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The People versus Corporate Welfare: North Carolina's Forsaken Opportunity to Reverse Perversion of the Commerce Clause and to Reinvigorate the Public Purpose Doctrine

JEANETTE K. DORAN*

INTRODUCTION

Public debate surrounding so-called "economic development incentives" has reverberated around the country.[1] These incentives are doled out in a variety of forms, including tax credits, direct cash subsidies and tax exemptions, purportedly designed to stimulate economic development by facilitating location or retention of industry.[2] Economists, attorneys and public officials have long debated the effectiveness of these measures, particularly relative to the cost of incentives.[3] The use of incentives has devolved into what some consider

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1. *See* Donald L. Barlett & James B. Steele, *Special Report: Corporate Welfare*, TIME MAGAZINE, Nov. 9, 1998, *available at* http://mega.nu/ampp/timecorpwelfare.html (discussing local and state subsidies aimed at attracting business); Charles E. McLure, Jr., *Tax Competition: Is What's Good for the Private Goose also Good for the Public Gander?*, 39 NAT'L TAX J. 341, 341–43 (1986).

2. *See* Mark L. Nachbar et al., *Income Taxes: State Tax Credits and Incentives, Tax Mgmt.* (BNA) No. 1180 (Jan. 26, 1996).

3. *See* Peter Fisher & Alan Peters, *The Failures of Economic Development Incentives*, 70 J. AMER. PLANNING ASSOC. 27, 35 (2004) (concluding that business incentives--including tax incentives--are not efficacious and that "there is a need for a radical transformation of policy ideas on how we achieve local economic growth"); James A. Papke, *Interjurisdictional Business-Tax Cost Differentials: Convergence, Divergence, and Significance?*, 9 STATE TAX NOTES 1701 (1995) (noting a study "cast[ing] doubt on the proposition that general tax incentives can have a decisive impact on investment location decisions"); Richard D. Pomp, *The Role of State Tax Incentives in Attracting and Retaining Business: A View from New York*, 29 TAX NOTES 521, 525 (1985) (concluding, after extensive review of the literature, that business tax incentives play only an insignificant "role in attracting or maintaining [in-state] firms . . . [and] probably results in a needless

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a tax war with one expert going so far as to describe the incentives competition as a "second Civil War."[4]

Among the justifications for the use of incentives is the argument that states have been caught in a "prisoner's dilemma."[5] That is, no state would give away incentives if each could ensure that no other state would.[6] Closer to home in North Carolina, the court of appeals seemingly adopted an "everybody-else-is-doing-it" rationale for incentives when it began its opinion in a case challenging the constitutionality of incentives with this quote from a law review article: "Today every state provides tax and other economic incentives . . . ."[7]

Against the backdrop of popular and academic debate, a series of lawsuits has challenged various incentives packages crafted for select corporations in North Carolina.[8] While the litigation in North Carolina and the evolution of our constitutional jurisprudence cannot impact directly the national legal debate, such cases bring into focus long-standing principles of constitutional law.[9] While a debate over the public policy questions related to corporate "incentives" may occur

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loss of state revenue"). *But see* William J. Barrett, VII, *Problems with State Aid to New or Expanding Businesses*, 58 S. CAL. L. REV. 1019, 1024–25 (1985) (citing a *Fortune* study showing the practical importance of business incentives). For a review of economic studies and surveys in this area, see Robert Lynch, *The Effectiveness of State and Local Tax Cuts and Incentives: A Review of the Literature*, 11 STATE TAX NOTES 949 (1996) (summarizing the major findings of hundreds of studies).

4. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 378 (1996).

5. Matthew Schaefer, *State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response*, 28 N.M. L. REV. 303, 303 (1998).

6. *Id.* at 303.

7. Blinson v. State, 651 S.E.2d 268, 271 (N.C. Ct. App. 2007) (quoting Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996)); *see also* Maready v. City of Winston-Salem, 467 S.E.2d 615, 626–27 (N.C. 1996) ("To date, courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives.").

8. *See, e.g.*, *Maready*, 467 S.E.2d at 618–19 (challenging "twenty-four economic development incentive projects entered into by the City [of Winston-Salem] or [Forsyth] County"); Munger v. State, 689 S.E.2d 230, 234 (N.C. Ct. App. 2010), *cert. granted*, 689 S.E.2d 230 (2010) (challenging various incentive packages to subsidize an internet data center by Google); *Blinson*, 651 S.E.2d at 271 (considering incentives awarded by state and local government to Dell, Inc., a computer manufacturer); Peacock v. Shinn, 533 S.E.2d 842, 846 (N.C. Ct. App. 2000) (considering the constitutionality of a contract between local government and a professional basketball team).

9. *See Maready*, 467 S.E.2d at 623–24 (collecting cases discussing the evolution of the public purpose doctrine allowing for disbursement of public funds).

around these cases,[10] the heart of the issue rests squarely on the time-honored concept that our constitution is the cornerstone of all law and that any act of the legislature inconsistent with the constitution must fail.[11]

Most cases challenging corporate incentives in North Carolina have focused on state constitutional provisions, including prohibitions on the award of exclusive emoluments and the public purpose doctrine, both of which have been a part of North Carolina's legal heritage since the state's first constitution in 1776 and have been added to over the years either by amendment or by virtue of the constitution of 1868 and revision of 1971.[12] However, one case presented North Carolina with the opportunity to lead the nation in reversing the perversion of the Commerce Clause in the United States Constitution. Sadly, North Carolina's courts did not accept the mantle of that leadership, opting instead to affirm a dismissal of the Commerce Clause challenge at the court of appeals and rejecting discretionary review by the supreme court.[13]

This Article neither espouses judicial intervention in any political controversy nor offers "broad" and "sweeping" constitutional theories. Instead, this Article is calculated to recognize the efforts of taxpayers who have resorted to the very constitutional rights afforded to them as citizens and taxpayers to challenge governmental acts which are repugnant to the very foundations of our society and to encourage the judiciary to fulfill its duty to reject legislation which is contrary to the state or federal constitution. As the North Carolina Supreme Court

10. *See* Anne C. Choe, *Blinson v. State and the Continued Erosion of the Public Purpose Doctrine in North Carolina*, 87 N.C. L. REV. 644, 663 (2009) ("Although courts and commentators have stated many legal arguments in order to analyze the respective roles of the judiciary and the legislature in making decisions regarding economic development incentives, policy arguments also creep into the debate at certain points.").

11. *See* Town of Emerald Isle v. State, 360 S.E.2d 756, 761 (N.C. 1987) ("It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional-but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." (quoting Glenn v. Bd. of Educ., 187 S.E. 781, 784 (N.C. 1936))); *see also* Kornegay v. City of Goldsboro, 105 S.E. 187, 189 (N.C. 1920) (discussing the scope of judicial review of legislative acts).

12. N.C. CONST. art. V, § 3; *see also Maready*, 467 S.E.2d at 623 (collecting cases discussing the evolution of the public purpose doctrine).

13. Blinson v. State, 651 S.E.2d 268 (N.C. Ct. App. 2007), *disc. rev. denied*, 661 S.E.2d 240 (N.C. 2008).

stated in the *Great Atlantic & Pacific Tea Co. v. Maxwell*[14] case: "The principle of equal rights to all, and special privileges to none, is fundamental . . . ."[15]

This Article first addresses briefly the appropriateness of judicial review of taxpayer challenges to corporate welfare packages in Part I, analyzes the Commerce Clause flaws in targeted tax incentives packages in Part II, and discusses one state's declaration of the constitutional infirmity of corporate welfare in Part III.

I. THE APPROPRIATENESS OF JUDICIAL REVIEW GENERALLY AND THE NECESSITY OF STATE COURT REVIEW IN PARTICULAR IN COMMERCE CLAUSE CHALLENGES TO CORPORATE WELFARE.

A long-standing principle of North Carolina law holds that "[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution."[16] While it is true that the legislature serves "as the lawmaking agent of the people,"[17] this affirmation of the legislature's responsibility is consistently coupled with the mandate that no law is valid if inconsistent with North Carolina's state constitution.[18] In fact, the judiciary has the power and the duty to declare a legislative act unconstitutional when such is "plainly and clearly the case."[19]

In determining whether an act of the legislature is valid under the state constitution, North Carolina law has firmly established that "issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with

14. Great Atl. & Pac. Tea Co. v. Maxwell, 154 S.E. 838 (N.C. 1930) (internal quotation marks omitted).

15. *Id.* at 841.

16. State *ex rel.* Martin v. Preston, 385 S.E.2d 473, 478 (N.C. 1989) (citing McIntyre v. Clarkson, 119 S.E.2d 888, 891 (N.C. 1961)).

17. *Id.* at 478; *see also* S. Auto Fin. Co. v. Pittman, 117 S.E.2d 423, 425 (N.C. 1960) ("We have neither the power nor the desire to usurp [the legislature's] power.").

18. *See* Lassiter v. Northampton County Bd. of Elections, 102 S.E.2d 853, 861 (N.C. 1958).

19. Town of Emerald Isle v. State, 360 S.E.2d 756, 761 (N.C. 1987) (quoting Glenn v. Bd. of Educ., 187 S.E. 781, 784 (N.C. 1936) (internal quotation marks omitted)); *see also* Kornegay v. City of Goldsboro, 105 S.E. 187, 189 (N.C. 1920) (discussing the scope of judicial review of legislative acts).

finality by [the North Carolina Supreme Court]."[20] In a brief review of North Carolina's history of state constitutional jurisprudence, the court noted the immemorial significance of the doctrine of judicial review:

> Prior to the creation of the United States of America by the ratification of the Constitution of the United States, North Carolina courts applied the doctrine of judicial review to strike down a legislative act as contrary to the Constitution of North Carolina. Thus, approximately sixteen years before *Marbury v. Madison*, . . . North Carolina's courts were among the first to recognize the doctrine of judicial review.[21]

Further emphasizing this crucial role of the judiciary, the court stated in *Moore v. Knightdale Board of Elections*:[22]

> [I]t is not only within the power, but . . . it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.
>
> The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.[23]

To determine whether an act of the General Assembly conflicts with the Constitution, the court is typically guided by the following principle: "Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt."[24] Notwithstanding the *beyond a reasonable doubt* standard that is typically applied, "[t]he presumption of constitutionality is not . . . and should not be, conclusive."[25]

20. *Martin*, 385 S.E.2d at 479 (citing State v. Arrington, 319 S.E.2d 254, 260 (N.C. 1984)).

21. *Id.* at 478 (internal citations omitted).

22. Moore v. Knightdale Bd. of Elections, 413 S.E.2d 541 (N.C. 1992).

23. *Id.* at 543 (citing State v. Knight, 85 S.E. 418, 427 (N.C. 1915)).

24. Baker v. Martin, 410 S.E.2d 887, 889 (N.C. 1991) (quoting Gardner v. Reidsville, 153 S.E.2d 139, 150 (N.C. 1967)).

25. *Moore*, 413 S.E.2d at 543.

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The inconclusive nature of the "presumption of constitutionality" of a legislative act,[26] was highlighted by *Corum v. University of North Carolina*,[27] in which the court stated:

> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation . . . is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.[28]

Thus, applying a modest form of judicial review to all legislative acts and casting litigation over economic incentive litigation as a policy debate rather than a legal debate, as suggested by the court of appeals in at least one appeal of an incentives lawsuit,[29] would contradict the supreme court's prior precedent. Instead, the supreme court has articulated that courts possess a clearly established duty to "ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith."[30]

A series of cases has addressed arguments that an "irreconcilable conflict"[31] exists between North Carolina's incentives schemes and the state constitution, though just one has raised federal constitutional questions.[32] Standing of the plaintiffs in each case has presented a first, and at times insurmountable, hurdle for the taxpayers attacking the state and federal constitutionality of incentives packages.[33] Far from being an issue of policy better left to the legislature, as propounded by at least two academics,[34] the constitutionality, as contradistinguished from the wisdom or folly, of corporate incentives is appropriate for judicial

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26. *See id.*

27. Corum v. Univ. of N.C., 413 S.E.2d 276 (N.C. 1992).

28. *Id.* at 290 (internal citations omitted).

29. *See* Blinson v. State, 651 S.E.2d 268, 271 (N.C. Ct. App. 2007) ("To the extent plaintiffs question the wisdom of the incentives and whether they will in fact provide the public benefit promised, they have sought relief in the wrong forum.").

30. Mitchell v. N.C. Indus. Dev. Fin. Auth., 159 S.E.2d 745, 750 (N.C. 1968).

31. *Moore*, 413 S.E.2d at 543 (citing State v. Knight, 85 S.E. 418, 427 (N.C. 1915)).

32. *See Blinson*, 651 S.E.2d at 273. *But see*, Maready v. City of Winston-Salem, 467 S.E.2d 615, 626–27 (N.C. 1996) (standing not discussed).

33. *Blinson*, 651 S.E.2d at 274 (holding plaintiffs lacked standing as taxpayers to raise claims under the Dormant Commerce Clause).

34. Jennifer Carr & Cara Griffith, *Can North Carolina Constitutionally Subsidize Google?*, 45 STATE TAX NOTES 585 (2007) ("In the end, it might be nice to get the court's take on the constitutionality of tax incentives, but that is an issue that is better addressed by the legislature.").

review.[35] As set forth below, the General Assembly "exceed[ed] its limitations"[36] in at least one high profile corporate welfare package.[37] The people's right to constitutional governance has been infringed upon; it is imperative, therefore, for the judiciary to exercise its duty to declare economic development incentives unconstitutional, notwithstanding their popularity.[38]

II. THE COMMERCE CLAUSE PROHIBITS CORPORATE WELFARE IN THE FORM OF TARGETED TAX INCENTIVES AND CORPORATE WELFARE.

At the outset, it should be noted that this Article does not dispute that North Carolina, like any other state, may "try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes,"[39] and may even "enact laws . . . that have the purpose and effect of encouraging domestic industry."[40] However, noble intentions do not warrant ignoble means, permissible ends do not dissolve constitutional constraints, and North Carolina's economic development efforts are not unfettered by the Commerce Clause.[41]

A. *Consideration of the Historical Context of the Commerce Clause*

The Commerce Clause is the affirmative constitutional grant of power to congress to regulate commerce: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[42] The Commerce Clause was born of "destructive trade wars among the states[,] a major problem

35. *See generally* Morgan L. Holcomb & Nicholas Allen Smith, *The Post-Cuno Litigation Landscape*, 58 CASE W. RES. L. REV. 1157 (2008) (discussing incentives lawsuits and standing in state and federal courts).

36. *See* State v. Harris, 6 S.E.2d 854, 866 (N.C. 1940) (holding a discriminatory licensing scheme unconstitutional).

37. *See infra* notes 83–111 and accompanying text; *see also infra* Part III.

38. *See* Maready v. City of Winston-Salem, 467 S.E.2d 615, 634 (N.C. 1996) (Orr, J., dissenting) ("While economic times have changed and will continue to change, the philosophy that constitutional interpretation and application are subject to the whims of 'everybody's doing it' cannot be sustained.").

39. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994).

40. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984).

41. U.S. CONST. art. I, § 8, cl. 3.

42. *Id.*

under the Articles of Confederation."[43] Competition among the states in the taxation arena was instrumental in development of the Commerce Clause.[44] Taxation—and state tax competition—was instrumental in the inclusion of the Commerce Clause in the Constitution. Alexander Hamilton asked, for example, "Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit?"[45]

If Congress has not legislated in an area of commerce, courts may nevertheless enforce the anti-protectionism purpose behind the Commerce Clause by striking down discriminatory state legislation through the Dormant Commerce Clause Doctrine, which has been described thusly:

> [T]he Constitution's express grant to Congress of the power to regulate Commerce . . . among the several States contains a further negative command, known as the dormant Commerce Clause, that create[s] an area of trade free from interference by the States. This negative command prevents a State from jeopardizing the welfare of the Nation as a whole by plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.[46]

While the goal of the Commerce Clause is to prevent the kind of "economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation,"[47] a State may enact legislation with "the purpose and effect of encouraging domestic industry."[48] The United States Supreme Court has consistently held that the "Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal."[49]

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43. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 245 (15th ed. 2004).

44. *See* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 60–66 (2005) (describing discrimination by seven states under the Articles of Confederation).

45. THE FEDERALIST NO. 7 (Alexander Hamilton).

46. Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005) (internal quotation marks and citations omitted).

47. Hughles v. Oklahoma, 441 U.S. 322, 325 (1979); *see also* Granholm v. Heald, 544 U.S. 460, 472 (2005).

48. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984).

49. *Id.*; *see, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279–80 (1988) (striking down an Ohio credit against the state's motor fuel tax for each gallon of ethanol sold provided the ethanol was made in Ohio or another state with a similar tax credit); Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 407 (1984) (invalidating New York corporate income tax credit measured by the share of a company's exporting business conducted from New York);

Specifically, the Supreme Court has stated:

> [n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business. The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects.[50]

B. *Modern Scope of the Commerce Clause*

"This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[51] While the United States Supreme Court's approach to determining the limit that the Dormant Commerce Clause has on state power has varied, there are "some firm peaks of decision which remain unquestioned."[52] "Among these is the fundamental principle that . . . [n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[53]

When a tax is discriminatory on its face, it is virtually *per se* unconstitutional.[54] The Supreme Court has consistently recognized that "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the

Maryland v. Louisiana, 451 U.S. 725, 760 (1981) (invalidating "First Use" tax imposed on certain uses of natural gas brought into the state); Fulton Corp. v. Faulkner, 516 U.S. 325 (1976); R.J. Reynolds Tobacco Co. v. City of N.Y. Dep't of Fin., 169 Misc. 2d 674, 688 (1995) (declaring unconstitutional portions of New York Administrative Code allowing accelerated depreciation deductions for in-state property only).

50. Boston Stock Exch. v. State Tax Comm'r, 429 U.S. 318, 329 (1977) (internal quotation marks and citations omitted).

51. *New Energy Co. of Ind.*, 486 U.S. at 273.

52. *Boston Stock Exch.*, 429 U.S. at 329 (internal quotation marks and citations omitted).

53. *Id.*; *see also Bacchus Imports, Ltd.*, 468 U.S. at 268 (discussing nondiscrimination as the "cardinal rule of Commerce Clause jurisprudence[]").

54. *See Westinghouse Electric Corp.*, 466 U.S. at 407 (explaining that for a facially discriminatory tax, "the Court 'need not know how unequal the [t]ax is before concluding that it unconstitutionally discriminates'" (quoting Maryland v. Louisiana, 451 U.S. at 760)).

latter.[55] If a restriction on commerce is discriminatory, it is virtually *per se* invalid."[56]

In determining whether discrimination exists, the United States Supreme Court has focused on the substance and not the form.[57] Justice White explained:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. . . . Consequently it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers.[58]

The clearest and most consistent example of the kind of discriminatory tax provision that is barred by the Commerce Clause is a tariff, i.e., a tax that is imposed only on those sellers of a product who manufacture the product out-of-state, and not on their competitors who manufacture in-state.[59] The credits typically included in incentives packages offered by states are the functional equivalent of a tariff.[60]

C. *North Carolina's Commerce Clause Indifference*

North Carolina's corporate income and franchise taxes apply to businesses that manufacture either inside or outside of the state, so long as they engage in sufficient activities in North Carolina to subject them

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55. *Id.*

56. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) (internal quotation marks omitted).

57. *Bacchus Imports, Ltd.*, 468 U.S. at 273 (dismissing Hawaii's defense that the tax exemptions should be permitted because the legislature's intent was to benefit local industry and not to burden out-of-state parties).

58. *Id.*

59. *W. Lynn Creamery*, 512 U.S. at 193 ("The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State."); *see also* Granholm v. Heald, 544 U.S. 460, 465–66 (2005) (holding that Michigan and New York statutes with the "object and design" of granting in-state wineries a "competitive advantage" over out-of-state competitors violated the Commerce Clause).

60. *See generally* Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 853–54 (1996) ("Perhaps most important, funneling money to existing in-state firms already engaged in economic battle with out-of-state competitors involves, in a rather pure sense, the sort of 'economic protectionism' at which the Commerce Clause takes aim.").

to the state's taxing jurisdiction.[61] One notable incentives package from the State of North Carolina effectively excused qualifying computer manufacturers who located their manufacturing activity in North Carolina by allowing them to substantially reduce, and indeed to entirely avoid, such tax liability.[62] This incentives deal was crafted for the benefit of Dell, Inc. and was the subject of a legal assault by seven individual taxpayers raising Commerce Clause claims as well as state constitutional claims.[63] In this case, the plaintiffs argued and the court of appeals did not disagree that the result was a system that granted a "direct commercial advantage" to those businesses that choose to manufacture in-state, by freeing them from the North Carolina tax burden that is faced by their competitors who manufacture their products elsewhere.[64]

The constitutional flaws with tax incentives targeted for a specific beneficiary locating within the state are revealed by analyzing the Dell giveaway. In 2005, during a special session of the General Assembly, the state created tax credits in the form of amendments to an existing incentives scheme, the Bill Lee Act,[65] as well as a new tax credit known as the New Tax Credit.[66] Both the Bill Lee Act amendments[67] and the

61. "The incidence of the tax on a foreign corporation is that part of its net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performable within the borders of North Carolina, and not upon its franchise to engage in interstate business in North Carolina." ET & WNC Transp. Co. v. Currie, 104 S.E.2d 403, 409 (N.C. 1958) (construing section 105-134 of the North Carolina General Statutes prior to its amendment in 1964).

62. Blinson v. State, 651 S.E.2d 268, 271–72 (N.C. Ct. App. 2007) (summarizing the 2004 Session Laws of North Carolina).

63. *Id.* at 271–73.

64. Brief of Plaintiffs-Appellants at 34, *Blinson*, 651 S.E.2d at 268 (N.C. Ct. App. 2007) (No. COA 06-1258); *Blinson*, 268 S.E.2d at 274 ("[P]laintiffs' claims under these provisions pertain only to a theoretical injury that might be suffered by other businesses that may attempt to compete with Dell . . . .").

65. The Bill Lee Act was first adopted in 1996 for the purported purpose of encouraging investment in economically distressed areas of the State. 1996 N.C. Sess. Laws 13. Article 3A, the Bill Lee Act, was repealed on January 1, 2007. N.C. GEN. STAT. § 105-129.2A(a) (repealed 2007). It was replaced with article 3J, the Replacement of Bill Lee Act ("Replacement Act"). *Id.* §§ 105-129.80 to .89 (2010). The Replacement Act streamlined and continued many of the credits for industries eligible under the Bill Lee Act, including technology companies. The new law went into effect on January 1, 2007, and contains a sunset provision through January 1, 2011. *Id.* § 105-129.82(a).

66. 2004 N.C. Sess. Laws 204, § 1 (extra session).

67. 2004 N.C. Sess. Laws 204, § 2 (extra session).

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New Tax Credit[68] were applicable against North Carolina's corporate income[69] and/or franchise tax.[70]

1. *North Carolina's Tax Scheme and Dell's Special Deal*

North Carolina's corporate income and franchise taxes, like those in other states, are based upon the corporations' net income apportioned to the business activity attributable to North Carolina.[71] The taxes derived from income earned through the *interstate* activity of corporations that engage in interstate commerce, so long as the taxed activity has a "substantial nexus" within North Carolina.[72] Specifically, the corporate income tax, against which the New Tax Credit and the Bill Lee Act Amendments may be applied, is a percentage of net income attributable to North Carolina by every C corporation *doing business* in this state.[73] Corporate income is apportioned to the state using three factors: the taxpayers' (1) property, (2) payroll, and (3) sales, located in North Carolina.[74] When determining the apportioned amount, North Carolina doubles the value of the sales factor.[75] Thus, North Carolina taxes the income of a corporation in large part based on where its customers are, as opposed to where the corporation's production activities are located.

Similarly, North Carolina's corporate franchise tax, against which the New Tax Credit and the Bill Lee Act amendments apply, is calculated by the same apportionment formula and is not based on whether the corporation is organized in North Carolina.[76] Franchise taxes are imposed on any corporation "doing business" in this state, for the privilege of "doing business" in this state.[77] "The franchise tax amounts to one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the total amount of capital stock, surplus and undivided profits."[78] Like the corporate income tax, if the corporation is conducting business in

68. N.C. GEN. STAT. §§ 105-129.60 to .66 (repealed July 1, 2010).

69. *Id.* § 105-130.3 (2010) ("A tax is imposed on the State net income of every C Corporation doing business in this State.").

70. *Id.* § 105-122(a) ("An annual franchise or privilege tax is imposed on a corporation doing business in this State.").

71. *Id.* §105-122(cl).

72. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

73. N.C. GEN. STAT. § 105-130.3.

74. *Id.* § 105-130.4(i).

75. *Id.*

76. *Id.* §105-122(cl).

77. *Id.* §105-122(a), (d) (implementing franchise or privilege tax on domestic and foreign corporations).

78. *Id.* §105-122(d).

several states, it apportions the amount subject to franchise tax according to the same apportionment formula used in determining the income tax, again with the doubling of the sales factor.[79] The New Tax Credit against both corporate income and franchise taxes applies only to a corporation with a manufacturing facility located *within the state*.[80] So while the corporate income[81] and franchise taxes[82] reach interstate activity, the credit is only available to those corporations with an in-state facility.[83]

2. *The Federal Constitutional Flaw with North Carolina's Practice*

By reducing tax liability of taxpayers only if they choose to increase their in-state investment or activities, North Carolina gives an advantage to in-state businesses and "forecloses tax-neutral decisions."[84] In *Westinghouse Electric Corp. v. Tully*, New York included "Domestic International Sales Corporation" (DISC) income in a corporation's income tax liability.[85] To encourage corporations with New York DISC income to locate additional exporting business in the state, New York offered a corporate income tax credit that was proportionate to the percentage of a corporation's exporting business conducted in New York.[86] The Supreme Court saw no substantive difference between New York's protectionist scheme and those struck down in *Maryland v. Louisiana*[87] and *Boston Stock Exchange*.[88] En route to declaring New York's statute unconstitutional, the *Westinghouse* court focused on the economic substance in determining that the several formal distinctions were "irrelevant."[89] The first distinction that the court found irrelevant was premised upon the nature of the tax involved: both *Maryland v. Louisiana* and *Boston Stock Exchange v. State Tax Commissioner* involved transactional taxes, while the *Westinghouse* court considered a franchise

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79. *Id.* §105-122(c1).

80. As noted previously, the "major computer manufacturer" also has to meet certain investment and hiring thresholds. Additionally, the unit output is a factor in determining the annual credit. *Id.* §105-129.62(a) (repealed July 1, 2010).

81. *Id.* § 105-130.3 (2010).

82. *Id.* § 105-122(b).

83. *Id.* § 105-129.62(a) (repealed July 1, 2010).

84. Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 406 (1984).

85. *Id.* at 392.

86. *Id.* at 393.

87. Maryland v. Louisiana, 451 U.S. 725 (1981).

88. Boston Stock Exch. v. State Tax Comm'r, 429 U.S. 318 (1997).

89. *Westinghouse*, 466 U.S. at 404.

tax.[90] Underscoring the Court's rejection of formalistic distinctions, Justice Blackmun for the majority admonished: "It cannot be that a State can circumvent the prohibition of the Commerce Clause against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate—as is the franchise tax—rather than on individual transaction."[91]

Importantly, a second distinction found irrelevant by the court was the nominal distinction between disallowing a tax credit, on the one hand, and imposing a tax on the other:

> New York discriminate[d] against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical. New York allows a 70% credit against tax liability for all shipments made from within the State. This provision is indistinguishable from one that would apply to New York shipments a tax rate that is 30% of that applied to shipments from other States. We have declined to attach any constitutional significance to such formal distinctions that lack economic substance. *See e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (tax scheme imposing tax at uniform rate on in-state and out-of-state sales held to be unconstitutional because discrimination against interstate commerce was 'the necessary result of various tax credits and exclusions' that benefited only in-state consumers of gas).[92]

Finally, the Court found it irrelevant whether the tax focused on diverting new business into the state or preventing current business from leaving, holding that the tax was a "discriminatory tax that 'forecloses tax-neutral decisions and . . . create[d] . . . an advantage' for firms operating in New York by placing 'a discriminatory burden on commerce to its sister States.'"[93]

"[A] tax upon the industry that is nondiscriminatory in its assessment, but that has an 'exemption' or 'credit' for in-state members . . . is no different in principle from a [directly discriminatory tax], and has likewise been held invalid."[94] The New Tax Credit upheld in *Blinson* provided Dell with an opportunity to eliminate 100% of its corporate income and franchise tax liability,[95] plus collect additional credit

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90. *Id.*

91. *Id.*

92. *Id.* at 404–05 (footnotes omitted).

93. *Id.* at 406 (quoting *Boston Stock Exch.*, 429 U.S. at 331).

94. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210–11 (1984) (Scalia, J., concurring) (internal citations omitted).

95. *See* N.C. GEN. STAT. § 105-129.64(b) (repealed July 1, 2010).

amounts that could have been carried forward for 25 years in connection with its in-state activity.[96] As in the case of *Westinghouse*, although the franchise and income taxes may be neutral, the New Tax Credit facially discriminates in favor of a company that builds a manufacturing facility in-state[97] and thereby "forecloses tax-neutral decisions" in violation of the Commerce Clause.[98]

The New Tax Credit benefits a corporation with North Carolina corporate income and/or franchise tax liability by lowering and likely eliminating that tax liability when the company invests in property in the state.[99] Conversely, for corporations with corporate income and franchise tax liability in North Carolina that choose to invest in manufacturing facilities out-of-state, the North Carolina corporate income and franchise tax acts as discriminatorily as does a tariff by providing a benefit to domestic manufacturers not eligible for the New Tax Credit, the eligibility for which is dependant upon the presence of manufacturing facilities in North Carolina.[100] Such "discriminatory taxation of out-of-state manufacturers" runs afoul of the Commerce Clause."[101] The discrimination here works precisely the same effect as a tariff in that it promotes domestic activity, here manufacturing, at the expense of foreign manufacturing.[102] It is the retention of the corporate income tax and franchise tax liability for choosing to invest outside of North Carolina that burdens the company by effectively extracting larger tax revenues from those computer manufacturers and business locating beyond North Carolina's borders, thereby effectively acting as a tariff.[103]

For example, Company A and Company B each sell equal numbers of computers in North Carolina annually, but currently have no in-state manufacturing facility. The income tax liability for both companies is

96. *See id.* § 105-129.64(d) (repealed July 1, 2010).

97. *See generally supra* notes 61–82 and accompanying text.

98. *Boston Stock Exch.*, 429 U.S. at 331.

99. *See* N.C. GEN. STAT. § 105-129.64 (repealed July 1, 2010).

100. *See id.* § 105-129.62(a) (repealed July 1, 2010).

101. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

102. *See, e.g.*, *id.* at 273; Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 266 (1984); Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 395–97 (1984). In some cases, the challenged benefit does not go directly to a domestic competitor, but to a competing product or a competitor's customers. *See, e.g.*, *Bacchus Imports, Ltd.*, 468 U.S. at 267; *Boston Stock Exch.*, 429 U.S. at 319–20.

103. *See, e.g.*, Armco Inc. v. Hardesty, 467 U.S. 638, 640–41 (1984); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617–18 (1981); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276 (1978); *cf.* Associated Indus. v. Lohman, 511 U.S. 641, 643–45 (1994) (invalidating tax on all goods imported into the state to the extent that tax exceeded sales tax revenues for which the tax was intended to "compensate").

the same in North Carolina. If Company A makes the required investments, hiring, etc. in a manufacturing facility as outlined in the Dell legislation, then Company A's franchise and corporate income tax liability will be eliminated. The burden on Company B is greater, and Company A receives a "direct commercial advantage" relative to Company B.[104]

The Bill Lee Act amendments violate the Commerce Clause in exactly the same way as the New Tax Credit explained above.[105] The Bill Lee Act generally provides tax credits against income taxes, franchise taxes and gross premiums taxes for new and expanding business in North Carolina.[106] These are credits based on new jobs created in the state, investment in machinery and equipment in the state, investment in technology, research and development, worker training, substantial investment in other property and development zone projects.[107] As previously discussed, tax incentives credits often require a threshold investment, including the credit for investing in machinery and equipment,[108] or satisfaction of minimum employment standards,[109] and the value of the credit is usually measured by the location where the business is expanding.[110] However, as noted previously, for companies like Dell that qualify for the New Tax Credit, most of these thresholds and tier requirements are waived by the Bill Lee Act amendments.[111] By offering credits for in-state business investment only, the Bill Lee Act amendments, like the New Tax Credit, provide "differential treatment . . . that benefits [in-state activity] and burdens [out- of-state activity]."[112] The New Tax Credits and the Bill Lee Act amendments treat in-state and out-of-state economic activities differently, benefiting the former and burdening the latter.

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104. *Boston Stock Exch.*, 429 U.S. at 329; *see also* cases cited *supra* note 102.

105. *See* cases cited *supra* notes 98–103 and accompanying text.

106. N.C. GEN. STAT. §§ 105-129.1 to .13 (2010) (indicating that The Bill Lee Act has been repealed for business activities occurring after January 1, 2007).

107. *Id.* §§ 105-129.1 to .13.

108. *Id.* § 105-129.

109. *Id.* § 105-129.8.

110. *Id.* §§ 105-129.1 to .13.

111. *Id.* § 105-129.4(b7).

112. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994).

D. Cuno: Unconstitutionality of Corporate Welfare Schemes Recognized

The tax credits at issue in *Blinson* are similar in both form and substance to those at issue in *Cuno v. DaimlerChrysler Corp.*,[113] a case out of the Sixth Circuit ultimately dismissed by the United States Supreme Court for lack of standing.[114] *Cuno* involved local and state incentives used by Ohio and the City of Toledo to induce DaimlerChrysler to expand its Jeep assembly plant in Toledo.[115] The local incentive provided DaimlerChrysler with a ten year property tax exemption, conditioned on DaimlerChrysler's agreement to meet investment and hiring requirements.[116] The other incentive was an investment tax credit (ITC) against Ohio's corporate franchise tax and corporate income tax, determined by an apportionment formula.[117] The ITC reduced the corporate franchise and income tax based on the amount of investment in machinery and equipment installed in Ohio.[118] The ITC is similar in form to North Carolina's Bill Lee Credits.[119] The Sixth Circuit held that Ohio, by granting tax credits to businesses that are subject to Ohio's franchise tax if they locate new economic activity at sites in Ohio while denying the credits to identically situated businesses that locate new activity out of state, was discriminating in favor of in-state economic activity.[120] Consequently, the Sixth Circuit held that the ITC violated the Commerce Clause.[121] In contrast, the court held that the property tax exemption did not unconstitutionally discriminate against out of state commerce.[122] While the Supreme Court held that the plaintiffs in *Cuno* lacked standing under the stringent standing requirements imposed by the United States Constitution,[123] the reasoning of the Sixth Circuit is nonetheless persuasive.[124] Furthermore, the Supreme Court's standing decision in *Cuno* underscores the importance of state court

113. Cuno v. DaimlerChrysler Corp., 386 F.3d 738 (6th Cir. 2004), *vacated in part and remanded*, 547 U.S. 332 (2006).

114. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 354 (2006).

115. *Id.* at 337; *Cuno*, 386 F.3d at 741.

116. *Cuno*, 386 F.3d at 741–42.

117. *Id.*

118. *Id.* at 741.

119. *See generally* N.C. GEN. STAT. §§ 105-129.2 (2010).

120. *Cuno*, 386 F.3d at 746.

121. *Id.*

122. *Id.* at 747.

123. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 346 (2006).

124. *Cuno*, 386 F.3d at 746.

review of Commerce Clause claims[125] where, as in North Carolina, courts are historically more welcoming to taxpayer lawsuits and not encumbered by the federal constitutional requirement of a "case or controversy."[126] State court challenges are not new[127] and have been met with some success.[128]

E. *Constitutional Means for Promoting Economic Development*

As noted at the outset, the Commerce Clause does not prevent states from encouraging economic activity.[129] However, as discussed at length above,[130] the United States Supreme Court has made clear that in exercising the right to encourage economic activity, States may not utilize measures that discriminate between in-state and out-of-state activity.[131]

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125. Paul V. McCord, *The Dormant Commerce Clause and the MBT Credit and Incentive Scheme: You Can't Get There From Here*, 53 WAYNE L. REV. 1431, 1478, n. 289–94 (2007).

126. Goldston v. State, 637 S.E.2d 876, 882 (2006) ("[T]he nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.").

127. *See, e.g.*, Brady v. City of Dubuque, 495 N.W.2d 701 (Iowa 1993); Hawkins v. City of Greenfield, 230 N.E.2d 396 (Ind. 1967).

128. *See* Dolores W. Gregory, *Worksheet BNA Interview: Sixth Circuit Decision in Cuno Raises Questions That Congress May be Called Upon to Answer in 2005*, TM STATE REPORT No. 1470 WS 10 (BNA) (2006).

129. *See* cases cited *supra* notes 38–39, 47 and accompanying text.

130. *See* cases cited *supra* notes 50–59 and accompanying text.

131. *See, e.g.*, S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (invalidating Alabama franchise tax that allowed domestic corporations to calculate the tax on a more favorable base than out-of-state corporations); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997) (invalidating Maine property tax exemption restricted to organizations primarily serving in-state residents); Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (invalidating North Carolina intangibles tax which reduced the taxable value of corporate stock depending on the percentage of a corporation's business conducted in the state); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994) (invalidating Oregon statute imposing additional charges on solid waste generated out of state and brought into Oregon for disposal); New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) (invalidating Ohio fuel tax credit restricted to in-state ethanol producers and producers from states granting reciprocal tax advantages to Ohio producers); Armco Inc. v. Hardesty, 467 U.S. 638 (1984) (invalidating West Virginia's wholesalers' gross receipts tax which exempted local manufacturers who were subject to manufacturer's tax); Maryland v. Louisiana, 451 U.S. 725 (1981) (invalidating Louisiana's natural gas tax whose credits and exemptions effectively sheltered in-state users from the burden of the tax); Boston Stock Exch. v. State Tax Comm'r, 429 U.S. 318 (1977) (invalidating provisions of New York securities transfer tax granting preferential rates to in-state sales).

Proponents of incentives like those in the New Tax Credit and the Bill Lee Act amendments argue that such tax credits do not discriminate since they are available to in-state and out-of-state corporations.[132] But, this argument misses the point that the relevant discrimination here is between companies that do and do not ultimately become North Carolina manufacturers, not between those companies who *could* locate in North Carolina.

Tax credit proponents also argue that the Commerce Clause does not prohibit "subsidies" and use that term to encompass the whole of economic incentives provided by states. Contrary to those arguments, however, it remains an open question as to the validity of subsidies under the Commerce Clause.[133] Even so, the supreme court has sharply differentiated between "direct" subsidies and tax incentives.[134]

III. CORPORATE WELFARE VIOLATES THE PUBLIC PURPOSE CLAUSES OF THE NORTH CAROLINA CONSTITUTION.

The North Carolina Constitution limits the government's right to impose taxes "for public purposes"[135] and also limits the power of the government to contract with and appropriate money to private entities "for the accomplishment of public purposes only."[136] Collectively, these provisions are the basis of what has become North Carolina's "public purpose doctrine."[137] Longstanding principles of law as set out below forcefully condemn the use of public moneys to benefit private entities and set forth a two-part test to evaluate whether expenditures are ultimately constitutionally permissible.

A. *Maready is not a Blanket Authorization for Corporate Welfare*

In addressing the issue of whether incentives packages violate article V, section 2(1) of the North Carolina Constitution, specifically

132. Brief of Defendant-Appellee Dell at 32, Blinson v. State, 651 S.E.2d 268 (N.C. Ct. App. 2007) (No. COA 06-1258).

133. *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994) ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that 'direct subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." (quoting *New Energy*, 486 U.S. at 278)).

134. *Camps Newfound/Owatonna*, 520 U.S. at 588–91 (citing *New Energy*, 486 U.S. 269).

135. N.C. CONST. art. V, § 2(1).

136. *Id.* art. V, § 2(7).

137. Blinson v. State, 651 S.E.2d 268, 273 (N.C. Ct. App. 2007).

the "public purpose" clause, the threshold question to be resolved is how broadly or narrowly the case of *Maready v. City of Winston-Salem*[138] should be interpreted. Taken to its logical conclusion, *Maready*, according to at least one lower court,[139] stands for the proposition that as long as the expenditure of public tax dollars is "aimed" at economic development, then the "public purpose" test has been met. However, a careful analysis of *Maready* reveals its holding is much more narrow.[140]

1. Maready *holds that N.C. GEN. STAT. § 158-7.1 is constitutional.*[141]

In *Maready*, the trial court entered four conclusions of law, only one of which is pertinent here. It is: "North Carolina General Statute §158-7.1 is unconstitutional in that it allows the expenditure of public funds for private purposes in violation of the North Carolina Constitution."[142]

The State's brief to the North Carolina Supreme Court in *Maready* contained only two "questions presented," again, only one of which applies to the discussion here: "Did the Trial Court commit error in holding that N.C.G.S. § 158-7.1 impermissibly allows the expenditure of

138. Maready v. City of Winston-Salem, 467 S.E.2d 615, 615 (N.C. 1996).

139. *Blinson*, 651 S.E.2d at 273.

140. *See id.*; *infra* notes 140–45 and accompanying text.

141. In examining the import and scope of section 158-7.1 of the North Carolina General Statutes, it is important to note that it begins with a general authorization: "(a) to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such a city or county . . . which in the discretion of the governing body of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of any city or county." N.C. GEN. STAT. § 158-7.1 (2010). Next under section 158-7.1(b), the statute sets out "specific economic development activities" but notes that the list does not limit, by implication or otherwise, the broader grant of authority. *Id.* § 158-7.1(b). The "specific" undertakings are, however, very general. For example, a county or city "may acquire and develop land"; "may acquire, assemble, and hold for resale property that is suitable for industrial or commercial use"; "may acquire, construct, convey, or lease a building suitable for industrial or commercial use"; "may construct, extend or own utility facilities"; "may extend or may provide . . . water and sewer lines"; or "may engage in site preparation for industrial properties or facilities." *Id.* The specific undertakings and the general grant in subsection (a) must both still be authorized and, if authorized by section 158-7.1, be determined as to whether they are constitutional as applied. *See id.* § 158-7.1(a).

142. Findings of Fact, Conclusions of Law & Judgment, Maready v. City of Winston-Salem, No. 95 CVS 623 (N.C. Super. Ct., Forsyth County Aug. 28, 1995).

public funds for private purposes in violation of the North Carolina Constitution?"[143]

In light of the question presented, the supreme court majority opinion written by Justice Whichard states: "We therefore hold that N.C.G.S. § 158-7.1 which permits the expenditure of public moneys for economic development incentive programs does not violate the public purpose clause of the North Carolina Constitution."[144] Therefore, *Maready* stands only for the single principle that section 158-7.1 of the North Carolina General Statutes is *facially* constitutional.[145] At no time does the case specifically detail the incentives in question, except in the dissent.[146]

In addition, the holding in *Maready* applies *only* to a single statute—section 158-7.1 of the North Carolina General Statutes. Frequently, mega-sized incentives packages result from special legislation.[147] These packages are based on independent and separate legislation, the validity of which is not determined by resort to the *Maready* court's core holding, but should be analyzed independently under the Public Purpose Clause.

Although courts are bound by the holding in *Maready* establishing that the expenditure by local government of public money for economic development programs pursuant to section 158-7.1 may be for a public purpose, courts must nevertheless make an independent determination of the constitutionality of specific incentives packages authorized by

143. Defendant-Intervenor-Appellant State of North Carolina's Brief at 1, *Maready*, 467 S.E.2d 615 (No. 422 PA 95).

144. *Maready*, 467 S.E.2d at 627.

145. *See* Wisc. Right to Life, Inc. v. Fed. Election Comm'n, 546 U.S. 410, 412 (2006) (per curiam) (upholding legislation against a facial challenge, but not "purport[ing] to resolve future as-applied challenges").

146. *Maready*, 467 S.E.2d at 634 (Orr, J., dissenting).

147. *See* Job Maintenance and Capital Development Fund, ch. 143B, 2007 N.C. Sess. Laws 552 (special legislation for Goodyear Tire & Rubber and Bridgestone/Firestone); 2004 N.C. Sess. Laws 204 (special legislation for Dell) [hereinafter Dell Legislation]; *see also* 2006 N.C. Sess. Laws 66 (special legislation for Google, Inc.); 2003 N.C. Sess. Laws 284 (appropriation for Johnson and Wales University, a private culinary school); 2005 N.C. Sess. Laws 276 (another appropriation for Johnson and Wales University, a private culinary school); 2006 N.C. Sess. Laws 66 (one more appropriation for Johnson and Wales University, a private culinary school); 2007 N.C. Sess. Laws 323 (appropriation for Johnson and Wales University, a private culinary school, again); 2008 N.C. Sess. Laws 107 (still another appropriation for Johnson and Wales University, a private culinary school); Jonathan B. Cox & Lynn Bonner, *Tire Makers Win State Incentives: A New Law that Broadens the Scope of Industrial Policy Makes Way for as Much as $60 Million to Improve N.C. Facilities*, RALEIGH NEWS & OBSERVER, Sept. 12, 2007.

separate legislation. In making this determination, these courts must utilize the test in *Madison Cablevision, Inc. v. City of Morganton*,[148] just as *Maready* utilized that test to evaluate section 158-7.1.[149]

In *Madison Cablevision*, Justice Meyer writing for a unanimous court quoted with approval a review of how the court had addressed the question of what constitutes a public purpose, noting that "[o]ur reports contain extensive philosophizing . . . on the subject."[150] Justice Meyer continued by stating public purpose jurisprudence is "best summarized in the 1970 opinion of the supreme court by Chief Justice Bobbitt:

> A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.[151]

Justice Meyer then set out the test which is still applicable today:

> Two guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality, *Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946); and (2) the activity benefits the public generally, as opposed to special interests or persons, *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665. This has been our traditional test, and we continue to adhere to it.[152]

Application of *Madison Cablevision* is wholly consistent with *Maready* where the majority not only acknowledged the two-part test in *Madison Cablevision*, but also utilized that test in resolving the issue before the court. As to the first prong of the test, the *Maready* majority stated:

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148. Madison Cablevision, Inc. v. City of Morganton, 386 S.E.2d 200 (N.C. 1989).

149. *Maready*, 467 S.E.2d at 624–26.

150. *Madison Cablevision*, 386 S.E.2d at 207.

151. *Id.* (quoting Martin v. Housing Corp., 175 S.E.2d 665, 672–73 (N.C. 1970)) (internal citations omitted).

152. *Id.*

> [W]hether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action. We conclude that the activities N.C.G.S. § 158-7.1 authorizes are in keeping with those accepted as within the scope of permissible governmental action.[153]

As to the second prong of the *Madison Cablevision* test, the *Maready* court states: "[U]nder the expanded understanding of public purpose, even the most innovative activities N.C.G.S. § 158-7.1 permits are constitutional *so long as they primarily benefit the public and not a private party*."[154] The majority, however, answered the question posed by the second prong of *Madison Cablevision* by concluding:

> The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, *such benefit is merely incidental*.[155]

Thus the second prong, answered in the context of statute, deemed section 158-7.1 constitutional.

In the most recent North Carolina Supreme Court case to address this area of the law, *Piedmont Triad Airport Authority v. Urbine*,[156] Justice Butterfield, writing for a unanimous court, stated:

> As we stated in Maready v. City of Winston-Salem, this Court is no stranger to the question of what activities are and are not a public purpose. Nonetheless, as Justice (later Chief Justice) Sharpe wrote in Mitchell v. N.C. Indus. Dev. Fin. Auth., a slide-rule definition to determine public purpose for all time cannot be formulated. Our recent holdings in Madison Cablevision, Inc. v. City of Morganton and Maready have employed a two-prong analysis to aid the determination of public purpose in each case before us.[157]

The court then went on to apply *Madison Cablevision's* two-part test.[158]

Thus, *Piedmont Triad* reinforces that "public purpose" must be determined on a case-by-case basis and requires the application of the two-prong analysis of *Madison Cablevision*. Even if job creation and

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153. *Maready*, 467 S.E.2d at 624.
154. *Id.* at 724 (emphasis added).
155. *Id.* at 725 (emphasis added).
156. Piedmont Triad Airport Auth. v. Urbine, 554 S.E.2d 331 (N.C. 2001).
157. *Id.* at 333 (internal quotation marks and citations omitted).
158. *Id.*

economic development could meet the first prong of the *Madison Cablevision* test, courts must evaluate the second prong to determine whether the subsidies in question benefit the public generally, as opposed to special interests or persons. It is useful in that regard to examine North Carolina Supreme Court case law over the years on that point.

Briggs v. City of Raleigh, et al.,[159] decided the question of whether an appropriation for the North Carolina State Fair was a public purpose. The opinion written by Chief Justice Stacy expounded at length about the means by which that question should be answered and what constituted use for the public versus private interests, stating:

> Indeed, it is well settled by all the decisions on the subject, with none to the contrary, that the power of taxation may not be employed for the purpose of establishing, aiding, or maintaining private business enterprises, whose sole object is the individual gain of the proprietors, no matter how beneficial to the community such enterprises may be. The attempted exercise of the taxing power for such purposes was long ago characterized as taxation to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom. However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means.[160]

Thus, as far back as 1928, the supreme court recognized that while the general community could benefit from the success of private businesses, the government could not use its taxing power to aid those privileged businesses. The court then continued:

> The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary.[161]

The court again recognized that even though the resulting good to the public was substantial, it was still an incidental advantage and concluded with the assertion that it was a violation of constitutional

159. Briggs v. City of Raleigh, 141 S.E. 597 (N.C. 1928).

160. *Id.* at 600 (internal quotation marks and citations omitted).

161. *Id.* at 600–01.

rights for government to use public funds for the benefit of a private enterprise. The court explained:

> The individual, by reason of his capacity, enterprise, or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising [sic] and thriftless their unemployed capital and intrust [sic] it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.[162]

In *Nash v. Town of Tarboro*, the court determined:

> We deem it unnecessary to cite or discuss the long list of decisions of this Court, dealing with the many things which have been held to fall within the definition of a public purpose, such as streets, sidewalks, bridges, water, light and sewerage plants, market houses, abattoirs, municipal buildings, auditoriums, hospitals, playgrounds, parks, railroads, armories, fairs and airports. Those decisions, in our opinion, do not support the contention that the cost of constructing and maintaining a hotel by a municipality is a public purpose within the meaning of our Constitution. . . . Certainly, a tax could not be constitutionally levied to aid one in building or conducting a hotel; and to exempt the keeper from the payment of the tax thereon is but doing indirectly what cannot be done directly.[163]

Then in 1968, the court addressed the constitutionality of industrial development bonds in *Mitchell v. N.C. Industrial Development Financing Authority*.[164] Justice Sharp set out the law in North Carolina, stating:

> A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so commingled that it is difficult to determine which predominates. It is clear, however, that for a use to be

162. *Id.* at 601 (internal quotation marks and citations omitted).

163. *Id.* (quoting Nash v. Town of Tarboro, 42 S.E.2d 209, 212 (N.C. 1947)) (internal quotation marks omitted).

164. Mitchell v. N.C. Indus. Dev. Fin. Auth., 159 S.E.2d 745 (N.C. 1968).

public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private.[165]

. . . .

Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.[166]

. . . .

If public purpose is now to include State or municipal ownership and operation of the means of production—even on an interim basis; if we are to bait corporations which refuse to become industrial citizens of North Carolina unless the State gives them a subsidy, the people themselves must so declare. Such fundamental departures from well established constitutional principles can be accomplished in this State only by a constitutional amendment.[167]

B. *Subsidies Arising from Contracts with Local Government and from Special Legislation Primarily, If Not Exclusively Benefit the Recipient and Violate the* Madison Cablevision *Test.*

Again, considering North Carolina's special incentives for Dell reveals the constitutional flaws with the state's incentives schemes. Consider the incentives given to Dell by local governments. There, the crux of the local subsidies at issue in that case consisted of: (1) approximately $7,000,000 in direct grants for Dell's benefits that cover the cost of buying the $7,000,000 tract of land; (2) direct grants to Dell for approximately $14,500,000 to prepare the site for construction of the facility; and (3) approximately $14,685,250 in direct grants to

165. *Id.* at 750 (internal citations omitted).

166. *Id.* at 755 (quoting State v. Town of North Miami, 59 So.2d 779, 784–85 (Fla. 1952)).

167. *Id.* at 760 (internal citations omitted).

Dell to reimburse Dell for property taxes that would be paid.[168] All of these grants coming out of the general fund of two local governments would have gone directly to Dell and were for Dell's sole benefit. Thus, under the *Madison Cablevision* test, the court should have determined: (1) whether these separate expenditures "involve[] a reasonable connection with the convenience and necessity of the particular [local governments]; and (2) whether the activit[es] benefit[] the public generally, as opposed to special interests or persons."[169]

Even if it was conceded that these expenditures could somehow have a "reasonable connection" with the "convenience and *necessity*" of the local governments, they still unquestionably would fail the second prong of *Madison Cablevision* because they primarily benefited Dell and not the public. As conceded by the court of appeals, all of the benefits of the expenditures directly and exclusively benefit Dell. Every dollar given in grants going to reimbursements for purchasing the site, to construction of infrastructure for the site, and to reimbursement of property taxes, went straight to Dell's corporate bottom line.

Utilizing the *Madison Cablevision* test again, the specific incentives born of special legislation like that at issue in *Blinson* fail to pass state constitutional muster. *Blinson* involved three basic incentives at the state level: (1) a tax credit of up to 100% for "large computer manufacturers" against corporate income and corporate franchise tax liability, with any additional credits permitted to be carried forward; (2) enhancements to the Bill Lee Act credits for "major computer facilities" against North Carolina corporate franchise tax, corporate income tax, personal income tax, and estate and trust tax; and (3) a refund of sales and use taxes paid on building materials, building supplies, fixtures and equipment that becomes part of real property in North Carolina. These subsidies total more than $242,000,000.[170]

Each of the above described tax credits and refunds were directed exclusively to the recipient's benefit. Each dollar saved by using the credits results in an equivalent increase in Dell's corporate bottom line. Thus, the state's activity—special legislation targeted primarily, if not exclusively, for a single cherry-picked corporation—benefits that corporation and only that corporation. Because the benefit of these incentive packages inure to the exclusive benefit of their respective

168. Amended Complaint & Petition for Declaratory Judgment at ex. H, Blinson v. State, No. 05 CVS 8378, 2005 WL 6340135 (N.C. Super. Ct., Wake Co. Sep. 9, 2005).

169. Maready v. City of Winston-Salem, 467 S.E.2d 615, 624 (N.C. 1996) (quoting Madison Cablevision, Inc. v. City of Morganton, 386 S.E.2d 200, 207 (N.C. 1989)).

170. *See supra* notes 70–82 and accompanying text.

recipients, the state subsidy package for each also fails the second prong of the *Madison Cablevision* test and is unconstitutional under article V, section 2(1) of the North Carolina Constitution.

In *Maready*, the plaintiffs argued that the issue fell squarely within the purview of *Mitchell*.[171] The majority of the court disagreed, and while finding *Mitchell* distinguishable, did not overrule it.[172] Thus, *Mitchell* stands as good law and binding precedent on the constitutional issue of applying the Public Purpose Clause to the subsidies under the Dell Legislation and to the local subsidies. The *Maready* majority attempted to distinguish that case from *Mitchell* in two respects: first in *Mitchell*, the general assembly had unenthusiastically passed the legislation, which was not the case in *Maready*;[173] and second, "the holding in *Mitchell* clearly indicates that the Court considered private industry to be the primary benefactor of the legislation and considered any benefit to the public purely incidental."[174] However, the *Maready* majority then states that "[t]he Court *rightly* concluded that direct state aid to a private enterprise, with only limited benefit accruing to the public, contravenes fundamental constitutional precepts."[175]

In *Stanley v. Department of Conservation and Development*, upon which the plaintiffs in *Maready* also relied, it was noted that "[i]n determining what is a public purpose the courts look not only to the end sought to be attained but also 'to the means to be used.'"[176]

The *Maready* majority attempted to explain this away by relying on article V, section 2(7) of the North Carolina Constitution, which was adopted in 1973, as discussed in *Hughey v. Cloninger*.[177] "Under subsection (7)[,] [*d*]*irect_disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation."[178] *Hughey*, however, was a case involving an appropriation from the Gaston County Board of Commissioners to the Dyslexia School of North Carolina.[179] The court in *Hughey* pointed out

171. *Maready*, 467 S.E.2d at 621.

172. *Id.* at 621–22.

173. *Id.*

174. *Id.* at 622.

175. *Id.* (emphasis added).

176. Stanley v. Dep't of Conservation and Dev., 199 S.E.2d 641, 653 (N.C. 1973) (quoting Turner v. Reidsville, 29 S.E.2d 211, 213 (N.C. 1944)).

177. Hughey v. Cloninger, 253 S.E.2d 898 (N.C. 1979).

178. *Id.* at 904 (emphasis added).

179. *Id.* at 900.

that the court of appeals had determined that a direct disbursement of public funds to private entities, such as the Dyslexia School "(could) not be the means used to effect a public purpose."[180] The supreme court, however, explained that article V, section 2(7) enables the General Assembly to "enact laws which permit the State, county, city or town, or any other public corporation to 'contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes *only*.'"[181] The court further noted that had there been statutory authority for the appropriation to the Dyslexia School, no public purpose problem would have existed since the "expenditures of public funds for the education of the citizens of North Carolina are for a public purpose."[182]

Obviously, the circumstances in *Hughey* are a far cry from the facts in *Maready*, as the weight of article V, section 2(7) on the determination of the constitutionality of the specific subsidies at issue here is negligible. This is not a situation where contracts are being entered into whereby a private entity, for example, a garbage collection company, is performing a public purpose and being compensated for it or an appropriation to a Chamber of Commerce made to assist in corporate recruitment.[183] Thus, the observation in *Maready* that "the constitutional problem under the public purpose doctrine that the Court perceived in *Mitchell* and *Stanley* no longer exists" simply is dicta.[184] In fact, the *Maready* opinion acknowledges the efficacy of *Mitchell* and its progeny by stating that while they "remain pivotal in the development of the doctrine, they do not purport to establish a permanent test."[185] While not establishing a permanent and irrevocable test applicable in every circumstance, the law in those cases remains binding precedent and valid in analyzing the constitutionality of the Dell legislation at issue and the application of section 158-7.1 of the North Carolina General Statutes to the various subsidies at issue.

180. *Id.* at 903 (quoting Hughey v. Cloninger, 245 S.E.2d 543, 547 (N.C. Ct. App. 1978)).

181. *Id.* at 903–04 (emphasis added) (quoting N.C. CONST. art. V, § 2(7)).

182. *Id.* at 904 (citing Educ. Assistance Auth. v. Bank, 174 S.E.2d 551 (N.C. 1970)).

183. *See* Horner v. Chamber of Commerce, 68 S.E.2d 660, 663 (N.C. 1952) (declaring unconstitutional an appropriation to chamber of commerce when the same was commingled with other chamber funds and "indiscriminately used" to pay for chamber's corporate functions, not just recruitment efforts).

184. Maready v. City of Winston-Salem, 467 S.E.2d 615, 623 (N.C. 1996).

185. *Id.*

IV. CONCLUSION

What remains to be seen is whether the Supreme Court of North Carolina, which declined to review the *Blinson* decision, will weigh in on the Commerce Clause issue and the excessively expansive public purpose determination of *Blinson* and *Peacock*. The policy reasons for reversing the tide of corporate welfare offered under the guise of economic development and job creation are beyond the scope of this Article.[186] Nevertheless, the constitutional mandates of the Commerce Clause and the public purpose doctrine do not depend on policy debates or political whim. These mandates, properly considered, do not allow subsidies, grants or preferential tax treatment calculated to benefit North Carolina at the expense of her sister states,[187] nor do they allow government to use public resources to buoy select private industry.[188] Future cases should and must be resolved by resort only to the federal and state constitutions for they are the cornerstone of all law.

186. *See supra* notes 3–4 and accompanying text; *see also* Peters & Fisher, Papke, Pomp, *supra* note 3; Enrich, *supra* note 4.

187. *See supra* Part II.

188. *See supra* Part III.