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## *American Trucking Associations v. Scheiner*. Truckers Challenge Pennsylvania's Highway User Fees Under the Dormant Commerce Clause

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# CASENOTES

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### I. INTRODUCTION

Like most states,<sup>1</sup> Pennsylvania levies a variety of fees and taxes on users of its highways.<sup>2</sup> These exactions are designed to partially reimburse the state for the expense of maintaining and building

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1. See 2 State Tax Guide (CCH) ¶ 50 (April 23, 1987) (summarizing highway user fee schemes of each state).

2. See generally 72 PA. CONS. STAT. ANN. §§ 2611a-2611z (Tax on Liquid Fuels), 2614.1-24 (Fuel Use Tax), 2617.1-26 (Motor Carriers Road Tax) (Purdon 1964 & Supp. 1986); 75 PA. CONS. STAT. ANN. §§ 1301-1377 (Registration Requirements), 1901-1960 (Registration Fees), 2101-2105 (Identification Markers for Motor Carriers Road Tax), 9501-9512 (Taxes for Highway Maintenance and Construction), 9901-9910 (Axle Tax for Highway Bridge Improvement) (Purdon 1977 & Supp. 1986). Highway user fees are classified into three groups: "first structure" taxes, which include registration and license fees; "second structure" taxes, which include motor fuel taxes; and "third structure" taxes, which include any other kind of tax (e.g., Pennsylvania's axle tax). See U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., ROAD USER AND PROPERTY TAXES ON SELECTED MOTOR VEHICLES, 1982, at 7 (1982); C. TAFF, COMMERCIAL MOTOR TRANSPORTATION 48 (7th ed. 1986); Note, *Taxation of Interstate Motor Commerce—Federal Occupation of the Field?*, 100 U. PA. L. REV. 71, 79 (1951).

its roads and bridges.<sup>3</sup> In an effort to raise more revenue for bridge rehabilitation and replacement,<sup>4</sup> in 1983 Pennsylvania levied a tax of \$36 per axle on trucks using the state's highways that weigh over 26,000 pounds.<sup>5</sup> Because Pennsylvania simultaneously reduced registration fees on in-state trucks, the axle tax in actual operation burdened only those trucks registered outside Pennsylvania.<sup>6</sup>

Other states soon responded. Within three months, the legislature of neighboring New Jersey denounced the axle tax for "causing great hardship" to owners of trucks registered in New Jersey and other states, and called on all states to take "retaliatory measures" against Pennsylvania.<sup>7</sup> A year later Maine retaliated by adopting what it called "reciprocal taxes."<sup>8</sup> These taxes were designed to mirror the taxes that other states (e.g., Pennsylvania) imposed on Maine-registered vehicles.<sup>9</sup> These events illustrate an important question currently facing the Supreme Court in *American Trucking Associations v. Scheiner*:<sup>10</sup> To what extent and in what manner may a state tax motor carriers engaged in interstate commerce to finance the facilities that the state provides to these carriers without violating the commerce clause?

This Note discusses whether Pennsylvania's axle tax is constitutional under the commerce clause. The first section considers whether the axle tax discriminates against interstate commerce. The next section discusses whether the complementary tax doctrine saves the discriminatory axle tax from invalidation. The section first addresses the argument that the axle tax may not be defended under the comple-

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3. The Pennsylvania Constitution requires that the proceeds of all highway user fees be used for "construction, reconstruction, maintenance and repair of and safety on public highways bridges and costs and expenses incident thereto." PA. CONST. art. VIII, § 11.

4. *American Trucking Ass'ns v. Scheiner*, 510 Pa. 430, 439, 509 A.2d 838, 843 (citing 75 PA. CONS. STAT. ANN. §§ 9907(a), 9908 (Purdon Supp. 1986)), *prob. juris. noted*, 107 S. Ct. 430 (1986).

5. Act of Dec. 8, 1982, No. 234, § 3, 1982 Pa. Laws 842, 845 (codified at 75 PA. CONS. STAT. ANN. §§ 9901-9910 (Purdon Supp. 1986)).

6. For a discussion of why the axle tax burden is imposed almost entirely upon interstate commerce, see *infra* notes 23-25 and accompanying text.

7. S.J. Res. 8019, 200th Leg., 2d Sess., 1983 N.J. Sess. Law Serv. 1478 (West), *reproduced in* Brief for Appellants at 1a-2a, *Scheiner* (No. 86-357).

8. ME. REV. STAT. ANN. tit. 29, § 2243-C (Supp. 1986).

9. *Id.* Thus, Maine would levy a tax of \$36 per axle on trucks registered in Pennsylvania weighing over 26,000 pounds. See *Private Truck Council of Am., Inc. v. Secretary of State*, 503 A.2d 214, 216 (Me.) (holding "reciprocal truck taxes" in violation of the commerce clause), *cert. denied*, 106 S. Ct. 1997 (1986); see also *Private Truck Council of Am., Inc. v. New Hampshire*, 128 N.H. 466, \_\_\_, 517 A.2d 1150, 1154 (1986) (imposing a retaliatory tax "is not a legitimate means by which to alleviate another state's alleged burden on interstate commerce").

10. 510 Pa. 430, 509 A.2d 838, *prob. juris. noted*, 107 S. Ct. 430 (1986).

mentary tax doctrine because Pennsylvania-based trucks do not suffer under any tax burden which needs to be compensated. This section then considers whether the axle tax and the registration fees fulfill the requirement that both levies be imposed upon substantially equivalent activity. The third section of this Note explores whether the cases that upheld flat-rate highway user fees against commerce clause challenges are still good law. The final section concludes that flat-rate highway user fees should be assessed under a new analysis.

## II. STATEMENT OF THE CASE

American Trucking Associations (ATA) brought a class action on behalf of all interstate motor carriers whose vehicles are registered outside of Pennsylvania and who are, or will be, subject to section 9902 of the Pennsylvania Vehicle Code, the axle tax.<sup>11</sup> ATA sought to have the axle tax declared unconstitutional on the ground that it discriminated against interstate commerce.<sup>12</sup> The Pennsylvania trial court found that, because of simultaneous registration fee reductions, the axle tax, as a practical matter, fell almost entirely on trucks registered out of state.<sup>13</sup> Accordingly, it held that the tax discriminated against interstate commerce in violation of the commerce clause.<sup>14</sup> On appeal, the Supreme Court of Pennsylvania reversed, holding that the axle tax, although burdening interstate commerce only, did not discriminate against interstate commerce because it compensated for the registration fees imposed only on local commerce, and that the tax

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11. 75 PA. CONS. STAT. ANN. § 9902 (Purdon Supp. 1986). ATA also brought another suit challenging the constitutionality of section 2102(b) of the Pennsylvania Vehicle Code, the marker identification fee. 75 PA. CONS. STAT. ANN. § 2102(b) (Purdon Supp. 1986). The Pennsylvania trial court struck down the \$25 marker fee as violating the commerce clause because it was imposed only on trucks based outside Pennsylvania. *American Trucking Ass'ns v. Bloom*, 77 Pa. Commw. 575, 466 A.2d 755 (1983), *aff'd*, 87 Pa. Commw. 345, 487 A.2d 768 (1985) (en banc), *rev'd sub nom.* *American Trucking Ass'ns v. Scheiner*, 510 Pa. 430, 509 A.2d 838, *prob. juris. noted*, 107 S. Ct. 430 (1986). The appeal was consolidated with the axle tax appeal and the Supreme Court of Pennsylvania reversed. *Scheiner*, 510 Pa. at 451-59, 509 A.2d at 849-53. ATA subsequently appealed this decision to the Supreme Court of the United States. *Scheiner*, 107 S. Ct. at 430. Because the marker fee and the axle tax raise the same issue (i.e., whether a flat tax disproportionately burdens interstate commerce), the marker identification fee will not be discussed in this Note.

12. *Scheiner*, 510 Pa. at 444, 509 A.2d at 845-46. ATA also challenged the axle tax under the privileges and immunities clause, U.S. CONST. art. IV, § 2, and the equal protection clause, U.S. CONST. amend. XIV. 510 Pa. at 444, 509 A.2d at 846. The supreme court rejected these claims. *Id.* at 463-64, 509 A.2d at 855-56. ATA is not raising these claims on appeal. See Brief for Appellants, *Scheiner* (No. 86-357).

13. *American Trucking Ass'ns v. Bloom*, 87 Pa. Commw. 379, 382, 487 A.2d 465, 467 (1985), *rev'd sub nom.* *American Trucking Ass'ns v. Scheiner*, 510 Pa. 430, 509 A.2d 838, *prob. juris. noted*, 107 S. Ct. 430 (1986).

14. *Id.*

was fairly related to the services provided to interstate commerce.<sup>15</sup> The Supreme Court of the United States has noted probable jurisdiction over this case.<sup>16</sup>

Pennsylvania enacted the axle tax in December 1982.<sup>17</sup> The tax applies to any truck or combination operated on Pennsylvania's highways that weighs more than 26,000 pounds.<sup>18</sup> It requires an annual payment of \$36 per axle.<sup>19</sup> Because trucks and combinations subject to the tax have between two and five axles, they pay an annual tax of between \$72 and \$180.<sup>20</sup> The stated purpose of the axle tax is "to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth" through projects funded by the Pennsylvania Highway Bridge Improvement Restricted Account within the Motor License Fund.<sup>21</sup> These projects involve the "rehabilitation, replacement and removal" of bridges on state highways.<sup>22</sup>

The legislation that created the axle tax simultaneously reduced the annual registration fees of those Pennsylvania trucks and truck tractors subject to the new axle tax.<sup>23</sup> This reduction was in multiples of \$36 and in almost every instance offset the entire effect of the axle tax.<sup>24</sup> As explained by the Supreme Court of Pennsylvania, "[t]he incremental \$36 registration fee reductions roughly correspond to the number of axles legally required for vehicles of various weights."<sup>25</sup>

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15. *Scheiner*, 510 Pa. at 463-64, 509 A.2d at 855.

16. *American Trucking Ass'ns v. Scheiner*, 107 S. Ct. 430 (1986) (noting probable jurisdiction).

17. Act of Dec. 8, 1982, No. 234, § 3, 1982 Pa. Laws 842, 845 (codified at 75 PA. CONS. STAT. ANN. §§ 9901-9910 (Purdon Supp. 1986)). The axle tax took effect April 1, 1983. *Id.* at 847.

18. Section 9902 provides as follows:

In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of \$36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the highways of this Commonwealth.

75 PA. CONS. STAT. ANN. § 9902 (Purdon Supp. 1986).

19. *Id.* Vehicles traveling less than 2000 miles per year in Pennsylvania are entitled to a rebate of the axle tax in proportion to their reduced mileage. *Id.* § 9905.

20. See 75 PA. CONS. STAT. ANN. § 4941 (Purdon Supp. 1986); see also Brief for Appellants at 4, *Scheiner* (No. 86-357). "Before rebates, the axle tax raised approximately \$80 million in fiscal year 1983-84, of which about \$68 million was paid for trucks registered in states other than Pennsylvania." *Id.*

21. 75 PA. CONS. STAT. ANN. § 9907(b) (Purdon Supp. 1986).

22. *Id.* § 9908.

23. Act of Dec. 8, 1982, No. 234, § 1, 1982 Pa. Laws 842 (codified at 75 PA. CONS. STAT. ANN. § 9916(a) (Purdon Supp. 1986)).

24. This offsetting effect is best seen by comparing Act of Dec. 8, 1982, No. 234, § 1, 1982 Pa. Laws 842, 842-43, which sets out the pre- and post-amendment registration fees, with 75 PA. CONS. STAT. ANN. § 4941 (Purdon Supp. 1986), which establishes the maximum weights of trucks and combinations.

25. *Scheiner*, 510 Pa. at 439, 509 A.2d at 843 (quoting *American Trucking Ass'ns v.*

Thus, the reductions in Pennsylvania's registration fees nullify the effect of the axle tax on in-state registered vehicles.

### III. THE DORMANT COMMERCE CLAUSE

The commerce clause states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States."<sup>26</sup> Although the commerce clause is phrased as a grant of power to Congress, it has long been interpreted to be a self-executing limitation on the states' taxing power.<sup>27</sup> This is because the " 'basic purpose of the Clause' [is] to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution."<sup>28</sup> Thus, the commerce clause "by its own force create[s] an area of trade free from interference by the States."<sup>29</sup>

The commerce clause's limitation on a state's power to tax is of course not absolute. A state tax is not per se invalid merely because it burdens interstate commerce.<sup>30</sup> Rather, as the Supreme Court has stated repeatedly, "interstate commerce may be made to pay its way," (i.e., for its share of the state's expenses for the services and facilities provided to it).<sup>31</sup> The Court's role is to strike a "delicate balanc[e]" between the state's interest "in exercising its taxing powers" and the "national interest in free and open trade."<sup>32</sup>

To effect this balance, the Court has developed an antidiscrimination principle.<sup>33</sup> This "cardinal rule" of commerce clause jurisprudence holds that no state, "consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local busi-

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Bloom, 87 Pa. Commw. 379, 382, 487 A.2d 465, 467 (1985), *rev'd sub nom.* American Trucking Ass'ns v. Scheiner, 510 Pa. 430, 509 A.2d 838, *prob. juris. noted*, 107 S. Ct. 430 (1986)).

26. U.S. CONST. art. I, § 8, cl. 3.

27. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328-29 (1977); *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946).

28. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981) (quoting *Boston Stock Exch.*, 429 U.S. at 356).

29. *Freeman*, 329 U.S. at 252.

30. *Maryland*, 451 U.S. at 754; *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

31. *E.g.*, *Maryland*, 451 U.S. at 754; *Complete Auto*, 430 U.S. at 281; *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 714 (1972).

32. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

33. This principle embodies one of the prongs in the four-prong test that the Court established in *Complete Auto* to determine when a state tax upon interstate commerce should be upheld. The tax will be sustained if it: (1) has a substantial nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 277-78.

ness.' ”<sup>34</sup> In applying the antidiscrimination principle, the proper focus is on the practical impact of the tax on interstate commerce.<sup>35</sup> The tax's impact can be accurately assessed only when the levy is viewed “in conjunction with other provisions of the State's tax scheme.”<sup>36</sup> Thus, a tax that apparently discriminates against interstate commerce may be saved from invalidation if another levy imposes a comparable burden upon local commerce.<sup>37</sup> In such a situation, the overall tax burden would be nondiscriminatory.

A state is barred not only from levying a tax that discriminates against interstate commerce but also from imposing a tax that disproportionately burdens interstate commerce. To survive a disproportionate burden challenge, the tax must bear a reasonable relationship to the presence or activities of interstate commerce in the taxing state.<sup>38</sup>

### A. *The Axle Tax Discriminates in Effect*

The axle tax, if viewed in isolation, does not discriminate against interstate commerce. By its terms, the tax applies to “all motor carriers” weighing over 26,000 pounds that use Pennsylvania's highways.<sup>39</sup> When the axle impost and the simultaneous reduction in registration fees are considered together, however, the impact of the new tax dis-

34. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

35. *Maryland*, 451 U.S. at 756. This contrasts with the formalistic approach used before *Complete Auto*. The formalistic approach focused on whether the tax was imposed directly or indirectly upon interstate commerce. A tax imposed directly was per se invalid. *Compare* *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951) (holding unconstitutional tax on “privilege” of doing business when applied against exclusively interstate business) with *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (upholding tax on “privilege” of doing business when applied against exclusively interstate business). See generally P. HARTMAN, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* § 2:13-:19 (1981) (tracing history of Court's analysis of state taxes on interstate commerce).

36. *Maryland*, 451 U.S. at 756.

37. This is called the complementary (or compensating) tax doctrine. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 585 (1937) (state's taxing scheme held nondiscriminatory because its 2% use tax compensates for its 2% sales tax); see also Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405, 406 (1986) (“A tax that singles out interstate commerce for discriminatory treatment is upheld in light of a ‘substantially equivalent levy’ imposing a comparable burden on local commerce.”); Note, *A Call for Internal Consistency Among State Taxing Schemes: Armco, Inc. v. Hardesty*, 38 TAX LAW. 519, 520 n.17 (1985) (“A ‘compensating tax’ is one that compensates for a like burden on in-state business and results in nondiscriminatory treatment of in-state and out-of-state transactions.”).

38. See *infra* Section III (C).

39. 75 PA. CONS. STAT. ANN. § 9902 (Purdon Supp. 1986). A “motor carrier” is defined as “[e]very person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth.” *Id.* § 9901.

criminate against interstate commerce.<sup>40</sup>

ATA, in its brief to the Supreme Court, raised the discrimination-in-effect argument as follows: First, ATA contended that if the axle tax were imposed solely on interstate commerce, a court would strike it down as a facially discriminatory tax.<sup>41</sup> ATA then posited that the axle tax must be struck down if it effects the same result through "manipulation."<sup>42</sup> The simultaneous reduction of Pennsylvania registration fees on vehicles subject to the axle tax in amounts virtually identical to the new impost constitutes such "manipulation."<sup>43</sup>

ATA's argument is compelling.<sup>44</sup> Admittedly, the fact that the reduction in Pennsylvania's registration fees was simultaneous to the imposition of the axle tax is not the dispositive factor. Although this fact may raise an inference of discriminatory intent,<sup>45</sup> it is unlikely to overcome the traditional deference that the Court gives to legislative acts.<sup>46</sup> Rather, the disposing fact is that the registration fee reductions offset virtually the entire effect of the axle tax on vehicles based in-state. This renders the axle tax discriminatory in practical effect regardless of the legislature's actual intent.<sup>47</sup>

The Court has invalidated facially neutral taxes when exemptions or credits favoring local commerce existed in other parts of the

40. See *supra* notes 23-25 and accompanying text.

41. Brief for Appellants at 17, *Scheiner* (No. 86-357).

42. *Id.* at 5, 18; see also *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious.").

43. Brief for Appellants at 19-20.

44. The Supreme Court of Pennsylvania admitted that "[a]t first blush, this is an appealing argument" but concluded that the axle tax was valid under the compensating tax doctrine. *Scheiner*, 510 Pa. at 459, 509 A.2d at 853.

45. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (excise tax on liquor sales discriminated against interstate commerce because undisputed purpose of tax exemption was to aid local industry).

46. See *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 716-17 (1972) (state legislature need not base a user fee on the most "exact[ ]" formula); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 183 (1940) (Black, J., dissenting) (any reasonable doubt as to the constitutional validity of a state's legislation must be resolved in its favor); cf. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (despite noting that legislative history of New York's amended transfer tax indicated discriminatory intent, Court's analysis of tax's validity focused solely on its practical effect). But see *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 639 (1981) (Blackmun, J., dissenting) ("The legislative history of [Montana's severance tax] is illuminating."). See generally *Tatarowicz & Mims-Velarde, An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 903-05 (1986) (effect of legislative history on Court's analysis of a state tax's validity).

47. Indeed, ATA's discriminatory intent argument rests on Pennsylvania's concession that in adopting these offsetting reductions the state "intended to lessen the burden upon 'local commerce.'" See Brief for Appellants at 18 (quoting *Scheiner*, 510 Pa. at 459, 509 A.2d at 853).



state's code. In *Maryland v. Louisiana*,<sup>48</sup> Louisiana imposed a "first use" tax on natural gas. "The Act itself, as well as provisions found elsewhere in the state statutes, provided a number of exemptions from and credits for the First-Use Tax."<sup>49</sup> These provisions "substantially protected [the Louisiana consumer] against the impact of the [tax]."<sup>50</sup> The Court therefore held that the first-use tax "unquestionably discriminate[d] against interstate commerce in favor of local commerce as the necessary result of various tax credits and exclusions."<sup>51</sup>

The axle tax actually effects its discrimination because of the presence of tax *reductions* elsewhere in the state code (i.e., in the registration fees on Pennsylvania-based trucks).<sup>52</sup> There appears to be no reason, however, why the Court would not apply the *Maryland v. Louisiana*<sup>53</sup> holding to a tax that discriminates because of offsetting tax reductions rather than because of exemptions or credits. In either case, the entire tax burden is placed squarely on the shoulders of interstate commerce. Moreover, any other holding would grant the more creative state legislatures a privilege to discriminate against interstate commerce through artful tax drafting.

### B. *The Complementary Tax Doctrine*

The Supreme Court of Pennsylvania did not deny that the registration fee reductions tended to nullify the axle tax's effect on local commerce.<sup>54</sup> Instead, it upheld the axle tax under the complementary tax doctrine.<sup>55</sup> The court reasoned that the axle tax on foreign-based vehicles was a complementary tax because it compensated for the registration fees levied against Pennsylvania-based vehicles:

[C]onsidered in conjunction with all other provisions of Penn-

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48. 451 U.S. 725 (1981); see *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (holding excise tax on liquor wholesalers unconstitutional because of exemptions for local liquor manufacturers); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (holding that New York tax credit against Domestic International Sales Corporation accumulated income for gross receipts attributable to export shipments made from New York discriminated against interstate commerce).

49. *Maryland*, 451 U.S. at 732.

50. *Id.* at 757.

51. *Id.* at 756. The Court rejected Louisiana's argument that the first-use tax was a compensatory tax for the state's severance tax on local production of natural gas because it found that the two taxes were not imposed on "substantially equivalent event[s]." *Id.* at 759. For a discussion of the Court's reasoning, see *infra* notes 80-83 and accompanying text.

52. See *supra* notes 23-25 and accompanying text.

53. 451 U.S. 725 (1981).

54. *Scheiner*, 510 Pa. at 459, 509 A.2d at 853. The court, in fact, admitted that the "registration fee reduction almost exactly offsets the \$36.00 axle tax." *Id.*

55. For a definition of the complementary tax doctrine, see *supra* note 37 and accompanying text.

sylvania's highway user fee system, [the axle tax] works no discrimination against interstate commerce in practical operation. It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing system.<sup>56</sup>

# 1. JUSTIFICATION FOR THE COMPLEMENTARY TAX: ONE-SIDED TAX BURDEN

The justification for a compensating tax is that it offsets a tax burden that is imposed solely upon local commerce.<sup>57</sup> A state will impose the compensating tax upon interstate commerce to nullify this one-sided burden.<sup>58</sup> This assumes that there is indeed a burden that must be compensated.

## a. Indirect Tax Contribution by Foreign-Based Trucks

ATA, in its brief to the Supreme Court, contended that there is no one-sided tax burden on Pennsylvania-based trucks because foreign-based trucks have already indirectly contributed to Pennsylvania

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56. *Scheiner*, 510 Pa. at 462, 509 A.2d at 855. In its brief to the Supreme Court, Pennsylvania surprisingly refused to rely on the complementary tax doctrine and conceded that the axle tax "has no specific counterpart imposed only on in-state businesses." Brief for Appellees at 18-19, *Scheiner* (No. 86-357). Instead, Pennsylvania argued that under Pennsylvania's entire scheme of highway user fees, Pennsylvania-based trucks pay higher taxes for using the state's highways than do foreign-based trucks: "[T]he Axle Tax is but a small part of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an extensive highway system. Under that scheme, domestic trucks clearly pay a higher price for the use of Pennsylvania highways than those registered out-of-state." *Id.* at 17, 18 n.17. Pennsylvania, however, could point only to its registration fees as an example of a tax that Pennsylvania-based trucks pay, but foreign-based trucks do not pay. *See id.* at 8-9. Given the existence of Pennsylvania's reciprocity arrangements, Pennsylvania could not rely upon the rather unsurprising fact that foreign-based trucks do not pay Pennsylvania's registration fees to prove that Pennsylvania-based trucks "pay a higher price" for using the state's highways. *See Scheiner*, 510 Pa. at 472, 509 A.2d at 860 (Nix, C.J. & McDermott, J., dissenting); *see also* Brief for Appellants at 26-27 (Pennsylvania's tax redistribution argument "rests on unsubstantiated assertions and *post hoc* rationalizations."). Yet, Pennsylvania could have relied upon this fact to support a complementary tax argument. Despite Pennsylvania's concession, the complementary tax doctrine will be discussed in this Note because it is the only theory that can sustain a discriminatory tax under the commerce clause.

57. *See Maryland v. Louisiana*, 451 U.S. 725, 758 (1981) ("The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate.").

58. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (purpose of compensatory use tax is to help local retailers compete on terms of equality with out-of-state counterparts who are exempt from sales tax and to avoid the likelihood of a drain upon the state's revenues because buyers could avoid sales tax by placing orders out of state); *see also Hellerstein, supra* note 37, at 406-07 (compensating use taxes prevent state from losing business and revenue).

for their use of the state's highways.<sup>59</sup> Pennsylvania therefore cannot justify the axle tax under the complementary tax doctrine. ATA's argument hinges on the presence of Pennsylvania's reciprocity provisions.<sup>60</sup> Pennsylvania, like almost every other state, engages in reciprocity.<sup>61</sup> Reciprocity is an arrangement where State *A* will offer the same registration fee exemptions to vehicles from State *B* that State *B* offers to vehicles from State *A*.<sup>62</sup> ATA argues that " 'reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of [Pennsylvania]; the agreement of their home states not to tax [Pennsylvania]-based trucks leaves [Pennsylvania] free to collect more than it otherwise could from its own truckers.' " <sup>63</sup> In other words, trucks based in, say, Ohio have contributed to Pennsylvania that amount of money which Ohio could have taxed Pennsylvania-based trucks but for the reciprocity arrangement.

This argument is not without difficulties. First, unless Pennsylvania actually receives this indirect economic contribution, the one-sided tax burden on Pennsylvania-based trucks will still exist. The mere theoretical possibility that a state may increase its registration fees does not eliminate an existing tax disadvantage.<sup>64</sup> Thus, until a state actually adjusts its registration fees, it should not be foreclosed from justifying a discriminatory tax as a compensating tax.

More fundamentally, the amount of tax that the reciprocating states indirectly contribute may be far less than the amount that they receive. This will occur when the damage to State *A*'s facilities caused

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59. Brief for Appellants at 22-24. ATA has raised this argument in other cases and prevailed. See *American Trucking Ass'ns v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986) (discriminatory taxes are not compensatory because foreign-based trucks "have already indirectly contributed to Vermont's treasury by virtue of this reciprocity"), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 21, 1986) (No. 86-69); *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986) (same), *petition for cert. filed*, 55 U.S.L.W. 3153 (U.S. Aug. 22, 1986) (No. 86-276); *American Trucking Ass'ns v. Quinn*, 437 A.2d 623 (Me. 1981) (same); see also *Private Truck Council of Am., Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986) (discriminatory permit fees do not compensate for registration fees).

60. 75 PA. CONS. STAT. ANN. §§ 6141-6153 (Purdon 1977 & Supp. 1986) (statutory provisions governing registration fee reciprocity).

61. See generally C. TAFF, *supra* note 2, at 48 ("The laws of 43 states currently provide that written reciprocity agreements with other states are permissible."); Note, *supra* note 2, at 79-83 (structure of state highway user fee schemes).

62. See C. TAFF, *supra* note 2, at 48. See generally 75 PA. CONS. STAT. ANN. §§ 6141-6153 (Purdon 1977 & Supp. 1986) (statutory provisions governing registration fee reciprocity).

63. Brief for Appellants at 23-24 (quoting *Quinn*, 437 A.2d at 626-27).

64. A state is unlikely to adjust its registration fees when they are already high. Cf. Note, *supra* note 2, at 83 n.87 ("Another reason for the existence of third structure taxes is the inertia of tax structures built around them."). For a discussion of the difference between first, second, and third structure taxes, see *supra* note 2. Pennsylvania's registration fees on five-axle tractor-semitrailer combinations (78,000 lbs. gross vehicle weight) are the tenth highest in the nation. See U.S. DEP'T OF TRANSP., *supra* note 2, at 33.

by trucks from State *B* (a reciprocating state) does not correspond to the damage to State *B*'s facilities caused by State *A*'s trucks. For example, a state with a relatively small number of trucks used in interstate commerce and a large amount of interstate highways would be under a substantial disadvantage.<sup>65</sup> This is because the amount of tax which other states have forgone would not reflect the degree of road and bridge damage caused by their trucks. Thus, although the state may be "free to collect" more tax from trucks based in the state, that amount often would not reflect the damage to the state's facilities. Pennsylvania, however, cannot easily claim to suffer under this kind of disadvantage. It ranks seventh in the nation in total number of registered trucks.<sup>66</sup> Accordingly, it has likely received a sizable indirect tax contribution from other states. Pennsylvania therefore cannot easily contend that it must levy the axle tax to nullify a tax imbalance.

#### b. Effect of Pennsylvania's Reciprocity Policy

Assuming that foreign-based trucks do not indirectly (or adequately) contribute to Pennsylvania through the reciprocity arrangement, the axle tax still may not be justified as a compensating tax. According to this argument, Pennsylvania has voluntarily created the supposed one-sided burden on Pennsylvania-based trucks by waiving its right to impose registration fees on foreign-based trucks.<sup>67</sup> Pennsylvania therefore cannot point to the existence of that burden to justify the imposition of a compensating tax.

How exactly does this waiver theory work? Pennsylvania, by recognizing reciprocity, has already decided to exempt foreign-based vehicles from its registration fees.<sup>68</sup> Having made this decision, the

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65. See Note, *supra* note 2, at 82 & n.79, 83 & n.87.

66. See U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., HIGHWAY STATISTICS, 1985, at 19 (1985).

67. ATA did not explicitly raise this argument in its brief. See Brief for Appellants at 22-27. It raised the argument and prevailed in other cases, however, where the same issue was involved. See *American Trucking Ass'ns v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986) (by enacting reciprocity statute, state waived right to impose new user fees on interstate commerce), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 21, 1986) (No. 86-69); *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986) (same), *petition for cert. filed*, 55 U.S.L.W. 3153 (U.S. Aug. 22, 1986) (No. 86-276); *American Trucking Ass'ns v. Quinn*, 437 A.2d 623 (Me. 1981) (same); see also *Private Truck Council of Am., Inc. v. New Hampshire*, 128 N.H. 466, \_\_\_, 517 A.2d 1151, 1154 (1986) (New Hampshire's acceptance of registration reciprocity "constituted a waiver of its right to impose registration fees on foreign-registered vehicles."). This Note will therefore examine the argument.

68. Pennsylvania's automatic reciprocity statute, for example, provides as follows:

If no agreement, arrangement or declaration is in effect with respect to another jurisdiction as authorized by this subchapter, any vehicle properly registered or

state cannot turn around and claim that it now must tax foreign-based vehicles to equalize the resulting one-sided tax burden. The very reason for the burden's supposed one-sidedness is that the state had previously decided only to tax local commerce (by enacting the reciprocity statute). Pennsylvania's reciprocity statute therefore waives the state's right to subsequently adopt the axle tax as a compensating tax.

The proposition that a state waives its sovereign power to tax when it decides to adopt a policy of reciprocity, on first glance, appears to be indefensible. No case advancing this remarkable theory has cited to any supporting authority.<sup>69</sup> It certainly cannot be said that, by adopting a reciprocity policy, the state has relinquished its taxing power in the manner traditionally associated with a waiver of a constitutional right.<sup>70</sup> On the contrary, a state ordinarily has every right to amend and modify its tax structure.<sup>71</sup>

There is a premise, however, which can support the waiver argument. This unarticulated premise must be that the reciprocity statute embodies a compact which the state cannot impair or alter.<sup>72</sup> The waiver argument therefore must ultimately be premised upon the compact and contract clauses.<sup>73</sup> Framed under these clauses, the

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licensed in the other jurisdiction, and for which evidence of compliance is supplied, shall receive, when operated in this Commonwealth, the same exemptions, benefits and privileges granted by the other jurisdiction to vehicles properly registered in this Commonwealth.

75 PA. CONS. STAT. ANN. § 6149 (Purdon 1977).

69. See *Conway*, 146 Vt. at \_\_\_, 508 A.2d at 407; *Quinn*, 437 A.2d at 626-27.

70. See *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830) (Waiver of taxing power "ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear."). As the Court has stated in a different context: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of sixth amendment right to counsel).

71. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 & n.13 (1977) ("[T]he Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects."); cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-17 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.").

72. Or, to be more precise, by imposing a third structure tax (the axle tax), Pennsylvania has impaired its obligation under the reciprocity agreement not to impose first structure taxes (registration fees) on vehicles based in the reciprocating state. A registration fee reciprocity agreement would be worthless if a state could avoid it simply by imposing a tax of a different type. For a discussion of the difference between first, second, and third structure taxes, see *supra* note 2. This argument has not been articulated in the Brief for Appellants, nor in any other case dealing with the complementary tax doctrine and reciprocity. No other theory, however, can justify the premise that a state is barred from modifying or revoking its statutorily-created reciprocity policy by imposing another user fee.

73. The compact clause states: "No State shall, without the Consent of Congress . . . enter

waiver argument essentially states that Pennsylvania has entered a compact with other states so that no state will impose registration fees on vehicles based in the other states.<sup>74</sup> By imposing the axle tax, Pennsylvania has altered this compact in violation of the contract clause.<sup>75</sup> Owners of foreign-based trucks, as third-party beneficiaries,

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into any Agreement or Compact with another State, or with a foreign Power." U.S. CONST. art. I, § 10, cl. 3. The contract clause states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

74. In this case, a tax exemption compact between Pennsylvania and other states could arise by virtue of two devices. See generally *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468-71 (1978) (forms which agreements or compacts subject to compact clause may take). First, Pennsylvania's Secretary of Transportation may execute formal agreements with other states. 75 PA. CONS. STAT. ANN. §§ 6142-6144 (Purdon 1977 & Supp. 1986). Until September 1982, Pennsylvania had entered into bilateral Apportioned Registration Agreements with 23 states and provinces. *Scheiner*, 510 Pa. at 436, 509 A.2d at 841. Thereafter, Pennsylvania became a member of the International Registration Plan (IRP). *Id.* Under both of these agreement structures, "apportionable vehicles" (such as interstate carriers) would pay Pennsylvania's registration fees in proportion to the fraction of miles traveled in Pennsylvania to total miles. *Id.* For a discussion of the different forms of reciprocity agreements, see C. TAFF, *supra* note 2, at 48-49.

The second way in which a tax exemption compact between Pennsylvania and other states could arise is through reciprocal legislation. 75 PA. CONS. STAT. ANN. § 6149 (Purdon 1977). For the text of Pennsylvania's automatic reciprocity statute, see *supra* note 68. Pennsylvania's automatic reciprocity statute plays a dual role in forming tax exemption contracts. It constitutes an acceptance of other states' offers for reciprocity made by virtue of their own automatic reciprocity statutes. It also manifests an offer of reciprocity to those states that have not yet enacted similar automatic reciprocity statutes. See F. ZIMMERMANN & M. WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 8-10 (1976); see also P. HARDY, *INTERSTATE COMPACTS: THE TIES THAT BIND* 2-3 (1982) ("In the case of interstate compacts, both the offer and the acceptance exist in the form of legislative acts.").

Congressional consent is not required for all interstate compacts despite the blanket language of the compact clause. See *Multistate Tax Comm'n*, 434 U.S. at 472 (upholding Multistate Tax Compact which established the Multistate Tax Commission even though compact did not receive congressional approval); *Bode v. Barrett*, 344 U.S. 583, 586 (1953) (upholding reciprocal legislation agreement even though it did not receive congressional approval). Consent is necessary only if the compact "enhance[s] the political power of the member States in a way that encroaches upon the supremacy of the United States." *Multistate Tax Comm'n*, 434 U.S. at 473; accord *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893). Such is not the case here. Pennsylvania's reciprocity agreements are "purely fiscal interstate agreements that facilitate interstate commerce and aid in execution of internal revenue policies . . . [and] conduce to, rather than restrain, commerce among the several states." See *Bode v. Barrett*, 412 Ill. 204, 233, 106 N.E.2d 521, 536 (1952), *aff'd*, 344 U.S. 583 (1953); see also Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 712 (1976) ("Reciprocal tax statutes . . . provide the paradigm instance of arrangements not deemed to require the consent of Congress.").

75. Interstate compacts, like any other contract to which a state is a party, are protected from impairment by the contract clause. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 91-93 (1823) (holding that the compact between Virginia and Kentucky by which private land titles in Kentucky, derived from Virginia before the separation of Kentucky from Virginia, "shall remain valid and secure" under the laws of Kentucky, and shall be determined by the laws "now existing" in Virginia, was impaired in violation of the contract clause by subsequent Kentucky legislation that adversely affected these titles); cf. *West Virginia ex rel Dyer v. Sims*,

would have standing to enforce the compact.<sup>76</sup>

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341 U.S. 22, 28 (1951) ("[A]n agreement solemnly entered into between States . . . can[not] be unilaterally nullified". . . .). See generally V. THURSBY, INTERSTATE COOPERATION 38-40 (1953) (discussing the relationship of the compact clause to the contract clause); B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 46-47 (1938) (discussing the application of the contract clause to interstate compacts). In the instant case, Pennsylvania should be barred from levying the axle tax on foreign-based trucks because this tax would impair the state's obligations under the reciprocity compacts. The IRP compact would be impaired because, unlike Pennsylvania's registration fees, the axle tax would not be apportioned on the basis of in-state mileage. The reciprocal legislation compacts would also be impaired because these compacts directly rule out such unilaterally imposed taxes.

The only question remaining is the extent to which the contract clause proscribes the impairment of a state's obligation under an interstate compact. A state under certain circumstances may impair the obligations of private contracts. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934) (upholding a state moratorium on mortgage foreclosures); see also *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down a statute that impaired a private contract but applying a balancing test). A state may also impair public contracts on appropriate occasions. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977) ("As with laws impairing the obligations of private contracts, an impairment [of a public contract] may be constitutional if it is reasonable and necessary to serve an important public purpose."). See generally Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1647-49 (1980) (discussing the distinction between public and private contracts). *Biddle*, the only case which has applied the contract clause to an interstate compact, seemed to suggest that in this context the contract clause must be read literally. See 21 U.S. (8 Wheat.) at 84 ("The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it."). But this rigid reading of the contract clause was merely a reflection of contemporary contract clause jurisprudence. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138-39 (1810) (rigidly analyzing a public contract with no discussion of the state's interest in impairing the contract).

Interstate compacts should be examined under the same analysis as public contracts. The public contract analysis of *United States Trust Co.* was established to meet the problem that a state, being a party to the contract, was likely to be influenced by its self-interest. 431 U.S. at 26. The same problem inheres with interstate compacts. To address this self-interest problem, the public contract analysis focuses upon whether the impairment "is reasonable and necessary to serve an important public purpose." *Id.* at 25. Here, the alleged purpose of altering the reciprocity compacts (by enacting the axle tax) was to effect a "rational restructuring of Pennsylvania's highway user charges." *Scheiner*, 510 Pa. at 445, 459-60, 509 A.2d at 846, 854; Brief for Appellees at 19-20. Other than suggesting that Pennsylvania's registration fees were "higher than the national average," the Supreme Court of Pennsylvania offered no reason why such a restructuring was necessary. See *Scheiner*, 510 Pa. at 445-46, 509 A.2d at 846; see also *id.* at 469, 509 A.2d at 858 (Nix, C.J. & McDermott, J., dissenting) ("[T]here is nothing in the statute itself or in the circumstances surrounding the enactment of Act 234 [the axle tax] which adds legitimacy to appellants' argument that it was designed to restructure the tax burden upon the trucking industry in this Commonwealth."); cf. Brief for Appellees at 19 (to require Pennsylvania to make findings before it can reallocate tax burdens under its highway user scheme would be to "exalt[ ] form over substance"). This barebones justification would be hardpressed to survive the strict test of necessity.

76. The standing issue involves two questions. First, are interstate carriers actually third-party beneficiaries to the reciprocity compact? Second, are they intended beneficiaries? See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 302-315 (1981) (contract beneficiaries). The first question centers on whether interstate carriers have actually received the benefit of a tax exemption under the compact. It may be argued that the interstate carrier receives no benefit from the reciprocity agreements of its base state (the state where its vehicle is

## 2. REQUIREMENT THAT TAXES BE IMPOSED UPON SUBSTANTIALLY EQUIVALENT ACTIVITY

A state cannot defend a tax that discriminates against interstate commerce "merely by pointing generally in the direction of some other tax" paid only by local commerce.<sup>77</sup> Otherwise, the commerce clause's protection of interstate commerce would be illusory. The Court therefore has established a test to narrow the scope of the complementary tax doctrine: taxes are not complementary unless they are imposed on "substantially equivalent event[s]."<sup>78</sup> Thus, the underlying activities being affected by each tax must bear a formal similarity.

The Court has applied this test in two cases.<sup>79</sup> In *Maryland v. Louisiana*,<sup>80</sup> the Court initially found that Louisiana's first-use tax on natural gas extracted from the federally-owned outer continental shelf area and processed in the state discriminated against interstate commerce because exemptions and credits protected local consumers from the tax's impact.<sup>81</sup> The Court then rejected Louisiana's argument that the first-use tax was valid because it compensated for the effect of the state's severance tax on local production of gas. As later clarified in *Armco, Inc. v. Hardesty*,<sup>82</sup> "[s]everance and first-use or processing [are] not 'substantially equivalent event[s]' on which compensating taxes might be imposed."<sup>83</sup> Similarly, in *Armco* the Court rejected the argument that a tax on wholesalers (from which local manufacturers

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registered). This is because the carrier's base state will adjust its fees to reflect that amount of tax which the reciprocating state forwent. See *supra* notes 59-63 and accompanying text (discussing ATA's indirect contribution argument). As shown above, however, the likelihood of a state actually readjusting its registration fees to reflect this forgone revenue is problematic. See *supra* text accompanying notes 64-65. The discussion therefore proceeds on the assumption that the reciprocity agreements reduce the total amount of taxes to which interstate carriers are subject. Given this assumption, an interstate carrier is indeed a beneficiary of its home state's reciprocity agreements. The second question (whether the carrier is an intended or incidental beneficiary) is significant because it determines whether the carrier has standing to bring suit and enforce the compact. See RESTATEMENT, *supra*, §§ 304, 315 (only an intended beneficiary may enforce a duty under the contract); see also E. FARNSWORTH, CONTRACTS § 10.5, at 734-35 (1982) (intended beneficiary has a newly-acquired right against the promisor). This question is problematic because it requires an analysis of the circumstances under which Pennsylvania adopted its reciprocity policy. See RESTATEMENT, *supra*, § 302.

77. See Brief for Appellants at 21.

78. *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984) (manufacturing and wholesaling are not substantially equivalent events); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981) (processing and severance are not substantially equivalent events).

79. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

80. 451 U.S. 725 (1981).

81. *Id.* at 756-57.

82. *Armco*, 467 U.S. at 642-43.

83. *Id.* at 643 (quoting *Maryland*, 451 U.S. at 759). In *Maryland*, the Court seemed to



conducting in-state wholesaling were exempt) compensated for the much higher manufacturing tax on local manufacturers. The Court concluded that "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State."<sup>84</sup>

Pennsylvania's axle tax and registration fee would appear to fulfill the substantial equivalence requirement.<sup>85</sup> At first glance, both taxes seem to be imposed on precisely the same activity—use of Pennsylvania's highways. As noted by ATA, however, there is a difference: while the registration fee is a tax on the privilege of using the highways of many states (by virtue of reciprocity arrangements), the axle impost is a tax merely on the privilege of using Pennsylvania's highways.<sup>86</sup> The difference between the two taxes therefore is that one—the registration fee—is accompanied by reciprocity and consequently covers a greater amount of activity. The question then is whether this difference is significant enough that the two taxes do not bear upon substantially equivalent activity.

The presence of reciprocity in the registration fee would not appear to be a relevant difference because, as initially supposed, both levies actually tax the same activity: the use of Pennsylvania's highways. Reciprocity merely allows Pennsylvania to tax a locally-based vehicle more heavily (through a higher registration fee) than it otherwise could.<sup>87</sup> But the level of Pennsylvania's registration fees does not seem to affect the question of whether those fees are imposed on the same activity as is the axle tax. It is certainly not beyond the bounds of reason to suggest that the activities taxed by the axle tax and registration fee are substantially similar. In any event, an attempt at applying the substantial equivalence test is somewhat of a scholastic

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advance the slightly different rationale that the state did not have the same conservation interest in the two taxes:

To be sure, Louisiana has an interest in protecting its natural resources, and . . . has chosen to impose a severance tax on the privilege of severing resources from its soil. But the First-Use Tax is not designed to meet these same ends since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned [outer continental shelf] land.

451 U.S. at 759 (citations omitted).

84. *Armco*, 467 U.S. at 643. In concluding that the manufacturing tax was "not in part a proxy" for the wholesale tax, the Court noted that it was impossible to tell "which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales." *Id.*

85. Although the Supreme Court of Pennsylvania concluded that the axle tax was a valid "compensatory tax," it did not address the substantial equivalence question. *See Scheiner*, 510 Pa. at 462, 509 A.2d at 855.

86. Brief for Appellants at 23, *Scheiner* (No. 86-357).

87. *See supra* text accompanying notes 59-63.

exercise given the test's malleable and formalistic nature.<sup>88</sup> Such an attempt illustrates the need for a different ground on which to uphold or invalidate the axle tax.

In its brief to the Supreme Court, ATA offered an entirely different interpretation of the substantial equivalence test.<sup>89</sup> Rather than framing the issue as whether the taxes affect substantially similar activity, ATA asked whether the taxes purchase the same privilege.<sup>90</sup> Under this formulation of the test, the presence of reciprocity may be significant because it changes the purchased privilege. ATA argued that by virtue of reciprocity arrangements, a Pennsylvania registration fee purchases the right to engage in interstate commerce in many states, while the axle tax only purchases the right to engage in interstate commerce in Pennsylvania.<sup>91</sup> ATA concluded that, because these taxes "purchase fundamentally different rights," they do not relate to substantially equivalent events.<sup>92</sup>

Even if ATA's formulation of the substantial equivalence test were accurate,<sup>93</sup> payment of Pennsylvania's registration fee itself does

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88. The Court's formulation of this test has not gone uncriticized. As Professor Hartman noted:

A "bright-line" test is not easily discernible from a number of decisions where the Court inquired whether the alleged compensating tax did properly serve as a balm of Gilead to heal an otherwise discriminatorily ill tax. . . .

. . . . The phrase "substantially equivalent events" . . . appears to be something of an accordian [sic] term that can be expanded or contracted as the Court thinks the situation warrants.

P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 2:19 (Supp. 1986); see also Judson & Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat from Economic Reality in Analysis of State Taxes*, 87 W. VA. L. REV. 723, 741 (1985) (Court engaging in "semantics-oriented analysis"); Lathrop, *Armco—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, 63 TAXES 551, 561 (1985) (Court reverting back to formalism).

89. In support of this argument, ATA in its brief quoted *American Trucking Associations v. Quinn*, 437 A.2d 623 (Me. 1981), and cited to *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *American Trucking Associations v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 21, 1986) (No. 86-69); and *American Trucking Associations v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *petition for cert. filed*, 55 U.S.L.W. 3153 (U.S. Aug. 22, 1986) (No. 86-276). Brief for Appellants at 23-24. In none of these decisions, however, did the court state that it was applying the substantial equivalence test.

90. Brief for Appellants at 23 ("[T]he axle tax and the registration fee do not relate to 'substantially equivalent events' because they do not serve the same function or purchase the same rights."). ATA in this context seems to use the word "right" interchangeably with the word "privilege." See *id.*

91. *Id.*

92. *Id.*

93. ATA's substantial equivalence test is superficially appealing. The manufacturing tax in *Armco v. Hardesty* purchased the right to manufacture in the state while the wholesaling tax only purchased the right to wholesale. Thus, both taxes were not substantially equivalent and

not purchase any privilege different than does payment of the axle tax. ATA concedes that it is the registration fee *combined* with the reciprocity arrangement that affords the privilege of using many states' highways.<sup>94</sup> If a reciprocity arrangement is revocable by either party, then its uncertain lifespan may make reciprocity insufficiently weighty to merit consideration. Therefore, an analysis operating on the assumption that reciprocity is a timeless constant may not accurately reflect reality. If a reciprocity arrangement did not exist, the registration fee and the axle tax would purchase the same privilege: the privilege of using only Pennsylvania's highways.<sup>95</sup> Yet, the contract clause may prevent a state from breaching a reciprocity agreement.<sup>96</sup> Under this assumption, an axle tax and a registration fee may indeed purchase different commodities.

### C. *Disproportionate Tax Burden on Foreign-Based Trucks*

Even if the axle tax were sustained as a nondiscriminatory tax under the compensating tax doctrine, the commerce clause inquiry is not yet over. The axle tax must also pass a test of proportionality. Under this test, the tax must bear a reasonable relationship to the level of the taxpayer's activities or presence in the state.<sup>97</sup> This additional commerce clause test is necessary to provide interstate commerce with a greater degree of protection against burdensome taxation. The antidiscrimination principle prevents a state from taxing interstate and local commerce unequally.<sup>98</sup> The fairly related (proportionality) requirement ensures that the level of a tax on interstate commerce is not unrelated to the extent of the presence of interstate commerce in the state. Because the presence of interstate commerce in a state will likely be far less than that of local commerce, the mere fact that local and interstate commerce are being taxed

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ATA's test could explain *Armco*. On the other hand, it could be argued that all general revenue taxes "purchase" the same thing: "the advantages of a civilized society." See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 (1981). The problem with ATA's argument is that it does not explain exactly *how* the taxes must be similar.

94. Brief for Appellants at 23.

95. Moreover, under the logic of ATA's argument, the registration fee and axle tax would purchase the same privilege (and therefore relate to substantially equivalent events) if a state included an axle tax in its reciprocity arrangements. This illustrates a problem with ATA's formulation of the test. Its test ignores the similarity of the activity being taxed and instead focuses on factors that operate independent of the tax (e.g., the existence of reciprocity arrangements).

96. For a discussion of the impact of the contract clause on Pennsylvania's reciprocity policy, see *supra* note 75.

97. See *infra* text accompanying notes 107-10, 133-35.

98. See *supra* notes 33-34 and accompanying text.

equally does not mean that interstate commerce is being taxed fairly. Both tests therefore are necessary.

In applying the fairly related test to the axle tax, the dispute centers around the manner in which the tax must be fairly related to the services that the state provides to interstate commerce. Two sets of decisions by the Supreme Court would offer two different answers. On the one hand, the *Aero Mayflower Transit Co. v. Georgia Public Service Commission*<sup>99</sup> line of cases<sup>100</sup> requires the *aggregate amount* of the tax to be fairly related to the services provided.<sup>101</sup> On the other hand, *Complete Auto Transit v. Brady*<sup>102</sup> and one of its progeny, *Commonwealth Edison Co. v. Montana*,<sup>103</sup> require the *computational formula* of the tax to be fairly related to the services provided.<sup>104</sup> When a flat tax such as the axle fee is involved,<sup>105</sup> the distinction between these two sets of decisions is likely to be decisive.<sup>106</sup> The amount of a flat tax will almost always pass muster. A flat tax, by its

99. 295 U.S. 285 (1935).

100. See *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) (tax based on vehicle's market value upheld); *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495 (1947) (flat taxes on property carrier for hire upheld); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) (flat caravan tax upheld); *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72 (1939) (graduated truck tax upheld); *Ingels v. Morf*, 300 U.S. 290 (1937) (flat caravan tax invalidated because amount excessive in relation to tax's declared purpose); *Morf v. Bingaman*, 298 U.S. 407 (1936) (flat caravan tax upheld); *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) (flat tax on property carriers for hire upheld); *Hicklin v. Coney*, 290 U.S. 169 (1933) (tax based on truck's carrying capacity upheld); *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245 (1928) (mileage tax on passenger carrier for hire upheld); *Clark v. Poor*, 274 U.S. 554 (1927) (tax on property carriers for hire based on carrying capacity plus regularity of routes upheld); *Kane v. New Jersey*, 242 U.S. 160 (1916) (tax based on vehicle's horsepower upheld); *Hendrick v. Maryland*, 235 U.S. 610 (1915) (same); see also *Capitol Greyhound Lines*, 339 U.S. at 561 (Frankfurter & Jackson, JJ., dissenting) (chart analyzing Court's highway user fee cases). But see *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 180 (1940) (gasoline tax on passenger carrier for hire invalidated because formula bore no reasonable relation to road use); *Interstate Transit v. Lindsey*, 283 U.S. 183, 190 (1931) (tax on passenger carriers for hire based on seating capacity invalidated because formula bore insufficient relation to use); *Sprout v. City of South Bend*, 277 U.S. 163, 170 (1928) (same). These cases will be referred to collectively as the "*Aero Mayflower* line of cases."

101. See *infra* text accompanying notes 107-10.

102. 430 U.S. 274 (1977).

103. 453 U.S. 609 (1981).

104. See *infra* text accompanying notes 133-35.

105. The Supreme Court of Pennsylvania described the axle tax as a "modified flat tax" because "it is imposed in accordance with actual use for [trucks] traveling less than 2,000 miles annually in the Commonwealth and at a flat \$36.00 per axle fee after 2,000 miles are traveled." *Scheiner*, 510 Pa. at 458-59, 509 A.2d at 853; see *supra* note 19.

106. This likewise applies to the \$25 marker identification fee, which ATA is also challenging. See Brief for Appellants at 28-34. For a discussion of ATA's challenge to the marker fee, see *supra* note 11.

very nature, however, will apparently never "measure" the services provided to a particular taxpayer.

### 1. THE *Aero Mayflower* LINE OF CASES

The axle tax should be upheld under the *Aero Mayflower* line of cases. These cases established the proposition that, for a user fee to be sustained under a commerce clause attack, the *total amount* of the fee must fairly relate to the services provided.<sup>107</sup> For instance, in *Capitol Greyhound Lines v. Brice*,<sup>108</sup> the latest in this line of cases, the Court upheld a tax imposed on common carriers at the rate of two-percent of the vehicle's market value. The Court ruled that flat user fees "are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads."<sup>109</sup> In sweeping terms, the Court reasoned that "administrative burdens of enforcement . . . may be sufficient to justify states in ignoring even such a key factor as mileage."<sup>110</sup>

More recently, in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*,<sup>111</sup> a decision not properly considered an *Aero Mayflower* flat tax case,<sup>112</sup> the Court in dicta further explained the fairly related standard for user fees. In *Evansville Airport*, the Court rejected an airline's challenge to a charge of one dollar for each passenger boarding commercial airlines at publicly-owned airports.<sup>113</sup> The proceeds of the fee were devoted to airport repair and maintenance.<sup>114</sup> The Court explained the fairly related standard as follows:

[W]hile state or local tolls must reflect a "uniform, fair and practical standard" relating to public expenditures, it is the *amount* of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the

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107. *E.g.*, *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 503 (1947) (allowing state to impose "a fair and reasonable nondiscriminatory tax as compensation for the use of its highways"); *Ingels v. Morf*, 300 U.S. 290, 296 (1937) (requiring taxpayer to show "that the fee is excessive for the declared purpose"); *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285, 289 (1935) ("fee is moderate in amount").

108. 339 U.S. 542 (1950).

109. *Id.* at 547.

110. *Id.* at 546-47 (footnote omitted).

111. 405 U.S. 707 (1972).

112. *See infra* note 150.

113. *Evansville Airport*, 405 U.S. at 709-10.

114. *Id.*

state facilities by individual users.<sup>115</sup>

The Pennsylvania axle tax should withstand challenge if analyzed under the standards set forth by these cases. It is graduated on the basis of a truck's number of axles. It fairly approximates use because the greater the number of axles, the heavier the truck, and consequently, the greater the damage to the road.<sup>116</sup> Certainly, the axle tax more accurately approximates use than did the tax upheld in *Capitol Greyhound Lines*, which was based on a vehicle's fair market value.<sup>117</sup> More importantly, the amount of the axle tax does not seem excessive. Considering the size of the trucks and combinations involved, \$36 per axle does not appear unreasonable (\$180 for a five axle combination).<sup>118</sup> In any event, ATA has challenged the formula and not the amount. That is, rather than attempting to show that the amount of the tax is unreasonable, ATA has tried to prove that foreign-based trucks pay a higher effective tax rate.<sup>119</sup> Under this line of attack, ATA has attempted to avoid the difficult burden of showing the excessiveness of the tax as applied.<sup>120</sup>

## 2. THE CONTINUED VITALITY OF *Aero Mayflower*

ATA, in its brief to the Supreme Court, argued that the *Aero Mayflower* flat tax decisions were effectively overruled by *Complete Auto Transit v. Brady*<sup>121</sup> and one of its progeny, *Commonwealth Edison Co. v. Montana*.<sup>122</sup> These decisions, ATA contended, hold

115. *Id.* at 716-17 (emphasis added).

116. See C. TAFF, *supra* note 2, at 45-46 ("The weight of vehicles affects the condition and life of the pavement by the amount of stress placed upon it.").

117. *Capital Greyhound Lines v. Brice*, 339 U.S. 542 (1950).

118. The Supreme Court of Pennsylvania found that the expenditures under the bridge improvement program would exceed one billion dollars over five years. *Scheiner*, 510 Pa. at 462, 509 A.2d at 855. Because axle tax revenues generated from the axle tax in fiscal year 1983-84 totaled only \$68 million from "all interstate motor vehicles," the court found that the axle tax was not "excessive or unrelated to the services provided by the Commonwealth." *Id.* at 462-63, 509 A.2d at 855.

119. See *infra* note 124 and accompanying text. In its brief to the Supreme Court, ATA apparently conceded that the amount of the axle tax is not unreasonable. Instead, it argued that the cumulative burden of flat taxes would be crippling. See Brief for Appellants at 35-37.

120. See *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 77-78 (1938) (taxpayer failed to show that tax is unreasonable); *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251-52 (1928) (taxpayer must "show that the aggregate charge bears no reasonable relation to the privilege granted"); see also Rosenberg, *State Taxation of Interstate Motor Carriers*, 46 VA. L. REV. 1221, 1225 (1960) ("[C]omplaining carrier . . . [must] meet[ ] the difficult burden of proof that the tax exceeds fair compensation . . ."). It seems doubtful that a class representing all out-of-state truckers could successfully challenge a flat tax because the tax certainly must fairly approximate the use of at least some class members.

121. 430 U.S. 274 (1977).

122. 453 U.S. 609 (1981). ATA stated that *Aero Mayflower* "is out of harmony . . . with more recent Commerce Clause jurisprudence." Brief for Appellants at 15, 47-48; see also

that the *computational formula*, rather than the *amount*, of the tax must bear a fair relationship to the taxpayer's presence or activities in the state.<sup>123</sup> ATA maintained that, under this standard, the axle tax is not fairly related to "the extent of the presence of interstate trucks on the highways of Pennsylvania."<sup>124</sup>

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American Trucking Ass'ns v. Gray, 288 Ark. 488, 497, 707 S.W.2d 759, 762 (1986) (rejecting ATA's argument that *Complete Auto* "overruled the Court's decisions in the two *Aero Mayflower* cases"), *appeal filed*, 55 U.S.L.W. 3175 (U.S. Sept. 3, 1986) (No. 86-358); American Trucking Ass'ns v. Goldstein, 301 Md. 372, 383-84, 483 A.2d 47, 53-54 (1984) (rejecting ATA's claim that *Complete Auto* and *Commonwealth Edison* "effectively overruled the flat fee cases").

123. Brief for Appellants at 49; *see Goldstein*, 301 Md. at 384, 483 A.2d at 54.

124. Brief for Appellants at 49. In its brief, ATA framed its disproportionate burden argument somewhat confusingly. ATA contended that the axle tax is invalid under the commerce clause because it both discriminates in effect against interstate commerce, and is not fairly related to the services provided by the state. *Id.* at 31, 49. These two deficiencies arise because, as a flat tax, the axle tax operates "to impose an effective tax rate, in terms of cost per mile, that is many times higher for the typical truck registered outside Pennsylvania than for a comparable truck registered in the State." *Id.* at 28. The premise of this argument is, of course, that a Pennsylvania-registered truck uses Pennsylvania's highways far more than does a foreign-registered truck. *Id.* at 33. *But see* Brief for Appellees at 36-38, *Scheiner* (No. 86-357) (arguing that "evidence is far from conclusive" that trucks registered outside Pennsylvania pay a higher effective tax rate).

ATA's argument truly centers upon its claim that the axle tax violates the commerce clause because it disproportionately burdens foreign-based trucks due to "their more limited presence in the state." Brief for Appellants at 31. Nevertheless, ATA cleverly shoehorns in the discriminatory effect argument under the following reasoning: The burden of the axle tax is disproportionately imposed on the less frequent users of Pennsylvania's highways. Because statistics show that foreign-based trucks are these less frequent users, the tax singles them out for a disproportionate share of the burden (even though some in-state trucks may also get soaked by the tax). *See id.* at 32-34.

A discrimination analysis, however, is not appropriate. The axle tax does not treat taxpayers differently on the basis of their state of origin. Its differential treatment is based on level of use. It is therefore inaccurate to claim that the tax "discriminates" against interstate commerce. *See Commonwealth Edison*, 453 U.S. at 617-20. For doctrinal clarity, ATA's argument should be analyzed under the fairly related test. *See id.* at 620 ("[A]ppellants' discrimination theory ultimately collapses into their claim that the Montana tax is . . . not 'fairly related to the services provided by the State.'"); *see also Gray*, 288 Ark. at 498, 707 S.W.2d at 763 (taxpayer's fairly related argument "can be answered under the same authority" as its discrimination argument); *Scheiner*, 510 Pa. at 454 n.14, 509 A.2d at 851 n.15 (applying a fairly related analysis to ATA's disproportionate burden argument although recognizing that this argument "raises discrimination concerns under the third prong as well as the fourth"); Brief for Appellees at 24 (arguing that ATA's "discrimination claim . . . collapses into the [fairly related] claim and must meet the same test").

Despite attempting to mask its disproportionate burden argument as a discrimination-in-effect one, ATA has revealed that its real quarrel is with the relationship of the axle tax to use of Pennsylvania's highways. This point is illustrated by comparing ATA's present discriminatory effect argument with its earlier argument that the axle tax discriminates against interstate commerce in effect because of the simultaneous reductions in registration fees. *See supra* text accompanying notes 41-43. The earlier argument alleged discrimination because a locally-registered truck was effectively exempted from the axle tax on the sole basis that it was locally registered. Under the present argument, "discrimination" is a function of the truck's relative use of the state's highways. ATA, moreover, proposes that, as an alternative to flat-

In the period before the Court decided *Complete Auto*, the Court's commerce clause analysis of state taxes was beset with formalistic labels.<sup>125</sup> The *Aero Mayflower* cases were decided during this period.<sup>126</sup> In this period, the Court based its tax analysis on a direct/indirect distinction. A state was prohibited from imposing a direct tax on the "privilege" of engaging in an exclusively interstate activity or transaction. The Court, however, recognized that a state had a peculiar interest in exacting compensation from users of its services and facilities, whether or not the user was a solely interstate concern.<sup>127</sup> Accordingly, it carved out an exception to the rule and thus afforded a basis for the *Aero Mayflower* decisions: a state could directly burden interstate commerce with a tax if the levy was for the privilege of using its highways (rather than for the privilege of engaging in interstate commerce).<sup>128</sup> Unfortunately, the line drawn between a privilege tax and a user fee was often imperceptible.<sup>129</sup>

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rate taxes, states impose mileage-based taxes which, as ATA contends, reflect actual use. Brief for Appellants at 39-40. In choosing such an alternative, ATA reveals that its ultimate dispute is with the relationship of the axle tax to actual use.

For the discriminatory effect argument, ATA relied heavily upon *Nippert v. City of Richmond*, where the Court invalidated a fixed-sum license tax the city of Richmond imposed upon itinerant merchants. 327 U.S. 416 (1946). ATA quoted the Court as stating "that 'a single act of . . . solicitation would bring the [flat tax] into play' and that the tax 'inherently bore no relation to the volume of business done or of returns from it.'" Brief for Appellants at 29 (quoting *Nippert*, 327 U.S. at 427). *Nippert*, however, did not involve a user fee. Unless the Court reevaluates its position that user fees are to be "put to one side" and decided under a different "fairly related" standard than general revenue taxes, *Nippert* has no bearing on the instant case. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 & n.12 (1981).

125. See *supra* note 35.

126. *Complete Auto* was decided in 1977 while the latest of the *Aero Mayflower* line of cases was decided in 1950. See cases cited *supra* note 100.

127. See *Clark v. Poor*, 274 U.S. 554, 557 (1927) ("The highways are public property. . . . Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep."); *Kane v. New Jersey*, 242 U.S. 160, 167 (1916) (power of state to legislate in the area of highway transportation has been "broadly sustained"); *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915) ("[W]here a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."); see also P. HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* 122 (1953) ("Few subjects of state regulation are so peculiarly of local concern as the use of state highways.").

128. See cases cited *supra* note 127.

129. As the Court stated in *Aero Mayflower* itself:

Appellant therefore confuses . . . a tax affirmatively laid for the privilege of using the state's highways, with a tax not imposed on that privilege but upon some other such as the privilege of doing interstate business. Though necessarily related, in view of the nature of interstate motor traffic, the two privileges are not identical, and it is useless to confuse them or to confound a tax for the privilege of using the highways with one the proceeds of which are necessarily devoted to maintaining them.

*Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 504-05 (1947) (citation omitted); see also Brief for Appellants at 42 & n.20 (arguing that the privilege tax rationale of



The Court finally abandoned the direct/indirect tax burden analysis in *Complete Auto*. The Court held that a state could impose a direct "privilege" tax on interstate commerce if the tax satisfied a four-prong test.<sup>130</sup> ATA, in its brief to the Supreme Court, suggested that this decision "rendered obsolete" the rationale of the privilege tax/user fee distinction.<sup>131</sup> Because a state was now free to impose a tax that directly burdened interstate commerce, there was no need to advert to a user fee justification for saving a tax that directly burdened interstate users of a state's highways. As the evanescent distinction between "privilege" and "user" taxes has disappeared, the new four-prong test should apply to all taxes.<sup>132</sup>

*Commonwealth Edison Co. v. Montana*<sup>133</sup> elaborated on the fourth prong—the fairly related requirement—of the *Complete Auto* test. *Commonwealth Edison* involved a challenge to Montana's thirty percent severance tax on coal mined in the state.<sup>134</sup> In upholding the tax, the Court rejected the argument that the proper inquiry was whether the *amount* of the severance tax fairly related to the services provided by the state. Remember, this inquiry was the exclusive focus of *Aero Mayflower*. Rather, in *Commonwealth Edison*, the Court ruled that "when the *measure* of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto* test that the State is imposing an undue burden on interstate commerce."<sup>135</sup>

It may therefore be argued that *Complete Auto* and *Common-*

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*Aero Mayflower* no longer has validity). Compare *Interstate Transit v. Lindsey*, 283 U.S. 183 (1931) (tax based on carrying capacity invalidated as a tax on privilege of engaging in interstate commerce) with *Hicklin v. Coney*, 290 U.S. 169 (1933) (tax based on carrying capacity upheld as a tax on privilege of using the state's highways).

130. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). The test is set out in *supra* note 33.

131. Brief for Appellants at 31, 47-48 ("Complete Auto . . . unquestionably prohibit[s] a state tax that, by failing to account for out-of-state companies' lesser presence in the state, operates to impose a greater tax burden on those companies than on in-state firms.") ("*Aero Mayflower* . . . is out of harmony . . . with more recent Commerce Clause jurisprudence . . .") ("Especially in the Commerce Clause area, a rule that has been rendered obsolete by subsequent legal and factual developments has no legitimate claim to continued application."); see also cases cited *supra* note 122.

132. Indeed, the Court has referred to this test in virtually every case in which a state's tax was challenged under the commerce clause. See *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 n.6 (1984); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 227-28 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Washington Dep't of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978).

133. 453 U.S. 609 (1981).

134. *Id.* at 613.

135. *Id.* at 629 (emphasis added).

*wealth Edison* effectively overruled the flat tax cases. *Complete Auto* discarded the distinction between direct and indirect taxes on interstate commerce and established a test for determining the validity of taxes that burden interstate commerce. Because the old privilege tax/user fee distinction is no longer needed as a justification for user fees (to evade the prohibition on direct burdens), the new test should be applied to the axle tax. As developed by *Commonwealth Edison*, the fourth prong of this test would invalidate the flat-rate axle tax because the tax is not *measured* to the activities of interstate commerce trucks in Pennsylvania. The *Aero Mayflower* cases, thus, have no more vitality as precedent.

Yet, there is a viable argument that the *Aero Mayflower* cases have continuing vitality because the Court has cited to them with approval on at least three separate occasions.<sup>136</sup> First, *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*,<sup>137</sup> a modern decision, upheld a user fee under an *Aero Mayflower* analysis.<sup>138</sup> This case admittedly is tainted by the fact that it was decided before *Complete Auto*.<sup>139</sup> Also, it involved a charge on the use of airport facilities rather than highway user fees. Nonetheless, *Evansville Airport* at least indicates that the *Aero Mayflower* cases, although decided some twenty years earlier, are not timeworn relics with no utility save display in a constitutional law museum.<sup>140</sup>

Second, in *Massachusetts v. United States*,<sup>141</sup> which was decided soon after *Complete Auto*, the Court relied upon the *Aero Mayflower* cases to resolve a question concerning state immunity from federal taxation. Drawing an analogy to the *Aero Mayflower* commerce clause cases,<sup>142</sup> the *Massachusetts* Court upheld a federal flat fee on users of aircraft in the navigable airspace of the United States as applied to aircraft owned by the state. The state, however, argued that flat user fees, while permissible in commerce clause contexts, should not be permitted in the state immunity context.<sup>143</sup> It asserted that the

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136. See Brief for Appellees at 24.

137. 405 U.S. 707 (1972).

138. The Court, for example, stated that "it is the amount of the tax, not its formula, that is of central concern." *Id.* at 716. For a discussion of *Evansville Airport*, see *supra* text accompanying notes 111-15.

139. That is, if it is true that *Complete Auto* somehow overruled the *Aero Mayflower* cases, *Evansville Airport* would offer no support.

140. See Brief for Appellees at 24 (arguing that the *Aero Mayflower* flat tax analysis "is [not] from a bygone era"). But see Brief for Appellants at 48 (arguing that the *Aero Mayflower* rule "has been rendered obsolete by subsequent legal and factual developments").

141. 435 U.S. 444 (1978).

142. *Id.* at 463-64 (stating that the argument that a flat tax "is not directly related to the degree of use . . . has been confronted and rejected in analogous contexts").

143. *Id.* at 464.

values protected by the doctrine of state immunity "require that any user tax be closely calibrated to the amount of any taxpayer's actual use."<sup>144</sup> The Court rejected this argument: "[E]ven if the flat fee does cost [the state] somewhat more than it would have to pay under a perfect user-fee system, there is still no interference with the values protected by the implied constitutional tax immunity of the States."<sup>145</sup> As noted by the dissent, however, the "essential sovereign interests" of the states are entitled to greater deference than are "ordinary business enterprises."<sup>146</sup> Therefore, if flat user fees are valid as against a state immunity argument, then *a fortiori* they must be valid as against an undue burden on interstate commerce argument.

Finally, in analyzing a severance tax under *Complete Auto's* fairly related prong, the Court, in *Commonwealth Edison*, "put [cases involving user fees] to one side" as irrelevant to its discussion of a general revenue tax.<sup>147</sup> Unlike user fees, a general revenue tax is valid only if its measure is fairly related to the taxpayer's activities in the state.<sup>148</sup> Thus, rather than overruling the flat tax cases, *Commonwealth Edison* cited them with approval in their context.

Neither the argument for, nor the argument against, the continuing vitality of the *Aero Mayflower* cases can offer a definitive answer to the question. Although the Court has cited the *Aero Mayflower* cases in modern opinions, it has neither reaffirmed nor overruled them. Since 1950, the year in which the last *Aero Mayflower* case was decided,<sup>149</sup> the Court has not been confronted with a case where flat-rate highway fees have been challenged under the commerce clause.<sup>150</sup>

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144. *Id.* at 464-65.

145. *Id.* at 466.

146. *Id.* at 473 (Burger, C.J. & Rehnquist, J., dissenting).

147. *Commonwealth Edison*, 453 U.S. at 621-22 & n.12 (citing *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972)); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Ingels v. Morf*, 300 U.S. 290 (1937)); see also *Commonwealth Edison*, 453 U.S. at 647 & n.13 (Blackmun, Powell & Stevens, JJ., dissenting on other grounds) ("[I]nterstate commerce can be required to 'pay its own way' in a narrower sense as well: the State may tax interstate commerce for the purpose of recovering those costs attributable to the activity itself.").

148. See *Commonwealth Edison*, 453 U.S. at 621-22 & n.12, 629.

149. *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950). For a discussion of *Capitol Greyhound Lines*, see *supra* text accompanying notes 108-10.

150. Although the Court adverted to the *Aero Mayflower* cases in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), that case did not involve a flat user fee. The challenged fee was a charge of one dollar for each person boarding a commercial aircraft. *Id.* at 709-10. The fee was proportioned to actual use: the more passengers an airline served, the greater the wear and tear to the state's airport facilities, and the greater the tax. Because the Court therefore was faced with a tax that clearly related to actual use, it had no occasion to reconsider whether flat taxes were valid. See Brief for Appellants at 48 ("[R]ather than being a discriminatory flat tax, the \$1 fee in *Evansville* . . .

The Court in *American Trucking Associations v. Scheiner*<sup>151</sup> therefore is largely free to determine whether *Aero Mayflower* is still "good law."

### 3. *Aero Mayflower* RECONSIDERED

The *Aero Mayflower* rule that the *aggregate amount*, rather than the *computational formula*, of a user fee must fairly relate to the services provided is supported by two basic rationales, both of questionable validity today. First, a carrier who pays the flat tax, and thus purchases a theoretically unlimited privilege of using the state's highways, cannot complain over its own failure to fully enjoy the privilege. As stated by Justice Cardozo in *Aero Mayflower*: "The fee is for the privilege of a use as extensive as the carrier wills that it shall be. . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."<sup>152</sup> This position, however, mercilessly ignores the plight of the carrier who engages solely in interstate commerce. As forcefully argued by ATA in its brief to the Supreme Court:

[This] reasoning founders on the fact that an interstate truck cannot be in more than one state at a time, and its route is governed by the demands of its shippers. In addition, as an increasing number of states adopt flat highway taxes, each certainly cannot justify its levy on the theory that trucks should spend more time in that state and less in others.<sup>153</sup>

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was proportional to the governmental services provided and operated to treat all users equally.").

Although the Court in *Massachusetts v. United States*, 435 U.S. 444 (1978), seemed to approve of the *Aero Mayflower* cases, this decision raised an implied state immunity issue and not a commerce clause question. Concededly, *Massachusetts* did involve a flat rate user fee and relied even more heavily upon the *Aero Mayflower* cases than did *Evansville Airport*. Its use of the flat tax cases, however, was only by way of analogy. See Brief for Appellants at 48.

User fees were not involved in either *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), or *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). In *Complete Auto*, the Court upheld a tax on the "privilege" of doing business within the state as applied to an exclusively interstate concern. 453 U.S. at 289. It thus overruled cases that distinguished between direct and indirect taxes on interstate commerce. As a case merely rejecting the view that "interstate commerce is immune from state taxation," *id.* at 288, *Complete Auto* provides scant support for the position that the *Aero Mayflower* cases have been effectively overruled. In *Commonwealth Edison*, the Court held that the *Aero Mayflower* rule (that the amount of the tax must fairly relate to the provided services) did not apply to general revenue taxes. 453 U.S. at 621-22 & n.12. It did not suggest that this rule was no longer applicable in user fee cases.

151. 510 Pa. 430, 509 A.2d 838, *prob. juris. noted*, 107 S. Ct. 430 (1986).

152. *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285, 289 (1935); see *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 506 n.19 (1947). The Supreme Court of Pennsylvania accepted this argument with respect to the marker identification fee. *Scheiner*, 510 Pa. at 457, 509 A.2d at 852.

153. Brief for Appellants at 45; see also Barrett, "Substance" vs. "Form" in the Application

A tax that disproportionately burdens interstate commerce should be based on a stronger foundation.

Flat-rate user fees are also justified on the ground that it is infeasible or inconvenient to administer a tax that is precisely calibrated to use by each vehicle. The Court articulated this concern in *Capitol Greyhound Lines v. Brice*,<sup>154</sup> the latest of the *Aero Mayflower* cases, as follows:

[W]ith full appreciation of congenital infirmities of the Maryland formula—and indeed of any formula in this field—as well as of our present rules to test its validity, we are by no means sure that the remedy suggested by appellants would not bring about greater ills. Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors . . . are so countless that we must be content with “rough approximation rather than precision.” Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens *may* be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers.<sup>155</sup>

Essentially, the Court, after weighing the costs and benefits of requiring a more equitable tax formula, decided that the balance should fall on the side of state discretion. The Court’s reasoning, however, did not appear to give the state unbridled discretion in arriving at its tax formula. Indeed, the Court stated that “upon this type of reasoning rests our *general rule*” that user fees are valid unless their amount exceeds fair compensation.<sup>156</sup> Thus, *Capitol Greyhound Lines* seems

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of the Commerce Clause to State Taxation, 101 U. PA. L. REV. 740, 788 (1953) (“[T]he very nature of the business indicates that the interstate carrier will not make as full a use of the state highways as the intrastate carrier.”); Kauper, *State Taxation of Interstate Motor Carriers*, 32 MICH. L. REV. 171, 203, 207 n.234 (1933) (arguing that the “heart of the difficulty” is the imposition of flat taxes that are “not apportioned according to the use made of the highways”); Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1267 (1940) (arguing that fees not based on mileage “work a particular hardship on carriers not operating over regular routes”).

154. 339 U.S. 542 (1950).

155. *Id.* at 546-47 (citation omitted) (emphasis added); see *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939) (“state is not required to compute with mathematical precision the cost to it of the services necessitated by the caravan traffic”); Brief for Appellees at 31-32 (asserting that “it is somewhat premature to argue that usage taxes based on mileage are so easy to administer that this Court should have no concerns about requiring such taxes”); cf. *Massachusetts v. United States*, 435 U.S. 444, 466 (1978) (“If the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system.”).

156. *Capitol Greyhound Lines*, 339 U.S. at 547 (emphasis added).

to allow some leeway for challenging tax formulas.<sup>157</sup> Unfortunately, the actual holding of the case effectively rules out such a narrow reading.<sup>158</sup>

The Court should reject the *Capitol Greyhound Lines* holding, but adopt the reasoning suggested (but not followed) in that case. Flat taxes represent a dual menace to interstate commerce. First, these taxes disproportionately burden interstate carriers which, by their very nature, cannot use a state's roads to the same extent as local carriers.<sup>159</sup> Secondly and relatedly, if these taxes receive the Court's constitutional imprimatur, many more states can be expected to levy them. The resulting cumulative burden may prove to be highly disruptive to the interstate carrier business.<sup>160</sup>

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157. In their dissent, Justices Frankfurter and Jackson argued that there should be such leeway:

Systems of taxation need not achieve the ideal. But the fact that the Constitution does not demand pure reason and is satisfied by practical reason does not justify unreason. . . . Reason precludes the notion that a tax for a privilege may disregard the absence of a *nexus* between privilege and tax.

*Id.* at 552-53 (Frankfurter & Jackson, JJ., dissenting).

158. The Court upheld a fee of two percent upon the "fair market value" of vehicles engaged in interstate commerce. *Id.* at 543. The dissent pointed out that this tax "has at best a most tenuous relationship to the privilege of using the roads, since differences in value are due to a vehicle's appointments [equipment] or its age or to other factors which have no bearing on highway use." *Id.* at 553. The Court nonetheless has attempted to give *Capitol Greyhound Lines* a narrow reading. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972). In *Evansville Airport*, the Court remarked that the tax involved in *Capitol Greyhound Lines* "was supplemental to a standard mileage charge imposed by the State, so that 'the total charge as among carriers [did] vary substantially with the mileage traveled.'" *Id.* at 716 (quoting *Capitol Greyhound Lines*, 339 U.S. at 546) (emphasis added) (brackets in original). This, however, ignores the fact that the Court, when passing on the validity of one tax, has generally refused to consider the impact of other taxes. *See Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 502 (1947); *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 77-78 (1939); *cf. Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251 (1928) (Discrimination against interstate commerce is not present merely because the tax is "different in form or adopt[s] a different measure or method of assessment [from the one imposed on intrastate commerce], or that it is subject to three kinds of taxes while intrastate carriers are subject only to two or to one."). In any event, the Court's observation in *Evansville Airport* would prove too much, as almost every state imposes a mileage-related fuel tax. *See U.S. DEP'T OF TRANSP., FED HIGHWAY ADMIN., HIGHWAY TAXES AND FEES, HOW THEY ARE COLLECTED AND DISTRIBUTED*, 1986, at 7-9 (1986).

159. For a discussion of ATA's disproportionate burden argument, see *supra* note 124 and accompanying text.

160. *See Capitol Greyhound Lines*, 339 U.S. at 557 (Frankfurter & Jackson, JJ., dissenting) (finding a "danger—and not a fanciful danger—that the interstate carrier will be subject to" the cumulative burden of multiple taxation); *see also Scheiner*, 510 Pa. at 472, 509 A.2d at 860 (Nix, C.J. & McDermott, J., dissenting) (arguing that if all states imposed legislation similar to the axle tax, "the impact upon interstate commerce would indeed be crippling").

## IV. CONCLUSION

An alternative to the *Aero Mayflower* version of the fairly related test is needed when examining highway user fees. The *Capitol Greyhound Lines* reasoning provides a good starting point for this alternative. In addition to the excessiveness-of-amount test heretofore employed, the Court should adopt a less burdensome alternative test.<sup>161</sup> This approach would balance the administrative cost to the state of enforcing and calculating the tax against the severity of the tax's burden on interstate commerce: the more burdensome the tax, the greater the burden upon the state to prove an absence of feasible alternatives to a flat tax.<sup>162</sup> In this way, a state could impose substantial taxes on out-of-state trucks as long as the taxes reasonably reflect the extent and manner of use. The interests of the states would be protected because they could still exact fair compensation from interstate commerce. Interstate carriers would be protected from the danger of cumulative taxation.

Under such an approach, the Court should invalidate the axle tax. It imposes an annual tax of between \$72 and \$180 on each truck or combination using Pennsylvania's highways for over 2000 miles a year. Because the axle tax goes beyond a mere nominal charge, it should reasonably reflect the extent and manner of use.<sup>163</sup> The axle tax reflects the *manner* of a truck's use of Pennsylvania's highways because a tax graduation based on axle number closely reflects the degree of wear and tear to which the state's roads and bridges will be subjected. However, the axle tax does not reflect the *extent* of the carrier's use of Pennsylvania's highway facilities. Once the carrier exceeds the 2000 mile limit, it pays a substantial tax that does not account for the total miles driven in Pennsylvania. Although the Pennsylvania Supreme Court in upholding the axle tax found that the

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161. The Court may be guided by its commerce clause analysis of state regulations of interstate commerce where it has employed a less restrictive alternative test. See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); see also *Tatarowicz & Mims-Velarde*, *supra* note 46, at 884 n.16 (arguing that a balancing approach may be used in certain situations when analyzing state taxation under the commerce clause).

162. In its brief to the Supreme Court, ATA stated that flat taxes cannot be "justified by a state's reflexively asserting, or a court's uncritically accepting, a claim of administrative convenience." Brief for Appellants at 42 (emphasis added). It thus acknowledged that there are occasions when a state, for administrative convenience reasons, may legitimately impose a flat tax.

163. Compare the axle tax with the \$5 marker identification fee. 75 PA. CONS. STAT. ANN. § 2102(b) (Purdon Supp. 1986). For a discussion of ATA's challenge to the marker fee when it was \$25, see *supra* note 11.

aggregate amount of the tax was not excessive, it offered no reason why a mileage-based tax would not be a feasible alternative.

ROBERT J. BORRELLO\*

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