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**RUC & THE COMMERCE CLAUSE OF  
THE UNITED STATES CONSTITUTION**

 **WA RUC**





# RUC and The Commerce Clause and other provisions of the United States Constitution |



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## PREFACE

The purpose of this report is to provide information for the Washington Road Usage Charge Steering Committee's consideration as they begin to deliberate whether or how the State of Washington could transition to a per-mile fee system as a future replacement for the state's motor vehicle fuel tax (gas tax).

The information contained in this report examines the issues that could be raised on whether a state-adopted road usage charge program meets the requirements of the Commerce Clause and other provisions of the United States Constitution and any potential restraints that might be imposed upon a RUC program.

Although this paper was drafted and reviewed by lawyers, the paper is not intended to provide specific legal advice to the State of Washington. If concerns remain related to any potential legal consequences of a road usage charge program, or if a road usage charge program is challenged on the grounds that it violates the Commerce Clause or any other provision of the US Constitution, the State should obtain legal advice and representation from its lawyers in the Office of the Attorney General of Washington.

This report is being presented to the Steering Committee as a draft version for review and discussion at its upcoming meeting on March 14, 2019.

For this report, all footnotes and citations appear at the bottom of the page to improve readability.

# EXECUTIVE SUMMARY

The purpose of this report is to examine the constitutionality of various scenarios under the Commerce Clause and other provisions of the United States Constitution for enactment and operation of a road usage charge system within the state of Washington.

**The restraints of the Commerce Clause.** The United States Constitution grants to Congress the authority to regulate interstate commerce and this power places a dormant restraint on the ability of any state to regulate or tax interstate commerce. Nevertheless, when Congress is silent with regard to an area of commerce, the states have certain abilities to place impositions on interstate commerce, especially regarding taxation.

Amendment V of the United States Constitution requires that a person cannot be deprived of liberty without due process of law. The Supreme Court interprets this clause to, among other meanings, create a right to travel between states without excessive burden. This interpretation is closely related, although not identical, to the Court's *nexus requirement* for taxation of interstate commerce under the Commerce Clause.

Over time, the Supreme Court has developed a four-factor test for examining whether a state taxation scheme violates the dormant Commerce Clause. Under *Complete Auto Transit, Inc. v. Brady*,<sup>1</sup> a state's tax on interstate commerce will not violate the dormant Commerce Clause so long as the tax:

- (1) applies to an activity with a substantial *nexus* with the taxing state,
- (2) is *fairly apportioned*,
- (3) does *not discriminate* against interstate commerce, and
- (4) is *fairly related* to the services the state provides.

**Nexus** is established when the taxpayer avails itself of the substantial privilege of carrying on business in a state. A state tax is **fairly apportioned** when it is *internally consistent*, meaning if the tax were duplicated in other states, it would not result in multiple taxation, and *externally consistent*, meaning a state's tax does not reach beyond that portion of value that is fairly attributable to economic activity within the taxing state. A

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<sup>1</sup> 430 U. S. 274 (1977)

state tax is ***non-discriminatory*** when it does not provide a direct commercial advantage to local business. Finally, a state tax has a ***fair relationship*** when the taxed business enjoys the opportunities or protections provided by the state.

This four-factor test has held since the Court established it, albeit with some adjustments in recent years to accommodate e-commerce changes to the economy.

**Application of the Commerce Clause to RUC.** This paper applies the *Complete Auto* four-factor test to nine RUC scenarios. The scenarios describe ways that design of a RUC program could affect driving across borders into Washington. The scenarios range from Washington residents paying RUC to *all* drivers paying RUC, including nonresidents, offsets of fuel tax against RUC payment, mileage reporting, tax rates and enforcement. All scenarios seem to pass the ***nexus, fair apportionment*** and ***fair relationship*** tests of the *Complete Auto* case. The possibilities for running awry of constitutional restraints comes with the application of the fourth factor: *non-discrimination*.

The analysis shows that most RUC designs do not impact rights under the United States Constitution. Certain areas of design, however, require obtaining specific legal advice or compliance with constitutional restraints protecting interstate commerce. This paper identifies four areas for a “careful watch” as a legislature and implementing agency adopts RUC policies and systems.

- 1) Separating RUC rates from fuel tax rates (in a situation where a state completely switches to a RUC system instead of a fuel tax system and the nonresident drivers continue to pay the fuel tax);
- 2) Offsetting, crediting or rebating fuel tax paid within the state exclusively to resident drivers;
- 3) Requiring nonresident drivers to use an electronic reporting method or compliance technology that places an extraordinary cost on out-of-state businesses relative to local businesses;
- 4) RUC and gas tax rates must have rational basis and declared public purpose;
- 5) Imposing a RUC enforcement regime that discriminates against nonresident drivers.

While interpretations of the dormant Commerce Clause may see change coming as the economy becomes more digitally-oriented, any alterations seem unlikely to affect the imposition of a per-mile charge in most iterations. The main factor for consideration should always be non-discrimination, a factor unlikely to undergo massive change in judicial interpretation.

Summary table:

	Scenario	Nexus	Fair Apportionment	Fair Relationship	Non-discrimination
1	Residents pay RUC on all miles; nonresidents pay fuel tax	Passes	Passes	Passes	Passes so long as RUC and effective per-mile fuel tax rates do not diverge substantially
2	Residents pay RUC based on miles driven within a state under a full replacement of the fuel tax; nonresidents pay Washington fuel tax	Passes	Passes	Passes	Passes so long as RUC and effective per-mile fuel tax rates do not diverge substantially
3	Residents pay RUC on all miles	Passes	Passes	Passes	Passes
4	Residents and nonresidents pay RUC on all Washington miles	Passes	Passes	Passes	Passes
5	Credit, offset, or rebate fuel tax paid in Washington	Passes	Passes	Passes	Passes as long as nonresidents are afforded the same opportunity as residents for credits, offsets, or rebates
6	Drivers report RUC manually	Passes	Passes	Passes	Passes
7	Drivers report RUC electronically	Passes	Passes	Passes	Passes as long as compliance technology and costs are not burdensome for nonresidents relative to residents
8	RUC rates vary based on vehicle characteristics	Passes	Passes	Passes	Passes as long as rates structures have a rational basis related to a declared public purpose



9	RUC enforcement approaches vary by driver class	Passes	Passes	Passes	Passes as long as the enforcement regime does not impose discriminatory processes on nonresident drivers
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# 1 BACKGROUND AND OBJECTIVES

## 1.1 WA RUC Steering Committee interest in the Commerce Clause of the United States Constitution

The Legislature’s intent in authorizing investigation of a per-mile road usage charge (RUC) was to study the funding mechanism as a potential future replacement for the state’s motor vehicle fuel tax (“gas tax”).<sup>2</sup> With increases in vehicle fuel economy expected to accelerate in the coming decade, a transportation funding system that is almost entirely dependent on gasoline sales will face declining revenue per mile, drawing into question whether the current gas tax system of roadway funding is financially sustainable over the mid and longer term.

Throughout its deliberations, the Washington Road Usage Charge (WA RUC) Steering Committee has identified policy issues to resolve before enacting a per-mile RUC. One of those issues is to understand the conditions, if any, under which a RUC could run afoul of the U.S. Constitution Commerce Clause. This report provides analysis of the issue for Steering Committee consideration.

## 1.2 Objectives

This report examines the constitutionality of various scenarios under the Commerce Clause for enactment and operation of a RUC system within the state of Washington, with the following objectives:

- ▶ Identify the restraints under the Commerce Clause and other provisions of the United States Constitution for state enactment of a RUC system in the state of Washington;
- ▶ Apply constitutional restraints to various RUC scenarios to identify general areas of concern for which system design and policy crafting can assist in avoiding potential constitutional pitfalls.

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<sup>2</sup> 2012 Supplemental Transportation Budget, Chapter 86, Laws of 2012, at section 205, subsection (4),

## 2 THE COMMERCE CLAUSE AND A STATE'S POWER TO TAX INTERSTATE COMMERCE

### 2.1 Commerce Clause of the United States Constitution

Before considering the restraints of the United States Constitution on the state's power to impose and collect a road usage charge from Washington residents and businesses and also visitors to Washington, we must consider the nature of the relevant provisions of the United States Constitution, particularly the 3<sup>rd</sup> clause of section 8 (the Commerce Clause), and why it was enacted.

First, the relevant text of this provision<sup>3</sup>:

**Article 1, section 8:**

*The Congress shall have power to lay and collect taxes, impost and excises, to pay the debts and provide for the common defence and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States; \*\*\*\*<sup>4</sup>*

*To borrow money on the credit of the United States;*

*To **regulate commerce** with foreign nations, and among the several states, and with the Indian tribes; \*\*\**

*\*\*\* To make all laws which shall be necessary and proper for carrying into execution the foregoing power, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.*

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<sup>3</sup> United States Constitution. Art. 1, Section 8, Clauses 1, 3, and 18, ratified July 3, 1788.

<sup>4</sup> As used in this paper, three starred elipses (\*\*\*) means "omitted irrelevant text."

## 2.2 History of the Commerce Clause

### 2.2.1 Congressional control of interstate commerce

In the period before the United States Constitution's effective date of March 4, 1789, the nation was fraught with individual state impositions on commerce between the states (interstate commerce), threatening the well-being, and indeed even the survival, of the national economy.<sup>5</sup> The Articles of Confederation, which governed the states prior to 1789, established a weak federal government with no ability to regulate national commerce nor prevent economic disputes between states.<sup>6</sup>

A desire to resolve the nation's economic strife led to the Constitutional Convention of 1787 and ultimately a new national governance document, the United States Constitution.<sup>7</sup> One of the fundamental rationales for creating the United States Constitution was to establish control of the nation's interstate commerce solely in the hands of the United States Congress.

Although not stated explicitly, by granting Congress the power to regulate interstate commerce, the Commerce Clause implicitly restrains the states from enacting legislation, including taxation, that unfairly burdens interstate commerce.<sup>8</sup>

## 2.3 Other relevant provisions of the United States Constitution

### 2.3.1 Right to Travel and the Due Process Clause

Although not explicitly identified in the United States Constitution, the Supreme Court has long held that persons in the United States have the right to travel freely across state borders.<sup>9</sup> The Court has not agreed upon the precise provision of the Constitution upon which the right to travel rests. At various times, members of the Court have identified the different provisions within the 14<sup>th</sup> Amendment to the Constitution as the source of the

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<sup>5</sup> *The Federalist, Papers VII and XXII.*

<sup>6</sup> Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787*, p. 5 (1966)

<sup>7</sup> Page Smith, *The Shaping of America, Volume Three: A People's History of the Young Republic*, p. 50 (1980)

<sup>8</sup> *Gibbons v. Ogden*, 22 U. S. 1 (1824)

<sup>9</sup> *Crandall v. Nevada*, 6 Wall. 35, 48 (1868)

right to travel although the *Crandall v. Nevada* case may indicate the right to travel may earlier origins.<sup>10</sup> Members of the Court have agreed that precise identification of the source of the right to travel does not have significance and recognized that the right to travel simply exists as a constitutional right implicit in the formation of a nation of states under the United States Constitution.<sup>11</sup>

The relevant text:

***Amendment XIV:***

***\*\*\* No state shall make or enforce any law which shall abridge the privileges or immunities<sup>12</sup> of citizens of the United States; no shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection<sup>13</sup> of the law.<sup>14</sup>***

The Supreme Court has identified three aspects to the right to travel: first, the right to move freely among states, second, the right to be treated as a welcome visitor rather than a hostile stranger and, third, the right for new arriving citizens to a state to be treated equally to native born citizens.<sup>15</sup> The Supreme Court applies the right to travel most often for challenges to durational residency requirements for taking advantage of benefits to citizens of a state or to criminal offenses or indigency.<sup>16</sup>

The Due Process Clause protects the right to travel from state interference. The Supreme Court has found, “[t]he right of travel \*\*\* as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clause of the Fifth and Fourteenth

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<sup>10</sup> 6 Wall. 35, 48 (1868)

<sup>11</sup> “Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.” *United States v. Guest*, 383 U.S. 745, 758 (1966). The Court stated the same view in *Shapiro v. Thompson*, 394 U. S. 618 (1969); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Zobel v. Williams*, 457 U.S. 55 (1982); *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986)

<sup>12</sup> “[T]he right to move freely from State to State is a privilege and immunity of national citizenship.” *Aptheker v. Secretary of State*, 378 U. S. 500 (1964) (Justice Douglas concurring opinion)

<sup>13</sup> *Shapiro v. Thompson*, 394 U. S. 618 (1969)

<sup>14</sup> United States Constitution. Amendment XIV, adopted 1868.

<sup>15</sup> *Saenz v. Roe*, 526 U. S. 489 (1999)

<sup>16</sup> *Edwards v. California*, 314 U. S. 160 (1941)

Amendments. Whatever its source, a State may neither tax nor penalize a citizen for exercising his right to leave one State and enter another.”<sup>17</sup>

## 2.4 A state’s power to tax interstate commerce

### 2.4.1 The dormant Commerce Clause

The Commerce Clause grants to Congress affirmative authority to regulate the nation’s commerce. When Congress exercises that authority, the enacted legislation controls, but when Congress takes no action, the states are not free to enact their own legislation free of restraint. This is true specifically for regulation of a state asset such as the state’s highway system. “The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to ensure safety and conservation of the highways \*\*\* and may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use.”<sup>18</sup> In *Clark v. Poor*, the Supreme Court held that highway use taxes on interstate carriers did not violate the Commerce Clause if “assessed for a proper purpose and is not an objectionable amount.”

The Supreme Court has long held that the Commerce Clause has a negative implication, a dormant Commerce Clause, that imposes limitations on the States’ abilities to impact interstate commerce absent congressional action.”<sup>19</sup> State impositions may not discriminate nor unduly burden interstate commerce. Yet, the Court weighs this limitation against public interest. State laws that “regulate evenhandedly to effectuate a legitimate local public interest ... will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>20</sup>

The Supreme Court’s rulings on the dormant Commerce Clause have evolved over many decades and will likely continue to evolve as the Court takes heed of the dramatic changes taking place in commerce in the 21<sup>st</sup> Century. The ability to

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<sup>17</sup> *Jones v. Helms*, 452 U. S. 418, 419 (1981)

<sup>18</sup> *Clark v. Poor*, 274 U. S. 554 (1927)

<sup>19</sup> *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 326 U. S. 761, 769 (1945)

<sup>20</sup> *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970)

purchase goods and services on-line via the Internet has substantially altered the national economy. It will be necessary for the Supreme Court to adapt the limitations on the power of the states to regulate and tax interstate commerce in-step. The Supreme Court has very recently recognized the impact of this change in the dynamics of the national economy and responded accordingly by overruling a longstanding position on the limitations of the states' power to tax interstate commerce.<sup>21</sup>

The Supreme Court's recognition of the need to update its interpretation of the dormant Commerce Clause for state taxation of interstate commerce makes reliance on the tests of its past rulings somewhat uncertain. Therefore, in examining the application of the dormant Commerce Clause to a new tax, such as a road usage charge for travel on state roadways, one must consider past rulings in context and perhaps predict potential areas of change.

In reading this paper, the reader should note that the Commerce Clause applies to the travel of businesses, whereas the Due Process Clause applies to the travel of individuals. This paper focuses on the impact of the Commerce Clause on RUC systems because the Commerce Clause requirements are similar, if not identical, to the Due Process Clause requirements and recent Supreme Court cases indicate the Commerce Clause may now be slightly stricter. For purposes of evaluating RUC systems, passage of the Commerce Clause requirements would also indicate passage of Due Process Clause requirements.

#### 2.4.2 The four-factor test

Any doubt about the ability of a state to tax interstate commerce was resolved in 1959 in *Northwestern States Portland Cement Co. v. Minnesota*,<sup>22</sup> when the Court held a state could impose a fairly apportioned, nondiscriminatory net income tax applied exclusively to interstate commerce. It was not until *Complete Auto Transit, Inc. v. Brady*<sup>23</sup> in 1977 that the Court established a four-factor standard for all cases since. Under *Complete Auto*, a state's tax on interstate commerce will not violate the dormant Commerce Clause so long as the tax:

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<sup>21</sup> *South Dakota v. Wayfair, Inc., et al.*, 585 U. S. \_\_\_\_ (2018)

<sup>22</sup> 358 U. S. 450 (1959)

<sup>23</sup> 430 U. S. 274 (1977)

- (1) applies to an activity with a substantial nexus with the taxing state,
- (2) is fairly apportioned,
- (3) does not discriminate against interstate commerce, and
- (4) is fairly related to the services the state provides.

#### 2.4.2.1 Nexus

Before the Supreme Court's very recent ruling in *Wayfair*, a determining factor for establishing substantial nexus with a taxing state was the physical presence rule. The Court required a physical presence such as retail outlets, personnel, sales-persons or property within the taxing state but denied the ability to tax a seller whose "only connection with customers in the state is by common carrier or the United States mail."<sup>24</sup>

To protect the viability of the state sales tax as a revenue raising measure in the new on-line economy, the state of South Dakota passed into law Senate Bill 106 to specifically challenge the physical presence requirement in the nexus factor. In response, the Supreme Court rethought the nexus requirement.

Acknowledging that "[m]odern e-commerce does not align analytically with a test that relies on the sort of physical presence" defined in earlier precedent and that "[t]he Internet's prevalence and power have changed the dynamics of the national economy," the Supreme Court updated its view of the state power to tax interstate commerce and overturned the earlier rulings requiring a physical presence in the taxing state.<sup>25</sup>

What is left of the nexus test without the physical presence rule? In *Wayfair*, the Court referenced a fairly recent earlier ruling on this point, "[S]uch a nexus is established when the taxpayer \*\*\* 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."<sup>26</sup> The Court said in *Wayfair* that the nexus of the remote on-line seller "is clearly sufficient based on both the economic and virtual contacts respondents have with the state."<sup>27</sup> The Court also observed the large amount of business undertaken by the

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<sup>24</sup> *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U. S. 275 (1972)

<sup>25</sup> *South Dakota v. Wayfair, Inc., et al.*, 585 U. S. \_\_\_\_, 138 S. Ct. 2080 (2018)

<sup>26</sup> *Polar Tankers, Inc. v. City of Valdez*, 557 U. S. 1, 11 (2009)

<sup>27</sup> *South Dakota v. Wayfair, Inc., et al.*, 585 U. S. \_\_\_\_ (2018)



seller within the state and that the seller is a large, national company with a large virtual presence.

Since *Wayfair* does not set a bright-line standard for nexus, the court leaves to later rulings further development of the nexus standard. Will business size matter? Will the amount of sales determine nexus? Or, will mere sales of any amount be considered *substantial* enough to establish nexus? The nexus test is now in uncertain territory.

#### 2.4.2.2 Fair apportionment

Following establishment of nexus with a state, the second factor of the *Complete Auto* test is fair apportionment of a state tax on interstate commerce. Fair apportionment seeks to remove the possibility of multiple taxation of a multi-state business for the same commerce simply because of crossing state borders and to prevent extraterritorial taxation. Presumably, every state can have no more than its fair share of the entire taxation of a business engaged in interstate commerce. While fair apportionment is preferred, the Supreme Court has excepted certain taxing schemes when fair division of the tax base “would produce insurmountable administrative or technological barriers,”<sup>28</sup> as long as interstate commerce is not disadvantaged. To determine whether a tax scheme is fairly apportioned, the Supreme Court examines whether the tax is internally and externally consistent.

“*Internal consistency* is preserved when the imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear.”<sup>29</sup> *Internal consistency* is a structural test that “hypothesizes a situation where other states have passed an identical statute.”<sup>30</sup> In *Oklahoma Tax Commission v. Jefferson Lines*, the Supreme Court upheld a sales tax on the price of a bus ticket for travel that originated in in the state but ended in another state. The Court reasoned “if every state imposed a tax on ticket sales within the state for travel originating there, no sale would be subject to more than one tax.”<sup>31</sup>

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<sup>28</sup> *Goldberg v. Sweet*, 488 U. S. 252 (1989)

<sup>29</sup> *Oklahoma Tax Commission v. Jefferson Lines*, 514 U. S. 175 (1995)

<sup>30</sup> *Goldberg v. Sweet*, 488 U. S. 252, 261 (1989)

<sup>31</sup> 514 U. S. 175 (1995)

Even if a state tax fails the internal consistency test, if all the taxed activities occur wholly within the state, the tax may satisfy the fair apportionment test. In *American Trucking Associations, Inc. v. Michigan Public Service Commission*,<sup>32</sup> the Supreme Court upheld a flat annual fee on the operation of trucks within the state because the tax was on “local deliveries,” all beginning and ending within the state. The Court stated, “The flat fee is imposed only on intrastate transactions. It does not facially discriminate against interstate or out-of-state activities or enterprises. It applies evenhandedly to all carriers making domestic journeys and does not reflect an effort to tax activity taking place outside of the State.”

*External consistency* looks “to the economic justification of the state’s claim upon the value taxed, to discover whether a state’s tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state.”<sup>33</sup> *External consistency* is a real world test that looks at “the practical or economic effect of a tax on [the] interstate activity.”<sup>34</sup> In *American Trucking Associations, Inc. v. Scheiner*, the Supreme Court struck down Pennsylvania’s flat tax on all trucks operating on state highways as failing the external consistency test by imposing a disproportionate burden on interstate trucks relative to intrastate trucks because interstate trucks traveled fewer miles per year in-state.<sup>35</sup> The Court, in *Jefferson Lines*, found the sales tax on the ticket price passed the external consistency test because sale of the ticket was a service that took place in the state rather than a tax on travel.

#### 2.4.2.3 Non-discriminatory

The most enduring factor in the *Complete Auto* test is the discrimination test, having emerged in earlier cases in the 19<sup>th</sup> century.<sup>36</sup> The principle as stated by the Supreme Court in *Northwestern States Portland Cement Co. v. Minnesota* is, “No state may,

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<sup>32</sup> 545 U. S. 429 (2005)

<sup>33</sup> *Oklahoma Tax Commission v. Jefferson Lines*, 514 U. S. 175 (1995)

<sup>34</sup> *Goldberg v. Sweet*, 488 U. S. 252, 262 (1989)

<sup>35</sup> *American Trucking Association v. Scheiner*, 483 U. S. 266 (1987)

<sup>36</sup> *Welton v. State of Missouri*, 91 U. S. 275 (1876)

consistent with Commerce Clause, impose a tax which discriminates against interstate commerce... by providing a direct commercial advantage to local business.”<sup>37</sup>

Though the Supreme Court has not adopted a precisely defined test for a discriminatory state tax scheme, the Court will consider discriminatory under the dormant Commerce Clause instances when a state imposes greater burdens on out-of-state goods or activities than on competing in-state goods or activities. Thus, the Court will find discriminatory imposition of a state excise tax on wholesale liquor sales while exempting local products.<sup>38</sup>

A state can violate the discrimination factor not only by imposing burdensome taxes on interstate commerce but also by offering discriminatory, preferential incentives or subsidies—tax credits, refunds, reduced rates, other favorable treatment—to favor in-state businesses designed to encourage the growth of local commerce, as the following case examples indicate:

- Providing reduced rates for stock transfers when the sale of stock was made through an in-state broker rather than an out-of-state broker.<sup>39</sup>
- Providing an income tax credit to encourage businesses to export through in-state corporations.<sup>40</sup>
- Granting a state tax credit for ethanol fuel if the ethanol was produced in the state.<sup>41</sup>
- Imposing a tax on milk dealers for all in-state sales of milk, whether or not the milk was produced in Massachusetts and then placing all tax proceeds in a segregated fund and distributing the fund exclusively to operators of in-state dairy farms.<sup>42</sup>

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<sup>37</sup> 358 U. S. 450, 457 (1959)

<sup>38</sup> *Bacchus Imports, Ltd. V. Dias*, 468 U. S. 263 (1984)

<sup>39</sup> *Boston Stock Exchange v. State Tax Commission*, 429 U. S. 318 (1977)

<sup>40</sup> *Westinghouse Electric v. Tully*, 466 U. S. 388 (1984)

<sup>41</sup> *New Energy Co. of Indiana v. Limbach*, 486 U. S. 269 (1988)

<sup>42</sup> *West Lynn Creamery, Inc. v. Healy*, 512. S. 186 (1994)

- Not offering Maryland residents a full credit on income taxes paid to other states under a personal income tax system under which Maryland residents were taxed on their worldwide income and nonresidents on income earned in the state.<sup>43</sup>

Notwithstanding, a discriminatory tax may be valid as a *complementary tax*.

- Providing a tax on the *use* of a product or service purchased from out-of-state businesses as a complement to an in-state sales tax.<sup>44</sup>

#### 2.4.2.4 Fair relationship

The final factor the Supreme Court set forth in *Complete Auto* is that the tax or levy must fairly relate to services the state, in turn, provides the payer. Essentially, the taxed business must enjoy the opportunities or protections provided by the state. This test does not consider the amount of the tax or the value of the services.

The fair relationship test requires that “the *measure* of the tax be reasonably related to the extent of the taxpayer's contact with the State, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of the state tax burden.”<sup>45</sup> On this basis, a Montana state severance tax on coal mined in the state but on federal property was upheld.

“Because it is measured as a percentage of the value of the coal taken, the Montana tax, a general revenue tax, is in proper proportion to appellants' activities within the State, and, therefore, to their enjoyment of the opportunities and protection which the State has afforded in connection with those activities. When a tax is assessed in proportion to a taxpayer's activities or presence in a state, the taxpayer is shouldering its fair share of supporting the state's provision of police and fire protection, the benefit of a trained workforce, and the advantages of a civilized society.”<sup>46</sup>

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<sup>43</sup> *Comptroller of the Treasury of Maryland v. Wynne*, 575 U. S. \_\_\_\_ (2015)

<sup>44</sup> *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937)

<sup>45</sup> *Commonwealth Edison Co. V. Montana*, 453 U. S. 609 (1981)

<sup>46</sup> *Commonwealth Edison Co. V. Montana*, 453 U. S. 609 (1981)

### 2.4.3 Relationship of the Commerce Clause and the Due Process Clause

While the Commerce Clause protects commercial activities from improper burdens to interstate travel, the Due Process clause protects persons with non-commercial purposes from improper burdens or restrictions to interstate travel. The Supreme Court has referred to the two clauses as closely related, both requiring *nexus* between the state and those it seeks to tax. “[T]he due process clause nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him \*\*\* In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual \*\*\* as by structural concerns about the effects of state regulation on the national economy.”<sup>47</sup>

The question is whether the nexus requirements of the Due Process Clause and the Commerce Clause are similar enough so that creation of a separate test is unnecessary for purposes of evaluating the constitutionality of a tax on use of a state’s road system.

While the recent *Wayfair* case may separate the relationship of the nexus tests of the Commerce Clause and Due Process Clause in some way, actual physical presence within a state should satisfy both clauses. Access to travel on and use of a neighboring state’s roadway system should be sufficient connection to the taxing state to provide the necessary link for either clause. If the tax is directly related to use of the taxing state’s roadway system, as a road usage charge system is set to measure and collect, then there should be no constitutional concern under either clause.

As for *fair apportionment*, both the Commerce Clause and the Due Process Clause seek to avoid multiple taxation and require fair apportionment to local activities, and both clauses require non-discrimination for state tax schemes.<sup>48</sup> Owing to recent the recent ruling in *Comptroller of the Treasury of Maryland v. Wynne*, the Commerce Clause restrictions may require greater scrutiny. A state’s tax scheme is not immune from the dormant Commerce Clause scrutiny simply because the state “has jurisdictional power under the Due Process Clause to impose the tax.”<sup>49</sup>

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<sup>47</sup> *Quill v. North Dakota*, 504 U. S. 298 (1992)

<sup>48</sup> *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959)

<sup>49</sup> 575 U. S. \_\_\_, 135 S. Ct. 1787 (2015)

The Due Process Clause's counterpart to the *fair relationship* test of the Commerce Clause is that the item taxed must have a *rational relationship* to the state and the intrastate values of the enterprise.<sup>50</sup> In none of its cases "has the Court clarified the specific distinction between the 'rational relationship' requirement of the Due Process Clause and the 'fair apportionment' requirement of the Commerce Clause."<sup>51</sup>

There is no question that the requirements of the Commerce Clause and Due Process Clause are similar, if not quite identical for all applications. As late as 1993, Walter Hellerstein, the leading legal scholar on this topic, saw no distinction between the substantive requirements of the two clauses.<sup>52</sup> The recent *Wynne* and *Wayfair* cases show that some distinction between the substantive requirements of the two clauses may exist, albeit perhaps narrow and case specific, but no such clarification has come forth.

Working the narrow territory between the Commerce Clause requirements and the Due Process Clause requirement may have no value for purposes of evaluating a tax on vehicle travel on roads within a state. Given that *nexus* is a simple requirement to satisfy (a person must drive a vehicle on the taxing state's roads), meeting the requirements for *fair apportionment*, *non-discrimination* and *fair relationship* under the possibly stricter Commerce Clause should satisfy the associated requirements of the Due Process Clause as well.

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<sup>50</sup> *Container Corp. v. Franchise Tax Board*, 463 U. S. 159, 165 (1983); *Norfolk W.R. Co. v. Tax Commission*, 390 U. S. 317, 325 (1968); *Quill v. North Dakota*, 504 U. S. 298, 306 (1992)

<sup>51</sup> *Stonebridge Lie Insurance v. Department of Revenue*, 18 OTR 423 (2006)

<sup>52</sup> "Although the theoretical premises underlying the two clauses are conceptually distinct, the Court has drawn no distinction between the substantive requirements of the two clauses." Walter Hellerstein, *State Taxation of Corporate Income from Intangibles: Allied-Signal and Beyond*, 48 Tax L Rev 739, 744 (1993)

	Commerce Clause	Due Process Clause
Purpose.	Protect national economy	Fairness for the individual
Nexus.	Substantial nexus	Minimal nexus
Fair Apportionment.	Avoid multiple taxation and require fair apportionment to local activities	Avoid multiple taxation and require fair apportionment to local activities
Non-discrimination.	Non-discrimination	Nob-discrimination
Relationship.	Fair relationship to the extent of the taxpayer's contact with the State	Rational relationship to the state and the intrastate values of the enterprise

Conclusion: The Supreme Court has found requirements for the Due Process Clause similar but perhaps slightly different from the four-factor *Complete Auto* test for the Commerce Clause. Recent cases applying the Commerce Clause to state taxation of interstate enterprises have adjusted the requirements to respond to a changing economy. The extent these adjustments will apply as well to the Due Process Clause is not yet known. For purposes of evaluating the constitutionality of a road usage charge program, however, whatever distinction exists between the two clauses will have no difference. Application of the Commerce Clause requirements should satisfy the requirements of the Due Process Clause.

# 3 THE COMMERCE CLAUSE AS APPLIED TO A ROAD USAGE CHARGE

## 3.1 History of the road usage charge

### 3.1.1 Enactment of the fuel tax by the states

Through the power of the 10<sup>th</sup> amendment to the United States Constitution, the states retained the power of taxation.<sup>53</sup> In the early decades of the 20<sup>th</sup> century, state and local governments used this power to fund roadways to accommodate the growing shift to automobile travel. The states funded roads through property taxes, poll taxes, and a mix of other general tax revenues.

In 1919, Oregon became the first state in the nation to impose a fuel excise tax, levied at the production level but with the ability for passing the tax down through the retail chain to roadway users. The fuel excise tax is based on the consumption of fuel by motor vehicles, which in turn use roadway facilities funded by the tax; thus, the motor vehicle fuel tax is a user fee (albeit an indirect one).

Soon after Oregon enacted the first fuel tax of one cent per gallon, other states quickly followed. Within ten years, every state had enacted some form of a fuel tax. Although the tax rates were comparatively low (typically about one or two cents per gallon in the early years), the tax was an effective revenue-generator for state and local governments.

Throughout the 20<sup>th</sup> century, the fuel tax provided the primary means of funding the maintenance and modernization of the nation's roadway system. Legislatures frequently increased fuel taxes to expand the roadway system to accommodate population growth and to prevent the erosion of revenues from the effects of inflation.

In the early 21<sup>st</sup> century, another erosion factor entered the picture: the entry into the marketplace of highly fuel-efficient vehicles which operated using little or no fuel. This new erosion factor could only be allayed by fuel tax increases for a temporary period before the inequity of putting the entire burden of roadway funding needs onto only

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<sup>53</sup> “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Amendment X of the United States Constitution.



conventional vehicles would face strong resistance. To solve this erosion problem, the states would have to create a new method of funding roadways that did not rely upon the purchase of fuel.

The fuel efficiency erosion factor, in particular, undermined the user-pays nature of the fuel excise tax. The amount of fuel taxes the users paid varied widely depending upon the fuel efficiency of the vehicle. By the turning of the 21<sup>st</sup> century, operators of fuel-inefficient vehicles would pay four or five times the amount of fuel tax per mile as the operators of fuel-efficient vehicles. Indeed, operators of all-electric vehicles paid no fuel tax at all.

### 3.1.2 [The states' exploration of a per-mile road usage charge for road funding](#)

As highly fuel-efficient vehicles began to enter the marketplace at the beginning of the 21<sup>st</sup> century, state legislatures began to explore potential future revenue mechanisms to replace the heretofore robust fuel tax.

After more than a decade of research and pilot testing, the Oregon legislature enacted in 2013 a permanent per-mile road usage charge of 1.5 cents per mile for volunteer motorists of light vehicles that became operational in 2015. Branded OReGO, this program was mandated to provide an offset of the fuel tax paid by the operator of the participating vehicle. Only residents of Oregon are eligible to volunteer for participation in the OReGO program. Motorists not volunteering continue to pay the fuel tax. Nonresidents have no ability to volunteer for participation in OReGO and therefore continue to pay the fuel tax while driving in Oregon.

Following Oregon's enactment of an operational per-mile road usage charge, other states continued the investigation along the lines of the OReGO program but with improvements. California tested a pilot program with 5,000 participants in 2016-17. Washington did the same with 2,000 participants in 2018-19. In 2018, Colorado conducted a small demonstration as did Pennsylvania and Delaware under the sponsorship of the I-95 Corridor Coalition. Recently, Utah has undertaken implementation of the second, operational, per-mile charge program (after OReGO), scheduled to commence in January 2020.

Similar in nature, all the road usage charge pilot programs offer account-based mileage reporting, with a single per-mile charge rate and an offset for fuel tax paid. Only

Washington's pilot engaged out-of-state vehicles, collecting real-money in a financial interoperability test with OReGO and mock-billing tests with residents of Idaho and British Columbia, Canada.

Hawaii's per-mile charge program will be different than the others. Hawaii's program will involve, at least initially, manual collection of odometer readings as part of the state's manual safety inspection and no interstate travel on the islands.

## 3.2 The essential nature of a road usage charge

A per-mile road usage charge (RUC), whether a tax or a fee, is based on measurement of distance traveled by a vehicle. Otherwise, the road usage charge characteristics are flexible. Details are left to state legislatures or Congress.

A road usage charge may have multiple purposes, depending on the jurisdiction. A RUC may have factors that differentiate vehicles and thus, more than one rate. Although many states are experimenting with a policy that would allow credits against gas taxes already paid, RUC does not *require* an offset or credit of fuel excise taxes paid for refueling a vehicle. Collection of vehicle data for calculation of a RUC may range from wireless electronics to manual reporting. A RUC may cover only resident motorists or cover all motorists driving on a state's roads. A RUC may cover mileage only driven within state by any driver or all mileage of a resident vehicle.

Judging whether a state's road usage charge violates or passes the Commerce Clause will largely depend upon the construction of the RUC policies and systems for collection of data and the charge. Therefore, the various legal tests applied to a state tax to determine conformity with the dormant Commerce Clause must be applied to a number of scenarios.

## 3.3 Application of the Commerce Clause to road usage charge scenarios

### 3.3.1 Scenarios for analysis of the constitutionality of a road usage charge

#### 3.3.1.1 Scenario 1 residents pay RUC based on miles driven within a state; nonresidents pay Washington fuel tax

Under scenario 1, the road usage charge has one rate applied only to miles driven by all resident vehicles within a state, with no offsets or credits for other taxes, thus RUC is

additive to the existing excise fuel tax. Since the basic RUC does not apply to nonresident vehicles and only applies to miles driven within the state, interstate commerce is not affected by this RUC design and therefore the Commerce Clause does not apply.

Conclusion: RUC scenario 1 should not violate the dormant Commerce Clause.

3.3.1.2 Scenario 2: residents pay RUC based on miles driven within a state under a full replacement of the fuel tax; nonresidents pay Washington fuel tax

Presumably, if RUC replaces the fuel tax entirely for resident drivers, the State of Washington would keep the fuel tax in place for nonresident drivers so they can contribute to the road system they drive upon, and burden, in Washington. The question is whether moving Washingtonians to a RUC obligation renders the fuel tax for nonresidents unconstitutional for violation of the Commerce Clause. Applying the four-factor test of *Complete Auto*, the fuel tax still has *nexus* because the driver pays the tax while in Washington. There is also a *fair relationship* because while in Washington, the nonresident motorists do avail themselves of the services of the state, including police and fire protection and the use of the state's highways.

Regarding *fair apportionment*, scenario 2 seems *internally consistent* because if the neighboring state were to also shift from a fuel tax to RUC, there would be no multiple taxation. The fuel tax paid by nonresident motorists should also be considered *externally consistent* as long as the revenues raised in this manner are applied to the Washington highway system as they are now.

It may be possible for the Washington legislature to render the fuel tax *discriminatory* under *Complete Auto* by raising the fuel tax rate to an exorbitant level for nonresident drivers while maintaining the RUC rate at a modest level for resident drivers.<sup>54</sup> Most likely, the test will measure the average per-mile amount paid by the average driver under each revenue system to compare the relative burden of the fuel tax an average

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<sup>54</sup> While the state motor vehicle fuel tax is paid at “the rack” (distributor/importer level) and passed on to the motorist in the form of a higher fuel price and the Supreme Court may ignore the discrimination on the grounds that the motorist does not directly pay the fuel tax, it is likely the Court would look to the reality of the unfair additional burden placed on non-resident drivers by the added tax amount, even though paid indirectly, and void the additional fuel tax as violating the dormant Commerce Clause. The dormant Commerce Clause applies not only to state taxation but also to state actions. A state's action that has the effect of increasing the price of fuel only on nonresident drivers may unfairly burden them and violate both the Commerce Clause and the Due Process Clause.

driver pays per-mile against the RUC per-mile rate. If the per-mile amounts paid for the fuel tax and RUC are significantly different, there may be a violation of the Commerce Clause. If the average per-mile amount paid by drivers under each revenue system is similar, there will be no violation of the Commerce Clause.

Conclusion: RUC scenario 2 should not violate the dormant Commerce Clause, unless the average fuel tax amounts paid, on per-mile basis, by nonresident drivers are significantly higher than the RUC per-mile rate paid by resident drivers.<sup>55</sup>

### 3.3.1.3 Scenario 3: basic RUC paid by residents on all miles driven

Under scenario 3, the basic road usage charge has one rate applied to all miles driven by all resident vehicles of a state with no offsets or credits for other taxes. Since the basic RUC does not apply to nonresident vehicles but applies to resident vehicles driven out-of-state, activity in another state is involved in calculating the road usage charge owed by these motorists. It is highly doubtful the Commerce Clause would apply in this scenario. The Supreme Court has declared that, “It is not a purpose of the Commerce Clause to protect state residents from their own state taxes.”<sup>56</sup>

Conclusion: RUC scenario 3 should not violate the dormant Commerce Clause.

### 3.3.1.4 Scenario 4: basic RUC paid by all drivers (residents and nonresidents) in Washington

Under scenario 4, the basic road usage charge has one rate applied to miles driven within Washington state boundaries by vehicles driven by both residents and nonresidents with no offsets or credits for other taxes. This is an intriguing scenario because operators of nonresident vehicles would be obligated to pay the road usage charge and this would involve travel by persons with commercial purposes and other purposes. The Supreme Court ruling in *American Trucking Associations, Inc. v. Michigan Public Service Commission* indicates that a RUC covering only activities within Washington involves intrastate commerce, and not interstate commerce, if the activities involve only local point-to-point deliveries beginning and ending within the state.

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<sup>55</sup> A variant to RUC scenario 2 sees a state raise fuel taxes but allow resident drivers to opt into RUC, with a rate set at revenue neutral rates with the previous fuel tax rate. In this case, the nonresident driver would pay higher fuel taxes relative to the resident drivers paying RUC. The result is the same as scenario 2; facially discriminatory under *Complete Auto*. If the state were to allow nonresident drivers to opt into RUC in lieu of paying the higher fuel taxes, presumably there would be no discrimination.

<sup>56</sup> *Goldberg v. Sweet*, 488 U. S. 252 (1989)

Therefore, the Commerce Clause would not apply even though nonresident trucking firms engage in the delivery activity.

When the activity involves transport of goods across state borders, the Supreme Court, as indicated in the *Scheiner* case, defines the activity as interstate commerce. The Supreme Court has long held that a state may impose reasonable charges for a vehicle's use of its highways, even for interstate commerce, and in doing so would not violate the Commerce Clause (absent another disqualifying factor).<sup>57</sup> Applying the four-factor test of *Complete Auto*, there is *nexus* because the miles are driven within the state and a *fair relationship* because while driving, the interstate motorists avail themselves of the services of the state, including police protection and the use of the state's highways.<sup>58</sup>

Nor is the RUC under scenario 4 *discriminatory* because the same rate applies to all vehicles driven in the state and there is no preference provided to resident vehicles. The Supreme Court in *Scheiner* posited a "charge per mile of highway use" as *fair* to strike down as discriminatory a flat fee applied to in-state and out-of-state vehicles that resulted in a cost per mile of five times per mile for out-of-state vehicles as for local vehicles. The Court's rationale in *Scheiner* is consistent with an earlier decision in *Continental Baking Co. v. Woodring*, in which the Court declared that a tax on highway use by interstate motorists based on per-gross ton-mile does not impose an unconstitutional requirement where the tax was used to compensate the state for providing highway facilities and was not shown to be unreasonable.<sup>59</sup> Furthermore, the Court more recently observed in dicta that "[l]ess discriminatory alternatives are available to alleviate \*\*\* concern [about the volume of waste entering a state facility] \*\*\* not the least of which are \*\*\* **a per-mile tax** on all vehicles transporting hazardous waste." (emphasis added)<sup>60</sup>

Regarding *fair apportionment*, the RUC in scenario 4 seems *internally consistent*. If each state were to adopt the same RUC, each state would only charge for miles driven within its boundaries and there would be no multiple taxation. This RUC structure also seems *externally consistent* in that there is economic justification for collecting a per-mile charge

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<sup>57</sup> *Hendrick v. Maryland*, 235 U. S. 610, 622 (1915); *Clark v. Poor*, 274 U. S. 554 (1927)

<sup>58</sup> Nearly parallel to the Commerce Clause, the Due Process Clause "requires some link, some minimum connection, between a state and the person \*\*\* it seeks to tax," *Miller Brothers Co. v. State of Maryland*, 327 U. S. 340 (1954).

<sup>59</sup> 286 U. S. 352 (1932)

<sup>60</sup> *Chemical Waste Management, Inc. v. Hunt*, 504 U. S. 334,345 (1992)

to pay for the in-state roadways an out-of-state vehicle travels upon, as the Supreme Court found in *Interstate Busses Corp. v. Blodgett*.<sup>61</sup> Further, the charge is properly proportioned to the value the driver gains by roadway access to the state.

The manner of data collection may change the outcome. This is the subject of scenarios 6 and 7.

Conclusion: RUC scenario 4 should not violate the dormant Commerce Clause.

### 3.3.1.5 Scenario 5: RUC paid by all drivers (resident and nonresidents) with a credit, offset or rebate for excise fuel tax paid in Washington

Scenario 5 is the same as scenario 4, except that in-state RUC payers receive offsets, credits or rebates of other taxes or fees, such as the fuel excise tax, to apply against the basic road usage charge. The *nexus* and *fair relationship* tests are met for the same reasons as for scenario 4. As for *fair apportionment*, the *internal consistency test* seems to be met because if every state applied the same scheme, multiple taxation would not result. The *external consistency test* also seems not an issue because the economic justification is the same as for scenario 4.

The issuance of offsets, credits and rebates for in-state motorists to the exclusion of out-of-state motorists may prove *discriminatory*. “Conjoining a tax and subsidy” may create “a program more dangerous to interstate commerce than either part alone,” *West Lynn Creamery*.<sup>62</sup> If a nonresident driver purchases fuel in Washington and does not receive the same credit as Washingtonian drivers, this seems facially discriminatory to interstate commerce because nonresident drivers would pay both the Washington fuel tax and the road usage charge for miles driven in Washington and resident drivers would only pay the road usage charge for miles driven in-state.

To resolve the discrimination issue, the road usage charge could offer an offset, credit or rebate for fuel tax purchased in Washington against miles driven in Washington for any motorist. The question then becomes whether discrimination remains against nonresidents who have paid fuel tax on fuel purchased out-of-state but get no credit against the road usage charge for miles driven within Washington on the same tank of fuel. In the instance of Washington not offering value to a nonresident for payment of an

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<sup>61</sup> 276 U. S. 245 (1928)

<sup>62</sup> 512 U. S. 186, 199 (1994)

out-of-state gas tax related to miles driven in Washington, the situation gives the appearance of burdensome unfairness; yet, if the motorist receives full credit for Washington's gas tax against the road usage charge for then driving miles in the neighboring state, the situation reverses itself. If in the same situation, the State of Washington only offers partial credit for payment of Washington's gas tax against the road usage charge in an amount fairly related to the charge, then the situation would not reverse itself wholly and a portion of the unfairness would remain. Whether the remaining amount that would be considered sufficiently burdensome to be considered facially discriminatory may be determined by the facts.

Conclusion: RUC scenario 5 may violate the dormant Commerce Clause if nonresident motorists are not afforded a similar opportunity to offset, credit or receive a rebate for fuel tax paid in Washington, or possibly in another state if the lost opportunity is considered burdensome.

#### 3.3.1.6 Scenario 6: RUC with manual reporting by all drivers (resident and nonresident) in Washington in Washington

The essential question for scenario 6 is whether manual reporting in a RUC system would unfairly burden interstate commerce. It's hard to imagine such a scheme could ever be devised because the State of Washington would have no practical way to impose manual reporting on all out-of-state drivers. These nonresidents are not connected to the vehicle reregistration system because the State of Washington does not, and likely would not, because of practical limitations, impose registration on all vehicles traveling across its borders. Nevertheless, some states do require heavy vehicles traveling interstate to register for purposes of paying a weight-mile tax<sup>63</sup> and the Supreme Court has not regarded such registration requirements for out-of-state vehicles as a material burden on interstate commerce.<sup>64</sup> The state of Oregon requires, at minimum, manual reporting of miles traveled, declared maximum weight and configuration as part of its weight-mile tax paid by heavy vehicle operators traveling within the state.

Manual reporting alone, should not violate the *nexus* and *fair relationship* factors of *Complete Auto* because the mileage reported will be miles traveled within Washington

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<sup>63</sup> The states with a weight-miles tax for heavy vehicles are Oregon, New Mexico, New York and Kentucky

<sup>64</sup> *Hendrick v. Maryland*, 235 U. S. 610, 622 (1915)



state. The *fair apportionment* factor should not be relevant because manual reporting does not affect the taxes paid or the tax rate. Further, manual reporting for out-of-state firms should not prove *discriminatory* relative to reporting requirements for resident firms if the reporting requirements are the same with no extra burden for firms located out-of-state. The Supreme Court has upheld a statute requiring interstate carriers to keep daily records and certify ton miles traveled monthly for purposes of assessing a tax on per-ton gross-mile.<sup>65</sup>

Conclusion: RUC scenario 6 should not violate the dormant Commerce Clause.

### 3.3.1.7 Scenario 7: RUC with wireless, electronic reporting by all drivers (resident and nonresident) in Washington

The essential question for scenario 7 is whether a requirement for wireless, electronic reporting in a RUC system would unfairly burden interstate commerce. If the same technology requirements for mileage reporting are the same for all motorists, whether in-state or out-of-state, then the burden is the same but the frequency of use may be much different and therefore the relative burden (cost and administrative difficulty) to obtain the reporting technology may be higher for infrequent users of the Washington roadway system. Nevertheless, residency is not necessarily an indication of infrequent use. Infrequent use may be a tendency for nonresident motorists but some nonresident motorists may use Washington's roads as often as a resident motorist if they live near the border and work or have business in the neighbor state every day.

There is surely *nexus* and *fair relationship* under scenario 7. *Complete Auto's fair apportionment test* has so far applied to tax rates or burdens rather than tax compliance and thus does not apply. The *non-discrimination* factor may apply if the cost of compliance provides favorable treatment to local businesses in a way that unfairly burdens out-of-state businesses by placing them at a competitive disadvantage.

The central question with regard to non-discrimination under scenario 6 is whether the reporting method or other compliance method requires burdensome acquisition of expensive technology or added personnel not required of the local businesses to a degree that discourages interstate commerce. The answer for scenario 7 is largely

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<sup>65</sup> *Continental Baking Co. v. Woodring*, 286 U. S. 352 (1932)



unknown because the reporting equipment and personnel required for a RUC system for light or heavy vehicles can vary widely. Some technologies and compliance requirements are relatively expensive or automatic which would not be especially burdensome for either local or out-of-state businesses. Other technologies or compliance requirements could be burdensome for both local and interstate businesses but more so for interstate carriers where cross-border visits are less common because the relative cost of each trip would prove much higher. If the RUC system had several options for reporting and compliance methods, this effect may be obviated by choice.

Conclusion: RUC scenario 7 may violate the dormant Commerce Clause if the electronic reporting method or compliance technology places an extraordinary cost on out-of-state business relative to local businesses.

### 3.3.1.8 Scenario 8: RUC paid by all drivers (resident and nonresident) in Washington with multiple rates for vehicles with differing characteristics

RUC systems may have variable rates for various vehicle types. This characteristic is often found in heavy vehicle distance charging systems that contain variable rates for factors such as distributed axle weight and configuration. In these heavy vehicle distance charging systems, some categories of vehicles have per-mile rates by weight class while others have annual flat taxes. These heavy vehicle charge systems have been challenged judicially, but the variable rates have survived if the annual flat tax applies only to intra-state business travel.<sup>66</sup> A state could adopt variable rates for a light vehicle RUC program to achieve public purposes beyond simply raising revenue for roadways.<sup>67</sup> The Supreme Court views rate variability as a legislative matter; “[t]he appropriate level or rate of taxation is essentially a matter for legislative, not judicial, resolution.”<sup>68</sup>

Conclusion: RUC scenario 8 should not violate the dormant Commerce Clause with rate structures that have a rational basis related to a declared public purpose rather than

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<sup>66</sup> *Clark v. Poor*, 274 U. S. 554 (1927); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245 (1928); *American Trucking Association v. Scheiner*, 483 U. S. 266 (1987)

<sup>67</sup> A RUC rate structure could accommodate, for example, public purposes such as managing greenhouse gas emissions, air quality control, energy use efficiency, congestion management, land use planning and fairness in paying for road capacity expansion and subsidizations for certain types of drivers such as those living in rural areas or who are less affluent.

<sup>68</sup> *Commonwealth Edison Co. V. Montana*, 453 U. S. 609 (1981)

simply a tax on doing business in the state, but annual flat taxes should be applied with caution.

### 3.3.1.9 Scenario 9: RUC with different enforcement approaches amongst driver classes

Owing to the distinct laws in the states and an inability to impose penalties on nonresident drivers without the cooperation of their home state, the enforcement mechanisms in a RUC system may vary between resident drivers and nonresident drivers. The central question for scenario 9 is whether different enforcement actions for resident and nonresident drivers will result in a burden for nonresident drivers involved in interstate commerce to such a degree that the enforcement regime for nonresident drivers discourages interstate commerce. That a state could impose a burdensome enforcement regime on nonresident drivers is unlikely. Washington state's easy access to the Department of Licensing, which has access to the state's vehicle registry and driver licensing records, makes imposition of enforcement measures against in-state drivers easy and not so easy against out-of-state drivers. Thus, as a practical matter, discrimination flows the opposite way and does not impede interstate commerce. Nevertheless, it is possible that creative enforcers could come up with a burdensome compliance procedure for nonresident motorists, even though this paper does not envision what such a procedure could encompass.

Conclusion: RUC scenario 9 should not violate the dormant Commerce Clause under a practical enforcement regime but enforcers should be cognizant of potentially imposing discriminatory processes against nonresident drivers while enthusiastically engaged in creating schemes to recover state-owed dollars from them.

## 3.4 Potential future changes in interpretation of the dormant Commerce Clause in state taxation schemes

### 3.4.1 The new digital economy affects judicial interpretation of past law

As the economy changes and technology evolves, the Supreme Court has shown willingness to adjust its interpretation of the application of the dormant Commerce Clause to state taxation schemes. The Court's decision in *South Dakota v. Wayfair, Inc.* upended a long-standing interpretation of the *nexus factor* of the four-factor *Complete Auto* examination. Which of the other three factors may be due for a make-over?

### 3.4.2 Is change coming for the *internal consistency test*?

Academic authors have heaped much criticism and analysis on the *internal consistency test* for examining the constitutionality of state taxation under the dormant Commerce Clause.<sup>69</sup> Some have declared the *internal consistency test* as dead while others call it a second order consideration while still others defend it as “the reigning standard.” As Mackenzie Catherine Scott states, “Taxation causes judges, scholars, states, and taxpayers enough confusion. Historically, the Supreme Court has done little to simplify this inherently complex area, wavering between the *Complete Auto* test and internal consistency test when analyzing state taxation under the dormant Commerce Clause.”<sup>70</sup>

Together, these authors point out that the future of the dormant Commerce Clause is uncertain as applied to state taxation of interstate commerce. It would be wise to keep abreast of any changes, or likely changes, when analyzing and considering the constitutionality of new state taxation schemes under the dormant Commerce Clause.

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69 Walter Hellerstein, Is “Internal Consistency” Foolish?: Reflection on an Emerging Commerce Clause Restraint on State Taxation, 87 Mich. L. Rev. 138 (1988); Walter Hellerstein and Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives. 81 Cornell L. Rev. 790 (1996); Bradley W. Joondeph, The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation, 71 Fordham L. Rev. 149 (2002); Walter Hellerstein, Is Internal Consistency Dead?: Reflection on an Evolving Commerce Clause Restraint on State Taxation. 61 Tax L. Rev. 1 (2007); Mackenzie Catherine Scott, Inconsistency with the Internal Consistency Test, 77 Louisiana L. Rev. 947 (2017).

70 Mackenzie Catherine Scott, Inconsistency with the Internal Consistency Test, 77 Louisiana L. Rev. 947, 973 (2017).

## 4 CONCLUSION

Analysis of the road usage charge scenarios above indicates that most impositions should not run afoul of the dormant Commerce Clause or the Due Process Clause of the United States Constitution. Naturally, RUC systems tend to have an advantage over other state taxation schemes when the mileage charged is entirely within a state's boundaries on an asset (the road system) that provides an economic justification for the charge and all vehicle operators pay the same rates (save for distinguishing characteristics such as distributed weight). All scenarios for RUC systems and policies seem to pass the *nexus*, *fair apportionment* and *fair relationship* tests of the *Complete Auto* case. The possibility of running awry comes with the application of the fourth factor: *non-discrimination*.

This paper identifies four areas for a “careful watch” as a legislature and implementing agency adopts RUC policies and systems.

- 1) Separating RUC rates from fuel tax rates (in a situation where a state completely switches to a RUC system instead of a fuel tax system and the nonresident drivers continue to pay the fuel tax);
- 2) Offsetting, crediting or rebating fuel tax paid within the state exclusively to resident drivers;
- 3) Requiring nonresident drivers to use an electronic reporting method or compliance technology that places an extraordinary cost on out-of-state businesses relative to local businesses;
- 4) RUC and gas tax rates must have rational basis and declared public purpose;
- 5) Imposing a RUC enforcement regime that discriminates against nonresident drivers.

While interpretations of the dormant Commerce Clause may see change coming as the economy becomes more digital, any alterations seem unlikely to affect the imposition of a

per-mile charge in most iterations. The main factor for consideration should always be non-discrimination, a factor unlikely to undergo massive change in judicial interpretation.

Summary table:

Scenario	Nexus	Fair Apportionment	Fair Relationship	Non-discrimination
1 Residents pay RUC on all miles; nonresidents pay fuel tax	Passes	Passes	Passes	Passes
2 Residents pay RUC based on miles driven within a state under a full replacement of the fuel tax; nonresidents pay Washington fuel tax	Passes	Passes	Passes	Passes so long as RUC and effective per-mile fuel tax rates do not diverge substantially
3 Residents pay RUC on all miles	Passes	Passes	Passes	Passes
4 Residents and nonresidents pay RUC on all Washington miles	Passes	Passes	Passes	Passes
5 Credit, offset, or rebate fuel tax paid in Washington	Passes	Passes	Passes	Passes as long as nonresidents are afforded the same opportunity as residents for credits, offsets, or rebates
6 Drivers report RUC manually	Passes	Passes	Passes	Passes
7 Drivers report RUC electronically	Passes	Passes	Passes	Passes as long as compliance technology and costs are not burdensome for nonresidents relative to residents
8 RUC rates vary based on vehicle characteristics	Passes	Passes	Passes	Passes as long as rates structures have a rational basis related to a declared public purpose
9 RUC enforcement approaches vary by driver class	Passes	Passes	Passes	Passes as long as the enforcement regime does not impose discriminatory processes on nonresident drivers