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STATE TAXATION AND THE DORMANT COMMERCE CLAUSE: THE OBJECT-MEASURE APPROACH

It has been well settled for more than a century that the federal courts may invoke the Commerce Clause, which states that "Congress shall have Power . . . To regulate Commerce . . . among the several States,"[1] even in the absence of relevant Congressional legislation, to invalidate various forms of state regulations that discriminate against interstate commerce or subject it to undue burdens. Over the past twenty years, the Court has resolved challenges to the validity of state taxes that affect interstate commerce by applying a four-part test first announced in *Complete Auto Transit, Inc. v Brady*.[2] Our thesis is that the *Complete Auto* test embodies the basic values underlying the Dormant Commerce Clause, but that it is more complicated than it needs to be, primarily because several of its parts are functionally redundant. This article proposes a new, simplified approach: a nondiscriminatory tax on an activity that can be reached by only one state should generally be upheld without the need for apportionment; but a nondiscriminatory tax on an activity that can be reached by more than one state must be apportioned to be valid. Our primary goal is not to reexamine

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[1] US Const, Art I, § 8, cl 3.

[2] 430 US 274 (1977); see Part I.B.

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the generally accepted purposes of judicial review under the Dormant Commerce Clause, but rather to develop a more workable approach for their fulfillment. Because of its greater clarity, simplicity, and ease of application, the object-measure standard should allow litigants, legislators, and lower courts, which must currently struggle with understanding and applying *Complete Auto*, to predict the outcomes of Dormant Commerce Clause challenges more reliably.

Part I of this article briefly traces the history of the Supreme Court's review of state taxation that affects interstate commerce. The Court initially developed a formalistic approach: interstate commerce itself was immune from state taxation. After several decades of gradual modifications, the Court, in 1977, explicitly discarded the old formalism in *Complete Auto*. Since then, *Complete Auto* has been applied in every case involving a Commerce Clause challenge to a state tax. Part II analyzes the problems of the *Complete Auto* test. Part III explains the suggested new approach, shows that it comprehends the values of the *Complete Auto* test, and defends it from potential criticisms from the rationales of other commentators. Finally, Part IV applies this approach to a variety of state taxes. Since this approach embodies the essential values of both the Dormant Commerce Clause and the *Complete Auto* test, it is not surprising that it yields the same results as most Supreme Court decisions dealing with state taxation of interstate commerce.

I. Development of the Court's Approach

An extended discussion of the development of the Court's "historically unstable analysis of state taxes under the dormant Commerce Clause" is not necessary and is well told elsewhere.[3] Nevertheless, a brief review will provide context by which to judge the *Complete Auto* test and our alternative for analyzing Commerce Clause challenges to state taxes.

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[3] Walter Hellerstein et al., *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 Tax L Rev 47, 50 (1995); see generally Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 2:9 to § 2:17 (1981); 1 Jerome R. Hellerstein and Walter Hellerstein, *State Taxation* (2d ed 1993); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 8.11 (4th ed 1991); Laurence H. Tribe, *American Constitutional Law* § 6-15 to § 6-20 (2d ed 1988); Walter Hellerstein, *State Taxation of Interstate Commerce: Perspective on Two Centuries of Constitutional Adjudication*, 41 Tax Law 37, 38–50, 53–61 (1987).

A. THE RISE AND FALL OF FORMALISM

Prior to 1977, the Court often struck down state taxes on interstate commerce on the formalistic ground that they were invalid attempts to regulate interstate commerce itself.[4] For example, in *Freeman v Hewitt*,[5] the Court invalidated a gross receipts tax assessed on interstate sales made within the state, not because it created the risk of multiple taxation, but simply because the Dormant Commerce Clause "created an area of trade free from interference by the States."[6] The Court reasoned that a gross receipts tax on interstate sales was a direct tax on interstate commerce and thus would not be allowed, even though taxes that reached interstate commerce indirectly were acceptable.[7] Similarly, in *Spector Motor Service, Inc. v O'Connor*,[8] the Court invalidated a Connecticut tax "imposed upon the franchise of a foreign corporation for the privilege of doing business within the State." The Court concluded that Spector Motor Service, which engaged solely in interstate trucking, in that all freight that it picked up in Connecticut was delivered outside the state, could not be required to pay a tax for the privilege of engaging in interstate commerce, as only Congress could grant such a right or privilege.[9]

B. COMPLETE AUTO

In 1977, the Court issued its landmark ruling in *Complete Auto*,[10] which overruled the formalistic approach of *Spector* and *Freeman*,

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[4] See, e.g., *Spector Motor Service, Inc. v O'Connor*, 340 US 602 (1951); *Joseph v Carter & Weekes Stevedoring Co.*, 330 US 422 (1947); *Freeman v Hewit*, 329 US 249 (1946); *McLeod v J. E. Dilworth Co.*, 322 US 327 (1944); *Philadelphia Steamship Co. v Pennsylvania*, 122 US 326 (1887); *Case of the State Freight Tax*, 82 US (15 Wall) 232 (1872).

[5] 329 US 249 (1946).

[6] Id at 252.

[7] Id at 256–57. This distinction between "direct" and "indirect" burdens on interstate commerce developed in the late nineteenth century in cases such as *Sanford v Poe*, 69 F 546 (6th Cir 1895), aff'd as *Adams Express Co. v Ohio State Auditor*, 165 US 194, 220 (1897). After fuller recognition in *Southern Ry. v King*, 217 US 524 (1910), it faded in *Western Live Stock v Bureau of Revenue*, 303 US 250, 256–58 (1938), and then resurfaced in *Freeman*. The most prominent judicial attack on the distinction came in *Di Santo v Pennsylvania*, 273 US 34, 44 (1927) (Stone dissenting). For influential scholarly criticism, see Noel T. Dowling, *Interstate Commerce and State Power*, 27 Va L Rev 1 (1940).

[8] 340 US 602, 603 (1951).

[9] Id at 608–09.

[10] 430 US 274 (1977).

and instead considered the practical effects of state taxes on interstate commerce. Complete Auto Transit transported automobiles into Mississippi for sale within the state. Mississippi imposed a privilege tax for doing business within the state, based on the gross income derived therefrom. The Court upheld this tax against the sole challenge that the state was forbidden from taxing the privilege of engaging in interstate commerce.[11] Synthesizing previous decisions, the Court held that a tax would be upheld against a 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."[12] The basis for Complete Auto Transit's claim was that interstate commerce was exempt from state taxation, but while *Spector* and *Freeman* had not yet been overruled, the Court noted that they had "been stripped of any practical significance."[13]

Reaction to *Complete Auto* was generally positive. Commentators hailed it as a complete repudiation of the old formalism that had initially gripped and later greatly influenced the Court for about three decades.[14]

C. POST–COMPLETE AUTO

Since *Complete Auto*, the Court has reviewed a number of different state taxes, rejecting most Commerce Clause challenges,[15]

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[11] The Court "considered not the formal language of the tax statute, but rather its practical effect." Id at 279.

[12] Id.

[13] Id at 288.

[14] Tribe, *American Constitutional Law* § 6-15 at 442 (cited in note 3); William B. Lockhart, *A Revolution in State Taxation of Commerce*, 65 Minn L Rev 1025, 1026–27 (1981).

[15] *Oklahoma Tax Comm'n v Jefferson Lines*, 115 S Ct 1331 (1995) (gross receipts tax on sales of interstate transportation tickets); *Barclays Bank PLC v Franchise Tax Board*, 114 S Ct 2268 (1994) (corporate franchise tax); *Itel Containers Int'l Corp. v Huddleston*, 507 US 60 (1993) (sales tax on lease of cargo containers); *Trivonia Corp. v Michigan Dept. of Treasury*, 498 US 358 (1991) (single business tax); *Amerada Hess Corp. v Director*, 490 US 66 (1989) (windfall profit tax); *Goldberg v Sweet*, 488 US 252 (1989) (tax on telephone calls); *D. H. Holmes Co. v McNamara*, 486 US 24 (1988) (use tax); *Container Corp. v Franchise Tax Board*, 463 US 159 (1983) (franchise tax); *Commonwealth Edison Co. v Montana*, 453 US 609 (1981) (severance tax on coal); *Department of Revenue v Association of Washington Stevedoring Cos.*, 435 US 734 (1978) (business and occupation tax).

though sustaining a few.[16] Several cases have made important refinements of aspects of the *Complete Auto* test.

In *Container Corp. v Franchise Tax Board*,[17] the Court upheld California's unitary "doing business" tax as applied to domestic-based multinational corporations. The tax is calculated by considering the company's entire integrated business, including subsidiaries, and then using a formula to determine the fraction of corporate income attributable to business activity within the state.[18] The Court supplemented its definition of *Complete Auto*'s fair apportionment prong, explaining that it encompassed an internal consistency test and an external consistency test.[19] An internally consistent tax is one that, "if every State were to impose an identical tax, no multiple taxation would result."[20] To test for internal consistency, the Court does not compare actual state taxes; it merely "hypothesizes a situation where other States have passed an identical statute."[21] The Court's definition of "external" is more difficult to pin down. It has described an externally consistent tax as one that taxes "only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed,"[22] emphasizing that external consistency is aimed at determining the "practical or economic effect of the tax."[23] Putting it yet another way, the Court explained that external consistency is aimed at ensuring that "the factor or factors used in the apportionment formula . . . actually reflect a reasonable sense of how income is generated."[24] Having created these two tests, the Court did not appear clearly to apply them to the tax in question, but its decision can probably be read as intending

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[16] *Fulton Corp. v Faulkner*, 116 S Ct 848 (1996) (intangibles tax); *Associated Industries of Missouri v Lohman*, 114 S Ct 1815 (1994) (use tax); *Quill Corp. v North Dakota*, 504 US 298 (1992) (use tax on out-of-state mail-order house); *American Trucking Assns. v Scheiner*, 483 US 266 (1987) (flat axle tax); *Tyler Pipe Industries v Department of Revenue*, 483 US 232 (1987) (doing business tax); *Armco v Hardesty*, 467 US 638 (1984) (gross receipts tax).

[17] 463 US 159 (1983).

[18] Id at 164–65.

[19] Id at 169. *Complete Auto* made no mention of internal or external consistency.

[20] *Goldberg v Sweet*, 488 US 252, 261 (1989) (citing *Container Corp.*, 463 US at 169).

[21] Id.

[22] Id at 262 (citing *Container Corp.*, 463 US at 169–70).

[23] Id.

[24] *Container Corp.*, 463 US at 170.

to hold that the California tax's apportionment scheme was reasonable.[25]

Goldberg v Sweet[26] further illustrates the operation of the internal and external consistency tests. Illinois imposed a 5 percent tax "on the gross charge of interstate telecommunications (1) originated or terminated in Illinois . . . and (2) charged to an Illinois service address, regardless of where the telephone call is billed or paid."[27] It was not difficult to conclude that this tax was internally consistent, because if every state taxed only interstate calls billed to addresses within it, each such interstate call would be taxed only once.[28] But the Court further blurred the nature of external consistency by finding it met here because the tax "reasonably reflect[ed] the way that consumers purchase[d] interstate telephone calls."[29] Since external consistency "is essentially a practical inquiry," the Court found it satisfied because it would be infeasible to apportion interstate telephone calls by mileage or other geographic units.[30]

In *Commonwealth Edison Co. v Montana*,[31] the Court provided insight into other prongs of the *Complete Auto* test. It explained that the fourth prong (that the tax be "fairly related to the services provided by the State") was closely connected to the first prong ("substantial nexus"), and merely added the "limitation that the measure of the tax must be reasonably related to the extent of the contact."[32] The "fairly related" prong was said to be satisfied by the "general services" provided by the state to the taxpayer.[33]

The Court's recent Dormant Commerce Clause decision, *Oklahoma Tax Commission v Jefferson Lines, Inc.*,[34] did little to clarify the unsettled aspects of the doctrine. *Jefferson Lines* involved a tax

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[25] Id at 180–83.

[26] 488 US 252 (1989).

[27] Id at 256.

[28] Id at 261.

[29] Id at 262.

[30] Id at 264–65. For further confusion surrounding the external consistency test, see note 52 and accompanying text.

[31] 453 US 609 (1981).

[32] Id at 626.

[33] *Goldberg*, 488 US at 267.

[34] 115 S Ct 1331 (1995).

imposed on the sale of certain goods and services in the state. The primary dispute in the case was largely over whether such a tax, as applied to the sale of tickets for interstate bus transportation, was externally consistent. Although the Court acknowledged the superficial similarity of the case to *Central Greyhound Lines, Inc. v Mealey*,[35] it ultimately concluded that the Oklahoma tax was externally consistent because it fell on the buyer and not the seller, unlike the tax in *Central Greyhound*. The buyer of the bus ticket could not be subjected to double taxation, just as a buyer of a good could not be.[36] This understanding of external consistency, however, looks exactly like internal consistency, thereby blurring the distinction between the two.

Since *Complete Auto*, then, although the Court has tinkered with and refined its test, each iteration, rather than clarifying the meaning of internal and external consistency (and the purpose of the fair relation requirement), has only served to muddle the *Complete Auto* approach, specifically raising the question whether there is now any distinction between internal and external consistency.

II. The Problem with Complete Auto

The central problem with *Complete Auto* is that its four prongs are functionally overlapping and redundant in attempting to fulfill the bedrock constitutional value served by judicial review of state taxation of interstate commerce: nondiscrimination against interstate commerce.[37] Although the question of what constitutes discrimination is complex and multifaceted, the evil, generally stated, is a state policy whose purpose *or* effect is to confer advantages on local interests at the expense of out-of-staters. The Court did not fully discuss the theoretical underpinnings of the test announced in *Complete Auto*, but it can be seen as securing two precepts that further the Dormant Commerce Clause's core prohibi-

[35] 344 US 653 (1948) (discussed in note 143). See 115 S Ct at 1340.

[36] Id at 1341.

[37] Hellerstein, *State Taxation of Interstate Commerce*, 41 Tax Law at 46, 60 (cited in note 3) ("The rule prohibiting state taxes that discriminate against interstate commerce has been . . . more firmly entrenched and consistently applied than any other . . . enunciated in this field.").

tion of discrimination against interstate commerce: avoidance of (*a*) multiple taxation on interstate commerce,[38] and (*b*) direct commercial advantage to local businesses at the expense of multistate enterprises.[39] This principle—that "the commerce clause prohibits taxes that bear more heavily on the interstate than the intrastate enterprise merely because the former does business across state lines"[40]—articulated a specially directed, yet expansive conception of nondiscrimination, one that seemingly differs somewhat in both purpose and effect from that concerning judicial review of state *regulation* of interstate commerce. Thus, when a state rule "regulates evenhandedly to effectuate a legitimate local public interest,"[41] it may still be rejected by the Court if "the burden imposed on commerce is clearly excessive in relation to the local benefits,"[42] even though neither its purpose nor effect is to treat interstate business any more onerously than local enterprises.[43] This is not the Court's focus, however, when it reviews state taxes. Even though a particular state's system or rates of taxation may impose exceedingly heavy burdens on business enterprises, thus significantly deterring entry of interstate commerce, the decisions show that the Court will not ordinarily invalidate the

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[38] *Complete Auto* quoted generously from *Western Live Stock v Bureau of Revenue*, 303 US 250, 254 (1938), for the proposition that "[i]t 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 business." 430 US at 288. This principle of not burdening interstate commerce with additional taxes dates to the drafting of the Constitution. See Federalist 42 (Madison) in Clinton Rossitor, ed, *The Federalist Papers* 264, 267–68 (Mentor, 1961); see also *Northwestern States Portland Cement Co. v Minnesota*, 358 US 450, 458 (1959); *Michigan-Wisconsin Pipe Line Co. v Calvert*, 347 US 157, 166 (1954); *J. D. Adams Manufacturing Co. v Storen*, 304 US 307, 311 (1938).

[39] *Associated Industries of Missouri v Lohman*, 114 S Ct 1815, 1820 (1994) ("The [Commerce] Clause prohibits economic protectionism—that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' "); *Boston Stock Exchange v State Tax Commission*, 429 US 319, 329 (1977); *Northwestern States*, 358 US at 458; *Memphis Steam Laundry Cleaner v Stone*, 342 US 389, 395 (1952); *Nippert v City of Richmond*, 327 US 416, 425 (1946); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich L Rev 1091, 1094–95 (1986) (observing that the Court's essential responsibility in this area is preventing purposeful economic protectionism and cumulative tax burdens).

[40] Walter Hellerstein, *Is "Internal Consistency" Foolish? Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich L Rev 138, 164 (1988).

[41] *Pike v Bruce Church, Inc.*, 397 US 137, 142 (1970).

[42] Id.

[43] See, e.g., *Southern Pacific Co. v Arizona*, 325 US 761 (1945).

tax as long as in-state businesses are subject to the same financial disadvantage.[44]

The bar of discrimination against interstate commerce contributes important clarification of the concept of "multiple taxation." The mere fact that a taxpayer is subjected to a number of different taxes does not violate the prohibition against multiple taxation if those taxes are imposed on unrelated activities, such as a sales tax, a property tax, an income tax, and a gasoline tax.[45] On the other hand, if two states both imposed their respective income taxes on all the earnings of a taxpayer who produced income in both states, that taxpayer *would* be subjected to multiple taxation. A business earning $50,000 all in one state would pay income tax to one state on that amount, but a multistate enterprise earning $50,000, half in one state and half in another, would pay income tax on the full amount twice. The obvious effect is discrimination against interstate commerce.

The problematic nature of the *Complete Auto* test may be sharply illustrated by considering each prong and the role it purportedly plays in protecting interstate commerce from either intentional or effective discrimination.

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[44] Although our focus is primarily on discrimination against interstate firms, discrimination against goods moving in interstate commerce is no less objectionable. Such discrimination, however, typically occurs through regulation, as compared to taxation.

Various reasons have been offered as to why discrimination against interstate firms is problematic, including "concept of union," "resentment/retaliation," and "efficiency." Regan, *The Supreme Court and State Protectionism*, at 1112–13 (cited in note 39). Although the subject is beyond the scope of this article, these three reasons, not all of which Regan accepts, tend to revolve around the concept of "protectionist" legislation as the "economic equivalent of war." Id at 1113. Thus, if Nevada enacts legislation that adversely affects California firms doing business in Nevada, California may retaliate with similar legislation, perhaps setting off escalating taxation.

An additional possible objection to discrimination against interstate firms due to their interstate character is that these firms typically do not have adequate representation in the taxing jurisdiction. See *South Carolina State Highway Dep't v Barnwell Bros.*, 303 US 177, 184 n 2 (1938); compare Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543 (1954); Jesse H. Choper, *Judicial Review and the National Political Process* 176–80, 206–07 (1980) (contrasting the adequate representation of states in the national government structure with the insufficient reflection of the national interest in the state legislative scheme). Thus, the only recourse available to interstate firms facing excessively high taxes is to refrain from doing business in that taxing jurisdiction, clearly an undesirable result.

[45] See *Jefferson Lines*, 115 S Ct at 1331 ("[T]he Commerce Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along").

The first proviso—that the tax be applied to an activity with a substantial nexus to the taxing state—ensures that there is a sufficient basis for applying the tax to the conduct within the state that triggers it. There is an obvious parallel between this prong and the Due Process requirement of "minimum contacts" with the forum state in order to justify personal jurisdiction over a defendant.[46] The Court has ruled, however, that the "substantial nexus" requirement is more stringent in that it might not be satisfied by some taxes that nevertheless meet the minimum contacts demand.[47]

In *Quill Corp. v North Dakota*, the Court reasoned that due process is concerned with "the fundamental fairness of government activity," whereas the Commerce Clause focuses on "structural concerns about the effects of state regulation on the national economy."[48] But the fact that the two clauses address different policies does not explain why the substantial nexus requisite is more stringent than minimum contacts. In fact, the Court's analysis centered on whether a state tax on vendors whose only contact with the state was by mail or common carrier violated the Dormant Commerce Clause.[49] *Quill* provided no guidance as to when substantial nexus would be more stringent than minimum contacts. This prong is thus something of an enigma.

The second prong—that the tax be fairly apportioned—is designed to protect interstate commerce both structurally (through the internal consistency requirement) and practically (through the external consistency requirement). Although these two conditions plainly further the goals of the Dormant Commerce Clause, an apparent redundancy has developed in the application of the test.

Until recently, external consistency, while rather opaque, seemed to retain a separate identity from internal consistency. Although apportionment was not required merely because it was feasible, the description of external consistency as a practical inquiry suggested that apportionment would usually be required where interstate commerce was involved.[50] However, in *Oklahoma Tax*

[46] *International Shoe Co. v Washington*, 326 US 310 (1945).

[47] *Quill Corp. v North Dakota*, 504 US 298, 313 (1992) (discussed in notes 79 and 80).

[48] Id at 312.

[49] Id at 313–15.

[50] See, e.g., *Goldberg v Sweet*, 488 US 252, 264–65 (1989) (not requiring apportionment because it would be "infeasible").

Commission v Jefferson Lines, Inc.,[51] the Court indicated otherwise. Oklahoma's tax was externally consistent largely because "no other State can claim to be the site of [agreement, payment, and delivery of services]."[52] Yet, this same feature ensured that the tax would be internally consistent; Jefferson Lines would be taxed only once even if every state imposed the same tax. External consistency thus becomes irrelevant because an internally consistent tax will be externally consistent as well.

The third prong, which fulfills the Court's long established mandate that a state tax that is facially discriminatory against interstate commerce must be invalid,[53] has been held merely to prohibit states from setting differential tax rates for in-state and out-of-state taxpayers.[54] While this establishes a significant threshold for state taxes to pass in order to satisfy the values of the Dormant Commerce Clause, it is also easily met. Since the core goals of the Dormant Commerce Clause are to prevent the conferral of benefits to in-staters at the expense of out-of-staters, particularly in the forms of multiple taxation on interstate commerce and direct commercial advantages to local businesses to the prejudice of interstate

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[51] 115 S Ct 1331 (1995).

[52] Id at 1341.

[53] See *Boston Stock Exchange v State Tax Commission*, 429 US 318, 329 (1977) (noting the "fundamental principle that . . . no state, consistent with the commerce clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business' "); Hellerstein, 87 Mich L Rev at 164 (cited in note 40) ("Aside from Justice Scalia's skepticism [regarding the Dormant Commerce Clause], no sitting Supreme Court Justice would dissent from the view that the commerce clause prohibits taxes that bear more heavily on the interstate than the intrastate enterprise merely because the former does business across state lines."). For a more subtle example, in *Armco v Hardesty*, 467 US 638, 640 (1984), West Virginia imposed a gross receipts tax "on persons engaged in the business of selling tangible property at wholesale." The state, however, exempted local manufacturers from the tax, on the grounds that they were already subject to a higher manufacturing tax. In invalidating the tax, the Court concluded that the higher manufacturing tax did not save it, since wholesaling and manufacturing were not substantially equivalent events. Thus, the compensatory tax doctrine, see Part III.C.3, did not apply. Id at 643. The Court noted that an out-of-state manufacturer would be subject to the West Virginia gross receipts tax, as well as the other state's manufacturing tax, while an in-state manufacturer would only be subject to West Virginia's manufacturing tax. Id at 644. See also *National Meat Assn. v Deukmejian*, 743 F2d 656, 660–61 (9th Cir 1984) (striking down as facially discriminatory a California tax of $1 per head of cattle for in-state beef processors, but a variable tax according to quantity on out-of-state processors). See generally Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal L Rev 1203 (1986).

[54] *Commonwealth Edison Co. v Montana*, 453 US 609, 618–19 (1981) (holding that because the rate of the tax in question did not treat in-staters and out-of-staters differently, it satisfied the third prong).

firms, the more challenging inquiry is whether a facially neutral tax nevertheless discriminates against or otherwise impermissibly burdens interstate commerce.

More importantly, this prong is superfluous, because any tax that sets different rates for in-staters as compared to out-of-staters will necessarily be internally inconsistent. If every state taxed out-of-staters at a higher rate than in-staters, then enterprises engaging in interstate business would face higher tax burdens than their intrastate counterparts.

Finally, there is the fourth requirement—that the tax be fairly related to the services provided by the state. In *Commonwealth Edison Co. v Montana*, the Court explained that the fourth prong "is closely connected to the first prong" while "impos[ing] . . . [an] additional limitation."[55] If the fourth prong really does impose a substantive limitation beyond that of the first prong, then a state theoretically could apply a tax on an activity with a substantial nexus to the state but which lacks a sufficient relationship to the state. That is, a tax could satisfy the first prong but still fail the fourth.

In practice, however, the fourth part of the *Complete Auto* test has failed to impose any additional hurdle. The Court has yet to invalidate a tax under it, as "services" has been defined so broadly—"receipt of police and fire protection, the use of public roads and mass transit, and other advantages of civilized society"[56]—that this condition is virtually meaningless. None of the five cases in which the Court has struck down state taxes under *Complete Auto* even discusses the fairly related prong,[57] and in other cases, taxpayers have not even bothered to contest the issue.[58]

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[55] 453 US 609, 626 (1981) (quoting *Western Live Stock v Bureau of Revenue*, 303 US 250, 254 (1938)).

[56] Id; see also *Amerada Hess Corp. v Director*, 490 US 66, 79 (1989); *D. H. Holmes Co. v McNamara*, 486 US 24, 32 (1988); *Japan Line, Ltd. v County of Los Angeles*, 441 US 434, 445 (1979); *Itel Containers Int'l Corp. v Cardwell*, 814 SW2d 29, 35 (Tenn), aff'd as *Itel Containers Int'l Corp. v Huddleston*, 507 US 60, 73 (1991).

[57] See note 16. This neglect is especially telling, since each of the other three prongs has been the basis for invalidating at least one state tax. See *Fulton Corp. v Faulkner*, 116 S Ct 848 (1996) (facially discriminatory against interstate commerce); *Quill Corp. v North Dakota*, 504 US 298 (1992) (no substantial nexus); *American Trucking Assns. v Scheiner*, 483 US 266 (1987) (internally inconsistent); *Tyler Pipe Industries v Department of Revenue*, 483 US 232 (1987) (facially discriminatory); *Armco v Hardesty*, 467 US 638 (1984) (not fairly apportioned and also facially discriminatory).

[58] *Trivonia Corp. v Michigan Dept. of Treasury*, 498 US 358, 373 (1991); see also *Barringer v Griffes*, 1 F3d 1331, 1335 (2d Cir 1993) (not challenging first and fourth prongs); *Merrion*

It is not difficult to see why the fourth prong has become so insignificant. Any taxpayer with a substantial nexus to the taxing state (the first prong) would appear necessarily to benefit from police and fire protection, as well as the amorphous "other advantages of civilization." The fourth prong, as defined by the Court, has become wholly subordinated to the first.

III. A Simpler Approach

A. BASIC PREMISE

From its seemingly straightforward beginnings, the *Complete Auto* test has evolved into a collection of disparate requirements, some redundant, some toothless, others rather opaque.[59] This is especially true in respect to facially neutral revenue rules. When imposing its four criteria, the Court usually reaches the correct result, but sometimes despite, rather than because of, the reasoning used to explain their application. We propose a more straightforward and more easily applicable approach to nondiscriminatory taxes[60] that emphasizes the distinction, never sharply identified by the Court, between the *object* of the tax and its *measure.*

The "object" of a tax is the activity or tangible thing that the state is taxing. For example, the object of a sales tax is the activity of the sale. The object of a property tax is the property present in the state. The object of a "doing business" tax (often referred to as a "privilege" tax or a tax for the "privilege of doing business") is business activity—such as manufacturing, sales, or any other commercial operations—being conducted within the state.

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v Jicarilla Apache Tribe, 617 F2d 537, 546 n 4 (10th Cir 1980) (declining to address the issue of fair relation because the appellant failed to build a factual foundation).

[59] Other commentators have characterized the Court's current doctrine as "confusing" and "elusive." See Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L J 425, 426 n 2 (1982); Ferdinand P. Schoettle, *Commerce Clause Challenges to State Taxes*, 75 Minn L Rev 907, 919 (1991); David F. Shores, *State Taxation of Interstate Commerce: Quill, Allied Signal and a Proposal*, 72 Neb L Rev 682, 683–84 (1993); Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 SC L Rev 381, 383 (1995); see also Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich L Rev 895, 937–41 (1992) (discussing ten pairs of inconsistent Dormant Commerce Clause cases).

[60] For an explanation of how our approach remains faithful to the *Complete Auto* values, see Part III.C.1.

The "measure" of a tax is the price or value of the activity or tangible thing by which the tax is calculated.[61] For example, the measure of a sales tax is the price of the product being sold; the measure of a property tax is the assessed value of the property.

Sometimes the object and the measure of the tax will be the same, such as with a business income tax. The object of such a tax is the activity of generating business income, and the measure of the tax is that same income.

Under our proposal, if the object of the tax is something that only one state has the ability to tax, such as (*a*) an intrastate sale or (*b*) real property located in the state, then an unapportioned tax should usually be held valid.[62] This should be true even if part or all of the measure might be used by another state as the measure of a different tax.[63]

On the other hand, if the object of the tax can be reached by more than one state, such as (*a*) the income of a multistate corporation or (*b*) property that moves from one state to another, then each state's tax must be fairly apportioned in order to avoid undermining Dormant Commerce Clause doctrine.[64] Note that for

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[61] It is admittedly difficult to define this term with any more precision without resorting to circularity, such as "the way of measuring the tax."

[62] The presumption of validity can he overcome in two instances: (1) if the tax was adopted with the intent to hurden interstate commerce, as in the case of a state that tries to exploit a natural advantage; and (2) if the nation's federal structure inherently disadvantages multistate enterprises. These issues of (1) "state pretext" and (2) "federal prejudice" are discussed at Part III.D.4.

[63] Although neither the Court nor commentators have advocated this specific approach, there have heen hints of it. For example, *Western Live Stock v Bureau of Revenue*, 303 US 250 (1938), involved a privilege tax on the business of publishing newspapers and magazines, measured by the gross receipts from the sale of advertising space. The Court upheld the tax as applied to a locally published, but nationally circulated magazine. Even though the gross receipts from the sale of advertising space might also be used as the measure of, say, another state's tax on the sale of advertising, Justice Stone noted that "[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 distribution of the magazine." Id at 260.

[64] A fair apportionment scheme is a central part of the object-measure approach's framework and is often critically important in avoiding the burden of deliherate *or* operational multiple taxation.

The question of a proper method of apportionment has reached the Supreme Court periodically. Under current doctrine, states may apportion various income taxes under a three-factor formula, or even a one-factor formula. If three factors are used, they are usually the ratios of property, payroll, and sales within the state to the total property, payroll, and sales. *Container Corp. v Franchise Tax Board*, 463 US 159, 170 (1983) (three factors); *Moorman Manufacturing Co. v Bair*, 437 US 267, 272 (1978) (one factor: gross sales).

In *Moorman*, the Court found Iowa's single-factor apportionment formula to he presump-

this second category of taxes, the possibility that more than one state can reach the object is sufficient to require apportionment; the taxpayer need not show that it is actually burdened by multiple taxes. "First, as the Court pointed out in *Armco* [*v Hardesty*], '[a]ny other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.' . . . Second, even if acceptable as a matter of principle, it is undesirable as a matter of practice. Taxpayers would face uncertainties in determining their state tax liabilities, states would face uncertainties in predicting state tax collections, and compliance and administration difficulties would be exacerbated. Finally, even if otherwise acceptable, there is something unseemly about determining state tax liabilities 'on a first-come-first-tax basis.' Given the fundamental concerns underlying the commerce clause, it would be perverse indeed to constitutionalize a rule rewarding beggar-thy-neighbor state tax policies with state tax collections depending on who won the race to the taxpayer's door."[65]

To illustrate: suppose that Acme manufactures in California and Nevada, but sells only in California. Acme's annual gross sales from its operations are $1 million; $750,000 of the value of the products sold is manufactured in California and the other $250,000 is manufactured in Nevada. Suppose that California and Nevada both have a manufacturing tax and a sales tax. Under our ap-

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tively valid and upheld it because the challenging taxpayer had failed to show by "clear and cogent evidence" that the formula led to results "out of all appropriate proportion." 437 US at 273–74. However, the Court has also implied that the three-factor apportionment formula—utilized by "forty-four of the forty-five States (including the District of Columbia) other than Iowa that impose a corporate income tax," id at 296 (Powell, J, dissenting)—is the preferred approach: Although the one-third weight given to each of the three factors—payroll, property, and sales—is not a precise apportionment for every case, the formula "has gained wide approval precisely because payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated." *Container Corp.*, 463 US at 183. It has become "something of a benchmark against which other apportionment formulas are judged." Id.

Although the Court's treatment of the issue of what constitutes a fair apportionment could be improved, a full-scale discussion is not necessary to implement the object-measure approach and is thus beyond the scope of this article. It should be noted, however, that while a single-factor apportionment scheme may be valid, it would be subject to the pretext analysis mentioned in note 62. See notes 171 and 172 and accompanying text.

[65] Hellerstein, 87 Mich L Rev at 169–70 (cited in note 40).

proach, California would be able to apply its sales tax on the full $1 million, since the sales take place exclusively in California. The object of this tax is sales within the state, and since no other state can reach that object, the sales tax does not need to be apportioned.

The matter is more complicated, however, with respect to the manufacturing tax. The object is manufacturing. Acme conducts such activity within both states, and thus a manufacturing tax would have to be apportioned fairly in order to avoid the imposition of multiple tax burdens on interstate commerce.[66]

Note that the object-measure approach does not require a nexus between the taxing state and the object of the tax beyond that mandated by the Due Process Clause.[67] The approach thus differs in this regard from the *Complete Auto* test, which contains a "substantial nexus" requirement more stringent than that imposed by the Due Process Clause.[68] Of course, a tax whose object can be reached by only one state will necessarily involve sufficient contacts for that state to impose the tax. In the case of a tax whose object can be reached by multiple states, however, it may be that one or more states lack the necessary minimum contacts to apply their taxes on the interstate transaction.[69] Under the object-measure approach, these states would be prohibited by the Due Process Clause, not the Commerce Clause, from applying their taxes.

B. A LEGISLATIVE ROLE FOR THE COURT

In reviewing Dormant Commerce Clause challenges to state taxes, it is important to note that the Court is *not* engaging in true judicial review, but rather is subject to revision by ordinary federal statutes.[70] The essence of Dormant Commerce Clause adjudication is that the Court is acting in the absence of Congressional legisla-

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[66] Under a one-factor (gross sales) apportionment scheme, see note 64, California would apply its manufacturing tax to $750,000. Nevada would apply its manufacturing tax to $250,000. It cannot apply its sales tax, because none of Acme's sales take place in Nevada.

[67] See generally *International Shoe Co. v Washington*, 326 US 310 (1945) (requiring "minimum contacts" for the exercise of personal jurisdiction), discussed at note 46.

[68] See *Quill Corp. v North Dakota*, 504 US 298, 313 (1992), discussed in notes 72 and 80.

[69] For recent discussion of the due process requirements for tax jurisdiction, see Christina R. Edson, *Quill's Constitutional Jurisprudence and Tax Nexus Standards in an Age of Electronic Commerce*, 49 Tax L Rev 893 (1996).

[70] Choper, *Judicial Review and the National Political Process* at 207–08 (cited in note 44).

tion.[71] If Congress disagrees with the Court's rulings, it can enact laws to undo the judicial decision.[72]

The most commonly discussed example of this special judicial role in respect to state taxation of interstate commerce is the Court's decision in *Northwestern States Portland Cement Co. v Minnesota*.[73] In *Northwestern States*, the Court upheld state taxation of the income of a multistate business, based solely on the fact that the business had a sales office in the taxing state. Seven months later, Congress reversed the result by statute.[74] Similarly, after the Court upheld a head charge on airline passengers in *Evansville-Vanderburgh Airport Authority District v Delta Airlines, Inc.*,[75] Congress enacted Section 7(a) of the Airport Development Acceleration Act of 1973.[76] Concluding that airport taxes of the sort permitted by *Evansville-Vanderburgh* were exposing interstate travelers to double taxation, Congress prohibited the imposition of such taxes.[77]

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[71] Id at 208; Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L J 569, 570.

[72] See, e.g., *Quill Corp. v North Dakota*, 504 US 298, 318 (1992) ("No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."). Moreover, Congressional overruling in this area should not engender the friction that it might in other circumstances, since under the Dormant Commerce Clause, Congress's authority is unquestionably superior to that of the Court. See generally Abner J. Mikva and Jeff Bleich, *When Congress Overrules the Court*, 79 Cal L Rev 729, 732–33 (1991).

Finally, while the fragmentary nature of Congress makes it unlikely that a Supreme Court decision affecting the taxation scheme of only one or a few states will adequately attract Congress's attention, the ordinary broad applicability of a Supreme Court decision on state taxation, such as one implementing the object-measure approach, makes it more likely that Congress would respond if it finds the results inadequately subtle or economically undesirable. Those adversely affected by tax decisions, such as large businesses and state governments, may well successfully mobilize against it.

[73] 358 US 450 (1959).

[74] 73 Stat 555, 15 USC §§ 381–84. Tbis Act prohibits states from taxing interstate business based only on "solicitation of orders . . . in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." Id at § 381.

[75] 405 US 707 (1972).

[76] 49 USC § 1513.

[77] Section 7(a) is discussed in *Aloha Airlines, Inc. v Director of Taxation of Hawaii*, 464 US 7 (1983). As an example of a Court decision regarding regulation as opposed to taxation of interstate commerce that was changed by Congress, see *United States v South-Eastern Underwriters Association*, 322 US 533 (1944), where the Court beld that the business of insurance was within the federal regulatory power under the Commerce Clause. In response, Congress enacted the Ferguson-McCarran Act of 1945, 59 Stat 33, codified at 15

In other instances, Congress has contemplated, but ultimately rejected, legislation that would undo Supreme Court decisions in this area. For example, in *National Bellas Hess, Inc. v Department of Revenue*,[78] the Court held that, under the Due Process Clause, a "seller whose only connection with customers in the State is by common carrier or the United States mail" did not have sufficient contacts with the state to justify requiring the seller to collect a use tax.[79] There have been eight bills introduced in the House and Senate aimed at reversing the *Bellas Hess* rule.[80]

One result of the special judicial role in this area, as compared to cases involving "true" judicial review, is that the Court is more justified in taking a quasi-legislative approach, one that is particularly appropriate for challenges to state taxes, where the Court, as Justice Scalia disapprovingly contends, must engage in "balancing the importance of the State's interest in this or that . . . against the degree of impairment of commerce."[81] This role, akin to statutory

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USC § 1011, which delegated the authority to regulate insurance companies to the states. The statute was upheld in *Prudential Ins. Co. v Benjamin*, 328 US 408 (1946).

In some instances, Congress has exercised its authority to undo the decisions of state courts. For example, in *Alaska Airlines v Dept. of Revenue*, 769 P2d 193, 198 (Or 1989), the state supreme court held that Oregon could tax overflight mileage of airplanes. Congress promptly passed a law to forbid this practice. See Pub L No 101-508, § 9125, 104 Stat 1388, codified at 49 USC § 1513(f).

[78] 386 US 753 (1967).

[79] Id at 758. This Due Process rationale of the *Bellas Hess* decision was overruled by *Quill Corp. v North Dakota*, 504 US 298, 308 (1992). See note 80. *Quill*, however, nevertheless struck down the use tax in question under the Commerce Clause on the grounds that it failed the first prong of the *Complete Auto* test. The Court held that an out-of-state mail vendor lacked a substantial nexus with the taxing state. *Quill*, 504 US at 311–12.

[80] *Quill*, 504 US at 318 n 11 (citing HR 2230, 101st Cong, 1st Sess (1989); S 2368, 100th Cong, 2d Sess (1988); HR 3521, 100th Cong, 1st Sess (1987); HR 3549, 99th Cong, 1st Sess (1985); S 983, 96th Cong, 1st Sess (1979); S 282, 93d Cong, 1st Sess (1973)).

It is worth noting that these bills present special constitutional problems. As pointed out above, the holding in *Bellas Hess* was based on the Court's then understanding of the requirements of the Due Process Clause, not the Commerce Clause. Since the Court acts as a final arbiter of constitutionality under the Due Process Clause, rather than in a quasi-legislative role as under the Dormant Commerce Clause, there is a serious question as to whether Congress could "undo" the due process requirement through ordinary federal legislation.

Quill overruled *Bellas Hess* on the ground that intervening cases had redefined the requirements of the Due Process Clause in such a way tbat physical contact was no longer necessary. See, e.g., *Shaffer v Heitner*, 433 US 186, 212 (1977) (applying the minimum contact analysis of *International Shoe Co. v Washington*, 326 US 310 (1945)). Thus, the Court suggested that Congress could in fact change the result legislatively without fear that the Due Process Clause would prohibit such a result. See Edson, 49 Tax L Rev at 924 n 185 (cited in note 69).

[81] *American Trucking Assns. v Smith*, 496 US 167, 203 (1990) (Scalia concurring).

interpretation rather than to judicial review because of Congress's ability to overturn the Court's ruling by ordinary legislation, would be the same as if Congress had enacted a broadly worded statute, pursuant to the Commerce Clause, prohibiting state taxes that placed an undue burden or discriminated against interstate commerce.[82] Indeed, it is wholly fair to infer such an implicit authorization from Congress based on the long-standing practice.[83]

Despite this unusually spacious discretion that results from the operation of the judiciary's adoption of Dormant Commerce Clause review, we believe that the special complexities of permissible state taxation of interstate commerce call for the Court's developing rules that are relatively simple for legislators, litigants, and judges to understand and apply, even though in some instances they may be less than optimal under principles of economics and public finance. The primary justification for this may be seen by comparing the much greater judicial effort required to assess the claim of multiple taxation in the typical state tax case than to adjudicate the issue of undue burden in the conventional state regulation case.[84] It is a fairly commonplace task for a trial court to determine (and for an appellate court to review) factual matters such as whether contour-shaped mudflaps are better than straight ones in keeping highway debris off the windshields of following vehicles,[85] or whether double trailer trucks cause more traffic accidents than singles.[86] There is no comparable decision grounded in adjudicative facts or physical experience, however, in an ordinary state tax dispute. Rather, the only real issues for judgment to which the court must immediately proceed—for example, whether, under the *Complete Auto* criteria, a single factor apportionment formula for a net income tax is "fair,"[87] or whether a coal severance tax is "fairly related to the services provided by the State"[88]—are wholly dependent on non-fact-finding policies and values. In some ways, these are similar to the "undue burden" conclusion in state regula-

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[82] Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich L Rev at 949 n 214 (cited in note 59).

[83] Dowling, *Interstate Commerce and State Power* (cited in note 7).

[84] *Pike v Bruce Church, Inc.*, 397 US 137 (1970).

[85] *Bibb v Navajo Freight Lines*, 359 US 520 (1959).

[86] *Kassell v Consolidated Freightways Corp.*, 450 US 662 (1981).

[87] *Moorman Manufacturing Co. v Bair*, 437 US 267 (1978).

[88] *Container Corp.*, 463 US at 170.

tion challenges, but they are also significantly different. In the end, the state regulation issue turns almost entirely on balancing two incommensurable values: the strength of the state's interest in the regulation versus the weight of the burden it imposes on interstate commerce. Final resolution of the state tax issue, on the other hand, requires application of sophisticated principles of economics and public finance, such as the incidence and impact of various taxes, matters on which the experience and expertise of courts are especially limited.[89]

Admittedly, a bright-line rule such as the object-measure approach may not take into account subtle effects of state taxes, nor match more economically sophisticated efforts to resolve the problem. Rather, its utility is a sensible and workable standard that does not incur the fairly complicated inquiries and attendant steep fact-finding costs associated with these more elegant or discriminating approaches.[90]

C. THE OBJECT-MEASURE APPROACH IN OPERATION

1. *Preserving the values of Complete Auto.* Despite its problems of opacity, redundancy, and unnecessary complexity, *Complete Auto*

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[89] See *United States v Topco Associates, Inc.*, 405 US 596, 609 (1972); Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv L Rev 4 (1984).

Whether balancing in state regulation cases is desirable, see *American Trucking Assns. v Smith*, 496 US 167, 203 (1990) (Scalia concurring) (balancing leads to "inherently unpredictable" results because courts are forced to act as legislatures), and whether the Court actually engages in that process, see Regan, 84 Mich L Rev at 1092 (cited in note 39), is beyond the scope of our discussion. But to the extent that the Court is serious about balancing in the state regulation cases, we believe that this exercise is less appropriate in state taxation cases. And to the extent that balancing is improper, our approach avoids a court having "to accommodate, like a legislature, the inevitably shifting variables of a national economy." *Smith*, 496 US at 203. Thus, while we suggest that the Court take a quasi-legislative approach, it should do so more in terms of formulating the rule to be applied in future cases, rather than to legislating on an ad hoc case-by-case basis.

[90] For example, one commentator suggests that a Dormant Commerce Clause inquiry should consider whether the entity being taxed has a "substantial economic presence" above and beyond that required to satisfy due process, with this additional analysis concentrating on "the percentage of the taxpayer's business conducted to insure that a business is not economically discouraged from doing business in that state." Edson, 49 Tax L Rev at 946 (cited in note 69). This is a fair argument, as it seems to be economically undesirable to require a taxpayer to incur a large tax preparation fee for a minuscule portion of its business. See id at 946 n 272. However, approaches that attempt to take into account these subtle effects quickly become extremely complex. Ferdinand Schoettle advocates evaluating the constitutionality of state taxes by examining whether they impose different marginal costs on in-state versus out-of-state taxpayers. Schoettle, 75 Minn L Rev at 911 (cited in note 59). Although Schoettle's approach is conceptually defensible, it would require fairly detailed fact-finding by district courts regarding marginal costs in multiple jurisdictions, pre-

does advance the essential values for judicial review under the Dormant Commerce Clause—that is, no advantage for in-staters at the expense of out-of-staters. We have already seen that the object-measure approach is easier to apply than *Complete Auto.* That simplicity does not come, however, at the expense of failing to achieve the goals of all four of *Complete Auto*'s prongs.

The first prong of *Complete Auto* is that the tax be "applied to an activity with a substantial nexus with the taxing State."[91] An unapportioned tax whose object is one that only the taxing state can reach—which is permitted by the proposed object-measure approach—must necessarily satisfy the first prong of *Complete Auto:* that only this state can reach the object mandates that the object be one that has a substantial nexus with the taxing state. On the other hand, if the object of the tax can be reached by more than one state—in which case the proposed approach requires apportionment—the Due Process Clause's requirement of minimum contacts will ensure a constitutional nexus. Note that our approach differs slightly here from *Complete Auto.* We do not interpret the Commerce Clause to require a separate nexus more stringent than that imposed by the Due Process Clause because that is not required to further protect interstate commerce against state taxes that accord a preference to local enterprises.

The second prong of *Complete Auto* is that the tax be fairly apportioned, meaning that it satisfies internal and external consistency. A tax whose object is one that only the taxing state can reach—which requires no apportionment under the object measure approach—will always be internally consistent, since only the taxing state can apply this tax. If every state imposed a similar tax, there would be no extra burden on interstate commerce, since it would be taxed in only one state. On the other hand, under the object-measure approach, a tax whose object is one that more than one state can reach must be apportioned and, consequently, will be internally consistent: if every state imposed a fairly apportioned tax, there would be no multiple tax burden.

Demonstrating that the object-measure approach satisfies exter-

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sumably based on testimony from economists. See id at 932 & n 109. For discussion of "the court's institutional competence to detect . . . [the wide range of] problems and design workable solutions," see Shaviro, 90 Mich L Rev at 988–89 (cited in note 59).

[91] *Complete Auto Transit, Inc. v Brady,* 430 US 274, 279 (1977).

nal consistency is somewhat difficult to do because of the fluctuating definition of the term. Nevertheless, to the extent that external consistency retains any independent meaning from internal consistency, it is satisfied by the object-measure approach. Thus, a tax whose object can be reached by only one state will be externally consistent for the same reason that the taxes in *Jefferson Lines* and *Goldberg v Sweet* were externally consistent: no other state can reach the object, and therefore the taxing state is not seeking to claim more than its fair share of taxable proceeds. On the other hand, if the object is one that more than one state can reach, the object-measure approach requires that the tax be properly apportioned, which indicates that the taxing state is not seeking to claim more than its fair share, that is, a share that would result in interstate commerce bearing a greater tax burden simply because of its interstate activities.[92]

The third prong of *Complete Auto* requires that the tax not discriminate against interstate commerce.[93] Under current doctrine, this requirement appears to be satisfied if the tax is applied at the same rate to intrastate and interstate business. In *Jefferson Lines*, the Court held that the sales tax did not discriminate against interstate commerce because "all buyers pay tax at the same rate on the value of their purchases."[94] In *Commonwealth Edison*, the Court held that Montana's severance tax did not discriminate against out-of-staters, even though the majority of the tax was paid by them. The Court focused instead on the fact that "the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers."[95] Since the object-measure approach only comes into play if the discrimination prohibition is already satisfied, it obviously comports with *Complete Auto*'s third prong.

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[92] Admittedly, there is a certain amount of circularity here due to the fact that "fairly apportioned" has heen defined in part by reference to external consistency. *See Jefferson Lines*, 115 S Ct at 1338. However, external consistency seems to be defined by reference back to fair apportionment. Id at 1339.

[93] Defining "discrimination" in this context is a daunting task, as Daniel Shaviro discusses. See Shaviro, 90 Mich L Rev at 935 (cited in note 59). For a recent illustration of the difficulty, see the opinions in *Camps Newfound/Owatonna v Town of Harrison*, 117 S Ct 1590 (1997). We note merely that discrimination is forbidden by the Dormant Commerce Clause. The object-ineasure approach concerns taxes that survive this initial bar.

[94] Id at 1345.

[95] *Commonwealth Edison Co. v Montana*, 453 US 609, 619 (1981).

Finally, the last prong is that the tax be "fairly related to the services provided by the State."[96] As mentioned earlier, this prong appears redundant considering the first prong, particularly in light of the Court's holding that the tax revenue need not be limited to the cost of the activity being taxed or the benefits actually conferred on the taxpayer.[97] The object-measure approach, as we have pointed out, at minimum requires a nexus that satisfies due process. That nexus means that the entity being taxed derives some benefits and conveniences from the taxing state's maintenance of civilization. Under the current doctrine, this connection is sufficient to satisfy the last prong of *Complete Auto.*[98]

2. *Layers of taxes.* An important postulate of the object-measure approach is that each state has the ability to levy a variety of complementary and overlapping taxes on different objects. For example, a state could theoretically impose a tax on the same company for sales, doing business, and gross receipts, even though the measure of these taxes is essentially the same.[99] In addition, the same company could be subject to state taxes for use of the roads, the presence of real property, and the severance of natural resources—to name but a few additional state revenue raising programs.

Of course, in practice, states will never levy every possible type of tax. For one thing, these taxes can be redundant. A doing business tax of 10 percent of sales, as applied to a retailer, is the equivalent of applying a 5 percent sales tax and a 5 percent doing business tax. Moreover, states that are poor in natural resources might not impose a severance tax, choosing to rely on other more productive taxes instead. Nevertheless, a meaningful qualification for any approach to state taxation of interstate commerce is to determine its ability to ensure that if every state were to impose every possible tax, interstate commerce would be at no disadvantage compared to intrastate commerce.

The object-measure approach satisfies this qualification. Only two types of taxes will pass the object-measure approach: (1) those

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[96] Id.

[97] *Oklahoma Tax Commission v Jefferson Lines, Inc.*, 115 S Ct 1331, 1345 (1995).

[98] After *Consolidated Edison*, the Court has virtually stripped this prong of any significance.

[99] "In fact, states with gross receipts taxes almost always impose retail taxes as well." Walter Hellerstein, Michael J. McIntyre, and Richard D. Pomp, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 Tax L Rev 47, 78 (1995).

whose objects can be reached only by the taxing state, or (2) those that are fairly apportioned. First, if every state imposed a tax of the initial type, interstate commerce would not be disadvantaged relative to intrastate commerce. A business would pay a given tax only once per taxable event, regardless of the number of states in which it does business. For example, if every state imposed the Oklahoma tax at issue in *Jefferson Lines*, a company selling 50,000 bus tickets would pay the gross receipts tax once on each ticket, regardless of whether these tickets were sold entirely in one state or 1,000 in each of all fifty states. Similarly, if every state imposed the telephone tax at issue in *Goldberg v Sweet*, a taxpayer would pay the telephone tax only once per call, regardless of whether it made calls to people in one state or in multiple states.

Second, if every state imposed the same fairly apportioned tax, interstate commerce would again not suffer relative to intrastate commerce because fair apportionment ensures that there is no multiple taxation. For example, if every state imposed the unitary tax at issue in *Container Corp.*, a business located entirely in California with income of $1 million would be taxed on the full amount in California, while a business with income of $1 million, half from operations in California and half from operations in Nevada, would be taxed by each state, but only on half its income.

3. *Avoidance of tax comparisons.* An important practical benefit of the object-measure approach is that it ordinarily avoids the problem of having to compare disparate state taxes to determine whether a given tax discriminates against or improperly burdens interstate commerce.[100] The problems with comparisons of taxes arise in two ways. First, the Court must determine which taxes are actually comparable. Yet the Court has indicated that comparing different taxes is a task for which it is not well suited.[101] The major exception to this rule is the Court's "compensatory tax" doctrine, under which a tax that imposes on interstate commerce the equivalent of an "identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause."[102] To

[100] There is a "pretext" exception. See Part III.D.4.

[101] *Nippert v City of Richmond*, 327 US 416, 430–31 (1946). But see *Alaska v Arctic Maid*, 366 US 199, 204 (1961) (comparing Alaska's doing business tax levied on freezing ships to the state's cannery tax).

[102] *Oregon Waste Systems, Inc. v Dept. of Environmental Quality of Oregon*, 114 S Ct 1345, 1352 (1994).

satisfy this doctrine, the interstate commerce tax must be levied on a "substantially equivalent event" as that on which the intrastate tax is levied.[103]

The paradigm of a "compensatory tax" is a use tax, which is imposed on the use of certain goods within the state, to complement a sales tax, which is imposed on the sale of goods within the state. A use tax appears on its face to discriminate against interstate commerce, since it is applied only on goods that are purchased outside the taxing state. However, the use tax does not conflict with the values of the Commerce Clause; rather, it simply assures that interstate commerce will not be *benefited* at the expense of intrastate commerce. For example, assuming that all prices are equal, if California imposes a sales tax of 8.5 percent, and Nevada imposes one of 6 percent, a consumer living on the California side of Lake Tahoe would have an incentive to purchase everything on the Nevada side of Lake Tahoe, thereby saving 2.5 cents in sales taxes on every dollar spent. California's use tax seeks to ensure that goods on the Nevada side of the lake—at least high cost goods—are no more attractive than those on the California side.[104] Thus, as the Court has noted, despite the facially discriminatory use tax, "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed."[105]

Otherwise, however, the Court has been reluctant to make such comparisons for other pairs of taxes. For example, in *Fulton Corp. v Faulkner*,[106] the Court refused to compare North Carolina's intangibles tax on stock having a business situs within the state to its corporate income tax because these taxes were not substantially similar.[107] The Court has also indicated that manufacturing and wholesaling are not substantially equivalent events,[108] nor are sev-

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[103] *Maryland v Louisiana*, 451 US 725, 759 (1981).

[104] As a practical matter, the use tax catches only sales of big ticket items that can be administratively tracked, e.g., automobiles that must be registered in the user state.

[105] *Henneford v Silas Mason Co.*, 300 US 577, 584 (1937).

[106] 116 S Ct 848 (1996).

[107] Id at 857.

[108] *Tyler Pipe Industries, Inc. v Washington State Dept. of Revenue*, 483 US 232, 242–43 (1987) (discussed in Part III.D.3); *Armco v Hardesty*, 467 US 638, 642–43 (1984).

erance and first use.[109] Given the Court's hesitance to make such difficult comparisons, any approach to Commerce Clause challenges should avoid requiring the Court to do so.

The second problem is that, even if the taxes apply to substantially equivalent activities, it is extremely difficult to make an accurate comparison of the burdens they impose. A proper analysis would be based on a number of factors: tax rate, economic effect of the tax on business, and so on.[110] Compounding the number of factors to consider is the fact that the effects of taxes in the real world "depend on elasticities of supply and demand, the ability of producers and consumers to substitute one product for another, the structure of the relevant market, the time frame over which the tax is imposed and evaluated, and so on."[111]

Under the object-measure approach, the Court does not make comparisons between different state taxes. The first part of the approach merely considers whether the object of the tax is one that more than one state can reach, and the second part merely considers whether the tax is fairly apportioned. Note that determining whether the object of the tax can be reached by more than one state does not require comparison of different taxes. Instead, the Court need only consider the nature of the activity being taxed, without reference to the taxes of other states or to other taxes of this state.

4. *The role of credits.* Under the object-measure approach, a state need not ordinarily give a credit for taxes paid to other states.[112]

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[109] *Maryland v Louisiana*, 451 US at 758–59.

[110] *Commonwealth Edison Co. v Montana*, 453 US 609, 628 (1981).

[111] *Fulton*, 116 S Ct at 859. Elasticity is a measure of "the *responsiveness* of the quantity demanded (or supplied) to a change in a given variable (such as own price, price of another good, or income)." James P. Quirk, *Intermediate Microeconomics* 36 (2d ed 1982). Because elasticity varies from product to product, a tax of general applicability, such as a sales tax, will alter the demand from products in significantly different ways, even though the price for each is being raised by the same proportional amount. Id at 38. Thus, an attempt to compare taxes would, to be accurate, require the Court to calculate the elasticities of a multitude of products and services, a task requiring the use of differential calculus. See Hal R. Varian, *Microeconomic Analysis* 80 (2d ed 1984).

The substitutability of one product for another will affect the elasticity. For example, if Kansas imposed a tax on, among other things, wheat, wheat buyers might turn to farmers in other Midwest states, because Iowa wheat is a close (or perfect) substitute for Kansas wheat, and, other costs being roughly equal, would be cheaper without the Kansas tax. See Quirk, *Intermediate Microeconomics* at 38.

[112] The Court has not yet made such reciprocity a constitutional requirement, although it has hinted it may do so in the future. See *Oklahoma Tax Commission v Jefferson Lines, Inc.*, 115 S Ct 1331, 1342 n 6 (1995).

If the object of the tax is one that only the taxing state can reach, taxes paid to other states would not be applicable to this tax. If the object of the tax is one that other states can reach, then our approach requires that the tax be properly apportioned, and therefore, the fact that taxes have been paid to other states is already accounted for.

However, if a taxing state explicitly grants a credit for other taxes paid, then the Court's universally accepted prohibition of facial discrimination against interstate commerce, which must be satisfied before the object-measure approach comes into play, would require that the credit be given equally to out-of-staters and in-staters. For example, if a state imposes a doing business tax measured by total receipts within the state, and also a sales tax measured by sales within the state, and gives a credit on the doing business tax for sales tax paid to the state, it would have to offer *that* credit to *all* businesses that pay a sales tax, including those that conduct their business and pay a sales tax outside the state.[113]

Note, however, that whether a state grants a credit to out-of-staters as well as in-staters is relevant only to the issue of whether the state is engaging in facial discrimination against interstate commerce. It has no bearing on the issue of apportionment, and is certainly not an alternative to apportionment.[114] Allowing credits to satisfy the apportionment requirement would, in effect, say that unapportioned taxes are invalid only when the challenging taxpayer shows *actual* multiple taxation. As we observed earlier, requiring the taxpayer to show actual burden is undesirable.[115]

D. RESPONSES TO POTENTIAL CRITICISMS

The writings of several prominent commentators suggest that they may find the object-measure approach overly formalistic, or nothing more than a reduction of *Complete Auto* to the internal consistency requirement. Others might view it as unfair, in that it

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[113] See *Williams v Vermont*, 472 US 14, 23–24 (1985) (invalidating on Equal Protection grounds a credit on sales taxes paid only to residents). See also *Tyler Pipe Industries* and *Armco*, discussed in note 16; *Barringer v Griffes*, 1 F3d 1331, 1336–37 (2d Cir 1993) (striking down a use tax that provided a credit for in-state sales tax paid but not for out-of-state sales taxes).

[114] See Hellerstein, 87 Mich L Rev at 185–86 (cited in note 40).

[115] See note 65 and accompanying text.

would allow an interstate business that manufactures in one state and sells in another state to be taxed by both states if the first imposes a tax on in-state manufacturing and the second a tax on in-state sales. Finally, the object-measure approach may not appear to respond to the ability of states to exploit special advantages and thereby "export" their tax liabilities to out-of-staters.

1. *Reincarnation of the Formal Rule.* Shortly after the decision in *Complete Auto*, William B. Lockhart praised the apparent demise of what he termed the "Formal Rule,"[116] referring to the Court's early Commerce Clause doctrine that "a state tax on any activity or process of interstate commerce was an invalid 'regulation of commerce.'"[117] The major shortcoming of the Formal Rule was that it failed to take into account the practical realities of taxes, concentrating instead on the formal language used to describe the tax.[118] As the Court itself noted in *Complete Auto*, legal formalities tended to create a "trap for the unwary draftsman."[119]

The object-measure approach may appear to embody a certain amount of formalism, primarily because the label affixed to the object may determine whether the state must apportion the tax.[120] For example, if California applies a tax to sales within the state, the tax need not be apportioned even if the goods sold originally came from or will eventually go into interstate commerce. But if California applies a tax on doing business to an interstate company, then the tax would have to be apportioned in respect to that part of the business fairly attributable to California. Although the ap-

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[116] Lockhart, 65 Minn L Rev at 1027 (cited in note 14).

[117] Id.

[118] Id at 1034. Lockhart lists three explanations for the Formal Rule's persistence. First, it represented a judgment hy the federal judiciary that allowing taxation of interstate commerce would create unmanageable hurdens on commerce. Id at 1031. Second, such taxation interfered with free trade among the states. Id at 1032. Finally, "[t]he justices were saying that because the state cannot forbid engaging in interstate business, a premise no one questions, it cannot tax engaging in such a business—a sheer non-sequitur." Id at 1033.

[119] 430 US at 279.

[120] Thus, Walter Hellerstein criticizes the Court's reasoning in *Tyler Pipe*, which agrees with the object-measure approach, as "a retreat into the very formalism tbat the Court had purportedly abandoned in *Complete Auto*. . . ." See Hellerstein, 87 Mich L Rev at 172 (cited in note 40). The Court viewed wholesaling and manufacturing as separate activities which could each be subject to a tax (in the state in which each occurred). 483 US at 251. As a consequence, a business that manufactured in one state and wholesaled in another could be subject to a tax in both states, each measured by the unapportioned value of the same goods. But, as discussed in Part III.D.3., this is not inconsistent witb tbe basic values of the Dormant Commerce Clause.

proach may appear to allow the state to dictate whether the tax needs to be apportioned depending on how it labels the object, thus amounting to nothing more than an exercise in semantics,[121] further analysis demonstrates that this is not so.

Although the object-measure proposal ordinarily permits the state to affix any label to the object of the tax that it designates, the labeling will be disregarded if it is a misdescription or subterfuge. Adjudication of Dormant Commerce Clause challenges to state taxes indicates that the issue should arise only infrequently. Most state and local taxes fall into familiar categories. When they do not,[122] the Court should examine the structure of the tax and determine as its true object that which has a proper (or reasonable)[123] nexus between the object of the tax and its measure. The absence of such a nexus indicates that the state is seeking to tax something beyond its reach, thus threatening imposition of multiple burdens on interstate commerce.

Consider the sales tax/doing business tax example mentioned above. If California wants to tax sales within the state, it can tax the full amount of that sale, even if the sale involves interstate commerce. As discussed earlier, California may do so because no other state can tax the sale. It should be clear, however, that the measure of this sales tax must be sales that take place *within* the state. If California were to include in its measure receipts from out-of-state sales, there would be no reasonable (or proper) nexus between the designated object of the tax (sales within the state) and the measure. The out-of-state sales do not conform to the object as defined by the state, and thus the Court cannot be bound by the state's definition. Similarly, if California wishes to impose a tax for doing business within the state, it can measure it by all revenue generated within the state, even if the taxpayer operates

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[121] Similarly, recall the telecommunications tax upheld in *Goldberg v Sweet* discussed in Part I.C. Walter Hellerstein contends that "[i]nsofar as the Illinois Supreme Court sought to justify the levy on the ground that it was imposed on a local 'taxable event,' it smacks of the formalism that the Court has discarded and replaced with a commerce clause jurisprudence rooted in practical economic reality." Hellerstein, 87 Mich L Rev at 187 (cited in note 40); but see Part IV.E.2.a.

[122] See, e.g., *Goldberg v Sweet*, discussed in Part I.C.; *Central Greyhound Lines, Inc. v Mealey*, discussed in note 143.

[123] "Proper" or "reasonable," unfortunately, are nebulous modifiers, as is "fairly related." None of these terms probably conveys the concept any better than the others. Consequently, the concept is best explained by examples.

in interstate commerce. Once again, California may do so because no other state can reach the object of doing business within California. But if California were to measure this tax by income produced in other states, it would belie its characterizing the object as doing business within the state. Thus, unlike some applications of the Formal Rule, results under the object-measure approach do not turn on mere semantics.

2. "*Super internal consistency.*" Does the object-measure approach do nothing more than reduce the *Complete Auto* test to internal consistency, which is the requirement that there be no multiple taxation even if every state adopted an identical tax? Walter Hellerstein has concluded that internal consistency, despite its preserving the values of the Commerce Clause, creates more confusion in practice than it resolves.[124] Hellerstein's criticism is not so much an indictment of internal consistency as questioning why the Court chose not to give stronger bite to the fair apportionment requirement instead.[125] He sees internal consistency as problematic in that it has far-reaching and probably unintended consequences, and that it has supplanted the role of fair apportionment. According to Hellerstein, the doctrine of internal consistency "undermines the authority of a number of Supreme Court precedents and places many existing state taxes in constitutional jeopardy."[126] While he acknowledges the possibility that those taxes are not worth saving, he questions whether the Court needed to use such a novel concept.[127]

The object-measure approach differs from "super internal consistency" in a significant way. Under *Complete Auto*, a tax that fails the internal consistency prong is automatically invalid, regardless

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[124] Hellerstein, 87 Mich L Rev at 188 (cited in note 40).

[125] Id at 176–77.

[126] Id at 164.

[127] Id at 165 ("[I]t is worthwhile inquiring whether the Court could have faithfully effectuated its commerce clause policy by more familiar means").

However, the treatise that Hellerstein co-authored explains that internal consistency is not a new concept, but rather falls out of the multiple taxation doctrine:

> Unlike Minerva, who sprang in full armor from Jupiter's brow, the internal consistency test did not spring unprecedented from Justice Brennan's brain as a fresh, new approach to state taxation of interstate commerce. Instead, Justice Brennan articulated what he regarded as merely an "obvious" corollary of existing doctrine.

2 Hellerstein and Hellerstein, *State Taxation* § 4.08 at 4–42 (cited in note 3).

of whether it passes the other prongs of the test.[128] This result occurs because "[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."[129] In addition, a tax that is internally consistent may nevertheless be struck down if it fails a different prong of the *Complete Auto* test.[130] Thus, the requirement of internal consistency is a necessary but not sufficient condition of constitutionality.

The object-measure approach, on the other hand, is less complicated. Whereas internal consistency is one of four prongs that must all be satisfied for a tax to pass the *Complete Auto* test, the two parts of the object-measure approach are complementary. A tax will be presumed valid either if it is one whose object can be reached by only one state or if it is fairly apportioned.[131] The latter part of the object-measure approach encompasses Hellerstein's emphasis on the fair apportionment requirement to vindicate the central value of the Dormant Commerce Clause. The principal difference between the object-measure proposal and both the *Complete Auto* test and Hellerstein's approach is that our proposal excuses certain taxes from the fair apportionment requirement—namely, those whose objects can be reached by only one state. Without such an exception, requiring an apportionment of taxes such as that upheld in *Goldberg v Sweet*,[132] a tax on telephone calls billed to in-state addresses, would present exceedingly difficult administrative problems that are unnecessary in order to avoid multiple taxation.[133]

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[128] See, e.g., *American Trucking Assns. v Scheiner*, 483 US 266 (1987). *Scheiner* is discussed at Part IV.E.1.b.

[129] *Oklahoma Tax Commission v Jefferson Lines, Inc.*, 115 S Ct 1331, 1338 (1995).

[130] The use tax struck down because of inadequate nexus in *Quill Corp. v North Dakota*, 504 US 298 (1992), appeared to be internally consistent, though the Court did not address this issue. The tax required out-of-state mail-order businesses to collect and remit use taxes on goods purchased for use in the taxing state. Id at 301. If every state imposed such a tax, interstate commerce would not face multiple taxation, since only one state can apply a use tax per transaction.

[131] The presumption of validity can be overcome if the person challenging the tax can show that the state adopted the tax intending to discriminate against interstate commerce, or that the state had some "special advantage." See Part III.D.4.

[132] 488 US 252 (1989). For an argument against the validity of the tax in *Goldberg* because of unfair apportionment, see Hellerstein, 87 Mich L Rev at 187 (cited in note 40) (discussed in note 121).

[133] Id at 264–65.

3. *Apparent unfairness.* By allowing states to apply unapportioned taxes to activities that involve interstate commerce, does the object-measure approach permit multiple taxation of interstate activity? For example, suppose that California imposes a tax on sales occurring within the state (measured by the sales price of the goods sold), and that Nevada imposes a tax on manufacturing conducted within the state (measured by the sales price of the goods manufactured). If Acme manufactures widgets in Nevada, but sells them only in California, Acme will have to pay two taxes on each widget (each measured by the full sales price). This apparent multiple burden disappears, however, when we hypothesize a second company. If Failsafe also produces and sells widgets, but manufactures widgets in California and sells them only in Nevada, it pays no sales tax to California, and no manufacturing tax in Nevada.

The fact that Acme pays two taxes and Failsafe pays none reflects an unfortunate business setup for Acme and a clever (or fortunate) one for Failsafe. "This type of discrepancy is simply the price the United States pays for federalism,"[134] and is analogous to the disparity in taxes paid by companies that do business in high-tax states versus those that do business in low-tax states.[135] While certain individual companies may pay more (or higher) taxes because they undertake particular business activities in one state rather than another, and although there may be economic problems that stem from such incentives,[136] they are not the *systemic* evils that the Dormant Commerce Clause was designed to address because they are neither protectionist in nature[137] nor do they im-

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[134] Hellerstein et al., 51 Tax L Rev at 65 (cited in note 3).

[135] See, e.g., Hellerstein, 87 Mich L Rev at 180 n 221 (cited in note 40) (noting that "the Court has found such adventitious burdens resulting from states' different taxing schemes constitutionally tolerable").

[136] This "locational disparity" is the subject of Shaviro's economic analysis of federalism. See Shaviro, 90 Mich L Rev at 900–02 (cited in note 59). The principle of location neutrality is that "it is optimal that the tax levied on a given amount of profit or a given taxpayer be invariant with regard to where property or persons are located." Id at 900. The optimality stems from the fact that taxes distort the prices of the goods on which they are imposed. Thus, if different states have different tax rates, economically rational actors will take those differences into account and adjust their consumption patterns accordingly. Id at 900, 902.

[137] The concept of "protectionism" is the centerpiece of an influential article by Donald Regan. Regan would consider a tax to be protectionist if it "was adopted for the purpose of improving the competitive position of local (in-state) economic actors . . . vis-à-vis their foreign (by which I mean simply out-of-state) competitors" and it is analogous to a tariff,

pose multiple taxes on interstate businesses simply because they engage in interstate commerce.[138]

Adopting this analysis in *Tyler Pipe Industries v Department of Revenue*,[139] the Court, though holding that the Washington taxes in question violated the Dormant Commerce Clause on other grounds, observed that Washington could tax the full value of both in-state wholesaling and manufacturing, and have both measured by the gross receipts of the activity: "[T]he activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax."[140] It follows that Washington could choose to tax only one of these activities—say, manufacturing—while Oregon could choose to tax wholesaling, and both states could measure their respective taxes by gross receipts (i.e., the value of the goods manufactured and wholesaled). This could, of course, result in Taxpayer *A*, who manufactures in Washington and wholesales in Oregon, paying both taxes, each measured by the same value.

Hellerstein strongly criticizes this consequence of the Court's reasoning in *Tyler Pipe* and, by implication, the object-measure approach. He believes that "part of [Taxpayer *A*'s] gross receipts that [Oregon] was taxing as attributable to wholesaling in the state was actually attributable to the value of the goods before they entered [Oregon]."[141] He contends that only "apportionment of the tax measure—gross receipts—would ensure . . . that the same tax measure was not taxed twice to the same taxpayer merely because the legislature had included it in the tax base under two taxable subjects—manufacturing and wholesaling. . . . Otherwise the state, under the guise of taxing some 'local incident' of that interstate activity, would be able to sweep into its tax base gross receipts, net income, or other values that other states could include in their

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quota, or embargo. Regan, 84 Mich L Rev at 1094–95 (cited in note 39). These facts would trigger the object-measure "pretext" analysis, discussed in Part III.D.4.

[138] For discussion of why neither "duplicative" taxation by different states nor different state taxes that "overlap" necessarily present risks that "rise to constitutional proportions," see *Moorman Manufacturing Co. v Bair*, 437 US 267, 278–79 (1978).

[139] 483 US 232 (1987), discussed in note 120.

[140] Id at 251.

[141] Hellerstein et al., 51 Tax L Rev at 99 (cited in note 99).

tax bases with equal justification by identifying some other 'local incident' of that interstate activity. The risk of multiple taxation to which such a regime would expose interstate commerce is plain."[142]

We disagree. Just as Taxpayer *A* would be taxed on 100 percent of its gross receipts for Washington's manufacturing tax, and 100 percent for Oregon's wholesaling tax, Taxpayer *B*, who manufactures in Oregon and wholesales in Washington, would not be subject to any manufacturing tax or any wholesaling tax. And no taxpayer would be taxed more than 100 percent on either wholesaling or manufacturing.[143] Although Congress may legislate against this form of "multiple taxation" if it shares Hellerstein's concern, this is not the kind of systemic disadvantaging of interstate businesses

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[142] Hellerstein, 87 Mich L Rev at 173, 177 (cited in note 40).

[143] This distinction suggests that, under the object-measure approach, the tax at issue in *Central Greyhound Lines, Inc. v Mealey*, 334 US 653 (1948), should probably have been upheld. Tbe case involved an "emergency tax on the furnishing of utility services," as applied to bus travel originating within and ending in New York. It was measured by gross receipts "derived from continuous transportation of passengers between New York points," id at 665, even though some of the routes traversed Pennsylvania or New Jersey. The Court held that the unapportioned tax violated the Commerce Clause, because New Jersey and Pennsylvania could also tax some portion of Central Greyhound's gross receipts. Id at 662.

The statutory scheme made clear that New York sought to tax transportation between cities in the state, measured by the gross receipts from that activity. Since this "emergency tax" does not fit tightly into a standard tax mold, it presents a difficulty in applying the object-measure approach. The problem is whether the object of the tax should be characterized as being for the *sale* or the *service* of the transportation. Under the object-measure proposal, Central Greyhound could be taxed 100 percent on its sales (assuming that all of its sales take place within New York), but only on an apportioned amount of its providing services, which in this case was 57.47 percent within New York. Id. Pennsylvania and New Jersey could similarly tax apportioned amounts of Central Greyhound's services, but not on its sales (assuming that they all took place in New York). Since the New York tax did not apply at all to transportation between points in New York and out-of-state points, id, despite the fact that service would take place within New York, it would seem most sensible to conclude that the object of tbe tax was the sale.

Would interstate commerce be disadvantaged if the tax, as so characterized, were upheld? In that situation, Central Greyhound would pay New York's tax for sales on 100 percent of its gross receipts, and Pennsylvania's and New Jersey's apportioned doing business tax for services on 43.53 percent of its gross receipts. A wholly intrastate company in New York would pay the tax on 100 percent of its gross receipts as well, but it would not be subject to any doing business taxes from other states. So Central Greyhound appears disadvantaged relative to intrastate commerce. But if New York imposed doing business taxes on sales *and* services, an intrastate business would pay two taxes, both measured by 100 percent of gross receipts. Tbis wholly intrastate company appears disadvantaged relative to Central Greyhound.

On the other band, suppose Pennsylvania imposed only a doing business tax on services. The wholly intrastate New York company pays 100 percent again, but a bus company that sells only in New York but operates in Pennsylvania and New York would pay only an apportioned tax in New York (less than 100 percent of its gross receipts) and no tax in Pennsylvania, since it has no sales there. The intrastate bus company would simply be another business with an unfortunate setup.

that should trigger judicial invalidation under the Dormant Commerce Clause.

4. *Special advantages and impure motives.* How does the object-measure approach address the matter of states that seek to exploit special advantages to the detriment of other states by "exporting" their tax liabilities to out-of-staters, thus benefiting in-staters at the expense of interstate commerce? An example of this phenomenon is a hotel tax. This tax is applied at the same tax rate to in-staters as out-of-staters. But because the renting of hotel rooms is an activity that those outside the taxing authority (whether inside or outside the state) are more likely to engage in than insiders, this tax falls more heavily on outsiders. Thus, a state whose economy is tourism-driven (say, Nevada) can apply a relatively high hotel (and sales) tax, knowing that the bulk of these taxes is borne by out-of-staters.[144]

A state that is rich in natural resources presents an even plainer example of a "special" advantage. By enacting a high severance tax and comparatively low income and property taxes, a legislature can structure a tax system in which state residents bear a comparatively small proportion of the state's tax liability. While it must be recognized that identifying a special or natural advantage is a matter of degree, another example may be found in the geographic advantage of port states, since they can tax activities connected with the onloading and offloading of cargo and pass that tax along to out-of-staters who are shippers or receivers of the cargo.

States can also exploit natural advantages through regulations that impose economic burdens on interstate commerce, thereby effectively acting as taxes. Two examples are *Cities Service Gas Co. v Peerless Oil & Gas Co.*[145] and *Parker v Brown.*[146] In *Parker*, California regulated the supply of raisins, even though 95 percent of those

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[144] See, e.g., John F. Due and John L. Mikesell, *Sales Taxation: State and Local Structure and Administration* 12 (1983); Betsy Wade, *Tax Collectors Lean on the Out-of-Towners*, NY Times § 5 at 3 (Aug. 25, 1991).

See also Carol L. Powers, *State Taxation of Energy Resources: Affirmation of Commonwealth Edison Co. v Montana*, 10 BC Envir Aff L Rev 503, 512 (1982): "Nevada exports a substantial portion of its taxes in the form of gambling taxes; Delaware does the same with its corporate franchise tax; as does Michigan with a production tax on automobiles; Florida with a sales tax geared to raise revenue from tourists; North Carolina from Tobacco; California from produce and vineyards; and New York from its stock exchange transactions."

[145] 340 US 179 (1950).

[146] 317 US 341 (1943).

raisins were destined for shipment in interstate commerce and even though California could dictate the national price of raisins by controlling its supply of raisins.[147] In *Cities Service*, Oklahoma regulated the price at the wellhead on natural gas, 90 percent of which was sold to out-of-staters.[148] Since both cases involved state regulatory systems that raised prices, the burden of which was borne vastly by interstate commerce, they are functionally similar to the severance tax at issue in *Commonwealth Edison Co. v Montana*,[149] discussed below.

The exploitative possibilities for states with natural advantages are not eliminated by the simple observation that if the rest of the country does not want to pay Montana's severance tax on coal, it need not buy the coal. For one thing, that argument would apply equally to an improperly unapportioned doing business tax—an interstate business that does not wish to pay such a tax (or any other tax that multiplies burdens or discriminates against interstate commerce) need not conduct business within the state. Yet, such taxes are plainly invalid under the Dormant Commerce Clause. For another thing, it may not always be practicable "not to buy the coal."[150] Suppose that California, Oregon, and Washington collectively decided to impose large port handling taxes. The opportunity to buy elsewhere, noted above, relies on a free and competitive market; yet, in this example, there may not be a commercially practicable substitute for shipping goods through the western coastal states.[151]

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[147] Id at 359.

[148] 340 US at 180.

[149] 453 US 609 (1981).

[150] Montana has 25 percent of the known coal reserves in the country, and over half of the low-sulphur coal reserves. *Commonwealth Edison Co. v Montana*, 453 US 609, 638 (1981) (Blackmun dissenting). Special advantages are most successfully exploited where they stem from monopolies. Thus, tourism-driven San Francisco cannot enact an excessively high hotel tax, since doing so would drive tourists away to vacation in other cities. But New Jersey could probably enact a high gasoline tax or highway toll to take advantage of the traffic between New York to its north and Pennsylvania, Delaware, Maryland, and Washington, D.C., to its south. Although such a tax would fall heavily on New Jersey residents, it would presumably generate enough revenue that New Jersey would be able to lower (or even eliminate) its income tax, and thereby export some portion of its tax liability to out-of-state taxpayers. These are, of course, all matters of degree, depending on the elasticity of demand and the cost and attractiveness of substitutes. For a theoretical discussion of elasticity, see Varian, *Microeconomic Analysis* at 70–72, 80 (cited in note 111).

[151] Again, the natural advantage is one of degree. See note 150. Of course, Congress is free to pursue a systematic and sophisticated economic analysis in enacting statutes in this area.

The *Complete Auto* test fails to take account of facially neutral taxes that exploit special (or natural) advantages.[152] In upholding a severance tax, even though the bulk of the cost is paid by out-of-staters, the Court reasoned that because states can constitutionally impose a severance tax of *some* rate, the rate itself is a question better left to the political process.[153]

The object-measure approach deals with the problem of special advantages by treating a tax whose object can be reached by only one state as *presumptively* valid. This presumption can be overcome if the entity challenging the tax can show that the state adopted the tax intending to discriminate against interstate commerce.[154] This showing will be difficult to make, as it is meant to be.[155] Our effort to achieve simplicity and workability will inevitably come up short in rooting out *all* discrimination against interstate commerce. But any requirement other than clear intent to discriminate would embroil federal courts in the task of comparing a number of different types of taxes in order to determine whether the state is exporting its tax liabilities.[156] For example, if Nevada, as a state with a tourism-driven economy, imposes a sales tax that is much higher than the average sales tax, is it exporting its tax liabilities to out-of-state tourists, or is it simply adopting a tax structure that is, in the view of its legislators, most efficient? The Court has expressed a reluctance to answer such questions as requiring arduous fact-finding beyond the scope of its abilities, and as a determination more properly made by state legislatures and by Congress.[157]

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[152] Indeed, the Court appears to be satisfied that it is for Congress to address the situation. *Commonwealth Edison*, 453 US at 637–38 (White concurring); see also *Quill Corp. v North Dakota*, 504 US 298, 318–19 (1992) (citing *Commonwealth Edison* for the same proposition).

[153] *Commonwealth Edison*, 453 US at 628.

[154] By intent to discriminate, we mean "tbings a legislator hopes to accomplish *by the operation of the statute.*" Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* 45 (1995) (quoting John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L J 1205, 1218 (1970)) (emphasis in original).

[155] Difficult, but not impossible. Tbe Court bas, in otber contexts, been able to ascertain legislators' intent in discriininating against racial and religious minorities, and there is no reason to believe that tbe Court would not be able to ascertain the intentions of state legislators in particularly egregious cases with respect to discriminating against interstate commerce. See id at 48–52.

[156] See Part III.C.3.

[157] Tbe Court bas noted that:

> [I]t is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demograpbic, social, and political considerations that must inforin a decision about an acceptable rate or level of state taxation.

The facts in *Commonwealth Edison Co. v Montana*[158] illustrate how a showing of intent to discriminate might be made. Montana applied a severance tax of up to 30 percent of the contract sales price on the output of the state's coal mines. At least 50 percent of the revenue generated by this tax was required to be paid into a permanent trust fund that could be appropriated only by agreement of three-fourths of the state legislators.[159] Moreover, 90 percent of the coal mined within the state ultimately was exported to the other forty-nine states.[160] Montana legislators clearly understood the consequences of raising the severance tax when they looked to the effect of Alberta, Canada's raising of its natural gas royalty tax while financing "universities, hospitals, reduction of other taxes, etc."[161] Due to the revenue generated by this tax, Montana was able to lower its property and income taxes and thereby keep its overall tax revenue constant while providing tax relief for state residents.[162] The juxtaposition of the increase in the severance tax rate along with a decrease in local taxes is strong circumstantial evidence of intent to discriminate against or improperly burden interstate commerce.[163]

Similarly, in *Hunt v Washington State Apple Advertising Commission*,[164] North Carolina enacted a statute prohibiting the labeling of apples as being of any grade other than the "applicable U.S. grade or standard." Washington, through a stringent inspection program, had implemented a grading system that was "the equivalent of, or superior to, the comparable grades and standards

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Commonwealth Edison Co. v Montana, 453 US 609, 628 (1981). As Justice Blackmun noted in dissent, however, it was extremely improbable that Montana legislators would ever lower the severance tax, since it accounted for 20 percent of the state's total revenue in 1981. Id at 642 (Blackmun dissenting).

[158] 453 US 609 (1981).

[159] Id at 612–13.

[160] Id at 639 (Blackmun dissenting).

[161] Id at 640 (Blackmun dissenting) (citing Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation 1 (1975)).

[162] Id at 642 (Blackmun dissenting). In fact, the changes in severance, property, and income tax rates occurred simultaneously. See Shaviro, 90 Mich L Rev at 957 (cited in note 59).

[163] It is possible, of course, that despite an improper legislative intent, the tax, in fact, might still not improperly burden interstate commerce. For consideration of why "in-state producers or landowners might bear most or all of the real tax burden" of Montana's scheme, see Shaviro, 90 Mich L Rev at 956–57 (cited in note 59).

[164] 432 US 333, 335 (1977).

adopted by the United States Department of Agriculture."[165] Thus, the statute—"unique in the 50 states"[166]—disadvantaged Washington by raising the cost of selling apples in North Carolina and by erasing Washington's comparative advantage earned through its grading system.[167] In invalidating the statute, the Court also noted indications that North Carolina had adopted the statute with the specific intent of discriminating against Washington.[168]

Intent to discriminate against interstate commerce could also be demonstrated more dramatically by the existence of a "smoking gun," such as a state-sponsored study of ways of exporting tax liability,[169] or other circumstantial or direct evidence.[170] Thus, it has been contended that Iowa's enactment of a single-factor sales formula for apportioning business income[171] was deliberately intended "to improve the economic position of the Iowa-based businesses over its competitors," the evidence being "that Iowa is a market state," and "insofar as out-of-state businesses are engaged in economic activity in Iowa it is likely to be through sales to Iowa customers."[172]

This pretext analysis seeks to prevent states from engaging in opportunistic taxation by choosing tax bases that favor themselves.[173] While no realistic approach can assure that every tax base is taxed exactly once, *no* tax base should be used to subject interstate commerce to multiple taxation under the object-measure approach.

A final kind of "special advantage" remains to be considered.

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[165] Id at 336.

[166] Id at 337.

[167] Id at 351–52.

[168] Id at 352.

[169] Compare *Amadeo v Zant*, 486 US 214, 217–18 (1988) (discussing the existence of a handwritten memorandum as evidence of a scheme to underrepresent women and blacks on juries).

[170] Choper, *Securing Religious Liberty* at 46 (cited in note 154). For example, Daniel Shaviro notes as evidence of tax exportation: "(i) use of a tax base that disproportionately reaches outsiders, at least as to direct incidence or in the short run; and (ii) the application to that base of a tax rate that is higher than the rate applied within the jurisdiction to other fiscally significant tax bases." Shapiro, 90 Mich L Rev at 916 (cited in note 59).

[171] *Moorman Manufacturing Co. v Bair*, 437 US 267, 272 (1978), discussed in note 64.

[172] Walter Hellerstein, 85 Mich L Rev at 765 (cited in note 3). See also Shaviro, 90 Mich L Rev at 955 (cited in note 59): "[O]nly Iowa fails to use a three-factor allocation formula for business income—although other states opportunistically vary the formula, for example, by giving greater weight to the sales factor in what are predominantly market states."

[173] See Shaviro, 90 Mich L Rev at 916 (cited in note 59).

Like several of the taxes just reviewed, certain types of flat taxes, though facially neutral, can be used to export tax liability to outsiders. For example, in *American Trucking Associations v Scheiner*,[174] Pennsylvania imposed a flat tax of $36 per vehicle axle per year for the privilege of using the state's highways, and applied the tax to trucks used in many states as well as those that traveled exclusively in Pennsylvania. As a consequence, a truck that traveled 100,000 miles annually in Pennsylvania would pay $36 per axle, but a truck that was driven the same distance over a five-state area might pay five times that amount if each state imposed a similar flat axle tax. Flat taxes of this kind effectively discriminate against interstate commerce in that they "bear more heavily on the interstate than the intrastate enterprise merely because the former does business across state lines."[175]

Similar to the situation of natural advantages, flat taxes such as those in *Scheiner* present exploitative possibilities despite the fact that they are assessed against an object that only the taxing state can reach.[176] Instead of an advantage such as an abundance of a rare natural resource or geographic location along a coastline, flat taxes capitalize on the benefit in this context that the nation's federal structure confers, especially on smaller states that are strategically located. Since every state is able to assess taxes, the number of states in the union plainly affects the amount of taxation that a national corporation must endure. For example, a corporation doing business in New England could conceivably have to pay six flat highway taxes—totaling $216 per axle under the rate assessed in *Scheiner*—whereas that same corporation would only have to pay $36 per axle in California, even though California is much larger geographically than the six New England states. Similarly, if California were to split into three states, the western corporation would suddenly have to pay three times as many flat highway taxes as before. Because of this inherent structural prejudice for multistate enterprises, these types of flat taxes should be invalidated regardless of the state's intention in imposing them.

It should be noted that not all flat taxes present a similar prob-

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[174] 483 US 266 (1987).

[175] See note 40.

[176] For example, the object of the axle tax in *Scheiner* was the use of highways within Pennsylvania, an object that only Pennsylvania could reach.

lem. For example, a state could assess an airport use tax as a flat dollar amount per ticket, rather than as a percentage of the price of the ticket. This type of "proportionate" flat tax presents little problem of multiple taxation, since an intrastate airline carrying one million passengers a year would have to collect and remit the same amount of tax as an interstate airline transporting the same number of passengers. On the other hand, under Pennsylvania's flat highway tax, an intrastate company pays only one such flat tax, while an interstate company with the same total volume of business or amount of highway use must pay one such flat tax for each state in which it conducts business. Thus, if instead of assessing a flat dollar tax per ticket, as was done in *Evansville-Vanderburgh Airport Authority District v Delta Airlines*,[177] a state imposed a flat airport use tax of $10,000 per year on every airline using airports in the state, an airline operating ten intrastate flights a day pays a total of $10,000 in airport use taxes, while an airline operating ten interstate flights a day must pay at least two such taxes—and theoretically up to twenty.[178] In that instance, the hypothetical tax would resemble the one struck down in *Scheiner* and would be invalidated under our approach.

IV. Application of the Proposed Approach

Because the object-measure approach and the *Complete Auto* test further the same underlying Dormant Commerce Clause prin-

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[177] 405 US 707 (1972).

[178] For other types of flat taxes that are probably invalid under *Scheiner* and tbat would be invalid under the object-measure approach, see *City of Chicago v Willett Co.*, 344 US 574 (1953) (flat license taxes on "carters"); *Wagner v City of Covington*, 251 US 95 (1919) (flat license tax applied on vendor of soft drinks); *Browning v City of Waycross*, 233 US 16 (1914) (flat occupation tax applied on vendor of lightning rods); *Center for Auto Safety, Inc. v Athey*, 37 F3d 139, 142 (4th Cir 1994); *New Hampshire Motor Transport Assn. v Flynn*, 751 F2d 43, 48 (1st Cir 1984); see generally Hellerstein, 87 Mich L Rev at 154 (cited in note 40). However, with regard to regulatory licensing fees, such as state bar dues or driver's license fees, a state that can justify the fee as an actual cost would not run afoul of the object-measure approach. These are regulations, not taxes, and would he judged accordingly under the Dormant Commerce Clause. See Hellerstein, 87 Mich L Rev at 156–57 (cited in note 40). It may be that a "licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his intrastate competitor." Id at 157. If the fee "is not designed as a revenue-raising measure," however, but rather as "a reasonable charge to cover administrative costs," *Ferndale Laboratories, Inc. v Cavendish*, 79 F3d 488 (6th Cir 1996) (upholding registration of pharmaceutical wholesalers), it may be justified under the Dormant Commerce Clause on the ground that a licensee who benefits from regulatory schemes in several states should pay for the costs of doing so.

ciples, it is not surprising that the object-measure approach would usually produce results quite similar to *Complete Auto.* Consequently, its virtues of clarity, simplicity, and ease of application may be achieved without any radical modification of Supreme Court doctrine.

A. AD VALOREM PROPERTY TAXES

An ad valorem property tax is one based upon the value of the property being taxed. The cases have primarily involved real property, instrumentalities of interstate commerce, or cargo in transit between states.

1. *Real property.* Under the object-measure approach, a tax on real property that is located within the state need not be apportioned, since the object of the tax—real property—is one that only the state in which it is located can reach.[179] This result is in accord with current doctrine.

2. *Property being used to transport goods interstate.* States may also apply a property tax on "instrumentalities of interstate commerce," such as airplanes, railroad cars, and trucks being used to transport goods through the state. Since the object of this tax, an instrumentality that moves in interstate commerce, is one that more than one state can reach, the property tax would have to be fairly apportioned under the object-measure approach.

The Court's current doctrine, which allows such ad valorem property taxes if there is a taxable "situs" (or nexus) between the property and the state[180] and if the tax is fairly apportioned,[181] is again in accord with the object-measure approach.

3. *Cargo in transit.* The object of a tax imposed on the value of personal property that is being transported through the state is personal property. Unlike real property or personal property permanently located within the taxing state, this property is traveling between states, and more than one state can tax it. Thus, under the object-measure approach, the tax must be properly apportioned.

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[179] Of course, if the real property spanned more than one state, each state could only tax that part located within it.

[180] See *Braniff Airways v Nebraska Board of Equalization,* 347 US 590, 601 (1954) (holding that an airplane has a taxable situs in a state where the airline company owned no property but made eighteen regularly scheduled flights a day from rented depot space).

[181] See *Union Tank Line Co. v Wright,* 249 US 275 (1919).

A tax on cargo in transit can be apportioned to eliminate the problem of multiple taxation by assessing the tax on a given "lien date" to reflect the proportion of time that mobile goods spend in the state.[182] This method avoids the problem of multiple taxation, even if different states use different lien dates. For example, if California, Oregon, and Washington select the first Monday, Tuesday, and Wednesday in January, respectively, as their lien dates, cargo shipped through California on Monday, Oregon on Tuesday, and Washington on Wednesday pays three taxes. Nonetheless, this is not impermissible multiple taxation on interstate commerce because a shipment beginning one day later would pay no taxes. The lien date is simply used to extrapolate the total value of cargo present in the state over the year without the need for assessing such values every day.

B. DOING BUSINESS TAXES

Taxes imposed for engaging in business—often referred to as doing business taxes, gross receipts taxes, license taxes, occupation taxes, or franchise taxes—are ordinarily apportioned through a measure that seeks to approximate the percentage of revenue derived within the state. Thus, under the *Complete Auto* test, a privilege tax for doing business may be applied to a trucking company that delivers goods from outside the state, measured by the gross income derived from transporting goods within the state.[183] A state may also apply an occupation tax on all businesses, based on gross income derived within the state, to a stevedoring company operating within the state that loads and unloads ships carrying cargo destined for interstate commerce.[184]

The object-measure approach works similarly. Since every state in which a multistate corporation conducts business can apply a doing business tax, the object-measure approach demands that such a tax be fairly apportioned.

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[182] In *Japan Line, Ltd. v County of Los Angeles*, 441 US 434, 445 n 8 (1979), the Court noted that "if each of appellants' containers is in California for three weeks a year, the numher present on any arbitrarily selected date would be roughly 3/52 of the total entering the State that year. Taxing 3/52 of the containers at full value, however, is the same as taxing all the containers at 3/52 value."

[183] *Complete Auto*, 430 US at 287.

[184] *Washington Revenue Dept. v Association of Washington Stevedoring Cos.*, 435 US 734 (1978).

Finally, as discussed above,[185] there may be circumstances in which a doing business tax applied to a solely intrastate object will be invalid under our approach. In certain instances, a state (or other taxing jurisdiction) might be exploiting a special or natural advantage through a facially neutral doing business tax, such as one applied, for example, to stevedoring. Stevedoring is an activity that only the taxing state can reach, and yet, like severance of natural resources, is one whose cost may be disproportionately borne by interstate commerce. Thus, a high doing business tax applied to stevedoring could result in the "exporting" of tax liability. Now, if the taxing jurisdiction is a large commercial state, say, California, there is little danger that a general doing business tax applied to stevedoring as well will be exploitative; since the tax is applied to so many other types of businesses, it is very unlikely that its high rate was meant to discriminate against interstate commerce. Similarly, the fact that a tax with a burdensome rate happens to affect a large percentage of interstate business should not make it vulnerable unless an intent to prejudice them can be shown. On the other hand, if the taxing jurisdiction is, say, a port city without a broad base of general businesses, there may be a danger of exploitation of a natural advantage. In such a situation, the pretext element of the object-measure approach would potentially invalidate such a tax.

C. SALES AND USE TAXES

A sales tax is a tax levied upon sales consummated within the taxing jurisdiction. A use tax is imposed on a person who uses within the state goods purchased outside the taxing state which are thus not subject to the consumer state's sales tax. As discussed above,[186] the purpose of use taxes is to prevent residents from purchasing goods outside the state in order to avoid their state's sales tax.

1. *Sales tax by "seller" state.* A sales tax imposed by the state in which the seller sells and delivers goods to an in-state buyer would be permissible under the object-measure approach, because no other state can tax that sales transaction fully consummated within

[185] See Part III.D.4.

[186] See Part III.C.3.

the taxing state. But suppose a state taxes sales by sellers in the taxing state to buyers who are not in the taxing state, such as a state that taxes all mail-order sales of an in-state seller, including those to out-of-state buyers.

In order to resolve this problem under the object-measure approach, one must determine (or define) where the event of the sale occurs. There are three possibilities: sales can be treated as occurring (1) in the state in which the seller resides,[187] (2) in the state in which the buyer takes possession of the good,[188] or (3) in both states, thus requiring apportionment. As long as one of these three possibilities is used consistently, there will not be a threat of multiple taxation on interstate commerce. Under the "seller state" or "buyer state" definitions, the object of the sales tax is one that only one state can reach: the seller state or buyer state, respectively. Under the "both states" approach, the tax must be apportioned, again avoiding the burden of multiple taxation.

The object-measure approach opts for the "seller state" definition: a seller state would be able to impose an unapportioned sales tax regardless of where the buyer takes possession of the item sold. The object of the sales tax is the sale itself, and regardless of how many states the good travels through before it is delivered to the buyer, the sale is defined as occurring in only one state. Since the object of the tax can be reached by only one state, the tax need not be apportioned.

Admittedly, this choice is somewhat arbitrary.[189] The "both states" definition is theoretically appealing in that apportionment would allocate tax revenue to the various states that had "connections" to the sales transaction. But it is highly impractical. First, it is unclear how an interstate sale would be apportioned. For example, if the seller resides in California and the buyer in Washington, would each state be entitled to apply its sales tax to half of the value of all such sales? How would the apportionment be affected if the California seller and Washington buyer signed the sales contract in Oregon? Second, requiring the seller to collect,

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[187] Thus, if a seller in California sells a good and ships it to Nevada, the sale would be viewed as occurring in California.

[188] Thus, in the California-Nevada example above, the sale would he viewed as occurring in Nevada.

[189] See, e.g., Shaviro, 90 Mich L Rev at 914 (cited in note 59) ("There may be no right answer as to where the sale occurred.").

apportion, and remit sales taxes to both the seller state and the buyer state on all interstate sales would increase the administrative burden on sellers by up to fifty times of either of the other approaches.[190]

The "buyer state" also has a plausible claim to justify application of a sales tax.[191] As William Lockhart noted, in respect to many types of interstate sales, it is in the buyer state that "the buyer acts to form the contract of sale . . . accepts the offer to sell or makes a counter-offer . . . makes payment for the goods . . . receives final delivery of the goods . . . and . . . finally uses or disposes of them."[192] The buyer state also has a reasonable claim because it is the state in which the object of the sale will presumably be used. On the other hand, many parallel acts of the sale occur in the seller state. To the extent that the buyer state has a claim because it provides the market for the sale, a similar claim may be made by the seller state: one regulates and protects demand for goods, the other supply. Perhaps the principal reason for preferring the "seller state" approach is efficiency and the reduction of administrative burden, since the seller need only deal with the sales tax of its own state. Under the "buyer state" approach, the seller assumes the same burden required for apportionment by the "both states" approach, in that sellers must keep track of the sales taxes of fifty or more jurisdictions.

The current doctrine on sales taxes is that a seller state may apply its full sales tax to a sale as long as the sale is consummated within the state, meaning that the buyer takes possession within the state, even though the good is used in other states.[193] However, in *J. D. Adams Manufacturing Co. v Storen*,[194] the Court held that the Commerce Clause prohibits a seller state from imposing an "unapportioned" sales tax on sales to buyers outside the state.[195]

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[190] In fact, the burden on sellers could increase by more tban fifty times if a formula more complex than a straight 50–50 split were used to apportion the sale. And the multiplier would be much greater if local sales taxes were taken account of.

[191] The Multistate Tax Compact suggests this approach, with a requirement that credits be given for any sales or use taxes paid in other states. See Shaviro, 90 Mich L Rev at 977 (cited in note 59).

[192] Lockhart, 65 Minn L Rev at 1049 (cited in note 14).

[193] *International Harvester Co. v Department of Treasury*, 322 US 340, 345 (1944).

[194] 304 US 307 (1938).

[195] Id at 310.

The Court has never passed on a seller state's attempt to apply an "apportioned" sales tax in this context, and it appears that such taxes do not exist. As discussed above, the object-measure approach yields a different result in this instance because we have defined the state in which an interstate sale occurs differently than the Court has (as will be further explained in the next subsection).

2. *Sales tax by "consumer" state.* An unapportioned tax on interstate sales by sellers outside the taxing state to buyers within the taxing state—as illustrated by a state that required an out-of-state mail order company to collect and remit that state's sales tax on sales made to its residents—would be invalid under the object-measure approach. The object of the tax—the sale—is something that is beyond the reach of the consumer state, because it has been defined as taking place in the selling state.[196]

Under existing doctrine, a consumer state may not generally impose a sales tax on goods shipped by common carrier from a seller outside the state.[197] The Court will allow a consumer state to impose a sales tax under such circumstances only if the interstate seller has substantial contacts in the state.[198] Substantial contacts generally means an office, salesroom, or other property. However, if the only presence of the seller consists of "drummers,"[199] the consumer state may not impose a sales tax.[200]

The object-measure approach may produce results that differ from those reached under the Court's current doctrine, stemming from the object-measure approach's definition of where the sale occurs. Consider, for example, the result if the object-measure approach defined the sale as taking place in the consumer state. Since the object of a sales tax is the sale within the state, only the consumer state would be able to reach that object, and therefore the consumer state would be able to impose an unapportioned sales tax. With the site of the sale defined in this way, the object-

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[196] Of course, as discussed earlier, this result stems from the object-measure approach's arbitrary definition of a sale as occurring within the seller state. For discussion of the additional complexities involved in defining where a sale of services (rather than goods) has occurred, see Hellerstein et al., 51 Tax L Rev at 104–06 (cited in note 99).

[197] *McLeod v J. E. Dilworth*, 322 US 327 (1944).

[198] *McGoldrick v Berwind-White Coal Mining Co.*, 309 US 33, 48–49 (1940).

[199] A drummer (or "traveling salesperson") solicits orders in the consumer state, with the orders subject to approval at the seller's out-of-state office.

[200] *McLeod v J. E. Dilworth Co.*, 322 US 327, 330 (1944).

measure approach would yield a result closer to current doctrine which, as has just been discussed, permits a consumer state to apply a sales tax to some sales of goods coming from outside the state, but which has operated to deprive a seller state from imposing its sales tax on sales to buyers outside the selling state.

3. *Use taxes.* As discussed earlier, use taxes are constitutionally valid under the compensatory tax doctrine, despite the fact that they appear facially discriminatory.[201] A use tax matches a sales tax to make up for the state's lost tax revenue "occasioned by in-state persons travelling to other states to make purchases of products that they will then use in the use tax state."[202]

The object of a use tax—the enjoyment of a good within the taxing state[203]—is one that only the taxing state can reach. Thus, under the object-measure approach, use taxes are presumptively valid.

D. SEVERANCE TAXES

The object of a severance tax is the extraction of natural resources from the state, and the usual measure is the value of such resources. Necessarily, the only state that can apply a severance tax to this object is the one that possesses the natural resource. Since the object can be reached by only one state, the tax is presumptively valid and need not be apportioned under the object-measure approach.[204]

The Court presently allows unapportioned severance taxes, on

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[201] See Part III.C.3.

[202] John E. Nowak and Ronald D. Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 UC Davis L Rev 273, 278 (1987).

[203] As has been made clear, see Part III.C.3, use taxes are fully consistent with the values of the Dormant Commerce Clause. Still, one might reasonably quarrel with the above description of the object of a use tax (see Part III.D.1) on the ground that its acknowledged "object" is to capture lost sales tax revenue. We believe, however, that the description should be sustained.

It is true that, as an operational matter, very few persons who make "use of good within the taxing state" actually pay the use tax. They are excused from paying it because they effectively receive a credit for paying a sales tax. But this neither refutes the accuracy of the description of the object for purposes of the object-measure approach, nor undermines the goal of nondiscriminatory treatment for interstate commerce (assuming that the sales tax credit applies to payments both inside and outside the state; see Part III.C.4).

[204] But see Part III.D.4 (discussing pretext).

the ground that such taxes satisfy the *Complete Auto* test.[205] Since the minerals are taken from the taxing state, there is a "substantial nexus" between the tax and the state. Since extraction cannot occur in any other state, severance taxes are necessarily internally and externally consistent. Since the tax rate is the same for in-state and out-of-state consumers, these taxes do not discriminate against interstate commerce.[206] Finally, as long as the tax is imposed on activity within the state, the Court will not inquire into the amount of the tax or the value of the benefit conferred upon the taxpayer.[207]

E. POST–COMPLETE AUTO CASES

This section compares the results under the object-measure approach with those reached by the Court using the *Complete Auto* test in a number of cases decided after 1978. Although the object-measure approach is generally consistent with the Court's rulings, the analysis is different, particularly in those cases where the Court invalidated the taxes in question. In those cases where the Court upheld the challenged taxes, the object-measure approach provides a clearer and simpler analysis.

1. *Taxes struck down.* There are two significant cases in which state taxes on interstate commerce were held to be in conflict with the Dormant Commerce Clause: *Quill Corp. v North Dakota*[208] and *American Trucking Associations v Scheiner.*[209]

a) Quill. In *Quill,* North Dakota required out-of-state mail vendors to collect and remit a use tax on goods purchased for use within the state, even if the vendors had no in-state outlets or sales representatives.[210] The Court concluded that such vendors had the requisite minimum contacts with North Dakota so as to satisfy the requirements of the Due Process Clause.[211] However, the Court

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[205] *Commonwealth Edison Co. v Montana,* 453 US 609, 629 (1981).

[206] Id at 618.

[207] Id at 620–21; see also *Oklahoma Tax Commission v Jefferson Lines, Inc.,* 115 S Ct 1331, 1345 (1995) ("The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity.").

[208] 504 US 298 (1992).

[209] 483 US 266 (1987).

[210] 504 US at 301.

[211] Id at 306–08.

held that the tax failed the first prong of the *Complete Auto* test, as it did not apply to an activity bearing a substantial nexus with the taxing jurisdiction. The difference between the Due Process and Commerce Clauses was that the former concerned "the fundamental fairness of governmental activity," while the latter concerned "the effects of state regulation on the national economy."[212] Thus, with respect to the Commerce Clause, *Quill* focused on the administrative burdens that such use taxes would impose on interstate taxpayers, particularly if "the Nation's 6,000-plus taxing jurisdictions" imposed similar taxes.[213]

Under the object-measure approach, a use tax on goods purchased for use within the state would be presumptively valid because the object of the tax—use of goods within the state—is one that only the taxing state can reach. Interstate businesses that pay a sales tax in the seller state under the object-measure approach would not suffer discrimination because "[v]irtually all states with use taxes grant, as a credit against the use tax, the amount of sales taxes paid to other states."[214] Therefore, the Due Process Clause rather than Dormant Commerce Clause values should determine whether an out-of-stater who maintains no outlets or sales representatives in the state may be required to collect and remit the tax.[215]

b) Scheiner. In *Scheiner*, Pennsylvania imposed a flat tax of $36 per vehicle axle per year for the privilege of using the state's highways.[216] The Court struck down this tax as not being internally

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[212] Id at 312.

[213] Id at 313 n 6.

[214] Nowak and Rotunda, 20 UC Davis L Rev at 274 (cited in note 202).

[215] Thus, the only true burden on interstate commerce is the hurden of record-keeping mentioned by the Court. However, as noted by Justice White in his dissent, this justification is illogical, in that "an out-of-state seller with one salesperson in a State would be subject to use tax collection burdens on its entire mail order sales" while "an out-of-state seller in a neighboring State could be the dominant business in the putative taxing State . . . yet not have to collect such taxes if it lacks a physical presence in the taxing State." *Quill*, 504 US at 329–30 (White concurring in part and dissenting in part). If the mere burden of having to keep track of the additional taxes to which an interstate business is subject is enough to constitute a significant effect on interstate commerce, then many apportioned taxes would be in jeopardy. For example, the standard doing business tax imposes a greater administrative burden on interstate businesses, which must determine the apportioned taxable income for each taxing jurisdiction, than on a purely intrastate business, which need only pay one tax. Of course, Congress can always change the rule based on a more careful appraisal of various administrative costs.

[216] 483 US 266, 274 (1987).

consistent, since if every state imposed flat highway taxes, interstate commerce would suffer a disadvantage relative to intrastate commerce.[217]

Under the object-measure approach, this tax would be invalid because of the peculiar problems for interstate businesses posed by flat taxes within the nation's federal structure.[218]

2. *Taxes upheld.* The taxes that have been upheld under *Complete Auto* require briefer discussion than those that were struck down.

a) Goldberg. In *Goldberg*, the Court upheld Illinois' telecommunications tax, "a 5% tax on the gross charge of interstate telecommunications (1) originated or terminated in Illinois . . . and charged to an Illinois service address, regardless of where the telephone call is billed or paid."[219]

Under the object-measure approach, this tax would be presumptively valid, since the object of the tax—telephone calls charged within the state—is one that only Illinois could reach. Moreover, since the tax is applied as a percentage of the price of each individual call, it does not burden interstate commerce more heavily than intrastate commerce.

b) D. H. Holmes. In *D. H. Holmes*, petitioner challenged imposition of Louisiana's use tax on the cost of catalogs printed out-of-state but distributed by Holmes within state to its customers via U.S. mail.[220] The Court concluded that it satisfied all four prongs of the *Complete Auto* test. The tax was fairly apportioned, since it offered a credit for sales taxes paid in other states, and since it was applied only to catalogs distributed for use within the state.[221] Because the catalog was intended to bolster the name recognition of D. H. Holmes within the state, the use of the catalogs had a substantial nexus with Louisiana.[222]

Under the object-measure approach, Louisiana would be able

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[217] Consider, for example, two businesses whose two-axle trucks travel 10,000 miles a year. The first business operates entirely within Pennsylvania, and thus must pay $72 a year. The second business' truck travels 5,000 miles a year in Pennsylvania and 5,000 miles a year in New York (which, for the sake of this example, also imposes a flat highway tax) resulting in $144 a year in flat taxes.

[218] See Part III.D.4.

[219] 488 US 252, 256 (1989) (citations omitted). See Part I.C.

[220] *D. H. Holmes Co. v McNamara*, 486 US 24, 26 (1988).

[221] Id.

[222] Id.

to apply its use tax on the catalogs. The object of a use tax is the use of goods within the taxing state. As long as the use tax is imposed only on catalogs distributed within the state,[223] only Louisiana can reach that object. Thus, the use tax need not be apportioned, despite the fact that the catalogs originated in interstate commerce. However, because Louisiana offers a credit against the use tax for payments of its own sales tax, the basic prohibition against discrimination requires that it offer that same credit for payments of out-of-state sales taxes. Since it does so,[224] the tax would be valid under the object-measure approach.

c) Container Corp. In *Container Corp.*, the Court upheld California's unitary business tax, as applied to domestic-based multinational businesses. As noted earlier, this is a doing business tax measured by corporate income attributable to business conducted within the state.

The object of the California tax is doing business, an object that can be reached by more than one state. Therefore, under the object-measure approach, the tax would have to be fairly apportioned. Since the California tax is apportioned, it would be valid under the object-measure approach.

d) Commonwealth Edison. In *Commonwealth Edison*, the Court upheld Montana's tax imposed on the activity of coal severance. The object-measure approach might (well) have concluded that the severance tax was invalid, even though only Montana could reach the object. While presumptively valid, the Montana severance seems vulnerable to the charge that it was established with the intent of exporting tax liability to the other states that purchased Montana's coal.[225] If so, the severance tax would be invalidated.

e) Jefferson Lines. Applied to the Oklahoma tax in *Jefferson Lines*, the object-measure approach reaches the same result that the Court did: despite its lack of apportionment, the tax does not violate the Dormant Commerce Clause. The object of the Oklahoma tax is the intrastate sale of particular goods and services—bus tickets in the specific case of Jefferson Lines. No other state could reach the object of the Oklahoma tax because no other state could apply a sales tax on ticket sales occurring within Oklahoma regard-

[223] Only 18 percent of the catalogs were distributed out-of-state. Id at 26.

[224] Id at 31.

[225] See Part III.D.4.

less of whether the ticket was for intrastate or interstate transportation.[226] If Jefferson Lines also sold bus tickets in Kansas for intrastate or interstate travel, Oklahoma could not apply its sales tax on those sales, but Kansas could. Nor is Jefferson Lines subject to a disproportionate amount of sales tax as compared to wholly intrastate businesses. Suppose, as above, that Jefferson Lines sells bus tickets in both Oklahoma and Kansas for interstate travel, and that a competitor, having the same total volume of sales, sells bus tickets for intrastate travel only in Oklahoma. Both companies are taxed on the same overall volume of ticket sales, although Jefferson Lines' sales are taxed in either (but not both) Oklahoma or Kansas, while the intrastate competitor's sales are taxed entirely in Oklahoma.

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The central goal of the object-measure approach is similar to, but slightly broader than, the *Complete Auto* test in attempting to satisfy the tenets of the Dormant Commerce Clause: to guard against conferring advantages on in-staters at the expense of interstate commerce. *Complete Auto* requires the application of four different subtests, some (such as the fair relation prong) that are functionally irrelevant, and others (such as internal and external consistency) that are not easily susceptible to application. We have proposed a more straightforward method for determining whether state taxes violate the Dormant Commerce Clause. Although simplicity may not be a sufficient reason by itself to adopt a new doctrine, the object-measure approach is more readily administered on a practical basis, which should result in more efficient litigation and legislation. By being able to predict the outcome of Dormant Commerce Clause challenges more reliably, parties should have more accurate assessments of their bargaining positions. Similarly, lawmakers should be able better to determine whether a proposed tax on interstate commerce will survive a Dormant Commerce Clause challenge.

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[226] A different problem would be presented if the sale involved interstate delivery of the ticket, such as if the ticket had been issued in Oklahoma but mailed to the buyer in California. In *J. D. Adams Manufacturing Co. v Storer*, 304 US 307 (1938), the Court ruled that an unapportioned sales tax imposed by the selling state on a good delivered to an out-of-state buyer violated the Dormant Commerce Clause. For a detailed discussion of *Adams Manufacturing* and the different result reached by our analysis, see Part IV.C.1.