

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-357

TITLE AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,  
Appellants V. JAMES I. SCHEINER, SECRETARY,  
DEPARTMENT OF REVENUE, ET AL.

PLACE Washington, D. C.

DATE April 28, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN TRUCKING ASSOCIATIONS, :  
INC., ET AL., :  
Appellants, :  
V. : No. 86-357  
JAMES I. SCHEINER, SECRETARY, :  
DEPARTMENT OF REVENUE, ET AL. :  
-----x

Washington, D.C.  
Tuesday, April 28, 1987

The above-entitled matter came on for oral  
argument before the Supreme Court of The United States  
at 10:04 o'clock a.m.

APPEARANCES:  
STEPHEN M. SHAPIRO, ESQ., Washington, D.C.; on behalf  
of the appellants.  
SUELLEN M. WOLFE, ESQ., Chief Deputy Attorney General  
of Pennsylvania, Harrisburg, Pennsylvania.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 86-357, American Trucking Associations versus James I. Scheiner.

Mr. Shapiro, you may proceed whenever you are ready.

ORAL ARGUMENT BY STEPHEN M. SHAPIRO, ESQ.,  
ON BEHALF OF THE APPELLANTS

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court, this appeal brings before the Court two taxes, the axle tax and the marker fee which are imposed by the State of Pennsylvania on trucks that travel over its highways. Appellants challenge both of these taxes under the commerce clause as discriminatory against truckers who engage in interstate operations.

I should make clear at the outset that we do not question the amount of revenues that Pennsylvania seeks to raise by these taxes. We strongly support the right of every state to raise the funds which it needs to keep its highways safe and unobstructed. Our objection to these taxes goes only to their discriminatory character and to the penalty which they impose on those who choose to participate in interstate commerce.



1 I would like to begin today with a discussion  
2 of our flat tax challenge which relates to both the  
3 marker fee and the axle tax. The marker fee charged a  
4 flat sum of \$25 per truck. The axle tax charges \$36 per  
5 axle. That is \$180 for almost every truck that travels  
6 in interstate commerce.

7 Under the axle tax a truck that travels a few  
8 thousand miles in Pennsylvania pays the same amount as a  
9 truck that travels ten, twenty, or fifty times as much.  
10 Truckers from other states who are light users of  
11 Pennsylvania's highways end up paying the same amount as  
12 local truckers who use the highways on a regular basis.

13 The result is a cost per mile that is much  
14 higher on the average for the out-of-state trucker than  
15 for the in-state trucker, and that, as this Court has  
16 pointed out on several occasions, is the inherent  
17 discriminatory effect of a flat tax which favors local  
18 users and disfavors users from other states whose  
19 business requires them to move across the country in  
20 interstate commerce.

21 QUESTION: Mr. Shapiro, now do you know that  
22 per mile is the proper apportionment? I mean, maybe it  
23 should be per ton of traffic or per ton mile or -- there  
24 are lot of different -- per hours on the roads of  
25 Pennsylvania. There are a lot of different --

1 MR. SHAPIRO: That is correct.

2 QUESTION: -- apportionments you could come  
3 to, aren't there?

4 MR. SHAPIRO: That is correct, Your Honor.  
5 The Court's recent opinions have made clear that the  
6 measure of the tax has to be geared in some respect to  
7 the extent of the taxpayer's in-state presence and  
8 activity. Ordinarily when we are discussing usage of  
9 the highway that would be mileage but it may be mileage  
10 along with weight or other factors. There is no single  
11 way that --

12 QUESTION: There is no single one. It could  
13 be hours on the road.

14 MR. SHAPIRO: It could be hours on the road.  
15 That's correct.

16 QUESTION: Is that any different from the  
17 discrimination that exists with respect to the citizens  
18 of Pennsylvania themselves? I presume that every  
19 Pennsylvania citizen who purchases a car and registers  
20 it in the state pays a flat registration fee which isn't  
21 dependent on how much he uses the car. It is the same  
22 type of discrimination there, isn't it?

23 MR. SHAPIRO: There are many flat taxes that  
24 do not discriminate against interstate commerce at all.  
25 The Nippert problem arises --

1 QUESTION: But you call that discrimination  
2 anyway.

3 MR. SHAPIRO: But it isn't necessarily  
4 commerce clause discrimination unless the out-of-state  
5 taxpayer is burdened in a way that the in-state taxpayer  
6 is not. The Nippert problem arises --

7 QUESTION: One wouldn't normally apply the  
8 term discrimination to that, would one?

9 MR. SHAPIRO: Well, this Court did, of course,  
10 in Nippert, and I would like to make clear what the  
11 Nippert problem is. When a taxpayer moves in interstate  
12 commerce from state to state and can only spend a  
13 limited amount of time in any particular state, that is  
14 where this problem is at its most acute.

15 In order to get the full benefit of the flat  
16 tax that the local taxpayer gets he'd have to give up  
17 the interstate business. Inherently he is spending 2  
18 percent or 5 percent of his time in each state around  
19 the country, and when he faces a large, unapportioned  
20 flat tax in state after state after state, that is what  
21 produces the difficulty for the interstate carrier.

22 As I have suggested to Justice Scalia, the  
23 real problem here is the problem of cumulative burdens  
24 which the trucker faces when he passes from state to  
25 state and he gets hit by flat taxes again and again. we

1 now have these flat taxes in seven different states, and  
2 additional states are now considering them. This means  
3 that the cost of engaging in a multi-state trucking  
4 business gets higher and higher the more the taxpayer  
5 attempts to participate in our national common market  
6 economy.

7 QUESTION: Mr. Snaprio, Congress is taking a  
8 look at this problem, isn't it?

9 MR. SHAPIRO: Congress is taking a look only  
10 at the administrative facets of state taxation of  
11 highways. It's not looking at the substance of the  
12 taxes, the discriminatory content of the taxes, and we  
13 think that is the significant --

14 QUESTION: It just seems to me that this Court  
15 in rather a long line of cases has basically approved  
16 this flat tax method --

17 MR. SHAPIRO: There is no question that the  
18 Aero Mayflower --

19 QUESTION: -- and there may be quite a  
20 reliance interest now of the states on that system, and  
21 maybe it isn't the best, but do you think we have to  
22 recognize the precedents?

23 MR. SHAPIRO: Well, I think the precedents are  
24 the heart of this, and I would like to address them in  
25 some detail. We say that these precedents have been out



1 of step with this Court's recent decisions ever since  
2 the Complete Auto Decision and ever since Commonwealth  
3 Edison. For a substantial period of time now the  
4 measure of the taxes had to be related to the extent of  
5 the taxpayer's in-state presence and activity, so the  
6 law changed, we say, with the watershed decision in  
7 Complete Auto and in Commonwealth Edison.

8 QUESTION: Well, but the case of Massachusetts  
9 against the United States, I think, cited those  
10 precedents again with approval even after Complete Auto.

11 MR. SHAPIRO: There is no question that the  
12 cases have continued to be cited. In the Massachusetts  
13 case we were talking about a tax by the United States, a  
14 single sovereign.

15 There was no problem of cumulative burdens  
16 there, and every taxpayer had a voice in the councils of  
17 the Federal Government, and this Court placed great  
18 emphasis on that. Now, the out-of-state drivers don't  
19 have any voice in the Pennsylvania legislature when this  
20 discriminatory legislation is imposed, and I think if  
21 the Court focuses on the economic realities of these  
22 cumulative burdens it will be clear that the more modern  
23 approach under this Court's decisions is the applicable  
24 approach.

25 QUESTION: Isn't there quite an administrative

1 burden for the states to try to collect a tax on some  
2 basis that actually reflects the weight of the vehicle  
3 and the miles traveled? That is kind of hard to do,  
4 isn't it?

5 MR. SHAPIRO: That is a critical issue, and I  
6 think it is important to recognize that every state in  
7 the United States has mileage based taxes today.  
8 Seventy or 80 percent of all highway taxes in every  
9 state are raised by this mileage based system, including  
10 Pennsylvania, and so to say that the system is not in  
11 place to collect more money in a nondiscriminatory way  
12 is just wrong.

13 Pennsylvania's brief concedes this point, that  
14 most of their taxes are raised by their fuel taxes,  
15 registration fees, apportioned income tax, so there  
16 really is no administrative convenience argument left  
17 which favors this flat tax approach.

18 QUESTION: Well, I am not sure that is right,  
19 Mr. Shapiro. The kind of mileage based taxes you refer  
20 to, fuel tax and that sort of a thing, are really kind  
21 of self-regulating, but here what you would have  
22 Pennsylvania do is to somehow by voluntary declaration,  
23 I guess, find out the number of miles each truck travels  
24 in Pennsylvania.

25 MR. SHAPIRO: Well, Your Honor, our submission

1 is that the nondiscriminatory taxes such as the fuel  
2 taxes, they are already in place. The collection  
3 systems are operating. The enforcement mechanism is  
4 there. They simply need to be raised. We have  
5 advocated raises in the fuel taxes in several states.

6 QUESTION: Well, but that doesn't rise to the  
7 level of a constitutional principle to just say it would  
8 be better if Pennsylvania did it the way we want it to.

9 MR. SHAPIRO: In the Nippert case this Court  
10 pointed out if there are less discriminatory  
11 alternatives available to the state that is of critical  
12 importance in deciding whether the discrimination can be  
13 countenanced under the Constitution. Now, here we have  
14 every state in the country using these nondiscriminatory  
15 alternatives.

16 There are only a handful of states that have  
17 relied on the flat taxes. Pennsylvania itself raises  
18 most of its taxes through nondiscriminatory taxes.  
19 There simply is no need to raise money by a  
20 discriminatory tax, and I think the Court will  
21 appreciate the importance of this if you consider one  
22 example that demonstrates the economic impact of these  
23 flat taxes.

24 If every state in the country had a flat tax  
25 just like the Pennsylvania axle tax, that would mean a

1 trucker with a local business in Pennsylvania would pay  
2 a maximum of \$180 in this flat tax, but if a trucker  
3 spread the same number of total miles over a 48-state  
4 basis it would cost that trucker \$9,000. That is the  
5 penalty for engaging in interstate commerce. That is  
6 the cost which is attached to letting your business  
7 participate in the national common market economy.

8 Now, if you have a fleet of trucks, a thousand  
9 trucks, the penalty is \$9 million. These are enormous  
10 penalties for engaging in interstate commerce.

11 QUESTION: Mr. Shapiro, if we could back up a  
12 minute, you said how fair school taxes were. Do you  
13 know that some states have school taxes that are picked  
14 up by head tax? How can you say that is fair?

15 MR. SHAPIRO: Well, there are many taxes such  
16 as head taxes or the --

17 QUESTION: I am not saying it is crucial, but  
18 I mean you have to consider it.

19 MR. SHAPIRO: That is correct, Your Honor.  
20 There are many different formulas for raising these  
21 taxes, and in the lion's share of the cases they don't  
22 discriminate against interstate commerce, which is the  
23 particular --

24 QUESTION: No, not at all.

25 MR. SHAPIRO: -- problem here that we are



1 concerned with. I think it is an important  
2 constitutional problem because these cumulative burdens  
3 penalize those who choose to carry goods across state  
4 borders. And they discourage the operation of a  
5 nationwide trucking business. They discourage the  
6 operation of trucking services that cross over state  
7 borders. They are a direct penalty for choosing to  
8 engage in interstate commerce.

9 QUESTION: Is there some empirical support for  
10 the proposition you just state, or is that just pretty  
11 much speculation?

12 MR. SHAPIRO: It is virtually definitional by  
13 these taxes.

14 QUESTION: I mean, is there empirical support  
15 for it?

16 MR. SHAPIRO: For the greater cost, yes. It  
17 is in the record in this case. The cost per mile is  
18 five times as high for the out-of-state --

19 QUESTION: No, I mean empirical support for  
20 the proposition that the sort of system Pennsylvania has  
21 discourages out-of-state trucks. I mean, have there  
22 been surveys?

23 MR. SHAPIRO: Well, this Court reached that  
24 very conclusion in the Nippert case.

25 QUESTION: Well, I am asking about whether

1     there has been empirical evidence saying that there are  
2     fewer trucks coming into Pennsylvania because of the  
3     kind of tax system it has.

4             MR. SHAPIRO: To my knowledge, Your Honor,  
5     other than what we have submitted in the record, there  
6     is not a study of this problem. We would like to  
7     emphasize before turning in greater detail to these flat  
8     tax cases that Justice O'Connor has referred to what we  
9     believe the governing commerce clause standard is in a  
10    case like this.

11            We begin with the Complete Auto Decision,  
12    which teaches that judicial review today must focus on  
13    the practical economic effect of these statutes and not  
14    on the labels which are attached to them, and the Court  
15    made clear in Complete Auto that a tax that falls on  
16    interstate commerce must be nondiscriminatory in its  
17    practical operation and it must be fairly related to the  
18    services which are provided by the state.

19            Now, in the Nippert case this Court explained  
20    the discriminatory practical impact of a flat tax when  
21    it invalidated a flat tax that fell on traveling  
22    salesmen. The Court explained, and I quote, "The very  
23    difference between interstate and local trade taken in  
24    conjunction with the inherent character of the tax makes  
25    equality of application of the tax to these two classes

1 of commerce impossible."

2 The Court emphasized that this discrimination  
3 is not just a matter of looking at one single state in  
4 isolation, but there are cumulative burdens as these  
5 large flat taxes are laid in succession on persons  
6 across the country to conduct their business.

7 The Court has pointed out in Armco and in  
8 other recent cases that the tax must not impose  
9 unacceptable discrimination if every state in the United  
10 States were to adopt that tax, and we think that the  
11 constitutional infirmity here is evident when you  
12 project these flat taxes onto a 50-state basis and you  
13 ask what would happen if every state had an axle tax and  
14 it cost \$9,000 to conduct the same business on a  
15 multistate basis than it would cost if you confined your  
16 operations to a single state.

17 Now, in Commonwealth Edison, this Court also  
18 explained that under the modern, pragmatic approach to  
19 commerce clause issues, a tax won't pass muster unless  
20 its measure is fairly related to the services provided  
21 by the state. The formula for measuring the tax has to  
22 be geared to the in-state presence and activity of the  
23 taxpayer.

24 Now, in this case, it is undisputed that the  
25 measure of the tax is not related to the taxpayer's

1 presence or activities in Pennsylvania. The very  
2 purpose of this tax is to raise money for highway  
3 maintenance and highway upkeep, yet the local trucker  
4 who travels 100,000 miles on the highway pays the same  
5 thing as an out-of-state trucker who comes in and puts  
6 in two or three or four thousand miles on the highway,  
7 even though the local trucker may be causing 50 times as  
8 much wear and tear on the highway system.

9 QUESTION: Again, the same thing happens with  
10 regard to intrastate residents, and we don't -- nobody  
11 considers that so discriminatory that it isn't the  
12 standard system in all the 50 states as far as I know.

13 MR. SHAPIRO: Those problems, of course, are  
14 not commerce clause problems. If the out-of-state  
15 interstate carrier is disadvantaged, that is the  
16 commerce clause concern.

17 QUESTION: I understand, but the argument you  
18 are making is not just that discrimination, which has an  
19 invidious overtone, against commerce is bad, but you are  
20 saying any absence of equality on the part of interstate  
21 commerce is bad.

22 MR. SHAPIRO: We do say if there is a  
23 practical economic effect of discriminating, that that  
24 is as bad as the bad purpose. Now, the Court has said  
25 that on many occasions, most recently in the Bacchus



1 case, and these discriminatory effects, I think it is  
2 important to point out, have not been overlooked by the  
3 other states which now retaliate against flat taxes.

4 we have eight states already which retaliate  
5 against the axle tax, and in a special report that we  
6 have lodged with the Court, the Pennsylvania Legislature  
7 has made a study of the effect of that retaliation, and  
8 it has found that the retaliation is "devastating to the  
9 state's motor carrier industry." This is the real world  
10 interstate impact of the axle tax. It is producing a  
11 virtual trade war among the states, and one that is very  
12 injurious to interstate trucking activity.

13 Now, despite all these discriminatory effects  
14 reliance is placed on the Aero Mayflower line of cases  
15 referred to by Justice O'Connor, and I would like to  
16 spend a few minutes talking about them because they are  
17 quite important. The principal rationale in Aero  
18 Mayflower was that a flat tax is reasonable because it  
19 pays for the "privilege" of highway use. The Court  
20 reasoned that it wasn't the state's fault if the driver  
21 didn't make full use of that privilege after paying for  
22 it. This, we say, is the kind of reliance on  
23 abstractions rather than dollars and cents effects which  
24 Complete Auto has put behind us.

25 The privilege rationale ignores the fact that

1 a truck can't be in more than one state at one time. So  
2 an interstate trucker who is forced to pay a substantial  
3 unapportioned flat tax in state after state for a  
4 privilege he can use only occasionally in any particular  
5 state is placed at a serious competitive disadvantage.  
6 The only way to get the full benefit of the privilege,  
7 in other words, is to give up the interstate business  
8 and become a local operator who can drive 50, 60, or  
9 70,000 miles on the highway.

10 No, the other point that was relied on in Aero  
11 Mayflower was administrative convenience that the Court  
12 has referred to in the argument, and I think it is  
13 important to bear in mind that almost all of the highway  
14 taxes today are raised by nondiscriminatory means. The  
15 state can simply rely more substantially on existing  
16 nondiscriminatory taxes which are already in place.

17 QUESTION: What are you talking about,  
18 gasoline, fuel taxes?

19 MR. SHAPIRO: Fuel purchase, fuel use taxes,  
20 the gross receipts tax, which is mileage-based in  
21 Pennsylvania, the apportioned registration fee. All of  
22 these are mileage-gearred taxes not only in effect in  
23 Pennsylvania but in every other state in the country, so  
24 we say that the discrimination that is inherent in the  
25 flat taxes can't logically be justified today by

1 reference to administrative convenience.

2 The existing nondiscriminatory taxes can  
3 simply be raised, as they regularly are, in states  
4 across the country.

5 QUESTION: What is the competitive  
6 disadvantage to your interstate truckers?

7 MR. SHAPIRO: They pay a very substantially  
8 higher cost per mile in any --

9 QUESTION: That is different. Whom are they  
10 competing with?

11 MR. SHAPIRO: They are competing with local  
12 business for local carriage of commerce.

13 QUESTION: So you are really talking about  
14 people from out-of-state who are making deliveries in  
15 Pennsylvania?

16 MR. SHAPIRO: Well, there is that  
17 discriminatory effect. There is a second and more  
18 important one, and that is, there is a discrimination  
19 against those who wish to engage in a 50-state  
20 commercial activity.

21 QUESTION: Well, I know, but what about a  
22 class of trucks, that all they do on Pennsylvania  
23 highways is go through the state? They make no local  
24 deliveries. Is that -- is there discrimination against  
25 them?

1 MR. SHAPIRO: Well, there is competition from  
2 the out-of-staters for that local business of picking up  
3 and dropping off.

4 QUESTION: What local business? That isn't  
5 what I said. What about -- the only use of Pennsylvania  
6 highways that these trucks make is, they go through the  
7 state, from one end to the other or from one side to the  
8 other. They don't stop in Pennsylvania except to buy  
9 gas, maybe.

10 MR. SHAPIRO: Well, they are not competing for  
11 the local carriage. That is true.

12 QUESTION: Well, they aren't being  
13 discriminated against, in short.

14 MR. SHAPIRO: Well, they are being  
15 discriminated in the sense that the flat tax regime  
16 makes it prohibitively expensive to engage in this  
17 50-state operation compared to the local operation.

18 QUESTION: Well, that is -- do you think that  
19 is a commerce clause question?

20 MR. SHAPIRO: Oh, we certainly do.

21 QUESTION: Well, there is no discrimination.

22 MR. SHAPIRO: There is a penalty for engaging  
23 in interstate operations. It balkanizes the trucking  
24 industry. It creates pressure to operate on a local  
25 scale. That is the principal commerce cause objection.



1 QUESTION: I don't understand that. I don't  
2 understand that. If somebody wants to deliver some  
3 goods from Iowa to New York City and goes through  
4 Pennsylvania?

5 MR. SHAPIRO: The Court has to view this as a  
6 situation where states across the country have flat  
7 taxes. Now, if a trucker is asked to pick up the goods  
8 on the east coast and take them to the west, if he has  
9 to pay flat tax in state after state, even though he is  
10 making light use of the highways in each state, that is  
11 going to discourage interstate operations  
12 categorically. It is going to put pressure on truckers  
13 to organize their services on a local or a regional  
14 basis, and we say that is a core commerce clause  
15 concern.

16 QUESTION: So you say in effect that there  
17 isn't going to be any interstate business of trucking  
18 stuff from New York to San Francisco, that it is all  
19 going to be transshipped at each state border if your  
20 view doesn't prevail?

21 MR. SHAPIRO: That is the balkanizing effect.  
22 We don't know that these consequences, of course, are  
23 going to occur that starkly, but that is the economic  
24 tendency of making it far more expensive to operate a  
25 business that spills over state lines.

1           QUESTION: Truckers would rather pay this axle  
2 tax than do that, I think.

3           MR. SHAPIRO: well, the axle tax is being  
4 replicated --

5           QUESTION: Questions like that are kind of out  
6 of our reach, aren't they?

7           MR. SHAPIRO: Well, the Court has said that  
8 even small amounts of discrimination are not acceptable  
9 under the commerce clause. There was an \$8,000  
10 discrimination in the Westinghouse case which  
11 invalidated the tax. Here we are talking about a much  
12 more substantial dollar amount, is our submission.

13          QUESTION: But, Mr. Shapiro, insofar as you  
14 attack the marker tax or marker fee, you attack the \$25  
15 fee, but I don't think you attack the \$5 fee, do you?

16          MR. SHAPIRO: We don't attack the \$5 fee.  
17 That illustrates my observation earlier that not every  
18 flat tax has a discriminatory effect on interstate  
19 commerce. There are some flat taxes that simply cover  
20 the cost of providing a particular service to you.  
21 Everybody pays the same thing. Everybody receives the  
22 same thing. Five dollars for your decal. That is the  
23 cost of giving you the decal. Or \$10 for towing.

24          We don't object to that kind of tax. We  
25 object to the revenue-raising tax which is laid for the

1 privilege of doing business where the interstate  
2 operator gets much less use than the in-state operator  
3 for the payment of \$180 or \$25, but we don't challenge  
4 flat taxes categorically, and I think that is an  
5 important concept.

6 Now, the last point that was relied on in the  
7 Aero Mayflower case was the Court's belief that flat  
8 taxes don't create a substantial burden on anybody, and  
9 this, as I have been driving at earlier, is simply not a  
10 tenable rationale today.

11 In contrast to the days of Aero Mayflower, the  
12 trucking industry today is made up of truckers, many of  
13 whom engage in business in all 48 states. These trucks  
14 are facing a rising tide of flat taxes across the  
15 country. We are talking about smaller companies and we  
16 are also talking about larger companies that may have  
17 several thousand trucks in their fleet, each of which  
18 has to be qualified in every state in the union in order  
19 to bring goods from the east coast to the west coast or  
20 from the north to the south, and we say that these  
21 accumulating burdens are very far from insubstantial or  
22 minimal.

23 These burdens, we say, are also in no sense  
24 counterbalanced or justified by the registration fee  
25 which Pennsylvania charges to its own truckers. The

1 argument has been made that a large registration fee is  
2 imposed on local truckers. The fact is that  
3 Pennsylvania's registration fee is just at the median in  
4 the United States today. The average was \$910 at the  
5 beginning of this year. Their fee is \$945.

6 The range is from \$36 up to \$2,200 in my home  
7 state of Illinois, so there is nothing unusual about  
8 their registration fee, and in addition to that it is a  
9 nondiscriminatory system. Everybody gets treated fairly  
10 under the registration system. Everybody gets the  
11 benefit of apportionment. Everybody gets the benefit of  
12 reciprocity when they travel over other reciprocity  
13 states. Truckers in each state get the benefit of the  
14 nondiscriminatory nationwide registration system,  
15 including truckers in the state of Pennsylvania.

16 Now, we submit, in short, that the practical  
17 approach to commerce clause issues which has been taken  
18 by this Court in its most recent decisions teaches that  
19 Aero Mayflower can no longer be invoked to defend flat  
20 taxes which impose these cumulative burdens on commerce  
21 which fail to satisfy the internal consistency principle  
22 when you consider these taxes on a 48-state basis --

23 QUESTION: Well, Mr. Shapiro, I assume that  
24 some states have collected millions of dollars of flat  
25 tax fees. If you are right, are they supposed to refund

1 all that money?

2 MR. SHAPIRO: Well, I don't speak generally to  
3 that issue, but in this case we have stipulations for a  
4 refund from the state that has dealt with that. We  
5 moved for -- we were prepared to move for an escrow, and  
6 the state said, no, there is no need to go for an escrow  
7 here, we can stipulate to a refund in the event that  
8 this is declared unconstitutional.

9 QUESTION: I would assume there is a pretty  
10 heavy reliance interest by states on this Aero Mayflower  
11 line.

12 MR. SHAPIRO: Well, this litigation, Justice  
13 O'Connor, was commenced immediately after the effective  
14 date of these taxes. It is as if these funds have been  
15 place in limbo pending the outcome of this litigation,  
16 and we think it would be very destructive to the  
17 policies of the commerce clause to permit those that  
18 have been discriminated against and injured by these  
19 exactions to go uncompensated, and the state agreed with  
20 us because they stipulated to a refund of these sums,  
21 and I think that that takes care of the refund issue in  
22 this case.

23 Now, of course, we have a second commerce  
24 clause challenge in this case which relates to the  
25 facial or the structural discrimination issue, and that,



1 of course, is focused in solely on the axle tax. The  
2 essence of this contention is that this statute  
3 discriminated on its face.

4 Section 3 of the statute imposed the new tax.  
5 Section 1 of the statute granted an offsetting reduction  
6 for local business. We say that this is squarely within  
7 the holding of Maryland versus Louisiana, where a  
8 general tax was imposed on commerce, offsetting  
9 reductions were given to local business.

10 We are met in defense of the statute with the  
11 argument that even though there is no compensatory tax  
12 doctrine defense here, that the whole arrangement should  
13 be defended and accepted because it constitutes a  
14 rational restructuring of tax burdens.

15 Now, the important thing, I think, to bear in  
16 mind about this rational restructuring argument is that  
17 there isn't a scintilla of evidence that anyone was  
18 engaged in a rational restructuring of tax burdens. The  
19 statute says on its face that its purpose was to  
20 rehabilitate bridges and give jobs to local residents.  
21 There isn't a single word said about adjusting or  
22 rearranging tax burdens to come up with an equitable  
23 solution that wouldn't discriminate against interstate  
24 commerce.

25 The Court is being asked to accept a new

1 doctrine, an unstructured doctrine, this rational  
2 readjustment doctrine, with absolutely no basis in the  
3 statute or its history to suggest that that was what was  
4 going on. Now, if the Court please, I would like to  
5 rest on our briefs which deal with the facial  
6 discrimination issue in greater detail and reserve the  
7 balance of our time for rebuttal.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
9 Shapiro.

10 We will hear now from you, Ms. Wolfe.

11 ORAL ARGUMENT BY SUELLEN M. WOLFE, ESQ.,  
12 ON BEHALF OF THE APPELLEES

13 MS. WOLFE: Mr. Chief Justice, and may it  
14 please the Court, there are two reasons why  
15 Pennsylvania's axle tax is constitutional.

16 First of all, flat user fees have formed a  
17 vital part of the tax schemes of all the states. They  
18 are easy to administer and fair in their application.  
19 So long as they are reasonably related to the services  
20 rendered by the state, they have been considered  
21 constitutional. The constitutionality of these taxes  
22 has been upheld for almost 100 years. And the  
23 appellants have just pointed out that they do not  
24 contest that Pennsylvania's axle tax is excessive.

25 The second reason is that the appellants

1 stress the fact that when Pennsylvania enacted its axle  
2 tax it reduced registration fees in an equivalent  
3 amount. However, what they don't stress is that in 1980  
4 Pennsylvania had raised its registration fees in the  
5 same amount. That means the only effect of the 1982  
6 drop in registration fees was to restore Pennsylvania's  
7 tax scheme to its status quo before imposing an axle tax  
8 on all trucks using Pennsylvania's highways.

9 The appellants request this Court to  
10 invalidate flat fees. There is no way to assess a  
11 particular user of a user system such as a highway  
12 system with his particular portion of the cost. That is  
13 because the costs are generated by so many factors. In  
14 a highway system it can be generated by weight, by  
15 mileage, and by configuration.

16 QUESTION: I suppose you could at some cost  
17 set up weighing stations at the border of the state  
18 where you come in from, say, between Binghamton and  
19 Scranton coming down, what, 81, is it, and then if you  
20 are driving all the way through coming out south of  
21 Gettysburg, and just ask the driver for a declaration of  
22 how many miles in the state, or maybe check odometers.

23 QUESTION: That is a possibility, Your Honor,  
24 but you must understand that that requires of the state  
25 a great administrative cost, and if you would do that

1       there -- you are requesting the state to rely on one  
2       factor in a system where the costs are generated by many  
3       factors.

4               If in fact the Court would accept the  
5       proposition that a user fee is by its nature  
6       discriminatory and unconstitutional, it is no  
7       exaggeration to say that it would create chaos in all of  
8       the 50 states. These states use these types of fees  
9       because they have found that they are administratively  
10      convenient, they are fair in their application, and --

11              QUESTION: Are there more than seven states  
12      using the flat tax --

13              MS. WOLFE: For highway systems?

14              QUESTION: -- system on highways?

15              MS. WOLFE: I believe at this point there are  
16      only seven states that are imposing a flat fee, and you  
17      have to understand Pennsylvania's situation to also  
18      understand why we decided to enact the axle tax.  
19      Pennsylvania has very hilly terrain, has very heavy  
20      truck traffic, and has very difficult weather and  
21      climate conditions. In addition, our bridges are in  
22      dire need of repair.

23              QUESTION: Why are your weather conditions any  
24      more difficult than a lot of other states?

25              MS. WOLFE: The weather conditions are very

1 cold as compared to the southern part of the nation,  
2 which causes stress --

3 QUESTION: Well, but there are a lot of  
4 northern states that don't do what Pennsylvania does.

5 MS. WOLFE: I am saying, Your Honor, that it  
6 is a combination of factors, that Pennsylvania has a  
7 unique situation. The weather in combination with the  
8 terrain, the heavy truck traffic has generated great  
9 damage to the highways.

10 QUESTION: Does New York do what Pennsylvania  
11 does?

12 MS. WOLFE: I am not aware of the fact whether  
13 New York imposes a flat tax.

14 QUESTION: (Inaudible.)

15 MS. WOLFE: Yes, absolutely, and they also  
16 have a very --

17 QUESTION: And they have a slight bridge  
18 problem, too.

19 MS. WOLFE: They have a very -- I believe the  
20 Wall Street Journal indicated that Pennsylvania and New  
21 York have the most severe situation so far as the  
22 condition and the damage of their bridges.

23 QUESTION: Of course, I suspect the most  
24 important of those factors you mention is that  
25 Pennsylvania has a lot of truck traffic.



1 MS. WOLFE: Absolutely.

2 QUESTION: Most of which is interstate and  
3 easily taxable. Wasn't the Pennsylvania Throughway the  
4 first Throughway that was built in the country?

5 MS. WOLFE: We had the first turnpike. Yes,  
6 Your Honor.

7 QUESTION: The first turnpike.

8 MS. WOLFE: Yes.

9 QUESTION: Feels like it, anyway.

10 (General laughter.)

11 MS. WOLFE: The appellants go on to suggest  
12 that the mileage-related fuel tax is the talisman to  
13 these flat taxes. But as I indicated before, the  
14 administrative ease that the appellants contend is  
15 possible today is not in existence in Pennsylvania.  
16 New York has imposed a system and it is in the record  
17 that it created tremendous cost. And quite simply  
18 Pennsylvania has a self-reporting system now.  
19 Self-reporting systems don't work. That is why we have  
20 withholding in personal income tax. In order to --

21 QUESTION: You say Pennsylvania has a  
22 self-reporting system. Did you mean New York has a  
23 self-reporting system?

24 MS. WOLFE: No, for the mileage taxes.

25 QUESTION: Pennsylvania does?

1 MS. WOLFE: Yes. In other words, we have to  
2 take the truckers' words for the amount of miles that  
3 they travel in the state, and we do that. It is an  
4 honor system. But it doesn't work. If in fact we went  
5 to a completely mileage-based system, that would impose  
6 upon the state a tremendous administrative burden. We  
7 would have to have an audit function in place.

8 There is also a need for a control factor in  
9 these state schemes. The bridges and the highways have  
10 got to be there for the convenience of the user, the  
11 trucks. Whether those trucks use it one time or 600  
12 times, they want that particular bridge or that  
13 particular highway there in good condition when they  
14 want to use it.

15 I will now revert back to the other issue, and  
16 that is the discrimination, and I believe it is a  
17 fairly --

18 QUESTION: Before you do that, I want to be  
19 sure I understand your argument about the difficulty of  
20 using an audit or whatever it is, but is it not correct  
21 that 43 states do have this kind of mileage tax and only  
22 seven have the flat tax?

23 MS. WOLFE: I'm not -- most states have a  
24 mileage-based tax, but I believe they have those taxes  
25 in combination with other taxes. I don't believe they

1       rely solely --

2               QUESTION: Even if they have others as well,  
3       apparently they are able to administer a mileage tax.

4               MS. WOLFE: Well, they administer it --  
5       apparently they do, but I am saying Pennsylvania  
6       probably isn't comparable. We have huge numbers  
7       involved here, and our numbers are, for instance, I  
8       would say, \$1 billion a year that we have to generate,  
9       and I am saying that we don't have the facilities to  
10      audit those types of numbers at the present time. I am  
11      not sure whether those states that have the 43 mileage,  
12      and we have a mileage system, too, in our fuel taxes.

13              QUESTION: The Chief Justice asked you about  
14      weight. Do truckers have to stop at weighing stations  
15      as they enter and leave the state?

16              QUESTION: No, Pennsylvania has a maximum  
17      weight, and we have weigh stations along certain  
18      highways where on occasion they have to pull over, but  
19      there is nothing at the entrance of the state and when  
20      they leave the state to actually weigh a truck, and that  
21      goes to show you administrative inconvenience also. If  
22      in fact we went to a pure weight system, the truckers  
23      would be the first ones to complain that they would have  
24      to stop --

25              QUESTION: I have often wondered about those

1 weigh stations. Do they just weigh and if they are not  
2 too heavy they let them go on, or do they keep any kind  
3 of record of what the weights were on the trucks?

4 MS. WOLFE: I imagine they keep records,  
5 because --

6 QUESTION: They do keep a record of every  
7 truck that is weighed?

8 MS. WOLFE: I am not positive, but I presume  
9 what they are doing is in fact trying to have support  
10 information to ascertain whether their system is fair,  
11 because once they see that they are having a lot of  
12 heavy vehicles, maybe they should shift away from one  
13 type of tax and into another. It is a consideration of  
14 the legislature --

15 QUESTION: In fact, isn't it true that if they  
16 are overweight they are arrested?

17 MS. WOLFE: Yes, they are.

18 QUESTION: On the spot?

19 MS. WOLFE: Yes, they are. It is illegal.

20 QUESTION: Most of those weigh stations that I  
21 have seen have always had a "Closed" sign on them.

22 (General laughter.)

23 MS. WOLFE: And the truckers are very happy  
24 about that, too.

25 I would like to address just for one moment

1 without delaying on the flat fee argument any more or on  
2 this system of the highways of Pennsylvania unless the  
3 Court has any additional questions, to address the  
4 discrimination issue which the appellants contend exists  
5 because of the fact that Pennsylvania lowered the  
6 registration fees in the same Act which enacted the axle  
7 tax.

8 At first blush the Pennsylvania Supreme Court  
9 admitted it looked to be discriminatory, but as I said  
10 before, those two events were essentially unrelated.  
11 They are not equivalent taxes. And if we presume, for  
12 instance, that we started in 1980, the registration fees  
13 as a flat playing field, we increased registration fees  
14 in 1980. In 1982, we decreased registration fees and  
15 imposed the axle tax. The system is not discriminatory  
16 at all. It brought the system back to the pre-1980  
17 level and imposed an axle tax on all trucks using  
18 Pennsylvania's highways regardless of whether they were  
19 registered in the state --

20 QUESTION: But was the formula by which they  
21 reverted to the 1980 level the same, just the same as  
22 the increase had been?

23 MS. WOLFE: It is very similar. There was  
24 just a straight -- from 1980 to 1983 there was a slight  
25 increase in the registration fee. In other words,



1 Pennsylvania trucks paid slightly more, and that is  
2 illustrated, I believe, in the record.

3 QUESTION: But the form of the statute was not  
4 just a simple reduction to the pre-level. It had this  
5 complicated formula with multiples of 36 in it, and so  
6 forth.

7 MS. WOLFE: You are absolutely correct, but  
8 basically they shifted the burden to the --

9 QUESTION: It is just a coincidence that it  
10 offsets against the axle tax?

11 MS. WOLFE: It was a coincidence of timing, I  
12 would call it.

13 QUESTION: Just a coincidence.

14 MS. WOLFE: Yes.

15 QUESTION: I guess Justice Nix wasn't really  
16 persuaded by that, was he?

17 MS. WOLFE: No, he was not persuaded by that.  
18 I think that Justice Nix refused to look also beyond the  
19 two taxes involved to the entire scheme to see that it  
20 works equitably.

21 Despite the appellant's attempt to really  
22 mischaracterize this case, there is no discrimination.  
23 They really launched upon a constitutional attack by  
24 seizing upon the fact that the 1982 Act changed two  
25 taxes in Pennsylvania's comprehensive tax scheme. That

1 tax scheme really includes 14 taxes which takes into  
2 consideration weight mileage and configuration.

3 In fact, the axle tax is proportional because  
4 it gives -- weight-related. It's according to the  
5 number of axles that the trucks have. It also gives a  
6 rebate for trucks traveling less than 2,000 miles. The  
7 two taxes, the axle tax and the registration fees, are  
8 entirely unrelated and certainly not equivalent. And so  
9 long as this Court looks beyond timing to ultimate  
10 effect as it always has, and so long as this Court is  
11 willing to reaffirm flat user fees as a viable component  
12 of the taxing system of the 50 states of the United  
13 States, the challenged taxes will stand.

14 We urge the Court to affirm the decision of  
15 the Court below.

16 QUESTION: Ms. Wolfe, would you concede that  
17 if every state in the United States imposed a  
18 substantial flat fee tax for highway use, that the  
19 cumulative burden of those taxes could have -- could  
20 pose a threat to the free flow of interstate commerce by  
21 trucks?

22 MS. WOLFE: I don't believe that there is a  
23 threat. I believe that as the trucks move interstate  
24 they are receiving a cumulative benefit, and they have  
25 to be asked to pay for that cumulative benefit, and also

1 with regard to a user fee certainly each state's law or  
2 user fee must pass its own rigid test according to the  
3 Aero Mayflower. It must be reasonably related.

4 QUESTION: Well, it certainly seems to me that  
5 the potential for a severe burden is there, viewed  
6 cumulatively, and I am surprised that you can't  
7 recognize that.

8 MS. WOLFE: I recognize the fact that  
9 interstate commerce should pay its own way and that they  
10 are enjoying the privilege of engaging in business in  
11 many states.

12 QUESTION: You don't think it should bear any  
13 relation at all to the extent of the use of the  
14 highways --

15 MS. WOLFE: I am saying that --

16 QUESTION: -- by the interstate user?

17 MS. WOLFE: I am saying that I don't foresee a  
18 cumulative problem --

19 QUESTION: Wouldn't that ultimately be the  
20 most fair way to do it? Would you concede that?

21 MS. WOLFE: I --

22 QUESTION: That a highway use tax should bear  
23 some reasonable relation to the miles traveled and  
24 perhaps the weight and configuration of the vehicle.

25 MS. WOLFE: If such a system would be possible

1 to achieve, that would be the best way probably. we've  
2 never define what factors are responsible.

3 QUESTION: You say it is not possible to  
4 achieve taxes that recognize --

5 MS. WOLFE: Not at this point. I believe  
6 truly that there is no direct evidence that mileage is  
7 the right way. There's too many factors, too many  
8 variables, and certainly Congress looks at this every  
9 year, and has made the same determination, and if they  
10 in fact saw the cumulative problem they could easily  
11 step in.

12 And just one more thing I would like to say  
13 is, I have not heard anything about the number of  
14 revenues that these trucks can raise by interstate  
15 commerce. Certainly they are able to generate far  
16 greater revenues than just participating in business in  
17 one state.

18 QUESTION: Isn't it true that your other  
19 examples of weight and so forth, you say none of them  
20 are perfect, mileage isn't perfect and so forth, but  
21 none of these other variables such as mileage would  
22 suggest that there is any distinction drawn between  
23 local truckers and interstate truckers, whereas the  
24 system you have used has the unique feature, as I  
25 understand it, according to the evidence, at least, of

1 placing a heavier burden on the interstate trucker than  
2 it does on the trucker who primarily drives in  
3 Pennsylvania, which would not be true of mileage tax,  
4 weight tax, or any of these other things.

5 MS. WOLFE: I don't know if I understand your  
6 question. What I am saying is, Pennsylvania's system is  
7 proportional. We do take other factors into  
8 consideration.

9 QUESTION: Well, but the flat tax doesn't.

10 MS. WOLFE: The flat --

11 QUESTION: The axle tax doesn't.

12 MS. WOLFE: It does according to weight, yes,  
13 according to the axles, which are in proportion to the  
14 number of axles you have basically.

15 QUESTION: Well, yes, but all trucks with five  
16 axles pay the same tax even if they do all their  
17 business in interstate commerce, and it does -- is it  
18 not correct that the burden of the tax falls more  
19 heavily on interstate truckers than it does on local  
20 truckers?

21 MS. WOLFE: I will say that we have no direct  
22 evidence that has been submitted concerning a cost per  
23 mile. And I think it was pointed out in the brief that  
24 the evidence as to mileage was objected to and never has  
25 been determined by the courts of Pennsylvania in that



1 there were no factual findings.

2 QUESTION: Yes, but under your theory it  
3 doesn't really make any difference. I mean, even if we  
4 assume that what they say the facts are are true, you  
5 would say, well, that doesn't matter.

6 MS. WOLFE: That is exactly right. I think  
7 that Pennsylvania's overall system does relate factors  
8 together to give equality to all trucks using the  
9 Commonwealth's roads.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
11 Wolfe.

12 Mr. Shapiro, you have four minutes remaining.

13 ORAL ARGUMENT BY STEPHEN M. SHAPIRO, ESQ.,  
14 ON BEHALF OF THE APPELLANTS - REBUTTAL

15 MR. SHAPIRO: I just have a few additional  
16 comments, Mr. Chief Justice.

17 Th argument was made by my colleague that the  
18 state really can't rely on mileage-based taxes or taxes  
19 that are geared to in-state presence and activity. I  
20 would refer the Court to Page 10, Footnote 13 of  
21 Pennsylvania's brief, which shows that \$131 million in  
22 highway revenues came from fuel taxes, \$80 million came  
23 from registration fees which were apportioned based on  
24 mileage, another \$10 million came from the motor carrier  
25 road tax, which is a mileage tax, only \$12 million came

1 from the flat tax, the marker fee. This hardly suggests  
2 that the revenues needed for highway upkeep can't be  
3 raised by nondiscriminatory taxes.

4 Now, we are not asking for perfection. We are  
5 not asking for any system that is related, tied to one  
6 factor or another. We ask only that the Court standard  
7 that the tax in its measure be related to in-state  
8 presence and activity, that that --

9 QUESTION: Mr. Shapiro, on that argument you  
10 really can't argue that every single interstate trucker  
11 is being discriminated against in favor of every single  
12 intrastate trucker?

13 MR. SHAPIRO: Quite to the contrary, we don't  
14 contend that. On the average that is so, but some of  
15 the biggest victims of this system are the Pennsylvania  
16 interstate truckers who get hit not only with flat taxes  
17 in seven different states --

18 QUESTION: Well, that may be so.

19 MR. SHAPIRO: -- but retaliatory taxes in  
20 eight more states.

21 QUESTION: But your argument is that just  
22 because the axle tax isn't mileage-related that it is  
23 unconstitutional on its face.

24 MR. SHAPIRO: We take the position that it  
25 is --

1           QUESTION: And that everybody, even though  
2 there are a lot of interstate truckers who won't be  
3 discriminated against as respects -- as compared with  
4 some intrastate truckers, just aren't discriminated  
5 against.

6           MR. SHAPIRO: That was the holding in  
7 Nippert. The very same point --

8           QUESTION: Yes.

9           MR. SHAPIRO: -- was observed by the Court in  
10 Nippert, and we think it is correct. On the average,  
11 there is a much greater impact on the interstate  
12 operator who can't be --

13          QUESTION: Of course, on the structural  
14 argument everybody, every interstate trucker is being  
15 discriminated against.

16          MR. SHAPIRO: That is correct. I would also  
17 like to comment on the observation that the bridges need  
18 to be repaired in this state. Nobody agrees with that  
19 more than us. Who gets hurt by defective bridges and  
20 highways more than the truckers? They depend for their  
21 own safety on the solidity --

22          QUESTION: Me. Me.

23          MR. SHAPIRO: And individual drivers, of  
24 course, but we suggest that even though these are  
25 legitimate state objectives that the constitutional rule

1 which forbids discrimination in raising these funds is  
2 so vitally important here, we are talking about  
3 instrumentalities of interstate commerce, trucking.

4 Three-quarters of the dollar value of the  
5 commerce in the United States moves by truck today. And  
6 yet we have taxes here that discriminate on their face,  
7 discriminate in their actual operation against  
8 interstate commerce, and which put pressure on the  
9 trucker not to operate on a basis across the state  
10 lines.

11 The comment was made by my colleague that we  
12 are talking about a corridor state here. well, that  
13 cuts two ways. The Founding Fathers in the debates on  
14 the commerce clause pointed out that no corridor state  
15 should be in a position to bleed interstate commerce or  
16 to blockade it through discrimination. That is what we  
17 say these taxes amount to.

18 Now, again, in summation, Pennsylvania has  
19 argued for a broad economic approach to the issue. we  
20 don't disagree with that kind of broad brush economic  
21 approach, but we would ask the Court to remember the  
22 rest of the states in the Union when considering these  
23 arguments and to consider the impact of these cumulative  
24 burdens that Justice O'Connor mentioned on  
25 transportation throughout the United States as opposed

1 to --

2 CHIEF JUSTICE REHNQUIST: Your time has  
3 expired, Mr. Shapiro.

4 The case is submitted.

5 (Whereupon, at 10:58 o'clock a.m., the case in  
6 the above-entitled matter was submitted.)

7  
8 *Paul H. Richardson*

9 (REPORTER)



# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
#86-357 - AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., Appellants V.

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JAMES I. SCHEINER, SECRETARY, DEPARTMENT OF REVENUE, ET AL.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)