2000

Pennsylvania's Manufacturing Exemption to the Capital Stock Tax, When Limited to Manufacturing within Pennsylvania, Violates the Commerce Clause *PPG Industries, Inc. v. Commonwealth*

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**CONSTITUTIONAL LAW — COMMERCE CLAUSE — CAPITAL STOCK TAX — MANUFACTURING EXEMPTION** — The Pennsylvania Supreme Court held that the Pennsylvania capital stock tax statute allows a corporation operating in Pennsylvania to exempt only the value of capital stock related to manufacturing within Pennsylvania from the computation of its capital stock tax, and, under that interpretation, the manufacturing exemption facially discriminates against interstate commerce.


The Commonwealth of Pennsylvania imposes a capital stock tax on domestic entities and a franchise tax based upon the capital stock of foreign entities that are located within the state.1 Under Pennsylvania law, foreign and domestic entities are given the option to be taxed by either method.2

Each method exempts from taxation the portion of an entity's

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1. See 72 PA. CONS. STAT. § 7602 (1990). A capital stock tax is a tax "assessed as a percentage of par or assigned value of capital stock of a corporation." BLACK'S LAW DICTIONARY 1458 (6th ed. 1990). A franchise tax is an "annual tax on the privilege of doing business in a state; it is not a direct tax on income." *Id.* at 659.

2. See Commonwealth v. After Six, Inc., 413 A.2d 1017, 1023 (Pa. 1980). 72 PA. CONS. STAT. § 7602(a), which applies the capital stock tax to domestic entities, provides that "any domestic entity or company subject to the tax prescribed herein may elect to compute and pay its tax under and in accordance with the provisions of subsection (b) of this section," and 72 PA. CONS. STAT. § 7602(b)(1), which applies the franchise tax to the capital stock of foreign entities, provides that "any foreign corporation, joint-stock association, limited partnership or company subject to the tax prescribed herein may elect to compute and pay its tax under section 602 (a)." 72 PA. CONS. STAT. § 7602 (1990).

72 PA. CONS. STAT. § 7601 defines a domestic entity as any "corporation having capital stock . . . now or hereafter organized or incorporated by or under any laws of the Commonwealth." 72 PA. CONS. STAT. § 7601 (1990). 72 PA. CONS. STAT. § 7601 defines a foreign entity as any "corporation . . . organized . . . under the law of any other state or territory of the United States, or by the United States, or . . . under the law of any foreign government, and doing business in and liable to taxation within the Commonwealth." *Id.*
capital stock that is devoted to manufacturing within Pennsylvania. This feature is known as the "manufacturing exemption," and exists in order to promote industry within the Commonwealth. The amount of capital stock subject to tax for an entity that chooses to be taxed as a foreign entity is determined by finding the appropriate apportionment factor and then multiplying the apportionment factor by the total amount of the entity's capital stock to find the taxable value. The apportionment factor includes a manufacturing exemption, and is identified by averaging three ratios: payroll in Pennsylvania to total payroll, tangible property in Pennsylvania to total tangible property, and sales in Pennsylvania to total sales; the manufacturing exemption reduces tax liability because it allows the subtraction from the Pennsylvania payroll, property, and sales totals the portions of payroll, property, and sales, respectively, that are attributable to the administration of manufacturing within Pennsylvania.

PPG Industries, Inc., a manufacturer of glass, fiberglass, paint, coatings, and chemicals, is headquartered in Pittsburgh, Pennsylvania. In 1983, PPG chose to be taxed as a foreign corporation for the purpose of the Pennsylvania capital stock tax. In determining its apportionment factor, PPG exempted the value

3. See PPG Indus., Inc. v. Commonwealth, No. 87, 1999 Pa. LEXIS 1734, at *3 (Pa. June 17, 1999). 72 PA. CONS. STAT. § 7602(a), which applies to entities that choose to be taxed as domestic entities, describes the manufacturing exemption as follows: [T]he provisions of this section shall not apply to the taxation of the capital stock of entities organized for manufacturing . . . within the State . . . but every entity . . . shall pay the state tax . . . upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the manufacturing . . . business, . . . it being the object of this provision to relieve from State taxation . . . only so much of the capital stock as is invested purely in the manufacturing . . . business.


5. See id. at *2.
6. See id. at *2-*3. The apportionment factor is determined as follows:

(Pennsylvania property - manufacturing exempt property) + total property = A
(Pennsylvania payroll - manufacturing exempt payroll) + total payroll = B
(Pennsylvania sales - manufacturing exempt sales) + total sales = C
(A+B+C) + 3 = apportionment factor.

Id. at *3.

of its payroll and property at its Pittsburgh headquarters devoted to all of its manufacturing, instead of solely the amount directly related to its manufacturing within Pennsylvania. The result was an apportionment factor of .027905 and a tax liability of $362,765.

The Pennsylvania Board of Finance and Revenue ("Board") took exception to PPG's manner of determining its apportionment factor. After conducting an audit of PPG's 1983 tax return, the Board determined that PPG had improperly included within the manufacturing exemption the value of the payroll and property located at PPG's headquarters that was devoted to administering manufacturing operations outside of Pennsylvania. Consequently, the Board concluded that the proper apportionment factor was .047750, and the proper tax liability was $716,250.

After the Board reviewed and affirmed its decision, PPG appealed to the Pennsylvania Commonwealth Court, and claimed that the Board's decision was improper on statutory and constitutional grounds. In a panel opinion, the commonwealth court concluded that the manufacturing exemption applied only to manufacturing within Pennsylvania, and that there was no constitutional violation under the Commerce Clause because no item of interstate commerce that moved across state lines was affected by the exemption as applied by the court.

9. See id. at *3-*4.
10. See id. at *3-*4. The ultimate tax liability was found by multiplying the apportionment factor by the value of PPG's capital stock, which PPG determined was $1.3 billion, and then multiplying the product, $36,276,500, by the millage rate affixed by 72 PA. STAT. § 7602(h), which was 10 mills for 1983. See id. A mill rate is a "tax applied to real property. Each mill represents $1 of tax assessment per $1000 of property value assessment." BLACK'S LAW DICTIONARY 994 (6th ed. 1990).
12. See id.
13. See id. The Board of Finance and Revenue also found that PPG's determination of the value of its capital stock was too low and adjusted it upward from $1.3 billion to $1.5 billion. See id. at *4, n.5. The recalculated apportionment factor, .047750, multiplied by the recalculated value of the capital stock, $1.5 billion, resulted in a taxable value of $71,625,000 which, multiplied by the millage rate of 10, equaled the tax liability of $716,250. See id. at *4.
14. See id. at *5. "PPG argued that the Code granted the exemption to headquarters' operations that concerned manufacturing generally, and that if it did not, the Commonwealth's methodology violated the Commerce Clause of the United States Constitution." Id. at *5. The Commerce Clause grants the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" to the national legislature. U.S. CONST. art. I., § 8, cl. 3.
15. PPG Indus., Inc. v. Commonwealth, 681 A.2d 824, 829 (Pa. Commw. Ct. 1995), aff'd en banc, 681 A.2d 832 (Pa. Commw. Ct. 1996). The panel of the court found no Commerce Clause violation because "nothing moving in interstate commerce is measured or affected by the exemption." Id. at 829. The panel consisted of Judges Samuel L. Rodgers, Dan Pellegrini,
After granting PPG's motion for en banc review of its initial decision, the Pennsylvania Commonwealth Court once again affirmed the findings of the Board. In holding that the manufacturing exemption applied only to manufacturing within Pennsylvania and that it was not a violation of the Commerce Clause, the commonwealth court echoed the conclusions found in the prior panel opinion. Specifically, Judge Dan Pellegrini, who had also authored the panel opinion, found that the words of the Code relating to the manufacturing exemption clearly included only in-state manufacturing, and that there was no Commerce Clause violation because there was no prejudicial effect on any transaction that crossed state lines as a result of only including in-state manufacturing within the exemption.

PPG appealed the commonwealth court's en banc decision to the Pennsylvania Supreme Court. PPG continued to attack the

and James R. Kelley. Id. at 824. A panel is a "group of judges (smaller than the entire court) which decides a case." BLACK'S LAW DICTIONARY 1111 (6th ed. 1990).

16. PPG Indus., 681 A.2d at 835. En banc "[r]efers to a session where the entire membership of the court will participate in the decision." BLACK'S LAW DICTIONARY 526 (6th ed. 1990). PPG hoped to achieve a more favorable ruling because, in the interim between when the commonwealth court's panel decision was announced and its acceptance of PPG's petition for en banc review, the United States Supreme Court delivered its decision in Fulton Corp. v. Faulkner, 516 U.S. 325 (1996), finding a North Carolina intangibles tax a violation of the Commerce Clause because the tax unconstitutionally discriminated against the ownership of stock in foreign corporations. PPG Indus., 681 A.2d at 834. An intangible is "[p]roperty that is a 'right' such as a patent, copyright, trademark, etc., or one which is lacking physical existence; such as goodwill." BLACK'S LAW DICTIONARY 809 (6th ed. 1990). An intangibles tax is imposed in certain states "on every resident for the right to exercise the following privileges: (a) Signing . . . and issuing intangibles; (b) selling . . . trading in and enforcing intangibles; (c) receiving income, increase, issues and profits of intangibles; (d) transmitting intangibles by will or gift or under state laws of descent; (e) having intangibles separately classified for taxes." Id.

The en banc commonwealth court distinguished Faulkner from the dispute before it on the basis that Pennsylvania's manufacturing exemption does not treat domestic and foreign corporations differently because any corporation, whether domestic or foreign, may choose to be taxed as either a domestic or foreign entity. PPG Indus., 681 A.2d at 835.


18. PPG Indus., 681 A.2d at 833, 835. Judge Bernard McGinley filed a dissenting opinion, in which he criticized the majority for failing to find a commerce clause violation. Id. at 836 (McGinley, J., dissenting). According to the dissent, the Commerce Clause is violated by the manufacturing exemption's treatment of out-of-state manufacturing because a decision to expand manufacturing activity outside of Pennsylvania increases an entity's Pennsylvania tax liability, while a decision to relocate manufacturing activity to Pennsylvania would reduce an entity's Pennsylvania tax liability. Id. (McGinley, J., dissenting).

19. PPG Indus., 1999 Pa. LEXIS 1734, at *6. Such an appeal of a commonwealth court decision concerning a ruling of the Board of Finance and Revenue is a matter of right for the appellant. Id. at *1 n.1. "Any final order of the Commonwealth Court entered in any appeal from a decision of the Board of Finance and Revenue shall be appealable to the
manufacturing exemption as applied by the Board on statutory and constitutional grounds. By urging the Pennsylvania Supreme Court to construe the language referring to the manufacturing exemption broadly, PPG hoped to have the entire value of the payroll and property at its Pittsburgh headquarters placed within the exemption, as opposed to just the portion of it attributable to manufacturing within Pennsylvania. In addition, PPG asserted that if the statute was not given a broad interpretation as requested, then the manufacturing exemption should be declared an unconstitutional state regulation of interstate commerce.

The Pennsylvania Supreme Court, speaking through Justice Stephen Zappala, summarily rejected the proposition that the statute allowed the manufacturing exemption to apply to out-of-state manufacturing as well as to that carried on in Pennsylvania. The court referred to Gilbert Associates, Inc. v. Commonwealth to establish that the manufacturing exemption should have the same effect regardless of whether an entity chooses to be taxed as a domestic or a foreign entity. Justice Zappala then cited Commonwealth v. Weldon Pajamas, Inc., in which the court held that only manufacturing inside Pennsylvania could be eligible for the manufacturing exemption, and gave it decisive weight in rejecting PPG's claim that the manufacturing exemption applied to the administration of out-of-state manufacturing from its headquarters.

After determining the scope of the manufacturing exemption, the court focused upon whether such a scope violated the Commerce

Supreme Court, as of right, under this section." 42 PA. CONS. STAT. ANN. § 723 (b) (1981).
21. Id. at *7. "PPG essentially argues that so long as its Pennsylvania headquarters conducts activities incident to manufacturing, such as budgeting, sales, engineering and production planning, the actual manufacturing does not have to take place in the Commonwealth." Id.
22. Id. at *9.
23. Id. at *8-*9.
25. PPG Indus., 1999 Pa. LEXIS 1734, at *7. The Pennsylvania Supreme Court in Gilbert Associates concluded that "notwithstanding the uniform and equal tax rates, by failing to provide an option to foreign corporations equivalent to that which has been provided to domestic corporations . . . the Legislature has imposed unequal tax burdens upon domestic and foreign corporations." Gilbert Assoc., 447 A.2d at 946-47.
26. 248 A.2d 204 (1968). In Weldon Pajamas, the court stated that "the taxpayer must actually be engaged in manufacturing in Pennsylvania to qualify for the exemption." Id. at 207.
Clause. The basis of Justice Zappala's analysis of the Commerce Clause was PPG's claim that the United States Supreme Court's decisions in *Westinghouse Electric Corp. v. Tully*, *Boston Stock Exchange v. State Tax Commission*, and *Fulton Corp. v. Faulkner* require that the manufacturing exemption be declared unconstitutional if found to mandate treating in-state and out-of-state manufacturing differently. The court concluded that the Pennsylvania manufacturing exemption does violate the Commerce Clause because it discriminates against out-of-state commercial activity regardless of whether any item moving across state lines is affected.

Justice Zappala's determination that the manufacturing exemption violates the Commerce Clause was made even though such a

28. *Id.* at *9.
32. *PPG Indus.*, 1999 Pa. LEXIS 1734, at *9, *16. *Boston Stock Exchange* arose out of New York's decision to tax securities transferred in New York differently if the securities were sold via a New York exchange than if they were sold on an exchange not in New York. *Id.* at *10-*11. The transfer of securities within New York that were sold on a non-New York exchange were taxed at a higher rate with no upper limit of taxation, while a New York sale and transfer was subject to a lower rate with a maximum tax levy. *Id.* at *11. The United States Supreme Court found that the tendency of the differential treatment to distort economic decision-making constituted an unconstitutional interference with interstate commerce. *Id.* at *12.

Another New York provision, which gave a tax credit to domestic international sales corporations if they increased their exports from New York ports, generated the litigation that resulted in the Supreme Court's decision in *Westinghouse Electric*. *Id.* A violation of the Commerce Clause was once again found because such a tax incentive tended to distort economic decision-making to the detriment of efficiency in order to achieve tax advantages. *Id.* at *13. The Court found it important to point out that a free market between states for pieces of interstate commerce exists, but does not extend to the discriminatory taxation of out-of-state commercial activity. *Id.*

The *Faulkner* litigation was a result of a North Carolina tax on the fair market value of shares of stock owned by North Carolina residents, which allowed a taxpayer to reduce his tax liability by a percentage equal to the percentage of the issuing corporation's income taxable in North Carolina. *Id.* at *15-*16. Because the tax effectively discouraged interstate commerce by disadvantaging a corporation's attempt to raise capital within North Carolina to the extent that the corporation conducted out-of-state commercial activities, the Supreme Court declared that the North Carolina tax violated the Commerce Clause. *Id.* at 16.

33. *Id.* at *18. The court specifically responded to the Commonwealth's argument that there is no Commerce Clause violation if no transaction crosses state lines by remarking that "[t]he application of Commerce Clause analysis is not limited to those cases involving a 'transaction or incident' that 'crosses state lines;' such cases are merely among the types of cases which implicate the Commerce Clause." *Id.* at *18. The standard for determining if a particular state provision is discriminatory is whether it treats in-state activity differently than out-of-state activity to the advantage of the former. *Oregon Waste Sys., Inc.*, v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).
decision may have a chilling effect upon manufacturing within Pennsylvania.\textsuperscript{34} The court decided that the discriminatory effect of the exemption would lead to business decisions being made on the basis of tax avoidance rather than economic efficiency, as well as to a degree of "economic Balkanization" that the Commerce Clause does not allow.\textsuperscript{35} Consequently, the decision of the Pennsylvania Commonwealth Court was reversed, and the case was remanded to the commonwealth court for a determination of whether the capital stock tax, of which the manufacturing exemption is a part, could be saved by being characterized as a compensatory tax.\textsuperscript{36} A compensatory tax is one that serves a valid local purpose that cannot be served in a nondiscriminatory manner.\textsuperscript{37}

The scope of the manufacturing exemption to the Pennsylvania capital stock tax was disputed nearly from its inception.\textsuperscript{38} In 1915, the Pennsylvania Supreme Court in \textit{Commonwealth v. Williamsport Rail Co.}\textsuperscript{39} was faced with the question of whether the exemption applied to a manufacturing company that did not actually manufacture anything within the state, but supplied raw materials

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34. \textit{PPG Indus.}, 1999 Pa. LEXIS 1734, at *19, n.9. The court pointed out that it "is ever mindful of the manufacturing exemption's long history and the potential chilling effect that an ultimate decision holding the manufacturing exemption unconstitutional would have on manufacturing in the Commonwealth." \textit{Id.}

35. \textit{Id.} at *19. The court stated that "[b]y employing the manufacturing exemption to the capital stock tax as a means of inducing other business operations, i.e., manufacturing, to be performed in Pennsylvania, Section 602 unconstitutionally forecloses 'tax neutral decisions' and affords preferential treatment to corporations that engage in manufacturing activities in the Commonwealth." \textit{Id.}

36. \textit{Id.} at *20. On remand, the commonwealth court refused to find the capital stock and franchise tax to be a compensatory tax. Michael Race, \textit{Judge Asks Lawmakers to Amend State Tax Law}, \textit{Pittsburgh Post-Gazette}, Dec. 3, 1999, at B9. The commonwealth court suggested that the manufacturing exemption either be expanded to include manufacturing performed in all states, or be abolished, so that even Pennsylvania manufacturing is not exempted. \textit{Id.} Estimates concerning the effect of removing the exemption entirely suggest that such action could result in a $600-700 million tax increase on manufacturers within Pennsylvania. \textit{Id.} Pennsylvania's legislature acted promptly to avoid such a result by expanding the manufacturing exemption to include manufacturing in any state. \textit{See} H.R. 1848, 183 Leg., Regular Session. (Pa. 1999).

37. \textit{PPG Indus.}, 1999 Pa. LEXIS 1734, at *20. "[O]nce a determination has been made that a statute is facially discriminatory, the burden then shifts to the state to establish that the statute 'advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives.'" Annenberg v. Commonwealth, No. 003 & 004, 1998 Pa. LEXIS 652, at *11 (Pa. April 7, 1998). This saving principle, that allows for an otherwise unconstitutional provision to be upheld if such a legitimate local purpose is found, was promulgated by the United States Supreme Court in \textit{New Energy Co. v. Limbach}, 486 U.S. 269, 278 (1988).


to a Pennsylvania company that transformed the raw materials into steel rails. The court concluded that supplying raw materials to a manufacturing concern is not equivalent to manufacturing. Therefore, the supplier of the raw materials was not given the benefit of the manufacturing exemption, even though the steel rails were the property of the supplier once the manufacturing process was complete.

The limited scope of the manufacturing exemption was further established and elucidated in 1968 in Commonwealth v. Weldon Pajamas, Inc. In Weldon, a New York corporation, which supplied cloth to its wholly-owned Pennsylvania subsidiary for the manufacture of clothing products, attempted to exclude the value of the raw material, work in process, and finished inventory at its subsidiary from the numerator of the tangible property fraction in determining its apportionment factor. The Pennsylvania Supreme Court found that the subsidiary may implement the manufacturing exemption to exclude the value of its assets actually used in manufacturing within Pennsylvania, but the parent benefits from no such exclusion unless it actually engages in manufacturing within the borders of Pennsylvania.

40. Williamsport Rail, 95 A. at 796. Williamsport Rail Company was incorporated for manufacturing purposes in Delaware and registered for doing business in Pennsylvania. See id. Because it had no factory in Pennsylvania, Williamsport Rail Company shipped its raw materials to Sweets Steel Company, which transformed the raw materials into steel rails for a fixed compensation. See id. The finished product, however, was the property of the Williamsport Rail Company. See id.

41. Id. See United States v. Anderson, 45 F. Supp. 943, 949 (S.D. Cal. 1942) (finding that a manufactured item could be nearly anything that man can make out of raw materials but cannot be the raw materials themselves). See also C.P. Jhong, Annotation, What Constitutes Manufacturing and Who is a Manufacturer Under Tax Laws, 17 A.L.R.3d 7, 20 (1968) (explaining that manufacturing within tax statutes normally requires a substantial alteration of the basic material).

42. Williamsport Rail, 95 A. at 796. The court declared that "buying raw material and sending the same to a company owning a plant, and paying that company an agreed price to shape the raw material into a manufactured product is not carrying on the business of manufacturing within the State as contemplated by our laws." Id. See Commonwealth v. Semet-Solvay Co., 105 A. 92, 93 (Pa. 1918) (finding that the manufacturing exemption extends only to the value of the capital stock related to assets actually used in manufacturing within Pennsylvania).

43. 248 A.2d 204 (Pa. 1968).

44. See Weldon Pajamas, 248 A.2d at 205.

45. Id. The court stated that "our analysis of the statute . . . convinces us that . . . the Legislature intended the manufacturing exemption to apply only to those corporations actually engaged in manufacturing in Pennsylvania." Id. One exception to the "actually engaged in manufacturing" requirement was identified. Id. This exception has a very narrow application, however; it applies only to corporations that are organized for manufacturing purposes and own a factory within Pennsylvania that is rented to another corporation that
State locational tax incentives designed to attract interstate businesses, such as the Pennsylvania manufacturing exemption, are neither indigenous to Pennsylvania nor are they a modern creation. As early as 1791, New Jersey offered tax advantages to Alexander Hamilton to entice him to locate his factory in the state. However, the proliferation of state locational tax incentives for business in recent years is a unique feature in American history. This proliferation has raised concerns that the country may begin to suffer from "economic balkanization" as each state competes against others to develop the most lucrative tax incentive plans; claims that the commerce clause is violated by this competition have arisen as well.

actually engages in manufacturing at the plant. Id. at 205.

46. See PPG Indus., Inc. v. Commonwealth, No. 87, 1999 Pa. LEXIS 1734, at *8 (Pa. June 17, 1999). The Pennsylvania Supreme Court in PPG Indus. stated that the "manufacturing exemption is a locational incentive that was created in order to establish a favorable climate in Pennsylvania for manufacturers and thus encourage the development of industry." PPG Indus., 1999 Pa. LEXIS 1734, at *8. See Commonwealth v. Williamsport Rail Co., 95 A. 795 (Pa. 1915) (identifying the purpose of the manufacturing exemption as the encouragement of investment in capital and the development of manufacturing within Pennsylvania).

47. See Mark Taylor, Note, A Proposal to Prohibit Industrial Relocation Subsidies, 72 Tex. L. Rev. 669, 671 (1994).

48. See KPMG Peat Marwick, Incentive Wars, Making a Good Deal Better, 95 State Tax Notes 222-46 (Nov. 17, 1995) [hereinafter KPMG Survey].

49. See KPMG Survey, supra note 48. According to a 1995 survey by KPMG Peat Marwick LLP, 79% of American companies surveyed receive some type of tax incentive. Id. Some of the most common forms of tax incentives, in addition to the apportionment factor reduction used by Pennsylvania, are investment tax credits (ITCs) and job-creation credits. See Peter D. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 378, 384 (1996). An investment tax credit is "legislation designed to stimulate investment by business in capital goods and equipment by allowing a percentage of the purchase price as a credit against individual and corporate taxes due and not merely as a deduction from taxable income." Black's Law Dictionary 826 (6th ed. 1990). A job-creation credit allows a reduction in tax owed according to a "multiple of a company's incremental in-state employment or payroll." Enrich, supra at 385. As of 1992, 37 states offered some form of investment tax credit, and 44 states offered some form of job-creation credit in order to attract companies. See id. at 385 n.6.

50. See Enrich, supra note 49, at 381. A common complaint about locational tax incentives is "not primarily that they favor intrastate commerce over interstate commerce, but rather that they seek to channel interstate commerce disproportionately into a particular state." Id. at 444 n.372. The economic efficacy to a particular state of attracting a company through tax incentives is debatable; one could argue that the real gain is not an economic one at all but, rather, a political one for the incumbent legislators of the offering state. Id. at 396. The spoils to a "victorious" state may, in fact, be economically deleterious considering the tax revenues that are foregone by offering the tax incentive – for example, Michigan identified $4.9 billion in tax expenditures (i.e., lost revenues due to tax incentives) on commerce for the 1996-1997 fiscal year. Id. at 388. From a national perspective, a contrary argument can be made that competition between states, with the weapon of choice being tax
This concern about the potential effects of competition between the states for commercial benefits is not a new feature of political debate in America.\(^51\) In fact, the Commerce Clause was designed as a means of avoiding interstate commercial rivalries by granting the authority to regulate interstate commerce to the national government instead of allowing it to reside in the several states.\(^52\)

It was not long before Congress's power to regulate interstate commerce was challenged by state action.\(^53\) In 1824, the United States Supreme Court was asked to resolve a controversy arising from New York's grant of an exclusive right to navigate the waters of the State of New York with boats powered by fire or steam to Robert R. Livingston and Robert Fulton in *Gibbons v. Ogden*.\(^54\) This exclusive grant precluded anyone else from using fire or steam to navigate such waters, including anyone coming from neighboring states into New York waters, even if one possessed a permit under an Act of Congress to engage in such a trade.\(^55\)

Chief Justice John Marshall, writing for the Court, framed the issue as one concerning whether the states retained a concurrent power to regulate interstate commerce along with the national incentives, "is actually a healthy process that drives down the level of state taxation of mobile capital to its economically optimal level." *Id.* at 401.

\(^51\) See, e.g., *The Federalist* No. 42, at 283 (James Madison) (Jacob E. Cooke ed., 1961) (referring to the discord generated from the lack of a national power to regulate interstate commerce within the Articles of Confederation and the necessity of granting such a power in any new plan of government).

\(^52\) See *The Federalist* No. 7, at 40 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Alexander Hamilton perceived the potential for rivalries to develop between competing states as a particularly nefarious possibility if a national power to regulate interstate commerce was left out of the Constitution. *The Federalist* No. 7, at 40. He described the potential imbroglio as follows:

> We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest. The spirit of enterprise, which characterises the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade, by which particular states might endeavour to secure exclusive benefits to their own citizens. The infractions of these regulations on one side, the efforts to prevent and repel them on the other, would naturally lead to outrages, and these to reprisals and wars.

*Id.*


\(^54\) *Gibbons*, 22 U.S. at 1-2.

\(^55\) *Id.* at 2. Gibbons owned two steamboats that he used to travel between Elizabethtown, New Jersey, and New York; he was duly licensed to use his steamboats in such a manner by a 1793 Act of Congress entitled "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." *Id.*
government. Concluding that the states retained no such power because to hold otherwise would be to assume that the framers of the Constitution intended for confusion to abound within the Union, the Chief Justice declared that only Congress had the power to regulate interstate commerce, while the states continued to hold the authority to manage their intrastate commercial affairs. What exactly constituted interstate commerce, a question to which Chief Justice Marshall gave no definitive answer, continued to generate disagreement for years to come.

The nature of the relationship between the power of the national government and that of the states as animated by Congress's authority to regulate interstate commerce was once again explained by Chief Justice Marshall in the 1829 decision of Willson v. Black Bird Creek Marsh Co. The controversy in Willson arose from the erection of a dam on navigable waters pursuant to an act of the Delaware legislature; a subsequent challenge to the act was based upon the claim that Delaware was attempting to regulate interstate commerce. Because Delaware was attempting to protect the health of its citizens by authorizing the construction of the dam and there existed no contrary national law concerning the waterway, no violation of Congress's power to regulate interstate commerce was found. Chief Justice Marshall's holding, however,

56. Id. at 8.

57. Id. at 13-15. Chief Justice Marshall remarked, "We do not find, in the history of the formation and adoption of the Constitution, that any man speaks of a general concurrent power, in the regulation of foreign and domestic trade, as still residing in the states." Id. at 13. The barrage on the notion that a concurrent power to regulate interstate commerce remained with the states also included a remark by the Chief Justice that such a situation was "insidious and dangerous" because it contained no inherent limits; a state could potentially fill in the gaps left by national legislation and, in effect, frustrate the national purpose sought to be accomplished. Id. at 17-19.

58. See generally United States v. E.C. Knight, 156 U.S. 1 (1895) (finding that manufacturing is not commerce); Swift & Co. v. United States, 196 U.S. 375 (1905) (holding that the process of buying and selling meat at a stockyard can be considered interstate commerce even if the animals are at rest within the stockyard if such a process has a direct effect on activities outside of a particular state); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding that interstate commerce has come to an end once an animal has been delivered to a slaughterhouse wherein it will be butchered); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (concluding that coal extraction is not an activity of interstate commerce).

59. 27 U.S. (2 Pet.) 245 (1829).

60. See Willson, 27 U.S. at 245. The decision of the owners of a sloop to ram through the dam in order to continue on through the marsh was the origin of the controversy. See id. at 245. An action of trespass was brought against the operators of the sloop; consequently, the authority of the state to license such a project was challenged. See id. at 246.

61. Id. at 250. The Court placed great weight upon the purposes to be served by the
cannot be seen as a robust limitation on national power because of his reference to Congress's "power to regulate commerce in its dormant state"; that is, the Commerce Clause was found to proscribe state legislation when Congress's inaction is seen as an approval of the status quo.62

The Court further refined the limits upon state involvement in areas touching upon interstate commerce in 1851 in Cooley v. Board of Wardens.63 At issue was a Pennsylvania law that required ships to hire pilots to aid in navigating through certain waters bordering upon Pennsylvania.64 The Cooley Court held that the law constituted a regulation of interstate commerce; nevertheless, the Court upheld the legislation because the nature of the subject regulated permitted state participation.65 More specifically, navigation through local waters was found to demand the diverse regulation that states may provide, as opposed to the uniform regulation that Congress is capable of delivering.66

The body of law detailing the restrictions placed upon a state's power to regulate certain subjects affecting interstate commerce was given another significant addition in the 1937 case of Henneford v. Silas Mason Co.67 After considering whether a Washington statute placing a two percent use tax on items bought outside of Washington and used within the state violated the Commerce Clause, the Henneford Court concluded that such a tax passed constitutional scrutiny because it merely compensated for a two percent sales tax that was affixed to items purchased within

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act and the lack of a contrary national law: "The value of the property on its banks must be enhanced . . . and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." Id.

62. Id. at 252. See, e.g., Welton v. Missouri, 91 U.S. 275, 280 (1875) (declaring that states may regulate some local subjects with effects upon interstate commerce until Congress acts, but subjects which are national in nature or require uniform legislation must remain free of state interference).

63. 53 U.S. 299 (1851).

64. See Cooley, 53 U.S. at 311-12. Failure to acquire the services of a satisfactory pilot resulted in a fine payable to the master warden for the benefit of the Society for Relief of Distressed and Decayed Pilots, their Widows, and Children. See id.

65. Id. at 319.

66. Id. The majority opinion quite clearly explains that the states may continue to regulate the subject until Congress acts to deprive them of such authority because "it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits." Id.

67. 300 U.S. 577 (1937).
Thus, a state regulation that touched upon interstate commerce was, nevertheless, upheld because it was deemed a compensatory tax, which placed an identical tax burden on in-state and out-of-state goods.\(^6\)

In 1963 in *Halliburton Oil Well Cementing Co. v. Reily*,\(^7\) the Court resolved a dispute concerning a Louisiana sales/use tax scheme similar to the one at issue in *Henneford*.\(^8\) The genesis of the controversy was the application of the sales/use tax provisions to an oil well servicing company doing business in Louisiana with equipment assembled by the company in Oklahoma and also with equipment purchased outside of Louisiana from entities that were not regularly engaged in the business of selling such equipment.\(^9\) The taxpayer objected to Louisiana's requirement that the taxpayer include in calculations for the use tax the value of labor and shop overhead relating to the equipment assembled outside of Louisiana and the value of the items acquired through the isolated sales even though no such requirements would have been imposed if the activities would have occurred within Louisiana.\(^10\) Chief Justice Earl

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68. *Henneford*, 300 U.S. at 588. Those subject to the two percent use tax were not exposed to potentially higher amounts of taxation than purchasers of in-state goods because the statute exempted anyone who had already paid a sales or use tax on an item in question equal to or greater than the tax imposed by Washington from the reach of the provision; if a sales or use tax that was already paid was less than two percent of the purchase price, then the owner was liable to Washington for the difference. *Id.* at 580-81.

69. *Id.* at 584. Justice Benjamin Cardozo, writing for the Court, explained the effect of the statute in his customarily colorful way: "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." *Id.* Justice Cardozo distinguished this case from *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935), wherein a New York provision preventing milk from being sold in New York if it was purchased out-of-state for less than the purchase price allowed within New York was found to violate the Commerce Clause, by highlighting the New York statute's effect of injecting its legislation into other states. *Id.* at 585. The Washington use tax was identified not as an attempt to project legislation to other states, but merely as a means of compensating for the unfavorable condition imposed upon sellers of goods within Washington by the state sales tax. *Id.* at 581.

70. 373 U.S. 64 (1963).

71. *Halliburton*, 373 U.S. at 65. The Louisiana tax provisions imposed a two percent sales tax on the value of items purchased within the state and a two percent use tax on the value of items purchased out-of-state but used within Louisiana; the use tax was reduced by the amount of any sales or use tax already paid on an item in a different state. *See id.* at 65-66.

72. *Id.* at 66-68.

73. *See id.* at 67. The fact that the value of labor and shop overhead would not have been included in the taxable value had the equipment been assembled within Louisiana was stipulated by the parties. *See id.* Louisiana also did not contest the assertion that the isolated sales (i.e., the purchase of a well cementing unit from a Texas company and the acquisition of an airplane from a New York company) would not have been taxed had they been conducted with a Louisiana concern (n.b., an isolated sale is one made by an entity that is
Warren, writing for the Court, found such inequitable treatment to be an unconstitutional discrimination against interstate commerce because it would pressure companies to locate within Louisiana in order to avoid the unfavorable treatment of out-of-state activity.\textsuperscript{74}

Following the \textit{Halliburton} decision, the Court was faced with an increased number of disputes concerning state tax provisions that resembled locational tax incentives, such as that giving rise in 1977 to \textit{Boston Stock Exchange v. State Tax Commission}.\textsuperscript{75} New York's decision to tax transfers of securities within New York differently depending upon whether the sale occurred on a New York exchange or an out-of-state exchange triggered the litigation in \textit{Boston Stock Exchange}.\textsuperscript{76} The challenged New York provision actually discriminated in favor of out-of-state residents as long as the sale of securities occurred within New York because it gave such out-of-state residents a fifty percent reduction in the rate of tax while granting no preferential tax treatment to in-state residents regardless of where the sale took place.\textsuperscript{77} In holding that the tax

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\item not regularly engaged in the business of selling such items). \textit{See id. at} 68.
\item \textit{Id. at} 72-73. Chief Justice Warren found this tendency to funnel companies into Louisiana from other states to be an especially pernicious attribute of the taxing scheme because of the potential for the "multiplication of preferential trade areas" that would be "destructive of the very purpose of the Commerce Clause." \textit{Id. See} Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951) (striking down a Wisconsin law requiring milk pasteurization plants to locate within five miles of the city of Madison because it impermissibly burdened interstate commerce).
\item Even though Chief Justice Warren's acerbic comments concerning the constitutionality of tax provisions that encourage business relocation are now over 36 years old, very few frontal assaults (direct attacks on the laws solely because of their nature as locational tax incentives) on such state laws have been made. Enrich, \textit{supra} note 48, at 407-08. The reason for this lack of challenges to such provisions has been attributed to a "lack of interest" because of "the fact that the parties who are ordinarily in a position to bring challenges to state business taxes, namely business taxpayers, have not found it in their interests to attack this particular class of state tax policies." \textit{Id. at} 408. \textit{But see} R. J. Reynolds Tobacco Co. v. City of New York Dep't of Fin., 643 N.Y.S.2d 865. (N.Y. App. Div. 1995) (agreeing with a company doing business both within New York and without that the allowance of accelerated depreciation deductions only for in-state investment unconstitutionally discriminates against interstate commerce); Beatrice Cheese, Inc. v. Wisconsin Dep't of Revenue, Nos. 91-1-100 to -102, 1993 Wisc. Tax LEXIS 5, at *6, *10 (Wis. Tax App. Comm'n Feb. 24, 1993) (agreeing with a business carrying on commercial activities both inside and outside Wisconsin that Wisconsin's tax statute is unconstitutional because it only allows accelerated depreciation deductions for property located within the state).
\item \textit{429 U.S. 318} (1977).
\item \textit{See Boston Stock Exch.}, \textit{429 U.S. at} 323-25. The motivation for the New York tax structure concerning securities transfers was the belief that the development of out-of-state exchanges, which detrimentally impacted upon the prosperity of New York exchanges, was caused by the securities transfer tax that was absent from many other state tax statutes. \textit{See id. at} 323-24.
\item \textit{See id. at} 324-25. Out-of-state residents who sold their securities on an out-of-state
provision violated the Commerce Clause, the Court expressly rejected the notion that there is no violation if the tax funnels business into a state instead of protecting in-state business from out-of-state competition.\textsuperscript{78}

In 1977, the law concerning the constitutionality of state tax provisions touching upon interstate commerce was clarified in \textit{Complete Auto Transit, Inc. v. Brady}\textsuperscript{79} as the Court described a four-part test to determine whether a state tax violated the Commerce Clause.\textsuperscript{80} The case arose out of the application of a Mississippi tax on the privilege of conducting business within the state to a motor carrier operating within Mississippi.\textsuperscript{81} The motor carrier claimed that the tax violated the Commerce Clause because the items transported were articles of interstate commerce and, therefore, the tax burdened interstate commerce.\textsuperscript{82} In rejecting this argument, Justice Harold Blackmun delineated the four-part test to be applied to state tax provisions to judge their consonance with the Commerce Clause: a tax must have a substantial nexus with the taxing state, it must be fairly apportioned, it must not discriminate exchange, like in-state residents, did not receive the benefit of the reduced tax rate. \textit{See id.}

The tax provision also discriminated against interstate commerce by providing a cap to any potential tax liability arising from a single transfer of securities if the sale was made on a New York exchange regardless of whether an in-state or an out-of-state resident was involved; no such cap existed if the sale occurred outside of a New York exchange. \textit{See id. at 324.}

78. \textit{Id.} at 334. The Court's opinion considered the possibility that the New York tax could be saved if it could be characterized as a compensatory tax for a burden imposed on sales within New York. \textit{Id.} at 331. In finding that the tax did not qualify as a compensatory tax, the Court concluded that "[r]ather than 'compensating' New York for a supposed competitive disadvantage resulting from § 270, the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." \textit{Id.}

79. 430 U.S. 274 (1977). Prior to this decision, the Court had not developed a clearly defined test for lower courts to consistently follow in state tax provision cases. \textit{See Northwestern States Portland Cement Co. v. Minnesota}, 358 U.S. 450, 467-58 (1959) (describing the "case-by-case" approach that produced a "quagmire" out of the body of law concerning state tax disputes).

80. \textit{Complete Auto Transit}, 430 U.S. at 279.

81. \textit{See id.} at 274-75. The motor carrier was a Michigan corporation that hauled vehicles, which were shipped into Mississippi by rail, from points within Mississippi to dealers within Mississippi. \textit{See id.} at 276. The tax in question was essentially a sales tax based upon the gross proceeds from doing business within Mississippi. \textit{See id. at 275-76.}

82. \textit{See id.} at 288-89. The Court concluded that none of the four prongs were violated, and affirmed the proposition that interstate commerce is not immune from state taxation. \textit{Id.} at 287-88. \textit{See Western Live Stock v. Bureau of Revenue}, 303 U.S. 250, 254-55 (1938) (declaring that an interstate business is not immune from state taxation merely because it engages in interstate commerce because it still must assume its portion of the state tax burden).
against interstate commerce, and it must be fairly related to services provided by the state in order to pass constitutional scrutiny.\textsuperscript{83}

The constitutionality of a state tax that encouraged the location of business within a state was once again considered by the Supreme Court in 1984 in \textit{Westinghouse Electric Corp. v. Tully}.\textsuperscript{84} New York's decision to grant a tax credit to reduce the tax liability arising from the operation of a domestic international sales corporation ("DISC") to the extent that the DISC conducted its export activity out of a New York port was objected to on Commerce Clause grounds.\textsuperscript{85} Of particular concern to the Court was the feature of the tax credit that caused it to decrease as export activity from ports outside of New York increased.\textsuperscript{86} Thus, not only did the tax credit serve to encourage business location within New York, but it also served to discourage out-of-state commercial activity regardless of the amount conducted within New York.\textsuperscript{87} Justice Harold Blackmun, speaking for the Court, struck down the tax credit provision on a basis similar to that found in \textit{Boston Stock Exchange} by objecting to the tendency of the credit to prevent tax-neutral decisions by enticing companies to locate within New York solely to gain favorable tax treatment to the detriment of other states.\textsuperscript{88}

The 1988 \textit{New Energy Co. v. Limbach}\textsuperscript{89} decision is important because within it the Supreme Court expressly referred to the possibility that a state tax provision that violates the Commerce Clause may, nevertheless, be upheld if the state can establish that it serves a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.\textsuperscript{90} This saving

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  \item 83. \textit{Complete Auto Transit}, 430 U.S. at 279.
  \item 84. 466 U.S. 388 (1984).
  \item 85. \textit{See Westinghouse Elec.}, 466 U.S. at 395-96. The motivation for the credit was supplied by a budget analysis that revealed that if DISC's were not taxed the state could lose up to $30 million in revenue, but that such taxation would likely result in the formation of DISC's outside of New York and a decrease in the amount of exportable goods produced within the state. \textit{See id.} at 392. A DISC is "[a] U.S. corporation . . . whose income is primarily attributable to exports. Income tax on a certain percentage of a DISC's income is usually deferred resulting, generally, in a lower overall corporate tax." \textit{BLACK'S LAW DICTIONARY} 484 (6th ed. 1990).
  \item 86. \textit{Westinghouse Elec.}, 466 U.S. at 401 n.9.
  \item 87. \textit{Id.}
  \item 88. \textit{Id.} at 405-06. The Court identified the general purpose of the Commerce Clause as the creation of "an area of free trade among the several states" and remarked that such tax incentives for business relocation impinged upon this purpose. \textit{Id.} at 402.
  \item 89. 486 U.S. 269 (1988).
  \item 90. \textit{New Energy Co.}, 486 U.S. at 278.
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principle arose from a dispute concerning an Ohio tax credit that was allowed to reduce the sales tax liability of fuel dealers relating to sales of ethanol, but only if the ethanol was produced in Ohio or in a state that gave similar tax treatment to sales of Ohio-produced ethanol. The Court's opinion summarily identified the discriminatory nature of the tax credit that burdened interstate commerce, and, subsequently, found that no satisfactory argument had been advanced that would allow it to stand through the saving principle.

In 1994 in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, the Court considered whether an otherwise impermissible compensatory tax could be upheld under the saving principle identified in *New Energy Co.* The provision at issue in *Oregon Waste Systems* was a surcharge resembling a compensatory tax on out-of-state waste disposed of within Oregon based upon the cost to the state of disposing of such waste. Because the fee paid for the disposal of in-state waste was less than that charged for the disposal of out-of-state waste, the surcharge was found to discriminate against interstate commerce. The Court held that such a tax, even though discriminatory, could be upheld not because of an isolated compensatory tax doctrine, but because a compensatory tax can, at times, serve a legitimate local purpose that cannot be served by reasonable nondiscriminatory alternatives. In finding that the Oregon tax must be struck down, the Court listed the necessary features of a compensatory tax argument capable of withstanding the strict scrutiny of Commerce Clause analysis: an identification of the...
intrastate tax burden being compensated for, a showing that the amount of the interstate tax imposed is close to but does not exceed the intrastate tax being compensated for, and a showing that the taxable events are substantially equivalent.98

In 1996, in *Fulton Corp. v. Faulkner*,99 the Supreme Court implemented the *New Energy Co.* and *Oregon Waste Systems* principles in striking down a North Carolina tax that encouraged investment in companies by North Carolina residents to the extent that the companies did business within North Carolina.100 Justice David Souter's majority opinion identified the North Carolina tax as discriminatory because it helped companies doing business in North Carolina raise capital from North Carolina residents, while hindering such efforts of those conducting large amounts of their business out-of-state.101 As one may have expected in the wake of *Oregon Waste Systems*, North Carolina attempted to justify the provision as a compensatory tax for the cost of maintaining its capital markets which businesses escape to the extent that they engage in business outside of North Carolina.102 The Court rejected this argument and, consequently, struck down the tax on Commerce Clause grounds because the tax failed to meet any of the three *Oregon Waste Systems* requirements.103

The Pennsylvania Supreme Court's determination in *PPG Industries* that the manufacturing exemption to the Pennsylvania capital stock tax facially discriminates against interstate commerce because it only applies to in-state manufacturing is consistent with an accurate reading of the statute and of Commerce Clause law.

98. *Id.* at 103. The Court found the fact that the interstate tax imposed was much greater than the intrastate burden being compensated for as being particularly decisive in striking down the tax. *Id.* at 104.


100. *Fulton Corp.*, 516 U.S. at 327-28. North Carolina residents were allowed a reduction in the rate of tax imposed upon the value of the stock that they owned to the extent that the companies issuing the stock did business in North Carolina. *See id.* The extent to which a company did business in North Carolina was determined by analyzing the fraction of its income subject to tax in North Carolina. *See id.* at 328.

101. *Id.* at 333. Justice Souter refused to acknowledge the possibility of a de minimis defense to a claim of discrimination against interstate commerce. *Id.* at 333, n.3. "De minimis" is short for "de minimis non curat lex," which means "[t]he law does not care for, or take notice of, very small or trifling matters." *Black's Law Dictionary* 431 (6th ed. 1990).

102. *Id.* at 334-35.

103. *Id.* at 336-39. Specifically, concerning the *Oregon Waste Systems* test, the Court found that the connection between the intrastate burden and the out-of-state benefit enjoyed by avoiding it was too speculative; that the burden of demonstrating that the interstate tax imposed was not greater than the intrastate tax being compensated for was not carried; and that the taxable events were not substantial equivalents. *Id.*
The scant amount of discussion within the court's opinion devoted to whether the exemption pertains to out-of-state manufacturing is warranted considering the relatively clear message that has emanated from the court's holdings on the subject since the inception of the exemption.\textsuperscript{104} In fact, the relatively one-sided treatment of the issue suggests that PPG's decision to controvert the scope of the exemption may have been based upon the premise that the court would rule differently in this instance, not because of any likelihood that the statute, on its face, would be interpreted differently, but because of the concomitant constitutional challenge.\textsuperscript{105} Because PPG attempted to retract its constitutional challenge once it became apparent that it may be successful, it is reasonable to conclude that it was merely used as a means of goading the court into deviating from the past interpretations of the scope of the exemption.\textsuperscript{106}

Regardless of PPG's motivation for bringing the constitutional challenge, the court correctly concluded that the allowance of the exemption only for in-state manufacturing facially discriminates against interstate commerce. This conclusion is certainly bolstered by the overall effect of the exemption, which not only encourages the expansion of manufacturing activity within the state but also hinders the development of such activity in other states.\textsuperscript{107} This dual effect invades two interests that are traditionally protected by the Commerce Clause and that serve as the underlying basis for many of the previously discussed Supreme Court decisions - the preservation of political unity (avoiding economic balkanization) and the promotion of economic efficiency (allowing for tax-neutral decisions).\textsuperscript{108}

Difficult cases may arise, however, when these two protected

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\item \textsuperscript{104} PPG Indus., Inc. v. Commonwealth, No. 87, 1999 Pa. LEXIS 1734, at *7-*10 (Pa. June 17, 1999).
\item \textsuperscript{105} Such a strategy is consistent with the understanding that courts will generally interpret a statute so that it is constitutional if such an interpretation is reasonable.
\item \textsuperscript{106} PPG Indus., 1999 Pa. LEXIS 1734, at *21, n.10. The court remarked that "[c]uriously, . . . PPG 'emphasizes that it has never sought to have the . . . exemption itself declared unconstitutional.' We find this assertion disingenuous. PPG, throughout these proceedings, has challenged the manufacturing exemption on constitutional grounds. . . . PPG cannot now, at this advanced stage of the proceedings, retract its constitutional attack." Id.
\item \textsuperscript{107} Id. at *15.
\item \textsuperscript{108} See Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (objecting to a state tax because of its tendency to divide the nation into various preferential trade areas); Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 406 (1984) (rejecting a state tax provision because it prevents tax-neutral decisions).
\end{itemize}
interests collide with another interest that is taken account of when judging the constitutionality of locational tax incentives – the protection of a state's freedom to compete for pieces of interstate commerce.\textsuperscript{109} Cases involving provisions that favor one state by discriminating against others do not present the difficult determinations that are posed by potential disputes that may arise when states choose to encourage commercial activity simply by giving the same favorable treatment to both in-state and out-of-state activity. For example, if Pennsylvania's manufacturing exemption actually did apply to in-state and out-of-state manufacturing, an argument could be made that it would encourage economic balkanization and prevent tax-neutral decisions, yet it would seem to comply with the notion that free competition does not discriminate against interstate commerce.

If forced to choose between the competing interests, it is quite possible that Commerce Clause law will be interpreted to favor the interests of political unity and economic efficiency at the expense of free competition for interstate commerce. Although it would be difficult to classify locational tax incentives that do not recognize state boundaries as discriminatory,\textsuperscript{110} it is conceivable that courts will find that such provisions violate the Commerce Clause in some way in order to avert an increase in interstate bidding wars for commercial activity.\textsuperscript{111} This temptation should be resisted, however, because the Commerce Clause does not remove a state's power to raise revenue to satisfy its own needs as long as its tax provisions do not discriminate against interstate commerce.\textsuperscript{112} Ultimately, such non-discriminatory tax measures should withstand Commerce Clause scrutiny because the existence of in-state voting taxpayers

\textsuperscript{109} This interest in allowing states to freely compete for interstate commerce has been repeatedly proclaimed in numerous Commerce Clause cases by quoting the Supreme Court in \textit{McLeod v. J. E. Dilworth Co.}: 
"[T]he very purpose of the Commerce Clause was to create an area of free trade among the several States." McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944).

\textsuperscript{110} The operative definition of "discrimination" for Commerce Clause questions was identified in \textit{Oregon Waste Systems, Inc. v. Department of Environmental Quality}, 511 U.S. 93, 99 (1994), as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." It is difficult to conclude that a provision that makes no distinction between two entities (e.g., between one state and another) somehow discriminates against one in favor of the other.

\textsuperscript{111} \textit{See} Enrich, \textit{supra} note 49, at 380-81 (urging courts to strike down locational tax incentives because they are unproductive but provided anyway because states cannot remove themselves from the contest while other states continue to participate).

\textsuperscript{112} This position was recognized in \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1, 199 (1824), within which the Court stated that the Commerce Clause does not remove the "power of the States to tax for the support of their own governments."
would prevent extreme locational tax incentive plans from being passed while the preservation of free competition for interstate commerce would compel states to keep the taxation of commercial activity at its economically optimal level.\textsuperscript{113}

\textit{Craig Haller}