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A Deferential Interpretation of the *Complete Auto Transit* Test for Determining Whether a State Tax Unconstitutionally Burdens Interstate Commerce: *Commonwealth Edison Co. v. Montana*

Well into this century the United States Supreme Court relied heavily on labels to categorize commerce clause challenges to state taxes alleged to burden interstate commerce.[1] If the intended incidence of a state tax as judged by the express terms of the statute (the *legal* incidence) was on the privilege of doing business and applied to businesses involved in interstate commerce, the tax would be invalidated. On the other hand, a carefully drafted tax statute whose legal incidence was on a "franchise" or "use" within the state would be upheld regardless of its actual incidence on interstate businesses.[2] In 1938 the Court recognized that states may, in some circumstances, levy taxes on activities affecting interstate commerce.[3] Since that time the Court has looked more and more to the practical effects of state taxes and less to the label given the tax in determining whether it burdens commerce. This trend culminated in 1977

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1. *See* Note, *State Taxation on the Privilege of Doing Interstate Business:* Complete Auto Transit, Inc. v. Brady, 19 B.C.L. REV. 312, 314-17 (1978); Note, *Taxation—State Taxation of Interstate Commerce: The Final Step:* Complete Auto Transit v. Brady, 21 How. L.J. 661, 664-69 (1978); Note, *Recent Developments in State Taxation of Interstate Commerce:* Complete Auto Transit, Inc. v. Brady *and* National Geographic Society v. California Board of Equalization, 7 CAP. U.L. REV. 143, 144-50 (1977).

2. In Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954), the Supreme Court struck down a tax imposed on the privilege of doing business in Virginia as applied to an interstate express agency. The tax was measured by the gross receipts of the taxpayer. Virginia redrafted the tax and placed the legal incidence of the tax on the value of intangible property in the state (the "going concern value" of the business), calling it a "franchise tax." The tax was still measured by the gross receipts of the taxpayer, but was nevertheless upheld in Railway Express Agency, Inc. v. Virginia, 358 U.S. 434, 435-43 (1959). *See* Note, *State Taxation on the Privilege of Doing Interstate Business:* Complete Auto Transit, Inc. v. Brady, 19 B.C.L. REV. 312, 316 n.31 (1978). For another illustration of the Court's formalistic analysis, compare Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) (sustaining a state highway "use" tax) with Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951) (striking down as unconstitutional a privilege tax on an interstate motor carrier).

3. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

when, in *Complete Auto Transit, Inc. v. Brady*,[4] the Court explicitly rejected the use of labels and adopted a four-part test to determine the validity of state tax measures challenged on commerce clause grounds. Under the *Complete Auto* test the tax will be upheld if it "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."[5] The purpose of the test is to determine the "practical effect" of the state tax. If the practical effect of the tax is to require an activity affecting interstate commerce to pay its fair share of the cost of government, the tax will be upheld, while if the practical effect is to unfairly burden interstate commerce to gain an advantage for local interests, the tax will be invalidated.[6]

Despite its concise statement of the proper test to apply, *Complete Auto* left several questions unresolved: (1) As a general policy question, is the "practical effect" analysis embodied within *Complete Auto*'s four-part test to be applied to all state taxes challenged under the commerce clause or will there continue to be some favored "local" taxes that are not subject to commerce clause scrutiny? (2) What is the meaning of the requirement that a tax be nondiscriminatory? and (3) What is the meaning of the requirement that the tax be "fairly related to the services provided by the State?" In July of 1981 the Supreme Court, in *Commonwealth Edison Co. v. Montana*,[7] provided some disturbing answers to these questions. As a result of that case, all state taxes that affect interstate commerce, even those previously exempt from commerce clause scrutiny because of their local nature, must now pass the *Complete Auto* test. However, that test is no longer as stringent as it had previously appeared because the Court interpreted both the nondiscrimination and the fair-relation prongs of the test in a manner that places a premium on careful draftsmanship and tends to reduce the importance of the tax's practical effect.

I. THE *Commonwealth Edison* CASE

In the early 1970's, the number of coal strip mining opera-

4. 430 U.S. 274 (1977).
5. *Id.* at 279.
6. *See The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 72-83 (1977).
7. 101 S. Ct. 2946 (1981).

tions in Montana increased greatly. In response to this increase and to public and legislative sentiment that Montana was being stripped of her natural resources without adequate compensation, the Montana legislature amended the state's coal severance tax schedule to increase the maximum severance tax on strip mined coal to thirty percent of the contract sales price.[8] Coal producers, after paying the tax under protest, joined with out-of-state utilities (whose costs were increased because of the tax) to bring this action for a declaratory judgment that the tax violated the commerce clause by burdening interstate commerce and that it violated the supremacy clause by frustrating federal policy.[9] The Montana state trial court in which the suit was brought granted defendants' motions to dismiss the complaint for failure to state a claim upon which relief could be granted.[10] The judge identified four categories of interstate commerce cases[11] and based his decision upon his assignment of the case to that category of cases in which the state has imposed a tax on activities not in commerce. The tax was not subject to the commerce clause since it involved taxation which preceded the entry of the goods into interstate commerce.[12] The plaintiffs appealed to the Montana Supreme Court.

The questions presented on appeal were whether the coal severance tax was impermissible under either the commerce clause or the supremacy clause as frustrating general national policies or "national policies contained in the Mineral Lands Leasing Act of 1920."[13] The court affirmed the trial court's decision that the coal severance tax was lawful under both the commerce clause and the supremacy clause.[14] On the commerce clause issue the Montana Supreme Court agreed with the district court that the severance tax preceded the entry of the coal into interstate commerce.[15] However, the court still conducted a

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8. Commonwealth Edison Co. v. State, 615 P.2d 847, 849-50 (Mont. 1980), *aff'd sub nom.* Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

9. 615 P.2d at 848.

10. *Id.* at 848-49.

11. *Id.* at 852. The categories of interstate commerce cases were (1) cases in which Congress has exercised its commerce clause power, (2) cases in which the state has regulated interstate commerce, (3) cases in which the state has taxed activities in interstate commerce, and (4) cases in which the state has taxed activities not in commerce.

12. *Id.*

13. *Id.* at 849.

14. *Id.*

15. *Id.* at 852.

Complete Auto analysis and concluded that the tax passed the four-part test, although the court did not rest its holding on that conclusion.[16] The only part of the test with which the court dealt at any length was the fourth part, the requirement that the tax be "fairly related to services provided by the State."[17] Since the nexus and fair apportionment parts of the test were met, the court concluded that this fourth part of the test did not apply.[18] In dealing with the supremacy clause question, the court found no federal statutes that either prohibited or preempted state taxation in this field and concluded that policies merely inferred from other federal energy enactments were not sufficient to sustain a supremacy clause challenge to the state tax.[19]

The United States Supreme Court upheld the result reached by the Montana Supreme Court on both the commerce and supremacy clause issues,[20] but used a commerce clause analysis that the lower courts had rejected as inapplicable. Specifically, the Court found that the characterization of a tax as "local" did not immunize it from commerce clause scrutiny.[21] Therefore, the Court conducted a *Complete Auto* analysis, found that the Montana tax satisfied all four parts of the test,[22] and upheld the statute on that basis. The Court described its decision as following its line of cases that have looked to the substance of state taxes rather than their form,[23] and stated explicitly that the proper analysis focused on the " 'practical effect

16. *Id.* at 856.

17. *Id.* at 855-56.

18. *Id.* at 856.

19. The plaintiffs relied on the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976), which dealt with mineral leases on federal lands, for the proposition that the federal government intended to retain "economic rents" in excess of those specifically provided for in the Act for the people of the nation as a whole. Therefore, they argued, the Montana tax frustrated this national policy when it appropriated these "economic rents" to itself. However, since the Act specifically preserves the right of the states to levy taxes even on federal lands, the court found that the state tax did not frustrate any policy expressed by the Mineral Lands Leasing Act. 615 P.2d at 862.

20. Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946, 2964 (1981). Although the vote to affirm the decision of the lower courts was six to three, only five of the Justices, Burger, Brennan, Stewart, Marshall, and Rehnquist, indicated that the tax was clearly constitutional. Justices Blackmun, Powell, and Stevens felt that plaintiffs had alleged serious constitutional claims and were entitled to an adjudication of those claims. Justice White concurred in the judgment out of deference for the political judgment of Congress, which had considered the problem and had declined to curtail the states' taxing power in this area.

21. *Id.* at 2953.

22. *Id.* at 2954-60.

23. *Id.* at 2952-53.

of a challenged tax,' "[24] as determined by *Complete Auto*'s four-part test.[25] Furthermore, the Court noted that the first two parts of the test, the nexus and fair apportionment requirements, were not in issue, since the plaintiffs conceded that these were met.[26] The Court then proceeded to find that the third prong of the test, the nondiscrimination requirement, was met because the *rate* of the tax was the same whether the coal was destined for in-state or out-of-state use,[27] and that the fourth prong, the fair relation requirement, was met because the tax was determined as a percentage of the value of the taxpayers' activities in the state.[28]

The dissent emphasized a number of facts not extensively considered by the majority that should have been considered in any serious search for practical effect:[29] the magnitude of Montana's coal reserves and their potential impact on the entire nation,[30] the enormous revenues the tax has generated for the state,[31] and Montana's imposition of several different taxes on the coal mined within its boundaries.[32] Although these "facts" had not been proven, the dissent felt that they raised questions about possible "practical effect" burdens on interstate commerce and that, before having their suit dismissed, plaintiffs should have been given a chance to prove that the facially neutral statute did impermissibly burden interstate commerce.[33]

II. ANALYSIS

By applying commerce clause scrutiny to the Montana severance tax, a type of tax traditionally exempt from such scrutiny because of its local nature, the Supreme Court has greatly extended its authority under the commerce clause. No longer will local taxes that affect commerce be exempt from a "practical effect" analysis to determine whether they burden interstate commerce. However, the manner in which the Court applied the

24. *Id.* at 2953 (quoting Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443 (1980)).
25. 101 S. Ct. at 2953.
26. *Id.* at 2954.
27. *Id.* at 2954-55.
28. *Id.* at 2955-60.
29. *Id.* at 2966-68 (Blackmun, J., dissenting).
30. *Id.* at 2965.
31. *Id.* at 2966.
32. *Id.* at 2967.
33. *Id.*

four-part "practical effect" test in *Commonwealth Edison* virtually guarantees that any carefully drafted state tax will pass the nondiscrimination and fair relation parts of the *Complete Auto* test.[34] The net result is a broader application of a diluted commerce clause analysis that will likely permit the states to impose heavy burdens on interstate commerce without running afoul of the commerce clause.

A. Extension of Commerce Clause Analysis to Local Taxes

Complete Auto was the culmination of a line of cases applying the doctrine that state taxes alleged to burden interstate commerce would be judged by their actual effect on commerce rather than by the language used in drafting them. Until *Commonwealth Edison* that principle had been used primarily to validate state taxes that formerly might have been struck down. In *Commonwealth Edison,* however, the Court extended the principle to bring commerce clause scrutiny to bear on local taxes, previously exempt from such scrutiny. That extension, although logical, was not inevitable. Both the Montana state district court and the Montana Supreme Court in *Commonwealth Edison* found that the *Complete Auto* analysis was intended to reach only those taxes that had been subject to commerce clause challenge in the past.[35] Local activities, such as the severance of minerals, were held to be taxable under the state's reserved powers and therefore not subject to the reach of the commerce clause. In 1980 the Tenth Circuit addressed the same issue and held that "it is settled that an occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation."[36]

The Tenth Circuit and the Montana courts were relying on past Supreme Court decisions in holding as they did.[37] In *Com-*

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34. *Id.* at 2968.

35. Commonwealth Edison Co. v. State, 615 P.2d at 852.

36. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 545 (10th Cir. 1980), *aff'd,* 102 S. Ct. 894 (1982). The court of appeals recognized that the commerce clause extends to Indian tribes as well as states, but noted that since tribes and states have different characteristics, not all commerce clause doctrines applicable to the states are applicable to Indian tribes. However, on the issue under discussion, the court was citing principles of law that are the same for states and tribes. The Supreme Court, in affirming the decision, did not deal with the "local" tax issue.

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

monwealth Edison the Court chose to overrule those past decisions and held that all state taxes that affect interstate commerce are subject to examination. While this result seems to be consistent with the emphasis on practical effect, it ignores the fundamental differences between local activities, such as the mining and severing of minerals, and primarily interstate activities, such as the transportation of goods from a local manufacturer to a national market. Thus, while the *Complete Auto* rule as diluted in *Commonwealth Edison* may achieve a correct result in finding under commerce clause analysis that a severance tax is constitutional, that same rule could be used to validate nonlocal taxes that burden interstate commerce and which would have been invalidated had the elements of the *Complete Auto* test been given more real meaning. Since the *Commonwealth Edison* Court did not limit the application of its interpretation of the *Complete Auto* test to the particular facts of the case, the potential for allowing the states to burden interstate commerce must be taken seriously.

B. The Nondiscrimination Requirement

Since the substantial nexus and fair apportionment requirements of the *Complete Auto* test are not often in issue,[38] the nondiscrimination requirement is the first real hurdle a state tax must clear. The Court has defined as nondiscriminatory taxes that apply the same rates to interstate businesses as to intrastate businesses.[39] In the instant case, severance taxes that apply equally to coal destined for either intrastate or interstate use were found to be nondiscriminatory. However, facial neutrality of rates does not guarantee that a tax is indeed nondiscriminatory.[40]

Justice Blackmun's dissent raises the question of whether a tax that derives ninety percent of its revenues from products destined for out-of-state use may not indeed discriminate against interstate commerce in spite of its facial neutrality.[41]

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cases used the "local" characterization in reaching their decisions.

38. *Complete Auto Transit*, 430 U.S. at 287; Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2954.

39. Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 750 (1978).

40. *Cf.* Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2968 (Blackmun, J., dissenting) (stating that facial neutrality does not guarantee noninterference).

41. *Id.*

Taxes may discriminate against interstate commerce either because they are computed on discriminatory bases or because their "economic incidence falls disproportionately on interstate activities."[42] This case is an example of the latter situation. Montana has a resource greatly in demand by the nation as a whole, but which its own population uses in relatively small amounts. This is merely fortuitous and does not constitute discrimination. However, Montana, recognizing this imbalance, chose the severing of this resource as the subject for a huge increase in taxation, knowing that by increasing this particular tax, rather than others, the burden would be laid primarily on out-of-state coal consumers. In this context, the nondiscrimination requirement is tied very closely to the fair relation requirement. If it can be shown, as the plaintiffs offered to do, that the amount of tax paid by out-of-state coal consumers greatly exceeds the value of services provided by the state, including the value of general societal services, then the state's choice of the coal industry, with mostly out-of-state customers, to bear a disproportionate burden of taxation could very well constitute discrimination, even though the tax statute is facially neutral.

The Court, however, chose to emphasize the facial characteristics of the tax statute rather than its effects in operation, just as it did in another 1981 case, *Maryland v. Louisiana.*[43] In that case, a Louisiana "first-use" tax on natural gas provided for a system of credits against the tax. Those credits were available for natural gas severed in Louisiana on which Louisiana's severance tax had been paid.[44] Because the credit provided for differential taxation of gas based on whether it was severed in Louisiana, the Court found that the first-use tax was discriminatory, even though the special master had found that actual discrimination had not yet been shown.[45] Thus, although the Court declared in *Maryland v. Louisiana,* as it did in *Commonwealth Edison,* that the ultimate test was the practical effect of the

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42. Note, *supra* note 6, at 78-81.

43. 101 S. Ct. at 2114 (1981).

44. *Id.* at 2134-35.

45. *Id.* The Court began the pertinent passage with the observation that "[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of a State's tax scheme." However, in resolving the discrimination issue the Court stated that since Louisiana had no interest in being compensated for the severance of gas from the Outer Continental Shelf lands, the tax could not be a compensatory tax; therefore, the tax credit provisions "unquestionably" discriminated and the plaintiffs were not required to prove the actual effects of the tax scheme in operation.

tax,[46] the fact that the tax appeared discriminatory on its face, without proof of actual effect, was sufficient to invalidate the tax.

C. *The Fair Relation Requirement*

Although the *Commonwealth Edison* Court used in its analysis the fourth part of the *Complete Auto* test (the requirement that the tax be "fairly related to the services provided by the State"), its treatment of that requirement is not consistent with past interpretations. In *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*,[47] the Court held that the commerce clause will invalidate state taxes when they *unfairly* burden commerce by requiring interstate commerce to pay more than its fair share of the cost of state government.[48] The clear implication of the Court's statement is that the fair relation portion of the *Complete Auto* test requires a comparison of the amount of tax paid by the interstate commerce activity with the cost of government services being provided to the activity. In a 1978 case citing *Complete Auto,* the Tenth Circuit interpreted the fair relation requirement to mean that states may pass laws affecting interstate commerce unless the burden imposed on the interstate activity greatly exceeds the extent of the local benefits conferred on the activity.[49] This implied requirement that the tax paid be compared to the services provided fits within the *Complete Auto* fair relation language.

The *Commonwealth Edison* Court, however, passed over these precedents and looked back to much earlier cases. In *Wisconsin v. J.C. Penney Co.*[50] the Court stated that the "simple but controlling question is whether the state has given anything for which it can ask return."[51] The *Commonwealth Edison* Court answered the "simple but controlling question" by stating that

> when the measure of a tax is reasonably related to the taxpayer's activities or presence in the State—from which it derives some benefit such as the substantial privilege of mining

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46. *Id.*

47. 435 U.S. 734 (1978).

48. *Id.* at 747-48.

49. Aldens, Inc. v. Ryan, 571 F.2d 1159, 1162 (10th Cir.), *cert. denied,* 439 U.S. 860 (1978).

50. 311 U.S. 435 (1940).

51. *Id.* at 444.

> coal—the taxpayer will realize, in proper proportion to the taxes it pays, "[t]he only benefit to which it is constitutionally entitled . . . [that is,] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes."[52]

The Court also defined "reasonably related" by stating that "[b]ecause it is measured as a percentage of the value of the coal taken, the Montana tax is in 'proper proportion' to appellants' activities within the State and, therefore, to their 'consequent enjoyment of the opportunities and protections which the State has afforded.' "[53] The Court thereby adopted a per se rule that any tax the amount of which is determined as a percentage of the value of the taxpayer's activities in the state is "fairly related to the services provided by the state."

As Justice Blackmun points out in his dissent, the Court's opinion allows the state to tax the severance of coal at any rate it chooses, as long as the rate is fixed as a percentage of the value of the coal.[54] If this is done, the tax will always pass the fourth prong of *Complete Auto,* regardless of the actual burden it imposes on commerce. If the Court strictly applies *Commonwealth Edison,* the coal producers could be required to pay the entire cost of "establishing and safeguarding" Montana's state government if their activities produce enough revenue for that purpose. This seems to strain severely the fair relation requirement of *Complete Auto* and cannot be reconciled with the construction of the fair relation requirement by a unanimous Court in *Department of Revenue of Washington.*[55] The Court in *Commonwealth Edison* would permit the imposition of a tax that "unfairly burdens commerce by exacting from the interstate activity more than a just share of the cost of state government,"[56] since the tax need only be proportionate to (i.e., computed as a percentage of) the value of the taxpayer's activities in the state, and need not (indeed, under *Commonwealth Edison* cannot) be compared to the cost of the governmental services provided.[57]

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52. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2960 (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522 (1932)).

53. *Id.* at 2958 (quoting General Motors Corp. v. Washington, 377 U.S. 436, 441 (1964)).

54. *Id.* at 2968-69.

55. 435 U.S. at 747-48.

56. *Id.* at 748.

57. *See* Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2958-60.

By taxing an interstate activity at a sufficiently high percentage of its value, it might be possible to generate virtually all of the revenue needed by the state, even though the interstate activity represents a relatively small portion of the state's total economy.[58]

The fair relation requirement, as interpreted by the *Commonwealth Edison* Court, appears to be merely a restatement of the substantial nexus and fair apportionment requirements of the *Complete Auto* test, without independent significance. In interpreting the fair apportionment requirement of the test, the Court stated that "[w]hen a general business tax levies only on the value of services performed within the State, the tax is properly apportioned."[59] This is very similar to the "percentage of the value" definition of a fairly related tax used by the *Commonwealth Edison* Court. Furthermore, the Court acknowledged that the fair relation requirement is closely connected to the substantial nexus requirement.[60] If, as appears to be the case, the fair relation requirement is included in the substantial nexus and fair apportionment requirements, it has no independent significance. The Montana Supreme Court suggested as much when it stated that the fair relation requirement applied only if the first two requirements were not met.[61] Yet the *Complete Auto* Court must have had some reason for including the requirement, and *Department of Revenue of Washington* applied it as though it had independent significance. The *Commonwealth Edison* Court, however, has taken away that independent significance.

III. Conclusion

The Supreme Court in *Commonwealth Edison* extended commerce clause analysis to local taxes, but so weakened the applicable test that the states appear to be free to tax interstate commerce as they do purely local activities. Since a tax that is facially neutral cannot be attacked with evidence of discrimina-

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58. Justice Blackmun points out that this is hardly a hypothetical situation, since the state of Alaska derives some ninety percent of its revenues from oil taxes and royalties and has abolished the income tax formerly imposed on its citizens. Montana has already received some property and income tax relief from its coal taxes, which allegedly account for as much as twenty percent of its total tax revenue. *Id.* at 2968 n.11.

59. Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 746 (1978).

60. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2958.

61. Commonwealth Edison Co. v. State, 615 P.2d at 856.

tory practical effect, good draftsmanship will get plaintiffs' suits dismissed without trial, as it did in *Commonwealth Edison*. Furthermore, since a tax computed as a percentage of the value of the taxpayer's activities in the state will per se be fairly related to the services provided by the state, the state cannot be shown to have imposed an unfair burden on interstate commerce as long as it uses the proper words in the statute. The Court supports this view of its holding by stating that "[t]he exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations."[62] Thus, rather than extending the restrictions of the commerce clause to taxes on local activities, the Court is allowing the states to exercise the same kind of unrestricted power over interstate commerce that they have always exercised over local activities, thereby greatly increasing the power of the states to burden interstate commerce.

This burden is permitted under the *Commonwealth Edison* holding because the nondiscrimination and fair relation requirements of *Complete Auto* can be satisfied by skillful drafting, and plaintiffs who challenge a state tax on commerce clause grounds will not be permitted to show the practical effect of the tax, even though the Court claims that practical effect is the ultimate touchstone of the tax's validity. The combined effect of the nondiscrimination and fair relation requirements, as now applied by the Court, would allow a state having a natural resource within its borders to derive all of its needed revenue from taxes on the severance of that resource. This would theoretically be possible even though in-state consumption of the resource is only one percent of the total, and even though the severance of the resource was taxed at ninety-nine percent of value, as long as the one percent in-state consumption was taxed at the same rate as the ninety-nine percent attributable to out-of-state use, and provided the rate was a percentage of the value of the resource being severed. By observing the proper verbal formalities in the tax statute, a state could have the entire cost of state government paid by out-of-state consumers of the resource without offending the commerce clause and without those out-of-state consumers ever having had the opportunity to show the practical

62. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2957 (quoting Ford Motor Co. v. Beauchamp, 308 U.S. 331, 334-35 (1939)).

effect of the tax. Justice Blackmun's statement that "appellants are entitled to an opportunity to prove that, in Holmes' words, Montana's severance tax 'embodies what the Commerce Clause was meant to end' "[63] seems far closer to the intent of the *Complete Auto* Court and the commerce clause.

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63. 101 S. Ct. at 2972 (quoting O.W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 296 (1920).