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Increasing State Taxing Power over Interstate Commerce: Oklahoma Tax Commission v. Jefferson Lines

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INCREASING STATE TAXING POWER OVER INTERSTATE COMMERCE: *OKLAHOMA TAX COMMISSION v. JEFFERSON LINES*

I. INTRODUCTION

"The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."[1] With these words, the Framers of the Constitution of the United States granted the legislative branch the power to oversee and coordinate interstate commerce. The "Commerce Clause," as this constitutional language is called,[2] although expressly granting power to the Federal government, does not expressly forbid the same exercise of power by the states.[3] In fact, nowhere does the Constitution express that states *may not* "regulate Commerce . . . among the several States."[4] This inconsistency has left a trail of Supreme Court decisions that began with *Gibbons v. Ogden*[5] and has culminated with the subject of this case note, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*[6]

In *Jefferson Lines*, the United States Supreme Court held a state may constitutionally pass legislation that imposes a tax on the sale of bus tickets for interstate travel.[7] In its decision, the Court found an Oklahoma tax to be constitutionally sound according to a four part test set forth in *Complete Auto Transit, Inc. v. Brady*.[8] The *Jefferson Lines* decision reversed the District Court and Court of Appeals which based their decisions on *Central Greyhound Lines, Inc. v. Mealy*.[9] In *Central Greyhound*, the Court held that a tax on bus tickets for interstate travel should be apportioned to represent only the percentage of mileage traveled in the taxing state.[10]

This case note is divided into seven sections. Section II outlines the facts of *Jefferson Lines* and the issues faced by the Court in that case. Section III sets forth the case law that has surrounded the Commerce Clause as it relates to state taxation of interstate commerce. Section IV describes the Court's reasoning behind its decision in *Jefferson Lines*. In Section V the dissent's arguments

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1. U.S. CONST. art. I, § 8, cl. 1.
2. *See, e.g.*, WILLIAM O. DOUGLAS, WE THE JUDGES (1956).
3. *See* U.S. CONST. art. I, § 8, cl. 1.
4. *Id.*
5. 22 U.S. (9 Wheat.) 1 (1824).
6. 115 S. Ct. 1331 (1995).
7. *Id.* at 1346.
8. 430 U.S. 274 (1977).
9. 334 U.S. 653 (1948). *See Jefferson Lines*, 115 S. Ct. at 1335.
10. *See infra* text accompanying notes 72-75.

are summarized. In Section VI this case note analyzes the validity of the majority's reasoning and concludes that the decision was improper because the tax fails the *Complete Auto* test due to lack of proper apportionment as dictated in *Central Greyhound.* Finally, Section VII briefly suggests how this decision may affect the future of interstate bus couriers.

II. THE FACTS AND ISSUES

A. Facts

Respondent, Jefferson Lines, Inc., is a Minnesota corporation providing passenger bus service for travel originating in Oklahoma.[11] From 1988 to 1990, Respondent sold bus tickets for both interstate and intrastate travel.[12] During this time, Oklahoma levied taxes on all sales of transportation for hire.[13] Oklahoma legislation provides that the tax is to be charged to the consumer, collected by the sellers and then remitted to the state.[14] The statute also directs that the vendor shall be liable for the tax if it is not collected or remitted.[15]

Respondent, Jefferson Lines, did not collect nor remit any taxes for the sale of interstate bus tickets from 1988 to 1990.[16] However, it did comply with the taxing statutes for sales of intrastate tickets during this time.[17] On October 27, 1989, Jefferson Lines filed for bankruptcy protection.[18] The Oklahoma Tax Commission reacted by filing proof of claims in Bankruptcy Court maintaining that Jefferson Lines was liable to the state for the uncollected taxes.[19] Jefferson Lines defended itself against the claim of indebtedness by arguing that Oklahoma's tax on interstate travel imposed an undue burden on interstate commerce and violated the Commerce Clause.[20]

The Bankruptcy Court agreed with Jefferson Lines, as did the District Court and the United States Court of Appeals for the Eight Circuit.[21] The

11. *See Jefferson Lines,* 115 S. Ct. at 1334-35.
12. *See id.* at 1335.
13. *See id.* at 1334 n.1. The Oklahoma taxing statute stated:

> 1. There is hereby levied upon all sales, not otherwise exempted . . . an excise tax of four percent of the gross receipts or gross proceeds of each sale of the following: . . . (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire . . . .

OKLA. STAT. tit. 68, § 1354(1) (Supp. 1988). During the years that Jefferson Lines, Inc. was selling bus tickets in Oklahoma, the tax percentage was 4%. *See Jefferson Lines,* 115 S. Ct. at 1334 n.1.

14. *See* OKLA. STAT. tit. 68, § 1361(A) (1991). "The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state." *Id.*
15. *See id.* "Every person required to collect any tax imposed by this article, . . . shall be personally liable for said tax." *Id.*
16. *See Jefferson Lines,* 115 S. Ct. at 1335.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id. See also supra* text accompanying note 1.
21. *See Jefferson Lines,* 115 S. Ct. at 1335.

Court of Appeals based its decision primarily on two Supreme Court decisions:[22] *Complete Auto Transit, Inc. v. Brady*[23] and *Central Greyhound Lines, Inc. v. Mealy*.[24] *Complete Auto* set forth a four prong test for determining the constitutionality of a state tax on interstate commerce.[25] One of the prongs requires that the tax be "properly apportioned."[26] In *Central Greyhound*, the Court held the state of New York could not tax the entire gross receipts of a bus company selling tickets for interstate travel.[27] In the Court's decision it stated such a tax must be apportioned and tax only the percentage (by mileage) of the bus trip that occurred in New York.[28] The Court of Appeals found that the facts of *Jefferson Lines* were analogous with the facts of *Central Greyhound* and, therefore, found the Oklahoma tax to be "unapportioned" and in violation of the Commerce Clause according to the *Complete Auto* test.[29]

B. Issue

The Supreme Court granted certiorari[30] in order to determine whether the Oklahoma taxing statute was constitutional. More specifically, the Court addressed whether the tax passed the *Complete Auto* test and whether the case was distinguishable from *Central Greyhound*.[31]

III. THE HISTORY OF THE COMMERCE CLAUSE AS IT RELATES TO STATE TAXATION OF INTERSTATE COMMERCE

A review of Chief Justice Marshall's comments in *Gibbons v. Ogden*[32] reveals that the interpretation of the Commerce Clause has substantially changed since 1824. One could argue that if Justice Marshall's views on the Commerce Clause and taxation were followed today, the issue in *Jefferson Lines* would not have been considered a "Commerce Clause" issue at all. In *Gibbons*, Marshall stated "[t]here is no analogy, . . . between the power of taxation and the power of regulating commerce"[33] because "[t]he power of taxation is . . . a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time."[34] However, the basis of the *Jefferson Lines* decision, made 170 years after *Gibbons*, rests on a

22. *See* Oklahoma *ex rel.* Oklahoma Tax Comm'n v. Jefferson Lines, Inc. (*In re* Jefferson Lines, Inc.), 15 F.3d 90, 91-92 (8th Cir. 1994).
23. 430 U.S. 274 (1977).
24. 334 U.S. 653 (1948).
25. *See Complete Auto*, 430 U.S. at 279.
26. *Id.*
27. *See Central Greyhound*, 334 U.S. at 663. *See also infra* text accompanying notes 72-75.
28. *See id.*
29. *See In re Jefferson Lines, Inc.*, 15 F.3d at 93.
30. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 114 S. Ct. 2672 (1994).
31. *See generally* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995).
32. 22 U.S. (9 Wheat.) 1 (1824).
33. *Id.* at 200.
34. *Id.* at 199.

question of how a state tax is affected by the Commerce Clause.[35] This section sets forth a line of cases which begins with a finding that there is "no analogy . . . between the power of taxation and the power of regulating commerce,"[36] and ends with a finding that a four pronged test is required to determine whether a state tax is "consistent with the Commerce Clause."[37]

Marshall's rather broad statements in *Gibbons* concerning the lack of analogy between taxation and regulation of commerce was put to the test three years later in *Brown v. Maryland*.[38] In *Brown*, the Supreme Court faced a situation in which a Maryland tax had a final effect of taxing all commerce imported into the State.[39] The Court held that the tax was in violation of the Constitution's prohibition of state tax on imports or exports.[40] In the *Brown* decision, Marshall expressed a need to keep states from any taxation of interstate commerce because of its inherent contradiction to the powers granted to Congress by the Commerce Clause.

> It results, necessarily . . . that the taxing power of the States must have some limits . . . . It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another . . . ? Or from taxing the transportation of articles passing from the State itself to another State . . . ? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given.[41]

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35. The *Jefferson Lines* case is in essence a decision addressing the constitutionality of a state tax with respect to the Commerce Clause. By applying the *Complete Auto* test to determine whether the tax is constitutional one can logically infer that the Court accepts that there is a possibility that a state tax could be unconstitutional with respect to the Commerce Clause.

36. *Gibbons*, 22 U.S. (9 Wheat.) at 200.

37. *Jefferson Lines*, 115 S. Ct. at 1334.

38. 25 U.S. (12 Wheat.) 419 (1827). The *Gibbons* case, although first to address the Commerce Clause in the Constitution, was an exercise in analyzing the extent of power that was given the federal government. In *Gibbons* a federal statute that allowed Gibbons to run ferries into New York harbors was in direct conflict with a New York statute that had given exclusive rights to Fulton and Livingston to run ferries there. Essentially the decision established that the federal government may encroach upon interstate commerce within individual states because the Commerce Clause gave them such power. The *Gibbons* case did not, however, decide to what extent the States could regulate interstate commerce. *Brown v. Maryland*, therefore, was the first case that required such an analysis.

In *Brown*, a State statute effectively taxed all imported (interstate) commerce. Justice Marshall developed a test which addressed the physical status of the package. Essentially, he found that goods that were sold in the same package in which they were brought into the state were still part of interstate commerce and could not be taxed by state statutes. Specifically he stated,

> This indictment is against . . . selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes then with the general property of the State, by breaking up his packages, and travelling [sic] with them as an itinerant pedlar.

Brown, 25 U.S. (12 Wheat.) at 443.

39. *See id.* at 423-24.

40. *See id.* at 444-46. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ." U.S. CONST. art. I, § 10, cl. 2.

41. *Brown*, 25 U.S. (12 Wheat.) at 448-49.

In case decisions that followed, this implied power to restrict the states from taxing interstate commerce, although never expressly granted to Congress, has been held to exist as the Dormant Commerce Clause.[42]

Twenty years after *Brown*, the validity of the Dormant Commerce Clause was still being questioned.[43] In a Supreme Court decision which combined three cases challenging Massachusetts, Rhode Island, and New Hampshire liquor licensing statutes, Chief Justice Taney found that the Dormant Commerce Clause did not completely bar the states from regulating interstate commerce.[44] Chief Justice Taney opined that the Commerce Clause prevented states from regulating interstate commerce only when such regulation is in conflict with Congressional statutes.[45] Specifically, Justice Taney stated:

> [I]t appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States .... The State may ... make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.[46]

In hopes of developing a more consistent interpretation of the Commerce Clause, the Supreme Court modified the *Thurlow* decision only four years later. In *Cooley v. Board of Wardens*,[47] the Court held that states should only be allowed to regulate local commerce not already regulated by Congress.[48] "The grant of commercial power to Congress does not contain any terms which ex-

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42. *See supra* text accompanying notes 1, 3. *See also* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1335-36 (1995); Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534-535 (1949).

43. *See* Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 578-79 (1847).

44. *See id.*

45. *See id.*

46. *Id.* The case was an opinion regarding three complaints that were argued together. The three cases argued were Thurlow v. Massachusetts, Pierce v. New Hampshire, and Fletcher v. Rhode Island. All three addressed statutes for the respective states concerning the sale of liquor without a license. Thurlow was convicted, the jury stating that he

> did presume to be, and was, a retailer of wine, brandy, rum, and spirituous liquors, to one Samuel Goodale, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Goodale two quarts of spirituous liquors, and no more, against the peace of said Commonwealth and the form of the statute in such case made and provided.

Id. at 505. Like other state statutes in question, the Massachusetts statute essentially demanded that a person be licensed to sell liquors according to their statutes. The defendants in each case argued that the sales made were of liquor in interstate commerce and thus should not be regulated by state statute. The Court agreed stating:

> No State can prohibit, by wholesale or retail, the sale of merchandise authorized by a valid law of Congress, or by treaties, to be imported into its markets; the retail sale being as indispensable to the object of importation, viz. use and consumption, as the wholesale .... If Congress has the power to regulate a subject-matter, a State cannot interfere to oppose or impede such regulation. The general government, though limited, is supreme as to those objects over which it has power.

Id. at 514.

47. 53 U.S. (12 How.) 299 (1851). In *Cooley*, a Pennsylvania statute required that all vessels passing through its waters must hire on a state pilot. Defendant did not take on a pilot in two different instances and was found guilty of violating the Pennsylvania piloting statute. *See id.* at 299.

48. *See id.* at 318.

pressly exclude the states from exercising an authority over its subject-matter,"[49] and when this subject matter "is local and not national . . . it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as . . . the several States should deem applicable . . . ."[50] As a result of the Court's decision, the *Cooley* opinion took away some of the power given to the states in *Thurlow* by granting Congress exclusive regulation power only on commerce which is national in subject matter.[51] The Court specifically stated, "Whatever subjects of this power are in their nature national . . . require exclusive legislation by Congress."[52]

For decades to come, the Court would struggle with the need to define regulated commerce as either local or national in an attempt to abide by *Cooley.* In 1872 the Court released two notable decisions. In *State Gross Receipts Tax v. Pennsylvania*[53] the Court held that a state tax must be examined for its effect on interstate commerce in order to assess it constitutionality.[54] The Court further held that a state tax that only indirectly affects interstate commerce is not unconstitutional, but one that directly affects interstate commerce violates the Commerce Clause.[55] In *State Freight Tax v. Pennsylvania,*[56] the Court returned to the *Maryland* decision and held that the Commerce Clause effectively excluded the states from regulating interstate commerce in any way.[57] In dissolving the *Thurlow* doctrine the Court stated:

> It has, indeed, often been argued, and sometimes intimated, by the court that, so far as Congress has not legislated on the subject, the States may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the Federal legislature by the same words.[58]

The Court bolstered its "dormant clause" belief in 1888 by stating, "In our opinion, such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form . . . ."[59] As the United States entered the twentieth century, the constitutionality of a state tax, therefore, depended upon whether the tax affected interstate commerce directly or indirectly. Any tax that directly affected interstate commerce was unconstitutional, whether it conflicted with Congressional legislation or not,

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49. *Id.*
50. *Id.* at 319.
51. *See id.*
52. *Id.*
53. 82 U.S. (15 Wall.) 284 (1872).
54. *See id.* at 293-94.
55. *See id.* at 295-96.
56. 82 U.S. (15 Wall.) 232 (1872).
57. *See id.* at 279.
58. *Id.*
59. Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

because the dormant Commerce Clause dictated that that realm of taxation was reserved only for the federal government.

In the early 1900's the Supreme Court continued to determine constitutionality questions based on a State's taxing statute's affect on interstate commerce.[60] The Court found, for example, that State taxes on gross receipts were unconstitutional if the gross receipts were generated from interstate commerce.[61] The Court justified its decisions by reasoning that such a tax was a direct burden on interstate commerce.[62]

With the New Deal legislation of the 1930's came a new interpretation of the Commerce Clause.[63] In *Western Live Stock v. Bureau of Revenue*,[64] the Court laid to rest the notion that only Congress could regulate interstate commerce.[65] Aside from a few isolated cases, the Court never returned to the theory of exclusive Congressional power over interstate commerce.[66] Instead the Court believed that the Commerce Clause was placed in the Constitution as a safeguard, not as a loophole.[67] Thus, although a business engaged in interstate commerce should not be overly burdened for reaching out of state, it should also not be able to use this as a reason to avoid paying its fair share of taxes.[68] The best way to ensure this, the Court concluded, was to determine if a state's

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60. *See, e.g.*, New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of New Jersey, 280 U.S. 338, 346 (1930).

61. *See id.* The Court stated:

> But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a State may not tax, burden, or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end.

Id. See also Meyer v. Wells Fargo & Co., 223 U.S. 298, 301-2 (1912).

62. *See, e.g., New Jersey Bell Telephone*, 280 U.S. at 346.

63. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 178-81 (2d ed. 1994).

64. 303 U.S. 250 (1938).

65. *See id.* In *Western Live Stock*, a publisher wholly prepared, edited, and published a livestock journal in New Mexico. The journal was sold and circulated to states other than New Mexico. Some of the advertisements that ran in the journal were obtained from and paid for by advertisers from other states. The New Mexico State taxing statute stated:

> There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:
> "I—At an amount equal to two percent of the gross receipts of any person engaging or continuing in any of the following businesses: . . . publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space). . . . "

Id. at 251-52 n.1. The publisher argued that the tax should not be allowed on amounts received for the sale of advertising space because the advertisements are eventually circulated into interstate commerce. The Court ruled, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their fair share of state tax burden even though it increases the cost of doing the business." *Id.* at 254. This doctrine of fair share served as a driving force in future Commerce Clause decisions.

66. *See* Freeman v. Hewit, 329 U.S. 249 (1946). *See also* Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951) (where the Court returned to its opinion that only Congress may regulate interstate industry commerce).

67. *See Western Live Stock*, 303 U.S. at 254 ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.").

68. *See id.*

tax subjected a business to the possibility of multiple taxation by other states.[69] Specifically, the Court found that the tax in *Western Livestock* was constitutional because "[t]he tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate [business]."[70] In the same year that the *Western Live Stock* opinion was handed down, the Court established, in *J.D. Adams Mfg. Co. v. Storen*,[71] that while a state tax on the gross receipts of a business conducting interstate commerce was unconstitutional because of the possibility of multiple taxation, that possibility would dissolve if the tax was apportioned to reflect only the percentage of the business done in the state.[72]

Ten years later, the Court handed down the *Central Greyhound* decision that would find a significant place in the judgments made in the *Jefferson Lines* litigation. In *Central Greyhound*, a New York statute imposed a tax[73] on the gross receipts generated from sales of bus tickets for trips that began and ended in New York but used the highways of Pennsylvania and New Jersey during 43% of the trip.[74] The Court found this situation to be ripe with opportunity to reaffirm their belief that a state tax may only burden interstate commerce in proportion to the percentage that the state is touched by it.[75] The Supreme Court held, therefore, that the apportionment requirement set forth in *Western Live Stock* applied to any state tax on the gross receipts from the sale of bus tickets for interstate travel.[76] The *Western Livestock* facts so closely resembled the facts found in *Jefferson Lines* that the Bankruptcy Court, District Court, Court of Appeals for the Eighth Circuit,[77] and two dissenting Supreme Court Justices[78] all found it to be indistinguishable, and the doctrine of stare decisis

69. *See id.* at 260.
70. *Id.*
71. 304 U.S. 307 (1938).
72. The Court stated:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured.

Id. at 311.

73. *See* Central Greyhound Lines, Inc. v. Mealy, 334 U.S. 653, 663 (1948). The dissent in *Central Greyhound* summarized the New York tax as follows:

> Section 186-a of the New York Tax Law is entitled "Emergency tax on the furnishing of utility services." It imposes a tax "equal to two per centum of its gross income . . . upon every utility doing business in this state . . . in addition to any and all other taxes and fees imposed by any other provision of law for the same period." The word "utility" is defined to include every person "subject to the supervision of either division of the state department of public service" and the words "gross income" are defined to include "receipts received in or by reason of any sale . . . made or service rendered for ultimate consumption or use by the purchaser in this state . . . ."

Id. at 664 (Murphy, J., dissenting) (quoting N.Y. TAX LAW §§ 186 to 189). *Central Greyhound* successfully argued that the tax should be found unconstitutional because it taxed the full value of a ticket for a trip that took place partly in other States.

74. *See id.* at 660.
75. *See id.* at 662-63.
76. *See id.* at 663.
77. *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1335 (1995).
78. Justice Breyer filed the dissenting opinion which was joined by Justice O'Connor.

prompted them to find the Oklahoma tax on the full price of an interstate bus ticket unconstitutional.[79]

The cases discussed in this section show that the Supreme Court has left behind a path of decisions upon which there are sharp changes of direction, establishments of bearings, and instances of doubling back. This path leads to the encampment at which the Court's current Commerce Clause opinion resides, the case of *Complete Auto Transit Inc., v. Brady*.[80] In *Complete Auto*, the Court established four prongs that must be met in order to find that a state tax is constitutional.[81] The *Complete Auto* test requires that the tax must (1) be applied to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) be nondiscriminatory towards interstate commerce; and (4) be fairly related to the services provided by the state.[82] The Supreme Court used the *Complete Auto* test to assess the constitutionality of the Oklahoma tax in *Jefferson Lines*.

IV. THE *JEFFERSON LINES* DECISION

The majority in *Jefferson Lines*[83] accomplished two tasks. First, it applied the *Complete Auto* test and found that each of the four prongs was met and that the Oklahoma tax was constitutional.[84] Second, it acknowledged the similarities between *Central Greyhound* and *Jefferson Lines* but distinguished the two cases in a way that it believed sufficiently showed that the finding did not contradict the doctrine of stare decisis.[85] This section examines the majority's analysis of each prong of the *Complete Auto* test. It then discusses the majority's rationale for finding that the facts in *Jefferson Lines* are distinguishable from those in *Central Greyhound*.

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79. *See Jefferson Lines*, 115 S. Ct. at 1349.

80. 430 U.S. 274 (1977). In *Complete Auto*, the Mississippi taxing statute at issue stated:

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

MISS. CODE ANN. 1942, § 10105 (Supp. 1972), as amended. Complete Auto was a Michigan corporation that transported vehicles from Michigan to Jacksonville, Mississippi for General Motors Corporation. The business was charged $122,160 for its sales of services over the course of three years according to the above Mississippi taxing statutes. Complete Auto argued that the tax was on interstate commerce and thus unconstitutional. The Court replied by saying that state taxes affecting interstate commerce are not per se unconstitutional but are to be assessed according to a four part test. *See Complete Auto*, 430 U.S. at 279.

81. *See id.*

82. *See id.*

83. The *Jefferson Lines* opinion was delivered by Justice Souter who was joined by Chief Justice Rehnquist, Justice Stevens, Justice Kennedy, and Justice Ginsburg. Concurring in the judgment were Justice Scalia and Justice Thomas. The concurring Justices agreed that the Oklahoma tax was constitutional, but argued against any opinion that suggests the existence of the dormant commerce clause. Specifically, Justice Scalia wrote, "I look forward to the day when Complete Auto will take its rightful place . . . among the other useless and discarded tools of our negative Commerce-Clause jurisprudence." *Jefferson Lines*, 115 S. Ct. at 1346 (Scalia, J., concurring).

84. *See id.* at 1338-46.

85. *See id.* at 1341.

A. *The* Complete Auto *Test*

1. A Common Nexus

For a state tax on interstate commerce to be constitutional, the tax must be upon activity that has a substantial nexus with the taxing state.[86] Jefferson Lines admitted that the tax upon interstate tickets has a minimal nexus to the in-state portion of the bus trip.[87] However, Jefferson Lines contended that the nexus is dissolved once the bus and its passengers cross the Oklahoma state boundary.[88] Thus, the business argued, the tax affects activity (travel in states outside of Oklahoma) that is without a nexus to Oklahoma.[89]

Jefferson Lines argued that the relationship between the sale of the ticket and the actual bus travel could become so far removed that it would be absurd to find the tax was on an activity that was *substantially* related to Oklahoma.[90] In its brief for the Supreme Court, Jefferson Lines stated:

> This is perhaps best evidenced by an example where a ticket is delivered in Oklahoma and all of the transportation services are rendered outside Oklahoma (e.g., a roundtrip ticket issued in Oklahoma for bus travel between Caney, Kansas and Minneapolis, Minnesota). Oklahoma would lack substantial nexus with transportation service rendered in Kansas, Minnesota and the points in between. Yet the Taxing Statute is sufficiently broad to tax the entire gross receipts from those services as if all of the services were performed in Oklahoma.[91]

The Court, however, relied on numerous cases, such as *McGoldrick v. Berwind-White Coal Mining Co.*,[92] which held that when tangible goods are sold and bought in the same state, a sufficient nexus to the state is established.[93] The Court reasoned that services sold and bought in the same state must, therefore, support a finding that a sufficient nexus existed.[94] In assessing the facts of this case, the Court found that a sale of a ticket for interstate travel created "nexus aplenty"[95] even though the service was carried out, in part, in other states.[96] The Court found that an argument referring to what happens when the bus trips exit Oklahoma is more appropriately argued under other prongs of the *Complete Auto* test.[97]

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86. *See id.* at 1337.

87. *See* Brief on the Merits for the Respondent Jefferson Lines, Inc. at 21, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S.Ct. 1331 (1995) (No. 93-1677). "The delivery of and payment for a bus ticket in Oklahoma establishes some minimal nexus with Oklahoma." *Id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *Id.*

92. 309 U.S. 33 (1940). *See Jefferson Lines*, 115 S. Ct. at 1337-38.

93. *See generally* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) (upholding a tax on sale of coal shipped into taxing state by seller).

94. *See Jefferson Lines*, 115 S. Ct. at 1338.

95. *See id.* (quoting D.H. Holmes Co. v. McNamara, 486 U.S. 24, 33 (1988)).

96. *See id.* The service for sale is interstate transportation for hire. Such a service, must be definition, be carried out partly in other states.

97. *See id.*

2. Fairly Apportioned

For a state tax on interstate commerce to be constitutional, it must be fairly apportioned.[98] This element, the Court admitted, was the most difficult of the four prongs to assess.[99] The Court began its discussion of fair apportionment by recognizing that this prong is the direct descendant of the *Western Live Stock* decision which evaluated a tax's validity on whether the possibility of multiple taxation existed.[100] The Court thus relied on one of *Western Live Stock's* descendants which established that a tax is fairly apportioned if it is both internally and externally consistent.[101]

a. Internally Consistent

Internal consistency, the Court stated,

> is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. . . . A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction . . . .[102]

Jefferson Lines argued that the taxing statute was not internally consistent because "it necessarily creates multiple taxation if another state adopts an identical statute,"[103] basing its argument on the statute's lack of a credit mechanism.[104] They worked with two hypothetical situations in an attempt to show how double taxation might occur.[105] The first situation involved the possibility of another state applying a tax not where the ticket is delivered, as Oklahoma's does, but instead on all services rendered in its state.[106] For example, if Kansas were to charge a tax on all services that begin in its state, a person who bought a ticket in Oklahoma for travel from Kansas to Minnesota would have to pay an identical tax to Oklahoma and Kansas. The absence of a credit mechanism, Jefferson Lines argued, would allow this multiple taxation to occur.[107]

The second situation in which the Oklahoma taxing statute could cause multiple taxation rests on the fact that Oklahoma taxes the *entire* receipt for an interstate bus ticket when all the services rendered are not within Oklahoma.[108] Thus, Jefferson Lines argued, if each state were to charge a tax on the entire receipt of an interstate ticket sale, the consumer would be forced to pay

98. *See id.* at 1337 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).
99. *See id.* at 1338. The Court in *Jefferson Lines* stated, "The difficult question in this case is whether the tax is properly apportioned within the meaning of the second prong of *Complete Auto*'s test . . . ." *Id.*
100. *See id.*
101. *See id.* (citing Goldberg v. Sweet, 488 U.S. 252, 261 (1989)).
102. *Id.*
103. Respondent's Brief at 23, *Jefferson Lines* (No. 93-1677).
104. *See id.*
105. *See id.* at 23-24.
106. *See id.* at 23.
107. *See id.* at 24.
108. *See id.*

the same tax for each state that the bus ride eventually touches.[109] This possibility would mean that a ticket delivered in Oklahoma for travel from Madison, Wisconsin to Minneapolis, Minnesota could be taxed on 100% of its price in Oklahoma, Wisconsin, and Minnesota.[110] To avoid the possibility of this multiple taxation, Jefferson Lines argued that there must be a credit mechanism for which the Oklahoma statute does not provide.[111] Therefore, Jefferson Lines argued, the taxing statute is not internally consistent and fails the *Complete Auto* test for constitutionality.[112]

The Court, however, did not agree with Jefferson Lines.[113] It focused on how the Oklahoma tax was applied.[114] It did not address Jefferson Lines' contention that multiple taxation would arise if another state taxed each ticket for *services rendered* but rather assessed the tax on the possibility of each state applying a similar tax on the *sale* of the ticket.[115] The Court found the Oklahoma tax internally consistent because a ticket sale only occurs once and thus would not be subject to the same "sales tax" in any other state.[116]

b. Externally Consistent

The second part of the second prong of the *Complete Auto* test dictates that for a taxing statute to be fairly apportioned, it must be externally consistent.[117] The Court likened this to a standard which requires that a state not reach "beyond that portion of value that is fairly attributable to economic activity within the taxing State."[118] Jefferson Lines attempted to persuade the Court that a tax on the entire gross receipts of a ticket for interstate travel cannot possibly be fair apportionment where the service rendered reaches beyond Oklahoma.[119] Jefferson Lines sought to convince the Court that, although the tax was described as being only on the sales activity found entirely in Oklahoma, its effects were essentially on interstate commerce.[120] The tax, Jefferson Lines argued, was not on the local event of the actual sale but rather on the entire bene-

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109. *See id.* at 23.
110. *See id.*
111. *See id.*
112. *See id.* For further explanation of how Jefferson Lines described the two situations in which identical taxes could arise if Oklahoma's tax is found constitutional, *see id.* at 24-25.
113. *See Jefferson Lines*, 115 S. Ct. at 1338.
114. *See id.*
115. *See id.*
116. *See id.* at 1341. The Court specifically stated, "[T]he taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination." *Id.*
117. *See* Goldberg v. Sweet, 488 U.S. 252, 260-61 (1989).
118. *Jefferson Lines*, 115 S. Ct. at 1338. The Court explained the difference between internal and external consistency by stating: "External consistency, on the other hand, looks not to the logical consequences of cloning, but the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Id.*
119. *See* Respondent's Brief at 26, *Jefferson Lines* (No. 93-1677).
120. *See id.* at 27. Jefferson Lines argued, "To impose a tax as if the activity is confined solely to Oklahoma does not eliminate the relation of the other states to the activity nor eliminate the benefits which the other states confer upon the activity within their borders." *Id.*

fit received by buying the interstate ticket.[121] Jefferson Lines reasoned that, "[T]o say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer."[122]

The Court, however, was unimpressed by Jefferson Lines' reasoning. The majority believed that there was firm ground to support a finding that a sale of services is a single, identifiable transaction that occurs completely in one state.[123] Because the sale is entirely in Oklahoma, the state may constitutionally base its percentage tax on the full value of any ticket.[124]

3. Non-Discriminating Against Interstate Commerce

The third prong of the *Complete Auto* test requires that a state tax not discriminate against interstate commerce.[125] The rationale behind this prong is to prevent states from expressly making it harder for out-of-state businesses to compete with in-state businesses.[126] To allow such discrimination would frustrate the purpose of the Commerce Clause, namely by discouraging free trade among the states.[127]

Jefferson Lines argued that the Oklahoma tax discriminated against interstate travel because of the possibility of multiple taxation and because it assessed a higher tax on the sale of interstate tickets than on the sale of intrastate tickets.[128] The "multiple taxation"[129] risk which was earlier used to show internal inconsistency, Jefferson Lines argued, also illustrates that the tax discriminated by establishing a risk that was not borne by intrastate ticket sales.[130] Jefferson Lines also used calculative hypothetical to argue that the tax, in its effects, placed a higher tax on interstate tickets.[131]

The Supreme Court was again not impressed by Jefferson Lines' logic.[132] It explained that Jefferson Lines' argument was essentially the same as the "unfair apportionment" argument made previously and was wrongly based on

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121. *See id.* at 30.

122. *Id.*

123. *See Jefferson Lines,* 115 S.Ct. at 1341. The Court stated, "The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination." *Id.*

124. *See id.* at 1344. The Court stated, "There is thus no reason to leave the line of long-standing precedent and lose the simplicity of our general rule sustaining sales taxes measured by the full value, simply to carve out an exception for the subcategory of sales of interstate transportation services." *Id.*

125. *See id.* at 1337.

126. *See id.* at 1344.

127. *See id.*

128. *See* Respondent's Brief at 40, *Jefferson Lines* (No. 93-1677).

129. *See id.* at 23. *See also supra* text accompanying note 103.

130. *See* Respondent's Brief at 40, *Jefferson Lines* (No. 93-1677).

131. *See id.* Jefferson Lines used an example involving two $100 tickets. One ticket is for intrastate travel, while the second is for an interstate ticket where 10% of the trip takes place in Oklahoma. In both instances, the consumer is charged the 4% tax, or $4.00. However, the consumer traveling on the interstate ticket is actually paying a 40% tax rate because only 10% of his trip took place within Oklahoma. Therefore, Jefferson Lines argued, Oklahoma's tax always exacts a higher rate upon interstate fares. *See id.* at 40-41.

132. *See Jefferson Lines,* 115 S. Ct. at 1345.

the *service* instead of the *sale*.[133] The Court found that, because the tax is on a sale, it did not matter where the final destination was, or how many miles were actually traveled in Oklahoma.[134] The tax was a sales tax, and, because it used the same 4% assessment for sales of intrastate and interstate tickets, it did not discriminate.[135]

4. A Fair Relation Between the Tax and the Benefits Conferred Upon the Taxpayer By the State

The last prong of the *Complete Auto* test requires that there be a fair relation between the tax and the benefits conferred upon the taxpayer by the state.[136] The essence of this prong was summed up by a Supreme Court decision which stated "[t]he purpose of this [prong] is to ensure that a state's tax burden is not placed upon persons who do not benefit from the services provided by the State."[137]

Jefferson Lines argued that the services provided by the state were only present for part of an interstate bus trip.[138] Jefferson Lines reasoned that because the ticket is a purchase of services in other states as well, the consumer who is taxed for the full ticket value is charged for benefits not received in Oklahoma.[139]

The majority dismissed this argument, remaining focused not on what was bought but rather on the sale itself.[140] The Court believed that the relevant services received, as intended by *Complete Auto*, are the public services such as fire and police protection that were provided while the ticket was being purchased.[141] Once again, the Court bolstered its position that the Oklahoma taxing statute was constitutional because it was a tax on an activity that occurred wholly inside of Oklahoma's geographical boundaries.

B. Addressing Central Greyhound Lines, Inc. v. Mealy

Having thoroughly addressed each prong of the *Complete Auto* test, the majority was left with a need to face the apparently similar case of *Central*

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133. *Id.*

134. *See id.* "[M]iles traveled within the State simply are not relevant proxy for the benefit conferred upon the parties to a sales transaction." *Id.*

135. *See id.*

136. *See id.* at 1337.

137. Respondent's Brief at 42, *Jefferson Lines* (No. 93-1677) (quoting Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)).

138. *See id.* at 42-43.

139. *See id.*

140. *See Jefferson Lines*, 115 S. Ct. at 1346.

141. *See id.* The Court stated:

> The bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax.

Id.

Greyhound.[142] In *Central Greyhound*, the Supreme Court held that a state tax on the gross receipts of bus tickets for interstate travel was unconstitutional.[143] The majority held that such a tax could only be levied on the portion of the trip which actually occurred in the taxing state.[144] This ruling is in direct opposition to the decision made in *Jefferson Lines*. The *Central Greyhound* case precedent was the foundation for Jefferson Lines' arguments as well as for the decisions handed down by the Bankruptcy Court, the District Court, and the Court of Appeals which found the Oklahoma tax unconstitutional.[145]

The majority acknowledged that the cases were similar in many aspects,[146] but the essential elements of the New York tax in *Central Greyhound* that made it unconstitutional were missing from the Oklahoma tax in *Jefferson Lines*.[147] The Court rested heavily on (1) the identity of the taxpayer and (2) the possibility of multiple taxation in each case.[148]

In *Central Greyhound*, the majority states, the taxpayer was the ticket *seller* who was forced to pay a tax on gross receipts.[149] In *Jefferson Lines* the taxpayer was the ticket *buyer*, while the seller only collected and remitted the tax payment.[150] This difference, the Court explained, is vital in assessing the possibility of multiple taxation.[151] The tax in *Central Greyhound* was on the full value of the ticket and left open the possibility that other states involved in the interstate bus trip would tax the *seller* for a portion of the proceeds made from the use of their roads.[152] Thus the tax created a potential for multiple taxation placed on the ticket seller.[153] The tax in *Jefferson Lines* is on the actual sale which could not be taxed again by other states because the sale occurred wholly in Oklahoma.[154] Therefore, the majority concluded, no possibility of multiple taxation exits and the tax is thus distinguishable from the tax found unconstitutional in *Central Greyhound.*[155]

V. THE *JEFFERSON LINES* DISSENT

Justice Breyer and Justice O'Connor dissented from the majority for "one simple reason."[156] The tax in *Central Greyhound* is identical in its effects to

142. *See id.* at 1340-41.
143. *See* Central Greyhound Lines, Inc. v. Mealy, 334 U.S. 653, 664 (1948).
144. *See id.* at 663.
145. *See Jefferson Lines*, 115 S. Ct. at 1335.
146. *See id.* at 1341. "To be sure, the two cases involve the identical services, and apportionment by mileage per State is equally feasible. . . . " *Id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.* at 1341-42.
155. *See id.* at 1341.
156. *Id.* at 1346 (Breyer, J., dissenting).

the tax in *Jefferson Lines*.[157] Therefore, the dissent was compelled by stare decisis to rule for Jefferson Lines as it did for the plaintiff in *Central Greyhound*.[158]

The dissent assessed each of the majority's reasons for distinguishing *Central Greyhound* from *Jefferson Lines* and found none of them to be convincing.[159] Specifically, the dissent stated that the majority's finding that the New York tax in *Central Greyhound* was on "gross receipts" and the Oklahoma tax was a "sales tax" does not help in determining constitutionality.[160] This attempt at giving the taxes different labels, the dissent stated, "seems more a formal, than a practical difference."[161] The determination that the New York tax was paid by the seller while the Oklahoma tax was on the buyer, the dissent opined, was only a literal and not sensible interpretation.[162] The Oklahoma tax makes the seller liable[163] for uncollected taxes and determines the amount due the state by calculating four percent of the gross receipts made by the business. By making Jefferson Lines ultimately liable, the tax, in essence, is identical to the unconstitutional one in *Central Greyhound*.

Second, the dissent disagreed with the majority's characterization of the tax as a sales tax.[164] It believed that the tax can only reasonably be taken as one on transportation of passengers, not one on the activity of selling tickets.[165] Thus, by taxing transportation the state is attempting to tax a part of the activity that does not occur within its boundaries.[166] The tax is therefore unapportioned and must be deemed unconstitutional.

In its summary, the dissent rested on a foundation of reasonableness.[167] It stated that *Jefferson Lines* is argued with two opposing analogies, and the one which is reasonably found to have more "comparative force"[168] should serve as the rule. On one hand there is the analogy of a sales tax, and on the other an analogy of a gross receipts tax identical to the one in *Central Greyhound*. In the dissent's opinion, when the Oklahoma tax is compared to the *Central Greyhound* tax and a sale-of-goods tax, similarities dictate that it, like the *Central Greyhound* tax, be found unconstitutional.[169] The tax, after all, is not on an

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157. *See id.*
158. *See id.*
159. *See id.* at 1348.
160. *Id.*
161. *Id.*
162. *See id.* at 1347.
163. *See* OKLA. STAT. tit. 68, § 1361(A) (1991). "Every person required to collect any tax imposed by this article . . . shall be personally liable for said tax." *Id.*
164. *See Jefferson Lines*, 115 S. Ct. at 1348 (Breyer, J., dissenting).
165. *See id.* The dissent stated:

> To suggest that the tax here is constitutional simply because it lends itself to recharacterizing the taxable event as a "sale" is to ignore economic reality. Because the sales tax is framed as a percentage of the ticket price, it seems clear that the activity Oklahoma intends to tax is the transportation of passengers—not some other kind of conduct (like selling tickets).

Id.

166. *See id.* at 1349.
167. *See id.* at 1348.
168. *Id.* at 1349.
169. *See id.* at 1346.

item that is sold in one state and then transported to another, rather, "it is a tax upon interstate travel itself — the very essence of interstate commerce."[170]

VI. ANALYSIS

The decision handed down by the Supreme Court in *Jefferson Lines* will probably affect State tax legislation. Although the Court took steps to expressly distinguish, rather than overrule, *Central Greyhound*, the net effect is such. The Court essentially decided that as long as the states express a tax as being on a *buyer* in a *sale of goods* and not on a *seller* providing interstate *service*, it is constitutional. This section analyzes the Court's decision by demonstrating how the Court decision grants more taxing power to the states than the framers of the Constitution intended.

"Consider not the formal language of the tax statute but rather its practical effect."[171] It is interesting that both Jefferson Lines and the Supreme Court relied on this quote from *Complete Auto*.[172] Jefferson Lines believed it showed that the Oklahoma tax was an unconstitutional wolf in sheep's clothing.[173] The Supreme Court, however, found that, when stripped to its bare effect, the tax was a simple sales tax that is constitutional.[174]

The effect of the Oklahoma tax is that it raises the price of interstate bus tickets bought in Oklahoma. Not since 1951 has the Supreme Court ruled that such an effect is "per se" unconstitutional.[175] Since then the Court has held that a state's tax on interstate commerce may, in some instances, be constitu-

170. *Id.* at 1349. Fully stated, the dissent wrote:

> After all, the tax before us is not a tax imposed upon a product that was made in a different State or was consumed in a different State or is made up of ingredients that come from a different State or has itself moved in interstate commerce. Rather, it is a tax imposed upon interstate travel itself — the very essence of interstate commerce. And, it is a fairly obvious effort to tax more than "that portion" of the interstate activity['s] revenue "which reasonably reflects the in-state component."

Id. (quoting Goldberg v. Sweet, 488 U.S. 252, 262 (1989)).

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

172. The Supreme Court quoted *Complete Auto* when reviewing *Jefferson Lines*, 115 S. Ct. at 1337, and Jefferson Lines relied on the quote to support its case in its brief to the Court, *see* Respondent's Brief at 28, *Jefferson Lines* (No. 93-1677).

173. *See* Respondent's Brief at 28-29, *Jefferson Lines* (No. 93-1677).

174. *See Jefferson Lines*, 115 S. Ct. at 1346.

175. *See* Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). In the last notable Supreme Court decision in which the Court held that taxing interstate commerce was to be done exclusively by Congress, the Court stated:

> Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in the interstate commerce when they gave Congress the power "To regulate Commerce with foreign Nations, and among the several States . . . " (citation omitted). While the reach of the reserved taxing power. . . the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress.

Id. at 608. The Supreme Court abandoned the decision in *Spector* in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and officially overruled *Spector* in *Complete Auto* by stating, "Accordingly, we now reject the rule of Spector Motor Service, Inc. v. O'Connor, that a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce, and that case is overruled." *Complete Auto*, 430 U.S. at 288-89.

tional.[176] While this holding allowed a few chickens to escape from the proverbial coop, the *Jefferson Lines* decision essentially opened the barn door. By categorizing the Oklahoma tax as a sales tax, the Court ignored its own instruction to consider the "practical effect."[177] Had it done so, the majority would have found, as the dissent stated, that "it is a tax imposed upon interstate travel itself — the very essence of interstate commerce."[178]

For each *Complete Auto* test prong, the Court avoided recognizing the *effects* of the tax and continually returned to the *description* of the "sales" tax.[179] The majority's reservation from accepting the practical effects of the tax was what allowed the tax to pass the stringent *Complete Auto* test. The remainder of this section assesses each prong of the *Complete Auto* test with respect to the practical effect the Oklahoma tax has on interstate commerce. The section concludes with an analysis of the Court's decision to distinguish *Jefferson Lines* from *Central Greyhound* rather than to overrule it.

A. The Complete Auto *Test*

1. A Common Nexus

The Supreme Court in *Jefferson Lines* found that, because the tax was described as being paid by the ticket buyer and levied on the sale of the ticket, it was essentially a sales tax.[180] The Court proceeded to reason that because the tax was on a sale, it was on an activity that is entirely conducted in the state of Oklahoma.[181] Thus, the Court found that there was "nexus aplenty here."[182] The nexus thus created is the connection between the activity (the sale) and the state levying the tax.[183] It would be difficult to argue that there is no connection between the two.

Although the first prong is easily met, its significance should not be underestimated. The common nexus prong acted as a foundation upon which the Court could support the more difficult prongs that lay ahead. The Court could have easily proven a common nexus with the last two sentences in section III. A. of its decision.[184] However, the Court used the opportunity to discuss the similarities between a sale of goods and a sale of services.[185] Proving such a similarity was not essential to showing a common nexus but was vital for satis-

176. *See id.*
177. *Jefferson Lines*, 115 S.Ct. at 1337.
178. *Id.* at 1348 (Breyer, J., dissenting).
179. Each prong in the Jefferson Lines decision refers to the "taxed activity" as the actual sale and not the activity of interstate transportation. *See, e.g., id.* at 1346 (stating "the tax falls on the sale.").
180. *See id.* at 1341.
181. *See id.* at 1346.
182. *Id.* at 1338 (quoting D.H. Holmes Co. v. McNamara, 486 U.S. 24, 33 (1988)).
183. The definition of nexus is "a connected group or series." OXFORD AMERICAN DICTIONARY 448 (1980).
184. *See Jefferson Lines*, 115 S. Ct. at 1338. The Court finished its "common nexus" assessment by stating, "Oklahoma is where the ticket is purchased, and the service originates there. These facts are enough for concluding that '[t]here is "nexus" aplenty here.'" *Id.* (citation omitted).
185. *See id.* at 1338-39.

fying the requirements set out in the other prongs of the *Complete Auto* test. By deciding that the tax was on a sale and not a service, the majority propelled its decision into a direction that was destined to find the Oklahoma tax constitutional.

Had the majority assessed the "practical effect"[186] that the tax had on interstate travel rather than the "formal language of the tax"[187] which describes a sales tax, it still would have found "nexus aplenty."[188] However, other *Complete Auto* test prongs require a finding that the entire activity occurred in Oklahoma.[189] Thus, it would not have been consistent to focus on the effects of the tax for one prong and the formal language of the legislation in another.

2. Fair Apportionment

The Court relied on its decision in *Goldberg v. Sweet*[190] for the purpose of satisfying the second prong of the *Complete Auto* test.[191] In *Goldberg* the Court ruled that a tax must be properly apportioned so that a State would receive only its "fair share" of the transaction surrounding interstate commerce.[192] The fair share doctrine had been handed down in *Western Live Stock*[193] where the Court found that if a tax puts the taxpayer in danger of paying an identical tax to other states, it is unconstitutional.[194] In order to determine if Oklahoma was attempting to take more than its fair share of taxes from the sale of interstate bus tickets, the Court examined the tax's internal and external consistency.[195]

a. Internal Consistency

The internal consistency, the Court stated, "simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage compared with commerce intrastate."[196] This evaluation, oddly, seems an exercise in reviewing the "formal language" of the tax, an approach from which *Complete Auto* expressly turns away.[197] In essence, the Court found that the Oklahoma tax was so worded as a "sales tax" that if it were applied in other states there would not

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186. The Court in *Jefferson Lines* began its discussion quoting Complete Auto which states: "Consider not the formal language of the tax statute but rather its practical effect." *Id.* at 1337 (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

187. *See id.*

188. *See supra* note 182 and accompanying text.

189. *See supra* Parts IV.A.2 & 4.

190. 488 U.S. 252 (1989).

191. *See Jefferson Lines*, 115 S. Ct. at 1338. "'[T]he central purpose [of the proper apportionment prong of . . . the *Complete Auto* test] is to ensure that each State taxes only its fair share of an interstate transaction.'" *Id.* (quoting *Goldberg*, 488 U.S. at 260-61).

192. *Goldberg*, 488 U.S. at 260-61.

193. *See supra* text accompanying notes 64-70.

194. *See supra* text accompanying note 70.

195. *See Jefferson Lines*, 115 S. Ct. at 1338-44.

196. *Id.* at 1338.

197. *See supra* text accompanying notes 79-81.

be a danger of identical taxation.[198] The Court specifically stated, "If every State were to impose a tax identical to Oklahoma's, that is, a tax *on ticket sales within the State for travel originating there*, no sales would be subject to more than one State's tax."[199] Because an *identical* tax found in another state would not force Jefferson Lines to pay multiple taxes, the Oklahoma tax is internally consistent.

This finding of internal consistency, however, reveals more of the majority's thinking than simply the outcome. The majority characterized the Oklahoma tax *as a tax on ticket sales within the State for travel originating there*.[200] The Court has disregarded Jefferson Lines' contention that the Oklahoma tax is too broad because it would allow a tax on the full value of a ticket bought in Oklahoma for a trip originating in another state.[201] Although a compelling argument, nowhere in the decision did the Court address that issue. Instead the Court assumed that there were constraints (that the travel will always originate in Oklahoma) on the tax which did not exist. The Oklahoma statute does not restrict the tax to ticket sales for travel that must touch Oklahoma.

b. External Consistency

Internal consistency alone is not enough to satisfy the second prong of the *Complete Auto* test.[202] A tax must also be externally consistent and, therefore, must not "reach beyond that portion of value that is fairly attributable to economic activity within the taxing State."[203] Again the majority returned to the formal language of the statute, not the practical effect of the tax, and described the Oklahoma statute as a "sales tax."[204] What is most alarming, is that the majority did not believe that a tax on interstate travel is different than a tax on the sale of goods.[205] Nor did the Court believe that there should be an exception for a sales tax on interstate travel.[206]

Justice Breyer, in his dissent, recognized the need to go beyond the formal language of the so-called sales tax and focus on the subject of the statute.[207] He stated, "[I]t is a tax imposed upon interstate travel itself—the very essence of interstate commerce."[208] By raising the more important practical effect of the tax, the dissent established a strong basis upon which to refute the

198. *See Jefferson Lines*, 115 S. Ct. at 1338.
199. *Id.*
200. *See id.*
201. *See supra* text accompanying notes 103-12.
202. *See Jefferson Lines*, 115 S. Ct. at 1338.
203. *Id.*
204. *Id.* at 1344.
205. *See id.* "[Jefferson Lines] fails to show that Oklahoma's tax on the sale of transportation imputes economic activity to the State of sale in any way substantially different from that imputed by the garden-variety sales tax. . . . " *Id.*
206. *See id.* "There is thus no reason to . . . carve out an exception for the . . . sales of interstate transportation services." *Id.*
207. *See id.* at 1348 (Breyer, J., dissenting).
208. *Id.* at 1349.

majority's categorization of the tax as one on a "garden-variety" sale of goods.[209] The difference between the sale of interstate bus tickets and the sale of goods that relate in some way to other states is where the value lies. An Oklahoma consumer who pays a tax on clothes from New York or coal from Pennsylvania finds the value in the goods themselves and not in the fact that the goods have been imported from another state. A bus ticket, however, has value only because of its relation to interstate commerce. Thus, as Justice Breyer stated in his dissent, the majority "ignores economic reality,"[210] when it decides that a customer who pays $100 for a trip from Oklahoma to another state is simply buying a slip of paper that may or may not enter interstate commerce.

The Oklahoma tax, by reason of economic reality, burdens the transportation services business, whether it is intrastate or interstate. By burdening interstate travel, however, the state is charging a tax on the *full value* of a ticket when the full value of the ticket is not found in the state. The majority explained external consistency as a tax which *does not* reach "beyond that portion of value that is fairly attributable to economic activity within the taxing State."[211] By taxing 100% of the ticket value for interstate travel, the entire value must have nothing to do with another state. To determine that a bus ticket bought in Oklahoma for a trip from Kansas to Minnesota has 100% of its value in Oklahoma seems odd, but that is the consequence of the majority's decision in finding that the Oklahoma tax was externally consistent.

3. Non-Discriminating Against Interstate Commerce

The crux of the third prong of the *Complete Auto* test is to ensure that states do not apply a tax on a foreign enterprise that is not applied on the similar local enterprise.[212] This tax must be charged by all businesses, whether they are headquartered in Oklahoma or in another state. The tax burdens both local and foreign states equally and does not discriminate in favor of local business.[213] The simplicity of this prong explains why Jefferson Lines did not

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209. *See id.* at 1344.

210. *Id.* at 1348 (Breyer, J., dissenting).

211. *Id.* at 1338.

212. *See id.* at 1344-45. The Court specifically described the prong:

> A State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." Thus, States are barred from discriminating against foreign enterprises competing with local businesses and from discriminating against commercial activity occurring outside the taxing State.

Id. (citation omitted).

213. The Oklahoma tax is levied on all transactions whether they be for interstate or intrastate bus tickets. The Oklahoma taxing statute states, "There is hereby levied upon *all* sales . . . ." OKLA. STAT. tit. 68, § 1354(1) (1991) (emphasis added). *See supra* note 14.

spend much effort arguing this element[214] and why the majority did not spend much effort in showing that the tax was not discriminatory.[215]

4. A Fair Relation Between the Tax and the Benefits Conferred Upon the Taxpayer By the State

Jefferson Lines asserted that the benefits conferred by Oklahoma upon the purchaser of an interstate bus ticket were present only during the part of the trip which remained in Oklahoma.[216] Oklahoma, however, taxes the entire ticket price, and, therefore, the tax is not "fair" because Oklahoma charges the taxpayer for benefits that he does not receive.[217]

The majority refuted Jefferson Lines' contentions by returning to its assumption that the activity taxed is not interstate travel but rather the sale of a service.[218] The Court continued by stating that the benefits conferred on the purchaser are the protections provided by Oklahoma police and fire departments.[219]

By categorizing the benefits that are received by the purchaser as those received during the ticket sale, the Court opens the door for questioning the "fairness" of the tax. If the benefits being provided to the taxpayer are police and fire protection, then why is the tax based upon a percent sales tax? The process for buying a $200 bus ticket is identical to the process for buying a $100 ticket. Yet a four percent tax would require the former purchaser to pay $8 for the same fire and police protection for which the latter purchaser would only pay $4. Although this observation may be better suited for an in-depth discussion of whether a flat fee sales tax is more fair than a percent sales tax, the tax policy has a specific effect on customers such as Jefferson Lines. The economic reality of the bus business is that interstate tickets are usually for a longer distance than intrastate tickets. A longer distance logically results in a higher cost for the ticket. Having a percent sales tax on the cost of the bus

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214. Jefferson Lines addressed prong three on only one page of 43 pages. Their loosely based argument revolved around how a tax on a similarly priced interstate and intrastate ticket does, in effect, levy a high percentage tax on the interstate ticket. Respondent's Brief at 40-42, *Jefferson Lines* (No. 93-1667). *See also supra* note 131 for a more in-depth description of Jefferson Lines' argument.

215. Likewise, the majority only dedicated one page to finding that the Oklahoma tax did not discriminate. It essentially avoided Jeffersons Lines' argument and felt it was more aptly discussed as a "fair apportionment" problem and not one of discrimination. *Jefferson Lines*, 115 S. Ct. at 1344-45.

216. *See* Respondent's Brief at 40-42, *Jefferson Lines* (No. 93-1667).

217. Specifically, Jefferson Lines claimed:

> The purchaser of interstate transportation services receives some benefit from the transportation services rendered in Oklahoma. However, the passenger receives no benefit from Oklahoma with respect to those transportation services rendered in other states. The interstate transportation service is taxed as if all of the services were: rendered in Oklahoma. A tax on the entire gross receipts of the rendering of interstate transportation services is not fairly related to the benefit provided by Oklahoma. Accordingly, the Taxing Statute fails the fourth prong of *Complete Auto.*

Id. at 42-43.

218. *See Jefferson Lines*, 115 S. Ct. at 1346.

219. *See supra* text accompanying note 141. The Court, having held strong to its categorization of the Oklahoma statute as a sales tax, stated in the fourth and last prong: "The tax falls on the sale that takes place wholly inside Oklahoma and is measured by the value of the service provided." *Jefferson Lines*, 115 S. Ct. at 1346.

tickets means that an interstate ticket purchaser would have to pay more money for the same "benefits conferred . . . by the State"[220] because interstate tickets are inherently more expensive. The majority did not address this issue, perhaps because the argument was not offered by Jefferson Lines. However, the argument does demonstrate the Court's strict adherence to the formal language approach and unwillingness to consider practical effects. Had the Court considered the practical effects of the tax, the majority could have found the tax to be for benefits such as police protection and road maintenance enjoyed only while the bus trip was in Oklahoma.

B. The Central Greyhound *Decision*

The Oklahoma tax at issue in *Jefferson Lines* is similar to the tax in *Central Greyhound* which the Court found unconstitutional, so similar that Justice Breyer based nearly his entire dissent on his belief that the taxes "are, for all relevant purposes, identical."[221] Both taxes were levied against the gross receipts of interstate ticket sales.[222] The interstate tickets were for trips which for a large portion took place outside the taxing state.[223] Also, both taxes were taken as a percentage of the full ticket cost, instead of the taxes being apportioned to only charge for the in-state value of the ticket.[224] Both statutes state that the tax is to be, in essence, a tax on the gross receipts of the sale of interstate tickets.[225]

The Court regarded the Oklahoma tax as being upon the buyer of the ticket while the New York tax was upon the seller.[226] This difference changes the definition of the tax from an income tax to a sales tax and allows the Oklahoma statute to pass the test of constitutionality.[227] Apparently, the Court believes

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220. *Id.* The fourth prong of the *Complete Auto* test requires that there be a fair relation between the tax and the benefits conferred upon the taxpayer by the state. *See supra* section IV(A)(4).

221. *Jefferson Lines*, 115 S. Ct. at 1346 (Breyer, J., dissenting).

222. *See infra* note 225.

223. *See infra* note 225.

224. Justice Breyer, in his dissent, specifically drew the analogy of the Oklahoma tax in *Jefferson Lines* to the New York tax in *Central Greyhound* by stating:

> The tax before us bears an uncanny resemblance to the New York tax. The Oklahoma statute (as applied to "[t]ransportation . . . by common carriers") imposes an "excise tax" of 4% on "the *gross receipts* or gross proceeds *of each sale*" made in Oklahoma. The New York statute imposed a 2% tax on the "*receipts* received . . . by reason of any sale . . . made" in New York (emphasis added). Oklahoma imposes its tax on the total value of trips of which a large portion may take place in other States. New York imposed its tax on the total value of trips of which a large portion took place in other States. New York made no effort to apportion the tax to reflect the comparative cost or value of the in-state and out-of-state portions of the trips. Neither does Oklahoma. Where, then, can one find a critical difference?

Jefferson Lines, 115 S. Ct. at 1347 (Breyer, J., dissenting) (citations omitted).

225. *See id.* Justice Breyer answered his own question by stating:

> Not in the language of the two statutes, which differs only slightly. Oklahoma calls its statute an "excise tax" and "levie[s]" the tax "upon all sales" of transportation. New York called its tax an "[e]mergency tax on . . . services" and levied the tax on "'gross income'" defined to include "'receipts . . . of any sale.'"

Id.

226. *See id.* at 1341.

227. The Court expressed this by stating:

that the most important constitutional consideration for a statute imposing a tax coming under the Commerce Clause, is whether the tax expresses itself as a sales tax. One could argue, however, that this is essentially an exercise in disregarding the effects of the statute. The Oklahoma tax is levied on the tax purchaser but also makes the ticket seller liable for collecting and remitting all the taxes charged.[228] The amount of money owed to the state is determined by charging 4% against the business' entire gross receipts.[229] This process results in the tax being, although on its face a tax upon the ticket buyer, in effect, identical to the one in *Central Greyhound.*

The Court did not overrule *Central Greyhound* but rather distinguished it from *Jefferson Lines.*[230] By doing so, the Court has in essence "distinguished into oblivion"[231] the *Central Greyhound* decision. Any state that wishes to tax interstate commerce may now do so as long as the tax is categorized as a sales tax. A state can claim that the activity being taxed is the sale that occurs entirely within its state boundaries. With the decision of *Jefferson Lines*, the *Central Greyhound* decision, which forced states to apportion their taxes against interstate travel, will take its place alongside other Supreme Court decisions which have not been overruled but are simply forgotten.[232]

The unique nature of interstate travel service sales makes it reasonable to "carve out" an exception to the Court's general rule sustaining sales taxes measured on the full value.[233] A great amount of truth exists in Justice Breyer's proclamation that activity like interstate travel is "the very essence of interstate commerce."[234] One can argue that the Framers of the Constitution wanted Congress, and not individual states, to control something that has such significant affect on interstate commerce.

VII. THE FUTURE OF INTERSTATE TRANSPORTATION PROVIDERS

Prior to *Jefferson Lines*, a business engaged in selling interstate tickets could rely on the *Central Greyhound* decision and anticipate being taxed only

> The significance of the taxpayer's identity is, indeed, central to the Court's longstanding recognition of structural differences that permit successive taxation as an incident of multiple taxing jurisdictions. The decision today is only the latest example of such a recognition and brings us as close to simplicity as the conceptual distinction between sales and income taxation is likely to allow.

Id. at 1344 n.7.

228. *See supra* text accompanying notes 13-15.

229. "There is hereby levied upon all sales, not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the *gross receipts* or gross proceeds of each sale of the following . . . " OKLA. STAT. tit. 68, § 1354(1)(C) (1992) (emphasis added). *See also supra* note 13.

230. *See Jefferson Lines*, 115 S. Ct. at 1340-41. "We, however, think that *Central Greyhound* provides the wrong analogy for answering the sales tax apportionment question here." *Id.*

231. United States v. Duffy, 454 F.2d 809, 814 (5th Cir. 1972).

232. It is interesting to point out that *State Freight Tax v. Pennsylvania*, 82 U.S. (15 Wall.) 232 (1872), which expressly found that a state may not regulate any commerce that touches interstate commerce, has never been overruled. Thus, *Central Greyhound* is most likely a decision that will be fading out of interstate tax considerations even though it has not been overruled.

233. The majority in *Jefferson Lines* believed that the Oklahoma sales tax on the bus tickets fell under a general rule which allows all sales taxes to be based upon the full sales price. *See supra* note 124.

234. *Jefferson Lines*, 115 S. Ct. at 1348 (Breyer, J., dissenting). *See also supra* note 170.

for the portion of a bus trip that was in the taxing state. As a result, Jefferson Lines, relying on *Central Greyhound,* [235]refused to pay what seemed to be an unconstitutional tax.

This decision expands state control over interstate travel. Thus a state can now tax interstate transportation as heavily as intrastate travel. This extended power gives states the freedom to enact taxing statutes that directly affect interstate transportation without regard to how much of the trip actually occurs in the state.

Businesses will accept the tax as a sales tax simply because the outcome of Commerce Clause decisions is unpredictable. The tax is ultimately paid by the consumer, and, therefore, the bus companies will probably not feel the burden enough to challenge the taxes.

As an alternative to paying the state tax, businesses may develop novel business practices to avoid the burden. One response could be legislative state shopping. For instance, businesses could conduct their sales in other states utilizing phone ordering so that the actual *sale* would occur in states with lower ticket sales tax.[236] They could also avoid a heavy tax by charging one dollar for trips to the Oklahoma border and then charging the remaining ticket price once the bus and passengers cross the state line.[237]

These possibilities will most likely not become reality, though. Economically, the cost of "end-running" a state tax would probably exceed the cost of simply paying it. Also, the Court has now defined the taxpayers as the ticket purchasers. Little chance exists that any individual will take on the legal costs of fighting a tax that only raises the price of a ticket by four percent. With this in mind, one can reasonably assume that the ultimate losers are the customers of businesses like Jefferson Lines as they will be required to pay higher ticket prices while the states control interstate commerce.

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235. One can infer that Jefferson Lines relied on *Central Lines* which made a tax on the gross receipts from interstate ticket sales unconstitutional. Such an inference could be made because they consciously refrained from collecting the tax for interstate ticket sales. One could not argue that Jefferson Lines simply did not know of the tax because they conformed to it and collected the 4% tax on intrastate ticket sales.

236. One way Jefferson Lines could have avoided paying the tax is to have any interstate ticket for a trip that begins in Oklahoma technically be purchased in Kansas. It would be ironic indeed if Oklahoma attempted to pass a tax in Oklahoma for the full price of tickets that depart in their state regardless of where the ticket was purchased. This would most certainly be in conflict with the very tax that the Court has approved due to multiple taxation.

237. To clarify this example, imagine an interstate bus ticket from Tulsa to Kansas City costs $100. Jefferson Lines could save the customer $3.96 by only charging $1 with the 4% sales tax ($1.04) for a trip from Tulsa to the Missouri state line. Once the bus is out of Oklahoma the passenger could buy the remainder of the ticket for $99 without being taxed. The result for the same trip is that the customer pays $104 if paying for the whole ticket in Oklahoma and $100.04 for the "split-ticket."