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Speak Softly and Carry a Big Commerce Clause: *General Motors Corp. v. Director of Revenue*

General Motors Corp. v. Director of Revenue[1]

I. INTRODUCTION

The effect of *General Motors Corp. v. Director of Revenue* ("*GM Corp.*") may well spread beyond the confines of the Missouri state line. Because the case applies United States Supreme Court precedent to a new constitutional problem, other states may look to it for aid in interpreting similar statutory provisions. There has, after all, been both judicial and scholarly debate concerning how strictly the Commerce Clause should be interpreted with regard to tax incentives and benefits.[2] *GM Corp.* makes clear that the debate is over in Missouri. The Commerce Clause will function as a sword for Missouri courts to prevent Missouri from becoming involved in an interstate commerce brawl.[3]

II. FACTS AND HOLDING

General Motors Group ("GM Group") attempted to file Missouri consolidated income tax returns in 1990, 1991, and 1992.[4] The Director of Revenue, upon receipt of the consolidated returns and the refund requests, decided that GM Group was not eligible to file consolidated returns.[5] Under Section 143.431.3(1) of the Missouri Revised Statutes, Missouri required a corporation to obtain at least fifty percent of its total income from Missouri sources in order to be eligible to file a consolidated return.[6] The Director also

1. 981 S.W.2d 561 (Mo. 1998).

2. *See infra* Part V. While this case deals with what has typically been called a tax benefit or incentive, this Note suggests in Part V that this might be better characterized as a location incentive.

3. *See infra* Part V.

4. *GM Corp.*, 981 S.W.2d at 562. GM Group consists of General Motors Corporation (domiciled in Detroit, Michigan but incorporated in Delaware) as well as about 300 subsidiaries. *Id.* From 1990 to 1992, GM Group transacted a considerable amount of business in Missouri. *Id.* "[GM Group] had approximately $1.3 billion in property, $300 million in payroll, and $2.3 billion in gross receipts in Missouri for each of the three years." *Id.* at 563. In fact, GM conducted so much business in Missouri that it requested refunds on its Missouri tax returns of $3,651,703 in 1990 and $1,172,400 in 1991. *Id.* No refund was requested in 1992. *Id.*

5. *Id.*

6. *Id.*

rejected GM Group's requests for refunds and "issued a notice of deficiency against GM in the amount of $12,533,176 for 1992."[7]

GM Group appealed the Director's decision to the Administrative Hearing Commission ("AHC"), asserting that Section 143.431.3(1) was unconstitutional because it violated the Commerce Clause of the United States Constitution.[8] The AHC upheld the Director's decision, but found that GM Group was not liable for any Missouri income tax in 1992.[9] The AHC did not rule on any of the constitutional issues because it did not have power to decide such issues.[10] GM Group then appealed to the Missouri Supreme Court, claiming that Section 143.431.3(1) discriminated against interstate commerce.[11]

Section 143.431.3(1) sets out the conditions under which an "affiliated group of corporations" may file a consolidated income tax return. The statute reads in relevant part:

> If an affiliated group of corporations files a consolidated income tax return for the taxable year for federal income tax purposes and fifty percent or more of its income is derived from sources within this state as determined in accordance with section 143.451, then it may elect to file a Missouri consolidated income tax return.[12]

An affiliated group of corporations that files a consolidated tax return receives a considerable tax advantage because it is treated as one corporation for tax purposes.[13] This allows such a group of corporations to "offset the gains of one or more of its companies . . . which may result in lower tax. In addition, filing a consolidated return is administratively more convenient than filing separate returns."[14]

GM Group argued that Section 143.451 violated the Commerce Clause because the fifty percent requirement discriminated against interstate commerce.[15] The Director of Revenue, according to GM Group, used the fifty percent requirement to deny GM Group a tax benefit based simply on its

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7. *Id.*

8. *Id.* GM Group also appealed on other federal and state constitutional bases, but the case was decided solely under the Commerce Clause. *Id.*

9. *Id.*

10. *Id. See* State Tax Comm'n v. Administrative Hearing Comm'n, 641 S.W.2d 69, 75-76 (Mo. 1982).

11. *Id.* Under the MISSOURI CONSTITUTION art. V, § 3, the court had original jurisdiction because the matter involved construction of revenue laws of the state. *Id.* at 562.

12. MO. REV. STAT. § 143.431.3(1) (1994).

13. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 563 (Mo. 1998).

14. *Id.*

15. *Id.*

corporate form and the geographic location of the majority of its business activities.[16]

The Missouri Supreme Court, in an opinion authored by Judge Covington, held that Section 143.431.3(1) violated the United States Constitution, article I, section 8, because it discriminated against interstate commerce.[17] The court based its reasoning on Commerce Clause precedent from the United States Supreme Court. Specifically, the court determined that *Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance* governed the case.[18] Relying on *Kraft*, the court overruled *Williams Co. v. Director of Revenue*[19] to the extent that *Williams* held the fifty percent requirement in Section 143.431.3(1) constitutional.[20]

III. LEGAL BACKGROUND

A. Overruling Williams

In *GM Corp.*, the Missouri Supreme Court discussed many of the United States Supreme Court cases relevant to its determination. However, the Court gave little attention to the Missouri Supreme Court case it overruled, *Williams Co. v. Director of Revenue*,[21] which held Section 143.431.3(1) constitutional.

In *Williams*, Williams Company ("Williams") and seven of its subsidiaries that had conducted business in Missouri from 1982 to 1984 sought the right to file consolidated Missouri income tax returns.[22] The Department of Revenue and the AHC determined that Williams and its subsidiaries were not eligible to file consolidated returns for those years because they did not meet the fifty percent requirement in Section 143.431.3.[23] Williams appealed to the Missouri Supreme Court, arguing that Section 143.431.3 violated the Commerce Clause because "the fifty percent 'source of income' requirement of the statute discriminate[d] against interstate commerce."[24] The court held that the statutory provision did not violate the Commerce Clause for two reasons. First, the court interpreted the statutory provision to be an attempt by the Missouri legislature to ensure that

16. *Id.* at 563.
17. *Id.* at 568.
18. *Id.* at 565; Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71 (1992).
19. 799 S.W.2d 602 (Mo. 1990), *cert. denied*, 501 U.S. 1260 (1991).
20. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 567 (Mo. 1998).
21. 799 S.W.2d 602 (Mo. 1990).
22. *Id.* at 603.
23. *Id.* at 604.
24. *Id.*

Missouri's taxation scheme did not tax income derived from non-Missouri sources.[25] The court further stated:

> [F]ormula apportionment of the income of a unitary affiliated group is more likely to be "fairly apportioned, nondiscriminatory, sufficiently connected with the taxpayer's state activities, and fairly related to state benefits provided the taxpayer" when the affiliated group derives the majority of its income from in-state sources. Conversely, when the unitary group's income derives primarily from sources outside the state, formula apportionment of the income of only those subsidiaries with direct relationships to the State yields a corpus of income more reasonably related to the group's activities within the state.[26]

According to the court, simply because Williams organized its company in a manner that was not advantageous for tax purposes did not mean that the fifty percent requirement violated the Commerce Clause.[27] Second, the court stated that Section 143.431.3 did not additionally tax appellants simply because of their interstate activities. Instead, Williams was burdened because the statutory provision did not allow Williams to consolidate losses incurred by subsidiaries outside of Missouri with gains realized in Missouri.[28] However, Missouri's practice of not allowing "consolidation of losses . . . when there is no clear nexus" between the losses of subsidiaries outside Missouri and the gains by subsidiaries within Missouri did not discriminate against interstate commerce.[29]

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25. The court stated that "formula apportionment and separate accounting" are "imperfect proxies for an ideal which is not only difficult to achieve in practice, but also difficult to describe in theory." *Id.* at 605. The Commerce Clause demands that states impose taxes on activities with a "substantial nexus with the taxing state." Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980). Taxes must be "fairly apportioned" and nondiscriminatory in their effect on interstate commerce, and must be "fairly related to the services provided by the State." *Id.*

26. *Williams*, 799 S.W.2d at 605 (citing Mid-America Television Co. v. State Tax Comm'n, 652 S.W.2d 674, 680-81 (Mo. 1983) (internal citations omitted).

27. Williams Co. v. Director of Revenue, 799 S.W.2d 602, 605 (Mo. 1990).

28. *Id.*

29. *Id.* Prior to *Williams*, *Mid-America Television Co.*, 652 S.W.2d at 680, upheld Section 143.431.3. In *Mid-America*, the Missouri Supreme Court stated:

> A group deriving less than half of its income from sources within this state can hardly be said to be conducting a unitary business within the state. It is not unreasonable for Missouri to decline to accord such a group the same tax treatment available to a single entity performing all or most of its business operations herein. This is especially true since the state is only allowed to tax corporations on income derived from sources within this state. The state has little reason to treat an affiliated group as a single taxpaying entity when less than 50 percent of the group's income is derived from sources within the

B. Reorganization or Relocation Will Not Save an Unconstitutional Burden

The Missouri Supreme Court found Section 143.431.3 unconstitutional based on its interpretation of *Kraft General Foods, Inc. v. Iowa Department of Revenue.*[30] In *Kraft*, Kraft General Foods, Inc. ("Kraft") conducted a "unitary business" in the United States and other countries.[31] The operation of this business subjected Kraft to tax liability in Iowa.[32] Pursuant to the Iowa Business Tax on Corporations, Iowa taxed dividends received from foreign subsidiaries but did not tax dividends received from domestic subsidiaries.[33] Kraft challenged this practice under the Foreign Commerce Clause.[34] The Supreme Court stated that application of the Iowa tax depended on both the domicile and the location of the subsidiaries and their business activities.[35] As a result, the only dividends taxed were those "reflecting the foreign business activity of

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> state, since the income earned by the members of the group outside the state is beyond the state's power to tax. . . . The fact that more tax may be owed to the state of Missouri by one corporation under one set of circumstances rather than another, without some showing of discrimination or arbitrary or unreasonable classification, is not sufficient to support appellants' claim of constitutional infirmities.

Id. at 681. This case did not involve a Commerce Clause challenge, although its reasoning is instructive to this Note.

30. 505 U.S. 71 (1992). Note that the Court did not exclusively base its reasoning on *Kraft*. The remainder of the opinion's legal background can be found *infra* Part III(C).

31. *Id.* at 72.

32. *Id.*

33. *Id.* at 72-73.

34. *Id.* at 73. The Foreign Commerce Clause prohibits discrimination by states against foreign commerce. The Court in *Kraft* noted:

> In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 . . . (1979), we concluded that the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce, in part because matters of concern to the entire Nation are implicated. Like the Import-Export Clause, the Foreign Commerce Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole.

Id. at 79 (citations omitted). *Japan Line* held that "when a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in [the doctrine governing the Interstate Commerce Clause], come into play." *Japan Line, Ltd.*, 441 U.S. 434, 446 (1979). "The first is the enhanced risk of multiple taxation. . . . The second additional consideration . . . is the possibility that a state tax will 'impair federal uniformity in an area where federal uniformity is essential.'" Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 185-86 (1983) (quoting *Japan Line, Ltd.*, 441 U.S. at 448) (citations omitted).

35. *Kraft*, 505 U.S. 71 at 76.

foreign subsidiaries."[36] Iowa argued that Kraft could avoid this tax liability by changing its corporate structure.[37] The Court rejected this argument, concluding that there is "no authority for the . . . proposition . . . that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business."[38] Iowa further argued that the statute did not violate the Foreign Commerce Clause because Iowa subsidiaries were not treated more favorably under the tax system than subsidiaries elsewhere.[39] The Court also rejected this argument, stating that favorable treatment of domestic (in this case Iowa) corporations was not necessary to prove a violation of the Foreign Commerce Clause.[40] According to the Court, "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce in part because matters of concern to the entire Nation are implicated."[41] The Court concluded its opinion by stating that "[t]he Iowa statute cannot withstand [Commerce Clause] scrutiny, for it facially discriminates against foreign commerce and therefore violates the Foreign Commerce Clause."[42]

36. Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71, 77 n.19 (1992).

37. *Id.* at 77-78. Iowa was joined by amicus.

38. *Id.* at 78.

39. *Id.* at 78-79.

40. *Id.* at 79.

41. *Id.* (citation omitted). The Court further rejected the proposition that foreign commerce discrimination can be justified by the fact that the United States Government and States impose burdens on domestic subsidiaries that offset the burden imposed by Iowa upon foreign commerce. *Id.* at 80-81. And finally, the Court rejected the argument that Iowa could "facially discriminate against foreign commerce" because of a "compelling justification"—the administrative convenience "of having state forms and auditing procedures [which] replicate federal practice." *Id.*

42. *Id.* at 82.

C. The Rest of the Story—Prohibitions on Discriminatory State Legislation in Violation of the Commerce Clause

The Commerce Clause,[43] not unlike other important federal constitutional provisions, has generated a wealth of case law concerning its interpretation and application. However, following the example of *GM Group*, it is helpful to consider only a small sampling of these cases.

In 1977, in *Boston Stock Exchange v. State Tax Commission*, the Supreme Court examined a New York statutory amendment that imposed higher taxes on securities transactions occurring outside the state.[44] In determining that the amendment violated the Commerce Clause by "impos[ing] an unequal tax burden on out-of-state sales in order to protect an in-state business," the Court articulated the essential structure for Commerce Clause analysis with respect to discriminatory tax burdens.[45] "[T]he very purpose of the Commerce Clause [is] to create an area of free trade among the several States."[46] The Commerce Clause acts as a limitation on the power of the States to tax interstate commerce.[47] However, the Clause does not restrict the "reserved 'power of the States to tax for the support of their own governments.'"[48] The challenge for the Court in adjudicating Commerce Clause cases is to find the balance between limiting the States' power and allowing them to exercise the reserved power inherent in principles of federalism.[49] Because courts generally adjudicate Commerce Clause cases on a case-by-case basis, there is "'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'"[50] The fundamental

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43. The Commerce Clause, U.S. CONSTITUTION, art. I, § 8, has generally been seen by the United States Supreme Court in the following light:

> We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. "In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 502 U.S. 564, 572 (1997) (quoting Freeman v. Hewit, 329 U.S. 249, 252 (1946)); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945); Morgan v. Virginia, 328 U.S. 373 (1946)).

44. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 319 (1977).

45. *Id.* at 328.

46. *Id.* (quoting McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944)).

47. *Id.*

48. *Id.* (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824)).

49. *Id.* at 328-29.

50. *Id.* at 329 (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)).

principle which must guide the Court in these determinations is the following: "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[51] In *Boston,* the Court concluded that because the New York statutory amendment at issue "impose[d] a greater tax liability on out-of-state sales than on in-state sales, [it] falls short of the substantially evenhanded treatment demanded by the Commerce Clause."[52] The Court will not sanction statutes that discriminate against interstate commerce even if the statutes are "pursuing a clearly legitimate local interest."[53] The Court concluded its analysis by stating:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.[54]

The Supreme Court elaborated on its Commerce Clause jurisprudence in *Complete Auto Transit, Inc. v. Brady.*[55] In *Complete Auto Transit,* Complete Auto Transit challenged a Mississippi sales tax that had been assessed against it for the privilege of doing business in Mississippi.[56] The Court adopted a new test for adjudicating Commerce Clause cases and disregarded what had been known as the *Spector* rule.[57] The *Spector* rule stated:

> [W]here a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the

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51. *Id.* at 329 (quoting *Northwestern States Portland Cement Co.,* 358 U.S. at 458) (omission in original).

52. *Id.* at 332.

> A state may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce. As we stated at the outset, the fundamental purpose of the Clause is to assure that there be free trade among the several States.

Id. at 334-35.

53. *Id.* at 336.

54. *Id.* at 336-37.

55. 430 U.S. 274 (1977).

56. *Id.* at 274.

57. *Id.* at 288-89; Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

> charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.[58]

Spector held that a state may not tax the privilege of doing business when that tax applies only to interstate commerce.[59] Application of the *Spector* rule led to the triumph of form over substance; and, by 1977, the Court had become dissatisfied with the operation of the *Spector* rule.[60] Simply put, "the *Spector* rule [no longer addressed] the problems with which the Commerce Clause is concerned."[61] Therefore, instead of relying on the semantic formalism of *Spector*, which made all taxes on the "privilege of carrying on interstate commerce" unconstitutional per se, the Court fashioned a more acceptable test.[62] The *Complete Auto Transit* test, as it has become known, sustains "against Commerce Clause challenge [a tax that is] applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[63]

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58. *Spector*, 340 U.S. at 609-10.

59. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 284 (1977).

60. *Id.* at 281, 284-85. The Court stated that the unsatisfactory operation of the *Spector* rule was exemplified in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975). Louisiana assessed a franchise tax against Colonial for the privilege of doing business in Louisiana. Colonial was a Delaware corporation which operated a pipeline through Louisiana and employed a number of persons to operate various pump stations across the pipeline. Colonial did no intrastate business. *Traigle*, 421 U.S. at 101-02. The Louisiana Court of Appeal held the tax was unconstitutional in violation of the *Spector* rule. *See* Colonial Pipeline Co. v. Mouton, 228 So. 2d 718 (La. Ct. App. 1969).

> The Louisiana Legislature, perhaps recognizing that it had run afoul of a rule of words rather than a rule of substance, then redrafted the statute to levy the tax, as an alternative incident, on the 'qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form.' Again, the Court of Appeal held the tax unconstitutional as applied to the appellant.

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 286 (1977) (quoting Colonial Pipeline Co. v. Agerton, 275 So. 2d 834 (La. Ct. App. 1973)) (internal citations omitted). The Louisiana Supreme Court, however, overruled this decision and held the tax constitutional. Colonial Pipeline Co. v. Agerton, 289 So. 2d 93 (La. 1974). The Supreme Court affirmed the decision. Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). The Court distinguished *Spector* from *Colonial* in that *Spector* dealt with a tax on the privilege of carrying on interstate commerce, while the "Louisiana Legislature . . . had worded the statute at issue 'narrowly to confine the impost to one related to appellant's activities within the State in the corporate form.'" *Id.* at 113-14.

61. Complete Auto Transit, Inc., 430 U.S. at 288.

62. *Id.* at 288-89.

63. Amerada Hess Corp. v. Director, 490 U.S. 66, 72 (1989).

In 1984, the Court decided *Westinghouse Electric Corp. v. Tully*,[64] which involved a dispute over the constitutionality of a New York statute granting franchise tax credits to "Domestic International Sales Corporations" ("DISC").[65] The case involved a New York statute enacted in response to changes in the United States Internal Revenue Code. Congress, in order to "provide tax incentives for U.S. firms to increase their exports,"[66] recognized certain corporations as DISCs.[67]

> A corporation qualifies as a DISC if substantially all its assets and gross receipts are export-related. Under federal law, a DISC is not taxed on its income. Instead, a portion of the DISC's income—labeled "deemed distributions"—is attributed to the DISC's shareholders on a current basis, whether or not that portion is actually paid or distributed to them. Under the statutory provisions in effect during the calendar years 1972 and 1973 . . ., 50% of a DISC's income was deemed distributed to its shareholders. Taxes on the remaining income of the DISC—labeled "accumulated DISC income"—are deferred until either that accumulated income is actually distributed to the shareholders or the DISC no longer qualifies for special tax treatment.[68]

New York's response required the "consolidation of the receipts, assets, expenses, and liabilities of the DISC with those of its parent."[69] The parent would then be charged a franchise tax based on the consolidated amount.[70] However, the parent qualified for a tax credit (called a DISC export credit), provided that the DISC of the parent conducted a substantial amount of business (*i.e.* shipping activity) in New York.[71] Westinghouse challenged this statutory provision as unfairly apportioned and discriminatory against interstate commerce in violation of the Commerce Clause.[72] The Supreme Court held that the tax scheme was fairly apportioned, but that the "Tax Commission's argument that New York employs a constitutionally acceptable allocation formula . . . serves only to obscure the issue."[73] According to the Court, the fact that the tax scheme is fairly apportioned[74] does not mean that it is nondiscriminatory.[75] Referring

64. 466 U.S. 388 (1984).
65. *Id.* at 390.
66. *Id.*
67. *Id.*
68. *Id.* at 390-92.
69. *Id.* at 393.
70. *Id.*
71. *Id.* at 393-94.
72. *Id.* at 395-96.
73. *Id.* at 398.
74. Fair or constitutional apportioning of a state's tax burden requires that the state

back to the basic analytical structure articulated in *Boston Stock Exchange*, the Court would not allow New York to give New York businesses an advantage through the use of discriminatory tax preferences.[76] The Court concluded: "When a tax, on its face, is designed to have discriminatory economic effects, the Court 'need not know how unequal the [t]ax is before concluding that it unconstitutionally discriminates.'"[77]

In 1987, the Court confronted *American Trucking Ass'ns v. Scheiner*,[78] a case involving state taxes on interstate motor carriers.[79] The Court recognized that Commerce Clause jurisprudence had left in its wake an "uneven course of decisions . . . reflect[ing] the difficulties of reconciling unrestricted access to the national market with each State's authority to collect its fair share of revenues from interstate commercial activity."[80] In *American Trucking*, the Court applied what is known as the "internal consistency" test.[81] To pass this test, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'"[82] Under this test, the tax at issue in *American Trucking* did not pass muster because if the tax were applied by other jurisdictions, interstate commerce would be restricted.[83]

In 1989, the Court decided *Amerada Hess Corp. v. Director*.[84] Thirteen large oil companies brought suit against New Jersey, alleging that the State's

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"does not undertake to tax any interstate activities carried on outside the state's borders." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 282 (1977).

75. Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 399 (1984).

76. *Id.* at 406. The Court stated that "a State may not encourage the development of local industry by means of taxing measures that 'invite a multiplication of preferential trade areas' within the United States in contravention of the Commerce Clause." *Id.* at 405.

77. *Id.* at 406-07 (quoting Maryland v. Louisiana, 451 U.S. 725, 760 (1981)).

78. 483 U.S. 266 (1987).

79. Pennsylvania assessed "annual taxes on the operation of trucks and truck tractors . . . . Because Pennsylvania provided a reduction in registration fees designed to offset the lump-sum tax for vehicles registered in Pennsylvania, the practical effect of the statute was to tax only vehicles registered out of state." General Motors Corp. v. Director of Revenue, 981 S.W.2d 561 (Mo. 1998).

80. *American Trucking*, 483 U.S. at 269.

81. *Id.* at 282-88.

82. *Id.* at 284 (quoting Armco Inc. v. Hardesty, 467 U.S. 638, 644 (1984)).

83. *Id.* at 284. The Commerce Clause prohibits discrimination against out-of-state businesses based on their geographic location. *Id.* at 286. Justice O'Connor disagreed with the Court's application of the "internal consistency" test. *Id.* at 303 (O'Connor, J., dissenting). She argued that *Armco* could only be read as stating "that a tax that is facially discriminatory is unconstitutional if it is not 'internally consistent.'" *Id.* She believed that the majority had conjured up the internal consistency test and was engaging in an "entirely novel enterprise." *Id.*

84. 490 U.S. 66 (1989).

Corporation Business Tax discriminated against interstate commerce.[85] Employing the *Complete Auto Transit* four-part test for adjudicating Commerce Clause challenges, the Court determined that even if the New Jersey tax was fairly apportioned, it could still discriminate against interstate commerce.[86] The Court stated that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce."[87] The Court concluded that the New Jersey tax did not run afoul of the Commerce Clause because it passed the *Complete Auto Transit* test.[88]

In 1994, the Court decided two important Commerce Clause cases—*Associated Industries v. Lohman*[89] and *West Lynn Creamery, Inc. v. Healy*.[90] Both cases involved "privilege" taxes that taxed companies for storing (*Lohman*) or bringing into the state (*West Lynn Creamery*) out-of-state products. In *Lohman*, Missouri argued that its use tax, imposed uniformly across the state on "goods purchased outside the State and stored, used, or consumed within the State," was compensatory in that it made up for the sales taxes that localities imposed on the sale of goods within those localities.[91] The Court disagreed, citing the primary purpose of the Commerce Clause—prohibiting economic protectionism.[92] Although "compensatory taxes" are not prohibited by the Commerce Clause (because of the notion that interstate commerce must pay its own way),[93] the Missouri use tax was not compensatory because it exceeded compensatory purposes and became discriminatory.[94] A tax is no longer compensatory when it exceeds the local tax for which it is designed to compensate.[95]

> Under our cases, unless one of several narrow bases of justification is shown, actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred.[96]

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85. *Id.* at 68.

86. *Id.* at 74-75.

87. *Id.* at 75. *See generally* Westinghouse Elec. Corp. v. Tully, 466 U.S. 388 (1984) (facially discriminatory); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (discriminatory intent); American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) (discriminatory effect).

88. *See generally Amerada Hess Corp.*, 490 U.S. at 73-79.

89. 511 U.S. 641 (1994).

90. 512 U.S. 186 (1994).

91. *Lohman*, 511 U.S. at 643.

92. *Id.* at 647.

93. *Id.* at 648.

94. Associated Indus. v. Lohman, 511 U.S. 641, 648 (1994).

95. *Id.*

96. *Id.* at 649-50 (internal citation omitted).

In *West Lynn Creamery*, the Court invalidated "premium payments" which, when combined with the subsidy given only to Massachusetts milk-producers, effectively made out-of-state milk more expensive than Massachusetts-produced milk.[97] Because the program "neutraliz[ed] advantages belonging to the place of origin,"[98] it was unconstitutional.[99]

In 1996, the Court, in *Fulton Corp. v. Faulkner*,[100] invalidated North Carolina's "'intangibles tax' on the fair market value of corporate stock owned by North Carolina residents or having a 'business, commercial, or taxable situs' in the State."[101] The tax was assessed uniformly across the state, but residents could take tax deductions based on the amount of business the corporation conducted in North Carolina.[102] Quoting from *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,[103] the Court stated that its first step was to determine if the statute "regulate[d] evenhandedly with only 'incidental' effects on interstate commerce, or discriminate[d] against interstate commerce."[104] The Court's analysis led it to hold that the statute facially

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97. West Lynn Creamery v. Healy, 512 U.S. 186, 194 (1994).

98. *Id.* at 196 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)).

99. *Id.* at 196. The Court rejected the following arguments by Massachusetts:

> (A) Because each component of the program—a local subsidy and a nondiscriminatory tax—is valid, the combination of the two is equally valid; (B) The dealers who pay the order premiums (the tax) are not competitors of the farmers who receive disbursements from the Dairy Equalization Fund, so the pricing order is not discriminatory; (C) The pricing order is not protectionist, because the costs of the program are borne only by Massachusetts dealers and consumers, and the benefits are distributed exclusively to Massachusetts farmers; and (D) The order's incidental burden on commerce is justified by the local benefit of saving the dairy industry from collapse.

Id. at 198. The court stated:

> The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

Id. at 201.

100. 516 U.S. 325 (1996).

101. *Id.* at 327.

102. *Id.* at 328.

> Thus, a corporation doing all of its business within the State would pay corporate income tax on 100% of its income, and the taxable percentage deduction allowed to resident owners of that corporation's stock under the intangibles tax would likewise be 100%. Stock in a corporation doing no business in North Carolina . . . would be taxable on 100% of its value.

Id.

103. 511 U.S. 93 (1994).

104. *Fulton Corp*, 516 U.S. at 331 (quoting *Oregon Waste*, 511 U.S. at 99).

discriminated against interstate commerce.[105] Such a statute, according to the Court, is "virtually per se invalid."[106] A tax that facially discriminates against interstate commerce can be justified only if the State proves that the tax is compensatory.[107]

Finally, in 1997, the Supreme Court decided *Camps Newfound/Owatonna, Inc. v. Town of Harrison.*[108] Camps Newfound/Owatonna ("Camps") challenged a Maine statute that gave a "general exemption from real estate and personal property taxes for 'benevolent and charitable institutions incorporated' in the State"[109] on the ground that a corporation (like Camps) which operated its principal business for out-of-state customers only qualified for a "more limited tax benefit."[110] The Court determined that it was clear from the face of the statute that it discriminated against interstate commerce. The statute clearly discriminated between camps serving in-state versus out-of-state customers by giving the camps serving in-state customers tax benefits while burdening the camps serving out-of-state customers. This unconstitutionally penalized "nonresident customers" of the camps.[111]

D. Conclusion

The above cases provide the framework necessary for understanding the legal issue in *GM Corp. Kraft* teaches that a state statute may not avoid a Commerce Clause challenge if a business may reorganize or relocate in order to take advantage of a tax benefit.[112] The cases discussed above articulate the purpose of the Commerce Clause—"to create an area of free trade among the . . . States."[113] The Court's role in adjudicating Commerce Clause cases is to balance federalism concerns with interstate commerce concerns.[114] Thus, the real difficulty in adjudicating Commerce Clause cases is that the cases are decided on a case-by-case basis and leave a confusing trail of precedent for courts to follow.[115]

One result of this case-by-case approach is that the Court has fashioned different tests throughout its Commerce Clause analysis. Recall that the Court replaced the *Spector* test with the *Complete Auto Transit* test[116] and "conjured

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105. *Id.*

106. *Id.* (quoting *Oregon Waste*, 511 U.S. at 99).

107. Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996).

108. 520 U.S. 564 (1997).

109. *Id.* at 567-68.

110. *Id.* at 568.

111. *Id.* at 578-79.

112. Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71, 77-78 (1992).

113. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977).

114. *Id.* at 328-29.

115. *Id.* at 329.

116. *See supra* notes 55-63 and accompanying text.

up" the internal consistency test in *American Trucking*.[117] Another result of this approach is that the Court continually distills governing principles in its Commerce Clause precedent. For instance, the Court has determined that whether apportionment is fair and whether a statute is discriminatory are two separate inquiries.[118] Discrimination against out-of-state businesses based on geographic location is not tolerated under the Commerce Clause.[119] And statutes may be defective if they are facially discriminatory, have discriminatory intent, or have a discriminatory effect.[120]

Several other important principles have risen to the top in Commerce Clause jurisprudence. Interstate commerce must pay its own way, and therefore compensatory taxes are constitutional if they are truly compensatory.[121] Whether there is a large or small amount of discrimination is irrelevant—all discrimination is equally unconstitutional.[122] State taxes may not negate business advantages based on location in other states.[123] The test for discrimination is a practical one.[124] Facial discrimination against interstate commerce is "virtually per se invalid."[125] Finally, statutes may not discriminate against businesses based on their participation in interstate commerce.[126]

IV. INSTANT DECISION

After marching through much of the above precedent, the Missouri Supreme Court in *GM Group* held that because Section 143.431.3(1) "expressly distinguished between affiliated groups that perform the majority of their business activities in Missouri and groups that perform the majority of their business activities out of state,"[127] the statute discriminated against interstate commerce.[128] The court analogized the statute to the one overruled in *Camps Newfound/Owatonna*,[129] where the statute discriminated between camps servicing out-of-state patrons and in-state patrons for purposes of assessing a tax benefit.[130]

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117. American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 282-88 (1987).
118. Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 399 (1984).
119. *Id.* at 286.
120. Amerada Hess Corp. v. Director, 490 U.S. 66, 75 (1989).
121. Associated Indus. v. Lohman, 511 U.S. 641, 648 (1994).
122. *Id.* at 649-50.
123. West Lynn Creamery v. Healy, 512 U.S. 186, 196 (1994).
124. *Id.* at 201.
125. Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996).
126. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).
127. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 566 (Mo. 1998).
128. *Id.*
129. *Camps Newfound/Owatonna*, 520 U.S. at 575-76.
130. *GM Corp.*, 981 S.W.2d at 564; *see also Camps Newfound/Owatonna*, 520 U.S.

The court further stated that the Missouri statute penalized GM Group because, while GM Group conducted a substantial amount of business in Missouri, most of its business was transacted elsewhere.[131] Therefore, because GM Group did not perform fifty percent of its business in Missouri, GM Group could not file a consolidated return in Missouri.[132] As the Supreme Court held in *Westinghouse*, statutes which provide incentives to businesses to conduct more business in a state facially discriminate against interstate commerce.[133] According to the court, the Missouri statute further discriminated against GM Group based on its geographic location.[134] As the Supreme Court held in *Amerada Hess Corp.*[135] and in *American Trucking*,[136] taxes which discriminate based on geographic location violate the Commerce Clause.[137] Finally, the Commerce Clause prohibits tax schemes which discriminate against corporations (or other businesses) based upon their corporate structure.[138] The fact that GM Group might have been able to take advantage of the consolidated return if it had changed its corporate structure and its geographic location had no constitutional force. Such discrimination is "an impermissible burden on interstate commerce."[139]

The court then went on to deal with the arguments advanced by the Director of Revenue.[140] The Director first argued that *Williams* controlled the disposition of the case. The court determined that the *Williams* decision upheld Section 143.431.3(1) on two grounds: (1) the tax "was designed to tax income reasonably related to an affiliated group's in-state activities and does not result in additional tax liability for groups that do not meet the statute's requirements," and (2) the tax was non-discriminatory because Williams could have avoided the burden placed upon it by restructuring its corporate form or by doing more business in Missouri.[141] In light of the Supreme Court's decision in *Kraft*, the court determined that the fact that GM Group could have restructured its

at 575-76.

131. *Id.* at 566.

132. *Id.* at 567.

133. *Id.* at 566; *see also* Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 407 (1984).

134. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 567 (Mo. 1998).

135. Amerada Hess Corp. v. Director, 490 U.S. 66 (1989).

136. American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

137. *Amerada*, 490 U.S. at 77; *American Trucking*, 483 U.S. at 286.

138. Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71 (1992).

139. *GM Corp.*, 981 S.W.2d at 566.

140. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 566-68 (Mo. 1998).

141. *Id.* at 566; *see also* Williams Co. v. Director of Revenue, 799 S.W.2d 602, 604 (Mo. 1990).

corporate form or changed its domicile no longer justified the statute's otherwise facially discriminatory nature.[142]

> After the [*Kraft*] decision, the *Williams* analysis is no longer valid. The fifty-percent requirement of section 143.431.3(1) favors businesses that conduct the majority of their business in Missouri and penalizes primarily out-of-state businesses. Affiliated groups such as GM Group are deprived of a valuable tax benefit merely because of their corporate form and the geographic location of their businesses.[143]

The Court therefore overruled *Williams* to the extent that it held Section 143.431.3(1) constitutional.

The Director advanced three other arguments in support of Section 143.431.3(1), all of which were rejected by the Court. First, the Director argued that because the statute "neither impose[d] a tax nor grant[ed] a tax credit," it did not burden interstate commerce.[144] But, as the Supreme Court held in *West Lynn Creamery*, the right to take advantage of a tax or commercial benefit (through filing a consolidated return or other means) is protected by the Commerce Clause.[145] It is impermissible for a statute to constrain the ability of a firm participating in interstate commerce to take advantage of such benefits simply because of such participation.[146] Because GM Group "[was] placed at a competitive disadvantage when it [was] denied the tax benefits that section 143.431.3(1) confer[red]," the statute "impermissibly discriminate[d] against interstate commerce."[147]

Second, the Director argued that Section 143.431.3(1) properly apportioned Missouri's tax burden based on the amount of business activities that took place in Missouri.[148] Because of the proper apportionment requirement in the *Complete Auto Transit*,[149] Section 143.431.3(1) was permissible under the Commerce Clause because it was necessary to determine the amount of a firm's Missouri taxable income.[150] But, recalling *Westinghouse*, the Missouri Supreme Court stated that "[a] determination that a states method of apportionment is constitutionally sound does not foreclose a determination of whether the state's

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142. *GM Corp.*, 981 S.W.2d at 566.

143. *Id.* at 566-67.

144. *Id.* at 567.

145. West Lynn Creamery v. Healy, 512 U.S. 186, 196 (1994).

146. *GM Corp.*, 981 S.W.2d at 567; *see also West Lynn Creamery*, 512 U.S. at 201.

147. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 567 (Mo. 1998).

148. *Id.*

149. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 282 (1977).

150. *GM Corp.*, 981 S.W.2d at 567.

tax scheme discriminates against interstate commerce."[151] Because Section 143.431.3(1) placed a preliminary requirement upon businesses—that they derive a majority of their total income from Missouri before they could file a consolidated return—the statute discriminated against interstate commerce because "it foreclose[d] interstate commerce-neutral decisions and create[d] both an advantage for businesses that conduct[ed] the majority of their business in Missouri and a penalty for businesses that conduct[ed] the majority of their business outside Missouri."[152]

The Director's third argument hinged on the internal consistency test found in *American Trucking*.[153] The Director argued that the apportionment scheme found in Section 143.431.3(1) passed the internal consistency test "because even if a group is not allowed to file a consolidated return, each individual corporation within the group would still have its tax liability fairly apportioned."[154] This argument, according to the Missouri Supreme Court, did not take into account that the problem with the statute was the fifty percent threshold requirement, not the apportionment scheme.[155] Applying the internal consistency test to the fifty percent requirement, the court found that if every jurisdiction enacted such a threshold requirement, the burden on interstate commerce would be apparent.[156]

> Affiliated groups would be unable to offset profits collectively earned by member corporations with the collective losses of the member corporations. The groups would not have the benefit of decreased tax liability or the administrative benefit of filing a single consolidated income tax return. If all states applied the fifty percent threshold requirement, business groups would be encouraged to perform the majority of their business within a single state and would be penalized for engaging in free trade.[157]

The court concluded that the fifty percent requirement in Section 143.431.3(1) violated the Commerce Clause, and that the threshold requirement could be severed from the rest of the statute.[158] The statute now allows

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151. *Id.* at 567 (citing Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 405-06 (1984)).

152. *Id.*; *see also* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977) (holding that states may not tax interstate commerce to provide an advantage to local businesses).

153. American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 282-88 (1987).

154. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 567 (Mo. 1998).

155. *Id.*

156. *Id.* at 567-68.

157. *Id.*

158. *Id.* at 568.

businesses to file a Missouri consolidated tax return if they file a federal consolidated tax return for that tax year.[159]

V. COMMENT

There can be no doubt that the Missouri Supreme Court's decision in *GM Corp.* will significantly affect the way large affiliates like GM Group will file their tax returns as well as the amount of taxes they will pay in Missouri.[160] The decision therefore significantly affects the amount of taxing revenue Missouri will collect each year from companies that transact business in this state. The decision is also significant because it is slightly ahead of its time. Although the decision is phrased as a prohibition on discrimination against businesses based on geographic location and other factors, it actually eliminates an incentive to conduct business in Missouri. This distinction should not be overlooked.[161]

A. The Enrich and Hellerstein Distinctions

Peter Enrich has remarked that "the states have enacted a vast array of tax provisions that are designed to lure businesses to locate their facilities in the state, and interstate 'bidding wars' offering tax breaks for major new facilities have become commonplace."[162] While the United States Supreme Court has not yet addressed the specific claim that a State is actually competing for business by offering location incentives, the Missouri Supreme Court's decision in *GM Corp.* can be seen as a foray into this area.

It is true that the Missouri fifty percent provision is not a location incentive in the sense that Enrich appears to contemplate. Nonetheless, the fifty percent provision could be construed as an incentive or a "lure" to draw companies into Missouri so that they might conduct more business activities here. The language could be interpreted as follows: You will be subject to increased tax liability only if the revenues you derive from Missouri increase. When the fifty percent threshold is crossed, Missouri will allow you to file a consolidated return that

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159. *Id.*

160. There can also be no doubt that this decision will cause much confusion at the Missouri Department of Revenue given the amount of money in refunds and other disbursements that will have to be paid. The Missouri Supreme Court did not address the impact of this ruling in light of Missouri's reliance on *Williams*. The Court has now done what it should have done in *Williams*. Depending upon the applicability of this section over the next few years, this case may create a mess for Missouri's administrative agencies.

161. *See generally* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996) (arguing that the Commerce Clause should also bar a state from providing incentives to businesses to locate within that particular state).

162. *Id.* at 380.

will help offset your increased tax liability. In this sense, the fifty percent requirement is an incentive for companies to transact more business in Missouri. It is not necessarily a protective measure for Missouri businesses. Phrasing the language of the statute in this way might change the fifty percent requirement into a "constitutional carrot" as opposed to an "unconstitutional stick." Walter Hellerstein has articulated what he believes to be a significant difference between the "carrot" and the "stick."[163] That is, Hellerstein has articulated what he believes to be the true test of whether a tax provision violates the Commerce Clause:

> In my judgment, two core principles . . . underlie the Court's state tax incentive decisions and should guide their proper interpretation. First, the provision must favor in-state over out-of-state activities; second, the provision must implicate the coercive power of the state. If, but only if, both of these conditions are met, courts should declare the tax unconstitutional.[164]

Hellerstein believes that this formulation will catch tax incentives designed to penalize business entities for conducting "targeted" activities within a state (the unconstitutional sticks) but will allow states to reduce "additional state tax liability to which the taxpayer would be subjected only if the taxpayer were to engage in the targeted activity in the state."[165] In this way, one could argue that Missouri, in Section 143.431.3, was simply attempting to reduce additional tax liability for companies performing more activity in Missouri.[166]

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163. *See* Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413, 414 (1997).

164. *Id.* at 424.

165. *Id.* at 425. Hellerstein states that in his "judgment, such incentives neither favor in-state over out-of-state investment . . . nor do they rely on the coercive power of the state to compel a choice favoring in-state investment." *Id.* The difference between the carrot and the stick might be put another way:

> [T]he "carrot" . . . offer[s] relief from additional tax liability attributable to an activity in which the state is inviting the taxpayer to engage and the "stick" . . . threaten[s] maximization of existing tax liability attributable to activity in which the taxpayer already is engaged.

Id. at 428.

166. Hellerstein acknowledges that his distinction is somewhat tenuous. *Id.* at 429.

> [O]ne might say that there is no functional difference between the "carrot" . . . and the "stick" . . . . Put another way, the distinction between selectively forgiving taxes otherwise due if a taxpayer engages in in-state activity and disclaiming the right to impose any taxes on a "virgin" tax base a state is seeking to attract may be a distinction that turns entirely on whether a particular taxpayer has previously engaged in some taxable activity in the state. This may be too thin a distinction to carry the constitutional weight I am asking it to bear.

However, according to Enrich, Hellerstein's distinction between a carrot and a stick is of no importance, and the Commerce Clause should be interpreted in precisely the manner the Missouri Supreme Court has chosen:

> The states' contemporary, destructive efforts to lure away one another's businesses for their own economic gain are dishearteningly reminiscent of the interstate economic frictions that took place under the Articles of Confederation, frictions that were a major impetus behind the Commerce Clause and, indeed, the entire Constitution.[167]

Thus, according to Enrich, both carrots and sticks should be viewed as unconstitutional departures from Commerce Clause requirements, and courts should rule as the Missouri Supreme Court did in *GM Corp.*

The distinction between carrots and sticks was not discussed in the Missouri Supreme Court's opinion. Perhaps this is because the distinction really has no meaningful constitutional importance. After all, the Court stated that the "form by which a state erects barriers to commerce has no effect on the determination of whether discrimination exists."[168] However, it is clear that state and federal courts will have to address Enrich's distinction as state legislatures find more creative ways around some of the semantic requirements of the Commerce Clause. Courts might also have to address this distinction when balancing the United States Supreme Court's statement that states may "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry"[169] within the strictures of Commerce Clause prohibitions.

Id. at 428-29. It is, however, outside of the scope of this Note to discuss his proposal at length. Also, the provisions that he contemplates would be constitutional and the Missouri provision are not truly analogous. Hellerstein's hypothetical "constitutional carrot" is a property tax incentive that does "not favor in-state over out-of-state investment and [does] not implicate the coercive power of the states." *Id.* at 438. He recognizes that the Supreme Court's Commerce Clause precedent regarding tax incentives prohibits any statutory tax regulation which renders companies unable to make tax-neutral decisions. *Id.* at 421. But Hellerstein's distinction is a helpful tool for understanding the subtle and somewhat unstable nature of Commerce Clause analysis. For example, using Hellerstein's model and a slightly different interpretation of the effect of the Missouri fifty percent statute might lead a court to a different result. This, in part, may explain *Williams*. *See infra* notes 170-85.

167. Enrich, *supra* note 161, at 406.

168. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 567 (Mo. 1998) (citing West Lynn Creamery, Inc., v. Healy, 512 U.S. 186, 201 (1994)).

169. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 336 (1977).

B. Overruling Williams Revisited

It is always interesting when a court reverses its own precedent, particularly when the case reversed was only five years old. Decided in 1993, *Williams* held that Section 143.431.3(1) did not violate the Commerce Clause.[170] As we have seen, the Court relied heavily upon *Kraft* in its determination that *Williams* is no longer good law.[171] The Court's reliance on *Kraft* is not terribly problematic save for the fact that *Kraft* involved the application of the Commerce Clause to state taxation of foreign commerce.[172] The United States Supreme Court determined in *Japan Line, Ltd. v. County of Los Angeles*[173] that "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce . . . ."[174] Since the Supreme Court could limit *Kraft* to foreign commerce clause applications, the Missouri Supreme Court could be criticized for relying too heavily on *Kraft* in overruling *Williams*.

The general principle the Missouri Supreme Court derived from *Kraft* was that "a statute that facially discriminates against interstate commerce" cannot be saved "by showing that the taxpayer could have avoided the adverse consequence of the statute by reorganizing its business or changing its domicile."[175] Since the *Williams* court relied on this principle to save Section 143.431.3(1), *Kraft* made this analysis invalid in the court's estimation.[176]

However, the *Williams* court distinguished Williams's situation from that of the companies in *Boston Stock Exchange*[177] or *Westinghouse*,[178] where the companies were "additionally tax[ed] . . . due to their interstate activities."[179]

> Rather, the increased tax in this case results from the fact that the members of the group that generated losses and other tax savings are incorporated separately from the Missouri subsidiaries. Many of these subsidiaries did not file Missouri corporate income tax returns for the years in question.[180]

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170. Williams Co. v. Director of Revenue, 799 S.W.2d 602 (Mo. 1990).

171. *GM Corp.*, 981 S.W.2d at 566-67; *see also* Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71 (1992).

172. *Kraft*, 505 U.S. at 79.

173. 441 U.S. 434 (1979).

174. *Kraft*, 505 U.S. at 79 (citing *Japan Line, Ltd.*, 441 U.S. at 445-446).

175. General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 566-67 (Mo. 1998).

176. *Id.*

177. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

178. Westinghouse Elec. Corp. v. Tully, 466 U.S. 388 (1984).

179. Williams Co. v. Director of Revenue, 799 S.W.2d 602, 605 (Mo. 1993).

180. *Id.*

Simple geographic relocation or a change in corporate structure would not necessarily have allowed Williams to take advantage of Section 143.431.3. Instead, geographic relocation or a change in corporate structure might have allowed Williams to take advantage of some tax benefits, but not necessarily the benefit available in Section 143.431.3. To take advantage of the statutory provision, Williams would have had to change its customer base to Missouri in order to derive more than fifty percent of its income from Missouri. The *Williams* court concluded:

> Disallowing consolidation of losses accrued outside Missouri with profits generated inside the state when there is no clear nexus between them (manifest by accruing under a single corporate franchise, or to a group deriving the majority of income from sources within the state) does not discriminate against interstate commerce.

This statement is relevant to the distinction noted earlier made by Enrich and Hellerstein.[181] Instead of taxing Williams more because of its interstate commerce activities, Section 143.431.3 in fact acted as an incentive for Williams to conduct additional business in Missouri so that it could offset its losses from other subsidiaries with profits made in Missouri. Thus, Section 143.431.3 discriminated against interstate commerce even before *Kraft* because it was an attempt by Missouri to take commerce from other states. The simple fact is that if Enrich's argument is accepted, *Williams* was decided incorrectly at the outset.[182] The *Williams* decision can be seen as implicitly based on the distinction between an "unconstitutional stick" and a "constitutional carrot."[183] Section 143.431.3 did not discriminate against interstate commerce because it did not increase tax liability for companies participating in interstate commerce. But, the statute would decrease tax liability for companies willing to transact a lot of business in this state—the "constitutional carrot."[184]

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181. *See supra* notes 162-69 and accompanying text.

182. The difficulty with making this argument is that the Supreme Court denied certiorari in *Williams*. This strengthens the Missouri Supreme Court's claim that *Kraft* really was a major change in the law. However, it might also be that the Supreme Court was comfortable with the analysis used in *Williams*, which relied heavily on apportionment and concluded that the provision was non-discriminatory.

183. Hellerstein, *supra* note 163.

184. The Court in *GM Corp.* seemed to speak of this when it stated:

> If every state required affiliated groups to conduct a majority of their business within the state before the groups could qualify to file consolidated income tax returns, there would be interference with free trade. . . . If all states applied the fifty-percent threshold requirement, business groups would be encouraged to perform the majority of their business within a single state and would be penalized for engaging in free trade.

General Motors Corp. v. Director of Revenue, 981 S.W.2d 561, 567-68 (Mo. 1998). In

Following the court's decision in *GM Corp.*, GM Group need not make any changes in its corporate sales policies. All such tax incentives and burdens are "unconstitutional sticks" in Missouri. Putting *GM Corp.*'s holding into Hellerstein's formulation of the Commerce Clause test, the Court found that Section 143.431.3(1) favored in-state over out-of-state activities and implicated the coercive power of the state.[185]

VI. CONCLUSION

GM Corp. stands as a clear statement against the "constitutional carrot." The Missouri Supreme Court will not tolerate discrimination against interstate commerce no matter the semantic formulation in which it may come. The distinction that the *Williams* decision made (albeit implicitly) is removed and Enrich's proposal may have to be implemented in future decisions. The court's willingness to depart from precedent based on a perceived change in Commerce Clause jurisprudence is both refreshing and startling. It is refreshing because the court was willing to correct itself. The court's review of Commerce Clause precedent beyond *Kraft* suggests that it was cognizant (at least subconsciously) of the fact that Section 143.431.3(1) was discriminatory at its inception. And yet this decision is startling because of the court's willingness to overturn precedent that was little more than five years old.

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actuality, there would be no penalty for engaging in free trade unless all states truly did impose this requirement. It might be more correct to say there would be no incentive to engage in free trade.

185. Hellerstein, *supra* note 172.