fected commerce, was not a regulation "directly. Very manifestly it is a tax upon the railroad company. . . . That its ultimate effect may be to increase the cost of transportation must be admitted. . . . Still it is not a tax upon transportation, or upon commerce. . . ." [1061]

Insofar as it drew a distinction between these two cases, the Court did so in part on the basis of *Cooley*, in that some subjects embraced within the meaning of commerce demand uniform, national regulation, whereas other similar subjects permit of diversity of treatment, until Congress acts. The Court also based its decision on the concept of a "direct" tax on interstate commerce, which was impermissible, and an "indirect" tax, which was permissible until Congress acted.[1062] Confusingly, the two concepts were sometimes conflated and sometimes treated separately.

In any event, the Court itself was clear that interstate commerce could not be taxed at all, even if the tax was a nondiscriminatory levy applied alike to local commerce.[1063] "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it . . . ; or upon persons or property in transit in interstate commerce." [1064] Some taxes, however, were sustained because they impose only an "indirect" burden. These included both generally applicable property taxes and taxes in lieu of property taxes, even if they were imposed on corporations operating instrumentalities of interstate commerce.[1065] A good rule of thumb in these cases is that taxation was sustained if the tax was imposed on some local, rather than an interstate, activity, or if the tax was exacted before interstate movement had begun or after it had ended.

An independent basis for invalidation was that the tax was discriminatory, in that its impact was intentionally or unintentionally felt by interstate commerce and not by local commerce, perhaps in pursuit of parochial interests. Many of the early cases actually involving discriminatory taxation were decided on the basis of the im-

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[1061] 82 U.S. at 294. This case was overruled 14 years later, when the Court voided substantially the same tax in Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887).

[1062] *See* The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913) (reviewing and summarizing at length both taxation and regulation cases). *See also* Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298, 307 (1924).

[1063] Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

[1064] The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 400–401 (1913).

[1065] The *Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 232 (1873). *See* Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U.S. 439 (1894); Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895). *See* cases cited in J. HELLERSTEIN & W. HELLERSTEIN (8th ed.), *supra*, at 195 *et seq*.