary Reflections on McKesson and American Trucking Associations*, TAX NOTES, July 16, 1990, p. 325.

64 *American Trucking Ass'ns I*, 483 U.S. at 282-83.

> interference with free trade because every State respects the registration of every other State. Payment of one registration fee enables a carrier to operate a vehicle either locally or in the interstate market. Having paid one registration fee, a vehicle may pass among the States as freely as it may roam the State in which it is based; the Commerce Clause is not offended when state boundaries are economically irrelevant.[65]

Nor did the motor fuel taxes imposed by Pennsylvania run afoul of the "internal consistency" test, even though they were imposed by every jurisdiction. Because they are apportioned to mileage traveled in Pennsylvania, they impose no greater burden on the interstate than on the intrastate carrier. Each pays the same amount "for traveling a certain distance that happens to be within Pennsylvania."[66]

But Pennsylvania's unapportioned flat taxes for the use of its roads plainly failed the "internal consistency" test. Unlike registration fees, payment of the tax to Pennsylvania provided no immunity from payment of similar taxes to other states. Unlike motor fuel taxes, payment was not apportioned to some neutral factor (such as extent of road use) that made state lines irrelevant. While registration fees and motor fuel taxes could thus be replicated by every state without placing the interstate carrier at a competitive disadvantage, the same could not be said of unapportioned flat taxes. "If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."[67]

In *American Trucking Associations I*, the Court reiterated the view expressed in *Armco* and *Tyler Pipe* that the application of the "internal consistency" test does not depend on whether states other than the taxing state have in fact imposed similar taxes so as to place an actual burden on interstate commerce. Yet it went on to note that other states had in fact adopted flat taxes so that the threat to free trade was in no sense hypothetical.[68]

Finally, in *Goldberg v. Sweet*,[69] the Supreme Court adverted to the "internal consistency" test in sustaining an Illinois telecommunications excise tax over the objection that it violated the commerce clause. The tax was imposed on the gross receipts from all telephone calls that either originated or terminated in Illinois and that were billed to an Illinois service address. The Court concluded that the tax

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[65] *Id.* at 283.
[66] *Id.*
[67] *Id.* at 284.
[68] *Id.* at 285.
[69] 488 U.S. 252 (1989).

"is internally consistent, for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call."[70]

II. COMMERCE CLAUSE RESTRAINTS ON STATE TAXATION: JUSTICE SCALIA'S JURISPRUDENCE

In his relatively brief tenure on the Court, Justice Scalia has written one opinion for the Court involving commerce clause restraints on state taxation;[71] he has accorded extended consideration to the merits of such issues in two other cases;[72] and he has summarily expressed his separate views of the merits on four other occasions.[73] While less than voluminous, Justice Scalia's contributions to the judicial debate over the scope of the Court's dormant commerce clause jurisprudence concerning state taxation are provocative and revealing.

A. *Justice Scalia and the Nexus Criterion*

Despite Justice Scalia's position that "only state taxes that facially discriminate against interstate commerce violate the negative Commerce Clause,"[74] and that he will therefore "refrain from applying, for Commerce Clause purposes, the remainder of the analysis articulated in *Complete Auto Transit, Inc. v. Brady*,"[75] Justice Scalia has nevertheless expressed his views on the nexus issue in a number of cases. The analytical justification for Scalia's action is that the nexus criterion is embodied in the due process requirement "that there be 'a "minimal connection" between the interstate activities and the taxing State.' "[76] Hence Justice Scalia's unwillingness to address the nexus issue under the dormant commerce clause does not preclude him from addressing the same issue under the due process clause. Since taxpayers typically invoke both the commerce and due process clauses in raising nexus objections to assertions of state tax power, Justice

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70 *Id.* at 261.

71 *See* New Energy Co. v. Limbach, 486 U.S. 269 (1988).

72 *See* Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part); *American Trucking Associations I*, 483 U.S. 266, 303 (1987) (Scalia, J., dissenting).

73 *See* Trinova Corp. v. Michigan Dep't of Treasury, 111 S. Ct. 818 (1991) (Scalia, J., concurring in the judgment); American Trucking Ass'ns II, 110 S. Ct. 2343 (1990) (Scalia, J., concurring in the judgment); Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989) (Scalia, J., concurring in the judgment); Goldberg v. Sweet, 488 U.S. 252, 271 (1989) (Scalia, J., concurring in the judgment).

74 *Goldberg*, 488 U.S. at 271 (Scalia, J., concurring in the judgment).

75 *Amerada Hess*, 490 U.S. at 80 (Scalia, J., concurring in the judgment).

76 *Id.* (quoting Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436-37 (1980) (citation omitted)); *see also supra* note 17 and accompanying text.

Scalia's narrow view of the commerce clause does not ordinarily limit his inquiry into the nexus question.

On the merits, Justice Scalia has signaled his general agreement with the Court's views on the nexus issue. He joined the Court in rejecting the claim that a state lacked sufficient nexus with catalogs shipped from outside the state directly to the taxpayer's in-state customers to warrant the imposition of tax liability for the use of the catalogs.[77] He explicitly noted his agreement with the Court's conclusion "rejecting [the taxpayer's] claim that it did not have a sufficient nexus" with the state when its only physical contact with the state was through independent contractors.[78] And in other cases he has either noted his concurrence[79] or failed to register any dissent[80] from the Court's disposition of the nexus issue.

B. *Justice Scalia and the Fair Apportionment Criterion*

As in the case of the nexus criterion, Justice Scalia would presumably have nothing to say about the fair apportionment criterion as a restraint on state tax power except that it is embodied in the Court's due process clause jurisprudence as well as in its commerce clause jurisprudence.[81] In fact, Justice Scalia has not had much to say about the fair apportionment criterion other than to agree on several occasions and without elaboration with the Court's conclusion that a tax was fairly apportioned.[82]

There is, however, one instance in which Justice Scalia has expressed his views as to the meaning of the fair apportionment requirement. In *Tyler Pipe*,[83] the taxpayer contended, among other things, that Washington's B&O tax measured by 100 percent of the receipts of an out-of-state manufacturer who made wholesale sales to Washington purchasers violated the Court's fair apportionment requirement because the value of the wholesaling activity, which was the nominal subject of the tax, was "partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax

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77 D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988).

78 Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 234, 252 (1987) (Scalia, J., concurring in part and dissenting in part).

79 *Amerada Hess*, 490 U.S. at 80 (Scalia, J., concurring in the judgment).

80 Goldberg v. Sweet, 488 U.S. 252, 271 (1989) (Scalia, J., concurring in the judgment).

81 *See* Norfolk & W. Ry. v. State Tax Comm'n, 390 U.S. 317, 325 (1968); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949).

82 *See Trivona*, 111 S. Ct. 818 (1991) (Scalia, J., concurring in the judgment); *Amerada Hess*, 490 U.S. at 80-81 (Scalia, J., concurring in the judgment); *Goldberg*, 488 U.S. at 271 (Scalia, J., concurring in the judgment); *cf. D.H. Holmes*, 486 U.S. 24.

83 483 U.S. 232 (1987). *See supra* text accompanying notes 61-62.

that activity."[84] The Court rejected this argument on the ground that "the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax."[85] In his separate opinion, Justice Scalia agreed: "Where . . . tax is assessed not on unitary income but on discrete events such as sale, manufacture, and delivery, which can occur in a single State or in different States, th[e] apportionment principle is not applicable; there is simply no unitary figure or event to apportion."[86]

Justice Scalia's view of the apportionment issue in *Tyler Pipe*, which was shared by the Court, cannot be squared with the Court's commitment to a commerce clause jurisprudence based on the "practical effect"[87] of state taxes and on "economic realities."[88] As the Court acknowledged, Washington's B&O tax on wholesaling activity indisputably includes receipts attributable in part to manufacturing activity carried on in other states.[89] Moreover, as Justice Brennan observed in his dissent in *General Motors Corp. v. Washington*,[90] which sustained Washington's B&O tax on wholesaling over the objection that it violated the fair apportionment criterion,

> if commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part. Such a tax must be apportioned to reflect the business activity within the taxing State.[91]

The response of Justice Scalia and the Court to these arguments was that the activity of wholesaling was a "discrete even[t]"[92] which "must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax,"[93] and there was therefore no "unitary . . . event to apportion."[94] But this view of wholesaling as a "discrete" activity that a state can tax without apportionment because the activity "must be viewed" as occurring "wholly within" the jurisdiction regardless of the measure of the tax is a retreat into the very formalism that the Court purportedly abandoned

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84 *Id.* at 251.
85 *Id.*
86 *Id.* at 256 (Scalia, J., concurring in part and dissenting in part).
87 Complete Auto Transit v. Brady, 430 U.S. 274, 278 (1977).
88 *Id.* at 279.
89 *Tyler Pipe*, 483 U.S. at 251.
90 377 U.S. 436 (1964).
91 *Id.* at 451 (Brennan, J., dissenting).
92 *Tyler Pipe*, 483 U.S. at 256 (Scalia, J., concurring in part and dissenting in part).
93 *Id.* at 251.
94 *Id.* at 256 (Scalia, J., concurring in part and dissenting in part).

in *Complete Auto Transit* and its progeny. The Court, after all, has told us on numerous occasions in recent years that these issues were to be decided on the basis of practical economic realities, not on the formal distinction between the subject and the measure of a tax.[95] Yet in *Tyler Pipe*, Justice Scalia and the Court relied on that formal distinction—invoking the fact that the subject of the tax is local wholesaling—to avoid an inquiry into the propriety of the measure of the tax, which concededly includes out-of-state values.

The critical point is that a tax levied upon interstate activity—whether measured by gross receipts, net income, or other values—must reflect the portion of the enterprise's activity that is being conducted in the taxing state, and the tax measure must be adjusted accordingly. Otherwise the state, under the guise of taxing some "local incident" of that interstate activity, would be able to sweep into its tax base gross receipts, net income, or other values that other states could include in their tax bases with equal justification by identifying some other "local incident" of that interstate activity. The risk of multiple taxation to which such a regime would expose interstate commerce is plain.

Perhaps it is unfair to criticize Justice Scalia for failing to adhere to the Court's commerce clause doctrine—a doctrine whose very legitimacy he questions. Indeed, while Justice Scalia has apparently chosen to join the substantive debate over selected commerce clause issues before the Court—issues which he may well regard as due process issues in disguise—he has never endorsed the Court's rejection of the formalism that characterized its earlier commerce clause jurisprudence. Nevertheless, aside from the illusion of clarity that this formalistic approach to apportionment may create, there is little to be said for ignoring the essential principle that a "State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part."[96]

C. *Justice Scalia and the Discrimination Criterion*

If there is any aspect of the Court's negative commerce clause doctrine with which Justice Scalia is sympathetic, it is the principle that state taxes may not discriminate against interstate commerce. Justice Scalia has indicated in several instances that he embraces the

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[95] *See, e.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609, 614-17 (1981); Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734, 743-48 (1978); Complete Auto Transit v. Brady, 430 U.S. 274, 280-81 (1977).

[96] General Motors Corp. v. Washington, 377 U.S. 436, 451 (1964) (Brennan, J., dissenting).

view that the commerce clause forbids "rank"[97] or "facial"[98] discrimination against interstate commerce, although even this position may be in some doubt in light of his recent pronouncement that he would "not apply 'negative' Commerce Clause decisional theories to new matters coming before us . . . ."[99]

Evidence that Justice Scalia embraces the Court's general view that the commerce clause forbids state tax discrimination against interstate commerce is reflected in the one state tax opinion that Justice Scalia authored for the Court, *New Energy Co. v. Limbach*.[100] The case involved an Ohio fuel tax credit of twenty-five cents per gallon for each gallon of ethanol sold as a component of gasohol.[101] The credit, however, was limited to fuel containing ethanol produced either in Ohio or in states which granted a reciprocal tax benefit[102] for fuel containing ethanol produced in Ohio. An Indiana manufacturer of ethanol challenged the constitutionality of the reciprocal credit when Indiana replaced its own ethanol tax exemption with a direct subsidy to Indiana ethanol producers, thus making it ineligible for Ohio's fuel tax credit.

Justice Scalia's opinion for a unanimous Court, striking down the fuel tax credit, was unexceptional. After reciting the settled principle that the commerce clause forbids discrimination against interstate commerce, Justice Scalia observed that the Ohio provision at issue "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination."[103] None of the state's defenses to this facially discriminatory statute could save it. The defense of "reciprocity"—that Ohio was really trying to promote interstate commerce by encouraging other

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97 *Tyler Pipe*, 483 U.S. at 265 (Scalia, J., concurring in part and dissenting in part).

98 *Amerada Hess*, 490 U.S. 66, 80 (1989) (Scalia, J., concurring in the judgment); Goldberg v. Sweet, 488 U.S. 252, 271 (1989) (Scalia, J., concurring in the judgment); *American Trucking Ass'ns I*, 483 U.S. at 304 (Scalia, J., dissenting).

99 *American Trucking Ass'ns II*, 110 S. Ct. at 2345. Justice Scalia's statement in the next breath, however, that "*stare decisis* . . . would normally cause [him] to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law," *id.*, may signal his continuing adherence to the commerce clause principle of nondiscrimination in cases of "rank" or "facial" discrimination.

100 486 U.S. 269 (1988).

101 Gasohol is a mixture of ethanol, or ethyl alcohol, with gasoline, in a ratio of 1:9 to produce automotive fuel. *Id.* at 271. The tax credit of 25 cents per gallon of ethanol, which represents ten percent of the volume of gasoline, made the cost of a gallon of gasohol two and one-half cents cheaper. New Energy Co. v. Limbach, 32 Ohio St. 3d 206, 206, 513 N.E.2d 258, 259 (1987), *rev'd*, 486 U.S. 269 (1988).

102 An exemption, credit, or refund.

103 *New Energy*, 486 U.S. at 274.

states to enact tax measures similar to Ohio's—was foreclosed by earlier precedent that had rejected similar reciprocity defenses to discriminatory state legislation.[104] The argument that the discrimination should be tolerated because of its limited scope was unavailing in light of the Court's precedent holding that "where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."[105] And the claim that the commerce clause was inapplicable because Ohio was acting as participant in, as distinguished from a regulator of, the interstate market[106] was dismissed for the simple reason that Ohio's intervention into the market took the form of taxation—"a primeval governmental activity."[107]

Perhaps the most interesting aspect of the *New Energy* opinion, at least from the viewpoint of someone who spends his time trying to make sense of the Court's state tax cases, is the fact that Justice Scalia admitted the possibility that the discriminatory levy could be justified if the state "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[108] While such an inquiry is clearly contemplated by the Court's approach to *regulations* that allegedly discriminate against interstate commerce,[109] the Court has never suggested that a discriminatory state *tax* could be sustained on the ground that no less discriminatory means were available to serve the same legitimate state purpose. Conceivably this is because there are almost always nondiscriminatory alternatives available to the state to fulfill the basic purpose served by taxes, namely, to raise revenue.[110]

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104 Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).

105 *New Energy*, 486 U.S. at 276.

106 *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429 (1980). *See generally* Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1121-41 (1980).

107 *New Energy*, 486 U.S. at 277.

108 *Id.* at 278.

109 *See* Maine v. Taylor, 477 U.S. 131, 151 (1977); Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979); Dean Milk v. City of Madison, 340 U.S. 349, 354 (1951); *supra* text accompanying note 12.

110 There are, however, instances in which the Court has sustained taxes that discriminate on their face against interstate commerce on the ground they are complementary to other taxes that impose an equivalent burden on local commerce, thereby making the entire taxing scheme nondiscriminatory. *See, e.g.*, Henneford v. Silas Mason Co., 300 U.S. 577 (1937). *See generally* Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986). The justification for such facially discriminatory "complementary" taxes may be seen as a form of the no-less-discriminatory-alternative analysis, at least when the state is precluded from imposing a single nondiscriminatory tax on local and interstate commerce. This is the case with respect to sales and use taxes, because states

Nevertheless, when a taxing measure is designed to further specific regulatory objectives, i.e., when it attempts to prescribe particular modes of conduct (aside from payment of the taxes themselves), it may well be appropriate for the Court to consider whether the state is unable to achieve those regulatory objectives by nondiscriminatory means. One can argue that *New Energy* was such a case. The state contended that the crediting scheme was designed to promote health and commerce: the former by encouraging the use of ethanol to reduce harmful exhaust emissions and the latter by encouraging commerce in ethanol. The Court rejected both justifications on the ground that the discriminatory treatment of non-Ohio ethanol did not serve the proffered objectives. The critical point, however, is simply that Justice Scalia entertained the no-less-discriminatory-alternative defense at all, which is somewhat of a novelty in a state tax case. The most plausible explanation for this is that Justice Scalia viewed the case as involving state regulation of interstate commerce, since there is no evidence of any attempt by Justice Scalia to introduce the regulatory mode of analysis into the adjudication of state tax controversies under the commerce clause.

Indeed, the notion that Justice Scalia would deviate from the traditional analytical framework for determining the validity of state taxes under the commerce clause would be inconsistent with his general animosity towards new commerce clause theories and his commitment to stare decisis insofar as he feels compelled to decide cases under the negative implications of the commerce clause.[111] Justice Scalia's apparent acceptance of the doctrine that the commerce clause prohibits state taxes that discriminate against interstate commerce permitted him to write a garden variety opinion invalidating a facially discriminatory tax on interstate commerce.

Justice Scalia has not always shared the Court's views as to whether a tax discriminates against interstate commerce. Because of his rejection of the Court's "internal consistency" doctrine,[112] he dissented from the Court's finding of discriminatory state taxation in *Tyler Pipe* and *American Trucking Associations I*.[113] And, as a result of his dissent in the latter case, Justice Scalia was compelled to address a discrimination argument that the Court did not have to reach.

The taxpayers in *American Trucking Associations I* argued that,

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may not impose "sales" taxes on out-of-state purchases and thus are compelled to impose "use" taxes on goods purchased outside the state but brought into the state in order to equalize the burden on all goods consumed in the state.

111 *See American Trucking Ass'ns II*, 110 S. Ct. at 2345.

112 *See supra* text accompanying notes 52-70.

113 The substance of these dissents is discussed *infra* in text accompanying notes 126-48.

wholly apart from the constitutional infirmity of imposing flat highway use taxes on interstate truckers, the Pennsylvania highway use tax (axle tax), which applied to both in-state and out-of-state vehicles on a facially neutral basis, was nevertheless discriminatory because the same law that introduced the axle tax reduced registration fees for Pennsylvania-based trucks by an amount equal to the axle tax. The taxpayers contended that while the axle tax appeared on its face to apply equally to in-state and out-of-state trucks, the simultaneous and offsetting reduction in Pennsylvania's registration fees effectively relieved in-state trucks of the burden of the axle tax and imposed virtually the entire cost of the tax on interstate truckers operating non-Pennsylvania-based vehicles on that state's highways. Under established commerce clause doctrine condemning state taxes whose "purpose" or "effect" is to favor local over out-of-state interests,[114] the axle tax allegedly failed to pass muster.

Justice Scalia did not see it that way, however. In his eyes, the critical fact was that each tax, viewed by itself, was nondiscriminatory, and he was unwilling to engage in any further inquiry because of the indeterminate nature of the analysis.[115] Justice Scalia was willing to concede that the reduction of the registration fee on Pennsylvania trucks could have the same effect as the grant of a credit for Pennsylvania-based truckers against the axle tax,[116] a scheme that would fail to pass muster under the Court's precedent.[117]

> But so would have the establishment of the registration fee and the axle tax at their current levels in the first place. To determine the facially discriminatory character of the tax not on the basis of the tax alone, but on the basis of the structure of a State's tax code, is to extend our case law into a new field, and one in which principled distinctions becomes impossible. What if, for example, the registration fees for Pennsylvania-based barges, rather than trucks, had been reduced in an amount that precisely compensated for the additional revenues to be derived from the increased axle fees? Or what if Pennsylvania had enacted the axle tax without reducing registration fees, and then one year later made a corresponding reduction in truck registration fees? . . . [T]o inquire whether a tax reduction is close enough in time or in mode to another tax so that

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114 *See, e.g.*, Bacchus Imports v. Dias, 468 U.S. 263, 270-71 (1984).

115 *American Trucking Ass'ns I*, 483 U.S. at 304-06 (Scalia, J., dissenting).

116 *Id.*

117 *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725 (1981) (tax on in-state use of gas extracted offshore found invalid because tax was creditable against other taxes imposed on local activities, thereby effectively limiting impact of tax on those engaged in local activities).

> "in effect" the latter should be treated as facially discriminatory is to ask a question that has no answer.[118]

Justice Scalia's narrow conception of the Court's proper role in determining whether a state tax discriminates against interstate commerce grows out of his understandable concern with the "arbitrariness"[119] of a commerce clause jurisprudence based on a judicial inquiry into the practical "effects" of a tax, "the character of the activity taxed,"[120] and the relationship of the tax to other aspects of the state tax structure. Nonetheless, one may question whether Justice Scalia's preoccupation with "the form of the tax"[121] can accommodate effective judicial prohibition of state taxes that in substance discriminate against interstate commerce.

If one hundred and fifty years of commerce clause litigation over discriminatory state taxes has taught us anything, it is that discrimination takes many forms, not all of which are discernible on the face of the statute. As a consequence, the Court has made it clear that "[t]he commerce clause forbids discrimination, whether forthright or ingenious"[122] and that states may not discriminate "by indirection."[123] Economic reality, not the draftsman's pen, has become the touchstone of commerce clause analysis.[124] Justice Scalia's contrasting emphasis upon the form of the statute in addressing questions of state tax discrimination[125] may avoid the evils of unstructured commerce clause analysis, but in the process it may also fail to identify substantial discrimination against interstate commerce.

D. *Justice Scalia and "Internal Consistency"*

In his attacks on the substantive aspects of the Court's commerce clause doctrine restraining state tax power, Justice Scalia has reserved his harshest criticism for the Court's reliance on the "internal consistency" principle to invalidate state taxes.[126] He has observed that "this internal consistency principle is nowhere to be found in the Constitution"[127] and is not "compelled by our past decisions."[128] Because

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118 *American Trucking Ass'ns I*, 483 U.S. at 305 (Scalia, J., dissenting).

119 *Id.*

120 *Id.* at 305 n.*.

121 *Id.*

122 Best & Co. v. Maxwell, 311 U.S. 454, 455 (1940).

123 Guy v. Baltimore, 100 U.S. (10 Otto) 434, 443 (1880).

124 Complete Auto Transit v. Brady, 430 U.S. 274, 284-85 (1977).

125 *American Trucking Ass'ns I*, 483 U.S. at 306 (Scalia, J., dissenting).

126 *See supra* text accompanying notes 52-70.

127 Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part).

128 *American Trucking Ass'ns I*, 483 U.S. at 304 (Scalia, J., dissenting).

"[w]e are already on shaky ground when we invoke the Commerce Clause as a self-operative check on state legislation, requiring us to develop rules unconstrained by the text of the Constitution,"[129] "[p]rudence counsels in favor of the least intrusive rule possible."[130] The "internal consistency" principle plainly is not such a rule. "I think it particularly inappropriate," Justice Scalia has declared, "to leap to a restrictive 'internal consistency' rule, since the platform from which we launch that leap is such an unstable structure."[131]

In his separate opinion in *Tyler Pipe*,[132] Justice Scalia took the Court to task for embracing a doctrine that measures the validity of state taxes on the basis of hypothetical rather than actual burdens on interstate commerce. By assuming that other states have adopted the challenged levy imposed by the taxing state, the "internal consistency" test may condemn the tax even though no other state has imposed a similar levy. As a consequence, taxes on interstate business may be struck down even though the business in fact pays no more tax than its intrastate competitor. This was clearly the case in *Armco*,[133] where the Ohio-based manufacturer selling in West Virginia paid no manufacturing tax to Ohio; it was also true, for the most part, in *Tyler Pipe*, where few of the Washington manufacturers selling in other states or out-of-state manufacturers selling in Washington could point to gross receipts taxes on wholesaling or manufacturing they paid to other states.[134] In objecting to the Court's reliance on the "internal consistency" principle to invalidate the Washington levy, Justice Scalia accused the Court of failing to "adhere to our long tradition of judging state taxes on their own terms,"[135] observing that "there is even less justification for striking them down on the basis of assumptions as to what other States *might* do than there is for striking them down on the basis of what other States *in fact* do."[136]

Insofar as the "internal consistency" doctrine is designed to prevent multiple taxation of interstate business, however, the Court's long tradition is not precisely the one described by Justice Scalia. Indeed, as originally formulated, the multiple taxation doctrine was couched in the language of possibility rather than certainty. Constitu-

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129 *Tyler Pipe*, 483 U.S. at 257 (Scalia, J., concurring in part and dissenting in part) (citation omitted).

130 *Id.*

131 *Id.* at 259.

132 *Tyler Pipe* is discussed *supra* in text accompanying notes 61-62.

133 *Armco* is discussed *supra* in text accompanying notes 58-60.

134 *See* National Can Corp. v. Washington Dep't of Revenue, 109 Wash. 2d 878, 889, 749 P.2d 1286, 1292, *appeal dismissed and cert. denied*, 486 U.S. 1040 (1988).

135 *Tyler Pipe*, 483 U.S. at 259 (Scalia, J., concurring in part and dissenting in part).

136 *Id.* (emphasis in original).

tionality depended on whether multiple burdens were capable of being imposed, not on whether they actually had been. In his seminal opinion in *Western Live Stock v. Bureau of Revenue*[137] articulating the multiple taxation doctrine, Justice Stone observed that

> [t]he vice characteristic of those [taxes] that have been held invalid is that they have placed on the commerce burdens that are *capable*, in point of substance, of being imposed with equal right by every state in which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.[138]

Other opinions rendered during the formative era of the multiple taxation doctrine likewise adhered to the precept that the risk of multiple taxation sufficed to invalidate the tax and that proof of actual multiple taxation was unnecessary.[139]

Although in subsequent opinions the Court was not as consistent as it might have been in addressing the question whether the risk of multiple taxation provided the predicate for striking down a state tax on commerce clause grounds,[140] the Court unequivocally put its imprimatur upon the "risk" theory of multiple taxation in *Mobil Oil Corp. v. Commissioner of Taxes*.[141] In *Mobil*, Vermont sought to tax an apportioned share of the taxpayer's dividend income from its unitary business being conducted in part in Vermont. Mobil maintained that Vermont's claim to an apportioned share of its dividends threatened to expose more than 100 percent of its income to state taxation because of the asserted power of New York, the state of Mobil's commercial domicile, to tax all of Mobil's dividends on an unapportioned basis. Since New York did not, in fact, tax the dividends at issue, Mobil was subjected to a risk of multiple taxation, and the

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137 303 U.S. 250 (1938).

138 *Id.* at 255-56 (citations omitted) (emphasis supplied).

139 *See* Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949); Central Greyhound Lines v. Mealy, 334 U.S. 653, 663 (1948); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 429 (1947) (overruled on other grounds by Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978)); Gwin, White & Prince v. Henneford, 305 U.S. 434, 439 (1939); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938). Although Northwest Airlines v. Minnesota, 322 U.S. 292 (1944) may be regarded as inconsistent with the "risk" rule, the Court subsequently read the case narrowly so as to conform to the "risk" rule. Braniff Airways v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590, 601-02 (1954).

140 *Compare, e.g.*, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 463 (1959) ("[t]here is nothing to show that multiple taxation is present. We cannot deal in abstractions") *with* Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 563 (1975) ("a vice in a tax on gross receipts doing an interstate business is the risk of multiple taxation").

141 445 U.S. 425 (1980).

Court therefore had to face the question whether proof of actual—not merely potential—multiple taxation was a prerequisite to establishing a violation of the commerce clause. In holding that the "risk" theory should prevail, the Court agreed with Mobil that "the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy."[142] And it rejected the state court's contention that actual multiple taxation must be demonstrated to make out a case under the commerce clause.[143]

In sum, the Court's "long tradition" of considering allegations of multiple taxation does reflect a willingness to consider "abstract" or "hypothetical" claims in adjudicating the validity of state taxes under the commerce clause, Justice Scalia's suggestion to the contrary notwithstanding. The question remains, however, whether Justice Scalia is right as a matter of principle in objecting to the "internal consistency" doctrine because it dispenses with the requirement that a taxpayer in fact be burdened by the tax at issue.

The Court's approach seems justified for several reasons. First, as the Court pointed out in *Armco*, "[a]ny other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated."[144] As a matter of principle, it is undesirable to fashion a rule of law that depends for its operation on the present configuration of the statutes of other states. Second, even if acceptable as a matter of principle, it is undesirable as a matter of practice. Taxpayers would face uncertainties in determining their state tax liabilities, states would face uncertainties in predicting state tax collections, and compliance and administration difficulties would be exacerbated. Finally, even if otherwise acceptable, there is something unseemly about determining state tax liabilities "on a first-come-first-tax basis."[145] Given the fundamental concerns underlying the commerce clause, it would be perverse indeed to constitutionalize a rule rewarding beggar-thy-neighbor state tax policies with state tax collections depending on who won the race to the taxpayer's door.

Beyond his objection to the "internal consistency" principle

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142 *Id.* at 444.

143 *See also* Exxon Corp. v. Department of Revenue of Wisconsin, 447 U.S. 207, 228 (1980) (entertaining multiple taxation claim even though "it is the *risk* of multiple taxation that is being asserted" and "actual multiple taxation has not been shown") (emphasis in original).

144 Armco, Inc. v. Hardesty, 467 U.S. 638, 644-45 (1984).

145 General Motors Corp. v. Washington, 377 U.S. 436, 458 (1964) (Goldberg, J., dissenting), *overruled*, Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 232 (1987).

based on its hypothetical nature, Justice Scalia also criticized it on the ground that while the principle condemns taxes if the adoption of the *same* tax by other states would impose a multiple tax burden on the multistate business, it does not deal with the problem of multiple taxation created by states imposing *different* taxes on the interstate enterprise.

> Specifically, I see no reason why the fact that other States, by adopting a *similar* tax, might cause Washington's tax to have a discriminatory effect on interstate commerce, is of any more significance than the fact that other States, by adopting a *dissimilar* tax, might produce such a result. The latter, of course, does not suffice to invalidate a tax. To take the simplest example: A tax on manufacturing (without a tax on wholesaling) will have a discriminatory effect upon interstate commerce if another State adopts a tax on wholesaling (without a tax on manufacturing)—for then a company manufacturing and selling in the former State would pay only a single tax, while a company manufacturing in the former State but selling in the latter State would pay two taxes.[146]

Because Justice Scalia shared the Court's view that apportionment was an inappropriate solution to the problem raised by Washington's tax,[147] he did not consider the possibility that apportionment of Washington's tax would solve the multiple tax problem he identified. In fact, a requirement that gross receipt taxes be apportioned would have assured that an interstate manufacturer/wholesaler's receipts would be divided between the manufacturing and selling jurisdictions based on its activities in the state.[148] The fact that one state taxed the receipts under a manufacturing tax while the other taxed them under a wholesaling tax would have no effect on the enterprise's liability. Thus the problem identified by Justice Scalia would disappear.

III. JUSTICE SCALIA AND THE COMMERCE CLAUSE: CONCLUDING OBSERVATIONS

Justice Scalia's animosity towards the Court's negative commerce clause doctrine is reflected not only in his broadside attack on the legitimacy of that doctrine but also in his narrow approach to its substantive scope. He has been willing to concur in the Court's substantive views of the Court's commerce clause doctrine limiting state tax power only in cases involving "rank" or "facial" discrimination or

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146 *Tyler Pipe*, 483 U.S at 258-59 (Scalia, J., concurring in part and dissenting in part).

147 *See supra* text accompanying notes 83-96.

148 *See* Hellerstein, *supra* note 52, at 177-78.

when the Court has rebuffed commerce clauses challenges to state taxes. In his separate concurring and dissenting opinions, he has taken formalistic and restrictive positions on issues of apportionment and discrimination and has rejected altogether the Court's "internal consistency" doctrine. All this can be explained, of course, by Justice Scalia's firm belief that the Court has no business enforcing the commerce clause and that "[f]iner tuning than this is for the Congress."[149] One can only speculate as to what would have been the consequences for the Union had this view prevailed on the Supreme Court for the past two centuries. I, for one, am left with the uncomfortable feeling that commerce among the states would have suffered at the hands of the "centrifugal forces of localism."[150]

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149 *Tyler Pipe*, 483 U.S. at 259 (Scalia, J., concurring in part and dissenting in part).

150 Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 222 (1957).