

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

merce clause protected only against the risk of double taxation.¹⁰⁹⁵ In *Northwestern States Portland Cement Co. v. Minnesota*,¹⁰⁹⁶ the Court reasserted the principle expressed earlier in *Western Live Stock*, that the Framers did not intend to immunize interstate commerce from its just share of the state tax burden even though it increased the cost of doing business.¹⁰⁹⁷ *Northwestern States* held that a state could constitutionally impose a nondiscriminatory, fairly apportioned net income tax on an out-of-state corporation engaged exclusively in interstate commerce in the taxing state. Thus, “[f]or the first time outside the context of property taxation, the Court explicitly recognized that an exclusively interstate business could be subjected to the states’ taxing powers.”¹⁰⁹⁸ In *Northwestern States*, where a foreign corporation maintained a sales office and employed sales staff in the taxing state for solicitation of orders for its merchandise, where an order was accepted at a home office in another jurisdiction, and where merchandise was shipped to customers in the taxing state, the corporation could be liable to pay the state’s income tax on that portion of the net income of its interstate business as was attributable to such solicitation.

Yet the following years saw inconsistent rulings that turned almost completely upon the use of or failure to use “magic words” by legislative drafters. That is, it was constitutional for the states to tax a corporation’s net income, properly apportioned to the taxing state, as in *Northwestern States*, but no state could levy a tax on a foreign corporation for the privilege of doing business in the state, both taxes being alike in all other respects.¹⁰⁹⁹ In *Complete Auto Transit, Inc. v. Brady*,¹¹⁰⁰ however, the Court overruled the cases embodying this distinction and articulated a standard that has governed the cases since.

The tax in *Brady* was imposed on the privilege of doing business as applied to a corporation engaged in interstate transporta-

¹⁰⁹⁵ Compare *Freeman v. Hewit*, 329 U.S. 249, 252–256 (1946), with *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 258, 260 (1938).

¹⁰⁹⁶ 358 U.S. 450 (1959).

¹⁰⁹⁷ 358 U.S. at 461–62. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). For recent reiterations of the principle, see *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 310 n.5 (1992) (citing cases).

¹⁰⁹⁸ Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 54 (1987).

¹⁰⁹⁹ *Spector Motor Service, Inc. v. O’Connor*, 340 U.S. 602 (1951). The attenuated nature of the purported distinction was evidenced in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), in which the Court sustained a nondiscriminatory, fairly apportioned franchise tax that was measured by the taxpayer’s capital stock, imposed on a pipeline company doing an exclusively interstate business in the taxing state, on the basis that it was a tax imposed on the privilege of conducting business in the corporate form.

¹¹⁰⁰ 430 U.S. 274 (1977).