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Preliminary Reflections on McKesson and American Trucking Associations

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TAX ANALYSTS SPECIAL REPORT

PRELIMINARY REFLECTIONS ON McKESSON AND AMERICAN TRUCKING ASSOCIATIONS

by Walter Hellerstein

Walter Hellerstein is Professor of Law at the University of Georgia and Of Counsel to the Law Firm of Morrison & Foerster. In this article, Hellerstein analyzes the United States Supreme Court's recent decisions in McKesson and American Trucking Associations involving the right of a taxpayer to a refund of an unconstitutional state tax. He also considers the implications of these decisions on future state tax litigation. Hellerstein was counsel to McKesson in the McKesson case.

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I. INTRODUCTION

On June 4, 1990, the Supreme Court issued its long-awaited decisions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*[1] and *American Trucking Associations, Inc. v. Smith*.[2] Both cases raised the question whether a taxpayer has a right to a refund of unconstitutional state taxes. In *McKesson*, the Court handed the taxpayers a stunning victory, holding unanimously that a taxpayer who is compelled to pay a tax that is later held to be unconstitutional under established Commerce Clause principles is entitled to meaningful retrospective relief. In *American Trucking Associations*, a sharply divided Court handed the taxpayers a mixed bag, holding that the taxpayers were entitled to retrospective relief only from the date of *American Trucking Associations, Inc. v. Scheiner*,[3] which overturned past precedent in establishing the taxpayers' substantive claims under the Commerce Clause.

This article has two purposes: first, to analyze the *McKesson* and *American Trucking Associations* cases; second, to consider their implications for future constitutional challenges to state taxes.

II. THE McKESSON CASE

McKesson involved a challenge to a Florida liquor excise tax scheme that favored local over out-of-state products. Like many other states, Florida had long provided preferential tax treatment to alcoholic beverages that were locally produced or made from local products. Although such local favoritism unquestionably violated settled principles of Commerce Clause jurisprudence, the states had relied on the umbrella of the Twenty-first Amendment[4] to shield their discriminatory liquor tax laws from Commerce Clause scrutiny.[5] In *Bacchus Imports, Ltd. v. Dias*,[6] however, the Court adopted a more limited view of the Twenty-first Amendment's impact on the Commerce Clause. It held that the Amendment did not empower states to favor local liquor industries by erecting barriers to competition and that it removed Commerce Clause restraints from state liquor taxation only insofar as the taxes were designed to promote temperance or other objectives of the Twenty-first Amendment.

After the Court's decision in *Bacchus*, the Florida legislature revised the state's liquor excise tax scheme. Instead of removing the underlying discrimination against

[1] 58 U.S.L.W. 4665 (U.S., June 4, 1990).
[2] 58 U.S.L.W. 4704 (U.S., June 4, 1990).
[3] 483 U.S. 266 (1987).

[4] The Twenty-first Amendment to the Constitution provides in part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Amend. XXI.

[5] The Court made it "clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).

[6] 468 U.S. 263 (1984).

out-of-state products, however, the legislature made largely cosmetic changes to Florida's liquor tax statutes. It replaced the previous express preferences for "Florida-grown" products with preferences for products made from specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and not in most other states. The Florida Supreme Court was not fooled by the legislature's wordsmithing, and it struck down the revised Florida liquor tax on the ground that it unconstitutionally discriminated against interstate commerce. Nevertheless, the Court refused to order a tax refund because of "equitable considerations," the state's "good faith reliance on a presumptively valid statute," and the court's belief that "if given a refund, [the taxpayers] would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers."[7]

A. The Eleventh Amendment Issue

Before addressing the question whether Florida could constitutionally deny a taxpayer a refund of a tax that discriminated against interstate commerce, the Court confronted the question whether the Eleventh Amendment deprived the Court of jurisdiction over the taxpayer's claim. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[8] The Eleventh Amendment has generally been construed to bar suits against states for monetary relief in federal court. The state contended that the rule likewise applied to suits, like McKesson's, which are initially brought in state court but invoke the federal appellate jurisdiction of the United States Supreme Court on review. The Court rejected this contention recognizing explicitly "what has long been implicit in our consistent practice and uniformly endorsed in our cases: the Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts."[9]

The principal issue . . . was whether prospective relief, by itself, exhausts the requirements of Federal law . . . .

B. The Refund Issue

1. The Due Process Requirement of 'Meaningful Backward-Looking Relief.' The principal issue in the case, as articulated by the Court, was "whether prospective relief, by itself, exhausts the requirements of federal law"[10] when a taxpayer has involuntarily paid a tax that has been held unconstitutionally discriminatory under settled Commerce Clause principles. It is important to note that there was no serious question that the *substantive rule* announced in the Florida case should be applied retroactively, i.e., within the applicable statute of limitations. For reasons that will be considered below in connection with the *American Trucking Associations* case, all of the Justices of Court concurred on this point." Hence the precise issue to which most of the Court's opinion in *McKesson* was addressed was whether prospective relief, by itself, exhausts the requirements of federal law when the substantive rule of the case has retroactive effect.

The Court's answer to this question was unequivocal:

> The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.[12]

The Court's conclusion followed from a number of earlier cases[13] which had established the rule that, "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the demands of the Due Process Clause."[14]

Florida was not limited to providing 'meaningful backward-looking relief' through a refund remedy.

The question, then, became exactly what "meaningful backward-looking relief" entailed. The Court first observed that in some circumstances such relief must consist of a refund. For example, if a state has levied a tax it is wholly without constitutional power to impose because it lacks jurisdiction over the taxpayer or because the taxpayer is immune from taxation under federal law, then the state would have "no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'"[15]

Florida, however, was not wholly without power to impose the liquor excise tax in question. Florida unquestionably possessed power to impose a liquor excise tax. The vice of the Florida tax was that the state's taxing power had been exercised so as to discriminate against interstate commerce, and the tax was unconstitutional only insofar as it operated in that manner. As a consequence, Florida was not limited to providing "meaningful backward-looking relief" through a refund remedy. To be sure, "[t]he State may . . . choose to erase the property deprivation itself by providing petitioner with a full refund of its tax payments."[16] But the Court also made it clear.

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[7] *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1010 (Fla. 1988).

[8] U.S. Const. amend. XI.

[9] 58 U.S.L.W. at 4668.

[10] *Id.*

[11] *See id.* at 4669 n.15.

[12] *Id.* at 4668-69 (footnotes omitted).

[13] *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912); *Ward v. Love County Board of Commissioners*, 253 U.S. 17 (1920); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. (1928); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931).

[14] 58 U.S.L.W. at 4670 (footnote omitted).

[15] *Id.* at 4671 (quoting *Ward*, 253 U.S. at 24).

[16] *Id.*

relying on remedial measures it had sanctioned in earlier cases involving discriminatory taxes,[17] that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination."[18]

The state's obligation to provide meaningful 'postdeprivation' relief was a consequence of its decision not to provide the taxpayer with a meaningful opportunity to contest the tax prior to the payment.

Florida was therefore free to "reformulate and enforce the Liquor Tax during the contested period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause."[19] Even though this might not provide the taxpayer with a refund, it would provide the taxpayer with "meaningful backward-looking relief" because the taxpayer, by hypothesis, would be subjected to a tax that conformed to the commands of the Commerce Clause. Any deprivation of the taxpayer's property would therefore be pursuant to a valid scheme and would thus provide the taxpayer with "all of the process it is due: an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property."[20]

The Court then suggested the options available to Florida that would satisfy its constitutional obligation to provide the taxpayer with meaningful retrospective relief. Florida could plainly do so by refunding to McKesson the difference between the taxes it paid and the tax it would have paid had it enjoyed the same rate reductions as its favored competitors.[21] Alternatively, Florida might, consistent with federal and state constitutional restrictions on retroactive legislation, assess back taxes from McKesson's competitors that received favored tax treatment thereby retrospectively eliminating the discrimination.[22] Finally, Florida might devise some combination of these two forms of relief, providing partial refunds and imposing a partial retroactive tax on the taxpayer's favored competitors.[23] What was critical, in the eyes of the Court, was the end result, namely, that the "resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce."[24] Only if it did, would the remedy render the taxpayer's property deprivation lawful and satisfy "the Due Process Clause's requirement of a fully adequate postdeprivation procedure."[25]

Finally, it is worth noting that the state's obligation to provide meaningful "postdeprivation" relief was a consequence of its decision not to provide the taxpayer with a meaningful opportunity to contest the tax prior to the payment. Thus, if the state had authorized the taxpayer to bring suit to enjoin the tax or to assert its constitutional objections in a defense to a tax enforcement proceeding, the state would have satisfied its due process obligation to provide the taxpayer with an opportunity to be heard before it was deprived of any significant property interest. Under such circumstances, the obligation to provide meaningful retrospective relief would never arise because the taxpayer would have received all the process to which it is due prior to paying the tax. However, because states are not required to provide such "predeprivation process," and because Florida, like most states, chose to require taxpayers to tender their tax payments before their objections were entertained and resolved in a meaningful hearing, it had to "provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."[26]

2. The Court's Rejection of 'Equitable' Defenses. In denying McKesson's claim for a refund, the Florida Supreme Court relied on two "equitable considerations" that it believed justified its refusal to order retroactive

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[17] The Court cited both the *Montana National Bank* and *Bennett* cases. See note 13 *supra*. *Montana National Bank* involved a state tax imposed on shares of banks incorporated under Federal law but not on shares of banks incorporated under state law. The levy violated a Federal statute requiring equal taxation of the shares of state and national banks. The Court there recognized "that the federal mandate of equal treatment could have been satisfied by collecting back taxes from state banks rather than by granting a refund to national banks." 58 U.S.L.W. at 4670. In *Bennett*, the Court held that state taxation of the shares of banks at a higher rate than the shares of competing domestic corporations violated the Equal Protection Clause. The Court there indicated that the banks' claim for a refund would have been defeated "if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors." *Bennett*, 284 U.S. at 247. Since the state had not so acted, however, the Court held that the banks were entitled to a refund.

[18] 58 U.S.L.W. at 4671.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* Under this criterion, the Court dismissed the state's suggestion that in order to redress the taxpayer's constitutional deprivation, the state need not *actually* impose a retroactive constitutional tax scheme on all liquor distributors (the taxpayer and its competitors) during the contested tax period. The state contended that if it had known that the liquor tax would have been invalidated, it would have chosen to tax all taxpayers at the higher rate to which the taxpayer was subjected rather than permitting the taxpayer to enjoy the lower rates imposed on its favored competitors. Because the taxpayer would have paid the same tax under this scheme as it actually paid, the argument continued, the taxpayer is not entitled to retrospective relief. The Court rejected this line of reasoning because it failed to fulfill the state's essential due process obligation to cure the discrimination to which the taxpayers had been subjected. Only an actual refund or other retroactive adjustment of the relative tax burdens borne by the taxpayer and its competitors could bring about the nondiscrimination that the Commerce Clause requires.

[26] *Id.* (footnotes and citations omitted). The Court's analysis also served to place the common-law rule that taxpayers have no right to the refund of a tax that is "voluntarily" paid in constitutional perspective. The Due Process Clause requires meaningful retrospective relief only when a tax is paid involuntarily or under duress. The Court observed, however, that

> if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers

relief. First, it observed that the state had implemented the taxing scheme "in good faith reliance on a presumptively valid statute."[27] The United States Supreme Court characterized this consideration as reflecting "a concern that a State's obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the State's ability to engage in sound fiscal planning."[28] The Court, however, found this justification insufficient to override Florida's constitutional obligation to provide meaningful retroactive relief on several grounds. With regard to future cases, the state's ability to impose various procedural requirements on actions for refunds met this concern. The Court adverted specifically to a number of procedural measures a state might adopt to limit its exposure to unanticipated refund claims such as limiting the availability of refunds to taxes paid under protest; enforcing relatively short statutes of limitations for tax refund actions; refraining from collecting taxes pursuant to taxing schemes that have been held unconstitutional; and placing challenged tax payments into an escrow account.

The state could not credibly claim that it was surprised by the invalidation of the levy.

As for the fiscal concerns generated by the *McKesson* case itself, the Court noted that the state's failure to avail itself of any of these methods of self-protection weakened its claim. Furthermore, the notion that the state was relying on a "presumptively valid statute" was hard to square with the fact that it had made only cosmetic changes from the preexisting liquor tax that expressly discriminated against out-of-state products. Hence the state could not credibly claim that it was surprised by the invalidation of the levy.

The second "equitable consideration" invoked by the Florida Supreme Court in denying the taxpayer its claim for a refund was that, if given a refund, McKesson would probably receive a "windfall" because the cost of the tax has likely been passed on to its customers.[29] The Court dismissed this defense on both factual and doctrinal grounds. Even assuming a state were obligated to refund an unconstitutional tax only insofar as the taxpayer bore the economic burden of the levy, the Florida court's assumption that the tax was in fact passed on by McKesson had no support in the record and therefore was "purely speculative."[30] "[A] court certainly cannot withhold part of a refund otherwise required to rectify an unconstitutional deprivation without first satisfactorily engaging in this inquiry."[31]

But the Court rejected the contention on more fundamental grounds. In contrast to a pass-on defense in the context of a tax that "merely exceed[s] the amount authorized by statute,"[32] Florida's tax unconstitutionally discriminated against interstate commerce. The tax injured McKesson not only because it was poorer than if it had not paid the tax, a problem that might be mitigated to the extent that it had passed the tax on to others, but also because it was placed at a competitive disadvantage to its competitors who were not burdened with the levy.

> To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (e.g., for advertising) in an effort to maintain its market share. The State cannot persuasively claim that "equity" entitles it to retain tax moneys taken unlawfully from petitioner due to its pass-on of the tax where the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place. We thus reject respondents' reliance on a pass-on defense in this context.[33]

Finally, the court addressed the state's claim that the requirement that it provide meaningful retroactive relief "would plainly cause serious economic and administrative dislocation for the State."[34] While acknowledging that

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to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure.

Id. at 4670 n. 21. The question whether a tax is paid "voluntarily" or "under duress" thus becomes a threshold question in the constitutional inquiry. The Court has held that a "tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure" when a tax must be paid to avoid economic sanctions or the seizure of the taxpayer's property. *Id.*

[27]See note 7 *supra*.

[28]58 U.S.L.W. at 4672.

[29]See note 7 *supra*.

[30]58 U.S.L.W. at 4673 n.30.

[31]*Id.* at 4673.

[32]58 U.S.L.W. at 4673. The Court had approved such a defense in *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386 (1934) involving a statutorily created pass-on defense in a refund action to redress a tax overassessment.

[33]*Id.* (footnotes omitted). The Court did not address the state's contention that the pass-on defense may nevertheless be invoked as a matter of state law because it found that the state had misdescribed state law in claiming that such a pass-on defense existed. *Id.* at 4673 n. 34. If such a pass-on defense did exist as a matter of state law, it would raise the question whether Federal due process and Commerce Clause principles nevertheless required the granting of meaningful retroactive relief, assuming as a factual matter that the tax was passed on to the taxpayer's customers. It may be worth noting that the Court did not list the pass-on defense as one of the "procedural requirements" a state might adopt to protect itself from unanticipated refund claims. Moreover, the pass-on defense really establishes only that the party who passed on the tax has no right to a refund, not that no refund should exist at all. As a matter of equity, if not as a matter of law, one would think that those who bore the economic burden of an unlawful tax would have the right to a refund when the state declines to refund such a tax on the ground that the statutory "taxpayer" has passed the burden of the tax on to others. In any event, a state's invocation of the pass-on defense would not necessarily protect the public fisc if those who bore the economic burden of the levy have a refund remedy. And, insofar as the pass-on defense would protect the state under state law from issuing any tax refunds, the question remains whether such a defense may be raised as a barrier to meaningful retroactive relief.

[34]*Id.* at 4673 (quoting from Brief for Respondents on Rearg. 20).

state interests have a legitimate role to play in shaping the contours of the relief that the Due Process Clause requires, it concluded that "the State's interest in financial stability does not justify a refusal to provide relief."[35] Instead, the Court adverted to the various procedural measures the state could take to protect itself in the future from unforeseen refund claims. It also observed that the state could minimize the administrative burdens imposed by its due process obligations by "fine-tuning" the relief accorded the taxpayer in accord with the flexible standards the Court had earlier delineated.[36]

The state could . . . 'fine-tune' the relief . . . in accord with the flexible standards the Court had earlier delineated.

In accordance with its determination that the taxpayer was entitled to "meaningful backward-looking relief," the Court in *McKesson* remanded the case to the Florida Supreme Court for further proceedings. In so doing, the Court reiterated that the state was free, within the minimum due process constraints it had delineated in *McKesson*, to fashion the remedy it deemed most appropriate to cure the unconstitutional discrimination.

III. AMERICAN TRUCKING ASSOCIATIONS, INC. V. SMITH

A. Procedural Background

American Trucking Associations involved a challenge to Arkansas' highway use tax, which was an annual tax levied at the flat rate of $175 or five cents per mile on heavy trucks traveling on Arkansas roads. The flat tax effectively applied to all trucks traveling more than 3,500 miles on Arkansas roads because, at the 3,500 mile level, the five cents per mile tax equaled $175. Because Arkansas-based trucks generally traveled many more miles on Arkansas roads than trucks based in other states, the taxpayers contended that the levy discriminated against interstate commerce by imposing greater per-mile costs on out-of-state trucks than on in-state trucks.

The taxpayers brought their suit in 1983, shortly after the Arkansas highway use tax was enacted. The Arkansas courts denied the taxpayers' claims relying on a series of United States Supreme Court decisions that had sustained flat highway use taxes over Commerce Clause objections.[37] The taxpayers appealed to the United States Supreme Court, which held the case pending its consideration of a similar challenge to a flat highway use tax arising out of Pennsylvania. In *American Trucking Associations, Inc. v. Scheiner*,[38] the Supreme Court held that the Commerce Clause barred Pennsylvania's flat highway use tax because it imposed higher effective tax rates on out-of-state than on in-state trucks and violated the Commerce Clause's "internal consistency" requirement.[39] In so holding, the Court explicitly overruled its earlier precedents that had rejected Commerce Clause challenges to flat highway use taxes.[40]

Scheiner was decided on June 23, 1987. Three days later, the Court vacated the judgment of the Arkansas Supreme Court that had sustained Arkansas' highway use tax and remanded the case for further consideration in light of *Scheiner*.[41] Following the taxpayers' unsuccessful efforts to have the Arkansas courts enjoin further collection of the highway use tax or to order an escrow of the taxes pending reconsideration of the merits of the case, Justice Blackmun ordered Arkansas to escrow such taxes on August 14, 1987 until a final decision on the merits of the case was reached.[42] In October 1987, Arkansas repealed the challenged highway use tax and replaced it with a tax requiring heavy trucks to pay 2.5 cents per mile of travel on Arkansas highways. In March 1988, the Arkansas Supreme Court held that the challenged highway use tax was unconstitutional in light of *Scheiner*.[43] Despite its decision on the merits, the Arkansas court refused to order refunds to the taxpayers for all taxes paid prior to Justice Blackmun's August 14, 1987 escrow order. The court based its prospectivity holding on the United States Supreme Court's decision in *Chevron Oil Co. v. Huson*,[44] which held that, in some circumstances, decisions may be given only prospective effect.

The Arkansas court refused to order refunds to the taxpayers . . . .

B. The Supreme Court's Opinions

In *American Trucking Associations*, the Supreme Court held that its decision in *Scheiner* should be applied prospectively and that the taxpayers were entitled to meaningful retrospective relief under *McKesson* only with respect to taxes imposed for highway use after *Scheiner* was handed down. The relatively straightforward holding of *American Trucking Associations* cannot mask the deep divisions in the Court over the appropriate role of the Court's prospectivity doctrine. Four Justices (O'Connor, Rehnquist, White, and Kennedy) subscribed to Justice O'Connor's plurality opinion which expressed the view that *Scheiner* should not be given retroactive effect under *Chevron*. Four Justices (Stevens, Brennan, Marshall, and Blackmun) subscribed to Justice Stevens' dissenting opinion which expressed the view that *Scheiner* should be applied retroactively and that *Chevron's* prospectivity doctrine should apply in only the most limited circumstances. The actual decision in the case

[35] *Id.* at 4674.

[36] *Id.*

[37] *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935).

[38] 483 U.S. 266 (1987).

[39] *See generally* W. Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138 (1988).

[40] *See* note 37 *supra*.

[41] *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1014 (1987).

[42] *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306 (1987).

[43] *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988).

[44] 404 U.S. 97 (1971).

turned on Justice Scalia's idiosyncratic concurrence in the judgment, which expressed sympathy for the dissenters' views about retroactivity in general but nevertheless joined the plurality for reasons relating to his distaste for the Court's Commerce Clause doctrine. In assessing *American Trucking Associations*, one should therefore keep in mind that the decision is based on an unstable coalition that could well come unglued in future controversies over the application of the Court's retroactivity doctrine.[45]

The question in a case like McKesson...is what relief the Due Process Clause requires to remedy the constitutional violation.

1. The Plurality's Opinion. In the eyes of the plurality, the only question before the Court in *American Trucking Associations* was: "Did the Arkansas Supreme Court apply *Chevron Oil* correctly?"[46] In this respect, as the plurality observed,[47] it is important to distinguish the "retroactivity" question at issue in *American Trucking Associations* from the "remedial" question at issue in *McKesson*. *McKesson* involved the question of the appropriate remedy when a taxpayer involuntarily pays a tax that is unconstitutional under existing precedent. There was no substantial question of prospectivity in *McKesson* because, under any view of the prospectivity doctrine set forth below, a decision that a tax violates settled Commerce Clause principles would not be applied prospectively.[48] When, however, there is some question as to the clarity of the law under which a tax has been declared unconstitutional, as there was in *American Trucking Associations*, then the question may be raised whether that decision should be applied prospectively i.e., "whether the decision applies to conduct or events that occurred before the date of the decision."[49]

Put another way, the question in a case like *McKesson*, where the constitutional principles are clearly established, is what relief the Due Process Clause requires to remedy the constitutional violation. The question in a case like *American Trucking Associations*, where the constitutional principles are not clearly established, is "whether there has been a constitutional violation in the first place"[50] with respect to conduct occurring prior to the date of the Court's decision. If the answer to that question is yes, then the principles of *McKesson*, which dictate the constitutionally appropriate relief, come into play. If the answer to that question is no, then, of course, there is no constitutional violation with respect to which *McKesson's* remedial principles need be applied.

In addition to identifying the question before the Court—whether the Arkansas Supreme Court correctly applied the Court's retroactivity doctrine articulated in *Chevron*—the plurality also made it clear that, in its view, the question was a matter of Federal law. "The retroactive applicability of a constitutional decision of this Court . . . is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."[51] The plurality's views on this score take on particular significance in light of the marked tendency in recent years of state courts routinely to hold constitutional decisions prospective when large amounts of refunds were potentially at stake.[52] The plurality may well have had these decisions in mind when it observed that the Court had consistently required state courts to adhere to its retroactivity decisions "to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights. . . ."[53]

The merits of the question whether a decision of the United States Supreme Court should be applied prospectively turned on the plurality's view of the proper application of the three-part test the Court had established in *Chevron*:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.[54]

The plurality concluded that *Scheiner* met *Chevron's* test for prospective application of the Court's decisions. They thought it "obvious"[55] that *Scheiner* met the first prong of the *Chevron* test because the Court's decision in *Scheiner* expressly overruled earlier Supreme Court precedents and thereby established a "new principle of law." It likewise concluded that *Scheiner* met the second prong of the *Chevron* test—whether retroactive application will further the purpose of the rule in question—because "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce."[56] Be-

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[45] The circumstances in which this might occur are considered below.

[46] 58 U.S.L.W. at 4707.

[47] *Id.*

[48] *See McKesson*, 58 U.S.L.W. at 4669 n.15; *American Trucking Associations*, 58 U.S.L.W. at 4707.

[49] *American Trucking Associations*, 58 U.S.L.W. at 4707.

[50] *Id.*

[51] *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 21 (1967)).

[52] *See, e.g., National Can Corp. v. Department of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286 (1988), *cert. denied and appeal dismissed*, 108 S. Ct. 2030 (1988); *Penn Mutual Life Insurance Co. v. Department of Licensing and Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (1987), *appeal denied*, 429 Mich. 871 (1987); *Metropolitan Life Insurance Co. v. Commissioner of Department of Insurance*, 373 N.W.2d 399 (N.D. 1985).

[53] 58 U.S.L.W. at 4707.

[54] *Chevron*, 404 U.S. at 106-07 (quoted in *American Trucking Associations*, 58 U.S.L.W. at 4707-08).

[55] 58 U.S.L.W. at 4708.

[56] *Id.*

cause the Arkansas highway use tax was consistent with preexisting Commerce Clause doctrine, the plurality took the position that the purpose of the Commerce Clause would not be served by applying the new rule to past conduct.

The plurality took the position that the purpose of the Commerce Clause would not be served by applying the new rule to past conduct.

Finally, the plurality found the balance of the equities weighed in favor of prospective application. The plurality pointed to a number of considerations as the basis for its conclusion on this score. Arkansas legislators, courts, and state tax authorities could justifiably rely on the Court's earlier precedents in enacting, sustaining, and administering the statute. While a state's reliance interests might merit little concern when the unconstitutionality of a state statute could have reasonably been foreseen, when a state cannot reasonably foresee such a development, as in a case when the Court overrules past precedents in holding a tax unconstitutional, "the inequity of unsettling actions taken in reliance on those precedents is apparent."[57] In light of the financial burdens and administrative costs that would be imposed on the state by virtue of retroactive application of *Scheiner*, the plurality concluded that "we think it unjust to impose this burden when the State relied on valid existing precedent in enacting and implementing its tax."[58]

The plurality's conclusion that *Scheiner* should be applied prospectively did not end its inquiry. The question remained whether the Arkansas Supreme Court had correctly held that the taxpayers were entitled only to the taxes that were paid into escrow pursuant to Justice Blackmun's order,[59] issued some two months after the Court's decision in *Scheiner*, or to all taxes imposed for highway use after *Scheiner* was handed down. The plurality had little difficulty concluding that the latter view was the proper one. In declaring that "*Scheiner* applies to the flat taxation of highway use after the date of that decision,"[60] the plurality made it clear that the implementation of the new substantive rule as of the date of the Court's decision means that the rule should operate with respect to the application of the tax, not to its collection. Thus the rule of *McKesson*, which requires meaningful retrospective relief for violations of settled constitutional principles, applies to the imposition of any flat tax for highway use after *Scheiner* was decided. Taxes that may have been paid prior to *Scheiner* for highway use after *Scheiner* would therefore be covered by the state's remedial obligations under *McKesson*. On the other hand, Arkansas would be entitled to collect flat highways taxes for highway use preceding *Scheiner* even if those taxes were collected after *Scheiner*. Because of the plurality's uncertainty as to the precise nature of the relief to which the taxpayers were entitled under *McKesson*, and because the question of the appropriate remedy within the constraints established by *McKesson* was a matter for state court determination in any event, the plurality remanded the case to the state court.

2. The Dissenting Opinion

Four Justices shared the view that *American Trucking Associations* should be dealt with precisely like *McKesson*, i.e., that the case should be remanded to the state court for it to determine, consistent with the due process standards articulated in *McKesson*, the meaningful retrospective relief to which the taxpayers were entitled. They based their opinion on two propositions: first, that "fundamental notions of fairness and legal process dictate that the same rules should be applied to all similar cases on direct review";[61] second, that *Chevron* merely stated a narrow "remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice of law principle applicable to all cases on direct review."[62]

Justice Harlan believed that once the Supreme Court had decided a new rule in a particular case, the rule should apply to all cases....

The dissenters' position that all decisions of the Court should be given retroactive effect was based on the views of Justice Harlan developed in a series of concurring and dissenting opinions addressed to the subject of retroactivity. Essentially, Justice Harlan believed that once the Supreme Court had decided a new rule in a particular case, the rule should apply to all cases with respect to which the parties' rights had not been finally adjudicated. As Justice Harlan explained in an opinion that the dissenters in *American Trucking Associations* quoted at length:

> The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed and have become *res judicata*.
>
> . . .
>
> To the extent that equitable considerations, for example, "reliance," are relevant, I would take this into account in the determination of what relief is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of dam-

[57] *Id.*
[58] *Id.* at 4709.
[59] *See* text at note 42 *supra*.
[60] 58 U.S.L.W. at 4710.
[61] *Id.* at 4717.
[62] *Id.* at 4719.

> ages to a party who finds himself able to avoid a once-valid contract under new notions of public policy.... The essential point is that while there is flexibility in the law of remedies, this does not affect the underlying substantive principle that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them.[63]

Relying on these views, which they believed were reflected in other decisions of the Court,[64] the dissenters concluded that the taxpayers were "plainly entitled to an adjudication that the Arkansas...tax violated the Constitution both before and after our decision in *Scheiner*."[65]

The dissenters also found that the Court's decision in *Chevron* was much more limited in scope than that attributed to it by the plurality. According to the dissent, *Chevron* involved "special circumstances,"[66] to wit, the application of a statute of limitations in a controversy between two private parties arising under Federal law in a Federal court. This was "an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver."[67] In the eyes of the dissenters, there was no warrant to extend the rule of *Chevron* and kindred cases beyond its narrow confines. Thus the dissent declared that *Chevron* "does not alter the principle that consummated transactions are analyzed under the best current understanding of the law at the time of decision...."[68]

The plurality responded to the dissent's arguments by declaring that "we have consistently applied the retroactivity doctrine enunciated in *Chevron Oil*"[69] and asserting that the dissent's claim "is little more than a proposal that we *sub silentio* overrule *Chevron Oil*."[70] As for Justice Harlan's views, the short answer was that the Court had never adopted them. If it had, no retroactivity question would ever arise. The plurality also took issue with the dissent's effort to equate "retroactivity" questions with "remedial" questions. "While application of the principles of retroactivity may have remedial effects, they are not themselves remedial principles."[71] Finally, the plurality rejected the dissent's invitation to extend the *per se* rule of retroactivity, which the Court had adopted in the criminal context,[72] to the civil sphere because of the significant differences it perceived in the two questions.

3. Justice Scalia's Concurring Opinion. With a 4-4 split on the issue of retroactivity in *American Trucking Associations*, it fell upon Justice Scalia to cast the decisive vote. And cast it he did, though for reasons that probably give cold comfort to the plurality he joined [73] and that may inspire the Court to revisit the question of civil retroactivity in the near future.

Justice Scalia's general view of constitutional decisionmaking would appear to give no quarter to the prospectivity doctrine.

Justice Scalia first expressed his sympathies for the position taken by the dissent "that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."[74] Indeed, Justice Scalia's general view of constitutional decisionmaking would appear to give no quarter to the prospectivity doctrine:

> To hold a governmental act to be unconstitutional is not to announce that we forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours "applies" in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense. Either enforcement of the statute at issue in *Scheiner* (which occurred before our decision there) was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision; and if it was not, then *Scheiner* was wrong, and the issue of whether to "apply" that decision needs no further attention.[75]

Despite Scalia's broad rejection of prospective constitutional decisionmaking, his peculiar views about the Court's so-called "negative" Commerce Clause jurisprudence induced him to deviate from his general position on retroactivity in *American Trucking Associations*. Although the Commerce Clause is no more than an affirmative grant of power to Congress "to regulate Commerce...among the several States,"[76] it is a cornerstone of constitutional doctrine that the Commerce Clause by its own force and without national legislation places limits upon state authority.[77] Needless to say, it has fallen upon the Supreme Court to delineate those limits. While the Court's negative Commerce Clause doctrine has

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[63] *United States v. Estate of Donnelly*, 397 U.S. 286, 295-97 (1970) (Harlan, J., concurring) (citations omitted), quoted in *American Trucking Associations*, 58 U.S.L.W. at 4717.

[64] E.g., *Cipriano v. City of Houma*, 395 U.S. 701 (1969) and *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

[65] 58 U.S.L.W. at 4718.

[66] *Id.* at 4719.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 4710.

[70] *Id.*

[71] *Id.* at 4712. The Court quoted D. Dobbs, *Law of Remedies* 3 (1973), which declares:

> The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is.

[72] *Griffith v. Kentucky*, 479 U.S. 315 (1987).

[73] Justice Scalia joined the plurality in holding *Scheiner* prospective, but he did not join its opinion.

[74] 58 U.S.L.W. at 4713.

[75] *Id.* at 4713-14 (emphasis in original).

[76] U.S. Const. art I, 8, cl. 3.

[77] *See* F. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 18 (Quadrangle Paperback ed. 1964).

been accepted by the Court for over 150 years. Justice Scalia has unabashedly expressed his disenchantment with that doctrine in several of his separate opinions.[78]

Justice Scalia renewed his attack on the Court's traditional Commerce Clause jurisprudence in *American Trucking Associations*. He characterized it as "arbitrary, conclusory, and irreconcilable with the constitutional text."[79] He expressed his belief that, in presuming what the law should be from congressional silence, "this jurisprudence takes us, self-consciously and avowedly, beyond the judicial role itself"[80] and effectively thrusts the Court into a legislative role. And he observed that

> [t]he "negative" Commerce Clause is inherently unpredictable—unpredictable not just because we have applied its standards poorly or inconsistently, but because it requires us and the lower courts to accommodate, like a legislature, the inevitably shifting variables of a national economy.[81]

Justice Scalia's repudiation of the Court's negative Commerce Clause jurisprudence had two consequences. First, with respect to "new matters" coming before the Court, it meant that Scalia would no longer "apply 'negative' Commerce Clause decisional theories" to such matters.[82] Second, with respect to matters coming before the Court that had already been adjudicated under the Commerce Clause, it meant that there was no basis—other than the mere existence of a particular Commerce Clause decision as a precedent—to hold that a tax is unconstitutional on Commerce Clause grounds.

Scalia would no longer "apply 'negative' Commerce Clause decisional theories" to such matters.

The latter consequence significantly colored Justice Scalia's views about *Scheiner's* retroactivity. While reiterating his position that prospective judicial decisionmaking by the Supreme Court "is fundamentally beyond judicial power,"[83] Scalia did not believe that this led inexorably to the conclusion that the pre-*Scheiner* Arkansas highway use taxes were unconstitutional. Declaring that *stare decisis*[84] "would normally cause me to adhere to a decision of this Court already rendered as to the constitutionality of a particular type of state law,"[85] thus inducing him to apply that decision (retroactively) to similar cases arising before the Court, he was unwilling to extend that position to the pre-*Scheiner* taxes at issue in *American Trucking Associations*:

> Though I do not believe I have the option of suspending the principle of retroactive judicial decisionmaking, the doctrine of *stare decisis* is a flexible command. I do not think that a sensible understanding of it requires me to vote contrary to my view of the law where such a vote would not only impose upon a litigant liability I think to be wrong, *but would also upset that litigant's settled expectations* because the earlier decision for which *stare decisis* effect is claimed (*Scheiner*) overruled prior law. That would turn the doctrine of *stare decisis* against the very purpose for which it exists. I think it appropriate, in other words—indeed, I think it necessary—for a judge whose view of the law causes him to dissent from an overruling to persist in that position (at least where his vote is necessary to the disposition of the case) with respect to action taken before the overruling occurred.[86]

In short, because Justice Scalia's views of the Commerce Clause and the appropriate application of the doctrine of *stare decisis* led to the conclusion that the pre-*Scheiner* taxes were constitutional whereas the post-*Scheiner* taxes were unconstitutional, he was able to join the plurality that had reached the same conclusion under the Court's prospectivity doctrine.

IV. IMPLICATIONS

With the ink barely dry on the Court's long and complex opinions in *McKesson* and *American Trucking Associations*, any consideration of the decisions' ramifications must be regarded as preliminary. With that caveat in mind, one can nevertheless identify some of the more salient implications of the Court's decisions.

First, it is clear from *McKesson* that when states impose taxes in violation of clearly established constitutional principles, and taxpayers are compelled to pay such taxes before challenging their validity, states are required to provide meaningful retrospective relief to the taxpayers. Whether this relief must take the form of refunds will depend on the nature of the constitutional violation. If, as in *McKesson*, the constitutional violation was one of unequal treatment, then the state may be able to satisfy its obligation to provide meaningful retrospective relief by retroactively taxing the favored class of taxpayers. In other cases, however, where the Constitution wholly deprived the state of the power to tax, refunds will be the only relief that will satisfy the states' due process obligation. Hence, if a state taxes income or property over which it has no jurisdiction, *McKesson* will require it to refund to the taxpayer the illegally exacted tax.

Second, the fact that the Court did not flatly order the state to pay refunds in *McKesson* should not be taken as diminishing the magnitude of the taxpayer's victory in that case. The likelihood that the state will seek to provide the taxpayer with relief other than refunds is remote in light of political realities and Federal and state

[78] *See, e.g., American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 303-06 (1987) (Scalia, J., dissenting); *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 259-65 (1987) (Scalia, J., concurring in part and dissenting in part).

[79] 58 U.S.L.W. at 4714 (quoting D. Currie, *The Constitution in the Supreme Court: the First Hundred Years 1789-1888* 234 (1985)).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Literally, let the decision stand; more generally, the policy of courts to adhere to precedent and not to disturb settled legal principles.

[85] 58 U.S.L.W. at 4714.

[86] *Id.* at 4714-15 (emphasis in original).

constitutional restraints on retroactive taxing legislation. From a political standpoint, it is difficult to imagine the legislature imposing a retroactive levy on the very class of potential taxpayers that had the political muscle to obtain the favored treatment in the first place. Moreover, retroactive taxation will transgress Federal and state constitutional principles if it seeks to reach transactions too far in the past. The taxes at issue in *McKesson*, for example, involve transactions occurring as early as 1985. Wholly apart from the state constitutional restrictions on any effort to impose a tax on transactions that occurred five years ago, an attempt to impose such a tax would clearly exceed the two-year period of retroactivity the Supreme Court approved in *Welch v. Henry*,[87]—a period that "approach[ed] or reach[ed] the limit of permissible retroactivity."[88] A five-year retroactivity period would likewise exceed the "short and limited periods" the Court found acceptable in *United States v. Darusmont*[89] and the 35-day period the Court found "not unreasonable" in *United States v. Hudson*.[90] Indeed, in its Brief on Reargument in *McKesson*, Florida indicated that it did "not believe...that a retroactive tax on exempted sales can reasonably be included on the list of alternative remedies" because it would be "harsh and oppressive" and might violate due process.[91]

Third, in couching its decision in *McKesson* in terms of the Due Process Clause, the Court dispelled any suggestion that the right to relief from an unconstitutional state tax exacted under duress is merely a question of state remedial law to which Federal constitutional principles have no application. The significance of this aspect of the Court's holding cannot be overestimated in light of the increasingly pronounced trend of state courts to fashion prospective remedies based on "equitable" considerations rooted in state law.

Fourth, the Court's dismissal of Florida's effort to mount a pass-on defense to its obligation to provide meaningful retrospective relief was an enormous victory for the taxpayer. Had the state prevailed on this point, the taxpayer's victory might well have been a Pyrrhic one. The taxpayer would have been relegated to a long and expensive trial in which it would have had to prove the extent to which it bore the economic burden of the tax, an inquiry that the Court recognized was beset with "theoretical, factual, and practical difficulties."[92] In rejecting the pass-on defense on doctrinal as well as evidentiary grounds,[93] the Court assured that the "backward-looking relief" to which taxpayers are constitutionally entitled when they have involuntarily paid unconstitutional taxes would truly be "meaningful."[94]

Fifth, the Court's decision in *American Trucking Associations*, while limiting the application of *McKesson's* requirement of "meaningful backward-looking relief" in the case at hand, provides little assurance that *McKesson* will be so limited in future cases involving claims for refunds of unconstitutional taxes. Indeed, the Court's decision in *American Trucking Associations* that its earlier decision in *Scheiner* should be applied prospectively hangs by the thinnest of threads. The prospective-only ruling rests on the judgment of four Justices that the standards of *Chevron* were satisfied and on the judgment of Justice Scalia that, in Commerce Clause cases, proper application of the doctrine of *stare decisis* compelled respect for the Court's earlier Commerce Clause precedents until they were overruled. Four Justices, however, would have applied the rule of *McKesson* to all cases because of their view that the Court's prospectivity doctrine had no place in principled constitutional adjudication and that the rule of *Chevron* applied only in "special circumstances."[95]

Indeed, the Court's decision in American Trucking Associations that its earlier decision in Scheiner should be applied prospectively hangs by the thinnest of threads.

The fragility of the prospective-only holding in *American Trucking Associations* can be appreciated by considering how little it would take to alter the outcome in other cases. Assuming that Justices Brennan, Marshall, Stevens, and Blackmun adhere to their view that prospective constitutional decisionmaking is inappropriate, then the rule of *McKesson* requiring meaningful backward-looking relief will be applicable in any refund action in which either Justice Rehnquist, White, O'Connor, or Kennedy believes that *Chevron* does not apply or in which Justice Scalia embraces his general view that retroactive decisionmaking is generally appropriate or, in Commerce Clause cases, that the doctrine of *stare decisis* requires retroactive decisionmaking.

These possibilities should cause the states considerable concern. They suggest that in any case holding a tax unconstitutional on non-Commerce Clause grounds, the states would be required to provide meaningful backward-looking relief. In such a case, Justice Scalia would presumably take the position that prospective adjudication was inappropriate,[96] and, along with the four Justices who adhere to that position in all cases, would be the swing vote for retroactive application of the Court's decision. Furthermore, if any of the four Justices who joined the plurality opinion in *American Trucking Associations* should be of the view that *Chevron* was in-

[87]305 U.S. 134 (1938).
[88]*Id.* at 151.
[89]449 U.S. 292, 299 (1981).
[90]299 U.S. 498, 501 (1937).
[91]Brief for Respondents on Reargument at 24-25.
[92]*McKesson*, 58 U.S.L.W. at 4673 n.31.
[93]See text accompanying notes 29-33 *supra*.
[94]*McKesson*, 58 U.S.L.W. at 4669.

[95]*American Trucking Associations*, 58 U.S.L.W. at 4719.
[96]This assumes, of course, that Justice Scalia's views about the Court's Commerce Clause jurisprudence are not equally applicable to other constitutional bases for invalidating state taxes. There is certainly nothing in the Court's decisions striking down state taxes on non-Commerce Clause grounds to suggest that this is the case. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 109 S. Ct. 633 (1989) (opinion, joined by Scalia, holding that state tax violates Equal Protection Clause); *Davis v. Michigan Department of Treasury*, 109 S. Ct. 1500 (1989) (opinion, joined by Scalia, holding that state tax violates Federal statute reflecting intergovernmental immunity doctrine).

applicable to the case at hand, e.g., because the decision did not establish a new principle of law, they too would constitute the decisive fifth vote for retroactive application of the decision.

The latter possibility was clearly illustrated by two *per curiam* decisions which the Supreme Court handed down on the last day of its 1989-90 Term involving the retroactive application of its decision in *Armco, Inc. v. Hardesty*.[97] In *Armco*, the Court held that West Virginia's Business and Occupation (B&O) Tax discriminated against interstate commerce in violation of the Commerce Clause because it taxed wholesale sales made in West Virginia by out-of-state manufacturers while exempting wholesale sales made in West Virginia by local manufacturers. Following the Court's decision, a West Virginia trial court, relying on *Armco*, granted summary judgment to Ashland Oil, Inc., which had challenged the application of West Virginia's B&O Tax to its West Virginia sales. The West Virginia Supreme Court reversed, however, holding that *Armco* did not apply retroactively.[98] Invoking state law criteria for retroactivity, which in its judgment "follow[ed] closely the analysis employed by the United States Supreme Court in *Chevron Oil Co. v. Huson*,"[99] the state court found that *Armco* "represented a reversal of prior precedent and that retroactive application of the *Armco* rule would cause severe hardship."[100] The state court therefore held that West Virginia could collect B&O Taxes due for fiscal years preceding the date of the decision in *Armco*.

In Ashland Oil, Inc. v. Caryl...the Court found that retroactive application of Armco was required.

In *Ashland Oil, Inc. v. Caryl*,[101] a unanimous United States Supreme Court, relying on *American Trucking Associations*, reversed the judgment of the West Virginia Supreme Court and held that its decision in *Armco* must be applied retroactively. The Court reiterated that "[t]he determination whether a constitutional decision of this Court is retroactive...is a matter of federal law,"[102] and it declared that it "must examine the state court's determination that *Armco* is not retroactive in light of our nonretroactivity doctrine."[103] Analyzing the doctrine from the perspective of both the dissent and the plurality in *American Trucking Associations*,[104] the Court found that retroactive application of *Armco* was required. Under the reasoning of the dissent, retroactive application was required "because constitutional decisions apply retroactively to all cases on direct review."[105] Under the reasoning of the plurality, retroactive application of *Armco* was required "because *Armco* fails to satisfy the first prong of the plurality's test for determining nonretroactivity"[106] laid down in *Chevron*.

It is noteworthy, and, from the states' standpoint, ominous, that the Court took a very narrow view of the scope of the "first prong" of its *Chevron* test, to wit, that "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed."[107] After adverting to the precedents that underlie its decision in *Armco*,[108] the Court acknowledged that "*Armco* unquestionably contributed to our dormant Commerce Clause jurisprudence"[109] and that "[i]n adopting the internal consistency test, *Armco* extended the doctrine beyond the context in which it had originated."[110] Nevertheless, these changes in the Court's Commerce Clause doctrine did not meet *Chevron's* first prong "[b]ecause *Armco* did not overrule clear past precedent nor decide a wholly new issue of first impression."[111] Having failed to pass the Court's

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[97]467 U.S. 638 (1984).

[98]*Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986).

[99]*Id.* at 534 n.6.

[100]*Id.* at 536-37.

[101]___ U.S. ___ (June 28, 1990) (Slip. Op.).

[102]Slip. Op. at 2 (quoting *American Trucking Associations*, 58 U.S.L.W. at 4707).

[103]*Id.*

[104]The Court made no reference to Justice Scalia's view of the issue. Justice Scalia's concurrence in the Court's *per curiam* opinion suggests, however, that he either adopted the position of the dissent in *American Trucking Associations* or that he felt that retroactive application of *Armco* was justified by *stare decisis*. *See* text accompanying notes 74-86 *supra*.

[105]*Ashland Oil*, Slip. Op. at 2.

[106]*Id.* at 3.

[107]*Chevron*, 404 U.S. at 106-07.

[108]Principally, *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), cited in *Ashland Oil*, Slip. Op. at 3-4.

[109]Slip. Op. at 4. In this connection, the Court cited law review articles "suggesting that *Armco's* invalidation of a facially discriminatory tax statute signaled a retreat from the economically realistic approach adopted by *Complete Auto Transit*...and a return to a more formalistic analysis." *Id.*

[110]*Id.*

[111]*Id.* In so concluding, the Court refused to characterize its decision in *Armco* as having "overrul[ed] clear past precedent on which litigants may have relied" (*Chevron*, 404 U.S. at 106) merely because it was inconsistent with a nearly identical decision which the Court dismissed for want of a substantial Federal question a year earlier. *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). The Court observed that it ordinarily gives less deference to summary dispositions and that it was unlikely that West Virginia relied on the 1982 dismissal since the statute struck down in *Armco* had been in effect for over half a century.

Curiously, the Court also attempted to distinguish *Armco* from its subsequent decision in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), which struck down a Washington B&O tax on manufacturing from which in-state wholesalers were exempt. In the eyes of this observer at least, the Court's conclusion in *Tyler Pipe* that Washington's taxing scheme was the "practical equivalent" (483 U.S. at 241) of West Virginia's from the standpoint of internal consistency was "inescapable" after *Armco*. W. Hellerstein, *supra* note 39, at 144. While Justice Scalia expressed the view that *Tyler Pipe* "overturn[ed] a lengthy list of settled decisions" and "revolutionize[d] the law of state taxation," 483 U.S. at 257 (Scalia, J., concurring in part and dissenting in part) by extending the internal consistency test, Scalia's views were shared only by Chief Justice Rehnquist. Perhaps the Court, in adverting to these comments of Scalia's, *Ashland Oil*, Slip. Op. at 5, was trying to explain, albeit indirectly, its dismissal of the appeal from the Washington Supreme Court's determination that *Tyler Pipe* should not be applied retroactively. *See National Can Corp. v. State Department of Revenue*, 109 Wash. 2d 878, 749 P.2d

rigorous interpretation of *Chevron's* first prong, which the Court clearly established as a threshold test,[112] *Armco* therefore applied retroactively under the rule advocated by the plurality in *American Trucking Associations*. On the basis of its decision in *Ashland*, the Court likewise held that *Armco* applied retroactively in *National Mines Corp. v. Caryl*,[113] which raised the same issue.

The prospect that the Court will retroactively apply its decision in Davis v. Michigan Department of Treasury must appear . . . frightening.

If the Court's decisions in *Ashland* and *National Mines* seem ominous to the states, the prospect that the Court will retroactively apply its decision in *Davis v. Michigan Department of Treasury*[114] must appear truly frightening. In *Davis*, the Supreme Court held that the states may not subject Federal retirement benefits to taxation while exempting state retirement benefits from taxation. Although the technical question before the Court was whether the state's disparate treatment of state and Federal employees violated a Federal statute preserving Federal employees' immunity from discriminatory taxation,[115] the Court concluded that the immunity guaranteed by the statute was "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental immunity."[116] The Court's decision striking down the discriminatory levy was, therefore, rooted in its precedents construing the intergovernmental immunity doctrine.

The fiscal implications of *Davis* for the states are truly staggering. Nearly half the states accorded disparate treatment to state and federal employees prior to *Davis*.[117] Refund exposure has been estimated at $140-192 million for Arizona, $30-40 million for Iowa, $160 million for Missouri, $66 million for Oklahoma, $142 million for Oregon, $150 million for South Carolina, $370 million for Virginia, and $130 million for Wisconsin, to name just a few of these states.[118] While legislatures across the country have been scrambling to deal with the problem created by *Davis* on a prospective basis,[119] the question remains whether the states, under *McKesson* and *American Trucking Associations* (as well as *Ashland Oil* and *National Mines*) will be required to provide meaningful relief on a *retrospective* basis.

On the basis of the foregoing analysis, the answer would appear to be "yes." Unless Justice Scalia's disenchantment with the negative Commerce Clause extends to the Supremacy Clause and the intergovernmental immunity doctrine, his sympathy for the dissent's position in *American Trucking Associations* would create a five-Justice majority for retroactive application of *Davis*. Moreover, the eight-Justice majority in *Davis* gave no indication that it was articulating a "new principle of law" within the meaning of *Chevron*. Indeed, the Court in *Davis* observed that the rule preventing state tax discrimination against the Federal government, on which the decision in *Davis* was predicated, derived from the seminal opinion in *McCulloch v. Maryland*,[120] which barred taxes that operate to discriminate against the Federal government or those with whom it deals.[121] Since it was "undisputed that Michigan's tax system discriminated in favor of retired state employees and against retired Federal employees,"[122] the Court had little difficulty concluding that the Michigan taxing scheme violated the established requirement that "the State treat those who deal with the government as well as it treats those with whom it deals itself."[123] Furthermore, in rejecting the state's claim that private parties could not receive the protection of the intergovernmental immunity doctrine, the Court declared that "all precedent is to the contrary,"[124] and it refused to depart from this "settled rule."[125] In light of the fact that each of the four Justices who joined the plurality in *American Trucking Associations* subscribed to the Court's opinion in *Davis*, it seems highly probable, especially in light of the Court's opinion in *Ashland Oil*, that at least one of those Justices would find that *Davis* does not establish a "new principle of law" under *Chevron*. The addition of even a single Justice to the four-Justice contingent that would apply the Court's decisions retroactively in all cases would, of course, spell the retroactive application of *Davis*.[126]

Finally, it is worth noting that the Court has recently granted certiorari in yet another case raising the question of a taxpayer's right to retrospective relief from unconstitutional state taxes. In *James B. Beam Distilling Co. v. State*,[127] the taxpayer sought a refund of $2.4 million in

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1286 (1988), *appeal dismissed and cert. denied*, 486 U.S. 1040 (1988). Justices White, Stevens, and Scalia would have noted probable jurisdiction and set the case for oral argument. *Id.* In any event, the Court's statement that *Armco* itself "was not revolutionary," *Ashland*, Slip. Op. at 5, underscores the Court's narrow view of *Chevron's* first prong.

[112]Until *Ashland*, it was not entirely clear whether the first prong of *Chevron* was a threshold test or merely one of three criteria that had to be taken into account in determining whether a decision should be applied prospectively. From the Court's disposition of this issue in *Ashland*, however, it now appears that the first prong establishes a threshold. The Court made no reference to the second and third prongs of the *Chevron* test once it had determined that *Armco* failed to satisfy *Chevron's* first prong.

[113]___ U.S. ___ (June 28, 1990) (Slip. Op.).

[114]109 S. Ct. 1500 (1989).

[115]4 U.S.C. section 111 (1988).

[116]*Davis*, 109 S. Ct. at 1506.

[117]*See* Eckl, Felde, Wolfe & Zimmerman, *State Taxation of Public Pensions: The Impact of Davis v. Michigan*, *Tax Notes*, May 28, 1990, 1119, 1122.

[118]BNA, Daily Tax Report G-2—G-3 (August 11, 1989).

[119]*See* note 117 *supra*.

[120]17 U.S. (4 Wheat.) 316 (1819).

[121]*Davis*, 109 S. Ct. at 1506.

[122]*Id.* at 1507.

[123]*Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 385 (1960).

[124]109 S. Ct. at 1507.

[125]*Id.*

[126]One should not lose sight of the fact that the present makeup of the Court could change in the near future. Indeed, three of the four Justices who favor general retroactive application of the Court's decisions (Brennan, Marshall, and Blackmun) are among the oldest members of the Court. It is therefore possible that future appointments to the Court could tilt the balance more strongly in favor of the doctrine of prospective decisionmaking as reflected in *Chevron*.

[127]259 Ga. 363, 382 S.E.2d 95 (1989), *cert. granted*, 58 U.S.L.W. 3779 (U.S., June 12, 1990).

liquor excise taxes paid in 1982, 1983, and 1984 under a Georgia statute that imposed a higher tax on alcoholic beverages imported into the state than on those manufactured in Georgia. The statute was amended shortly after the United States Supreme Court invalidated a similar statute in *Bacchus Imports, Ltd. v. Dias.*[126] The Georgia court summarily concluded that the tax violated the Commerce Clause because "the purpose and effect of the statute was simple economic protectionism which is virtually per se invalid under the Commerce Clause of the U.S. Constitution."[129] Applying the *Chevron* doctrine, however, the Georgia court found that its decision established a "new rule"[130] derived from *Bacchus* and that the balance of the equities weighed in favor of the state because of the "severe financial burden"[131] that retroactive application would impose on the state. It therefore concluded that "prospective application of the decision is appropriate,"[132] and it refused to provide the taxpayers with refunds.

Perhaps the most puzzling question is why the United States Supreme Court granted certiorari in the case. Ordinarily, when the Court has decided a case that is likely to have a substantial impact on another case for which Supreme Court review has been sought, the Court will simply remand the pending case for reconsideration in light of its intervening decision. In that way, the Court has the benefit of the lower court's views as to the application of the Court's decision to the facts of the pending case. That, of course, is exactly what the Supreme Court did with respect to the pending challenge to the Arkansas highway use tax in *American Trucking Associations* once it had decided the case raising similar issues with respect in the Pennsylvania highway use tax in *Scheiner.*[133] Hence, the natural disposition of the *James Beam* case would have been to remand to the Georgia Supreme Court for reconsideration in light of *McKesson* and *American Trucking Associations.*

The Twenty-first Amendment had not 'repealed' the Commerce Clause wherever state regulation of liquor was concerned.

Since the Court has apparently decided to accord plenary consideration to the *James Beam* case,[134] the question remains whether *James Beam* is more like *McKesson* (and *Ashland* and *National Mines*), in which case "meaningful backward-looking relief" will be in order, or is more like *American Trucking Associations*, in which case prospective application of *Bacchus* may be appropriate.[135] The answer to this question will presumably turn on whether all of the five Justices that joined in the judgment in *American Trucking Associations* believe that *Bacchus* established a new principle of law. In *McKesson*, it will be recalled,[136] the discriminatory liquor taxes involved transactions occurring after *Bacchus* was decided, so there was no question that the exaction violated established Commerce Clause precedent. In *James Beam*, by contrast, the taxes involve transactions occurring before *Bacchus* was decided. If *Bacchus* establishes a "new principle of law" within the meaning of *Chevron*, the fundamental issue of retroactivity raised by the case would appear to be indistinguishable from the issue raised by *American Trucking Associations.*[137]

For years, state courts have been refusing to award refunds to taxpayers who have successfully challenged state taxes....

Prior to the Court's decision in *Ashland Oil*, one might have argued with some force that the taxes at issue in *James Beam*, like the taxes at issue in *American Trucking Associations*, had been imposed in accord with longstanding Supreme Court precedent,[138] and that *Bacchus*, like *Scheiner*, established a "new principle of law" within the meaning of *Chevron*. Under *Ashland Oil's* requirement that a decision must either "overrule clear past precedent [or] decide a wholly new issue of first impression"[139] to satisfy *Chevron's* first prong, however, it is questionable whether *James Beam* can meet the test. While the Court in *James Beam* limited the "broad language"[140] of some of its earlier opinions in *Bacchus*, it did not expressly overrule past precedents in reaching its conclusion as it did in *Scheiner*. Nor is it clear that the issue in *James Beam* was one of "first impression whose resolution was not clearly foreshadowed."[141] Furthermore, in *Bacchus*, the Court made some effort to justify its limited view of the impact of the Twenty-first Amendment on the Commerce Clause by pointing to statements in more recent cases indicating that the Twenty-first Amendment had not "repealed" the Commerce Clause wherever state regulation of liquor was concerned.[142] In short, the question whether *Chevron's* "new principle of law" standard has been met in *James Beam* remains open for debate in the Supreme Court, as, of course, do the

[126]468 U.S. 263 (1984). *See* text following note 5 *supra.*

[129]*James B. Beam*, 382 S.E.2d at 96.

[130]*Id.*

[131]*Id.*

[132]*Id.* at 97.

[133]*See* text at note 41 *supra.*

[134]It is still possible, of course, that upon further reflection the Court will remand in light of *McKesson* and *American Trucking Associations.*

[135]This assumes that the Justices in *James Beam* adhere to the positions they took in *American Trucking Associations.*

[136]*See* text following note 6 *supra.*

[137]For purposes of this comparison, I am ignoring taxes imposed after the date of the Supreme Court decisions that adopted a "new principle of law" within the meaning of *Chevron.*

[138]In *American Trucking Associations*, these precedents were the Supreme Court's decisions sustaining flat highway use taxes over Commerce Clause objections. *See* text at notes 37-40 & n.37 *supra.* In *James Beam*, these precedents were the Supreme Court's decisions sustaining discriminatory state liquor taxes over Commerce Clause objections, on the ground that they were permitted by the Twenty-first Amendment. *See* text at notes 4-6 *supra.*

[139]*Ashland Oil*, Slip. Op. at 5.

[140]*Bacchus*, 468 U.S. at 274.

[141]*Chevron*, 404 U.S. at 106-07.

[142]*Bacchus*, 468 U.S. at 274-75.

questions whether the Georgia court properly found that the second prong of the *Chevron* test was inapplicable[143] or that it properly balanced the equities in favor of the state.[144]

V. CONCLUSION

The Court's decisions in *McKesson* and *American Trucking Associations* are of enormous significance. For years state courts have been refusing to award refunds to taxpayers who have successfully challenged state taxes under the Federal Constitution on the ground that the decisions should be applied prospectively. The Court has now made it clear that the Due Process Clause requires the states to grant meaningful retroactive relief when they compel taxpayers to pay taxes that are later found to be unconstitutional under settled constitutional principles. Moreover, while the Court approved the prospective application of Arkansas' highway use tax, it did so only by the slimmest and shakiest of majorities, a point driven home by its *per curiam* determinations in *Ashland Oil* and *National Mines* that *Armco* must be applied retroactively. When the Court revisits the question of prospective application of state tax decisions, as it will next Term and thereafter, it should clarify some of the unanswered questions spawned by its pathbreaking decisions in *McKesson* and *American Trucking Associations*.

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[143]The Georgia Supreme Court found that the second prong of the *Chevron* test—whether retroactive application of the rule in question will further or retard its operation—"has no application here because the statute was repealed in 1985." *James Beam*, 382 S.E.2d at 96. The Georgia court's treatment of this issue seems like a *non sequitur*. The rule in question is the rule of the Commerce Clause, not the statutory rule of taxation that was held unconstitutional. Hence the question is whether retroactive operation of the Commerce Clause rule invalidating the tax will further or retard its operation. In *American Trucking Associations*, the Court found that the second prong of the *Chevron* test was met because, prior to the Court's decision in *Schiener*, flat highway use taxes were consistent with Commerce Clause doctrine, and "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce." *American Trucking Associations*, 58 U.S.L.W. at 4708. The plurality believed that the purpose of the Commerce Clause would not be served by applying the new rule to past conduct that was consistent with preexisting doctrine. Assuming that the Court found that *Bacchus* established a "new principle of law," one might make the same point in *James Beam*. In this respect, however, there is one significant difference between *American Trucking Associations* and James Beam. Whereas the flat highway use taxes at issue in *American Trucking Associations* were once thought to be consistent with Commerce Clause doctrine, the discriminatory liquor taxes at issue in *James Beam* were never thought to be consistent with such doctrine. It was just that the Twenty-first Amendment was construed to override familiar Commerce Clause considerations. Whether this distinction would justify retroactive application of *Bacchus* is by no means clear. It does suggest, however, that one cannot blithely assume that *James Beam* is simply a clone of *American Trucking Associations*.

[144]This assumes that the threshold test of *Chevron's* first prong has been met.