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A Critical Analysis of Garrett Freightlines, Inc. v. Montana Railroad Commission

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NOTES

A CRITICAL ANALYSIS OF *GARRETT FREIGHT LINES, INC. v. MONTANA RAILROAD COMMISSION*

John Alke

On March 15, 1973, the Montana supreme court handed down its decision in *Garrett Freightlines, Inc. v. Montana Railroad Commission*.[1] Garrett, a regulated motor carrier, had challenged the validity of Montana's gross receipts tax on motor carriers.[2] That tax had had substantial impact not only on Garrett as a taxpayer[3] but on the funding of the Public Service Commission for which it provided a major source of funds.[4] The court, in a 3-2 decision, sustained Garrett's challenges and struck down the tax as being in violation of the commerce clause of the United States Constitution[5] and the due process clauses of both state and federal constitutions.[6]

The decision is unusual in that the weight of precedent would have seemed to compel the court to reach an opposite conclusion. Not only does the opinion run contrary to the general body of the case law, but this specific tax had earlier been sustained by Montana's supreme court,[7] and the United States Supreme Court.[8] The Majority opinion exhibits an extreme insensitivity to the constitutional issues involved.[9] It fails to deal with their crucial aspects, yet is still able to confidently conclude that the tax is unconstitutional. For example, the tax is declared in violation of the commerce clause without the aid of a single U.S. Supreme Court opinion to elucidate the meaning of that clause which has seldom been held self-explanatory.

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1. Garrett Freightlines, Inc. v. Montana Bd. of R.R. Comm'rs, 161 Mont. 482, 507 P.2d. 1040 (1973).

2. Revised Codes of Montana, §8-127 (1947) [hereinafter cited as R.C.M. 1947].

3. In 1971, Garrett paid $33,211.94 in gross receipts taxes; letter from the Public Service Commission, March 19, 1975.

4. The Public Service Commission collected $630,394.36 in gross receipts taxes from all carriers in 1971; letter from the Commission, March 19, 1975.

5. U.S. CONST. art. I, §8.

6. U.S. CONST. amend. XIV; MONT. CONST. art. III, §27.

7. Board of Rwy. Comm'rs v. Aero Mayflower Transit Co., 119 Mont. 118, 172 P.2d 452 (1946).

8. Aero Mayflower Transit Co. v. Board of Rwy. Comm'rs. 332 U.S. 495 (1947).

9. The apparent insensitivity of the court seems symptomatic of a general mood or philosophy in this area. In *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, 153 Mont. 352, 463 P.2d 470 (1970), the court invalidated Montana's $1.00 enplaning tax. An identical tax was upheld by the U.S. Supreme Court in *Evansville Airport v. Delta Airlines*, 405 U.S. 70 (1972).

Because of the usual position taken by the Montana supreme court, and the paucity of authority cited for it, the court's rationale in invalidating the tax should be subjected to a thorough, segment-by-segment analysis.

I. THE CASE

Garrett Freightlines, Inc., a trucking company, was incorporated in Idaho, and engaged in the business of transporting general commodities. It operated as both an interstate and intrastate shipper[10] in Montana, and accordingly operated under both an Interstate Commerce Commission and a Montana Public Service Commission certificate of public convenience and necessity. A motor carrier is defined by the Montana Motor Carrier Act, R.C.M. 1947, §8-101 *et seq.* [hereinafter cited as Act] as:

> every person or corporation, their lessees, trustees or receivers appointed by any court whatsoever, operating motor vehicles upon any public highway in the State of Montana for the transportation of persons and/or property for hire, on a commercial basis either as a common carrier or under private contract, agreement, charter or undertaking . . . .[11]

In addition, "The words 'for hire' mean for remuneration of any kind, paid or promised, either directly or indirectly, or received or obtained through leasing, brokering, or buy-and-sell arrangements where a remuneration is obtained or derived for transportation service . . . ."[12]

Garrett undisputably fell within this category as a common carrier for hire. As such it was subject to the gross receipts tax imposed by the Act, in addition to any other taxes imposed by law.[13] Garrett did dispute the fairness of the tax in that private carriers, those not falling within the definition of "for hire", were not motor carriers as defined by the Act and not subject to the tax. In addition, Garrett objected to the fact that certain transportation movements were specifically exempted:

> (1) Motor vehicles used solely in carrying nonmanufactured agricultural commodities.

10. An intrastate shipment is one whose origin and destination lie within the same state. An interstate shipment is one with only an origin or destination in the state, or is merely traversing the state.

11. R.C.M. 1947, §8-101(8).

12. R.C.M. 1947, §8-101(9).

13. For example, gasoline taxes are indirectly imposed on carriers by R.C.M. 1947, §§84-1801 to 84-1841, and a gross vehicle weight tax is imposed by R.C.M. 1947, §§53-615 to 53-643.

(2) School busses transporting for school related activities.
(3) Transportation in regular course of business of employees, materials, and supplies by a person or firm engaged exclusively in construction or maintenance of highways.
(4) Transportation in regular course of business of employees, materials and supplies by a person or firm engaged exclusively in logging or mining operations so far as construction or production is concerned.
(5) Transportation within a town of less than 500 persons or a commercial area as designated by the Public Service Commission.
(6) Transportation of periodicals, magazines, and newspapers.
(7) Tow trucks, wreckers, and ambulances.[14]

Garrett also objected to the formula used to compute the tax. It contended that it did not accurately reflect a value for its use of Montana's highways. The formula itself was simple, differing slightly between intrastate and interstate operations in order to apportion interstate receipts to only Montana operations.

Intrastate Tax = Total Gross Operating Revenue X .00575
Interstate Tax = Total Gross Operating Receipts X Montana Miles Traveled/Total Miles Traveled X .00575[15]

The court agreed with Garrett's contentions, invalidating the tax on two broad grounds: that the tax denied Garrett equal protection under the law, and that the formula did not reasonably reflect the value of road use by Garrett.

II. The Equal Protection Arguments

This court finds that the revenue collected by the Public Service Commission under Section 8-127 R.C.M. 1947 constitutes an unconstitutional levy under Article III Section 27 of the Montana Constitution and the Fourteenth Amendment of the Constitution of the United States in that said levy denies Garrett uniformity of taxation, is discriminatory, confiscatory, prohibitive, arbitrary, and is a tax on the privilege of doing business.[16]

The court opens its analysis of the issues by a unique examination of the basic concepts involved. It asserts that a tax on the privilege of doing business is a violation of article III, section 27 of the Montana Constitution, and the 14th Amendment of the United States Constitution. It is an accepted proposition that a state may tax occupations for the privilege of doing business. License taxes on

14. R.C.M. 1947, §8-101(8).
15. R.C.M. 1947, §8-127. .
16. Garrett Freightlines, Inc. v. Board of R.R. Comm'rs, *supra* note 1 at 486.

everything from carbon black producers[17] to micaceous mineral miners[18] testify to the range of occupations taxed. What the court probably had in mind was the prohibition against a state taxing an interstate enterprise for the privilege of doing business as a purely interstate enterprise such as in *Spector Motors v. O'Connor*,[19] where the Connecticut state court had construed a tax on interstate shippers as for the privilege of doing business in Connecticut.

However, the concept of *Spector Motors* and the Montana court's statement stand on two entirely different footings. Except in the sense that the due process clause requires sufficient contact with the taxing state,[20] the United States Supreme Court has made it abundantly clear that it is not that clause, but the commerce clause, which prohibits the privilege tax on interstate commerce. "Courts have invoked the commerce clause to invalidate state taxes on interstate carriers only upon finding that . . . (2) the tax was imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance or for administration of road laws; . . ."[21] The Montana court's statement is thus incorrect as a statement of law.

In addition, the court's statement does not seem to be a correct application of the law to the facts in the instant case. Although this is not a tax on the privilege of doing business, such a tax could constitutionally be imposed on Garrett. Garrett is not a business engaged solely in interstate commerce but does a substantial amount of business as an intrastate shipper.[22] Thus, according to the United States Supreme Court, a tax could be imposed on Garrett for the privilege of doing business on the basis of its intrastate operations.[23]

What the court stresses with its language "denial of uniformity of taxation", "discriminatory", and "arbitrary" is that the tax denies Garrett equal protection. It buttresses this contention with three arguments: that the tax favors railroad trucking subsidiaries, that it discriminates against common carriers in favor of private

17. R.C.M. 1947, §§84-1001 to 84-1010.

18. R.C.M. 1947, §§84-5901 to 84-5909.

19. Spector Motor Service v. O'Connor, 340 U.S. 602 (1951).

20. Norton Co. v. Dept. of Revenue, 340 U.S. 534,537 (1951); General Motors Corp. v. Washington, 377 U.S. 436, 441 (1964).

21. Capitol Greyhound Lines v. Brice, 339 U.S. 542, 544 (1950).

22. In Garrett's Exhibit A, Docket No. 6206, entitled "In the Matter of the Petition of Garrett Freightlines, Inc. for authority to increase all intrastate rates and charges" (Montana Public Service Commission), Garrett gives its 1973 intrastate revenues as $263,094.

23. Western Livestock v. Bureau of Revenue, 303 U.S. 250, 258 (1938); Sprout v. City of South Bend, 277 U.S. 163, 171-172 (1928); Spector Motor Service v. O'Connor, *supra* note 19 at 609-610.

carriers, and that the Act's exemptions are not rational classifications.

A. *The Railroad Subsidiary*

The argument that the tax denies Garrett uniformity of taxation because it favors railroad trucking subsidiaries is of questionable merit. The court reasons that by virtue of the parent-subsidiary relationship, the subsidiary trucking company purposely undercharges the railroad parent, thereby reducing its gross revenues and its tax liability. The dissent points out that even if true, the fact that the subsidiary can evade the tax points to the impropriety of the rate, not the tax.[24] By the majority's reasoning, an income tax would seem unconstitutional by virtue of a person's ability to reduce his apparent taxable income by failure to report all his wages. Neither the appellate briefs nor the court explain how this improper agreement is facilitated. The majority opinion specifically refers to railroad subsidiaries holding certificates of public convenience and necessity.[25] Such carrier's rates are usually regulated not by private agreement but by tariff submitted to the Public Service Commission.[26] If those are indeed the kinds of rates in question, Garrett would have a remedy by intervening in the railroad subsidiaries' rate applications.[27] That a tax may be evaded is certainly not grounds for invalidation.

B. *The Carrier for Hire—Private Carrier Distinction*

The court goes to great lengths to show that Garrett's exhibits to the trial court demonstrated an unconstitutional discrimination against Garrett, because private carriers were not taxed.

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24. Garrett Freightlines Inc. v. Board of R.R. Comm'rs., *supra* note 1 at 497.

25. *Id.* at 488.

26. There are three classes of motor carriers which hold certificates of public convenience and necessity: Class A motor carriers, those carriers operating between fixed termini over fixed routes at fixed rates; Class B motor carriers, those carriers operating at fixed rates but not between fixed termini over fixed routes; and Class C motor carriers, those motor carriers whose rates and charges are fixed by private agreement, R.C.M. 1947, §8-102. The rates of all Class A and B carriers must be filed and approved by the Commission, R.C.M. 1947, §8-104.2. However, R.C.M. 1947, §8-104.1 mandates that *all* rates and charges be regulated not only in the best interests of the public but in the best interests of the three different classes of carriers. In addition, R.C.M. 1947, §8-103(c) specifically gives the Commission authority to set maxima and minima for Class C carriers. If Garrett's allegations were in fact true, it would seem that it has an ample remedy which would compel the railroad subsidiaries not to improperly evade the tax by understating the tax.

27. Any rate hearing is a "contested case" under the MONTANA ADMINISTRATIVE PROCEDURES ACT, R.C.M. 1947, §82-4202(3). As such, Garrett, a party as defined in R.C.M. 1947, §82-4202(6), would have a right to participate.

> Garrett's witnesses in their testimony indicate that the number of private carriers not subject to the gross revenue tax is substantial, and on the increase yearly. The witnesses further showed that Garrett is in competition with its own customers. These customers are electing to become private carriers in an alarming number of cases, and they are not subject to the gross revenue tax.
> Of equal concern and of grave importance is the use that such private carriers make of Montana's highways.[28]

On a superficial level, this is one of the few statements in American jurisprudence that implies competition is unconstitutional. On the specific issue of discrimination favoring private carriers, the court's statements fly in the face of well-established principles set down by the United States Supreme Court.

> Common carriers for hire, who make the highways their place of business may properly be charged an extra tax for such use.[29]

This constitutionally authorized maltreatment of common carriers stems from the unique relationship arising with the state when commerce moves over the state's highways. The state owns the highways, and the inevitable destruction of those thoroughfares through use requires that a state have the power to pass regulations governing them.[30] That power leads to the necessary corollary that a state be able to make the users of its thoroughfares contribute to their construction and upkeep.[31] As a part of its power to protect and foster its highway system, the state has power to classify traffic according to its destructive tendencies and tax it accordingly.[32] Thus, it is within the state's power to determine that one who uses the highway for his business is a heavier, hence more abusive, user.[33]

Even if there are private carriers who use the highways as much or more than common carriers, the rationale does not break down. It is clear that the tax must be assessed for a proper purpose. That purpose can be gleaned either from the statute itself or a demonstrable relationship between the tax and the alleged purpose for its imposition.[34] Montana's statute specifically identifies the tax as being imposed for the privilege of road use,[35] and the United States

28. Garrett Freightline, Inc. v. Board of R.R. Comm'rs, *supra* note 1 at 484.
29. Clark v. Poor, 274 U.S. 554, 557 (1927).
30. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).
31. Hendricks v. Maryland, 235 U.S. 610 (1915).
32. Morf v. Bingaman, 298 U.S. 407, 411-412 (1936); Clark v. Paul Gray, Inc., 306 U.S. 583, 593 (1934).
33. Clark v. Paul Gray, Inc., *supra* note 32.
34. McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 181 (1940) (concurring opinion); Aero Mayflower Transit Co. v. Board of Rwy. Comm'rs, *supra* note 8 at 503; Capitol Greyhound Lines v. Brice, *supra* note 21 at 554.
35. R.C.M. 1947, §8-127.

Supreme Court has recognized that it is levied for a proper purpose.[36] However, the significant factor, as far as the instant case is concerned, is that the tax proceeds and purpose do not have to be directed to physical upkeep and maintenance, but may be for the cost of administering highway regulations. As stated by the United States Supreme Court:

> it is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the act; and some for other purposes. This if true is immaterial since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiff.[37]

It is clear from the opinions of the Supreme Court that administration costs are themselves a proper purpose for such taxation as long as they are reasonable in amount.[38] Additional leeway is put into the state's taxing system in terms of both justifying the tax, and spending the proceeds in that the tax funds do not have to be earmarked for special purposes and spent accordingly, but may go into the general fund.[39] The state has a mix of "proper purposes" for the tax, and can apparently alter that mix without affecting the validity of the tax. A good example of the interrelationship of these factors, and their relationship to a classification scheme, is found in the caravan cases: *Morf v. Bingaman*,[40] *Ingels v. Morf*,[41] and *Clark v. Paul Gray, Inc.*[42] At issue in all three cases was a tax on vehicles being transported on their own wheels for sale in the concerned state. Two cars were linked together, the first being driven and the second towed. In *Morf*, Arizona imposed a $7.50 tax per vehicle for the privilege of road use. Those transporting cars for resale complained that they were being discriminated against in favor of private vehicle users. The Supreme Court upheld the tax on the grounds that it was justifiable for Arizona to conclude that the caravans caused more damage to the highways because they slid more going around corners. California imposed basically the same tax but dedicated it solely to the cost of administering the regulations. The Supreme Court invalidated this tax in *Ingels*, as adminis-

36. Aero Mayflower Transit Co. v. Board of Rwy. Comm'rs, *supra* note 8 at 503.
37. Clark v. Poor, *supra* note 29 at 557.
38. Clark v. Poor, *supra* note 29 at 557; Interstate Transit Co. v. Lindsay, 283 U.S. 183, 186 (1931); Ingels v. Morf, 300 U.S. 290, 294 (1937).
39. Aero Mayflower Transit Co. v. Board of Rwy. Comm'rs. *supra* note 8 at 502-503.
40. Morf v. Bingaman, *supra* note 32.
41. Ingels v. Morf, *supra* note 38.
42. Clark v. Paul Gray, Inc., *supra* note 32.

tration costs could only be estimated at $25,000, while the tax brought in $225,000 in revenue. After the decision, California amended the tax to resemble Arizona's, in that it also compensated for the stated privilege of road use. The Court sustained the tax in *Clark*.

It cannot be questioned that one of the purposes of Montana's gross receipts tax on motor carriers was to cover administration costs. Although payment of the tax was made directly into the general fund at the time of its invalidation,[43] the tax was originally earmarked for the Public Service Commission.

> All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the same to the credit of a special fund designated as "motor carrier fund"; such fund shall be available for the purposes of defraying the expenses of administration of this act, and the regulation of business herein described, and shall be accumulative from year to year.[44]

Yet the tax does not suffer the infirmity of *Ingels* as the tax is levied:

> In addition to all other licenses, fees, and taxes imposed upon motor vehicles in this state *and in consideration of the use of the highways of this state* . . . . (emphasis supplied)[45]

Clearly Montana's tax, as such, has just as broad a constitutional base to justify its scheme of differentiation between carrier for hire and private carrier as that approved in *Clark*.

Thus, there is a clear point of distinction that justifies the differing treatment of private and common carriers. As a valid exercize of its duties and powers under *South Carolina State Highway Department v. Barnwell Brothers*,[46] the Public Service Commission regulates carriers for hire in the public interest by controlling their rates, fixing routes, and generally insuring their compliance with applicable law. The Montana supreme court has never questioned the propriety of these functions—nor could they.[47] In the light of the United States Supreme Court's decisions that a state may tax a common carrier for its additional use of the highways and the cost of its regulation, it is difficult to understand how Montana's supreme court can accept the validity of the Public Service Commis-

43. R.C.M. 1947, §84-1902.
44. R.C.M. 1947, §8-117.
45. R.C.M. 1947, §8-127.
46. South Carolina State Highway Dept. v. Barnwell Bros., *supra* note 30.
47. State v. Healow, 98 Mont. 177, 38 P.2d 285 (1934); Fulmer v. Board of R.R. Comm'rs, 96 Mont. 22, 28 P.2d 849 (1934); Barney v. Board of R.R. Comm'rs, 93 Mont. 115, 17 P.2d 82 (1932).

sion's function, yet deny it the ability to defray the costs generated by that function. Even if some common carriers and private carriers physically abuse the highways to the same extent, the common carriers will always impose a greater financial burden on Montana because of the cost of administering the Motor Carrier Act.

III. The Exemptions to the Act

The Montana court also concludes that Garrett was denied equal protection in that the specific exemptions to the act, listed in R.C.M. 1947, §8-101(8), are arbitrary.[48] How the court reaches this conclusion is not made clear, as the court's discussion is devoted to the carrier for hire—private carrier distinction. The sum and substance of the court's authority appears to be a dictionary:

> It cannot be denied that the exempt vehicles and private carriers make as much and as arduous use of the highways as do the plaintiff and similar carriers. There is no distinction or just classification of the exempt carriers and private carriers as they are all engaged in business for a profit and use the highways of the State of Montana in such business. It appears that the exemptions and the exclusion of private carriers is a result of successful lobbying and not because of any real classification distinctions. To classify has been defined as "To group or segregate in classes which have systematic relations." (Webster's New Collegiate Dictionary, Second Edition). From such definition the exempt vehicles and private carriers seem to be excluded on an arbitrary basis rather than on a classification of systematic relations.[49]

The court, of course, is entirely correct that an arbitrary classification is defective, but its rush to that conclusion, unsupported by competent authority, is directly contrary to many of the decisions of the United States Supreme Court.

The court's analysis clearly is limited to the internal logic of the taxation scheme itself. Such a restricted view is not the proper approach to determine the constitutionality of the tax.

> There is nothing in the present record to advise us as to the extent or regularity of traffic in farm and dairy products. Be that as it may, exemption of a tax stands on far different footing, though the purpose of the tax is the upkeep of the highway. At such times the legislature may go far in apportioning and classifying to the end that public burdens may be distributed in accordance with its own conception of policy and justice.[50]

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48. *See* material, *supra* note 15.

49. Garrett Freightlines, Inc. v. Board of R.R. Comm'rs, *supra* note 1 at 490.

50. Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285, 293 (1935).

The court should have examined the broader implications of the tax exemptions.

Two good examples are the exemptions for school buses and transportation of employees, supplies and equipment for highway construction. Both transportation movements are services rendered to the public at direct public expense. Increasing motor vehicle taxes would directly increase the burden on property tax payers as the tax would be passed on as a higher cost to the general public. Regarding the exemption of school buses, the Supreme Court has said, "The distinct public interest in this sort of transportation affords sufficient reason for the classification."[51] There is likewise ample justification for exempting the transportation of property within small towns and villages. The state may feel that the administration costs are so prohibitive that it would cost the state more to enforce the tax and other regulations than to exempt it from the operation of the act.[52] A question could be raised, however, as to the discretion vested in the commission in determining when this exemption will apply.

The question of the validity of an exemption for agricultural commodities, like Montana's, has been raised numerous times with at least five cases reaching the United States Supreme Court. In four of the cases the exemption was sustained.[53] Only in one case, *Smith v. Cahoon*, was the tax invalidated.[54] One reason for sustaining the tax was a recognition that the tax, while nominally imposed on the carrier, is really paid by the shipper,[55] and that agriculture is already heavily burdened.[56] Another, and the prime reason, is that this type of transportation movement is usually seasonal in nature.[57] In *Smith*, the invalidation rested on fairly narrow grounds. A general class of carrier was exempted from paying a bond or carrying insurance because these vehicles were carrying agricultural commodities. The Court, looking closely into the specific intent to provide a pool of funds for possible tort claimants, concluded that the public interest would be disserved by making such an exemption. The Court, in retrospect, in *Aero Transit v. Georgia Public*

51. Continental Baking Co. v. Woodring, 286 U.S. 352, 357 (1932).

52. *Id.* at 369.

53. Continental Baking Co. v. Woodring, *supra* note 51; Sproles v. Binford, 286 U.S. 374 (1932); Hicklin v. Coney, 290 U.S. 169 (1933); Aero Mayflower Transit Co. v. Georgia Public Service Commission, *supra* note 50.

54. Smith v. Cahoon, 283 U.S. 553 (1933).

55. Taxes paid under R.C.M. 1947 §8-127 are a proper cost item in considering what rates are necessary to generate a proper rate of return.

56. Aero Mayflower Transit Co. v. Georgia Public Service Commission, *supra* note 50 at 291.

57. Hicklin v. Coney, *supra* note 53 at 177.

Service Commission also felt that the exemption in *Smith* cut too broadly, including too many carriers without sufficient reason.[58] A broad reading of *Smith* as a rationale for a possible invalidation of an exemption such as Montana's should be avoided. In the first place *Smith* is an insurance case, applying the exemption to a broad class, while in Montana insurance is not an issue. The exemption has been narrowly drawn to include only carriers hauling exclusively agricultural commodities. More importantly, the *Smith* case was followed by *Aero* and arguably the *Smith* standards no longer apply. *Aero* specifically stands for the proposition that the permissible public policy considerations may be outside the specific purpose of the tax.[59] In *Smith* the analysis was concerned solely with the internal logic of the regulation.[60]

The preceding types of analysis should likewise be applied to the remaining exemptions: newspapers, periodicals, magazines, ambulances, and wreckers. Like the seasonal nature of agricultural commodities, these transportation movements are sporadic. Wreckers and ambulances ply the highways only when emergencies arise. Even daily newspapers are of a special nature in that they would be transported only at a certain time in the day to specific points. More importantly, a public policy may be served by not adding to the cost of chance misfortune (emergency vehicles) or educational enlightenment (newspapers and periodicals). Clearly some of these exemptions make more sense than others. No one can seriously question the important public interest in transporting school children while many may question a public policy which bestows benefits on companies such as the large grocery chains through a general exemption for agricultural commodities. A court may, and probably is able to, develop rationales which arrive at opposite conclusions from those presented here. However, that is not the proper function of a court.

> When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgement, and its action within its range of discretion cannot be set aside because compliance is burdensome.[61]

As pointed out by the dissent,[62] there is perhaps an additional reason for the exemptions in the Motor Carrier Act, in that roughly the

58. Aero Mayflower Transit Co. v. Georgia Public Service Commission, *supra* note 50 at 291.
59. *Id.* at 293.
60. Smith v. Cahoon, *supra* note 54 at 567.
61. Sproles v. Binford, *supra* note 53 at 389.
62. Garrett Freightlines, Inc. v. Board of R.R. Comm'rs, *supra* note 1 at 497.

same exemptions to the Interstate Commerce Commission's authority are made by statute.[63] Although that statute specifically states that it is not intended to affect a state's taxing power, it does apparently prohibit any attempt by the state to regulate these subjects of commerce if it is interstate in nature (with the exception of safety regulations).[64] Thus, if one of the avowed purposes of the tax is to pay administration costs it would be entirely consistent to exclude those prohibited subjects not only from regulation but also from taxation.

IV. The Invalid Formula Argument

> The exaction imposed by Section 8-127 R.C.M., not being related to the use of the highways is a tax only on the income producing ability of a vehicle, it is confiscatory, and the statute does not take into consideration Garrett's profit or loss from the trucking operation.[65]

Gross receipts taxes were originally held in low constitutional esteem by the Supreme Court.[66] Even attempts to apportion such a tax only to incidents within the taxing state were fruitless if the tax somehow touched interstate receipts,[67] on the reasoning that gross receipts were just too crude a measure.[68] The Court, however, made a considerable policy reversal in *Western Livestock v. Bureau of Revenue*,[69] sustaining a gross receipts tax on essentially local activity although some interstate receipts would be involved. The same general theory applies to taxation of transportation over a state's highway. In *Central Greyhound Line v. Mealey*, the Court, while invalidating parts of the tax, stated: "On the record before us the tax may constitutionally be sustained on the receipts from the transaction apportioned as to mileage within the state."[70] Such a tax was also fully upheld in *Canton Railroad Co. v. Rogan*,

> The objection to Maryland's tax on the grounds that interstate commerce is involved is not well taken. It is settled that a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to business done within the state

63. 49 U.S.C. §303(b).
64. State Corp. Comm'n v. Bartlett & Co. Grain, 338 F.2d 495 (10th Cir. 1964).
65. Garrett Freightlines, Inc. v. Board of Rwy. Comm'rs, *supra* note 1 at 492.
66. Fargo v. Michigan, 121 U.S. 230 (1887); Phil. & S. Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887).
67. Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U.S. 217 (1908); Meyer v. Wells, Fargo & Co. 223 U.S. 298 (1912).
68. United States Glue v. Oak Creek, 247 U.S. 321, 329 (1918).
69. Western Livestock v. Bureau of Revenue, *supra* note 23 at 255.
70. Central Greyhound Lines v. Mealey, 334 U.S. 653, 663 (1948).

> (see *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 255) and not reaching any activities carried on beyond the borders of the state. Where transportation is concerned, an apportionment according to mileage within the state is an approved method *Greyhound Lines v. Mealey*, 334 U.S. 653, 663.[71]

Is Montana's gross receipts tax a proper one? The court doesn't really reach the issue, but it clearly is' The total receipts of Garrett are apportioned between mileage traveled in Montana, and miles traveled out of Montana:

> Total Receipts X Montana Mileage/Total Mileage X .00575 = Tax.[72]

As Garrett's activity in Montana increases, or its activity outside the state decreases, the portion of its receipts attributable to Montana will increase. The tax formula will reflect that fact by increasing the size of the second factor in the formula. Thus the court's statement that, "It does not rise with an increase in mileage or weight of the vehicle, but only upon the income producing ability of the vehicle"[73] is clearly incorrect.[74]

What the court loses sight of is the special nature of the tax. As discussed earlier, there is a special relationship between a state and its highways that makes it permissable for the state to charge even purely interstate commerce for their use. Because of the impossibility of arriving at any exact measure of road use, it is a settled point of law that the reasonableness of the charge is measured not by the formula which computes it, but the amount actually paid.

> Thus unless we are to depart from prior decisions, the Maryland tax based on the cost of the vehicles should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted.[75]

Judging by previous taxes upheld by the Supreme Court, Montana's tax produces a reasonable charge. In 1971, Garrett traveled 5,910,876 miles over Montana's highways and paid a gross receipts tax bill of $33,211.99.[76] In *Interstate Busses Corp. v. Blodgett*[77] the Supreme Court upheld a flat tax of $.01 per mile as a reasonable

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71. Canton R.R. Co. v. Rogan, 340 U.S. 511, 515 (1951).
72. R.C.M. 1947, §8-127.
73. Garrett Freightlines Inc. v. Board of R.R. Comm'rs, *supra* note 1 at 494.
74. The quoted portion of the court's opinion is drawn absolutely verbatim from appellee's brief, pages 33-34. That language in turn is a very close paraphrase of language appearing in *Interstate Transit Inc. v. Lindsay*, 283 U.S. 183, 190 (1931). However in that case the tax was a flat tax and did not have *any* variance according to mileage traveled.
75. Capitol Greyhound Lines v. Brice, *supra* note 21 at 545.
76. *See* materials, *supra* note 3.
77. .Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928).

charge. That scheme, if used in Montana, would have generated a tax liability for Garrett of $59,108 or roughly 85% greater than its liability under Montana's present tax scheme. In *Blodgett*, as in Montana, the carrier also paid a host of other taxes, but that does not per se effect the validity of the charge.[78]

It should be pointed out that under the court's analysis, *no* tax on gross receipts as a highway use tax could ever be sustained. The tax is invalidated "as not being related to highway use," but related solely to the income producing ability of the vehicle. It is also invalidated because it doesn't take into account Garrett's profits or losses. Those two criteria are totally contrary to one another. For the tax to reflect profits and losses, as the latter criterion requires, would require it to reflect income as a factor. Yet to do so would make it immediately defective under the first criterion as not being related to highway use.

V. CONCLUSION

The court's decision in *Garrett* finds little or no support in the substantive law regarding state taxation of interstate and intrastate motor carriers. The court has handed down a decision which totally upsets established law in the area, yet makes no attempt to explain the departure from precedent and provides little, if any, authority for its decision.

Perhaps the most disturbing facet of the whole opinion is the court's treatment of its prior decision *Bd. of RR. Comm'rs v. Aero Mayflower Transit*,[79] a decision upheld by the United States Supreme Court.[80] In *Aero*, Montana's gross receipts tax was specifically upheld. Immediately after that opinion the legislature amended R.C.M. 1947 §8-127, but only to incorporate the judicial construction imposed on the statute by the court in *Aero*.[81] There can be no doubt that *Aero* had to be overruled to reach the result in *Garrett*. Yet the court did not distinguish the case, overrule it, or sustain it. The decision is only mentioned once, as authority for overruling the tax in *Garrett*, a truly incongruous use.

> We hold that the gross revenue formula has no relationship to the use made by Garrett's vehicles in traveling the highways of the State of Montana and the tax varies according to the volume of interstate business. The Montana Supreme Court in the Rwy. Com. v. Aero Mayflower Tran., 119 Mont. 118, 172 P.2d 452, stated:

78. *Id.* at 251-252.
79. Board of Rwy. Comm'rs v. Aero Mayflower Transit Co., *supra* note 7.
80. Aero Mayflower Transit Co. v. Board of Rwy. Comm'rs, *supra* note 8.
81. Laws of Montana (1947), ch. 73 §2, *amending* R.C.M. 1947, §8-127.

> The company contends that in fixing the exactions imposed upon it, no distinction is made between large and small vehicles, or heavy and light loads, nor the numbers of miles travelled over the highways. *There is merit in this contention.* The heavier the load and the greater the number of miles travelled the greater the wear and tear on the roadway. It is obvious that the tax set up in section 3847.27 (section 8-127, R.C.M. 1947) was for the purpose of meeting this situation. A short trip and a light load would bring the carrier but little revenue whereas the heavier traffic and longer hauls would produce more revenue and require more taxes. (Emphasis supplied).

Garrett's testimony of witnesses and exhibits has shown that heavy loads and long hauls do not always produce more revenue.[82]

This citation and the material for which it is supposed to provide authority are drawn verbatim from Garrett's appellate brief.[83] In both instances it appears to be out of context. If the court had actually read and analyzed its previous opinion, the very next sentence would have seemed to suggest that the court should reach a conclusion opposite from the one in *Garrett*:

> Some discrimination may arise from the tax but in that respect we refer to what was said in *Hilger v. Moore*, 56 Mont. 146 at page 176, 182 Pac. 477 at page 484 where we find in the case of *Travelers Ins. Co. v. Connecticut* 185 U.S. 364, 371, 22 S. Ct. 673, 676, 46 L.Ed. 949 this rule applied: "But, further, the validity of this legislation does not depend on the question whether courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature . . . ."[84]

The *Garrett* opinion defies the making of generalizations to guide a legislature in enacting a constitutional tax on motor carriers for the privilege of highway use. As pointed out, parts of the opinion are so contrary to one another that it is arguable that under the opinion no such tax could constitutionally be imposed, yet it would seem to be beyond question that one can be. The inherent weakness of a decision such as *Garrett* is that it does nothing but reach a result. There is no rationale or analysis consistent enough to guide future courts or legislatures in resolving similar questions. *Garrett*

82. Garrett Freightlines, Inc. v. Board of R.R. Comm'rs, *supra* note 1, at 492-493.
83. Appellee's brief, pages 15-16.
84. Board of Rwy. Comm'rs v. Aero Mayflower Transit Co., *supra* note 7 at 136.

is an anomaly and hopefully will be treated as such and quickly overruled.[85]

85. As pointed out earlier, note 9 *supra, Garrett*, while anomolous in and of itself, is indicative of the type of result the Montana court reaches when dealing with the taxation of interstate business.