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STATE TAXATION OF GROSS RECEIPTS AND THE NEGATIVE COMMERCE CLAUSE

David F. Shores*

Occasionally, a court renders an opinion which is not merely open to serious question but is astonishingly incoherent. Constitutional limitations on state taxation of interstate commerce have produced more than their fair share of such opinions. The United States Supreme Court, itself, has characterized its decisions in this area as a "tangled underbrush." Its recent decision in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue was just such a case.

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1. In Justice Scalia's view the commerce clause decisions limiting state taxation of interstate commerce have "made no sense." He characterized this entire area of commerce clause jurisprudence as "impoverished territory." Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue, 483 U.S. 232, 260, 265 (1987) (Scalia, J., dissenting). Others agree. Leading commentators have characterized the decisions as based on "tenuous distinctions," Lockhart, A Revolution in State Taxation of Commerce?, 65 MINN. L. REV. 1025, 1030 (1981), and on "insubstantial and pointless formalism." P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 88 (1981). Many of the cases criticized in these commentaries were based on a rule of tax immunity for interstate commerce which was rejected by the Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). However, as discussed below, many distinctions engendered by the tax immunity rule remain. See infra notes 40, 81, and text accompanying note 145.

Further evidence of the deplorable state of the decisional law is provided by the fact that two leading authorities do not agree on how one of the most important limitations on state taxing power, the multiple tax doctrine, applies. One claims the doctrine is breached when an interstate activity is potentially subject to multiple taxation. The other insists only actual taxation by two or more states is prohibited. Compare J. Hellerstein, State Taxation—Corporate Income and Franchise Taxes 120 (1983) ("In 1980, the Court . . . apparently put the matter to rest by reaffirming the risk test of multiple taxation.") with P. Hartman, at 36 ("[T]he current version of multiple burdens doctrines (sic) as a commerce clause obstruction to a tax requires the showing of an actual multiple tax burden.") (emphasis in the original). See also P. Hartman, at 82.


Ten years prior to *Tyler Pipe*, in *Complete Auto Transit, Inc. v. Brady*, the Court recognized that commerce clause limitations on state taxing power had "no relationship to economic realities," and stood "only as a trap for the unwary draftsman." In an effort to rationalize this branch of commerce clause jurisprudence, it overturned the tax immunity doctrine which had been developed by case law over a period spanning one hundred years. *Tyler Pipe* deserves close examination because it was wrongly decided and because it represents the Court's failure, in *Complete Auto*, to place commerce clause analysis of state taxing power on a sound footing. That failure supports Justice Scalia's suggestion that the Court jettison the so-called negative commerce clause doctrine under which it decides if a state tax unduly burdens interstate commerce.

5. Id. at 279.
7. *Tyler Pipe* was wrongly decided in that the Court reaffirmed as a commerce clause objective the prohibition of multiple taxation of interstate commerce, but adopted a method of analysis which failed to achieve that objective. See infra text following note 107.
8. *Complete Auto* and the expectations it engendered are discussed below. See infra text following note 30.
9. The negative commerce clause doctrine, also referred to as the dormant commerce clause doctrine, holds that the constitutional grant of power to Congress to regulate interstate commerce implies a limitation on state power to regulate or otherwise burden commerce which must be explicated by the Court so long as Congress remains silent. For a fuller explanation see L. Tribe, *American Constitutional Law* 325-26 (1978). Justice Scalia rejected this doctrine and argued that "The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce." *Tyler Pipe*, 483 U.S. at 263. "Congress' silence," he said, "is just that—silence . . . ." Id. at 262 (quoting Alaska Airlines v. Brock, 480 U.S. 678, 686 (1987)). Original intent as a tool of constitutional construction is a slippery concept. It seldom, if ever, is irrefutably demonstrated by the historical record, and Professor Hartman has argued:

"Whatever may have been the intent of the framers of the Constitution . . . the commerce clause undoubtedly has been one of the most significant provisions in the Constitution in forging the confederation into a viable Nation, not only through the unifying force of that clause but also by its restraint upon state action that would unduly hinder national economic growth."

P. Hartman, *supra* note 1, at 18.

Since evidence of intent is ambiguous, neither mandating nor ruling out the negative commerce clause doctrine, the question is whether application of the doctrine to state taxing power represents wise interpretation of the clause, or usurpation of legislative power. If, as many seem to agree (see *supra* note 1 and accompanying text), the Court's state tax cases have been characterized chiefly by capricious distinctions and haphazard development, it is very difficult to view the negative commerce clause as wise constitutional interpretation. The inability to produce a coherent body of decisional law may indicate an institutional infirmity. As the Court has recently stated, "The uneven course of decisions in this field reflects
The purpose of this article is to propose a modest realignment of the framework for commerce clause analysis of state taxing power. The proposal grew out of an observation by Justice Rutledge that while due process and commerce clause limitations on state taxing power overlap, clear analysis requires that they be viewed independently rather than collapsed into a single conception. The Supreme Court has failed to heed this advice, and in recent years it has exacerbated the situation by sometimes collapsing into one the, previously separate, commerce clause concerns of discrimination and multiple taxation. To understand why the suggested realignment would contribute to the development of a coherent body of decisional law based on economic realities rather than meaningless distinctions, it is necessary to examine briefly what has gone before.

I. BACKGROUND - A HISTORICAL SKETCH

Much has been written about the evolution of commerce clause limitations on state taxation of interstate commerce. What follows is a very cursory outline.

The commerce clause states that: "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, . . ." Use of the negative commerce clause doctrine, assumes that when Congress has not exercised its power to regulate interstate commerce it nonetheless intends that such commerce be free of undue burdens imposed

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." American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 269 (1987).

Perhaps the problems of state taxation of interstate commerce simply cannot be resolved by the Court through case law with its dependence on general principles. If, as Justice Frankfurter put it, "nice distinctions are to be expected," in delineating the scope of state taxing power, Northwestern Cement Co. v. Minnesota, 358 U.S. 450, 473 (1959) (Frankfurter, J., dissenting) (quoting Galveston H. & S.A.R. Co., v. Texas, 210 U.S. 217, 225 (1908)), perhaps they should be made through the legislative or regulatory process. Although legislative action is certainly not precluded by the negative commerce clause, it is discouraged. Congress will be less likely to address the issues of state taxation of interstate commerce so long as the Court does, even in its fumbling manner. If the negative commerce clause makes effective solutions to pressing problems of state taxation less likely, it can hardly be defended as wise interpretation.

While Justice Scalia's view may seem radical today, it is on all fours with that of Chief Justice Taney who could find no support in the commerce clause for invalidating any state tax. License Cases, 46 U.S. (5 How.) 504 (1847).

10. See infra, note 40.


by the states. For one hundred and fifteen years, the Court has been deciding when the state tax burden on interstate commerce is "undue" and therefore violative of the negative commerce clause.

The Court, over the years, has based the commerce clause limitations on state taxing power on three general principles, two of which survive to the present day. These principles are referred to as the tax immunity doctrine, the discrimination doctrine, and the multiple tax doctrine. The tax immunity doctrine, explicitly abandoned in 1977, held that interstate commerce was immune from state taxation. Since interstate commerce draws its sustenance from an economy nurtured at the expense of state as well as federal government, however, complete immunity from state taxation makes no sense. The Supreme Court succinctly stated, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden . . . ."

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14. The first decision in which a state tax on interstate commerce was held to violate the commerce clause was Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872). For an analysis of this case see, Shores, supra note 11, at 131-32.
15. Some might argue that the only surviving principle is that which prohibits discrimination against interstate commerce. Cf. J. Hellerstein, supra note 1, at 122-23, 126. While the scope and effect of general principles are almost invariable topics for lively debate in any area of law, the law seldom degenerates to the point where the very existence of a general principle is open to serious question. There is a critical need for well-reasoned Supreme Court decisions in this area.
16. The tax immunity doctrine can be traced to Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872), and was explicitly adopted in Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887). It flatly prohibited any state tax on interstate commerce. It would seem that since taxation of interstate commerce was per se unlawful, no further limitation should have been necessary. As discussed below, the immunity doctrine never provided a complete shield from state taxation. See infra text accompanying note 21.
17. The Court has observed that "The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the (Commerce) Clause." Boston Stock Exch. v. State Tax Comm., 429 U.S. 318, 329 (1977). The discrimination principle was probably first applied to invalidate a state tax in Welton v. Missouri, 91 U.S. 275 (1876).
18. Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872) seemed to express some concern for the harmful effects of multiple taxation. See Shores, supra note 11, at 131-32. It was not until 1938 that the Court explicitly recognized multiple taxation as an important factor in commerce clause analysis. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258 (1938). See Shores, supra note 11, at 137.
To limit the scope of the tax immunity doctrine the Court applied a direct-indirect test under which interstate commerce was immune from direct but not indirect state taxes.\textsuperscript{21} This test spawned many absurd distinctions which exposed the Court's commerce clause jurisprudence to ridicule if not contempt.\textsuperscript{22} Perhaps the height of absurdity was reached in the \textit{Railway Express} cases.\textsuperscript{23} Virginia had applied its "doing business" tax, measured by gross receipts, to Railway Express Agency. Although the tax only applied to gross receipts attributable to activities within the state, it was held invalid as a direct tax on interstate commerce because the business activities conducted within the state were part and parcel of the taxpayer's interstate business.\textsuperscript{24}

The Virginia legislature revised the statute by changing the formal subject matter of the tax from "doing business" within the state to the "intangible property"\textsuperscript{25} and "going concern value"\textsuperscript{26} connected with the taxpayer's business activities within the state. Again, the tax was measured by fairly apportioned gross receipts.\textsuperscript{27} Since the tax was now on intangible property owned by a concern engaged in interstate business it was viewed as an indirect rather than a direct tax on interstate commerce and when challenged, was upheld.\textsuperscript{28} The practical economic burden of the tax was, of course, unchanged. Only the words had been altered, but using the "magic words" made constitutional an otherwise unconstitutional tax.\textsuperscript{29}

In \textit{Complete Auto Transit, Inc. v. Brady},\textsuperscript{30} the Court reviewed these and other cases in which the tax immunity rule had been applied and concluded that "[t]he reason for attaching constitutional significance to a semantic difference is difficult to discern."\textsuperscript{31} "There is no economic consequence," said the Court, "that follows necessarily from the use of . . . particular words, . . . and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect."\textsuperscript{32} The immunity rule was explicitly rejected\textsuperscript{33} in favor of other decisions which

\textsuperscript{21} See J. Hellerstein, \textit{supra} note 1, at 103.
\textsuperscript{22} See \textit{supra} note 1.
\textsuperscript{24} \textit{Railway Express I}, 347 U.S. 359 (1954).
\textsuperscript{25} \textit{Railway Express II}, 358 U.S. 434, 438 (1959).
\textsuperscript{26} \textit{Id.} at 440.
\textsuperscript{27} \textit{Id.} at 438.
\textsuperscript{28} \textit{Railway Express II}, 358 U.S. 434 (1959).
\textsuperscript{29} The Court neither changed this reality nor added to its own dignity by asserting that more was involved than "the use of magic words." \textit{Id.} at 441.
\textsuperscript{30} 430 U.S. 274 (1977).
\textsuperscript{31} \textit{Id.} at 285.
\textsuperscript{32} \textit{Id.} at 288.
\textsuperscript{33} \textit{Id.}. 

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considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax 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.\textsuperscript{34}

The Court's approval of this four-part test for evaluating a tax under the commerce clause, and its rejection of the tax immunity rule were heralded as a revolution in state taxation.\textsuperscript{35} Commonwealth Edison Co. v. Montana,\textsuperscript{36} decided four years after Complete Auto, raised the question whether the revolution was real. In an earlier article, this author commented:

\textit{Commonwealth Edison} suggests that the Court will allow meaningless distinctions based on the formal subject matter of a tax to narrow the scope of the multiple tax doctrine as applied to taxes measured by gross receipts. . . . It took the Court one hundred years to realize that it could not simultaneously maintain the tax immunity rule, achieve goals incompatible with that rule, and develop coherent precedents. One can hope that it will not repeat that process with the multiple tax doctrine.\textsuperscript{37}

\textit{Tyler Pipe} confirms what \textit{Commonwealth Edison} suggested. Complete Auto did not signal the dawn of principled analysis for state tax cases. Instead, the Court continues to function without the tax immunity rule in much the same way as it had functioned with the rule. "Magic words" may be as critical under some recent cases as under the \textit{Railway Express} cases.\textsuperscript{38} The only difference is that in the \textit{Railway Express} cases the magic words were critical to applying the tax immunity rule, while they are now critical to applying the multiple tax doctrine, or, more precisely, to an outgrowth of that doctrine, the "internal consistency test."\textsuperscript{39} Before examining \textit{Tyler Pipe} and demonstrating that this is true, it will be useful to discuss briefly some current problems in the Court's approach to issues of state taxation and their relationship to the four-part test of Complete Auto.

\textsuperscript{34} \textit{Id.} at 279. One of the prior decisions specifically approved was \textit{General Motors Corp. v. Washington}, 377 U.S. 436 (1964). \textit{See Complete Auto}, 430 U.S. at 279. \textit{Tyler Pipe}, however, endorsed Justice Goldberg's dissent in \textit{General Motors} (see \textit{Tyler Pipe}, 483 U.S. at 242), and indicated the \textit{General Motors} holding was overruled to the extent inconsistent with the Court's most recent pronouncements. \textit{Tyler Pipe}, 483 U.S. at 248. The Court's vacillation in evaluating precedent suggests that its state tax decisions continue to be devoid of principled analysis.

\textsuperscript{35} \textit{Lockhart}, supra note 1, at 1038 ("[R]ecent decisions signal the end to the Formal Rule in all of its tax manifestations."); \textit{see also J. HELLERSTEIN}, supra note 1, at 126-27; P. HARTMAN, supra note 1, at 88-90.

\textsuperscript{36} 453 U.S. 609 (1981). \textit{Commonwealth Edison} upheld a Montana severance tax measured by total gross receipts from interstate sales of coal mined in Montana. For an analysis of this decision see Shores, supra note 11, at 150-55.

\textsuperscript{37} Shores, supra note 11, at 169.

\textsuperscript{38} \textit{See infra} text accompanying notes 92 and 155. \textit{See also infra} note 40.

\textsuperscript{39} \textit{See infra} text accompanying notes 99-100.
II. SOME CURRENT PROBLEMS WITH THE COURT'S STATE TAX DECISIONS

A. The Relationship of the Due Process and Commerce Clauses

One problem which has long plagued state tax decisions has been the Court's failure to separate due process from commerce clause considerations. While analysis based upon fusing due process and commerce clause

40. For example, in Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983), the Court stated: "The Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a "minimum connection" or "nexus" between the interstate activities and the taxing state ...." Id. at 165-66 (quoting Mobil Oil Corp. v. Commissioner of Texas, 445 U.S. 425, 436-37 (1980)). Previously, the Court had stated:

The Due Process Clause places two restrictions on a State's power to tax income generated by activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. . . . Second, the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.


The fusion of the due process and commerce clauses reflected by Container Corporation is a holdover from pre-Complete Auto decisions in which both clauses were viewed as relating to the question of whether the state had power to tax a given transaction. This approach is illustrated by McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944), where the Court held Arkansas could not apply its sales tax to a sale in Tennessee by a Tennessee vendor to an Arkansas buyer even though the goods were delivered in Arkansas because: "The very purpose of the Commerce Clause was to create an area of free trade among the several States." Id. at 330.

In a related case, General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), the Court upheld Iowa's use tax as applied to goods purchased in Minnesota and delivered in Iowa to an Iowa purchaser, observing that the use tax was "a nondiscriminatory excise laid on all personal property consumed in Iowa." Id. at 338. The Dilworth view that commerce clause analysis goes to the existence of a state's power to tax was logical under the tax immunity rule, since, at least in theory, the State had no power to impose a direct tax on interstate commerce. Justice Rutledge, who had no sympathy for the immunity rule, viewed the existence of state power as a due process issue, anterior to the commerce clause question of whether state taxing power was exercised in a way that unduly burdened commerce. Dissenting in Dilworth and concurring in General Trading he wrote:

The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

Id. at 352 (Rutledge, J., concurring). Now that the tax immunity rule has been repudiated there is no basis for viewing the existence of state taxing power as a constitution clause issue.
concepts does not necessarily produce bad results, it does contribute to a lack of clarity and sets the stage for fundamental error.\textsuperscript{41}

The due process clause provides that no person shall be deprived of property without due process of law.\textsuperscript{42} As applied to state taxation, the due process clause is concerned with whether the state has power to tax. Essentially, the issue comes down to whether there is some relationship between the taxpayer and the state which justifies the tax. As the Court has stated: "The simple but controlling question is whether the state has given anything for which it can ask return."\textsuperscript{43} Obviously, one state cannot impose an income tax, or any other tax, on a resident of another state who has no connection with the taxing state. But, if some connection or nexus exists, for example, the nonresident has income from sources within the taxing state, the due process requirement is met.\textsuperscript{44}

Properly viewed, the commerce clause is relevant only after the due process requirement is met. It poses the question: Has the state exercised its power to tax in a way that unduly burdens interstate commerce? The two constitutional limitations overlap in that, whenever a state violates due process by attempting to tax interstate commerce with which it has no nexus, the commerce must be connected with some other state and that state has power to tax. If the second state exercises its power to tax, duplicative taxation will result and commerce will be unduly burdened. In other words, any tax on interstate commerce that violates the due process clause will also violate the commerce clause, because it creates a danger of multiple taxation and thus creates an undue burden.\textsuperscript{45} The due process limitation can, therefore, rationally be viewed as subsumed in the commerce clause limitation.

Apparently this was the Court's view in \textit{Complete Auto}. The first and fourth prongs of the four-part commerce clause test adopted in \textit{Complete Auto} look to whether "the tax is applied to an activity with a substantial nexus with the taxing state . . . and is fairly related to the services provided

\begin{footnotesize}
\begin{enumerate}
\item \textquotedblleft Due Process\textquotedblright{} and \textquotedblleft commerce clause\textquotedblright{} conceptions are not always sharply separable . . . . To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes \textquotedblleft undue.\textquotedblright{} . . . [A]lthough the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones. International Harvester Co. v. Department of Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring).
\item U.S. Const. amend. XIV, § 1.
\item Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).
\item In Wisconsin v. J. C. Penney Co., a Wisconsin tax on dividends paid by a Delaware corporation out of earnings attributable to business activities in Wisconsin was upheld. \textit{Id.}
\end{enumerate}
\end{footnotesize}
by the state.' As previously discussed, nexus relates also to the due process question of whether the state has power to tax.

The fair relationship test of the fourth prong becomes important only if a nexus exists. It asks whether the power to tax has been exercised in a way that is reasonably related to the nexus. As recently described by the Court,

Beyond the threshold (nexus) requirement, the fourth prong of the Complete Auto Transit test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of State tax burden." At best, the fourth prong provides a nebulous standard which operates as a refinement of the nexus test. Arguably, it is automatically satisfied whenever the nexus requirement is satisfied and adds nothing to commerce clause analysis.

Whatever its precise meaning, the fourth prong and the nexus test of the first prong, to which it relates, both go to the due process question of power to tax. In one post-Complete Auto decision, the Court specifically recognized the first and fourth prongs as due process rather than commerce clause tests. Complete Auto and other recent decisions, however, fused due process and commerce clause concerns. That is unfortunate. Minimally, separating the analysis of whether a state has power to tax under the due process clause, from the analysis of whether a state has imposed an undue burden on interstate commerce, would help clarify why the Court concluded a state tax either was or was not constitutional. Beyond that, it might contribute to the Court's insights and have a positive effect on its conclusions.

The second and third prongs of the Complete Auto test are of central importance to commerce clause analysis. They alone impose requirements

46. Complete Auto, 430 U.S. at 279.
48. Id. at 645 (Blackmun, J., dissenting).
49. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272 (1978). The Court stated: The Due Process Clause places two restrictions on a State's power to tax income generated by activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. . . . Second, the income attributed to the State for tax purposes must be rationally related to values connected with the taxing state. Id. at 272-73 (citations omitted).
50. See Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, where the Court stated: "The Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State." Id. at 165-66.
under the commerce clause which are not duplicated elsewhere in the Constitution, and they reflect the longstanding commerce clause requirements that state taxes be fairly apportioned and nondiscriminatory.

B. The Relationship Between the Multiple Tax Doctrine and the Fair Apportionment Requirement

Some commentators have suggested that since the four-part test of Complete Auto does not specifically refer to the multiple tax doctrine, that doctrine no longer exists. Since the Court neither advanced nor repudiated the multiple tax doctrine, the argument must be that the theory of Complete Auto implies its repudiation. This argument is unpersuasive. The Court

51. In his Tyler Pipe dissent, Justice Scalia suggested the antidiscrimination function of the commerce clause is duplicated by the privileges and immunities clause, U.S. Const., art. IV, § 2, cl. 1, which provides that the citizens of each state are entitled to all privileges and immunities of citizens of the several states. Tyler Pipe, 483 U.S. at 265. However, it has been recognized since 1898 that a corporation is not a citizen for purposes of this clause. Blake v. McClang, 172 U.S. 239 (1898). Similarly, the Court has held that a corporation is not a citizen for purposes of the privileges and immunities clause of the Fourteenth Amendment. Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Mkgt. Ass'n, 276 U.S. 71 (1928). Most taxes on interstate commerce are paid by corporations which can look only to the commerce clause for protection from discriminatory state taxation. It is arguable that one purpose of the equal protection clause of the Fourteenth Amendment is to promote harmonious relationships among states within the federal system. State taxes which discriminate against taxpayers from out-of-state are not conducive to such relationships, and thus may violate the equal protection clause. See Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1958) (Brennan, J., concurring); Department of Revenue v. Amrep Corp., 358 So. 2d 1343 (Fla. 1978). Although this argument would seem to merit serious consideration, it has received little attention (perhaps because discrimination against out-of-state taxpayers is normally challenged under the commerce clause), and has never taken root. See Western & S. Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 667 n.21 (1981). Cf., Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985). One important difference in holding a discriminatory tax unconstitutional under the equal protection clause rather than the commerce clause is that Congress can repudiate a Supreme Court decision based on the latter, but not the former. This Congressional power with respect to commerce clause decisions flows from the fact they are based on a presumption of Congressional intent, and are authoritative only so long as Congress remains silent. See supra note 9. It has been suggested that Congress may have power to overturn a Supreme Court decision which affects interstate commerce even where the decision is based on a constitutional provision other than the commerce clause. See ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 331 (1982) (Burger, C.J., concurring). Cf. Id. at 331, 349-50 (O'Connor, J., dissenting).

52. Nowak & Rotunda, Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept, 20 U. C. DAVIS L. REV. 273, 308 (1987). As the title suggests, the authors further assert that demise of the multiple tax doctrine was a good thing. For an explanation of why their analysis fails to support this assertion see infra note 136.
did refer to fair apportionment, and in theory, no fairly apportioned tax creates an undue risk of multiple taxation. Specifically requiring that a tax be fairly apportioned and that it also avoid the risk of multiple taxation would have been redundant. In short, the fair apportionment prong is simply another label for the multiple tax doctrine. In a post-Complete Auto case, the Court made this abundantly clear when it stated:

It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions.... Otherwise there would be multiple taxation of interstate operations.\(^{53}\)

The failure of some decisions to deal adequately with the risk of multiple taxation,\(^{54}\) can be explained as the product of faulty analysis\(^{55}\) and the Court's long held view that apportionment is an imprecise process which sometimes does not eliminate totally the risk of multiple taxation.\(^{56}\) It does not support the argument of some commentators that "the requirement of apportionment was not established to avoid the possibility of multiple taxation,"\(^{57}\) and the Court has stated that is exactly why it was established.\(^{58}\)

### C. The Relationship Between of the Discrimination and the Multiple Tax Doctrines

As previously discussed,\(^{59}\) due process requirements relating to taxation of interstate commerce can be submerged into the commerce clause requirements, although doing so tends to hinder rather than help analyses. A similar phenomenon exists with respect to the multiple tax and discrimination doctrines. Traditionally applied, the discrimination doctrine demands substantially equal treatment of interstate and intrastate business under the tax laws of a given state. These tax laws are evaluated without regard to how they interact with those that either have been or may be adopted by other states.\(^{60}\)

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54. See Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (upholding a single factor apportionment formula based on sales when most states used a three factor formula based on payroll, property and sales).
55. See Shores, supra note 11, at 158-62.
56. See Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).
57. Nowak & Rotunda, supra note 52, at 298.
58. See supra note 53 and text accompanying; see also Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 185 (1983) ("[C]onsistent application of the fair apportionment standard can generally mitigate, if not eliminate, double taxation ... ").
59. See supra note 40 and text accompanying.
In *Halliburton Oil Well Cementing Co. v. Reily*, 61 for example, a Louisiana use tax was struck down because it applied to second-hand equipment purchased outside the state for use within the state, while the compensatory 62 sales tax did not apply to second-hand equipment purchased within the state. A Louisiana taxpayer could, therefore, reduce his taxes by purchasing second-hand equipment within rather than without the state. Such favoritism for local transactions, the Court observed, departs from the equality required by prior decisions and discriminates in violation of the commerce clause.

The multiple tax doctrine focuses on the law of the taxing state and law that any other state having power to tax either has adopted or may adopt, 63 and asks whether the tax laws combine to impose an undue burden on property used in interstate commerce or an activity conducted in interstate commerce. In other words, it asks whether an undue burden would result if all states having power to tax a given thing or a given activity exercised their power and actually imposed a tax.

Although the multiple tax doctrine has traditionally been viewed as independent of the discrimination doctrine, 64 *Northwestern States Portland

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62. For a discussion of compensating taxes see infra text following note 80.
63. It has been argued, unpersuasively in the author's opinion, that only actual multiple taxation violates the multiple tax doctrine. See P. Hartman, supra note 1. Under this view any state which meets the nexus requirement of the due process clause can tax an item in full without violating the multiple tax doctrine so long as no other state actually taxes the same item. If a second state also has a nexus with the item in question its power to tax would present no multiple tax issue until exercised. If the second state actually exercised its power and imposed a tax, the power of the first state would be diminished proportionately. In short, the power of any state to tax an item would expand and contract depending upon whether other states also having power to tax did or did not exercise their power. In Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980), Mobil argued Vermont could not tax any part of certain dividend income because it was taxable in full by New York. The Commissioner argued that since New York had chosen not to tax the dividend income, no issue of multiple taxation existed. The Court said: "We agree with Mobil that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy." Id. at 444. The Vermont tax was upheld because Vermont and New York could each tax a portion of the dividend income and Vermont taxed no more than a reasonable portion.
The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited
Cement Co. v. Minnesota,\textsuperscript{65} raised a question concerning that perception. The Court upheld a tax on income derived from interstate business conducted within the state because the tax neither discriminated against interstate commerce (intrastate business was subject to an equal tax on its income), nor subjected it to an undue burden (since income was fairly apportioned).\textsuperscript{66} In reaching that conclusion the Court stated, "[A] state [may not] impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'"\textsuperscript{67}

Northwestern Cement suggested, however unclearly, that multiple taxation is a form of discrimination, and provides no independent basis for finding an undue burden. In Moorman Manufacturing Co. v. Bair,\textsuperscript{68} Iowa imposed a tax on income derived from an interstate business conducted partly in Iowa. Income was apportioned according to sales whereas all other states with a similar tax, apportioned income according to payroll, property, and sales. The Court rejected the taxpayer's (an Illinois corporation selling in Iowa) argument that the Iowa tax created a risk of multiple taxation violative of the commerce clause. Justice Powell, dissenting, determined that Iowa's use of its single-factor apportionment formula when considering the use by all other states of the three-factor formula, created a risk of multiple tax burdens on out-of-state corporations selling in Iowa.\textsuperscript{69} He therefore concluded that "the single-factor sales formula necessarily discriminates against out-of-state manufacturers."\textsuperscript{70} Had Justice Powell's view prevailed, it would have shown clearly that the risk of

by Article I, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the ex-action, but it is settled that this will not save the tax if it directly burdens interstate commerce.

\textit{Id.} at 311-12.
\textsuperscript{65} 358 U.S. 450 (1959).
\textsuperscript{66} \textit{Id.} at 461.
\textsuperscript{67} \textit{Id.} at 458.
\textsuperscript{68} 437 U.S. 267 (1978).
\textsuperscript{69} See id. at 289 n.4. The multiple burden is easily demonstrated through an illustration drawn from an example used by Justice Powell. \textit{Id.} at 284 n.2. Assume an Iowa corporation with all payroll and property in Iowa, and an Illinois corporation with all payroll and property in Illinois, which uses the three factor formula. Each corporation makes one half of its sales in Iowa and one half in Illinois. Income of the Iowa corporation would be apportioned 50% to Iowa since 50% of its sales were in Iowa, and 16.67% to Illinois (50% + 0% + 0% = 50% + 3 = 16.67%). Income of the Illinois corporation would be apportioned 50% to Iowa and 83.33% to Illinois (50% + 100% + 100% = 250% ÷ 3 = 83.33%). Thus the Illinois corporation would pay tax on 133% of its income while the Iowa corporation would pay on only 67% of its income.
\textsuperscript{70} \textit{Id.} at 292.
multiple taxation is a form of discrimination.\textsuperscript{71} From a purely theoretical standpoint it, makes no difference whether the risk of multiple taxation is dealt with under the discrimination doctrine, or under a separate multiple tax doctrine. Either way, a tax that subjects interstate commerce to the risk of multiple taxation is invalid. For clear analysis, however, it seems helpful to keep discrimination questions arising under the laws of a single state separate from multiple taxation questions caused by the interaction of the laws of all states in which an interstate business is conducted. Although the point is a minor one, the Court should take whatever precautions it can to avoid the confusion that has characterized many of its state tax decisions.\textsuperscript{72} As discussed below, fusion of the multiple tax and discrimination doctrines materialized in \textit{Armco, Inc. v. Hardesty},\textsuperscript{73} and may have contributed to the failed analysis in \textit{Tyler Pipe}.\textsuperscript{74}

\textsuperscript{71} It has been suggested that collapsing the multiple tax doctrine into the discrimination doctrine is nothing new, having been suggested in a number of earlier dissenting opinions, and that doing so “leaves the present posture of Supreme Court decisions . . . essentially unchanged.” \textsc{J. Hellerstein}, \textsc{State Taxation—Corporate Income and Franchise Taxes}, at S-xxix (1987 supp.). Professor Hellerstein points out that Justice Black viewed the commerce clause as prohibiting only taxes which discriminate against interstate commerce, \textit{id.} at S-xxix n.26, and that “the multiple tax doctrine is part of the rubric of the prohibition by the Commerce Clause of discriminatory taxation.” \textit{Id.} However, Justice Black’s view of multiple taxation was in no sense similar to that of Justice Powell. Black opposed the multiple tax doctrine on substantive grounds. In \textit{J.D. Adams Mfg. Co. v. Storen}, 304 U.S. 307, (1938), he dissented from the Court’s holding that an Indiana tax violated the commerce clause because of the risk of multiple taxation, stating: “only Congress has the power to formulate rules, regulations and laws to protect interstate commerce from \textit{merely possible future unfair burdens}.” \textit{Id.} at 328 (emphasis in original). Unlike Justice Powell who found unconstitutional discrimination resulting from the “prospect of multiple burdens,” \textit{Moorman Mfg. Co.}, 437 U.S. at 289 n.4, Justice Black believed such a prospect to be entirely benign—or at least as presenting no problem with which the Court could properly deal. In short, Justice Black repudiated the multiple tax doctrine in no uncertain terms. Justice Powell would have enforced it as a branch of the discrimination doctrine, and in so doing would have broken new ground.

As discussed \textit{infra} in text accompanying notes 96-99, Justice Powell was eventually able to implement his view that the risk of multiple taxation is a form of discrimination. Whether collapsing the multiple tax doctrine into the discrimination doctrine will have an impact on substantive law is unknown and unknowable. In theory Professor Hellerstein is clearly correct. There is no necessary impact. It seems probable, however, that the lack of clear analysis engendered by fusing the two doctrines will adversely affect the outcome of many cases. It is hard to imagine how the Court could have decided \textit{Tyler Pipe} as it did if it had allowed the multiple tax doctrine to operate independently. \textit{See infra} text following note 109 for discussion of \textit{Tyler Pipe}.

\textsuperscript{72} \textit{See supra} note 1.

\textsuperscript{73} 467 U.S. 638 (1984). For a discussion of \textit{Armco} \textit{see infra} text following note 78.

\textsuperscript{74} \textit{See infra} text following notes 107 and 119.
D. The Multiple Tax Doctrine and Internal Consistency

Container Corp. of America v. Franchise Tax Board\(^75\) held that the taxpayer, a corporation doing business in California, and certain foreign subsidiaries were engaged in a unitary business, and that California was entitled to tax a fair portion of income derived from the unitary business. The Court stated:

Having determined that a certain set of activities constitute a "unitary business," a State must then apply a formula apportioning the income of that business within and without the State. Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair. The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed.\(^76\)

This was the first case in which the Court described the fair apportionment prong of the Complete Auto test as requiring internal consistency. Since California apportioned income according to a three-factor formula based on payroll, property, and sales, this dicta concerning internal consistency was innocuous. The requirement that no more than all the income be taxed if all states used the same formula was automatically met; if all states used a formula identical to California's, exactly 100% of total income (or any other base) would be taxed. An apportionment formula based on sales or any other single factor automatically meets the internal consistency test as well.\(^77\) The internal consistency qualification took on greater prom-

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76. Id. at 172-73.
77. It is when different states use different formulas that problems of actual potential multiple taxation arise. See supra notes 68-69, and accompanying text. These problems are assumed away under the internal consistency test since all states are assumed to use the same apportionment formula, and Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), held that they are to be resolved by Congress, not by the courts.

Recently, some states have altered their allocation formulas to give extra weight to the sales factor. For example, North Carolina moved from a three factor formula based on property, payroll and sales with each factor given equal weight, to a three factor formula with sales given twice as much weight as the other two factors. Such a weighted formula is more favorable to local industry than an unweighted formula because it reduces the share of its total income allocated to the home state. For example, assume a North Carolina corporation has all of its property and payroll in North Carolina and its sales evenly divided between North Carolina and Virginia. Assuming both states used an unweighted three factor formula 83.33% (100% + 100% + 50% = 250% ÷ 3 = 83.33%) of the corporation's income would be apportioned to North Carolina, and 16.67% (0% = 0% + 50% = 50% ÷ 3 = 16.67%) would be apportioned to Virginia. If both states used the new weighted formula adopted by North Carolina (100% + 100% + 50% + 50% = 300% ÷ 4 = 75%) would be allocated to North Carolina, and 25%
inence, however, in *Armco Inc. v. Hardesty*, 78 where the Court applied it for a purpose other than determining the fairness of formulary apportionment.

III. **ARMCO**

*Armco* involved West Virginia's tax on gross receipts. The tax, applied at the rate of .88% to gross receipts, derived from the sale of goods manufactured within West Virginia, whether sold within or without the State. This facet of the tax was labeled a manufacturing tax. Gross receipts, derived from the sale within West Virginia of goods manufactured elsewhere, were taxed at a .27% rate. This facet of the tax was labeled a wholesaling tax. The Court held the wholesaling tax was unconstitutional for two reasons, one sound and one unsound.

First, the Court noted that the wholesaling tax was facially discriminatory since it applied only to goods manufactured outside the state. Facial discrimination does not automatically render a tax invalid. 79 The discrimi-

(0% + 0% + 50% + 50% = 100% ÷ 4 = 25%) to Virginia. Taxes payable to the home state are reduced by adopting the weighted formula. Taxes payable to other states which have made a similar change will be increased. Of course, each state making the change will hope that other states will be slow to follow suit. So long as they are, the decrease in local taxes will not be offset by an increase in taxes paid to other states and the change provides an incentive for industry to locate within the state. Justice Powell's dissent in *Moorman* probably would have barred this kind of competition among the states. See *supra* note 69 and accompanying text. The first state to move to a weighted formula would have created a risk of multiple taxation violative of the commerce clause. For example, if only North Carolina used the weighted three factor formula while all other states used an unweighted three factor formula, a Virginia corporation with all its property and payroll in Virginia and its sales evenly divided between Virginia and North Carolina would have 83.33% (100% + 100% + 50% = 250% ÷ 3 = 83.33%) of its income apportioned to Virginia and 25% (0% + 0% + 50% + 50% = 100% ÷ 4 = 25%) to North Carolina. Thus, it would be taxed on 108% of its income.


79. A tax may be discriminatory on its face yet nondiscriminatory in operation. For example, a state may impose a use tax upon goods purchased outside the state for use within the state. Although such a tax applies only to goods purchased outside the state, it will be upheld if it merely compensates for a sales tax applicable to goods purchased and used within the state since "the purpose of such a sales-use tax scheme is to make all tangible property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State making it subject to the sales tax, or from without the State, making it subject to a use tax at the same rate." Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 66 (1963). In *Halliburton Oil* the use tax in question imposed a heavier burden on certain transactions than did the sales tax. Although the inequality "may have been an accident of statutory drafting," the Court held the use tax unconstitutional. *Id.* at 72. It thus made clear that the effect as well as the purpose of the facially discriminatory tax must be equality of treatment under the laws of the taxing state.
ination here, however, was not cured by the manufacturing tax because "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State."80

Although manufacturing and wholesaling are different events, this observation sheds no light on the practical economic effect of the taxes. In both instances, the tax was measured by gross receipts, and the state's apparent purpose was to tax all gross receipts having a substantial connection with the state, through either manufacturing or selling activities conducted within the state. Neither the state nor the taxpayer had much interest in the label attached to the tax or its formal subject matter. Gross receipts measured the tax, and the taxing provision should have been viewed as imposing a single tax (rather than two separate taxes) on all gross receipts connected with the state.81 Alternatively, the two taxes could have been viewed as compensatory taxes. Either way the discrimination against interstate commerce was nonexistent because gross receipts realized by in-state manufacturers were taxed more heavily than those of out-of-state manufacturers, and the commerce clause is not concerned with discrimination against local interests,82 since such discrimination cannot burden interstate commerce.83

80. Armco, 467 U.S. at 643.
81. Prior to Complete Auto a tax on gross receipts derived from the interstate sale of goods manufactured within the state would have been viewed as a direct tax on interstate commerce and invalid under the tax immunity doctrine. See Freeman v. Hewitt, 329 U.S. 249 (1946). A tax "on manufacturing" measured by total gross receipts derived from interstate sales was viewed as an indirect tax on interstate commerce and therefore permissible under the immunity doctrine. American Mfg. Co. v. City of St. Louis, 250 U.S. 459 (1919). For similar reasons a tax "on wholesaling" measured by total gross receipts derived from interstate sales to customers within the taxing state was allowed. See General Motors Corp. v. Washington, 377 U.S. 436 (1964). This analysis under the tax immunity rule led to the entirely artificial notion that neither a manufacturing tax measured by unapportioned gross receipts nor a wholesaling tax measured by unapportioned gross receipts presented a multiple tax issue. The former was a tax on manufacturing and no other state could tax the manufacturing. The latter was a tax on wholesaling and no other state could tax the wholesaling. If formal distinctions are to be abandoned after Complete Auto, the "manufacturing" and "wholesaling" tax labels ought to be abandoned and the taxes recognized for what they are—taxes on gross receipts.

As an alternative to characterizing the taxes according to their measure, the manufacturing and wholesaling taxes could have been viewed as compensating taxes. Compensating taxes, such as sales and use taxes, are analyzed as a unity or as a single tax. The Court considered and rejected characterizing the taxes in Armco as compensating taxes, since they were not on "substantially equivalent event[s]." Armco, 467 U.S. at 643 (quoting Maryland v. Louisiana, 451 U.S. 725, 759 (1981)).
The Court relied on only *Maryland v. Louisiana* for the proposition that the manufacturing tax and wholesaling tax should be evaluated separately. This case is distinguishable since it involved real rather than imagined discrimination. Louisiana, like many states, has severance taxes which apply to the extraction of natural resources. In the case of natural gas, Louisiana's severance tax applied at the rate of seven cents per thousand cubic feet. The tax did not apply to gas extracted from the Outer Continental Shelf (OCS) through offshore drilling, although most of the OCS gas was piped to refining plants in Louisiana before being sold to consumers in interstate commerce. It was estimated that 90% of the OCS gas processed in Louisiana was sold to out-of-state consumers.

Louisiana adopted a "first-use" tax applicable to any gas entering Louisiana that had not been previously taxed by a state or the United States. The first use tax applied at a rate exactly equal to the Louisiana severance tax of seven cents per thousand cubic feet. Since most states, like Louisiana, impose a severance tax, the first use tax essentially applied to only OCS gas. If Louisiana's tax statute had stopped at that point, nothing in the Court's opinion intimates a constitutional problem would have existed. Louisiana's first use and severance taxes would have taxed all gas connected with the State in an evenhanded fashion, just as West Virginia's manufacturing and wholesaling taxes treated all gross receipts connected with the State in an evenhanded fashion.

Louisiana went further. It effectively exempted, from the first use tax, any OCS gas sold within the state. The result was an obvious preference for in-state users of OCS gas since neither the severance tax nor the first use tax applied. This preference, the Court concluded, could not be justified on grounds that the first use and severance taxes were compensatory taxes.

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83. *Id.*
84. *Id.* at 725 (1981).
85. *Id.* at 731.
86. *Id.* at 729.
87. See supra note 81 and accompanying text. As the discussion indicates, the West Virginia tax held unconstitutional was not only evenhanded, it treated out-of-state sellers more generously than in-state sellers. In effect, the Court's holding turned the discrimination doctrine on its head by condemning a tax which discriminated in favor of interstate commerce. Cf. Allied Stores of Ohio, Inc., v. Bowers, 358 U.S. 522 (1958) (Brennan, J., concurring) (state discrimination in favor of interstate commerce is constitutional).
88. After reviewing a system of exemptions and credits relating to the first use tax, the Court concluded: "OCS gas may generally be consumed in Louisiana without the burden of the First-Use Tax. Its principal application is to gas moving out of the State." *Maryland v. Louisiana*, 451 U.S. at 759. Since OCS gas was not extracted within the state, it was also free of the severance tax.
because "the common thread running through the cases upholding com-
pensatory taxes is the equality of treatment between local and interstate commerce." Since equality of treatment was plainly lacking in the Louisiana scheme, the first use tax was held discriminatory. The Court stated:

The two events (use and severance) are not comparable in the same fashion as a use tax complements a sales tax. In that case, a state is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the state. No such equality exists in this instance.

Contrary to the suggestion of Armco, Maryand v. Louisiana did not blithely assume the first use and severance taxes to be noncompensatory because use and severance are not substantially equivalent events in a physical sense. Instead, they were held noncompensatory because the severance tax in no way compensated for the inequality of treatment inherent in the first use tax which applied only to OCS gas sold out-of-state. Inequality of treatment was the critical determinant. In Armco, unlike Maryand v. Louisiana, the only inequality which existed favored the out-of-state seller. Either the manufacturing tax and the wholesaling tax should have been characterized as a single tax on gross receipts with a higher rate applicable to in-state than out-of-state sellers, or the two taxes should have been regarded as compensatory since the manufacturing tax cured (compensated for) the facial discrimination of the wholesaling tax.

Viewed alone, that is, without regard to the taxing power of other states, the Armco West Virginia tax on gross receipts treated interstate commerce more generously than intrastate commerce and was nondiscriminatory in the commerce clause sense. The best evidence of this is seen in that, as in the Railway Express cases, the taxing provision could be reformulated and the discrimination cured through a mere change in words. If the wholesaling tax applied, at the rate of .27%, to gross receipts derived from the sale of goods manufactured or sold within the state there would be no discrimination since the wholesaling tax would apply equally to in-state and out-of-state sellers. If the manufacturing tax applied at the rate

89. Id.
90. Id.
91. In commenting on the "substantially equivalent events" test as applied in Armco, Professor Hartman has said the phrase "appears to be something of an accordion term that can be expanded or contracted as the Court thinks the situation warrants." P. Hartman, Federal Limitations on State and Local Taxation 40-41 (Supp. 1987).
92. See supra text accompanying note 23, for a discussion of the Railway Express cases.
93. The state of the manufacturer may impose a manufacturing tax measured by gross receipts regardless of where the goods are sold. See Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). The market state may impose a wholesaling tax measured by gross receipts realized by an out-of-state seller if the seller is
of .61% to gross receipts derived from the sale (within or without the state) of goods manufactured within the state, the tax burden would be identical to that held unconstitutional in Armco, but no discrimination against interstate commerce would exist.\(^{94}\) The problem with this branch of the Armco decision was that the Court elevated form over substance just as it did in the Railway Express cases. The "manufacturing tax" versus "wholesaling tax" label was deemed critical.\(^{95}\)

Nonetheless, Armco was correctly decided because the second rationale that provided for its holding was sound, although rather clumsily applied. Perhaps sensing that its analysis of the relationship between the manufacturing and wholesaling taxes was less than satisfying, the Court went on to observe that when the two taxes are considered together, discrimination against interstate commerce persists. If Ohio or any of the other 48 states imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.\(^{6}\)

We have already seen that in his Moorman dissent Justice Powell merged the multiple tax doctrine into the discrimination doctrine.\(^{97}\) In Armco he did exactly the same thing, this time writing for the majority. The constitutional impediment to the West Virginia tax was genuine. An out-of-state manufacturer selling in West Virginia was potentially subject to two taxes on gross receipts, whereas an intrastate seller was not. Until Armco, however, the multiple tax problem resulting from the interplay of taxes which might be adopted by two or more states was viewed as an apportionment problem, not a discrimination problem. In characterizing the risk of multiple taxation as discrimination, Justice Powell invoked the internal consistency notion of Container Corp. rather than rely on his present within the market state through at least one employee, including an employee not engaged in selling activities. Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560 (1975). For a critique of this case see Shores, supra note 11, at 148-50.

\(^{94}\) In-state manufacturers would pay taxes equal to .88% (.27% + .61%) of total gross receipts. Out-of-state manufacturers would pay a tax equal to .27% of gross receipts derived from West Virginia. The tax burden would be identical to that involved in Armco. The proposed tax would be politically unpopular because in-state manufacturers would be subject to two taxes measured by gross receipts, the manufacturing tax and the wholesaling tax. Practical people would view this as double taxation. Under the Court’s analysis it would not be double taxation because the manufacturing tax and wholesaling tax were held as two distinct taxes.

\(^{95}\) As Justice Rehnquist, dissenting, pointed out, "The Court's analysis . . . employs a formalism I thought we had generally abandoned in Complete Auto Transit, Inc. v. Brady . . . ." Armco, 467 U.S. at 648.

\(^{96}\) Id. at 644.

\(^{97}\) See supra text accompanying notes 68-69.
dissent in *Moorman*. Recognizing that the Court in *Container Corp.* said that an apportionment formula (not a tax) must be internally consistent to meet the fair apportionment requirement (not the discrimination requirement), Justice Powell concluded that, "[a] similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce."

Thus, in a few short lines, drawing what support he could from dicta in *Container Corp.* concerning fair apportionment, Justice Powell created a new rule of internal consistency for determining when a tax is discriminatory. Under this rule, apparently intended to apply only to facially discriminatory taxes, a tax discriminates in violation of the commerce clause if it lacks internal consistency as that term was used in *Container Corp.*. Essentially, then, the tax is discriminatory if its application by other states would result in multiple taxation. This is the first case in which the Court looked to the laws (or possible future laws) of two or more states and held a tax discriminatory because it created a risk of multiple taxation. Under this branch of the *Armco* decision, equal treatment of interstate and intrastate business subject to the laws of the taxing state was not sufficient to avoid discrimination. The Court assumed such equality of treatment when it considered the West Virginia manufacturing tax and wholesaling tax together. Nonetheless, it concluded that the taxes were discriminatory because of potential multiple taxation.

The *Armco* reasoning was sound and consistent with prior law insofar as it recognized potential multiple taxation as an undue burden on interstate commerce, thus violative of the commerce clause. The hazard of collapsing

98. See supra text accompanying note 75 for discussion of *Container Corp.*
100. Chief Justice Rehnquist and Justices O’Conner and Scalia have taken the position that under *Armco* the internal consistency test applies only to statutes which discriminate on their face. See *Tyler Pipe*, 483 U.S. at 253 (O’Conner, J., concurring). Justice Scalia, with whom the Chief Justice joined, concurring in part, dissenting in part, stated:

The holding of *Armco* thus establishes only that a facially discriminatory taxing scheme that is not internally consistent will not be saved by the claim that in fact no adverse impact on interstate commerce has occurred. To expand that brief discussion into a holding that internal consistency is always required, and thereby to revolutionize the law of state taxation, is indeed remarkable.

*Id.* at 257.

This reading of *Armco* is supported by the language from the *Armco* opinion quoted above. See supra text accompanying note 99. However, the majority opinion in *Tyler Pipe* did not explicitly state that the internal consistency test applies only to facially discriminatory taxes, and its scope is unclear. See infra text accompanying notes 149-54.

101. See supra text accompanying note 96, and note 100.
the multiple tax doctrine into the discrimination doctrine, however, was revealed by Justice Powell's dicta concerning hypothetical taxes imposed by West Virginia and Ohio. If Ohio imposed a facially neutral tax only upon manufacturing and West Virginia only upon wholesaling with both taxes measured by gross receipts, Justice Powell hypothesized, exactly the same multiple tax problem that proved fatal to the actual West Virginia tax would arise. Since both Ohio's manufacturing tax and West Virginia's wholesaling tax would be measured by unapportioned gross receipts, local business selling in West Virginia would be taxed once on gross receipts, while an Ohio business selling in West Virginia would be taxed twice. Yet, in this context, multiple taxation is benign, said Justice Powell, because "such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business."102

The Court never explained why the risk of multiple taxation provides sufficient reason to condemn a facially discriminatory statute but not a facially neutral statute, nor was the risk explained by the "impermissible discrimination" versus "fair encouragement" dichotomy.103 Perhaps facial discrimination served to put the statute in a disfavored category and caused a generally tolerable burden to become intolerable. But, this explanation makes no sense for two reasons. First, the facial discrimination could have been cured by a mere change in the words of the taxing statute.104 It was, therefore, unpersuasive to attach constitutional significance to facial discrimination. Second, the practical economic effects should have governed and they were the same under the facially neutral statute as under the facially discriminatory statute. The burden was in the form of multiple taxation of interstate business, and it was unaffected by the terms of the taxing statute.

The proper application of the multiple tax doctrine in the context hypothetically addressed by Justice Powell was clearly set forth in Adams Manufacturing Co. v. Storen,105 which held Indiana could not tax all gross receipts derived from the sale in other states of goods manufactured in Indiana. The Court in Adams, recently cited with approval in Japan Line, Ltd. v. County of Los Angeles,106 said:

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to fullest extent by

102. Armco, 467 U.S. at 645.
103. As Professor Hartman has said, "The line between a stick and an alluring, succulent carrot as a means of getting business to locate in the taxing State may not always be completely clear. The same statute may contain elements of both." P. Hartman, supra note 91, at 47.
104. See supra text accompanying note 92.
105. 304 U.S. 307 (1938).
106. 441 U.S. 434, 446 (1979).
States in which the goods are sold as well as those in which they are manufactured.\textsuperscript{107}

The hypothetical taxes approved by Justice Powell should be invalid for the same reason. If an Ohio manufacturer, selling in West Virginia, must pay a manufacturing tax to Ohio and a wholesaling tax to West Virginia, and both taxes are measured by the same gross receipts, the practical effect is multiple taxation of gross receipts no matter what labels are attached to the taxes. Justice Powell's failure to treat multiple taxation consistently, regardless of whether it results from a facially discriminatory or facially neutral statute, probably stemmed from his unwillingness to view multiple taxation and discrimination as separate problems. Combining them confuses the analysis and contributes to the false notion that the risk of multiple taxation created by a facially discriminatory statute imposes a greater burden on interstate commerce than the burden created by a facially neutral statute.

The \textit{Armco} Court reached the right result in striking down the West Virginia tax out of concern for multiple taxation, although its reliance on the discrimination doctrine was misplaced. Fortunately, the Court's discussion of the multiple tax problem created by a neutral statute taxing all gross receipts derived from interstate sales was dicta. One could hope that before the situation discussed hypothetically in \textit{Armco} reached the Court, it would reconsider the wisdom of hinging the constitutionality of multiple taxation on the existence of facial discrimination which in no way affected the burden on interstate commerce created by multiple taxation. Especially when, on the facts of \textit{Armco}, the unconstitutionality could be cured by merely revising the language of the statute. As the Court said in \textit{Complete Auto}: "The reason for attaching constitutional significance to a semantic difference is difficult to discern."\textsuperscript{108}

\section*{IV. \textit{Tyler Pipe}}

\textit{Tyler Pipe Industries, Inc. v. Washington State Department of Revenue},\textsuperscript{109} illustrates that this hope was misplaced. \textit{Tyler Pipe} had much in common with \textit{Armco}. It involved a tax imposed by the state of Washington equal to \textit{.44\%} of gross receipts derived from either manufacturing or wholesaling within the state.\textsuperscript{110} If a business engaged in both activities the statute provided an exemption from the manufacturing tax.\textsuperscript{111} The multiple activities exemption meant that gross receipts connected with business activities transacted within the state were taxed once, whether those activities

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{107} \textit{Adams Mfg. Co.}, 304 U.S. at 311.
\item \textsuperscript{108} \textit{Complete Auto}, 480 U.S. at 285.
\item \textsuperscript{109} 483 U.S. 232 (1987).
\item \textsuperscript{110} \textit{Id.} at 237.
\item \textsuperscript{111} \textit{Id.} at 236-37.
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consisted of manufacturing, selling or both. The exemption, then, meant the manufacturing tax only applied to in-state manufacturers who sold outside the state. Just as the West Virginia wholesaling tax in *Armco* was held invalid because it applied to only out-of-state manufacturers selling in West Virginia, the Washington manufacturing tax was held invalid because it applied to only in-state manufacturers who sold outside the state but not to in-state manufacturers who sold within the state. Unlike *Armco*, *Tyler Pipe* also involved a challenge to the nondiscriminatory wholesaling tax on the ground that gross receipts derived from interstate transactions were subject to tax without fair apportionment. The discrimination and apportionment facets of the case are separately considered below.

A. The Discrimination Issue

Since the manufacturing tax in *Tyler Pipe* was facially discriminatory, the Court considered whether the wholesaling and manufacturing taxes should be considered as separate taxes or as compensating taxes. If examined as compensating taxes the practical effect was nondiscriminatory, since all firms doing business within the state paid a tax equal to .44% of gross receipts connected with the state. The only difference in the tax scheme was that both in-state manufacturers and out-of-state manufacturers selling within the state paid a wholesaling tax, while in-state manufacturers selling outside the state paid a manufacturing tax. Following *Armco*, the Court held that the manufacturing tax and the wholesaling tax were non-compensating taxes, therefore, each was irrelevant to an evaluation of the other. Since the manufacturing tax applied only to in-state manufacturers

112. *Id.* at 234 ("We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax challenged here.")
113. *Id.* at 251. A third issue, not discussed in this article, was whether the business activities of *Tyler Pipe* had a sufficient nexus with the state of Washington to justify the gross receipts tax. *Id.* Under *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), the nexus requirement was quite clearly satisfied by *Tyler Pipe*’s business activities within the state, and the Court so held. *Tyler Pipe*, 483 U.S. at 251.
114. *Tyler Pipe*, 483 U.S. at 240 ("This statutory exemption for manufacturers that sell their products within the State has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*.”). The state of Washington tried to distinguish *Armco* on the ground that its manufacturing tax which applied only to goods manufactured within the state and sold outside the state was in some way different from West Virginia’s wholesaling tax which applied only to goods manufactured outside the state and sold within the state. Relying on Justice Goldberg’s dissenting opinion in *General Motors Corp. v. Washington*, 377 U.S. 436, 459 (1964), the Court rejected this argument and, to the extent its holding was inconsistent with the ruling in *General Motors*, that case was overruled. *Tyler Pipe*, 483 U.S. at 241, 248.
116. *Id.* at 244.

http://scholarship.law.missouri.edu/mlr/vol54/iss3/3
selling in interstate commerce, the discrimination was substantive as well as facial and thus fatal under the commerce clause.\textsuperscript{117}

As in \textit{Armco}, the \textit{Tyler Pipe} Court relied on \textit{Maryland v. Louisiana} in holding that manufacturing and wholesaling were not "substantially equivalent events,"\textsuperscript{118} therefore, neither tax could be taken into account in evaluating the constitutionality of the other. For the reasons discussed above in connection with \textit{Armco},\textsuperscript{119} the Court's reliance on \textit{Maryland v. Louisiana} was misplaced. In that case, intrastate transactions were accorded preferential treatment under Louisiana law since they alone were exempt from both Louisiana's severance tax and its first use tax. The taxes were therefore properly viewed as noncompensating. Because Washington law accorded equal treatment to all taxpayers conducting business within the state, the Court should have viewed its manufacturing and wholesaling taxes as compensating taxes.\textsuperscript{120}

Despite its reliance on \textit{Maryland v. Louisiana}, the Court's analysis in \textit{Tyler Pipe} was significantly different from that in \textit{Armco}. \textit{Armco} found a commerce clause violation for two independent reasons: 1) the West Virginia wholesaling tax was discriminatory in that it applied only to out-of-state sellers, and the unequal treatment under the wholesaling tax was not compensated for by the manufacturing tax because the wholesaling tax and the manufacturing tax were not taxes on substantially equivalent events; and 2) even if unequal treatment under West Virginia law was cured by viewing the wholesaling tax and manufacturing tax as compensating taxes, discrimination persisted because of the risk that interstate transactions alone might be subject to multiple taxation.\textsuperscript{121} Initially, the \textit{Tyler Pipe} opinion appeared to take the same approach;\textsuperscript{122} however, in the end it abandoned the first reason.

\textsuperscript{117} \textit{Id.}, at 240. The taxes were held noncompensatory because they created a risk of multiple taxation which applied to interstate transactions, but not to intrastate transactions. Once the manufacturing tax was severed from the wholesaling tax, the discriminatory effect was obvious. Absent a compensating tax applicable to goods manufactured and sold within the state, no plausible argument could be made in support of a manufacturing tax applicable only to goods sold outside the state. \textit{See infra} text accompanying note 124.

\textsuperscript{118} \textit{Tyler Pipe}, 483 U.S. at 244.

\textsuperscript{119} \textit{See supra} text accompanying notes 84-91.

\textsuperscript{120} As explained above, under a more straightforward analysis leading to the same result, the Washington statute could have been viewed as imposing a single tax on all gross receipts connected with the state. The discrimination would then disappear since all firms doing business within the state would be subject to a single uniform tax on gross receipts connected with the state. \textit{See supra} note 81.

\textsuperscript{121} \textit{See supra} text accompanying notes 84-99.

\textsuperscript{122} \textit{Tyler Pipe}, 483 U.S. at 243.
The only reason the taxes were noncompensating and therefore discriminatory, according to the *Tyler Pipe* Court, was that an out-of-state manufacturer selling in Washington might be required to pay a manufacturing tax to another state, and a wholesaling tax to Washington; while an in-state manufacturer selling in Washington would pay only the wholesaling tax. Expansion of the multiple activities exemption to include out-of-state manufacturers who paid manufacturing taxes to another state eliminates the risk of multiple taxation, and, in the words of the Court, would "cure the discrimination." Assume, for example, that Production Corporation manufactured goods in California and sold them in Washington. If California imposed a manufacturing tax measured by total gross receipts, the gross receipts would have been taxed twice, once by California and once by Washington. However, if Production Corporation moved its manufacturing activities into Washington the multiple activities exemption would have resulted in a single tax on gross receipts, and it was this preference for local transactions which the Court held improper. Preferential treatment for intrastate commerce would be eliminated if the multiple activities exemption was expanded to apply whenever both manufacturing and wholesaling were taxed by any state. Washington's wholesaling tax would then apply only in the absence of a manufacturing tax levied by any state. If California adopted such a manufacturing tax, Production Corporation would pay a single tax on sales in Washington, regardless of whether manufacturing occurred in California or Washington. Since Washington's manufacturing and wholesaling taxes would then create no risk of multiple taxation, they would be viewed as compensating taxes. The wholesaling tax, applicable to in-state manufacturers selling within the state, would then compensate for the facial discrimination of the Washington manufacturing tax applicable only to in-state manufacturers selling outside the state. The *Armco* notion that a manufacturing tax and a wholesaling tax could not be compensating taxes, even in the absence of a risk of

123. The Court stated:

We . . . reject the . . . contention that the State's imposition of a manufacturing tax on local goods sold outside the state should be saved as a valid "compensating tax". . . . [T]he only burden for which the manufacturing tax exemption is arguably compensatory is the State's imposition of a wholesale tax on local sales of local manufacturers; absent the exemption, a local manufacturer might be at an economic disadvantage because it would pay both a manufacturing and a wholesale tax, while a manufacturer from afar would pay only the wholesale tax. The State's justification for thus taxing the manufacture of goods in interstate commerce, however, fails under our precedents. The local sales of out-of-state manufacturers are also subject to Washington's wholesale tax, but the multiple activities exemption does not extend its ostensible compensatory benefit to those manufacturers.

*Id.* at 242-43.

124. *Id.* at 249.
multiple taxation, because wholesaling and manufacturing were not substantially equivalent events in a physical sense, was implicitly abandoned.\(^{125}\)

This revision of the Armco analysis was engendered by the Court’s consideration of its earlier decision in Henneford v. Silas Mason Co.,\(^{126}\) involving the constitutionality of a compensating use tax adopted by the state of Washington. All states that impose a tax on retail sales face the problem of residents avoiding the tax by purchasing goods in another state which has no sales tax, or a lower sales tax. The compensating use tax provides a solution to the problem. It applies (at the same rate as the sales tax) to goods purchased outside the state and used within the state.\(^{127}\) Like Washington’s manufacturing tax involved in Tyler Pipe, the use tax challenged in Henneford was facially discriminatory because it actually applied to only transactions which crossed a state line.\(^{128}\) Its practical effect however, was not discrimination but evenhandedness. It put individuals who purchased goods outside the state for use within the state on the same tax footing as persons who purchased and used within the state. The only difference was that the former paid a use tax and the latter paid a sales tax. As Justice Cardozo explained in upholding the use tax in Henneford:

125. Some language in the Court’s opinion seems to follow the Armco notion that a manufacturing tax and a wholesaling tax can never be compensating taxes because manufacturing and wholesaling are not substantially equivalent events in a physical sense. See Tyler Pipe, 483 U.S. at 244. The Court’s statement that eliminating the risk of multiple taxation would cure the discrimination makes clear, however, that the mere fact manufacturing and wholesaling are different events in a physical sense did not provide an independent basis for holding the taxes non-compensating. Id. at 249. The Court apparently reasoned as follows: Since the manufacturing-wholesaling taxes created a risk of multiple taxation for interstate transactions but not for intrastate transactions, the two taxes were not on substantially equivalent events. Since they were not on substantially equivalent events they were not compensating taxes, and the facial discrimination of the manufacturing tax on interstate transactions was not compensated for by the wholesaling tax on intrastate transactions. Therefore, the manufacturing tax was discriminatory in operation as well as form and was unconstitutional.

The important point is that the substantially equivalent events test as applied in Tyler Pipe was meaningless. Satisfaction of the test was entirely dependent upon whether the taxes created a risk of multiple taxation, which was the real concern. See id. at 249 (“Either repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other states would presumably cure the discrimination.”).\(^{126}\) 300 U.S. 577 (1937).

127. The Washington use tax involved in Henneford (like use taxes adopted by most states), theoretically applied to all goods used within the state. However, any sales tax paid was allowed as a credit against the use tax. Since all goods purchased in Washington were subject to the sales tax, the use tax could apply only with respect to goods purchased outside the state and used within the state.\(^{128}\) Henneford v. Silas Mason Co., 300 U.S. 577 (1937).
When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. . . . If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another.129

Since the Court found that intrastate and interstate transactions were treated equally under the sales-use tax scheme when viewed as a whole, the use tax was characterized as a compensating tax and there was no discrimination for commerce clause purposes.

The question in Tyler Pipe, as in the sales-use tax context, was whether interstate transactions were subjected to a burden not imposed on intrastate transactions. In the sales-use tax context, no such burden was found because the consumer paid exactly the same Washington tax whether goods were both purchased and used within the state, or were purchased elsewhere and used within the state. By a parity of reasoning, Washington’s manufacturing-wholesaling tax imposed no special burden on interstate commerce. The tax was the same whether goods were manufactured and sold within the state, manufactured within the state and sold elsewhere, or manufactured elsewhere and sold within the state.

To paraphrase Justice Cardozo, when the account was made up, the Washington manufacturer who sold to a stranger from afar was subject to no greater burdens as a consequence of manufacture and sale than one who sold to a dweller within the gates. The one paid upon one activity or incident, and the other upon another, but the sum was the same when the reckoning was closed. If the wholesaling tax were abolished, the Washington manufacturer selling within the state pays at once upon the manufacture, since he no longer qualifies for a multiple activities exemption.130 As long as the wholesaling tax is in force, he pays upon the wholesaling, and pays at the same rate. Nonetheless, the Court distinguished Henneford, observing:

We upheld the [use] tax because, in the context of the overall tax structure, the burden it placed on goods purchased out of state was identical to that placed on an equivalent purchase within the State. This identical impact was no fortuity; it was guaranteed by the statutory exemption from the

129. *Id.* at 584.

use tax for the goods on which a sales tax had already been paid, regardless of whether the sales tax had been paid to Washington or to another State.

The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington. The multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State. Washington’s tax scheme is therefore inconsistent with our precedents.

Thus, the critical distinction between Tyler Pipe and Henneford was that Washington’s manufacturing tax, involved in Tyler Pipe, was reduced only for a wholesaling tax paid to Washington, whereas its use tax, involved in Henneford, was reduced for a sales tax paid to Washington or any other state. Contrary to the Court’s assertion, until Tyler Pipe, a reduction in the use tax for a sales tax paid to another state was not viewed as constitutionally mandated. The reason was twofold. First, a sales tax paid to another state presented no discrimination problem because until Armco the Court had looked only to the laws of the taxing state in

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131. The Court erred in its interpretation of Henneford. In Henneford, Justice Cardozo said:
Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now.
Henneford, 300 U.S. at 587. Contrary to the assertion of the Court in Tyler Pipe, the identical impact of Washington’s sales-use tax upon interstate and intrastate transactions was indeed a fortuity, and was in no sense mandated by Henneford.

132. Tyler Pipe, 483 U.S. at 245 (citation omitted).

133. See Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 77 (1963) ("'[A] state may not be constitutionally obliged to credit the amount of sales taxes paid in other States against the use tax it imposes.'") (Brennan, J., concurring); Williams v. Vermont, 472 U.S. 14, 21-22 (1985).

This Court has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax. The District of Columbia and all but three states with sales and use taxes do provide such a credit, although reciprocity may be required. . . . Appellants urge us to hold that it [a credit against the use tax for sales taxes paid to another state] is a constitutional requirement. Once again, however, we find it unnecessary to reach this question.

Id. at 21-22 (citations omitted). See also supra note 131.
determining whether a tax was discriminatory. So long as the taxing state treated interstate and intrastate commerce equally, there was no discrimination. Second, under a line of questionable authority, a sales tax imposed by one state and a use tax imposed by another state did not implicate the multiple tax doctrine, because the sales tax and the use tax were viewed as taxes on different things, even though both taxes were measured by the sale price of the thing sold. Thus, if a Washington resident purchased

134. Justice Cardozo's Henneford opinion was very clear on this point. He emphasized that Washington went beyond what the constitution required in allowing a credit against its use tax for sales taxes paid to another state. So long as the tax system of a given state, "reckoned as a self-contained unit," treated interstate and intrastate transactions equally, there is no discrimination for commerce clause purposes under the holding of Henneford. Henneford, 300 U.S. at 587.


136. The notion that a tax on a sale and a tax on use were taxes on different things was directly attributable to the tax immunity doctrine discussed above. See supra note 40. Under that doctrine interstate transactions were immune from state taxation. Recognizing a sales tax imposed by one state and a use tax imposed by another state as two taxes on a single transaction would have implied the power of each state to tax an interstate transaction. To avoid this implication the Court held that an interstate sale is subject to a sales tax by the state of origin if the sale is consummated there, and to a use tax by the state of destination. See supra text accompanying note 135. One tax preceded the interstate journey; the other followed it. Neither was on an interstate transaction. They were on different things and thus arguably presented no multiple tax issue. This analysis was similar to that which developed under the tax immunity doctrine with respect to manufacturing and wholesaling taxes measured by gross receipts. See supra note 81. For a critique of this line of authority concluding that these circumstances do present a multiple tax problem see Shores, supra note 11, at 164-68. For a contrary view, see Nowak and Rotunda, Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept, 20 U.C. DAVIS L. REV. 273 (1987), arguing that it should be constitutional for State A to grant a credit against its use tax for a sales tax paid to State A while denying such a credit for a sales tax paid to State B because the State A tax is not discriminatory "when looked at by itself," and one could just as well claim that the burden on interstate transactions comes from State B's tax. Id. at 281-82, 308. Since neither state can be said to be at fault, the authors conclude that the multiple tax doctrine asks the wrong question and should be abandoned.

This argument was implicitly rejected by Tyler Pipe. See infra text accompanying note 137. It is a flawed argument in that it assumes a tax should be unconstitutional under the multiple tax doctrine only if it can be shown that one state has caused the undue burden. The multiple tax doctrine, of course, rejects this premise. It holds that State A may not apply an unapportioned tax to an interstate transaction if other states have power to tax the same transaction. The question of whether State A or some other state is at fault for the burden which would result if both states taxed without apportionment is simply irrelevant. Conceivably, the multiple tax doctrine represents bad policy, but Nowak and Rotunda do not tell us why this is so. They simply state the well-known fact that constitutionality under the multiple tax doctrine does not turn on fault and conclude automatically that this is a bad thing. For an argument that comes to grips with the issue of whether it is
a widget in California and paid a sales tax to California, Washington could impose its use tax when the widget was brought into Washington without raising a multiple tax issue. The tax on the sale was viewed as separate from the tax on use.

The *Tyler Pipe* Court’s implicit rejection of this line of authority was sound, and it now seems clear that under *Henneford*, as reinterpreted by *Tyler Pipe*, a use tax applicable to goods purchased outside the state for use within the state will be constitutional only if it is reduced for any sales tax paid to another state. Evenhanded treatment in the sense that goods purchased within the state are subject to a sales tax equal to the use tax applicable to goods purchased outside the state will not suffice. To pass the discrimination test of *Tyler Pipe*, it must further be shown that the use tax creates no risk of multiple taxation by application to goods already subjected to another state’s sales tax.

Similarly, evenhanded treatment in the sense that goods manufactured within and sold without the state are subject to a manufacturing tax equal to a wholesaling tax applied to goods sold within the state (regardless of where manufactured) will not suffice. It must further be shown that the manufacturing tax creates no risk of multiple taxation by application to goods subject to another state’s wholesaling tax.

Since the discrimination found in *Tyler Pipe* flowed from the risk of multiple taxation, it could have been cured by eliminating that risk. The Court jettisoned the erroneous Armco notion that failure to meet a “substantially equivalent events” test provides an independent reason for holding the manufacturing and wholesaling taxes noncompensatory and, therefore,
Although this was a step in the right direction, the Court's adherence to the *Armco* notion that the risk of multiple taxation is discriminatory led ultimately to an incoherent result; the Court's holding on the discrimination issue is incompatible with its holding on the apportionment issue.

**B. The Apportionment Issue**

The Washington manufacturing tax was held discriminatory only because it created a risk of multiple taxation for taxpayers manufacturing in Washington and selling elsewhere or manufacturing elsewhere and selling in Washington, but not for Washington manufacturers selling within the state. Since constitutional infirmity rested on the risk of multiple taxation, the Court must have viewed Washington's manufacturing tax measured by gross receipts and another state's wholesaling tax measured by the same gross receipts as taxes on the same thing. Otherwise, there is no multiple tax problem since taxes plausibly can be viewed as multiple only if they apply to the same thing.

For example, if an interstate firm pays real estate taxes to Washington on real estate used in its Washington manufacturing business, and pays California real estate taxes on real estate used in its California wholesaling business, these taxes cannot be viewed as multiple. Each state or political subdivision is taxing a different thing, since each tax is measured by a different tax base. But, a Washington manufacturing tax and a California wholesaling tax measured by the same gross receipts can be viewed as multiple because they are measured by the same thing. Indeed, that is the most persuasive view since the thing taxed is the gross receipts. Manufacturing activities in Washington and wholesaling activities in California provide the due process connection which enables each state to tax gross receipts attributable to those activities, but as a matter of economic reality, gross receipts measure the tax and are the real subject of the tax. 

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139. For a discussion of this facet of the *Armco* case see *supra* text following note 78. As pointed out above, see *supra* note 125, under *Tyler Pipe* the "substantially equivalent events" test has no independent significance because it is automatically met once it is shown that: (1) the manufacturing tax on goods sold out of state applies at the same rate as the wholesaling tax on goods sold within the state, and (2) there is no risk of multiple taxation created by either tax.

140. If Washington could adopt a wholesaling tax applicable to all goods sold within the state, and a manufacturing tax applicable only to goods manufactured within and sold without the state, other states could do likewise. Therefore, manufacturers in other states selling in Washington could be subject to such a manufacturing tax as well as to Washington's wholesaling tax.

141. For a contrary, but unpersuasive, argument that a tax "on manufacturing" measured by gross receipts is a tax on manufacturing, and a tax "on wholesaling" measured by the same gross receipts is a tax on wholesaling, see *supra* note 81. The argument is supported by past decisions which applied the now discarded tax immunity rule.
as the Court’s holding on the discrimination issue correctly implies, Washington’s manufacturing tax and another state’s wholesaling tax (or Washington’s wholesaling tax and another state’s manufacturing tax) measured by the same gross receipts are on the same thing, then a multiple tax problem exists whenever any state taxes unapportioned gross receipts attributable to activity conducted in more than one state.

Tyler Pipe made this argument under the apportionment prong of Complete Auto. Since Tyler Pipe paid the Washington wholesaling tax on products manufactured in another state and sold in Washington, it claimed the tax was not fairly apportioned because gross receipts taxed in full by Washington were partly attributable to manufacturing activities carried on in another state. The gross receipts were also subject to taxation by that state. Fair apportionment solves the multiple tax problem by allowing each state to tax only a portion of total gross receipts. Without apportionment a transaction crossing a state line is subject to multiple taxation while local business will pay a single tax. Thus, Washington’s unapportioned wholesaling tax presented precisely the same multiple tax burden that caused the Court to characterize its manufacturing tax as discriminatory. Since the manufacturing tax imposed an undue burden on interstate commerce because of the risk of multiple taxation one expects the wholesaling tax to be invalid for the same reason. Yet, Tyler Pipe’s apportionment argument was summarily rejected with the following explanation:

This apportionment argument rests on the erroneous assumption that... Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and the wholesaling tax are not compensating taxes for substantially equivalent events in invalidating the multiple activities exemption. Thus, the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.

It is, of course, true that only Washington could tax the wholesaling. The critical question, however, was whether Washington was taxing wholesaling, or was taxing gross receipts attributable to not only wholesaling activities but also manufacturing activities carried on in another state. If

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143. To reiterate an important point, the manufacturing tax held discriminatory because it did not apply to Washington manufacturers selling within the state (they paid the Washington wholesaling tax); but it did apply to Washington manufacturers selling outside the state, even if they paid a wholesaling tax to another state. Thus, interstate, but not intrastate transactions were subject to multiple taxation. See id. at 246-47. Washington’s wholesaling tax similarly created a risk of multiple taxation for interstate transactions because goods manufactured outside Washington also could be subject to a manufacturing tax measured by unapportioned gross receipts; there would be no double taxation since only the state in which the sale occurred would tax.
144. *Id.* at 251.
Washington was taxing gross receipts then it was taxing something the manufacturing state also could tax. Instead of addressing this issue, the Court reverted to the formalistic reasoning supposedly abandoned in Complete Auto.\textsuperscript{145} It held that since each state attached a different label to its tax, Washington’s wholesaling tax was on something different than what was being taxed by another state’s manufacturing tax, even though both taxes were measured by the same gross receipts.

In some instances, there is a nice convergence between the formal subject matter of a tax and its measure. For example, if a tax is imposed on income and is measured by income there is no question whether income is being taxed. If a flat tax of, say, $500 per year were imposed on wholesaling, it would be equally clear that the tax was on wholesaling. There simply would be no basis for claiming the tax was on something else. When there is a divergence between the subject matter and the measure, any realistic analysis of what is being taxed must consider whether the measure truly represents the subject matter, or whether it indicates something other than the formal subject matter is being taxed.

For example, if Washington imposed an annual tax on wholesaling equal to 1\% of the fair market value of all property owned by any firm engaged in wholesaling within Washington, it cannot be assumed this is a tax on wholesaling within Washington that no other state can tax. Since the tax is measured by the value of property wherever located, it should be viewed as a property tax with a risk of multiple taxation on any out-of-state property owned by the taxpayer. Similarly, if gross receipts measured the tax, it should be viewed as a tax on gross receipts. Another state in which manufacturing occurs can impose a tax measured by the same gross receipts, therefore, it is clear that neither state is taxing exclusively manufacturing or wholesaling. Each is taxing gross receipts attributable to manufacturing and wholesaling activity which occurs in both states. If, as Complete Auto mandated, economic realities rather than legal formalities are to govern the analysis, the Court cannot automatically assume a statute which imposes a tax “on wholesaling,” actually imposes a tax on wholesaling. Careful consideration must be given to its measure.

Perhaps the Court did not make an automatic assumption based on the verbal formulation of the taxing state. It did, after all, provide a reason for concluding that the Washington tax was on wholesaling, which no other state could tax, although measured by gross receipts. The Court said Washington’s wholesaling tax cannot be viewed as duplicated by another state’s manufacturing tax when measured by the same gross receipts, because for purposes of the discrimination issue the manufacturing tax and whole-

\textsuperscript{145} See supra text accompanying note 30, for discussion of Complete Auto.

See also supra note 81; Hellerstein, supra note 137, at 171.
saling tax are not compensating taxes on substantially equivalent events.\textsuperscript{146} Thus, for purposes of the apportionment issue a tax on wholesaling must be viewed as separate from a tax on manufacturing.

As discussed above,\textsuperscript{147} in analyzing the discrimination issue the Court first found that the manufacturing and wholesaling taxes created a risk of multiple taxation for interstate transactions which did not exist for intrastate transactions. Because of this risk of multiple taxation the Court found that the taxes did not apply to substantially equivalent events and were not compensating taxes. In short, for purposes of the discrimination issue, the taxes were not compensating taxes because they created a risk of multiple taxation. Yet, for purposes of the apportionment issue, the Court said there was no risk of multiple taxation because it had already characterized the taxes as noncompensating. Obviously, the Court cannot have it both ways. If the taxes were noncompensating because of the risk of multiple taxation, how can it also be true that there was no risk of multiple taxation because the taxes were noncompensating?

There is, however, another possible explanation for the Court's apparent contradiction in holding that the manufacturing tax and wholesaling tax created a risk of multiple taxation for discrimination purposes, but not for apportionment purposes. Arguably, the manufacturing tax was discriminatory not merely because it was noncompensating and created a risk of multiple taxation, but because the risk arose under a statute that was facially discriminatory.\textsuperscript{148} Perhaps facial discrimination doomed the manufacturing tax while facial neutrality saved the wholesaling tax. Indeed, it has been suggested that \textit{Tyler Pipe} "established a predictable test" under which a facially discriminatory tax is unconstitutional if it is not internally consistent, that is, if its imposition by other states would result in multiple taxation.\textsuperscript{149} Since the Court characterized the manufacturing tax as facially discriminatory, \textit{Tyler Pipe} can be read in this way. However, only Justice

\textsuperscript{146}The language quoted above (\textit{see supra} text accompanying note 144) might be interpreted as stating a second reason; that is, that manufacturing and wholesaling are not a unitary activity. The term "unitary activity," however, has no independent meaning. Its meaning must be derived from the context and it is plain from the context that manufacturing and wholesaling were held not to constitute a unitary activity because they were not substantially equivalent events for purposes of the discrimination analysis. Surely the Court did not use the term "unitary activity" as synonymous with "unitary business." Under the Court's prior decisions "unitary business" does have an independent meaning and it is clear that manufacturing and wholesaling activities undertaken by a single firm generally constitute a unitary business. Exxon Corp. v. Wisconsin, 447 U.S. 207 (1980) (exploration, production, refining and marketing of petroleum products constitute a unitary business).

\textsuperscript{147}\textit{See supra} text following note 123.

\textsuperscript{148}\textit{Tyler Pipe}, 483 U.S. at 240.

\textsuperscript{149}Note, \textit{The "Internal Consistency Test" is Alive and Well: Tyler Pipe Industries, Inc. v. Washington Department of Revenue}, 41 \textit{TAX LAW.} 587, 601 (1988).
O'Connor was explicit on the point. She, alone, made clear that multiple taxation of gross receipts is unconstitutional only when it arises under a tax statute which is discriminatory on its face.\textsuperscript{150}

This interpretation has superficial appeal. The multiple activities exemption from Washington's manufacturing tax shielded local transactions from multiple taxation but failed to extend the same protection to interstate transactions. A Washington manufacturer selling in Washington paid only the wholesaling tax and could be taxed by no other state. A Washington manufacturer selling elsewhere, or an out-of-state manufacturer selling in Washington could be taxed twice, once by the manufacturing state and again by the market state. Since Washington decided to treat its wholesaling and manufacturing taxes as a unity by exempting, from the manufacturing tax, transactions on which a Washington wholesaling tax had been paid, the Court treated, as a unity, for commerce clause purposes, wholesaling and manufacturing taxes imposed by any state. If Washington repealed the exemption from the manufacturing tax for goods on which a Washington wholesaling tax was paid, goods moving intrastate would be taxed twice. The reasoning of \textit{Tyler Pipe} suggests double taxation of goods moving interstate would then be nondiscriminatory and permissible.

Unfortunately, as pointed out with respect to \textit{Armco},\textsuperscript{151} limiting \textit{Tyler Pipe} to facially discriminatory statutes provides no explanation as to why the risk of multiple taxation should be condemned when it arises under a facially discriminatory statute, but approved when it arises under a facially neutral statute. In either case, interstate transactions alone will be subject to the risk of multiple taxation. This is because it is extremely unlikely that a state would impose double taxation on goods manufactured and sold within the state. Rather, after \textit{Tyler Pipe} a state is likely to impose either a manufacturing tax or a wholesaling tax, but not both. Double taxation will then occur only with respect to interstate transactions. For example, if State $X$ adopts a nondiscriminatory manufacturing tax measured by unapportioned gross receipts, State $Y$ adopts a nondiscriminatory wholesaling tax measured by unapportioned gross receipts and a taxpayer happens to manufacture in State $X$ and sell in State $Y$, multiple taxation will occur, although it cannot occur with respect to intrastate transactions. Such multiple taxation is benign under \textit{Tyler Pipe} since it results from the decision of each state to adopt a tax statute with a different formal subject matter, and the taxpayer's unfortunate choice in locating its activities.

\textsuperscript{150} \textit{Tyler Pipe}, 483 U.S. at 253. Chief Justice Rehnquist and Justice Scalia were of the view that as applied in \textit{Armco} the internal consistency test applied only to facially discriminatory taxes, see supra note 100, but that \textit{Tyler Pipe} applied it to a statute which was not facially discriminatory and thereby expanded it to a test of general application. Id. at 259.

\textsuperscript{151} See supra text accompanying note 103.
This situation is admittedly distinguishable from one in which a state seeks (as Washington did) to tax all gross receipts it has a connection with, either through manufacturing or wholesaling conducted within the state, but exempts only intrastate transactions from multiple taxation, thereby creating facial discrimination. The distinction, however, does not have inherent constitutional significance. Unless reasons exist for hinging the constitutionality of multiple taxation on this distinction, it is merely a semantic distinction which represents no economic or realistic difference, and which has no proper role in constitutional analysis. In fact, no reasons were advanced by the Court, and none seem likely. The burden on interstate commerce created by multiple taxation is unaffected by whether it arises under a facially discriminatory statute. No rational basis existed for concluding that Washington’s facially discriminatory manufacturing tax and another state’s wholesaling tax measured by the same gross receipts were on the same thing and therefore created a risk of multiple taxation which discriminated against interstate commerce, while simultaneously concluding that Washington’s facially neutral wholesaling tax and another state’s manufacturing tax were not on the same thing and created no risk of multiple taxation under the apportionment prong of Complete Auto.

Furthermore, the notion that Tyler Pipe applies only to facially discriminatory taxes is undercut by the Court’s decision in American Trucking Association, Inc. v. Scheiner,\textsuperscript{152} handed down the same day. American Trucking involved a Pennsylvania tax of $35 per axle which applied to all trucks used within the state. Although the Court recognized that the tax was not facially discriminatory, it applied the internal consistency test to invalidate the tax.\textsuperscript{153} Justice O’Connor, dissenting, criticized the majority for “creating an 'internal consistency' rule of general application . . . .”\textsuperscript{154} It, therefore, appears that the internal consistency rule is not limited to facially discriminatory statutes and the reach of Tyler Pipe is unclear.

Suppose, for example, that Washington reworded its statute to impose a tax on gross receipts derived from the sale of goods manufactured or sold within the state.\textsuperscript{155} The economic effect of this statute is precisely the

\textsuperscript{152} 483 U.S. 266 (1987).
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 303.
\textsuperscript{155} As applied to a Washington manufacturer selling elsewhere this statute would impose a tax on an interstate sale by a local manufacturer. Prior to Complete Auto such a tax would have been unconstitutional under Freeman v. Hewitt, 329 U.S. 249 (1946), because a tax on gross receipts from an interstate transaction was a direct tax on interstate commerce which violated the tax immunity doctrine. However, a tax “on manufacturing” measured by gross receipts derived from interstate transactions was permitted as a tax on a local event indirectly affecting interstate commerce. See American Mfg. Co. v. City of St. Louis, 250 U.S. 459 (1919). See also supra note 81. Although the distinction was strictly one of words and was an outgrowth of the tax immunity doctrine, it also can be found in pre-
same as the statute that was held unconstitutional in *Tyler Pipe*. Under this scheme, goods manufactured and sold in Washington are subject to a single tax measured by gross receipts. Goods manufactured in Washington and sold elsewhere are subject to the Washington gross receipts tax because of being manufactured within the state. They will also be taxed by the state in which the sale occurs if that state adopts a statute identical to Washington’s. Goods manufactured elsewhere and sold within Washington are subject to Washington’s gross receipt tax, and will be taxed by the state of manufacture if that state adopts a provision identical to Washington’s. Would such a statute pass muster under *Tyler Pipe*?

If the internal consistency test applies, the answer is no. Arguably, the test does not apply, because the reworded statute applies uniformly to all gross receipts connected with Washington whether derived from interstate or intrastate commerce and is, therefore, facially neutral. Although this argument finds support in *Tyler Pipe*’s suggestion that the internal consistency test applies only to facially discriminatory taxes, the argument cannot be true. If it were true, an unconstitutional tax could be made constitutional through a mere change in words. It seems unlikely the Court would knowingly adopt such a position in the face of *Complete Auto*. Furthermore, *American Trucking* supports a broader application of the internal consistency test. Although not facially discriminatory, the reworded statute most likely would be unconstitutional because it is the economic equivalent of the statute struck down in *Tyler Pipe*.

This conclusion, which seems to be dictated by the Court’s *Tyler Pipe* holding on the discrimination issue, does not rest easily with its holding on the apportionment issue. It means that the risk of multiple taxation, not facial discrimination was the critical concern that led to invalidation of Washington’s manufacturing tax on discrimination grounds. Also, since risk of multiple taxation was the critical concern, the Court's decision upholding the wholesaling tax which created exactly the same risk is inexplicable.156

*Complete Auto* decisions applying the multiple tax doctrine. See, e.g., J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); followed in Evco v. Jones, 409 U.S. 91 (1972). *Adams* held that taxes imposed by the state of manufacture on unapportioned gross receipts derived from sales in another state violated the multiple tax doctrine, while taxes on manufacturing measured by gross receipts derived from sales in another state did not. The *Adams* Court observed that the manufacturing tax was valid, because it was on a local activity and merely measured by gross receipts from interstate sales; whereas the tax on gross receipts was invalid, since it was a tax on the sale which could be duplicated by the state in which the sale occurred. Prior to *Tyler Pipe* one would have assumed that *Complete Auto* consigned this formalism to the junk heap.

156. Under *Tyler Pipe* any state may adopt a nondiscriminatory manufacturing tax, or a nondiscriminatory wholesaling tax, and either may be measured by total gross receipts derived from interstate sales. Since such taxes are viewed as being
This analysis is buttressed by the Court’s recent decision in GTE Sprint Communications Corp. v. Sweet. Illinois imposed a tax of five percent on the gross charge for interstate telephone calls which either originated or terminated within the state and which were charged to an Illinois "service address," regardless of where the calls were actually billed or paid. An equivalent tax applied to intrastate telephone calls. The term "service address" referred to the location of the telephone involved in the call. For example, if a call were placed from a company's headquarters in Arkansas to its sales office in Illinois, and was charged to the Illinois phone, the tax applied even if the bill was sent to and paid from the headquarters office in Arkansas. Under these circumstances, Arkansas could also impose a tax since the call originated there and was paid there. If, however, the call was charged to the Arkansas telephone (Arkansas service address), the Illinois tax would have been inapplicable.

Since the Illinois tax applied to the entire charge for an interstate telephone call, and in some circumstances, another state could impose a tax measured by the same charge, it was challenged under the apportionment prong of Complete Auto. The solution Tyler Pipe suggests is that no multiple tax problem exists because one state (Arkansas in the above example) is taxing the origination of an interstate call, while the other state (Illinois) is taxing the termination. Each state is therefore taxing a different thing. Contrary to the implication of Tyler Pipe, the Court recognized that even though the tax was literally imposed upon the privilege of originating or receiving an interstate telephone call charged to a service address within the state, it was nonetheless a tax on the call which created a risk of multiple taxation. Relying on its earlier decisions in the sales on manufacturing or on wholesaling, which in turn are viewed as separate activities taxable only by the state in which they occur, each tax automatically is deemed to be fairly apportioned.

If State A imposes a manufacturing tax measured by unapportioned gross receipts, and State B imposes a wholesaling tax measured by the same gross receipts, under Tyler Pipe there is no multiple taxation in a constitutional sense. However, there clearly is multiple taxation in a practical sense. A firm manufacturing in State A and selling in State B will be taxed twice on the same gross receipts. If it manufactures and sells exclusively in State A or State B its gross receipts will be taxed once. If it manufactures in State B and sells in State A it will not be taxed at all. The purpose of the multiple tax doctrine is to avoid such special burdens on interstate commerce. Although Tyler Pipe allows multiple taxation in a practical sense, nothing in the opinion suggests an abandonment of the multiple tax doctrine. That doctrine exists under the apportionment prong of Complete Auto which was applied by the Court in Tyler Pipe. The fact it was applied incorrectly doesn’t imply its rejection.

158. Id. at 586 n.6.
159. Id. at 590 n.13.
160. The Court stated: "We recognize that, if the service address and billing location of a taxpayer are in different states, some interstate telephone calls could be subject to multiple taxation." 92. at 590.
and use tax cases, the Court upheld the tax only because Illinois allowed a credit against its tax for any tax paid to another state, and the credit precluded multiple taxation. An analogous evaluation of the wholesaling tax involved in *Tyler Pipe* would have led to its demise since Washington did not allow a credit against its wholesaling tax for a manufacturing tax paid to another state.

V. *Tyler Pipe* in Perspective

Because the *Tyler Pipe* opinion is at odds with itself, it provides little insight for a confident prediction of how it will be applied in future cases. It may be, as Justice Black argued in his dissenting opinion in *J.D. Adams Manufacturing Co. v. Storen*, that the regulation of any burden on interstate commerce resulting from the interplay of the tax laws of two or more states is a matter for the legislature. The arbitrary result under *Tyler Pipe* where the location of business activities may determine whether gross receipts are taxed twice, once, or not at all, lends credence to the argument. Justice Black would have held unconstitutional under the commerce clause only those taxes which, looked at alone, imposed an unfair and discriminatory burden on interstate commerce. He would therefore have upheld any of the three forms of gross receipts taxation discussed above, that is, a tax on total gross receipts derived from goods sold within the state (the Washington wholesaling tax upheld in *Tyler Pipe*); a tax on total gross receipts derived from goods manufactured within the state regardless of where sold (*Tyler Pipe* indicated such a nondiscriminatory manufacturing tax is permissible); or a tax on total gross receipts derived from goods either manufactured or sold within the state (the reworded statute which is an economic equivalent of Washington's manufacturing—wholesaling tax partially invalidated by *Tyler Pipe*).

*Adams Manufacturing* involved a statute of the latter type. It was held unconstitutional over Justice Black's dissent because of the risk of multiple taxation. In striking down the tax the Court explained:

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited

163. See supra note 156.
164. See *Tyler Pipe*, 483 U.S. at 249.
by Article I, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the ex-action, but it is settled that this will not save the tax if it directly burdens interstate commerce.65

This rationale applies not only to a tax statute which by its terms imposes a tax on gross receipts, but also to any tax measured by gross receipts derived from activities carried on in more than one state. The Adams Manufacturing Court, however, chose to confine its holding to a tax of the former type which was actually at issue in the case. It distinguished American Manufacturing Co. v. St. Louis,66 which had upheld a tax “on manufacturing” measured by gross receipts from interstate transactions, observing that “the tax in the present case is not a tax on the manufacture but a tax on gross sales.”67

The formalistic distinction between a tax “on manufacturing” measured by gross receipts and a tax on gross receipts was incompatible with the multiple tax rationale which was central to the decision. In Freeman v. Hewitt,68 decided nine years after Adams Manufacturing, the Court invalidated the Indiana gross receipts tax as applied to proceeds realized by an Indiana resident from a sale of stock on the New York Stock Exchange. It chose not to repudiate the distinction, but to adopt a different rationale. Rather than rely on the multiple tax doctrine, it applied the tax immunity doctrine and held the tax invalid as a direct tax in interstate commerce.69

Since the tax in American Manufacturing tax was on the local activity of manufacturing, it was an indirect tax on interstate commerce and permissible under the Freeman rationale.70

As the Court observed in Complete Auto, “Freeman was viewed in the commentary as a triumph of formalism over substance”71 It was the modern origin of the tax immunity rule,72 and in rejecting the tax immunity rule the Complete Auto Court implicitly overruled Freeman. In contrast, the Court has quoted with approval from Adams Manufacturing in at least two post-Complete Auto decisions.73 Until Tyler Pipe it seemed clear the formalistic distinction between a tax on manufacturing measured by gross receipts and a tax on gross receipts was a useless relic of another era. The central reasoning of Adams Manufacturing rooted in economic reality rather than legal formalism appeared to have the support of the Court. After

166. 250 U.S. 459 (1919).
169. Id. at 253-54.
170. Id. at 255-56.
171. Complete Auto, 430 U.S. at 281.
172. Id. at 279.
Tyler Pipe this is no longer true. Consistent with Freeman, and contrary to the central rationale of Adams Manufacturing, the Court has now held that a tax on manufacturing measured by gross receipts is different in a constitutionally significant way from a tax on wholesaling measured by the same gross receipts.

If, as the Court's post-Complete Auto decisions seemed to indicate, Complete Auto revitalized the Adams Manufacturing rationale, abandoned in Freeman, any state tax, regardless of its form, measured by unapportioned gross receipts derived from interstate transactions would have been held unconstitutional. Imposing an apportionment requirement would have been consistent with Adams Manufacturing and Complete Auto, and also with the principle enunciated in Mobil Oil Corp. v. Commissioner of Taxes,\(^\text{174}\) that "the linchpin of apportionability in the field of state income taxation is the unitary business principle."\(^\text{175}\) Under this principle, income derived from manufacturing in one state and selling in another will normally be derived from a unitary business\(^\text{176}\) and will be subject to apportionment.\(^\text{177}\) There is no sound reason for treating gross receipts differently from income for apportionment purposes.\(^\text{178}\)

Perhaps the Court faltered because of its failure to separate the discrimination and multiple tax issues. If the Court had applied the discrimination doctrine (as it traditionally has done) to require substantial equality of treatment for interstate and intrastate transactions under the tax laws of a given state looked at in isolation,\(^\text{179}\) the Court would have held the

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\(\text{174}\) 445 U.S. 425 (1980);
\(\text{175}\) Id. at 439.
\(\text{176}\) The manufacturing and selling activity of a single firm will generally constitute a unitary business. See supra note 146.
\(\text{177}\) For a discussion of how the apportionment requirement might apply to taxes on gross receipts see Shores, supra note 11 at 155-57.
\(\text{178}\) There may be reasons for treating gross receipts differently from income as a matter of political choice. For example, a congressional subcommittee has opposed apportionment of gross receipts because that "would introduce numerous complexities into a form of taxation whose chief virtue is simplicity." Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, State Taxation of Interstate Commerce, H.R. Rep. No. 565, 89th Cong., 1st Sess. 1114 (Comm. Print 1965). Such reasons, however, provide no sound basis for distinguishing gross receipts from income as a matter of constitutional law. Decisions of constitutional law ought to be based on principled analysis, not political choice. If Congress disapproves of a particular result achieved by the Court in applying the commerce clause, it is free to overturn that result. See supra note 9. Such legislative intervention would be vastly preferable to an unprincipled Supreme Court decision, since it would not destroy the fabric of constitutional law.

\(\text{179}\) See supra text following note 59. Justice Cardozo reflected this view in Henneford v. Silas Mason Co., 300 U.S. 577 (1937), when he said: "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." Id. at 587.
Washington statute nondiscriminatory. Interstate and intrastate transactions were treated evenhandedly under the Washington tax scheme. Both were taxed at the single rate of .44% of gross receipts.\textsuperscript{180} If the interplay of Washington's tax law with that of other states had been evaluated under the multiple tax doctrine, it seems unlikely the Court would have made the error of ascribing significance to a factor (facial discrimination) which has no proper role in determining whether multiple taxation violates the commerce clause.

VI. CONCLUSION

The\textit{ Tyler Pipe} decision lacks coherence. One part of it condemns the risk of multiple taxation as violative of the commerce clause. Another part closes its eyes to multiple taxation by treating a manufacturing tax and a wholesaling tax measured by the same gross receipts as taxes on different things. This is reminiscent of the Court's pre-\textit{Complete Auto} decisions involving the tax immunity doctrine in which it was neither willing to abandon the doctrine nor apply it in a principled fashion. The result was a tangle of inconsistent \textit{ad hoc} decisions which only served to discredit the Court and constitutional jurisprudence. Similarly, \textit{Tyler Pipe} holds that multiple taxation of interstate commerce sometimes is unconstitutional and sometimes is not, but provides no principled means for separating the former from the latter. Taken together with \textit{Armco}, it has generated a new and controversial internal consistency test of uncertain scope and effect.

Nearly fifty years ago Justice Rutledge suggested that the Court would promote clarity of consideration and of decision if the due process and commerce clause limitations on state taxing power were approached "at least tentatively as if they were separate and distinct, not intermingled ones."\textsuperscript{181} That was sound advice then. It is sound advice now. It was never heeded by the Court, and the results have been less than gratifying.

Indeed, the Court has moved in the opposite direction. Not only are due process and commerce clause issues intermingled, but within the framework of commerce clause analysis, discrimination and multiple tax issues are now intermingled through a new internal consistency test which, in \textit{Tyler Pipe}, has produced an internally inconsistent opinion. If rational analysis is ever to prevail in this "impoverished territory,"\textsuperscript{182} the Court must move toward an analytical framework which facilitates rather than frustrates clarity of consideration and of decision. This can be accomplished, or at least aided, by treating separately the separate problems of discrimination and multiple taxation.

\textsuperscript{180} \textit{Tyler Pipe}, 483 U.S. at 237.
\textsuperscript{181} International Harvester Co. v. Department of Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., dissenting).
\textsuperscript{182} \textit{Tyler Pipe}, 483 U.S. at 265 (Scalia, J., dissenting).
Complete Auto promised to abandon commerce clause analysis of prior decisions which had "no relationship to economic realities." In a word, it promised a method of analysis which is rational rather than irrational. The promise is a modest one, but Tyler Pipe demonstrates that if it is to be fulfilled the Court must do two things. First, it must avoid unnecessary intermingling of due process and commerce clause concerns. The due process question of whether a state has power to impose a particular tax need not be blended (confused?) with the commerce clause question of whether power to impose the tax has been exercised in a way which unduly burdens interstate commerce. Second, it must untangle the multiple tax and discrimination doctrines which until Armco operated independently to determine whether a tax unduly burdened interstate commerce. This can be achieved only through abandonment of the internal consistency test which the Court has adopted incrementally through a series of missteps beginning in Armco and ending in American Trucking.183 Treating separate things separately would do much to clarify analysis and thus facilitate decisions which reflect economic realities. This assumes, of course, that the Court meant what it said in Complete Auto. If it did not, if the Court remains wedded to artificial distinctions produced by the formalism of pre-Complete Auto decisions, a tax on gross receipts will be treated as something different from a tax on manufacturing measured by gross receipts, and each will be treated as different from a tax on wholesaling measured by gross receipts. That's simply the end of the matter, and no realignment of the analytical framework can affect the result.

More is involved, however, than the constitutional status of taxes measured by gross receipts. Armco and Tyler Pipe are unprincipled decisions which recognize distinctions that are without practical or economic significance. Like Freeman v. Hewitt they represent a triumph of formalism over substance. If artificial and formalistic reasoning is to survive Complete Auto, with respect to gross receipts taxes, spill-over effects will inevitably reach other forms of taxation. The highly touted revolution184 in state taxation of interstate commerce will turn out to have been a chimera.

183. Professor Hellerstein has asked the rhetorical question—is "internal consistency" foolish? Hellerstein, "Is Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation, 87 Mich. L. Rev. 138 (1988). His explicit answer is "no." Id. at 188. He goes on to conclude, however, that the internal consistency test added nothing to the pre-existing commerce clause jurisprudence and may exacerbate confusion and uncertainty. It would seem that a new test which adds nothing but confusion is foolish, and ought to be abandoned.

184. See supra note 35.