Taxes And Bounties Burdening Interstate Commerce: Distinguishing Boston Stock Exchange From Alexandria Scrap

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The Supreme Court has long construed the commerce clause of the Constitution as forbidding states to enact legislation that discriminates against out-of-state businesses in interstate commerce. In two recent cases the Court considered different state statutory schemes, one involving the taxation of securities transfers and the other designed to give subsidies for the removal and destruction of abandoned motor vehicles, both of which had this discriminatory effect. However, while the Court struck down the securities transfer tax, it upheld the state subsidy. Examination of the factors relied on by the Court to reach opposite results in these cases reveals an inconsistency in the constitutional analysis and a need for more precise definition of the boundaries of permissible state regulation of interstate commerce.

Since its enactment in 1905, the New York State securities transfer tax statute and its amendments have been the subject of several constitutional attacks. In the most recent of such cases, Boston

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1 U.S. Const. art. 1, § 8, cl. 3 provides in part that "[t]he Congress shall have power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
6 In New York ex rel. Hatch v. Reardon, 204 U.S. 152 (1907), the original statute imposing a tax of two cents per one hundred dollars of face value or fraction thereof of stock sold or transferred in New York, 1905 N.Y. Laws, ch. 241, § 1, survived claims that it violated the due process clause of the fourteenth amendment. Although the Court in Hatch heard arguments as to the constitutionality of the statute under the commerce clause, that case left the question undecided since the transaction at issue was intrastate only, and the plaintiffs therefore lacked standing to raise the issue. 204 U.S. at 160-61. A 1906 amendment, 1906 N.Y. Laws, ch. 414 § 1, which changed the standard of taxation to two cents per share of one hundred dollars of face value or fraction thereof, was held unconstitutional as an arbitrary and unfair method of classi-
Stock Exchange v. State Tax Commission, regional stock exchanges sought a declaratory judgment from a New York state court to the effect that a 1968 amendment to the statute was an unconstitutional discrimination against interstate commerce. Plaintiffs alleged that the amended law imposed a greater tax burden on securities transactions involving out-of-state sales than those involving in-state sales. While the trial court denied the defendant State Tax Commission's motion to dismiss, the Appellate Division reversed and declared the 1968 amendment constitutional. The Court of Appeals of New York unanimously affirmed. On appeal, the United States Supreme Court unanimously reversed the court of appeals' judgment, holding that the amendment violated the "free trade purpose of the Commerce Clause."

People ex. rel. Farrington v. Mensching, 187 N.Y. 8, 79 N.E. 884 (1907). Notwithstanding Farrington, the New York legislature in 1913 enacted an amendment that taxed shares of stock without nominal or par value at the rate of two cents per share, and not per dollar amount of face value. 1913 N.Y. Laws, ch. 779, § 1. In addition, a 1932 amendment imposed an additional emergency tax equal to the amount previously payable. 1932 N.Y. Laws, ch. 62, § 270-a. In 1933 the legislature extended the "per share" method of taxation to sales or transfers of any kind of stock, not just shares without par value, and the rate imposed was one and one-half cents per share of stock selling for less than $20 per share, and two cents per share for all others selling above that price. 1933 N.Y. Laws, ch. 643, §§ 2, 3. While this method of "per share" taxation was in apparent conflict with the Farrington decision, the New York Court of Appeals in Vaughan v. State, 272 N.Y. 102, 5 N.E.2d 53 (1936), appeal dismissed, 300 U.S. 638 (1937), held the tax constitutional as applied to non-par stock, in effect overruling Farrington.

In O'Kane v. State, 283 N.Y. 439, 28 N.E.2d 905 (1940), the Court of Appeals of New York addressed the issue expressly left open in Hatch—whether § 270, as amended, discriminated against interstate commerce. In a 4-3 decision, the court held that the tax was not discriminatory and therefore constitutional. 283 N.Y. at 442, 28 N.E.2d at 909.


1 Joining as plaintiffs with the Boston Stock Exchange were the Cincinnati, Detroit, Midwest, Pacific Coast and Philadelphia-Baltimore-Washington (PBW) stock exchanges. Id. at 602 n.1.

2 No federal court had jurisdiction to grant the relief requested, since an adequate remedy could be obtained in the state court. 28 U.S.C. § 1341 (1970).


4 Id. at 602.

5 Id. The trial court's memorandum decision is unreported.


8 Boston Stock Exch. v. State Tax Comm'n, 97 S. Ct. 599, 610 (1977). In the state
Section 270 of the New York Tax Code imposes a tax on all sales, agreements to sell and all deliveries or transfers of shares or certificates of stock\(^7\) made in New York.\(^8\) Before section 270-a took effect,\(^9\) the rate of tax imposed varied with the price and number of shares involved,\(^10\) but did not differentiate according to whether the sale of securities took place in-state or out-of-state. Section 270-a altered the transfer tax by establishing different tax rates dependent upon whether the sale preceding an in-state transfer or delivery occurred in-state or out-of-state. While a transfer of title to shares of stock may occur in New York, the actual sale of these shares preceding such a transfer is a separate event which can occur outside of New York. The statute granted two major tax advantages to taxable transactions involving in-state sales. First, a maximum tax of $350 applied to a transaction involving an in-state sale, whereas all other transactions were taxed at rates that, in the case of block sales of stock, resulted in a much higher tax. For example, a large investor who both sold and transferred stock in New York would have had his tax liability limited to $350, whereas an investor who transferred shares in New York court plaintiffs also argued that § 270-a was unconstitutional under the privileges and immunities clause, U.S. Const. art. IV, § 2, and the equal protection clause, U.S. Const. amend. XIV. Plaintiffs abandoned these arguments on appeal to the Supreme Court and presented only the commerce clause issue. 97 S. Ct. at 602 n.2.

\(^7\) N.Y. Tax Law § 270(1)(McKinney 1966). "The fact that two or more of the taxable events . . . occur within the State of New York with respect to a single transaction does not mean that more than one tax is imposed; only one tax is payable with respect to any one transaction." Rules and Regs. under the New York Tax Law, Title 20, § 440.1, reprinted in 2 Stats Tax Rep., N.Y. § 57-102(c)(CCH 1973).

\(^8\) Exceptions exist for transactions involving, inter alia, transfers of stock from a fiduciary to his nominee, from an owner to a custodian of certificates, and mere loans of stock or certificates. N.Y. Tax Law § 270(5)(a-k)(McKinney 1966 & Cum. Supp. 1976).

\(^9\) Section 270-a became effective on July 1, 1969.

\(^10\) N.Y. Tax Law § 270(2)(McKinney 1966) states:

> The tax imposed by this section shall be two cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one cent for each share where the selling price is less than five dollars per share; two cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and four cents for each share where the selling price is twenty dollars or more per share.

A stamp is required to be affixed to the stock certificate or corporate books as evidence of payment of the tax. Id. at § 270(4). On July 8, 1975, a 25% tax surcharge on all taxes computed under § 270 and § 270-a became effective. N.Y. Tax Law § 270-d (McKinney Cum. Supp. 1976).
but effected the sale in New Jersey would have paid tax at the regular rate without regard to the $350 limit. Second, non-residents who undertook transactions involving an in-state sale as opposed to an out-of-state sale would have been accorded a 50% discount in the amount of tax due. Thus, a Massachusetts resident who both sold and transferred stock in New York would have paid only one-half the amount of tax he would have paid if he had transferred the stock in New York but sold it on the Boston exchange.

2 An example of the operation of the maximum tax provision is as follows: X, a large investor, e.g., a pension fund, wishes to sell 100,000 shares of ABC Company common stock. [It is assumed that the stock sells for more than $20 per share, since stock selling for less than that amount is subject to a lower tax rate]. If X sells on the New York Stock Exchange and transfers record ownership or effects delivery in New York, it pays only the maximum tax, i.e., $350. If instead it sells on an out-of-state exchange and transfers or delivers in New York, it must pay the regular rate of $.05 per share, or a total of $5,000.

21 A "non-resident" is an individual who is not a dealer or member of an in-state securities exchange, is not domiciled in New York, and does not maintain a permanent place of business or employment in the state. N.Y. TAX LAW § 270-a(1)(b) (McKinney Cum. Supp. 1976).

22 An example of the operation of the non-resident discount is as follows: Y, a non-New York resident, wishes to sell 100 shares of ABC Company common stock. If Y sells on an out-of-state exchange and transfers record ownership or effects delivery in New York, he pays a rate of $.05 per share for a total tax of $5.00. If, on the other hand, Y sells on the New York Stock Exchange and transfers or delivers in New York, he pays a tax calculated at a rate of exactly half as much, i.e., $.025 per share. In the latter case, Y pays half as much tax not because he is a non-resident, but because he is a non-resident who sold within New York State rather than outside it.

Brief for Appellants, supra note 20, at 8. After the decision of the court of appeals in this case but before its disposition by the Supreme Court, a Congressional amendment of the Securities Exchange Act of 1934 rendered void one challenged application of § 270-a. Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 21(2)(d), 89 Stat. 161 (amending Securities Exchange Act of 1934, 15 U.S.C. § 78bb(d)), provides in part that No State . . . shall impose any tax on securities which are deposited in or retained by a registered clearing agency [or] registered transfer agent . . . unless such securities would otherwise be taxable by such State . . . if the facilities of such registered clearing agency [or] registered transfer agent . . . were not physically located in the taxing State . . . .

The State recognized that this law prohibits taxation under § 270-a where "the sole event in New York State is the delivery or transfer to or by a 'registered clearing agency' or a 'registered transfer agent' . . . ." Release of the State of New York Department of Taxation and Finance (Dec. 1, 1975), reprinted in 2 STATE TAX REP.,
Plaintiffs alleged that since section 270-a imposed an unequal tax burden on out-of-state sales as opposed to sales made in New York, the amendment unconstitutionally discriminated against interstate commerce. In response, the state offered two main grounds for

N.Y., ¶ 57-101, .605 (CCH 1976). Thus, any taxation of securities transfers preceded by an out-of-state sale when transfer is effected by a registered transfer agent would not be taxable. A "transfer agent" is a person who, on the behalf of an issuer of securities, engages in countersigning, exchanging, converting, or registering the transfer of securities, as well as transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. Securities Exchange Act of 1934, 15 U.S.C. § 78c(25) (Supp. V 1975). Pub. L. No. 94-29, however, did not erase completely the types of transfers to which § 270-a would have given favorable tax treatment, thereby encouraging sales of securities in New York to the detriment of the plaintiff exchanges. If a New York resident were to sell a block of securities to another resident and effect delivery in New York, there would have been a greater tax due if the preceding sale occurs out-of-state rather than in-state, and Pub. L. No. 94-29 is not applicable. Similarly, if an in-state transfer of securities were to be carried out by a person other than a registered transfer agent, Pub. L. No. 94-29 would not change the favorable tax treatment that would have been given by § 270-a to in-state sales. See Jurisdictional Statement of Appellants at App. G, Boston Stock Exch. v. State Tax Comm'n, 97 S. Ct. 599 (1977).

The commerce clause does not merely serve as an authorization to Congress to legislate for the safeguarding and encouragement of interstate commerce; rather, the clause "even without implementing legislation by Congress is a limitation upon the power of the States." Great Atlantic & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976); Freeman v. Hewit, 329 U.S. 249, 252 (1946), citing Morgan v. Virginia, 328 U.S. 373 (1946); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). Burdens upon interstate commerce imposed by a state pursuant to its taxing powers have been subject to closer scrutiny than burdens flowing from an exercise of police power, since the state presumably may derive the same tax revenue through taxation of sources other than interstate commerce. Freeman v. Hewit, 329 U.S. at 253. Nor may a state "justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade." Id. at 254. The sale of intangibles such as securities is commerce within the meaning of the commerce clause. Id. at 258-59.

In addition to the claim that § 270-a did not violate the commerce clause, the state argued in the lower courts that the trial court lacked subject matter jurisdiction and that the plaintiffs lacked standing to challenge the constitutionality of the statute. Boston Stock Exch. v. State Tax Comm'n, 97 S. Ct. 599, 602 n.3 (1977). Addressing the issue of subject matter jurisdiction, the Supreme Court noted that state courts have the power to decide cases involving federal constitutional rights where neither the Constitution nor federal statute withdraws jurisdiction. Id. See note 9 supra. Secondly, the Court held that the exchanges had met the two-part test for establishing subject matter jurisdiction laid down in Association of Data Processing Serv. v. Camp, 397 U.S. 150 (1970). Since plaintiffs' allegation established that the higher tax imposed by § 270-a on out-of-state sales of securities diverted business from their facilities to those in New York, the amendment caused them "injury in fact," and a case or controversy existed. Id. at 152. Moreover, the exchanges' right to free competition was "arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question." Id. at 153. Thus, the plaintiffs had standing to sue both in their own right and on behalf of
upholding the statute. First, the defendant argued that since the unamended version of section 270 actually discouraged sales in New York when no other taxable event occurred in-state, the amendment should have been viewed as compensatory legislation intended to neutralize New York’s competitive disadvantage and therefore as inoffensive to the commerce clause. Second, the state maintained that the favorable treatment by section 270-a of out-of-state sales would have had no practical effect on interstate commerce regardless of whether a sale involved residents or non-residents. Respondent relied on the court of appeals’ statement that “it is more than likely . . .


21 In addition to the arguments set out in the text, the state also urged that § 270-a should have been sustained because it was a tax imposed on a local event at the end of interstate commerce, and the commerce clause does not prohibit the taxing of an intrastate transfer of property that has flowed through interstate commerce. Boston Stock Exch. v. State Tax Comm’n, 97 S. Ct. 599, 608 n.12 (1977). Cf. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)(ad valorem tax imposed on goods at end of foreign commerce not violative of import-export clause, U.S. CONST. art. I, § 10 cl. 2); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) (state sales tax imposed on transfer of property at end of interstate commerce not violative of commerce clause). The Supreme Court disposed of the argument in a footnote, reasoning that § 270-a impermissibly discriminated between transactions on the basis of an interstate element, see International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349 (1944), and that “the commercial power [of the federal government] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.” Boston Stock Exch. v. State Tax Comm’n, 97 S. Ct. 599, 608 n.12 (1977), citing Welton v. Missouri, 91 U.S. 275, 282 (1876).

22 Since none of the states in which the plaintiff exchanges are located taxes the sale or transfer of securities, Boston Stock Exch. v. State Tax Comm’n, 97 S. Ct. 599, 604 (1977), § 270 created an incentive to sell out-of-state, thereby putting the New York exchanges at a disadvantage. 97 S. Ct. at 607 n.11.

23 The “competitive disadvantage” argument was accepted by the Court of Appeals of New York, which analogized § 270-a to state use taxes that have been sustained by the Supreme Court as valid compensating legislation. Boston Stock Exch. v. State Tax Comm’n, 37 N.Y.2d 535, 542, 337 N.E.2d 758, 762, 375 N.Y.S.2d 308, 314 (1975). See, e.g., Henneford v. Silas Mason Co., 300 U.S. 577 (1937). In Henneford, the State of Washington imposed a 2% sales tax on all goods sold at retail in-state and a 2% compensating tax on the use of goods in-state, for the purpose of discouraging the incentive created by the sales tax for residents to purchase goods out-of-state. The use tax did not apply when the goods had already been taxed by Washington at a rate equal to or greater than 2%. The Supreme Court sustained the tax as a non-discriminatory method of equalizing the tax burden laid upon in-state and out-of-state purchases of goods. Id. at 584. See also General Trading Co. v. Iowa State Tax Comm’n, 322 U.S. 335 (1944).
that the sale would be made on a New York exchange in any event." when the sale is by a resident. With regard to out-of-state sales by non-residents, the defendant relied on the lower court's finding that since in-state sales by non-residents are themselves interstate transactions, section 270-a did not discriminate against interstate commerce in favor of intrastate commerce; rather, it imposed different tax treatments upon two kinds of interstate commerce. This type of discrimination, the defendant implied, was permissible under the commerce clause.

The Court rejected the defendant's argument concerning section 270-a's compensatory effect by reasoning that prior to the 1968 amendment the statute had no impact upon the decision as to where the sale of securities was to take place. After the amendment, however, the favorable tax treatment afforded by section 270-a to in-state sales became a significant factor in choosing the situs of the sale. Thus, rather than compensating New York for a competitive disadvantage, the amendment foreclosed tax-neutral decisions and created both an advantage for exchanges in New York and a burden to other states. The Court acknowledged that section 270 in the absence of the amendment did create a competitive disadvantage for the New York exchanges, but noted that the state could constitutionally re-


31 Brief for Appellees at 19, Boston Stock Exch. v. State Tax Comm'n, 97 S. Ct. 599 (1977) [hereinafter cited as Brief for Appellees].

32 Under the unamended version of § 270, an in-state transfer or delivery resulted in a payment of tax not influenced by the situs of the sale; the latter factor resulted in discriminatory tax treatment only after the advent of § 270-a. Boston Stock Exch. v. State Tax Comm'n, 97 S. Ct. 599, 607 (1977). See text accompanying notes 19-22 supra.

33 97 S. Ct. at 607-08.
move this disadvantage simply by declaring that sales would not be a taxable event.\textsuperscript{34}

The Court distinguished the use tax cases relied on by the court of appeals\textsuperscript{35} by noting that in those cases an individual faced with the choice of an in-state or out-of-state purchase could make the choice without regard to tax consequences.\textsuperscript{36} Section 270-a, however, imposed greater liability on out-of-state sales than in-state sales, and thus precluded the evenhanded treatment present in the use tax situation. The Court therefore concluded that the tax was inherently discriminatory.\textsuperscript{37}

In addressing the state's contention that the amendment would actually have had little practical effect on interstate commerce,\textsuperscript{38} the Boston Stock Exchange Court made several responses. First, with regard to residents who were engaged in out-of-state block sales of securities,\textsuperscript{39} it stated that if the court of appeals' assumption as to practical effect were true, there would have been no reason for the legislature to have reduced the tax burden on in-state sales of residents as opposed to out-of-state sales.\textsuperscript{40} In fact, the legislative history of section 270-a revealed that one of the primary reasons for enacting the amendment was the recognition that many New York residents were selling large blocks of stock on out-of-state exchanges, thereby negating the assumption of the lower court.\textsuperscript{41} In addition, the Su-

\textsuperscript{31} Id. at 607 n.11. Since the state could thus achieve its goal without resorting to a scheme of taxation that offends the commerce clause, this case apparently would be controlled by prior decisions holding that the existence of reasonable, non-discriminatory alternatives renders invalid the use of methods which discriminate against interstate commerce. See Great Atlantic & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 377 (1976); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); Minnesota v. Barber, 136 U.S. 313, 328 (1890). The Court's solution of eliminating sales as a taxable event, however, would be viewed by New York as unsatisfactory in at least one respect: taxation revenue would no longer be forthcoming from the situation where the securities sale occurs in New York but the transfer occurs out-of-state. See note 98 infra.

\textsuperscript{32} See note 27 supra.


\textsuperscript{34} Id. at n.12.

\textsuperscript{35} See text accompanying note 28 supra.

\textsuperscript{36} Since the tax due on both in-state and out-of-state sales by residents was identical until the tax payable reached $350, see N.Y. Tax Law § 270-a(1)&(2)(McKinney Cum. Supp. 1976), the tax discrimination against out-of-state sales became operative only when large or "block" transactions were made. Sales of securities in blocks of 10,000 shares or more comprised approximately 17% of the trading volume in securities trading on the New York Stock Exchange in 1975. Large Blocks, N.Y. Stock Exch. Dm't Newslet'r (Jan. 2, 1976).

\textsuperscript{37} 97 S. Ct. at 609.

\textsuperscript{38} Id. The legislative findings in connection with the adoption of § 270-a, 1968 N.Y.
The Supreme Court noted that the potentially large disparity in tax amounts owing on out-of-state sales by residents as opposed to in-state sales could not be viewed as having a minimal practical effect on interstate commerce. The Court concluded that as a result of this disparity, investors making block transactions would be more likely to rely on state-created economic incentives than on pure geographic proximity in choosing the situs of the sale.

So far as the treatment by section 270-a of in-state and out-of-state sales by non-residents is concerned, the Court agreed with the interpretation of the court of appeals that the discrimination involved was not between interstate and intrastate commerce but rather between two kinds of interstate commerce. It stated that there had been no prior occasion to address the question whether a state may tax in a manner that discriminates between two types of interstate transactions to favor local commercial interests, but stated that such discrimination nonetheless violated the commerce clause. Since a state may not enhance local commerce through unequal burdens upon the commerce of other states the Court apparently concluded that any state law that has such discrimination as

Laws, ch. 827, § 1, stated that the amendment was necessary for "the retention within the state of New York of sales involving large blocks of stock." Transactions of 10,000 or more shares on the regional exchanges increased by 202% in 1965-67 alone. Brief for Appellees, supra note 31, at 5. See note 53 infra.

For an example of a transaction that would encompass such a disparity, see note 20 supra.

97 S. Ct. at 609.

Id.

Where the transaction involved a non-resident, it may have had the benefit of both the discriminatory maximum tax on block sales and the 50% discount on the tax payable, as opposed to a transaction made by a resident, who may have taken advantage only of the maximum tax provision when making a block sale. See notes 20 & 21 supra.

See text accompanying note 30 supra.

97 S. Ct. at 609. In the case of a sale by a non-resident, an order is sent to a New York broker who executes it. Upon execution, the customer normally will send his stock certificate by mail to the broker in fulfillment of his agreement to sell. When the certificate crosses state lines by mail, the transaction qualifies as interstate in character. Boston Stock Exch. v. State Tax Comm’n, 37 N.Y.2d 535, 543, 337 N.E.2d 758, 763, 375 N.Y.S.2d 308, 315 (1975). A similar transaction was held to be an interstate sale in Freeman v. Hewit, 329 U.S. 249, 259 (1946).

97 S. Ct. at 609.

Id.

its end result must fall, regardless of whether the means employed favor intrastate over interstate commerce or favor one interstate transaction over another.\textsuperscript{51}

In so holding, the Supreme Court struck down a law clearly violative of the commerce clause.\textsuperscript{52} The plain meaning of the legislative findings indicated a desire to protect the New York securities industry from competition by the plaintiff exchanges.\textsuperscript{53} Indeed, the New York Stock Exchange was so alarmed at the upsurge in out-of-state trading\textsuperscript{54} that it threatened to move from New York City if some tax

\begin{itemize}
  \item \textsuperscript{51} 97 S. Ct. at 610. As support for its holding, the Court found Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), particularly relevant. 97 S. Ct. at 610 n.14. In \textit{Baldwin}, a New York statute forbade the in-state sale of milk imported from out-of-state unless the price paid to the producers was at least equal to the minimum price payable to New York producers. The state defended the law as necessary to assure the economic health of local industry. The Court disagreed, stating:

  \begin{quote}
    If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.
  \end{quote}

  \textit{Baldwin v. G.A.F. Seelig, Inc.,} 294 U.S. 511, 522 (1935). Insofar as § 270-a also represented an attempt by New York to protect a local industry, securities sales, from foreign competition, \textit{Baldwin} would seem directly controlling.

  \item \textsuperscript{52} When it enacted § 270-a, the legislature also included a savings provision whereby the invalidity of any part of the amendment does not negate the enforcement of any other part. 1968 N.Y. Laws, ch. 827, § 10. In addition, the rates of taxation imposed by the original tax law, N.Y. Tax Law § 270 (McKinney 1966), are reimposed without distinction between sales by residents and non-residents and without the $350 maximum tax limit on block sales. 1968 N.Y. Laws, ch. 827 § 11. The Supreme Court remanded the case to the lower courts to determine which parts of § 270-a survived its judgment in \textit{Boston Stock Exchange}. 97 S. Ct. at 610 n.15.

  \item \textsuperscript{53} The legislative findings stated in part:

  The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are non-residents of the state of New York requires that the tax on transfers of stock . . . is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state.

  1968 N.Y. Laws, ch. 827, § 1. In approving ch. 827, the Governor of New York noted that competition for the New York markets had been increased by the rise of regional stock exchanges, and indicated that the purpose of the amendment was to “provide long-term relief from some of the competitive pressures from outside the State.” 1968 \textit{Public Papers of Governor Rockefeller} 552-54, \textit{reprinted in} 1968 N.Y. Laws Vol. 2, at 2384 (McKinney), \textit{quoted in} \textit{Boston Stock Exch. v. State Tax Comm’n}, 97 S. Ct. 599, 605 n.10 (1977).

  \item \textsuperscript{54} From 1965 to 1967, the volume of trading on regional exchanges increased by 73.2%. Regional “cross” volume (a transaction in which the broker finds both the buyer and seller) increased 202% in the same period. Block transactions of 10,000 or more shares on the regional exchanges also increased by 202%. Of the total share trading on
relief was not forthcoming to ease New York’s competitive disadvantages.\textsuperscript{55} Nonetheless, as vital as such state interests may be,\textsuperscript{56} the incentive provided by section 270-a for the making of sales in-state was great enough virtually to require investors to trade in New York.\textsuperscript{57} As such, the statute closely resembled other laws which the Supreme Court had struck down as requiring business operations to be performed in the home state that could just as readily be performed elsewhere.\textsuperscript{58} Nor may the burden that had been imposed by section 270-a be constitutionally justified simply because the statute attempted to neutralize a competitive disadvantage.\textsuperscript{59}

While \textit{Boston Stock Exchange} thus seems compatible with the principles of other commerce clause decisions, it appears inconsistent with a recently-decided Supreme Court case also dealing with discrimination in interstate commerce. At issue in \textit{Hughes v. Alexandria Scrap Corporation}\textsuperscript{60} was the constitutionality of a complex statutory scheme designed to rid Maryland of abandoned automobiles. A study

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\textsuperscript{55} Revenue to the City of New York from the transfer tax totalled $229 million for fiscal 1968. The securities industry as a whole contributed $365.5 million in taxes in 1967. As of that time, the exchanges provided 50,000 jobs at a total payroll of $748 million, and paid $45 million in the rental of 6.5 million square feet of office space. \textit{Id.}

\textsuperscript{56} This conclusion was prompted by the finding that “investors . . . can be expected to choose an exchange on the basis of services, prices, and other market conditions rather than geographical proximity.” \textit{Id.} at 609. Even if this were not the case, however, the Court noted that § 270-a would still offend the commerce clause, since regardless of whether the tax advantage offered by § 270-a was the sole cause of the injury to the regional exchanges, at the very least it reinforced the choice of an in-state exchange and was an “inhibiting force” to the free flow of interstate commerce. \textit{Id.} at 609 n.13.

\textsuperscript{57} See, e.g., Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963), where a taxing scheme imposing a greater tax on persons using equipment in Louisiana that they had manufactured out-of-state than on persons using equipment in Louisiana that they had manufactured in-state was struck down as requiring an out-of-state operator to move his business in-state in order to compete on equal terms. \textit{See also} Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970), where the Court stated that “this particular burden on commerce has been declared virtually per se illegal.”

commissioned by the state legislature had determined that the two main reasons for the in-state accumulation of junked cars were the practice of wrecking companies to stockpile them for spare parts and the low profits earned by wreckers for delivering vehicles to scrap processors. To remedy this situation, Maryland enacted a statute requiring wreckers to obtain a license and pay a fine for any vehicle of a certain age kept on their lots for more than one year. In addition, the statute obligated the state to pay a bounty for each Maryland-titled vehicle delivered to a licensed processor for destruction. As a condition for receiving the bounty, the processor must submit to the state several documents proving his clear title to the vehicle, except in the case of inoperable vehicles over eight years of age ("hulks"), which required no documentation of title.

A 1974 amendment to the law changed the documentation requirements as to hulks. In-state processors are now required to submit only a document executed by the deliverer which certifies his own right to the vehicle and indemnifies the processor against any third-party claims for conversion. Out-of-state processors, however, are required to submit much more elaborate documentation, corresponding to that required for abandoned vehicles in general. The appellee,
an out-of-state processor, charged that this greater documentation requirement induced suppliers to deliver hulks to in-state processors, thereby causing a considerable decline in the appellee's business. By thus giving Maryland processors an advantage over out-of-state businesses, the amendment was alleged to discriminate unconstitutionally against interstate commerce.

While the lower court granted relief to the appellee, the Supreme Court reversed. Mr. Justice Powell, writing for the majority, conceded that the amendment has burdened interstate commerce. Nonetheless, the Court declined to hold the law unconstitutional for the sole reason that Maryland's action was not "the kind of action with which the Commerce Clause is concerned." As in Boston Stock Exchange, the Court noted that the situation presented to it was one of first impression. It characterized past decisions under the commerce clause where state regulations were struck down because of their burdening effect as involving state interference with the interstate market through prohibition or regulation. The Court then distinguished Alexandria Scrap by stating that Maryland had not sought to regulate or prohibit the interstate flow of hulks, but instead had entered into the market to bid up their price. Maryland had made it more lucrative for unlicensed suppliers to dispose of their hulks in-state rather than out-of-state.

During the six-month period immediately following the effective date of the amendment, July 1, 1974, the amount of bounty-eligible hulks delivered to appellee dropped 31.8%. The number of hulks delivered by unlicensed suppliers, who could not enjoy the benefit of the easily procurable wrecker's certificates, declined by 54.9%. 426 U.S. at 801 n.11 and 802 n.12.

Id. at 802.


426 U.S. at 814. The trial court also accepted the argument that the amendment denied appellee equal protection of the laws under U.S. Const. amend. XIV, but the Supreme Court reversed that holding also. 426 U.S. at 814.

Id. at 807.

Id. at 805.

Id. at 807. See text accompanying note 45 supra.


426 U.S. at 808.
Thus, the state’s entrance into the market as a purchaser, a factor not present in *Boston Stock Exchange*, was sufficient to validate a statute the practical effect of which is to favor intrastate commerce over interstate commerce. Maryland’s principal argument in favor of the amendment was that it tends to reduce the amount of state funds flowing to out-of-state processors for the destruction of Maryland-titled hulks.81 In addition, however, the statute serves to require out-of-state processors to conduct their businesses in-state in order to compete effectively with Maryland processors.82 This result, condemned in prior cases,83 was also the factor which led the Court in *Boston Stock Exchange* to invalidate the New York transfer tax.84 Nevertheless, the majority in *Alexandria Scrap* held that “*nothing in the purposes animating the Commerce Clause forbids a State...from participating in the market and exercising the right to favor its own citizens over others.*”85

The issue framed by these two decisions seems apparent: what factors compel the conclusion that a tax advantage given to protect local industry is invalid, yet a statutory scheme designed to give government subsidies so as to protect local industry is valid? Three possible factors in *Alexandria Scrap* merit examination. The first is the entrance by the state into the market in the role of a restrictive purchaser of items in interstate commerce.6 The attacks on statutes which give states rights to prefer the purchasing of goods produced

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81 *Id.* at 812.

82 The trial court found this aspect of the statute to be one of the main grounds for declaring the amendment unconstitutional, noting that a state may not lawfully require “an out-of-state operator to become a resident in order to compete on equal terms” with in-state businesses. *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46,60 (D. Md. 1975), *citing* Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963). While the lower court acknowledged the legitimacy of the state’s desire to conserve subsidy payments in cases where hulks are abandoned outside of Maryland, it concluded that this goal could not be rationally achieved by the 1974 amendment. Instead, the court viewed the practical effect of the differing documentation requirements relating to in-state and out-of-state processors not only as establishing a substantial burden on interstate commerce, but also as an attempt to protect in-state operators from outside competition. 391 F. Supp. at 62-63.

83 *See* note 78 *supra*.

84 *See* text accompanying notes 54 & 55 *supra*.

85 426 U.S. at 810. The Court noted that the appellee is free at any time to withdraw from the bounty program if its benefits do not justify the annual license fee. The Court distinguished the appellee’s position from that of a foreign business that enters a state as the result of private market forces but is thereafter burdened with discriminatory regulation or taxation. *Id.* at 810 n.20.

86 *See* text accompanying notes 77 & 82 *supra*. 
in-state over those produced out-of-state have generally failed. However, those situations involved the purchase of items of commerce for end use. As the dissent in Alexandria Scrap points out, Maryland was not engaged in buying products for end use, and the general presumption that such statutes are constitutional should not apply in this case. The situation in Boston Stock Exchange was not predicated upon New York's purchasing power in the securities industry. Instead, the issue was New York's use of the taxing power to further economic protectionism. Nonetheless, in both cases an end sought was the fostering of local industry, and the means used to achieve this goal discriminated against interstate commerce. Since the Alexandria Scrap Court's reliance upon the state's proprietary purchasing power as a distinguishing factor was not explained by

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\(^7\) See, e.g., Fla. Stat. Ann. § 283.03 (West 1975), which provides in part that "[a]ll the public printing of this state shall be done in the state . . . ."

\(^8\) See Field v. Barber Asphalt Paving Co., 194 U.S. 618 (1904) (power of town aldermen under a state statute to specify purchase of foreign asphalt over domestic upheld); American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), aff'd mem. 409 U.S. 904 (1972) (state statute requiring public printing of state to be performed in-state upheld). But see Garden State Dairies, Inc. v. Sills, 46 N.J. 349, 217 A.2d 126 (1966), noted in 80 Harv. L. Rev. 1337 (1967), where the court refused to declare as valid per se a state statute requiring any milk seller who sold milk to a state agency to certify that during the preceding year he purchased fresh milk produced in New Jersey in an amount at least equal to the amount being sold by him to the state. See generally McAllister, Court, Congress and Trade Barriers, 16 Ind. L.J. 144, 164-65 (1940); Melder, The Economics of Trade Barriers, 16 Ind. L.J. 127, 139-41 (1940).

\(^9\) See cases cited in note 88 supra.

\(^10\) 426 U.S. at 824 (Brennan, J., dissenting).

\(^11\) See American Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (M.D. Fla. 1972) (court acknowledged that "proprietary statutes imposing restraints had heretofore been presumed to place only reasonable and insubstantial burdens on interstate commerce"). But see Garden State Dairies, Inc. v. Sills, 46 N.J. 349, 217 A.2d 126, 130 (1966). When a state purchases products for end use, it may impose whatever conditions or qualifications it deems desirable under the rule that a contract cannot be made without the consent and agreement of both contracting parties. See MacMillan Co. v. Johnson, 269 F. 38, 31 (E.D. Mich. 1920). However, Maryland is not engaged in end-use purchasing. Rather, through the payment of bounties the state is influencing only one aspect of a flow of interstate commerce that begins prior to the state's regulation and continues subsequently. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 824 (1976) (Brennan, J., dissenting). Thus, Maryland's role in the scrap-processing market is not that of a contracting party but of a regulating force which provides an incentive to divert processing to in-state locations. As such, the state should not enjoy the presumption that any restraints it imposes on interstate commerce will result in only insubstantial burdens, since the effects of those restraints extend beyond Maryland's own activities in the scrap market to a larger area of the interstate commerce in scrap metal. Id. at 824 n.6.
thorough analysis and could not be directly supported by precedent, this latter factor does not seem sufficiently important to compel a result different from that reached in Boston Stock Exchange.

A second ground for distinguishing the two cases is that in Alexandria Scrap the basic statutory scheme embodied a clearly legitimate interest: the improvement of the environment by ridding the state of abandoned automobiles. Similarly, the asserted purpose of the amendment was to ensure that bounty payments are limited to hulks abandoned within Maryland, and that public funds are not dispersed to aid the clearance of vehicles abandoned in other states. The purpose of the amendment at issue in Boston Stock Exchange was the encouragement of the New York securities industry and the avoidance of the considerable loss of jobs and revenue that would occur if the exchanges were to move out-of-state. Thus, while Maryland’s ultimate goal seems somewhat less economically motivated, in qualitative terms the two public interests appear equally valid. Where valid public interests are present, the Court has held that the question becomes one of degree, and the extent of the burden on interstate commerce that will be tolerated depends on the nature of the purpose involved and on whether it could be promoted as efficiently with a lesser impact on interstate activities. However, the fact that

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92 The lack of detailed analysis by the majority in Alexandria Scrap disturbed the dissenting justices, who urged a remand to ascertain additional facts concerning the practical effects of the amendment. Id. at 824-26, 829-30 (Brennan, J., dissenting).
93 See text accompanying notes 88 and 89 supra. Prior cases dealing with states’ proprietary purchasing power concerned items bought for end use. unlike the situation in Alexandria Scrap. See note 91 supra.
94 Id. at 811.
95 Id. at 809.
96 See text accompanying notes 49-51 supra.
98 New York could have erased the competitive disadvantage inherent in §270 simply by declaring that sales would not be a taxable event. See text accompanying note 34 supra. Other methods of providing tax relief to persons making in-state sales of securities conceivably could include a deduction on state personal income tax, see, e.g., N.Y. Tax Law § 615(d)(2)(McKinney 1975), or a credit against tax due by a corporation making in-state sales of securities, see, e.g., N.Y. Tax Law § 210(4)(2)(McKinney Supp. 1976). These alternatives are different in form from the type of tax relief afforded by § 270-a, but their effect on interstate commerce appear equally inhibitory. Thus, elimination of sales as a taxable event under § 270 is probably
New York's basic interests were economic while Maryland's were environmental should not have been influential.

Third, the Court in *Alexandria Scrap* noted that the interstate commerce affected by the Maryland amendment appeared to have been created by the bounty scheme itself. That is, prior to the initiation of the subsidy program, the movement of hulks across state lines might have been too small to be significant. The very offering by Maryland of the subsidies increased the interstate flow. The Court stated that it would hesitate to hold that the commerce clause forbids state action interfering with a flow of commerce dependent for its existence upon state subsidies. In *Boston Stock Exchange*, however, the interstate movement was substantial and in no way dependent upon a state subsidy for its existence. Nonetheless, this distinction cannot support the result in *Alexandria Scrap*, since the Court there concluded that the issue was not clearly presented, due to an insufficient record concerning the details of the hulk market prior to the commencement of the bounty scheme.

Thus, the differences in the methods used by Maryland and New York to encourage local industry, in the ultimate legislative goals sought and in the direct control exerted by the states upon the

the most reasonable solution, since any transaction involving the transfer of securities in-state would still be taxable.

The trial court in *Alexandria Scrap* suggested that Maryland could have accomplished its purpose of reducing the flow of state subsidies out-of-state by conditioning the bounty upon a hulk's abandonment in Maryland instead of its being titled there. *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 63 (D. Md. 1975). While such an alternative would have substantially eliminated the interstate commerce, see text accompanying notes 99-100 infra, this result would be unobjectionable, since "the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business." *426 U.S.* at 815-16 (Stevens, J., concurring). The dissent's desire to remand the case was founded in part upon a desire to determine the reasonable alternatives, if any, available to Maryland to accomplish the amendment's legislative purpose. *Id.* at 829 (Brennan, J., dissenting).

* Id. at 809 n.18.

* Id. at 824 n.6.

* See text accompanying notes 86-91 supra.

* See text accompanying notes 91-92 supra.
volume of the particular type of commerce concerned do not explain adequately the opposite conclusions reached in Boston Stock Exchange and Alexandria Scrap. A final distinction between the two cases might lie in the national importance and breadth of the securities industry as compared to the restricted and localized nature of the interstate commerce in abandoned vehicles. A burden upon the latter type of commerce in the pursuit of a legitimate public interest could be viewed as more tolerable than a burden upon the former, simply because of the volume and importance of the interstate activity involved in each. However, such a distinction is not convincing. The validity of restraints on interstate commerce should not depend solely upon the scope of the particular activity concerned. While the degree of inhibition upon a given type of interstate commerce is a crucial factor, the actual volume of that interstate activity, be it the nationwide securities industry or the destruction of one state's abandoned automobiles, should not be determinative. In addition, the special treatment given by Alexandria Scrap to a state which enters the interstate market not as a regulator but as a purchaser could prove troublesome in future cases where states may seek immunization from the commerce clause through adoption of a "purchasing" role. While Boston Stock Exchange seems consistent with prior interpretations of the commerce clause, Alexandria Scrap indicates that more detailed clarification is needed to determine the type of methods a state may constitutionally employ to give commercial advantages to its own citizens in interstate commerce.

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106 See text accompanying notes 96-98 supra.
107 See text accompanying note 97 supra.
109 It is interesting to note that Mr. Justice White, who concurred in the dissenting opinion in Alexandria Scrap, wrote the unanimous opinion of the Court in Boston Stock Exchange. Alexandria Scrap was not mentioned in Boston Stock Exchange.
110 See text accompanying notes 58-60 supra.