The Incomplete *Complete Auto Transit* Test: Commerce Clause Analysis in *Commonwealth Edison Co. v. Montana*

I. Introduction

On July 2, 1981, the United States Supreme Court upheld Montana's thirty percent coal severance tax[1] in *Commonwealth Edison Co. v. Montana*[2] against challenges under the commerce and supremacy clauses of the United States Constitution. One observer stated that, as a result of the Court's decision, " 'we face economic Balkanization between the energy-rich and energy-poor regions of our country.' "[3] A study released by a coalition of members of Congress from eighteen northeastern and midwestern states referred to severance taxes as threatening to create " 'a kind of United American Emirates, a group of superstates with unprecedented power to beggar their neighbors in the federal system.' "[4]

By the confluence of several factors, the coal-producing states of the Rocky Mountains have the power to become, in the eyes of their critics, " 'our OPEC within.' "[5] First, Montana and Wyoming contain 40% of the nation's known coal reserves and 68% of low-sulfur coal reserves.[6] Second, these two states occupy a pivotal geographic position in relation to the midwestern and northwestern energy markets.[7] Third, as a combined result of the OPEC oil embargo, federal energy legislation encouraging coal consumption,[8] and federal environmental legislation encouraging the burning of low-sulfur coal,[9] the demand for coal from this region has

1. Mont. Code Ann. § 15-35-103 (1981).
2. 101 S. Ct. 2946 (1981).
3. N.Y. Times, July 3, 1981, at B12, col. 2.
4. Washington Post, July 3, 1981, at A1, col. 4.
5. *Wars Between the States*, Time, August 24, 1981, at 19.
6. H.R. Rep. No. 96-1527, Pt. 1, 96th Cong., 2d Sess. 3 (1980).
7. *See* J. Krutilla, A. Fisher & R. Rice, Economic and Fiscal Impacts of Coal Development: Northern Great Plains 13-15 (1978).
8. Energy Policy and Conservation Act of 1975 § 2(6), 42 U.S.C. § 6201(6) (1976); Powerplant and Industrial Fuel Use Act of 1978 § 102(b)(3), 42 U.S.C. § 8301(b)(3) (Supp. II 1978).
9. Energy Supply and Environmental Coordination Act of 1974 § 7(a), 15 U.S.C. § 793(a)(1976).

dramatically increased.[10] Most significant for present purposes, since 1971 the coal-producing states have increased their severance taxes to unprecedented levels, bringing about a tremendous transfer of money from the coal-consuming states to the coal-producing states.[11]

Awareness of the market power wielded by the coal-producing states caused four Montana coal producers and eleven of their out-of-state utility customers to file suit challenging the constitutionality of Montana's coal severance tax. The Supreme Court evaluated the tax using a four-part test which examined the practical effect of the tax on interstate commerce.

This comment will examine the test employed by the Supreme Court in *Commonwealth Edison* to determine whether the Montana coal severance tax was an unreasonable burden on interstate commerce in violation of the commerce clause of the United States Constitution. In particular, the fourth prong of the test, whether the tax "is fairly related to the services provided by the State,"[12] will be examined.

Part II discusses severance taxes in general and the Montana tax in particular. Part III examines the *Commonwealth Edison* decision in detail. This part describes the four-part test enunciated in *Complete Auto Transit, Inc. v. Brady*,[13] and analyzes its application to the Montana coal severance tax. Part IV suggests an alternative application of the test. Part V delineates the prospects for congressional action on the severance tax issue.

II. SEVERANCE TAXES

A severance tax is a levy upon natural resources at the time they are severed or removed from the soil. The tax can either be a flat rate on the quantity of resource extracted,[14] or a percentage of the value of the resource extracted.[15] The first severance tax in the

10. For example, in the nine years between 1971 and 1979 the amount of coal strip-mined in Montana rose from 6,983,186 tons to 32,545,071 tons. Commonwealth Edison Co. v. State, 615 P.2d 847, 850 (Mont. 1980), *aff'd*, 101 S. Ct. 2946 (1981).

11. *See, e.g.*, N.D. CENT. CODE § 57-61-01 (Supp. 1979); MONT. CODE ANN. § 15-35-103 (1981); WYO. STAT. §§ 39-2-202, 39-6-302(a)-(f), 39-6-303(a) (1977 & Supp. 1981).

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

13. 430 U.S. 274 (1977).

14. *See, e.g.*, N.D. CENT. CODE § 57-61-01 (Supp. 1979).

15. *See, e.g.*, MONT. CODE ANN. § 15-35-103 (1981).

United States was levied in 1846 when Michigan taxed minerals extracted in the state at a rate of 4% of their gross value.[16] Currently, thirty-three states have severance taxes covering the entire range of natural resources.[17] In 1980, $4,167,399,000 in severance taxes were collected by the states, accounting for 3% of total state tax revenues.[18] The range of individual state tax revenues attributable to severance taxes varies from 35.2% of total revenues in Alaska to less than 0.05% in Missouri, Nevada, North Carolina, Virginia and Wisconsin.[19]

The states use their severance tax revenues for a variety of purposes. The states have devoted these revenues to highway construction, support for schools and recreation, land reclamation in mining areas and a variety of other needs.[20] Some states have dedicated their revenues to trust funds for either specific purposes[21] or for general support of the state government.[22] Revenues have also been used to reduce or eliminate state taxes. For example, Alaska, Texas and Wyoming—all of which impose severance taxes—do not have state income taxes.[23] Louisiana has used severance tax revenues to reduce property taxes.[24]

Since mineral resources are nonrenewable, a state may find it prudent to use severance tax revenues to nurture a more permanent base of economic activity.[25] Unlike other economic resources whose production can be taxed more than once, natural resources

16. *Wars Between the States, supra* note 5. *See* 1846 MICH. PUB. ACTS, c.78.

17. Hagstrom, *The Severance Tax is the Big Gun in the Energy War Between the States*, 13 NAT'L J. 1544, 1545 (1981).

18. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATE GOVERNMENT TAX COLLECTIONS IN 1980, at 7 (1981) (Table III) [hereinafter cited as 1980 STATE TAX COLLECTIONS].

19. *Id.*

20. *See infra* note 38.

21. *See, e.g.*, N.D. CENT. CODE § 57-62-02 (Supp. 1981).

22. *See, e.g.*, COLO. REV. STAT. § 39-29-108 (Supp. 1981).

23. *Wars Between the States, supra* note 5. *See also* N.Y. Times, June 5, 1981, at A10, col. 1.

24. *Federal Preemption of State Energy Policies: Hearings Before the Subcomm. on Limitations of Contracted and Delegated Authority of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 23 (1980) (statement of Byron Dorgan)[hereinafter cited as *Federal Preemption Hearings*].

25. One of the stated objectives of the Montana coal severance tax is " 'to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline.' " Commonwealth Edison Co. v. Montana, 101 S.Ct. 2946, 2969-70 n.13 (Blackmun, J., dissenting) (quoting Joint Conference Committees, Montana State Legislature, Statement to Accompany the Reports of the Free Joint Conference Committee on Coal Taxation, at 1).

such as coal, petroleum and natural gas are nonrenewable and can be taxed only once. The severance of these resources is a permanent loss to the state, and this loss must be compensated for in severance taxes. With the revenues from severance taxes, a state can promote new economic opportunities to replace those irretrievably lost by the extraction of natural resources.[26]

In 1980, 90% of the nation's severance taxes were derived from energy-related resources and 88.6% of the nation's total severance tax revenues went to eight energy producing states—Texas, Louisiana, Alaska, New Mexico, Kentucky, Florida and Wyoming.[27] The highest severance taxes are levied by three coal-producing states in the Northern Great Plains region. Montana has a maximum 30% tax on coal.[28] Wyoming state and local ad valorem taxes on coal total 17.5%.[29] North Dakota has a flat rate tax on lignite which is the equivalent of between 14 and 17% of value.[30] However, the rate of the severance tax levied by a state tells only part of the story. While the rates at which Montana, Wyoming and North Dakota levy their severance taxes are the highest in the nation, the severance taxes on all resources collected by these three states accounted for only 6% of the nation's severance tax revenues in 1980.[31]

Montana has levied a coal severance tax since 1921.[32] Immediately prior to the enactment of the current severance tax schedule in 1975,[33] the severance of Montana coal was taxed at a flat rate of

26. Note, *An Outline For Development of Cost-Based State Severance Taxes*, 20 NAT. RESOURCES J. 913, 926–27 (1980).

27. Hagstrom, *supra* note 17, at 1545. These figures do not include West Virginia's gross receipts tax on coal which is not classified as a severance tax. The severance tax totals also do not include property, sales and income taxes derived from energy production.

28. MONT. CODE ANN. § 15–35–103 (1981).

29. WYO. STAT. §§ 39–2–202, 39–2–402, 39–6–302(a)–(f), 39–6–303(a) (1977 & Supp. 1981). *See* Commonwealth Edison v. Montana, 101 S.Ct. 2946, 2966 n.5 (1981).

30. N.D. CENT. CODE § 57–61–01 (Supp. 1979). By comparison, Alaska taxes oil at 12.25%, ALASKA STAT. § 43.55.011 (1962 & Supp. 1981), and natural gas at 10%, *id.* § 43.55.016, and Texas taxes oil at 4.6%, TEX. TAX CODE ANN. § 201.052 (Vernon 1979), and natural gas at 7.5%. *Id.* § 202.052.

31. 1980 STATE TAX COLLECTIONS, *supra* note 18, at 7 (Table III). In comparison, Texas alone accounted for 36.6% of the nation's severance tax revenues in 1980. *Id.* In per capita terms, in 1980, Montana collected $129.30 in severance taxes per state resident and Texas collected $107.19 in severance taxes per state resident. *See id.*; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION AND HOUSING: UNITED STATES SUMMARY, ADVANCE REPORTS (1981).

32. Commonwealth Edison Co. v. Montana, 101 S.Ct. 2946, 2951 (1981). *See* 1921 Mont. Laws c.155.

33. MONT. CODE ANN. § 15-35-103 (1981).

approximately $0.34 per ton.[34] Under the 1975 amendment, coal mined within the state is taxed at rates varying between 3 and 30% of the coal's value, depending upon the energy content of the coal and the method by which it is extracted.[35] A producer's first 20,000 tons of annual production are exempt from the tax.[36]

In the 1976 general election, Montana voters approved a constitutional amendment adding a new section to the 1972 Montana Constitution. This section provides that after December 31, 1979, at least 50% of the coal severance tax revenues will be deposited in a trust fund, the principal of which is to remain inviolate unless appropriated by 75% of each house of the state legislature.[37] The coal severance tax trust fund is not earmarked for any specific purpose, but rather is intended to support the state government in perpetuity. The remaining severance tax revenues are appropriated according to a statutory formula.[38]

In 1980, Montana collected $94.6 million from its combined severance taxes,[39] which represented 21.7% of the state's total tax revenues.[40] This amount was a marked increase over 1979,[41] and a phenomenal increase over 1970.[42] To date, $54 million has been

34. Commonwealth Edison Co. v. Montana, 101 S.Ct. 2946, 2965 n.3 (1981) (Blackmun, J., dissenting). Even prior to 1975 Montana and its local governments imposed higher taxes on the production of coal than any other state. *Id.* at 2965 n.4.

35. MONT. CODE ANN. § 15-35-03(1) (1981). Surface-mined coal is taxed at a maximum rate of 30% of its contract sales price, and underground-mined coal is taxed at a maximum rate of 4% of its contract sales price. *Id.* Contract sales price is defined as "either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department [of revenue] under 15-35-107." MONT. CODE ANN. § 15-35-102(1) (1981).

36. *Id.* § 15-35-103(3).

37. MONT. CONST., art. IX, § 5.

38. *See* MONT. CODE ANN. § 15-35-108(1981). Revenues from the Montana coal severance tax not dedicated to the trust fund are allocated in the following percentages of the remaining balance: 37.5% for the local impact and education trust fund; 4.5% for alternative energy research development and demonstration; 10% for state equalization aid to public schools; 5% for cultural affairs and parks; 2.5% for renewable resource development bonds; 1% for county land planning; and any remainder to the general fund of the state.

39. Montana also levies a 5% severance tax on oil and a 2.65% severance tax on natural gas. MONT. CODE ANN. § 15-36-101 (1979).

40. 1980 STATE TAX COLLECTIONS, *supra* note 18, at 7 (Table III).

41. In 1979, $53.9 million in severance taxes were collected, representing 13.5% of the state's revenues. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE STATE GOVERNMENT TAX COLLECTIONS IN 1979, at 7 (1980) (Table III).

42. In 1970, $4.73 million in severance taxes were collected, representing 3.6% of the state's revenues. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE STATE TAX COLLECTIONS IN 1970, at 7 (1970) (Table III).

deposited in the coal severance tax trust fund.[43] The severance tax is not the only tax levied on Montana coal production.[44] In addition to revenues generated by state taxes, Montana receives large amounts of coal mining revenue from the federal government under the Mineral Lands Leasing Act of 1920 ("MLLA").[45]

III. *COMMONWEALTH EDISON CO. V. MONTANA*

A. *The Decision*

In 1978, four Montana coal producers and eleven of their out-of-state utility customers brought suit in Montana state court challenging the Montana coal severance tax on grounds that it was invalid under the commerce[46] and supremacy[47] clauses of the United States Constitution. Prior to receiving evidence, the state district court granted Montana's motion to dismiss for failure to state claims upon which relief could be granted.[48] The producers and utilities appealed to the Montana Supreme Court, which affirmed the lower court's decision.[49]

The state supreme court rejected Commonwealth Edison's supremacy clause challenge, which alleged that the severance tax was preempted by the federal government and that it frustrated national policies contained in the MLLA. The court concluded that plaintiffs' mere statement that the Montana severance tax frustrated national policy was insufficient because plaintiffs failed to specify any federal statute substantially frustrated by the tax.[50] In response to the allegation that the severance tax frustrated national

43. Hagstrom, *supra* note 17, at 1545.

44. Montana imposes a gross proceeds tax of 33 or 45%, MONT. CODE ANN. § 15-6-132 (1981), a resource indemnity trust tax of 0.5% of the gross value of production in excess of $5,000, *id.* § 15-38-104, a property tax of 11% on the value of mining equipment, *id.* § 15-6-138(b), and a corporate license tax, *id.* § 15-31-101.

45. 30 U.S.C. §§ 22, 48, 49, 171, 181-194, 201-209, 223-229, 229a, 241, 251, 261-263, 352 (1976 & Supp. III 1978). Under this statute, 50% of the royalties from in-state federal lands leased for mining is returned to the state and another 40% of the revenue from federal leases is returned to the state through a reclamation fund. Furthermore, areas affected by increased coal production are eligible for federal grants under § 601 of the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 4 § 8401 (Supp. II 1978).

46. U.S. CONST., art. I, § 8, cl. 3.

47. U.S. CONST., art. VI, cl. 2.

48. Commonwealth Edison Co. v. State, 615 P.2d 847, 848-49 (Mont. 1980), *aff'd*, 101 S.Ct. 2946 (1981).

49. *Id.* at 863.

50. *Id.* at 860-61.

policy under the MLLA, the court stated that the statute specifically allowed for state taxation[51] and that this allowance had been upheld by the United States Supreme Court in *Mid-Northern Oil Co. v. Walker.*[52]

The Montana Supreme Court also held that the tax was not subject to commerce clause scrutiny, reasoning that the severance of coal from the soil was an activity preceding the entry of the coal into interstate commerce.[53] The court relied on a trilogy of United States Supreme Court decisions[54] from the 1920's which employed similar reasoning to uphold state severance taxes against commerce clause challenges.[55] The court rejected the utilities' contention that the Supreme Court had retreated from these decisions, but, for the sake of argument, applied a test advocated by the utilities and enunciated in *Complete Auto Transit, Inc. v. Brady.*[56] That decision set forth a four-part test which evaluates the practical impact of a state tax on interstate commerce. The court found that the utilities could not have prevailed even under the *Complete Auto Transit* test.[57]

The leading case of the trilogy on which the Montana court relied was *Heisler v. Thomas Colliery Co.*[58] The case involved a Pennsylvania tax on anthracite coal, 80% of which was shipped out of state. The plaintiff challenged the tax on the grounds that by taxing anthracite coal and not bituminous coal the state was making an arbitrary classification in violation of the equal protection clause of the fourteenth amendment. Plaintiff also argued that because most of the anthracite coal was shipped out of state, the tax was a discriminatory burden on interstate commerce in violation of the commerce clause. The Supreme Court held that because anthracite and bituminous coal had different properties there was a rational basis for the tax's distinction. Consequently, the tax did not violate

51. *Id.* at 862.

52. 268 U.S. 45, 49-50 (1925).

53. Commonwealth Edison Co. v. State, 615 P.2d 847, 857 (Mont. 1980), *aff'd*, 101 S.Ct. 2946 (1981).

54. Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923); Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

55. Commonwealth Edison Co. v. State, 615 P.2d 847, 851 (Mont. 1980), *aff'd*, 101 S.Ct. 2946 (1981).

56. 430 U.S. 274 (1977). *See infra* text accompanying notes 81-91.

57. Commonwealth Edison Co. v. State, 615 P.2d 847, 856 (Mont. 1980), *aff'd*, 101 S.Ct. 2946 (1981).

58. 260 U.S. 245 (1922).

the equal protection clause.[59] The Court further held that no commerce clause claim could be made because the coal had not yet entered interstate commerce.[60] The Montana Supreme Court relied upon the latter holding in sustaining Montana's coal severance tax.

Commonwealth Edison appealed the decision of the Montana Supreme Court to the United States Supreme Court,[61] which granted review.[62] Although the Supreme Court upheld the Montana coal severance tax,[63] it rejected the Montana Supreme Court's reliance on *Heisler*. The Court agreed with appellants that *Heisler* had been undermined by more recent cases rejecting the notion that a state tax or regulation affecting interstate commerce was immune from commerce clause scrutiny because it attached only to a local activity.[64] Because the economic effects of a severance tax could not be distinguished from other taxes that had been subjected to commerce clause scrutiny, the Court held that the Montana tax must be evaluated under the four-part test of *Complete Auto Transit*. After conducting its own analysis of the severance tax under the criteria of the four-part test, the Court agreed with the Montana court's alternative holding that the appellants' commerce clause claim could not have prevailed under the *Complete Auto Transit* test.[65]

Turning to appellants' challenge under the Supremacy Clause, the Court held that while federal statutes encourage coal use, there

59. *Id.* at 255.

60. *Id.* at 261. *Heisler* remained the controlling case in the field of state energy resources taxation for 60 years.

61. Pursuant to 28 U.S.C. § 1257(2)(1976), the Supreme Court will review decisions by appeal if a state court has upheld a state statute against a claim that it is repugnant to the Constitution, treaties or laws of the United States.

62. Commonwealth Edison Co. v. Montana, 101 S.Ct. 607 (1980). Appeal to the Supreme Court under 28 U.S.C. § 1257(2) is ostensibly a matter of right. However, as with certiorari, it is essentially discretionary. "[I]n most cases the Court summarily affirms, or dismisses the appeal for want of a substantial federal question. Thus while such dispositions represent decisions on the merits, they are of scant comfort to the appellant who has obtained no relief." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 551 (3d ed. 1976).

63. Commonwealth Edison Co. v. Montana, 101 S.Ct. 2946, 2964 (1981). The Court affirmed the Montana Supreme Court in a 6–3 decision. Justice Marshall wrote the majority opinion, Justice White wrote a concurring opinion, and Justices Powell and Stevens joined in Justice Blackmun's dissent.

64. *Id.* at 2952. The Court cited Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 350 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137, 141-42 (1970); Nippert v. City of Richmond, 327 U.S. 416, 423-24 (1946).

65. *Commonwealth Edison*, 101 S.Ct. at 2960.

was no proof that Congress intended to preempt all state activity in the area of coal development. To the contrary, the Court found that the MLLA and a Supreme Court decision established that Congress envisioned a role for the states.[66] In section 32 of the MLLA,[67] Congress had expressly permitted states to impose taxes on federal lessees. The Court in *Mid-Northern Oil Co. v. Walker*[68] had held that under section 32 the states could "levy and collect taxes as though the government were not concerned."[69]

The Court also held that the tax was not inconsistent with the Powerplant and Industrial Fuel Use Act of 1978.[70] Section 601(a)(2)[71] of the Act anticipated the continued existence of state severance taxes, and the legislative history shows that Congress enacted the statute with the Montana coal severance tax in mind.[72] Thus, the Court concluded that the appellants had failed to prove that the tax violated either the commerce or the supremacy clause, or that a trial was necessary to determine the constitutionality of the tax.[73]

Justice Blackmun's dissent was based on the premise that a "tailored tax"[74] deserves careful scrutiny and that because the coal severance tax was such a tax, the appellants deserved a trial on the facts.[75] Justice Blackmun recited several factors that vouched for the substantiality of the appellants' commerce clause claim. These

66. *Id.* at 2961.
67. 30 U.S.C. § 189 (1976).
68. 268 U.S. 45 (1925).
69. *Id.* at 49.
70. 42 U.S.C. §§ 8301-8483 (Supp. II 1978).
71. 42 U.S.C. § 8401(a)(2) (Supp. II 1978).
72. *See* H.R. REP. No. 95-1749, 95th Cong., 2d Sess. 93 (1978) (conference report), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 8760, 8786.
73. *Commonwealth Edison*, 101 S.Ct. at 2964. Justice White's short concurring opinion stated that because Congress has the power to protect interstate commerce from intolerable burdens, he felt that "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government." *Id.* White noted that Congress was aware of the problem, that it had not acted and that the Solicitor General had counselled against overturning the tax. However, he conceded that there was force to the argument that the tax was unconstitutional in light of the fact that most of the Montana tax was collected on coal mined on federal lands and that the federal government shared royalties with the state and returned money through the reclamation fund. *Id.*
74. The term "tailored tax" is derived from a footnote in *Complete Auto Transit*, 430 U.S. at 288 n.15, which states that state taxes on interstate business are susceptible to tailoring to subject interstate business to effects forbidden by the commerce clause and therefore should be subject to careful scrutiny by the courts.
75. *Commonwealth Edison*, 101 S.Ct. at 2964-65.

factors included the pivotal position of Montana in the low-sulfur coal market, the substantial revenues generated by the tax, the legislative history of the 1975 tax schedule and a congressional committee's finding[76] that the Montana severance tax revenues were far in excess of the cost of coal development.[77] He agreed that the *Complete Auto Transit* test was the correct standard to apply but argued that the Court had misapplied the test so as to make it ineffectual with regard to the coal severance tax.[78] Justice Blackmun observed that while a trial on the tax's validity would require complex factual inquiries, this was not beyond judicial competence.[79] He concluded that deference to Congress was an inadequate judicial response since the severance tax question involved the most serious issues of federalism.[80]

B. *The Complete Auto Transit Test*

In 1977, Justice Blackmun wrote a unanimous opinion for the Court in *Complete Auto Transit, Inc. v. Brady*,[81] which enunciated a four-part test for ascertaining whether a state tax was an unreasonable burden on interstate commerce. The case involved an action by a Michigan corporation, Complete Auto Transit, Inc. ("Complete Auto"), which transported motor vehicles, within the state of Mississippi, from manufacturers to dealers.

Complete Auto challenged the validity of Mississippi's 5% tax on gross income earned by doing business within the state.[82] The corporation claimed that transport of vehicles within Mississippi was part of interstate commerce, and relied on the rule set forth in *Spector Motor Service v. O'Connor*.[83] That rule held that a tax on

76. H.R. REP. No. 96-1527, PT. 1, 96th Cong., 2d Sess. 2 (1980).
77. *Commonwealth Edison*, 101 U.S. at 2965-67.
78. *Id.* at 2968.
79. *Id.* at 2971.
80. *Id.* at 2971–72.
81. 430 U.S. 274 (1977).
82. 430 U.S. at 275-76. *See* MISS. CODE ANN. § 27–65–13 (1972).
83. 340 U.S. 602 (1951). In *Spector*, Connecticut imposed a tax upon the privilege of doing business within the state measured by apportioned net income. Some of the shipments of Spector Motor Service, a Missouri corporation engaged exclusively in interstate trucking, originated or terminated in Connecticut. The company brought suit to enjoin the collection of the tax. The Supreme Court held the tax unconstitutional as applied to what was exclusively interstate commerce.

the privilege of engaging in an activity may not be applied to an activity that is part of interstate commerce.[84]

The *Complete Auto Transit* Court affirmed the decision of the Supreme Court of Mississippi,[85] thus upholding the privilege tax and overruling *Spector.*[86] The Court overruled the *Spector* rule because it rejected the premise that interstate commerce was absolutely immune from taxation: "the *Spector* rule [did] not address the problems with which the Commerce Clause is concerned."[87] The Court noted that the *Spector* rule bore no relationship to economic realities because it looked only to the fact that the incidence of the tax was the privilege of doing business rather than to the practical effect of the tax upon interstate commerce.[88]

In *Complete Auto Transit,* Mississippi's citation of decisions[89] applying a practical analysis proved persuasive. The Court viewed its holdings in these cases as having "sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[90]

In deciding *Complete Auto Transit,* the Court did not apply its four-part test to the concrete facts of the case, because the appellant failed to allege that the criteria had not been met.[91] Thus, the

84. In *Complete Auto Transit,* 430 U.S. at 279, the State of Mississippi cited a series of Supreme Court decisions for the propositions that the commerce clause was not intended to relieve interstate commerce of its just share of state tax burdens and that state taxes would be evaluated on the basis of their practical effect on interstate commerce rather than on the formal language of the tax statute. General Motors Corp. v. Washington, 377 U.S. 436 (1964); Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959); Memphis Gas Co. v. Stone, 335 U.S. 80 (1948); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

85. Complete Auto Transit, Inc. v. Brady, 330 So.2d 268 (Miss. 1976), *aff'd,* 430 U.S. 274 (1977).

86. *Complete Auto Transit,* 430 U.S. at 288-89.

87. *Id.* at 288.

88. Over the years the *Spector* rule had been narrowed to one of draftsmanship and phraseology, with the Court increasingly using a practical analysis of the impact a state tax had on interstate commerce. *See* Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975); Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959); Railway Express Agency v. Virginia, 358 U.S. 434 (1959).

89. *Complete Auto Transit,* 430 U.S. at 279. *See supra* note 85.

90. *Complete Auto Transit,* 430 U.S. at 279.

91. In the opinion, the four criteria of the *Complete Auto Transit* test were spelled out twice: first, in stating that appellant had failed to allege that the criteria had not been satisfied, *id.* at 277-78, and second, in the aforementioned passage pertaining to the practical analysis of the effect of state taxes on interstate commerce. *Id.* at 279.

result in *Complete Auto Transit* is of little help in applying the four-part test to subsequent cases.

C. *The Complete Auto Transit Test and the Montana Coal Severance Tax*

Prior to *Commonwealth Edison*, the Court's decisions[92] applying the *Complete Auto Transit* test had focused on the threshold question of a state's right to levy any tax on the interstate commerce in question.[93] *Commonwealth Edison* was the first case in which the Court applied the fourth prong of the test to a claim that the rate of a tax exceeded the value of services provided by the state, and thus was not fairly related to them.[94] Appellants in *Commonwealth Edison* did not contest Montana's right to levy a coal severance tax. Rather they contested the rate of the tax as being discriminatory against interstate commerce and as not being fairly related to the services provided by the state.

Commonwealth Edison Co. ("the Company") argued first that the tax was discriminatory because its burden was borne primarily by out-of-state consumers,[95] an argument addressed to the third prong of the *Complete Auto Transit* test. The Court was unconvinced. It noted that appellants' argument ran counter to the premise underlying the Court's discrimination decisions, that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States."[96] For purposes of interstate and foreign

92. *See, e.g.*, Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980); National Geographic Society v. California Bd. of Equalization, 430 U.S. 551 (1977).

93. In Maryland v. Louisiana, 101 S.Ct. 2114 (1981), appellants argued that there was not a sufficient relation between the services provided by the state and the Louisiana first use tax. However, because the Court found the tax to be discriminatory it did not have to address this issue. *Id.* at 2133 n.27.

94. *Cf.* Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978); National Geographic Society v. California Bd. of Equalization, 430 U.S. 551 (1977).

95. Appellants asserted that because 90% of Montana coal was shipped out of state under contracts that shifted the burden to out-of-state utility customers, the tax discriminated against interstate commerce. The Court treated appellant's discrimination theory as a variant of their claim under the fourth prong of the *Complete Auto Transit* test because, in light of the fact that appellants conceded that some severance tax could be levied, their claim pertaining to the excessiveness of the tax burden borne by out-of-state consumers was identical to a claim that the tax was not fairly related to the services provided by the state. *Commonwealth Edison*, 101 S.Ct. at 2954-55.

96. *Commonwealth Edison*, 101 S.Ct. at 2954 (quoting McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944)).

commerce, state borders are virtually irrelevant. Thus, to strike down the Montana tax solely because most of the state's coal was shipped out of state would be irreconcilable with the goal of promoting free trade which underlies the commerce clause. Furthermore, the Court stated that there was no basis for any claim that the commerce clause gives any state a right of access to resources of another state at reasonable prices.[97]

The Company's second claim, that Montana's coal severance tax revenues far exceeded the value of state services provided to the coal mining industry, was addressed to the fourth prong of the *Complete Auto Transit* test. Commonwealth Edison argued that it was entitled to an opportunity to prove that the tax was not fairly related to costs pertaining to mining.

The Court rejected this argument because it had accepted the Montana Supreme Court's characterization of the coal severance tax as a general revenue tax.[98] In so doing, the Court disregarded a separate body of case law involving state-imposed charges linked to the use of state-owned or state-provided services or facilities—user fees.[99] The states have considerable latitude in imposing general revenue taxes because there is no due process clause requirement that the amount of revenue generated by an activity must correspond to the value of services provided by that activity. In support of this proposition, the Court quoted from its decision in *Carmichael v. Southern Coal & Coke Co.*:[100]

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.[101]

97. *Commonwealth Edison*, 101 S.Ct. at 2955.

98. The Court stated, "appellants have completely misunderstood the nature of the inquiry under the fourth prong of the *Complete Auto Transit* test." *Id.* at 2956. In further response to appellants' argument that the fourth prong of the *Complete Auto Transit* test necessitated an inquiry into the relationship between coal severance tax revenues and coal development costs, the Court observed that tax rates were a matter for legislative determination and that it was unlikely a legal test could be devised for the determination of acceptable levels of state taxation. It was noted that under the federal arrangement it was up to the Congress to determine when state tax policies were adverse to the national interest. *Id.* at 2959.

99. *Id.* at 2956.

100. 301 U.S. 495 (1937).

101. *Id.* at 522.

This great latitude in taxation, the Court reasoned, is not forfeited because the activity taxed is in interstate commerce.[102]

The majority determined that the fourth prong of the test derived from decisions holding that the controlling question was whether an activity was taxed in relation to the opportunities provided by the taxing state.[103] Clarifying the fourth prong of *Complete Auto Transit*, the Court held that the relevant inquiry was whether the measure of the tax was reasonably related to the taxpayer's activities in the state.[104] Under the Court's formulation, the inquiry under the fourth prong was a development of the inquiry conducted under the first prong, that is, whether the taxpayer had a substantial nexus with the taxing state. The first prong was satisfied because the operating incidence of the tax was on the mining of coal within the state; the fourth prong was satisfied because the tax was based on a percentage of the value of the coal extracted in the state, and, therefore, was clearly reasonably related to the taxpayer's contact with the state.[105]

Justice Marshall's opinion for the majority was quite broad and did not examine the motivation underlying the Montana coal severance tax. It glossed over the contradictions between the legislative history and the Montana Supreme Court decision and labelled, without independent analysis, the coal tax a general revenue tax. The majority failed to give any reason for so readily deferring to the Montana Supreme Court's characterization.[106]

The Court was under no obligation to accept the state court's categorization of the tax. In *La Costa v. Department of Conservation*,[107] the Court stated:

> This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form.[108]

102. *Commonwealth Edison*, 101 S.Ct. at 2956–57.

103. *Commonwealth Edison*, 101 S.Ct. at 2958, n.14 (citing General Motors Corp. v. Washington, 377 U.S. 436 (1964); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)).

104. *Id.* at 2958.

105. *Id.*

106. *See id.* at 2956.

107. 263 U.S. 545 (1924).

108. *Id.* at 550 (citations omitted).

Yet, in *Commonwealth Edison* there is no evidence the Court considered alternative characterizations of the Montana coal severance tax, such as that of a user fee or, perhaps, a hybrid category blending elements of a general revenue tax with those of a user fee.[109]

Perhaps the Court's reluctance to address the substantiality of appellants' claims can be explained by the introduction in Congress of bills to address the issue,[110] and by the belief that the Court should steer clear of the complex factual questions involved until it was clear that the legislative branch would not act on the question.

The Court's failure to account for the differences between a challenge to the rate of a tax on interstate commerce and a challenge to a state's right to levy any tax on interstate commerce, and its failure to adjust accordingly the analysis under the fourth prong of the *Complete Auto Transit* test, undermined its decision in *Commonwealth Edison*. Under the Court's formulation, the fourth prong collapses into the first prong whenever a state levies an ad valorem tax. How can this be called a test of a tax's practical effect on interstate commerce?

IV. The Blackmun Dissent and an Alternative Test

In his dissenting opinion, Justice Blackmun contended that the Court's application of the *Complete Auto Transit* test emasculated the test's fourth prong. Under the Court's reasoning, any ad valorem tax, no matter how high, would satisfy the "fairly related" test. This formulation, he observed, was just as "mechanical" as the discredited *Heisler v. Thomas Colliary Co.*[111] test.[112] Nothing in the Court's prior decisions dictated such a reformulation of the fourth prong. Justice Blackmun contended that the two cases relied upon by the majority[113] both dealt solely with the existence of a substantial nexus between the taxpayer and the taxing state, not with the "fairly related" question.[114]

109. Furthermore, the Court failed to acknowledge that appellants' challenge was unlike any previous case in which the Court had applied the *Complete Auto Transit* test.

110. S. 2695, 96th Cong., 2d Sess. (1980), 126 Cong. Rec. S5306 (daily ed. May 14, 1980); H.R. 7163, 96th Cong., 2d Sess. (1980); H.R. 6654, 96th Cong., 2d Sess. (1980); H.R. 6625, 96th Cong., 2d Sess. (1980).

111. 260 U.S. 245 (1922). *See supra* text accompanying notes 58-60.

112. *Commonwealth Edison*, 101 S.Ct. at 2968.

113. *See id.* at 2958 n.14 (citing General Motors Corp. v. Washington, 377 U.S. 436 (1964); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)).

114. *Commonwealth Edison*, 101 S.Ct. at 2968 n.12.

Justice Blackmun took issue with the majority's characterization of the Montana coal severance tax as a general revenue tax. Language in the Montana Supreme Court decision stated that the tax was intended partially to compensate the state for coal development costs;[115] in addition, the report of a conference committee of the Montana legislature listed support of the general fund as only one of three objectives of the 1975 amendment.[116]

Justice Blackmun noted that, in the past, the Court had looked behind facially neutral and properly apportioned state taxes, and that in *Michigan-Wisconsin Pipe Line Co. v. Calvert*[117] such a tax was invalidated. In *Calvert*, the Court responded to the state's argument that it conferred benefits on the taxpayer by saying that this was sufficient only to get the tax past the due process hurdle, and that the Court still must inquire into the impact of the tax on interstate commerce.[118]

While a trial on the validity of the Montana coal severance tax would involve "complex factual inquiries,"[119] Justice Blackmun believed such an inquiry to be within judicial competence. He suggested that the following test be applied:

> If the tax is in fact a legitimate general revenue measure identical or roughly comparable to taxes imposed upon similar industries, a court's inquiry is at an end; on the other hand, if the tax singles out this particular interstate activity and charges it with a grossly disproportionate share of the general costs of government, the court must determine whether there is some reasonable basis for the legislative judgment that the tax is necessary to compensate the State for the particular costs imposed by the activity.[120]

Justice Blackmun's dissent was correct in stating that the Court's formulation of the fourth prong of the *Complete Auto Transit* test "is no less 'mechanical' than the approach entertained in *Heisler*."[121] Under the majority's formulation[122] any ad valorem

115. *Id.* at 2969 n.13 (citing Commonwealth Edison v. State, 615 P.2d 847, 850, 855 (Mont. 1980), *aff'd*, 101 S.Ct. 2946 (1981)).

116. *Commonwealth Edison*, 101 S.Ct. at 2969 n.13.

117. 347 U.S. 1954 (1954).

118. *Id.* at 163-64.

119. *Commonwealth Edison*, 101 S.Ct. at 2971.

120. *Id.* at 2971-72.

121. *Commonwealth Edison*, 101 S.Ct. at 2968.

122. "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society," ' " *Id.* at 2959 (quoting Exxon Corp. v. Wisconsin Dep't. of Revenue, 447 U.S. 207, 228 (1980) (quoting Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979))).

tax would be upheld. So long as a tax is proportional, the inquiry under the fourth prong goes no further than the substantial nexus inquiry under the first prong of the *Complete Auto Transit* test. Furthermore, under the Court's formulation, so long as a tax is facially neutral the discrimination inquiry of the third prong of the *Complete Auto Transit* test will never be an issue.

Commonwealth Edison was the first case in which the Court applied the *Complete Auto Transit* test to a challenge to both a severance tax and to the amount of a tax. If the test is to be of any significance in addressing these issues, some refinement of the fourth prong is necessary. One possibility would be to discard the distinction between general revenue taxes and user fees when evaluating severance taxes. There is some evidence that abandoning the distinction is appropriate.

First, two user fee cases were cited in the *Complete Auto Transit* opinion in reference to the criteria of the four-part test. In *Ingels v. Morf*,[123] the Court struck down the California "Caravan Act," a statute requiring vehicles moving on state highways to obtain a permit, as an unconstitutional burden on interstate commerce. The Court held that for a state to justify exacting a payment which burdens interstate commerce, it must affirmatively appear that the payment is demanded as a reimbursement for the expense of facilities or regulations which the state is constitutionally empowered to provide. The fee was struck down because plaintiff had carried the burden of showing that the charge was excessive in relation to the value of the services provided.

In *Clark v. Paul Gray, Inc.*,[124] a subsequent enactment of the "Caravan Act" was upheld. The Court held that the state was not required to compute with mathematical precision the cost of services necessitated by caravan traffic. If fees do not appear manifestly disproportionate to the services provided, a court cannot say the fees are excessive.

Comparing the user fee decisions with the other decisions relied on to arrive at the tests in *Complete Auto Transit*,[125] it is apparent

123. 300 U.S. 290 (1937).

124. 306 U.S. 583 (1939).

125. 430 U.S. 274, 278 n.6, 279 n.9 (1977). The Court cited Boston Stock Exchange v. State Tax Comm'r, 429 U.S. 318 (1977) (tax imposing greater liability on out-of-state sales than on in-state sales held to discriminate against interstate commerce); General Motors Corp. v. Washington, 377 U.S. 436 (1964) (tax on unapportioned gross receipts from wholesale sales to in-state dealers held reasonably related to taxpayer's in-state activities); Illinois Cent. R. Co. v. Minnesota, 309 U.S. 157 (1940) (tax on railroad's earnings from in-state

that the former were cited as challenges to the sufficiency of the relation between taxes and the services provided by the state. In *Ingels v. Morf* and *Clark v. Paul Gray, Inc.*, the Court inquired into the substantive relation between a taxpayer's in-state activities and the value of services provided by the state. At the very least, these two decisions show that the requirement set down by the fourth prong can be given a "narrow" interpretation as well as the "broad" interpretation employed by the Court in *Commonwealth Edison.*[126] Indeed, the majority's assertion in *Commonwealth Edison* that the "fairly related" test is derived from decisions in which the controlling test was whether commerce was taxed in relation to its presence in the taxing state[127] seems questionable when it is recalled that Justice Blackmun in *Complete Auto Transit* relied on two user fee decisions.[128]

In *Commonwealth Edison*, the Court cited *Interstate Transit, Inc. v. Lindsey*[129] to support its distinction between the test used to determine the validity of general revenue taxes and that applied to

operations upheld because it was evenhanded and bore a fair relation to property employed in state); Ingels v. Morf, 300 U.S. 290 (1937) (highway user fee struck down because it was excessive in relation to value of services provided by state); Standard Steel Co. v. Washington Revenue Dep't., 419 U.S. 560 (1975) (unapportioned gross receipts tax upheld because it bore a fair relation to benefits conferred, there was no showing of multiple taxation, and tax was exactly proportioned to activities taxed); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) (highway user fee upheld because fees did not appear manifestly disproportionate to services provided); Northwestern Cement Co. v. Minnesota, 358 U.S. 540 (1959) (tax on net income from intrastate operations valid so long as it was not discriminatory and properly apportioned to local activities forming sufficient nexus to support the tax); Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948) (tax on capital used in state by corporation engaged solely in interstate commerce upheld because tax was not discriminatory, there was no possibility of multiple taxation, the amount was reasonable, and it was properly apportioned to in-state activities); Wisconsin v. J.C. Penney Co., 311 U.S. 345 (1940) (tax on dividends declared on income attributable to in-state activities upheld because of fair relation between benefits conferred and measure of tax).

126. 101 S.Ct. at 2969 (Blackmun, J., dissenting). Broadly interpreted, the fourth prong permits a state to require interstate commerce to pay its proportional share of the costs of living in a civilized society; narrowly interpreted, the test permits a state to recover the costs attributable to in-state activities engaged in by interstate commerce.

127. *See, e.g.*, General Motors Corp. v. Washington, 377 U.S. 436 (1964); Wisconsin v. J.C. Penney Co., 311 U.S. 345 (1940).

128. Justice Blackmun's characterization of the inquiry under the fourth prong of the *Complete Auto Transit* test as including an examination of the relation between a tax and the value of the services provided by a state was demonstrated when in his *Commonwealth Edison* dissent he cited *Ingels v. Morf, Clark v. Paul Gray, Inc.* and other user fee decisions as examples of a narrow application of the "fairly related" test. 101 S.Ct. at 2969 n.13.

129. 283 U.S. 183 (1931).

user fees.[130] An examination of *Interstate Transit*, however, reveals that its underlying premise is no longer valid. The distinction between user fees and general revenue taxes was made because of the then-prevailing doctrine that taxes on interstate commerce had to be evaluated as user fees. The discredited *Spector*[131] rule that a state could not tax an activity that was exclusively interstate commerce was based on this doctrine. If *Interstate Transit* is the only basis for this distinction, then the invalidity of the premise underlying *Interstate Transit* suggests that the distinction has become an artificial one.

In its user fee decisions, the Court has demonstrated great flexibility when evaluating state tax formulas. In *Capitol Greyhound Lines v. Brice*,[132] the State of Maryland exacted a toll of 2% of the fair market value of motor vehicles used in interstate commerce in addition to a standard mileage charge. Thus, the charge levied on interstate commerce arguably was not proportional to the mileage travelled in the state. Nonetheless, the Court upheld the tax, stating that it "should be judged by its result, not its formula, and must stand unless proven to be unreasonable."[133]

In *Evansville-Vandenburgh Airport Authority District v. Delta Airlines, Inc.*,[134] the Court stated the following standard for assessing the constitutionality of user fees under the commerce clause:

> So long as the [user fee] 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 state facilities by individual users.[135]

Thus, it seems a court would have sufficient flexibility evaluating a severance tax under the user fee standard.

In *Evansville-Vandenburgh*, the State of New Hampshire imposed a per passenger fee on commercial airline flights, with fifty percent of the revenues dedicated to the state aeronautical fund and the remainder going to municipalities and airport authorities own-

130. 101 S.Ct. at 2956 n.12.
131. 340 U.S. 602 (1951). *See supra* text accompanying notes 83-84.
132. 339 U.S. 542 (1950).
133. *Id.* at 545.
134. 405 U.S. 707 (1972).
135. *Id.* at 716–17.

ing public landing areas. The appellants claimed that the tax could not be upheld as a user fee because fifty percent of the revenue was allocated to the communities in the form of unrestricted general revenues. In upholding the tax, the Court stated that:

> so long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use. The State's choice to reimburse local expenditures through unrestricted rather than restricted revenues is not a matter of concern to these appellants.[136]

Except in name, the Montana coal severance tax is not significantly different from the New Hampshire airport user fee. In both cases, significant portions of the revenues collected from activities were allocated to fund governmental operations other than the services provided to the taxed activities. This functional similarity indicates that in the area of severance taxes the line between a general revenue tax and a user fee is quite blurry.

There is an affirmative basis to argue that the Montana coal severance tax is closer to a user fee than a general revenue tax. Although the Montana Supreme Court described the coal severance tax as "imposed for the general support of the government,"[137] it also spoke of the tax in language that suggests a user fee: "Montana can require strip-coal mining to assume its just share of the cost of the state government that it enjoys, and for the governmental cost that has occurred, is now occurring, and will occur in the future as a direct result of such strip-coal mining."[138] The objectives of the 1975 tax schedule as stated in a report of a joint committee of the Montana legislature intimate that the coal severance tax was intended at least partially as a user fee.[139] Furthermore, representatives of the Montana state government testified before Congress that their goal in levying the severance tax was to recoup the costs

136. *Id.* at 720.

137. Commonwealth Edison Co. v. State, 615 P.2d 847, 856 (Mont. 1980), *aff'd*, 101 S.Ct. 2946 (1981).

138. *Id.* at 855.

139. *Commonwealth Edison*, 101 S.Ct. at 2969–70 n.13 (Blackmun, J., dissenting). Justice Blackmun quoted the Joint Conference Committees, Montana State Legislature, Statement to Accompany the Report of the Free Joint Conference Committee on Coal Taxation. The objectives were to "(a) preserve or modestly increase revenues going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline." *Id.* at 1.

of coal development.[140] These representations by Montana's legislative and executive branches should have been accorded great weight. Formally, they indicate that a user fee analysis would have been proper; in light of the Montana tax's functional likeness to a user fee, that result would have afforded a more sensitive treatment of the facts.

To encompass severance taxes, the concept of a user fee should be expanded to embrace the full range of impacts which resource development can have on a state. Rather than covering just the cost of the regulations and services for which user fees traditionally have been utilized,[141] the analysis of a severance tax should cover the cost of developing an infrastructure to cope with large-scale resource development. There is no reason why this analysis could not also make some provision for a reasonable trust fund to cope with the long-term costs of resource development. The Court's standard for assessing the validity of user fees has always been quite flexible, and there is no reason why the analysis cannot be expanded to cover the services demanded of a state to accommodate sudden, large-scale resource development. This inquiry would be more complex than that in traditional user fee cases. However, in light of the superficiality of the Court's analysis under the fourth prong in *Commonwealth Edison*, the threshold analysis under the "fairly related" test will have to become more substantial if the *Complete Auto Transit* test is to be a practicable gauge of a state tax's impact on interstate commerce.

Both the modified user fee standard and the formulation of the fourth prong of the *Complete Auto Transit* test in Justice Blackmun's *Commonwealth Edison* dissent attempt to forge a middle ground between the factual inquiry of a traditional user fee analysis and the ineffectual inquiry into proportionality of the Court's formulation of the fourth prong. Either of these alternative formulations of the examination of whether a tax "is fairly related to the services provided by the State"[142] is more effective than the Court's formulation in achieving the purpose of the *Complete Auto Transit*

140. *Coal Severance Tax: Hearings on S. 2695 Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 2d Sess. 194 (1980) (statement of Thomas L. Judge, Governor of Montana) [hereinafter cited as *Hearings on S.2695]*.

141. *See, e.g.*, Ingels v. Morf, 300 U.S. 290 (1937) (road repairs and policing); Evansville-Vandenburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) (airport administration and maintenance).

142. *Complete Auto Transit*, 430 U.S. at 279.

test to be a "practical analysis"[143] of the effect of a state tax on interstate commerce.

V. FUTURE PROSPECTS

Despite the Court's hopes that Congress will resolve the severance tax issue, it is likely that as a result of its perfunctory analysis in *Commonwealth Edison*, the Court will have to readdress the severance tax issue. As discussed below, it will be difficult for Congress to overcome built-in obstacles to resolving the severance tax issue.

During the Ninety-sixth Congress four bills were introduced to place a cap on coal severance tax rates.[144] Thus far in the Ninety-seventh Congress two such bills have been introduced.[145] None of the bills proposed in the Ninety-sixth Congress was enacted. One proposal for a 12.5% cap on coal severance tax rates, H.R. 6625, was reported out by the House Committee on Interstate and Foreign Commerce in the final days of the Ninety-sixth Congress.[146] The full House never acted on H.R. 6625. Among the Committee's findings were the following:

> 5) Certain State coal severance tax rates in excess of 12½ percent are resulting in revenues being paid to those States far in excess of the direct and indirect impact costs attributable to the coal production while unreasonably increasing energy costs, including electric utility rates to out-of-State consumers;
> 6) A State tax unfairly skewed to elicit revenues from out-of-State residents who are denied a voting voice in determining such tax may polarize the Nation and promote fractiousness and regional divisiveness . . . . [147]

The opposing camps in the dispute over coal severance tax rates have yet to find a common ground on which to wage a meaningful debate. Until some consensus is reached on the function to be served by severance taxes, and until the scope of the debate is broadened to recognize the impact of severance taxes on natural resources other than coal, the prospects for congressional action on the severance tax question remain nil.

143. *Id.*

144. S. 2695, 96th Cong., 2d Sess. (1980), 126 CONG. REC. S5306 (daily ed. May 14, 1980); H.R. 7163, 96th Cong., 2d Sess. (1980); H.R. 6654, 96th Cong., 2d Sess. (1980); H.R. 6625, 96th Cong., 2d Sess. (1980).

145. S. 178, 97th Cong., 1st Sess. (1981); H.R. 1313, 97th Cong., 1st Sess. (1981).

146. H.R. REP. No. 96-1527, PT. 1 (1980).

147. *Id.* at 2.

Proponents of a ceiling on coal severance tax rates argue that the rates typically bear no relation to the cost of coal development and claim that the taxes are an effort by the coal-producing states to take advantage of the surge in demand created by the energy crisis.[148] They cite studies asserting that a tax of two to four cents per ton would cover the cost of coal development.[149] Advocates of a cap on severance tax rates point out that much of the coal extraction taxed by the producing states occurs on federal lands, yielding funds for reclamation[150] and a return of fifty percent of federal royalties to the producing states.[151] The allocation of a significant portion of severance tax revenues to state trust funds is taken as evidence that producing states do not need all of the revenues generated by severance taxes.[152]

Proponents of a severance tax rate ceiling also point to the potential adverse effects of severance taxes upon the federal system. Specifically, they predict an unprecedented transfer of wealth to the producing states, the distortion of federal revenue sharing allocations, and the possibility of retaliatory taxes by the consuming states.[153] Advocates of the legislation dismiss their opponents' argument that a ceiling on severance taxes would set a dangerous precedent for federal limits on other exercises of state taxing power because, they claim, the severance tax situation is unique.[154]

Opponents of a ceiling on coal severance tax rates argue that the legislation would be an unconstitutional limit on state freedom to structure integral operations in areas of traditional governmental functions, citing the Supreme Court's decision in *National League of Cities v. Usery*.[155] It is argued that a cap on coal severance tax rates would create a dangerous precedent for federal limits on other forms of state taxation.[156]

148. *Hearings on* S. *2695, supra* note 140, at 247 (statement of William P. Rogers).

149. *Id.* (statement of William P. Rogers, quoting from study prepared by National Economic Research Associates).

150. 30 U.S.C. § 191 (1976). *See supra* note 45.

151. *Hearings on* S. *2695, supra* note 140, at 50 (statement of Sen. Durenberger).

152. *Id.* at 250 (statement of William P. Rogers).

153. *Id.* at 39 (statement of Sen. Durenberger).

154. *Id.* at 39 (statement of William P. Rogers).

155. 426 U.S. 833 (1976). In *National League of Cities*, the Court in a 5-4 decision held that the federal Fair Labor Standards Act was not applicable to the states and their political subdivisions so far as they are engaged in carrying out "traditional governmental functions." *Id.*at 852.

156. *Federal Preemption Hearings, supra* note 24, at 32 (statement of Robert Hall).

Opponents of the legislation claim that the 12.5% ceiling in the proposed statutes is an arbitrary limit bearing no relation to the cost of coal development. They cite a Congressional Budget Office study of the costs of coal development[157] and a Los Alamos Scientific Laboratory study indicating that severance taxes on coal would not become a burden on interstate commerce until they reached the 35 to 40% range.[158] As for policy, severance tax defenders argue that free market principles require that energy customers be allowed to decide whether the tax is an unreasonable burden on interstate commerce.[159]

In answer to charges that severance taxes raise the cost of energy to end users, opponents of the tax limit point to the fact that severance taxes are a miniscule part of the final price of coal, far exceeded by transportation costs and state sales taxes on energy consumers.[160] They note that on a per-BTU basis the Montana coal severance tax is in line with the severance taxes levied by oil- and gas-producing states.[161]

Finally, opponents reject the premise that coal mined on federal lands should be specially shielded from state taxation. They would treat federal ownership as irrelevant in light of the legal recognition accorded private property rights[162] in coal on the leased federal lands.[163] Furthermore, defenders of the severance taxes claim that federal royalty refunds and reclamation funds are inadequate to cover the cost of coal development.[164] Severance tax trust funds are justified as an exercise of the state's freedom to dispose of its revenues in the best interest of the state.[165]

157. *Id.* at 46 (statement of Ruth Towe).

158. *Id.* at 32, 34 (statement of Robert Hall).

159. *Id.* at 12 (statement of Joseph McElwain).

160. *Hearings on S. 2695*, *supra* note 140, at 121 (statement of Sen. Melcher).

161. *Id.* at 9 (statement of Sen. Wallop).

162. *See, e.g.*, London Extension Mining Co. v. Ellis, 134 F.2d 405, 411 (10th Cir. 1943); Olson v. Pedersen, 194 Neb. 159, 172, 231 N.W.2d 310, 318 (1975); 58 C.J.S. *Mines and Minerals* § 177 (1948).

163. *Hearings on S. 2695*, *supra* note 140, at 9 (statement of Sen. Wallop).

164. *Federal Preemption Hearings*, *supra* note 24, at 25 (statement of Byron Dorgan).

165. *Id.* at 23. This list of arguments for and against a congressionally imposed ceiling on state severance tax rates is by no means exhaustive. However, it does illustrate the lack of consensus on the basic facts necessary to reach a decision on reasonable severance tax rates. Part of the problem is that opposing sides in this debate are not speaking in the same terms. For example, advocates of the ceiling speak in terms of the absolute transfer of dollars from the consuming states to the producing states, while their opponents speak in terms of the added cost to the average utility customer. Advocates of the legislation speak in terms of the

Two developments are needed in order for the severance tax debate to be usefully resolved. First, some common denominators must be defined. For example, what is the purpose of a severance tax? What social and economic costs are attributable to energy resource development? Second, the focus of the debate must expand beyond the severance tax *rates* of coal-producing states to the more meaningful issue of the transfer of wealth occurring because of domestic energy resource development. It is at least misleading, and more likely hypocritical, to claim that Montana's thirty percent coal severance tax is bringing about an unjustifiable transfer of wealth. In comparative terms, oil and gas severance taxes imposed by other states are far more significant. It is ironic that controversy should have focused on the *rate* in Montana, where the tax yielded $94 million in 1980, while Texas's collection of more than $1.5 billion in oil and gas severance taxes[166] goes uncriticized.

At present, prospects for the passage of legislation imposing a ceiling on coal severance tax rates are not good. As a practical matter, the congressional committees and subcommittees to which such legislation is sent are dominated by Senators and Congressmen from energy-producing states and the West.[167] It is highly unlikely they will be receptive to legislation limiting coal severance taxes. In addition, although the proposed 12.5% coal severance tax rate ceiling would affect only the states of Montana, Wyoming and North Dakota, the debate must inevitably expand to the broader issue of the transfer of wealth between the states by means of severance taxes. While the severance tax rates of the coal-producing states are the highest in the nation, the oil- and gas-producing states are responsible for an overwhelming proportion of the transfer of wealth attributable to severance taxes.[168] Thus, the oil- and gas-

tax rates charged by the coal-producing states, while defenders of the tax rates speak in terms of how, on a per-BTU basis, coal severance taxes compare favorably with the oil and gas severance taxes.

166. 1980 STATE TAX COLLECTIONS, *supra* note 18, at 7 (Table III).

167. For example, of the 20 members of the Senate Energy and Natural Resources Committee in the 97th Congress, 11 members are from energy-producing states or the West: Senators McClure (Idaho), Hatfield (Oregon), Domenici (New Mexico), Wallop (Wyoming), Murkowski (Alaska), Nickles (Oklahoma), Jackson (Washington), Johnston (Louisiana), Bumpers (Arkansas), Ford (Kentucky), and Melcher (Montana).

168. To illustrate, in 1980, Montana, Wyoming and North Dakota collected less than 6% of the nation's severance tax revenues; that same year the oil- and gas-producing states of Texas, Oklahoma and Alaska, the states with the largest severance tax yields, collected over 61% of the nation's severance tax revenues. 1980 STATE TAX COLLECTIONS, *supra* note 18, at 7 (Table III).

producing states cannot help but be drawn into the severance tax debate. The regional conflicts will not be confined to disputes based on the different energy production sectors. The energy producing states are in the West and to some degree in the South. The energy consuming states are in the Northeast and the Midwest.

Finally, there is the issue of the respective roles of the state and federal governments in the federal system. This state-federal dichotomy takes on added importance due to the Reagan Administration's intention of transferring government functions from the federal to the state level. These collateral issues could prevent consensus in Congress on the question of the need for ceilings on state severance taxes. In the event of a congressional stalemate, the debate will shift back to the judicial forum, and the Court will be forced to resolve the issue more clearly than it did in *Commonwealth Edison*.

If the Supreme Court is presented anew with the severance tax issue, the fourth prong of the *Complete Auto Transit* test again will be the tactical key to the litigation. While the superficial treatment given to the "fairly related" issue in *Commonwealth Edison* might be excused because the issue could be deferred to Congress, the Court's application of it was "mechanical" and for all intents and purposes emasculated its former substance.[169] If the *Complete Auto Transit* test is to be a useful device for evaluating the impact of severance taxes on interstate commerce, the Court must revitalize the analysis under the fourth prong to comprehend the relation between the tax schedule and the impact of resource development. Specifically, the adaptation of the user fee standard to the analysis of severance taxes under the fourth prong of the *Complete Auto Transit* test would lead to more satisfactory adjudications of the commerce clause issue.

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169. *Commonwealth Edison*, 101 S.Ct. at 2968 (Blackmun, J., dissenting).