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## Notes

“WORKS FOR ME”: WHAT’S NEXT FOR PENNSYLVANIA  
CORPORATE INCOME TAX LIABILITIES AFTER *NEXTEL*  
*COMMUNICATIONS OF THE MID-ATLANTIC*  
v. *COMMONWEALTH*

RILEY BAUER\*

“Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.”<sup>1</sup>

I. INTRODUCTION: ANSWERING THE CALL FOR FAIR TAX TREATMENT  
ACROSS ALL PENNSYLVANIA CORPORATIONS

Some critics argue that large corporations take the above quote to heart and arrange their taxes in a way that best serves them, to the detriment of everyone else.<sup>2</sup> While Pennsylvania is home to some of the na-

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1. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff’d*, 293 U.S. 465 (1935); *see also Commissioner v. Newman*, 159 F.2d 848, 850–51 (2d Cir. 1947) (“Over and over again courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions.”).

2. *See* Matthew Gardner, Robert McIntyre & Richard Phillips, *The 35 Percent Corporate Tax Myth: Corporate Tax Avoidance by Fortune 500 Companies, 2008 to 2015*, INST. TAX’N & ECON. POL’Y. (Mar. 9, 2017) <https://itep.org/the-35-percent-corporate-tax-myth/> [<https://perma.cc/3DND-VWUZ>] (discussing how corporations take advantage of loopholes and special breaks to detriment of general public, “disadvantaged companies,” U.S. economy, state governments, taxpayers, and “integrity of the tax system and public trust therein”); *see also* Patricia Cohen, *Profitable Companies, No Taxes: Here’s How They Did It*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/business/economy/corporate-tax-report.html> [<https://perma.cc/P26F-CCUA>] (discussing how billion-dollar companies do not pay taxes). *But see* Philip Van Doorn, *Here Are the Actual Tax Rates the Biggest Companies in America Pay*, MARKETWATCH (Oct. 14, 2017, 7:49 AM), <https://www.marketwatch.com/story/these-companies-may-enjoy-a-windfall-under-trumps-tax-plan-2017-09-29> [<https://perma.cc/DRA9-HXFY>] (elaborating on effective income tax rates for American companies in Dow Jones Industrial Average and Standard & Poor’s 500). It is important to note that most taxes from businesses are generated by “pass-

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tion's largest companies—including Comcast, Kraft Heinz, and Dick's Sporting Goods—it is also home to a significant number of small businesses.<sup>3</sup> These corporations, large and small, contribute an ample portion of the annual revenue to the Commonwealth of Pennsylvania via the corporate income tax.<sup>4</sup> This tax revenue is vital to finance governmental initiatives, such as the twenty-two Community Revitalization Projects or the forty-five Multimodal Transportation Projects across Pennsylvania for which Governor Tom Wolf recently approved funding.<sup>5</sup>

through businesses,” meaning the company itself does not pay income taxes but rather the income “passes through” to the business owners who then report it on their own individual income tax returns. *See generally* Kyle Pomerleau, *An Overview of Pass-through Businesses in the United States*, TAX FOUND. (Jan. 21, 2015), <https://taxfoundation.org/overview-pass-through-businesses-united-states/> [https://perma.cc/9KTK-C2FX] (discussing how pass-through businesses employ more and earn more net business income than C corporations). Some of the largest American companies are “pass-through businesses,” such as limited liability partnerships. *See, e.g., About Deloitte*, DELOITTE, <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/about-deloitte.html> [https://perma.cc/WQ72-LHZL] (last visited Jan. 15, 2018) (detailing structure of Deloitte US consisting entirely of limited liability partnerships); *see also America's Largest Private Companies: 2017 Rankings*, FORBES, <https://www.forbes.com/largest-private-companies/list/#tab:rank> [https://perma.cc/DMJ3-S25D] (last visited Mar. 5, 2018) (reporting Deloitte's revenue as \$36.8 billion). For further example, the law firm that yielded the most revenue in the U.S. in 2016 is a limited liability partnership. *See The Am Law 100: Firms Ranked by Gross Revenue*, THE AM. LAW. (Apr. 26, 2017), <https://www.law.com/americanlawyer/almID/1202784616627?tokenvalue=C1B297A3-CE62-4604-91CD-8E3415368521> [https://perma.cc/5SUQ-ZLBV] (reporting Latham & Watkins LLP's 2016 gross revenue as \$2.823 billion).

3. *See* Fabiola Cineas, *14 Philadelphia-Area Companies Make Fortune 500 for 2017*, PHILADELPHIA MAG. (June 8, 2017), <http://www.phillymag.com/business/2017/06/08/philadelphia-fortune-500-companies/> [https://perma.cc/ST5C-GLRX]. Some of the largest Pennsylvania companies by market capitalization located in the greater Philadelphia area include Comcast, AmerisourceBergen, Toll Brothers, UGI, Genesis Healthcare, Crown Holdings, Universal Health Services, Lincoln National, and Aramark. *See id.* (reporting Fortune 500 companies near Philadelphia); *see also* Brandon Dixon, *Six Pittsburgh Companies Make Latest Fortune 500 List*, PITTSBURGH POST-GAZETTE (June 7, 2017, 2:34 PM), <http://www.post-gazette.com/business/money/2017/06/07/Six-Pittsburgh-Companies-Fortune-500-List-2017-Kraft-Heinz/stories/201706070169> [https://perma.cc/ZBS9-V8KM] (listing Fortune 500 companies in the Pittsburgh area). Some of the largest Pennsylvania companies by market capitalization located in the greater Pittsburgh area include Kraft Heinz, PNC Financial, PPG, U.S. Steel, Dick's Sporting Goods, and Wesco International. *See id.* (reporting Fortune 500 companies near Pittsburgh); *see also* U.S. SMALL BUS. ADMIN., *Pennsylvania Small Business Economic Profile* (2017) (issuing information regarding Pennsylvania small businesses). In 2014, Pennsylvania had 1,025,045 companies that employed fewer than 500 employees. *See id.* (tabulating number of small business in Pennsylvania).

4. *See* PA. DEP'T OF REVENUE, *Monthly Revenue Report November 2017*, (Nov. 2017), [http://www.revenue.pa.gov/GeneralTaxInformation/News%20and%20Statistics/Documents/MRR/2017/2017\\_11\\_mrr.pdf](http://www.revenue.pa.gov/GeneralTaxInformation/News%20and%20Statistics/Documents/MRR/2017/2017_11_mrr.pdf) (reporting total corporate tax collections as 9.6% of total tax collections for November 2017). This Casebrief focuses on a state tax issue. For a brief discussion on some relevant federal tax concerns, *see infra* notes 108-111 and accompanying text.

5. *See* Eleanor Lamb, *Gov. Tom Wolf Announces 45 Multimodal Projects for Pennsylvania*, TRANSP. TOPICS (Feb. 9, 2018, 2:45 PM), <http://www.ttnews.com/articles/>

Like most states, Pennsylvania allows corporations to lower their tax liabilities in the form of “deductions” if they meet certain conditions.<sup>6</sup> Deductions are used to reduce taxable income for purposes of calculating overall tax liability.<sup>7</sup> Under the Pennsylvania Revenue Code (PRC), one such deduction available for corporations is a “net loss carryover deduc-

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gov-tom-wolf-announces-45-multimodal-projects-pennsylvania [https://perma.cc/UK6T-X2Y4] (detailing Governor Wolf’s announcement of funding \$41.5 million for projects improving “highways, bridges, bike and pedestrian paths, ports and waterways,” and other multimodal transportation projects); *see also* *Governor Wolf Approves Support for 22 Community Revitalization Projects Throughout Pennsylvania*, GOVERNOR’S OFF. (Jan. 3, 2018), https://www.governor.pa.gov/governor-wolf-approves-support-22-community-revitalization-projects-throughout-pennsylvania/ [https://perma.cc/LY5Y-HQB5] (detailing \$5.4 million in state support to Allegheny County, Beaver County, Berks County, Blair County, Cambria County, Cameron County, Delaware County, Elk County, Erie County, Lackawanna County, Lancaster County, Luzerne County, Mercer County, Montour County, Philadelphia County, Schuylkill County, Venango County, Westmoreland County, and York County for various projects). Governor Wolf also recently approved \$1 million worth of funding for a second project for Lackawanna County with the revitalization of a downtown Scranton building. *See* *Governor Wolf Announces \$1 Million in Funding for Scranton Downtown Revitalization Project*, GOVERNOR’S OFF. (Jan. 12, 2018), https://www.governor.pa.gov/governor-wolf-announces-1-million-funding-scranton-downtown-revitalization-project/ [https://perma.cc/PZ4D-L67T] (detailing funding through Redevelopment Assistant Capital Program to assist in creation of new Lackawanna County Government Center). *But see* Robert Harrison, *Turning Business Losses Into Tax Refunds*, J. OF ACCT. (July 1, 2010), https://www.journalofaccountancy.com/issues/2010/jul/20102732.html [https://perma.cc/FLH3-4UEH] (discussing expenditures by businesses with taxes refunded).

6. *See* Nicole Kaeding, *Does Your State’s Corporate Income Tax Code Conform with the Federal Tax Code?*, TAX FOUND. (Dec. 20, 2017), https://taxfoundation.org/state-corporate-income-tax-code-conformity/ [https://perma.cc/7JXP-ZHVG] (detailing which states follow the federal tax code, which allows for deductions by corporations in certain instances). Other mechanisms that governments use to allow taxpayers to reduce their tax liabilities include credits and exemptions. *See generally* *Policy Basics: Tax Exemptions, Deductions, and Credits*, CENTER ON BUDGET & POL’Y PRIORITIES (July 7, 2015), https://www.cbpp.org/research/policy-basics-tax-exemptions-deductions-and-credits [https://perma.cc/HC2F-K4AX] (explaining exemptions, deductions, and credits). *See also* *What Are Exemptions, Deductions, and Credits?*, MONEYTIPS (Feb. 8, 2017), https://www.moneytips.com/exemptions-deductions-and-credits [https://perma.cc/UBJ2-QLCZ] (explaining differences between deductions, exemptions, and credits). Exemptions are similar to deductions in that they reduce taxable income and thereby indirectly reduce taxes owed. *See id.* (noting similarities between exemptions and deductions). The main difference between the two is that exemptions normally deal with relationships of the taxpayer while deductions commonly deal with expenses paid by the taxpayer. *See id.* (distinguishing exemptions from deductions). Credits differ from deductions and exemptions because they directly reduce tax liability, dollar-for-dollar. *See id.* (explaining credits); *see also* Kimberly Amadeo, *Progressive Tax with Examples*, THE BALANCE (Jan. 25, 2018), https://www.thebalance.com/progressive-tax-definition-examples-4155741 [https://perma.cc/JVS8-89VF] (further discussing credits).

7. *See* *Tax Deduction*, INVESTOPEDIA, https://www.investopedia.com/terms/t/tax-deduction.asp?lgl=myfinance-layout-no-ads [https://perma.cc/R5PE-TM5J] (last visited Jan. 29, 2018) (describing tax deductions).

tion.”<sup>8</sup> A corporation is eligible for a net loss carryover deduction when it has incurred a net loss—when the total amount it spent exceeds the total amount it earned—in a prior year and it has not since claimed that loss as a deduction.<sup>9</sup> The corporation then carries over the loss from the prior year to apply it to the current year’s tax calculation in order to decrease the corporation’s taxable income.<sup>10</sup> Formerly, the PRC stipulated that corporations were only allowed to deduct from taxable income an amount of net loss carryover that was equal to the greater of either a fixed dollar amount (a flat dollar cap), which the Commonwealth set for tax year 2007 at \$3 million, or a fixed percentage of the corporation’s taxable income (a percentage cap), which the Commonwealth set for tax year 2007 as 12.5% of taxable income.<sup>11</sup> These options provided a notable advantage to smaller businesses over their larger counterparts.<sup>12</sup>

In *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth*, the Supreme Court of Pennsylvania addressed this discriminatory advantage, and held that the flat dollar cap was unconstitutional under the Pennsylvania Constitution.<sup>13</sup> Specifically, the court held that the cap resulted in a violation of the Pennsylvania Constitution’s Uniformity Clause, which states that subjects “of the same class,” such as all businesses regardless of

8. 72 PA. CONS. STAT. § 7401(3)(4)(a) (2017) (“[F]or the taxable year beginning in 1995 and each taxable year thereafter, a net loss deduction shall be allowed from taxable income . . .”).

9. See Scott Drenkard, *Corporate Net Operating Loss Carryforward and Carryback Provisions by State*, TAX FOUND. (Nov. 6, 2014), <https://taxfoundation.org/corporate-net-operating-loss-carryforward-and-carryback-provisions-state/> [<https://perma.cc/HL4Y-KFEP>] (explaining net loss carryover deductions); see also *Net Loss*, INVESTOPEDIA <https://www.investopedia.com/terms/n/netloss.asp> [<https://perma.cc/7KTY-L3AS>] (last visited Jan. 29, 2018) (explaining net loss as expenses exceeding income for given period of time).

10. See Drenkard, *supra* note 9 (detailing net loss carryover deductions by state). Losses may only be carried forward for twenty years from the year they were incurred. See 72 PA. CONS. STAT. § 7401(3)(4)(c)(2)(A) (2017) (promulgating that losses incurred “1998 and thereafter” may be carried forward twenty years). A net loss is defined in the PRC as “the negative amount for said taxable year . . .” *Id.* § 7401(3)(4)(b)).

11. See, e.g., 72 PA. CONS. STAT. § 7401(3)(4)(c)(1)(A)(II) (promulgating for taxable year 2007 either flat dollar cap of \$3 million or percentage cap of 12.5%, of taxable income).

12. See *Nextel Commc’ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 699 (Pa. 2017), *cert. denied*, 86 U.S.L.W. 3614 (2018) (detailing advantage provided to smaller corporations). Corporations with taxable income of \$3 million or less were given essentially a “de facto” total exemption if they had net loss carryover equal to taxable income. See *id.* at 698–99 (explaining conditions for small corporations). On the other hand, corporations with taxable income over \$3 million were not allowed to exempt their entire income even if they had net loss carryover equal to or greater than their taxable income. See *id.* at 699 (explaining conditions for larger corporations).

13. See *id.* at 699, 703 (elaborating on advantage given to smaller corporations over larger counterparts and holding \$3 million flat deduction as unconstitutional).

their size, must be taxed uniformly.<sup>14</sup> The court then severed the unconstitutional flat dollar cap, while preserving the uniform, and therefore constitutional, percentage cap.<sup>15</sup>

In response to the *Nextel* decision, Governor Wolf signed a bill amending the tax provision for taxable year 2018 and onwards to include only a percentage cap.<sup>16</sup> Though it has for Nextel, litigation related to Pennsylvania's net loss carryover deduction has not yet entirely ceased.<sup>17</sup> While it has since been denied, Nextel filed an Application for Reargument with

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14. *See id.* at 701 (finding unconstitutional via Uniformity Clause) (internal quotations omitted); *see also* PA. CONST. ART. VIII, § 1 ("All taxes shall be uniform, upon the same class of subjects"); *Commonwealth v. Overholt & Co.*, 200 A. 849, 853 (Pa. 1938) (holding that uniformity requires tax to "operate alike on the classes of things or property subject to it.").

15. *See Nextel*, 171 A.3d at 705 ("Accordingly, we sever only the \$3 million flat deduction from the NLC.").

16. *See* Christine M. Hanhausen, Jonathan E. Maddison, Ashley R. Rivera, Kyle O. Sollie & Robert E. Weyman, *Pennsylvania Enacts Tax Bill*, REED SMITH (Oct. 30, 2017), <https://www.reedsmith.com/en/perspectives/2017/10/pennsylvania-enacts-tax-bill> (describing new Pennsylvania tax bill, including parts of bill that were enacted in response to *Nextel* decision); *see also* 72 PA. CONS. STAT. § 7401(3)(4)(c)(1)(A)(II) (2017); *Pennsylvania Law Removes NOL Dollar Cap and Increases Its Percentage Cap, Establishes Sales Tax Provisions for Marketplace Providers, and Makes Other Changes*, EY (Nov. 6, 2017), <https://taxnews.ey.com/news/2017-1857-pennsylvania-law-removes-nol-dollar-cap-and-increases-its-percentage-cap-establishes-sales-tax-provisions-for-marketplace-providers-and-makes-other-changes> [<https://perma.cc/2E63-MWE8>] (describing changes effectuated by signing of bill). For tax year 2018, the cap will be at 35% of taxable income. *See id.* (detailing percentage cap for tax year 2018). For tax year 2019 and onwards, the cap will be at 40% of taxable income. *See id.* (detailing percentage cap for tax year 2019 and thereafter).

17. *See* *Petition for Writ of Certiorari, Nextel Comm'ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682 (Pa. 2017), cert. denied, 86 U.S.L.W. 3614 (2018) (No. 17-1506), 2018 U.S. S. Ct. Briefs LEXIS 1813 (raising due process right to relief claim as chief reason to grant review). *But see* Jad Chamseddine, *U.S. Supreme Court Denies Nextel's Attempt to Recoup \$3.94 Million*, TAX NOTES (June 12, 2018), <https://www.taxnotes.com/state-tax-notes/gains-and-losses/us-supreme-court-denies-nextels-attempt-recoup-394-million/2018/06/18/284d0> (reporting U.S. Supreme Court denying certiorari on June 11, 2018). *See also* Leslie Pappas, *Nextel Asks Pennsylvania Supreme Court to Rehear Case*, BLOOMBERG NEWS (Nov. 7, 2017), <https://www.bna.com/nextel-asks-pennsylvania-n73014471776/> [<https://perma.cc/UA5Q-XNZV>] (reporting Nextel's application for reargument filed roughly two weeks after *Nextel* decision). The crux of Nextel's petition is that application of the *Nextel* decision to *R.B. Alden* would create "an 'irreconcilable conflict' in remedy" because if the flat dollar cap is deemed unconstitutional for *R.B. Alden* then the company will enjoy an unlimited deduction for tax year 2006. *See id.* (discussing implications of applying *Nextel* to *R.B. Alden*); *see also* Matt Wilk, *Pennsylvania Provides Guidance on the Corporate NOL Limitation*, RSM (Dec. 15, 2017), <http://rsmus.com/what-we-do/services/tax/additional-tax-resources/blog/december-2017/pennsylvania-provides-guidance-on-the-corporate-nol-limitation.html> [<https://perma.cc/JH5Y-JZ7D>] (discussing *Nextel* in the context of *R.B. Alden*). For tax year 2006 and all tax years before, there was no percentage cap, but only a flat dollar cap of \$2 million. *See* 72 PA. CONS. STAT. § 7401(3)(4)(c)(1)(A)(I) (imposing flat dollar cap for all tax years "before January 1, 2007, [of] two million dollars").

Application for Consolidation in *R.B. Alden Corp. v. Commonwealth*.<sup>18</sup> *R.B. Alden*, a sister case to *Nextel*, deals with an earlier version of the net loss carryover deduction when there was solely a flat dollar cap and not a percentage cap at all.<sup>19</sup> At the appellate level, the Commonwealth Court held that the flat dollar cap created different classes of taxpayers, and thus was unconstitutional under the Pennsylvania Constitution.<sup>20</sup> The decision was appealed to the Supreme Court of Pennsylvania and is still pending.<sup>21</sup>

This Casebrief argues that by invalidating and effectively discontinuing the flat dollar cap, the Supreme Court of Pennsylvania in *Nextel* upset long-standing legislation and extinguished a significant advantage that the General Assembly had given small business owners.<sup>22</sup> Part II of this Casebrief will provide context and background to the constitutional issues related to the flat dollar cap and explain the relevant Pennsylvania Constitution clause and conflicting statutory provisions.<sup>23</sup> Part III will recount

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18. 169 A.3d 727 (Pa. Commw. Ct. 2017); see *Supreme Court of Pennsylvania Holds That the State's Net Operating Loss Deduction Limitation as Applied Is Unconstitutional*, BDO (Dec. 2017), <https://www.bdo.com/insights/tax/state-and-local-tax/supreme-court-of-pennsylvania-holds-that-the-state> [<https://perma.cc/3GJY-X3ZJ>] (detailing *Nextel*'s post-decision actions); see also Act 43-2017 *Notice of Pennsylvania Supreme Court Decision Concerning Constitutionality of Corporate Net Income Tax Net Loss Deduction*, 48 Pa. Bull. 701 (Jan. 27, 2018) (noting Pennsylvania Supreme Court issuing order denying *Nextel*'s Application for Reargument on January 4, 2018).

19. See *R.B. Alden Corp.*, 169 A.3d at 729 (discussing \$2 million limit on amount of net loss carryover deduction allowed for tax year 2006). See generally Kyle Sollie & Paul Melniczak, *Next Steps for Pennsylvania Taxpayers Following Nextel*, REED SMITH (Nov. 8, 2017), <https://www.reedsmith.com/en/events/2017/11/next-steps-for-pennsylvania-taxpayers-following-nextel> (highlighting similarities between *Nextel* and *R.B. Alden*).

20. See *id.* at 730 (“[T]he net loss carryover deduction limitation creates separate classes of taxpayers/corporations with unequal tax burdens, based solely on income. Pennsylvania law clearly provides that the amount of a taxpayer’s income is not a reasonable distinction on which to treat taxpayers differently.”).

21. See Matthew Melinson, Vito Cosmo, Gregory Rineberg, Patrick Skeehan, Katherine Piazza & Jamie Yesnowitz, *Pennsylvania Supreme Court Finds Net Loss Carryover Deduction Cap Violates Uniformity Clause; Severs Fixed Dollar Limitation*, GRANT THORNTON (Nov. 30, 2017), <https://www.grantthornton.com/~media/content-page-files/tax/pdfs/SALT-alerts-states-M-W/PA/2017/PA-SC-finds-net-loss-carryover-deduction-11-30.ashx> [<https://perma.cc/KV73-2JEV>] (detailing *R.B. Alden* appeal within context of *Nextel*).

22. See *Nextel Commc’ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 699 (Pa. 2017), *cert. denied*, 86 U.S.L.W. 3614 (2018) (eliminating effective two-class system of taxpayers to level out any advantage given to one particular group); see also Randy Varner, *Pennsylvania High Court Finds NOL Cap Unconstitutional; Severs Offending Provisions; Denies Refund to Taxpayer*, MCNEESE (Oct. 18, 2017), <https://www.mcneeseandlocaltax.com/2017/10/pennsylvania-high-court-finds-nol-cap-unconstitutional-severs-offending-provision-denies-refund-taxpayer/> [<https://perma.cc/X8VX-VK75>] (emphasizing ramifications of *Nextel* decision to small businesses).

23. For a discussion of the background and legal environment in which the *Nextel* decision was made, see *infra* notes 28–66 and accompanying text.

the facts and procedure that led to the decision in *Nextel*.<sup>24</sup> Part IV will discuss the court's reasoning for finding only the net loss carryover flat dollar cap unconstitutional.<sup>25</sup> Part V will analyze the consistency of the court's conclusions in *Nextel* with respect to prior decisions and reasoning.<sup>26</sup> Finally, Part VI will examine the impact that the *Nextel* decision could potentially have on corporations operating in Pennsylvania and their corporate tax liabilities.<sup>27</sup>

## II. THE #4-1-1: A BACKGROUND ON THE ISSUES PRESENT IN *NEXTEL*

For almost a century and a half, the Pennsylvania Constitution has mandated the General Assembly to uniformly prescribe taxes across the same class of taxpayers.<sup>28</sup> And for almost four decades, the PRC has made a net loss carryover deduction available for corporations, commonly subject to caps.<sup>29</sup> Large corporations contend that these caps create distinct classes artificially and arbitrarily based on revenue—one class that pays, another class that does not—and thereby impose non-uniform taxes on what are, in reality, subjects of the same class.<sup>30</sup> Through the years, the Supreme Court of Pennsylvania has honed its Uniformity Clause jurisprudence to address the rift created between this concrete principle of uniformity and the relatively recent development of deductions and caps.<sup>31</sup>

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24. For a retelling of the facts and discussion of the procedure leading up to *Nextel*, see *infra* notes 67–83 and accompanying text.

25. For a narrative analysis of *Nextel*, see *infra* notes 84–103 and accompanying text.

26. For a critical analysis of *Nextel* in light of the Supreme Court of Pennsylvania's Uniformity Clause jurisprudence, see *infra* notes 104–125 and accompanying text.

27. For a discussion of the impact that *Nextel* will potentially have on small business owners, large business owners, business advisors, and the Commonwealth, see *infra* notes 126–145 and accompanying text.

28. For a discussion of the Uniformity Clause of the Pennsylvania Constitution, see *infra* notes 32–35 and accompanying text.

29. For a discussion of net loss carryover deductions in the PRC, see *infra* notes 36–50 and accompanying text.

30. See *Nextel Commc'ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 699 (Pa. 2017), *cert. denied*, 86 U.S.L.W. 3614 (2018) (discussing how caps “effectively create[ ]” two classes). The court explains that one class is exempt from paying any corporate net income tax solely due to having income less than \$3 million. See *id.* (discussing first and larger class). The other class, the one *Nextel* falls into, consists of those corporations that had income in excess of \$3 million. See *id.* (discussing second class).

31. For a discussion on Supreme Court of Pennsylvania precedent regarding the Uniformity Clause, see *infra* notes 51–66 and accompanying text.



A. *Statewide Coverage: The Uniformity Clause*

The Uniformity Clause is the only provision within the Pennsylvania Constitution that addresses the state's taxing power.<sup>32</sup> Without creating a detailed definition, the Supreme Court of Pennsylvania stated that in order to be uniform, a tax must "operate alike on the classes of things or property subject to it."<sup>33</sup> The clause was first adopted in 1874 as a response to the legislative implementation of discriminatory tax laws that showed preference to particular industries and individuals.<sup>34</sup> To this day, the clause remains the crux of the issue in many tax cases argued before the Supreme Court of Pennsylvania.<sup>35</sup>

B. *Rollover Plan: Net Loss Carryover Provisions*

The net loss carryover deduction was first introduced in the PRC in 1980, exclusively with a flat dollar cap, in an effort to encourage businesses to make substantial investments in new technologies.<sup>36</sup> A flat dollar cap is

32. See PA. CONST. ART. VIII, § 1; see also Vito Cosmo, Matthew Melinson & Patrick Skeehan, *The Power Behind Pennsylvania's Uniformity Clause*, PA. INST. OF CERTIFIED PUB. ACCT. (Sept. 3, 2015), <https://www.picpa.org/articles/picpa-news/2015/09/03/the-power-behind-pennsylvania-s-uniformity-clause> [<https://perma.cc/NV62-H47K>] (discussing power of this "simple sentence").

33. See *Commonwealth v. Overholt & Co.*, 200 A. 849, 853 (Pa. 1938) (defining uniformity in context of Uniformity Clause).

34. See ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 578 (1985) ("Tax exemptions which had been given to favored groups encouraged the approval of the uniformity clause which was inserted into the Constitution."); see also *Nextel*, 171 A.3d at 694 (discussing adoption of Uniformity Clause). The main industry receiving preferential treatment prior to the adoption of the Uniformity Clause was the railroad industry. See *Nextel*, 171 A.3d at 694–95 (noting railroad industry as "primary beneficiary of support from [the] Commonwealth's public fisc"). The railroad industry was not only favored by special tax laws but also was appropriated significant funds for construction and was given charters for exclusive operation in certain parts of the Commonwealth. See *id.* (detailing benefits received by railroad industry).

35. See, e.g., *Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue*, 154 A.3d 268, 271 (Pa. 2016) (establishing statutory provision at issue with Uniformity Clause). Frequently, the issue falls to whether a classification of similar things is legitimate or not. See *id.* at 272–73 (discussing issue of classification). While the Supreme Court of Pennsylvania in *Mount Airy* noted that the General Assembly has significant discretion, nonetheless a reasonable classification requires non-arbitrary, just, and not unreasonably discriminatory results with its method of calculating tax. See *id.* at 273 (quoting *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1211 (Pa. 2009)). See generally Robert Swift, *Pennsylvania's Income Tax Shaped by Constitution*, TIMES-TRIBUNE (June 22, 2009), <http://thetimes-tribune.com/news/pennsylvania-s-income-tax-shaped-by-constitution-1.78136> [<https://perma.cc/F4K5-Z9YV>] (detailing importance of Uniformity Clause).

36. See Act of December 8, 1980, 1980 Pa. Laws 1117 § 2 (instituting first net loss carryover deduction); *Nextel*, 171 A.3d at 704 (discussing policy for net loss carryover deduction). The legislative history shows that the General Assembly intended the deduction to encourage businesses to develop new technologies and to acquire any infrastructure necessary to do so. See *Nextel*, 171 A.3d at 704. (discussing policy). The deduction would allow corporations to deduct the losses sustained during their investing years against their revenues enjoyed during more

a limitation of a particular dollar value on the amount of a corporation's loss eligible for deduction for that year.<sup>37</sup> For example, suppose in Year 1, Corporation X has a net loss of \$1.5 million and then in Year 2, Corporation X has taxable income of \$1 million.<sup>38</sup> If the PRC established a flat dollar cap of over \$1 million, for instance \$3 million, Corporation X will be able to fully deduct its taxable income in Year 2 with the net loss carryover of Year 1 and will have a remaining \$500,000 of that net loss to carry forward to another year with positive taxable income.<sup>39</sup> If, instead, the flat dollar cap were only \$750,000, Corporation X would only be able to deduct \$750,000 of its taxable income.<sup>40</sup> Corporation X would still then have to pay taxes on the remaining \$250,000 taxable income that was not deducted.<sup>41</sup> However, Corporation X would still have the remaining \$750,000 of net loss to carry forward to apply to another year with positive taxable income.<sup>42</sup>

The deduction remained almost exclusively a flat dollar cap from 1980 until 2006.<sup>43</sup> From 2006 until December 27, 2017, the deduction included a flat dollar cap as well as a percentage cap.<sup>44</sup> A percentage cap is a limitation of a percent-based value, determined by a calculation of a percentage of taxable income on the amount of a corporation's loss eligi-

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profitable future years. *See id.* (detailing mechanism of net loss carryover deduction). The flat dollar cap was implemented in order to maintain the Commonwealth's financial health. *See id.* (explaining justification for flat dollar cap). In their argument, the Department states the inclusion of a cap indicates that the Commonwealth could not "sustain an unlimited deduction." *See id.* at 701 (using legislative history of caps to buttress argument).

37. *See Nextel*, 171 A.3d at 698–99 (explaining flat dollar cap).

38. *See generally id.* (detailing numbers relevant to calculation of net loss carryover deduction).

39. *See* Nicholas Fiore, *How to Calculate Net Operating Losses for Individuals*, AICPA (Oct. 16, 2014), [https://www.aicpastore.com/Content/media/PRODUCER\\_CONTENT/Newsletters/Articles\\_2014/Tax/Net-Operating-Losses.jsp](https://www.aicpastore.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2014/Tax/Net-Operating-Losses.jsp) [<https://perma.cc/AD4F-ME8B>] (discussing how to calculate net loss carryover).

40. *See id.* (detailing calculation).

41. *See Tax Loss Carryforward*, INVESTINGANSWERS <http://www.investinganswers.com/financial-dictionary/tax-center/tax-loss-carryforward-4151> [<https://perma.cc/EWY5-27GA>] (last visited Jan. 29, 2018) (discussing tax consequences if taxable income is not fully deducted).

42. *See id.* (explaining how net loss is truly carried forward).

43. *See, e.g.*, Act of December 8, 1980, 1980 Pa. Laws 1117 § 2 (instituting flat dollar cap). There was a brief period in the early 1990s where the deduction was removed in its entirety but was then later reinstated. *See* Act of June 16, 1994, P.L. 279, No. 48, § 10 (reinstating flat dollar cap); Act of August 4, 1991, P.L. 97, No. 22, § 16 (removing flat dollar cap). For further discussion of the use of a flat dollar cap's treatment in Pennsylvania, see *infra* note 44 and accompanying text.

44. *See* 72 PA. CONS. STAT. § 7401(3)(4)(c)(1)(A) (2017) (promulgating caps for taxable years); *see also* Aaron Marines, *New Pending Rules for Corporate Net Loss Carryover Deductions in Pennsylvania*, LANCASTER LAW BLOG (Dec. 18, 2017), <https://www.lancasterlawblog.com/2017/12/articles/authors/aaron-marines/new-pending-rules-for-corporate-net-loss-carryover-deductions-in-pennsylvania/> [<https://perma.cc/BZ7G-VYCCQ>] (noting General Assembly drafting new net loss carryover statute in anticipation of *Nextel* decision).

ble for deduction for that year.<sup>45</sup> For example, suppose the percentage cap is 12.5% of taxable income and in Year 1, Corporation X once again has a net loss of \$1.5 million and then in Year 2, Corporation X once again has taxable income of \$1 million.<sup>46</sup> Corporation X would only be able to deduct \$125,000, or 12.5% of \$1 million, from its taxable income.<sup>47</sup> Corporation X would still have to pay tax on the remaining \$875,000 of taxable income not deducted, as compared to the remainder of \$250,000 under a flat dollar cap of \$750,000.<sup>48</sup> Corporation X would also then still have the remaining \$1,375,000 of net loss to carry forward to apply to another year with positive taxable income.<sup>49</sup> While a percentage cap likely means net loss will be spread over many more years than it would under a flat dollar cap, a percentage cap also means that if a corporation has any taxable income, that corporation will necessarily have a tax liability.<sup>50</sup>

### C. Call Back: Prior Supreme Court of Pennsylvania Decisions

Decided only a few years after the adoption of the Uniformity Clause, *In re Cope's Estate*<sup>51</sup> lays the foundation for the jurisprudence of the clause.<sup>52</sup> At the time of the case, the Direct Inheritance Tax Law excluded all estates worth \$5,000 or less from paying a direct inheritance tax.<sup>53</sup> The court found the tax, dependent solely on property value, to be a means of unequally distributing the tax burden by granting an outright exemption for certain class members.<sup>54</sup> The court ruled in favor of the estate of

45. See *Nextel Commc'ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 698–99 (explaining percentage cap).

46. See generally *id.* (detailing numbers relevant to calculation of net loss carryover deduction).

47. See *id.* (explaining calculation of net loss carryover deduction subject to percentage cap).

48. See *How to Calculate Capital Loss Carryover*, THE MOTLEY FOOL, <https://www.fool.com/knowledge-center/how-to-calculate-capital-loss-carryover.aspx> [https://perma.cc/HU68-SB5M] (last visited Jan. 29, 2018) (explaining net loss carryover deduction). For an example demonstrating the results with a flat dollar cap, see *supra* notes 38–42 and accompanying text.

49. See *id.* (detailing how net loss is carried forward to future years).

50. See *Nextel*, 171 A.3d at 698–99 (explaining implications of flat dollar cap versus percentage cap).

51. 43 A. 79 (Pa. 1899).

52. See *Nextel*, 171 A.3d at 696 (noting Pennsylvania Supreme Court's longstanding and steadfast adherence to interpretation of Uniformity Clause in *In re Cope's Estate*).

53. See *In re Cope's Estate*, 43 A. at 79–80 (discussing Direct Inheritance Tax Law and implications).

54. See *id.* at 81 (declaring what qualities of tax law lead to unconstitutionality). The Supreme Court of Pennsylvania noted that the legislature has the authority to “justly and fairly, but never arbitrarily” classify subjects, but stated that a purported classification based “solely on a difference in quantity of precisely the same kind of property” is unconstitutional. See *id.* (justifying holding). The court stated that the Direct Inheritance Tax Law instituted an “arbitrary ratio” as to which estates are taxed and which are exempt. See *id.* (declaring Direct Inheritance Tax Law as arbitrary).

Marmaduke Cope, which was worth nearly \$1 million, and held that the tax rate classification structure was “necessarily unjust, arbitrary and illegal” and therefore, unconstitutional.<sup>55</sup>

Since *In re Cope's Estate*, the Supreme Court of Pennsylvania has heard a number of other tax cases where the tax provisions at issue were alleged to have violated the Uniformity Clause, similar to the tax provisions at bar in *Nextel*.<sup>56</sup> In *Mount Airy #1, LLC v. Department of Revenue*,<sup>57</sup> per the Pennsylvania Race Horse Development and Gaming Act, casinos located outside Philadelphia County were obligated to pay both an “annual county local share assessment” and a “municipal local share assessment,” while casinos located within Philadelphia County were only required to pay the annual county local share assessment.<sup>58</sup> Through the municipal local share assessment, casinos outside Philadelphia County were then necessarily subdivided based on whether they had yielded above or below \$500 million in slot machine revenue.<sup>59</sup> The court found merit in the argument made by Mount Airy, a hotel and casino located in Mount Pocono, Pennsylvania, that through this subdivision, the General Assembly was tax-

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55. *See id.* (discussing constitutionality of Direct Inheritance Tax Law). In total, the estate of Marmaduke Cope was worth \$917,519.88. *See id.* at 80 (valuing estate).

56. *See, e.g., Lebanon Valley Farmers Bank v. Commonwealth*, 83 A.3d 107, 114 (Pa. 2013) (holding that averaging provision of shares tax not unconstitutional due to lack of uniformity from “justifie[d] . . . short-term disparity of result” from merger of two institutions).

57. 154 A.3d 268 (Pa. 2016).

58. *See id.* at 271 (discussing facts). The act defined gross terminal revenue (GTR) as “‘all cash or cash equivalent wagers received by a slot machine,’ less any amounts paid out to players in various forms.” *See id.* (quoting 4 PA. CONS. STAT. § 1103 (2017) (defining gross terminal revenue)). All slot machine licensees, regardless of location, had to pay a daily tax of 34% of GTR. *See id.* at 279 (breaking down aspects of Gaming Act). Additionally, casinos located within Philadelphia County had to pay an annual county local share assessment of 4% of the casino’s GTR. *See id.* at 271 (discussing tax assessment for Philadelphia casinos). If, instead, the casinos were located outside of Philadelphia County, they had to pay both an annual county local share assessment of 2% of the casino’s GTR and a municipal local share assessment, which is the greater of either 2% of the casino’s GTR or a lump sum of \$10 million. *See id.* (discussing tax assessment for non-Philadelphia casinos). *See generally* Christine Hanhausen, Frank Gallo, Kenneth Levine & Lee Zoeller, *PA Supreme Court Declares Portion of Slot Machine Tax Unconstitutional; Provides Possible Preview of Pending NOL Cap Case*, REED SMITH (Sept. 29, 2016), <https://www.reedsmith.com/en/perspectives/2016/09/pa-supreme-court-declares-portion-of-slot-machine> (discussing the case and its impact).

59. *See id.* at 271–72 (explaining further classification of casinos located outside Philadelphia County based on slot machine revenue). With the municipal local share assessment, if a casino located outside Philadelphia County had GTR at or below \$500 million, it necessarily would pay the \$10 million lump sum. *See id.* at 271 (detailing subdivision implications for casinos with GTR at or below \$500 million). If a casino located outside Philadelphia County had GTR above \$500 million, the casino would always pay more than \$10 million for its municipal local share assessment. *See id.* (detailing subdivision implications for casinos with GTR above \$500 million).

ing them discriminately.<sup>60</sup> Thereafter, the court held the local share assessment unconstitutional as a non-uniform tax.<sup>61</sup>

In *Valley Forge Towers Apartments N, LP v. Upper Merion Area School District*,<sup>62</sup> the school district, as a taxing district, had the power to appeal property assessments within its boundaries.<sup>63</sup> In these “reverse tax appeals,” the school district specifically targeted commercial properties while declining to appeal assessments of single-family residential homes.<sup>64</sup> The court held that the school district was not able to adopt a program of targeting a specific sub-classification of properties (i.e., commercial properties), where that sub-classification is drawn according to property type, for assessment.<sup>65</sup> Through both the *Mount Airy* and *Valley Forge* decisions, the Supreme Court of Pennsylvania sharpened its Uniformity Clause jurisprudence, holding that differences in monetary value associated with property were not legitimate criteria for tax classification.<sup>66</sup>

60. *See id.* at 272 (finding *Mount Airy*’s argument persuasive). The court stated that the General Assembly effectively created a “variable-rate tax.” *See id.* at 276 (noting lack of uniformity in “such quantitative distinctions”). The court stated that, while it might not be explicit in the language of the statute, the municipal local share assessment creates a “second tax bracket with a marginal rate of 2% for casinos with GTR greater than \$500 million.” *See id.* (discussing tax effectively created by statutory thresholds).

61. *See id.* at 280 (discussing holding). The court severed the local share assessment portions from the Gaming Act, left the remaining provisions intact, and left the task of replacing the severed provisions to the General Assembly. *See id.* at 279–80 (discussing rationale for severing completely and leaving to General Assembly for redrafting).

62. 163 A.3d 962 (Pa. 2016).

63. *See id.* at 966 (detailing facts). Given constant market fluctuations, real property needs to be reevaluated in order to accurately reflect property value and assess taxes accordingly. *See id.* (discussing cause for reassessments). At the time of the case, 80% of single-family homes in the district were undervalued in their assessments. *See id.* (discussing need for reassessment).

64. *See id.* (describing motivations of school district regarding assessments). At the advice of a realty firm, the Upper Merion Area School District targeted commercial properties, like apartment complexes, because their property values are generally higher than those of single-family homes. *See id.* (detailing advice received). Further, residents who vote in local elections own most of the single-family homes, and therefore, for political reasons, appeals for their assessments were not pursued. *See id.* (discussing political motive).

65. *See id.* at 978 (discussing holding). The court held by reversing the Commonwealth Court’s sustaining of the School District’s objections and remanded the matter back to the lower court. *See id.* (detailing procedure of holding); *see also* Jeffrey Wilhelm, *PA Supreme Court Prohibits Taxing Jurisdictions from Specifically Targeting Commercial Properties for Reverse Assessment Appeals*, REED SMITH (July 6, 2017), <https://www.reedsmith.com/en/perspectives/2017/07/pa-sup-ct-prohibits-taxing-jurisdictions-targeting-commercial-properties> (discussing impact of *Valley Forge* decision).

66. *See* *Mount Airy #1, LLC v. Pennsylvania Dep’t of Revenue*, 154 A.3d 268, 280 (Pa. 2016) (holding different levels of revenue as arbitrary with classifying casinos); *see also* *Valley Forge*, 163 A.3d at 979–80 (holding initiative to assess only high value properties as discriminatory classification). Over a century ago, shortly after the adoption of the Uniformity Clause, the Supreme Court of Pennsylvania held that disparate tax treatment based solely on asset value is unconstitutional. *See In re*

### III. HOW THE CABLES WERE LAID OUT: THE FACTS AND PROCEDURE OF *NEXTEL*

In April 2017, the Supreme Court of Pennsylvania heard the parties' cases in *Nextel*, which contained legal arguments relatively similar to those used in *Mount Airy* and *Valley Forge*.<sup>67</sup> In short, while Nextel had sufficient net loss carryover greater than its income for the year, the company thought it was unfair that it still had to pay taxes, unlike 98.8% of its corporate competitors, simply due to its volume of revenue.<sup>68</sup> The Commonwealth Court ultimately sided with Nextel and found both of the net loss carryover caps unconstitutional.<sup>69</sup>

#### A. "Roll Right, Roll Call": Recounting the Facts of *Nextel*

In 2007, Nextel, a mobile telecommunications services provider, earned \$45,053,282 in total taxable income.<sup>70</sup> The company had a cumulative net loss carryover of \$150,636,792.<sup>71</sup> Under the 2007 PRC, Nextel was only able to deduct 12.5% of their total taxable income, or \$5,631,660, because its total taxable income was greater than the flat dollar cap of \$3 million.<sup>72</sup> Therefore, despite having a cumulative net loss carryover in excess of its total taxable income, the company still had to pay tax on the remaining taxable income after the deduction, which amounted to \$39,421,622.<sup>73</sup> Nextel made the payment but then immediately filed a refund claim to recover the \$3,938,220 of taxes paid.<sup>74</sup>

#### B. Procedure: The Commonwealth Court Rules in Favor of an Unlimited Plan

Nextel first filed its refund claim against the Pennsylvania Department of Revenue (Department) with the Board of Appeals, claiming the

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*Cope's Estate*, 43 A. 79, 81 (Pa. 1899) (holding different monetary values as invalid when classifying estates).

67. See *Nextel Commc'ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 689–93, 701–02 (Pa. 2017), *cert. denied*, 86 U.S.L.W. 3614 (2018) (outlining arguments of Nextel and Department of Revenue).

68. See *id.* at 687 (elaborating how only 1.2% of all Pennsylvania corporations incurred tax liability in 2007). For a further discussion on the facts at issue in *Nextel*, see *infra* notes 70–74 and accompanying text.

69. For a discussion on the Commonwealth Court decision, see *infra* notes 75–83 and accompanying text.

70. See *Nextel*, 171 A.3d at 685 (reporting Nextel's net income for tax year 2007).

71. See *id.* (detailing Nextel's accumulated net loss carryover from years prior to tax year 2007).

72. See *id.* at 685–86 (discussing options of Nextel's net loss carryover deduction). See generally 72 PA. CONS. STAT. § 7401(3)(4)(c)(1)(A)(II) (2017) (promulgating caps for tax year 2007).

73. See *Nextel*, 171 A.3d at 686 (discussing Nextel's tax liabilities).

74. See *id.* (documenting Nextel's immediate filing for refund of \$3,938,220).

net loss carryover provision was unconstitutional.<sup>75</sup> The Board of Appeals ruled that it did not have the legal authority to address the issue posed and subsequently rejected the claim.<sup>76</sup> Nextel then petitioned to the Board of Finance and Revenue, which denied the petition and rejected the argument.<sup>77</sup> Upon the Board of Finance and Revenue's denial, Nextel appealed to the Commonwealth Court.<sup>78</sup> The Commonwealth Court rejected the Department's arguments and eliminated both caps for the deduction.<sup>79</sup> The court held that the distinction made by the net loss carryover provision was based solely on revenue and was "unjust, arbitrary, and illegal."<sup>80</sup> Lastly, the Commonwealth Court directed the Department to refund Nextel its corporate net income tax paid of almost \$4 million.<sup>81</sup> Judge Pellegrini wrote a dissenting opinion arguing in favor of severability, the process of striking only the invalid provisions of a statute while keeping the valid provisions intact.<sup>82</sup> In his opinion, Judge Pellegrini argued that by severing the flat dollar cap and preserving the percentage cap, the legislative intent behind the net loss carryover deductions can and should be maintained.<sup>83</sup>

75. *See id.* (describing Nextel's first appeal). Nextel argued, as it did later at trial, that the net loss carryover deduction complete with the cap was unconstitutional under the Uniformity Clause. *See id.* (noting Nextel's initial argument).

76. *See id.* (discussing Board of Appeals' rejection on grounds that it had no legal authority to rule on constitutional challenge for opining on such challenges are outside the scope of the Board's power).

77. *See id.* (describing Board of Finance and Revenue's response). In its petition to the Board of Finance and Revenue, Nextel asserted its right to carry over all prior net losses to fully deduct its taxable income. *See id.* (describing Nextel's petition). The Board denied the petition and rejected the argument, noting that while it was not authorized to determine questions of a tax provision's constitutionality, it could "apply the law as it was written." *See id.* (discussing holding of Board and what authority it has).

78. *See id.* (detailing Nextel's third appeal). The Pennsylvania judiciary system is split into two separate courts at the intermediate appellate levels: the Superior Court and the Commonwealth Court. *See Learn, UNIFIED JUD. SYS. OF PA.* <http://www.pacourts.us/learn> [<https://perma.cc/AUK2-X654>] (last visited Jan. 30, 2018) (detailing Pennsylvania court system). The Superior Court hears appeals in criminal and most civil cases from the Courts of Common Pleas. *See id.* (discussing duties of Superior Court). The Commonwealth Court hears appeals of decisions by state agencies, as was the case in *Nextel*, and where the Commonwealth is a party. *See id.* (discussing duties of Commonwealth Court).

79. *See Nextel Commc'ns of the Mid-Atl., Inc. v. Commonwealth of Pennsylvania*, 129 A.3d 1, 9–11 (Pa. Commw. Ct. 2015) (discussing holding).

80. *See id.* (discussing reasoning for holding).

81. *See id.* at 13 (decreeing order for refund from Department to Nextel). The actual amount that the Department had to refund Nextel per the Commonwealth Court's order was \$3,938,220. *See id.* (ordering refund).

82. *See id.* at 14–15 (Pellegrini, J., dissenting) (arguing in favor of severability). In his dissent, Judge Pellegrini quotes the Statutory Construction Act which states that unconstitutional provisions should be severed from any constitutional provisions so long as they are not "so essentially and inseparably connected with" them. *See id.* (Pellegrini, J., dissenting) (citing 1 PA. CONS. STAT. § 1925 (1972)).

83. *See id.* at 15 (Pellegrini, J., dissenting) (arguing that severability would achieve majority's purpose while preserving General Assembly's intention to limit

IV. "RAISING THE BAR": A NARRATIVE ANALYSIS OF *NEXTEL*

Ultimately, the Supreme Court of Pennsylvania affirmed in part and reversed in part the decision of the Commonwealth Court.<sup>84</sup> The majority agreed that, as applied to Nextel, the two different caps arbitrarily produced two separate classes, but the court severed solely the flat dollar cap to remedy and denied Nextel its refund.<sup>85</sup> Justice Baer provided a concurring opinion arguing that the flat dollar cap was facially unconstitutional, not just unconstitutional as applied in this circumstance.<sup>86</sup>

A. *Calling the Shots: The Majority's Response to Nextel's Call*

Justice Todd, writing for the majority, began the analysis with a review of the parties' arguments.<sup>87</sup> She specifically focused her attention on cases raised by the Department as examples of tax provisions held to be constitutional where the statutory rate, and not necessarily the actual rate, was uniform.<sup>88</sup> Justice Todd distinguished these cases by noting that the

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deduction). Judge Pellegrini contended that the General Assembly's desire to limit net loss carryover is apparent and that severability should be implemented to protect that desire. *See id.* (Pellegrini, J., dissenting) ("Because the remaining valid provisions . . . carry out the intent of the General Assembly, protect the public purse, and are complete and capable of being administered without the severed provisions, I dissent . . .").

84. *See Nextel*, 171 A.3d at 705 (decreeing Commonwealth Court decision affirmed in part and reversed in part).

85. For a further discussion of the majority opinion in *Nextel*, see *infra* notes 88–100 and accompanying text.

86. For a further discussion on Justice Baer's concurring opinion in *Nextel*, see *infra* notes 101–103 and accompanying text.

87. *See Nextel*, 171 A.3d at 689–92 (discussing arguments of both Department and Nextel).

88. *See id.* at 689–91 (discussing arguments of Department). The Department first argues that the Commonwealth Court incorrectly made its holding based on the actual rate of tax, contradicting precedent that based its opinion on the statutory rate. *See id.* at 689–90 (explaining first argument). To buttress its argument, the Department cites cases involving excise taxes, where calculations were uniform but resulting tax liabilities were not, held to be constitutional. *See id.* at 690 (citing *Turco Paint & Varnish Co. v. Kalodner*, 184 A. 37, 42 (Pa. 1936) and *Commonwealth v. Warner Bros. Theatres, Inc.*, 27 A.2d 62, 64 (Pa. 1942)). The Department then distinguishes these cases from other cases where the taxes were not uniform, finding these to be in line with the corporate tax issue while the others dealt with either a personal income tax issue or an estate tax issue. *See id.* at 690–91 (distinguishing *Amidon v. Kane*, 279 A.2d 53 (Pa. 1971), *Clifton v. Allegheny Cty.*, 969 A.2d 1197 (Pa. 2009), and *In re Cope's Estate*, 43 A. 79 (Pa. 1899)). The Department justifies this by arguing that these three forms of taxpayers "behave differently." *See id.* at 691 (providing justification for argument). Finally, the Department argues in the alternative that the Uniformity Clause requires "only substantial, not perfect, uniformity." *See id.* (raising alternative argument). Nextel responded to these claims comparing those cases noting how the Supreme Court of Pennsylvania found them to be "violative of the Uniformity Clause" because "similarly situated taxpayers shoulder[ed] unequal burdens of taxation," as was the case here. *See id.* at 692 (addressing Department's arguments). Nextel then hinges a series of arguments on the notion that the tax base is not the same for all



discrepancies in corporate tax liabilities in those cases were not the “product of purposeful legislative differentiation,” unlike the statutory provision at issue in *Nextel*, where the disparate tax treatment was caused by a “deliberate choice of statutory language.”<sup>89</sup>

Following its analysis of the Department’s examples, the court described the basis and intent behind the Uniformity Clause’s adoption: to prevent preferential tax treatment given to one industry over another.<sup>90</sup> The court delved into the clause’s history to establish the legislative intent that the court upheld throughout its decision.<sup>91</sup> Next, the court discussed the purpose of the clause and concluded that the clause does not require absolute uniformity, but rather mere “substantial uniformity.”<sup>92</sup>

The court then articulated the inquiry regarding whether subdividing subjects into classes is valid as whether that classification is “based upon some legitimate distinction between the classes that provides a non-arbitrary, reasonable, and just basis for the disparate treatment.”<sup>93</sup> The court

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corporations because over 19,000 corporations had no taxable income. *See id.* (distinguishing Department’s same tax base argument).

89. *See id.* at 700 (distinguishing *Turco Paint & Varnish Co. v. Kalodner*, 184 A. 37 (Pa. 1936) and *Commonwealth v. Warner Bros. Theatres, Inc.*, 27 A.2d 62 (Pa. 1942)). In *Turco Paint*, the corporation net income tax statute hinged on three factors: gross receipts, payroll, and physical property. *See Turco Paint & Varnish Co.*, 184 A. at 41 (describing tax statute relevant in case). The Supreme Court of Pennsylvania held that while it caused a variation in amount of net income subject to tax between corporations, this variance was not “constitutionally offensive.” *See id.* at 40 (holding that corporation net income statute was constitutional). In *Warner Bros.*, the Supreme Court of Pennsylvania rejected a claim arguing that by borrowing the federal income tax system’s definition of “taxable income” that there was an “unlawful delegation.” *See Warner Bros. Theatres, Inc.*, 27 A.2d at 64 (Pa. 1942) (“The Act before us does not violate the Uniformity provision of the Constitution.”).

90. *See Nextel*, 171 A.3d at 694–96 (discussing Uniformity Clause’s history). The Uniformity Clause came with a “Reform Constitution” in 1874, with an intent to disrupt practices that were advancing “private or personal interests at the expense of the public’s welfare.” *See id.* at 694 (providing context). At the time, many industries involving infrastructure, notably the railroads, were receiving preferential tax treatment. *See id.* at 694–95 (detailing issue at time of adoption).

91. *See id.* at 698–99 (discussing unconstitutionality of flat dollar cap based on its defiance to underlying policies of Uniformity Clause in not providing preferences for certain industries).

92. *See id.* at 696 (discussing Uniformity Clause’s purpose). The court described the clause as the “specific remedy” to quell the power of the General Assembly to enact special tax laws and to prevent a small select group from having to shoulder a burden that benefits all. *See id.* at 695 (describing Uniformity Clause’s role). The court then defines the level of uniformity required “as nearly uniform as practicable in view of the instrumentalities with which and subjects upon which tax laws operate.” *See id.* at 696 (internal quotation marks omitted) (quoting *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1210 (Pa. 2009)).

93. *See id.* (quoting *Mount Airy #1, LLC v. Pennsylvania Dep’t of Revenue*, 154 A.3d 268, 274 (Pa. 2016)). Due to a rebuttable presumption that the General Assembly does not intend to violate the Pennsylvania Constitution, the burden of proof to show unconstitutionality of a tax lies with the taxpayer. *See id.* (discussing burden of proof).

continued by noting a long-standing jurisprudence, which exhibits tax laws that purport to be applicable to an entire class but, in actuality, wholly exempt certain members and, therefore, were held unconstitutional.<sup>94</sup> The court concluded by finding that the net loss carryover provision as written was in direct contravention to this principle and was unconstitutional.<sup>95</sup> Through this holding, the Supreme Court of Pennsylvania affirmed the Commonwealth Court's decision that the net loss carryover deduction is "unconstitutional as applied to Nextel".<sup>96</sup> While affirming an as-applied challenge leaves the possibility of the provision being constitutional in other contexts, the majority noted that the distinction between "facially unconstitutional" versus "unconstitutional as applied" is a "meaningless one," thereby suggesting the net loss carryover provision would be unconstitutional in all circumstances.<sup>97</sup>

The court then discussed severability, noting at first a general presumption in favor of it.<sup>98</sup> Following the logic of Justice Pellegrini in the Commonwealth Court, the majority instituted the remedy that, it reasoned, maintains the legislative intent of the deduction by striking solely

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94. *See id.* at 697 (citing *In re Cope's Estate*, 43 A. 79 (Pa. 1899), *Kelley v. Kalodner*, 181 A. 598 (Pa. 1935), *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664 (Pa. 1964), and *Amidon v. Kane*, 279 A.2d 53 (Pa. 1971)). The court stated that this is based on the Uniformity Clause's "paramount tenet" that tax burdens should be endured by all obligated to pay. *See id.* at 697. The court reassured that not all exemptions are unconstitutional, rather just those that, through structure and operation, guarantee entire excusal of any tax burden. *See id.* at 698 (clarifying position on exemptions).

95. *See id.* at 699 (discussing holding). The majority held that while the net loss carryover provision did not explicitly exempt income below a certain threshold, by operation it necessarily did. *See id.* at 698 (discussing real effect of net loss carryover provision). The majority stated that the existence of the flat dollar cap, in effect, created two classes of corporate taxpayers. *See id.* at 699 (describing effect). The majority then held that by having these two classes of similar taxpayers have different tax obligations based solely on their taxable income, the General Assembly created an "arbitrary and unreasonable classification." *See id.* (establishing holding).

96. *See id.* at 701 (discussing implications of holding).

97. *See id.* at 701 n.20 ("However . . . the distinction in this case is arguably a meaningless one, given that our decision has precedential value in future challenges to similar statutes."). In the footnote, the majority also noted that Nextel never argued that the net loss carryover provision was facially unconstitutional. *See id.* ("Nextel has not previously argued, and does not presently allege, that the NLC is facially unconstitutional."). A statutory provision is facially unconstitutional when no application of the provision would be constitutional. *See Alex Kreit, Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 663–73 (2010) (explaining constitutional challenges and differences between facial and as-applied challenges). A statutory provision is unconstitutional as applied when it is generally constitutional but operates unconstitutionally under particular circumstances. *See id.*

98. *See Nextel*, 171 A.3d at 702–03 (discussing public policy of severability). The court noted two exceptions where provisions should be entirely eliminated rather than just severed: (1) where the valid provisions are dependent on the void provisions or (2) where the valid provisions are incomplete as to the legislative intent. *See id.* at 703 (explaining justifications to not sever).

the flat dollar cap deduction and thereby reversing the Commonwealth Court's total elimination of the deduction.<sup>99</sup> Finally, the court rejected Nextel's refund for all corporate income tax paid for 2007, reversing the Commonwealth Court's decree.<sup>100</sup>

#### B. *Justice Baer's Concurrence: Ensuring Good Reception*

In his concurring opinion, Justice Baer clarified his view that the majority's holding struck down the net loss carryover provision as facially unconstitutional rather than unconstitutional as applied.<sup>101</sup> Justice Baer noted that the majority opinion included the following sentence: "We have determined that the NLC, as written, is unconstitutional as applied to Nextel," yet in a footnote considered the distinction "meaningless."<sup>102</sup> Further, Justice Baer rejected adhering to Nextel's own claim that it was an as-applied challenge.<sup>103</sup>

#### V. "HITTING THE MARK": A CRITICAL ANALYSIS ON HOW NEXTEL FELL IN LINE WITH PRECEDENT, REINFORCING A FLAT TAX SYSTEM

While taxes can generally be categorized into three major categories—regressive, progressive, and flat—entire tax structures, e.g. all taxes within a specific state, rarely fall into one category.<sup>104</sup> While one may assume a tax structure based around a "Uniformity Clause" would be flat,

99. *See id.* at 704 (discussing appropriate remedy). The court laid out three options that it perceived: (1) remove the flat dollar cap, (2) remove both the flat dollar cap and the percentage cap, or (3) remove the entire net loss carryover deduction. *See id.* at 703 (describing options available). The legislative intent behind the deduction and its caps, as determined by the court, was to incentivize investment while maintaining Pennsylvania's fiscal health. *See id.* at 704 (detailing legislative intent).

100. *See id.* at 705 (dismissing Nextel's refund as previously granted by Commonwealth Court). The court reasoned that by severing only the flat dollar cap, Nextel is still required to pay its tax under the percentage cap, which it already had done and therefore there was no overpayment. *See id.* (discussing implications). Nextel argued that by not rewarding the company, the court would chill the bringing of future related actions by other litigants. *See id.* (discussing Nextel's argument in favor of refund). But the court dismissed this argument, stating "there is always an incentive in the avoidance of liability for payment of taxes." *See id.* (quoting *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274, 84 (Pa. 2007)) (dismissing Nextel's argument).

101. *See id.* at 706 (Baer, J., concurring) (clarifying that court's decision invalidates NLC provision on its face despite majority's ambiguity). Justice Baer found that Nextel's challenge "necessarily implicates the facial validity of the NLC." *See id.* (Baer, J., concurring) (justifying argument).

102. *See id.* at 701, 701 n.20, 706 (Baer, J., concurring) (reaffirming holding and considering distinction between facially and as-applied challenge as "meaningless").

103. *See id.* at 706 (Baer, J., concurring) ("[A] court should not be constrained in its holding simply by virtue of the manner in which a litigant has characterized its claim.").

104. For descriptions and examples of regressive, progressive, and flat taxes, see *infra* notes 108–112 and accompanying text.

what constitutes as “uniform” remains slightly uncertain.<sup>105</sup> Nonetheless, the *Nextel* decision still falls within the bounds set out by the Supreme Court of Pennsylvania’s own jurisprudence.<sup>106</sup> Though the court honored its precedent, the decision is still highly disruptive.<sup>107</sup>

A. *Drawing Lines: Distinguishing Between a Regressive, a Progressive, and a Flat Tax*

The United States’ federal tax system is, on the whole, considered a progressive system, meaning that tax rates increase as an entity’s taxable income increases.<sup>108</sup> However, through recent tax reform legislation, more federal taxes—such as the federal corporate tax—have become flat, meaning that no matter how much more taxable income an entity might have, its tax rate remains the same.<sup>109</sup> Still, the federal tax structure is neither entirely progressive nor entirely flat, for there are even some taxes, such as the Social Security payroll tax, that are regressive.<sup>110</sup> A regressive tax is one where tax rates decrease as taxable income increases.<sup>111</sup> Through *Nextel* and other recent decisions, the Supreme Court of Penn-

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105. See *Mount Airy #1, LLC v. Pennsylvania Dep’t of Revenue*, 154 A.3d 268, 273 (Pa. 2016) (noting uncertainty in Uniformity Clause jurisprudence). The opinion states “no provision in our constitution has been so much litigated yet so little understood.” See *id.* (internal quotation marks omitted) (quoting *In re Lower Merion Twp.*, 233 A.2d 273, 276 (Pa. 1967)).

106. For an analysis on how *Nextel* connects with murky precedent, see *infra* notes 113–118 and accompanying text.

107. For a discussion on how *Nextel* disrupts long-standing systems, see *infra* notes 119–125 and accompanying text.

108. See Amadeo, *supra* note 6 (defining progressive tax and providing examples); *Are Federal Taxes Progressive?*, TAX POL’Y CENTER <http://www.taxpolicycenter.org/briefing-book/are-federal-taxes-progressive> [<https://perma.cc/J39Q-4RPZ>] (last visited Jan. 30, 2018) (detailing how federal taxes overall are primarily progressive with limited exceptions).

109. See Dan Caplinger, *Here’s Who Got the Biggest Tax Rate Break from Corporate Tax Reform*, THE MOTLEY FOOL (Jan. 3, 2018, 7:16 PM), <https://www.fool.com/taxes/2018/01/03/heres-who-got-the-biggest-tax-rate-break-from-corp.aspx> [<https://perma.cc/VZC6-5MD7>] (describing recent corporate tax reform as flat tax system); see also *Corporate Tax Reform—Summary of New Laws Taking Effect*, WEISS & Co. (Jan. 5, 2018), <http://weisscpa.com/news/corporate-tax-reform-summary-new-laws-taking-effect/> [<https://perma.cc/KV94-U2M3>] (explaining how tax reform converted corporate progressive tax system into flat tax system).

110. See Kimberly Amadeo, *Regressive Tax With Examples*, THE BALANCE (Jan. 9, 2018), <https://www.thebalance.com/regressive-tax-definition-history-effective-rate-4155620> [<https://perma.cc/D4J5-JJG9>] (discussing regressive taxes and noting Social Security payroll tax as example). The Social Security payroll tax is considered regressive because it has maximum wage base limit of \$128,400, meaning the tax is not paid on any income above that amount. See Christy Bieber, *What Is the 2018 Maximum Social Security Tax?* THE MOTLEY FOOL (Dec. 10, 2017, 6:02 AM) <https://www.fool.com/investing/2017/12/10/what-is-the-2018-maximum-social-security-tax.aspx> [<https://perma.cc/M39T-4FW6>] (explaining Social Security payroll tax).

111. See Amadeo, *supra* note 110 (defining regressive tax).

sylvania has solidified that the Pennsylvania tax structure is becoming more and more flat.<sup>112</sup>

B. *Audible, Though Slightly Muffled: How Nextel Fits Within Hazy Precedent*

While a flat tax system would seem to be inherent in a mechanism that is commonly referred to as a “Uniformity Clause,” this presumption has not proven to be the case.<sup>113</sup> As noted in *Mount Airy*, the exact scope of the General Assembly’s ability to tax within the confines of the Uniformity Clause is not completely clear.<sup>114</sup> In *Nextel*, the majority opinion described what makes a reasonable classification, albeit with a nebulous definition.<sup>115</sup>

In *Mount Airy*, the court held that the relevant inquiry into whether a tax classification is valid is whether “the classification is based upon some legitimate distinction between the classes that provides a non-arbitrary, reasonable, and just basis for the disparate treatment.”<sup>116</sup> Through this inquiry, the Supreme Court of Pennsylvania has previously found that classifications based on certain criteria, such as geographic location, gross revenue, and property type, as in *Valley Forge*, were invalid.<sup>117</sup> By determining that an implicit classification based solely on a certain level of net income is invalid, the Supreme Court of Pennsylvania in *Nextel* is in line with its own precedent and ensures that the corporate income tax remains uniform, or flat, across corporations regardless of income.<sup>118</sup>

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112. See, e.g., *Nextel Commc’ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 685 (Pa. 2017), cert. denied, 86 U.S.L.W. 3614 (2018) (holding that flat dollar cap violates uniformity and thus should be severed).

113. See *Swift*, supra note 35 (detailing how Uniformity Clause requires taxes be levied at “a flat percentage rate” across taxpayers of same class). But see *Turco Paint & Varnish Co. v. Kalodner*, 184 A. 37, 41 (Pa. 1936) (providing three factor test for corporate excise tax, resulting in disparate tax treatment for like corporations as uniform).

114. See *Mount Airy #1, LLC v. Pennsylvania Dep’t of Revenue*, 154 A.3d 268, 273 (Pa. 2016) (“Despite the well-understood text and impetus of the Uniformity Clause, this Court occasionally has struggled to articulate the precise limits that the provision imposes upon the General Assembly’s authority to enact tax legislation.”).

115. See *Nextel*, 171 A.3d at 695–96 (describing ability of General Assembly to classify). Examples of reasonable bases of classification include “differences recognized in the business world, . . . the want of adaptability of subject to the same method . . . to produce justice and reasonably uniform results, or . . . public policy.” *Id.* (internal quotation marks omitted) (quoting *Jones & Laughlin Tax Assessment Case*, 175 A.2d 856, 863 (Pa. 1961)).

116. See *Mount Airy*, 154 A.3d at 274 (discussing what forms of tax classification satisfy Uniformity Clause concerns); see also *Hanhausen, Gallo, Levine & Zoeller*, supra note 58 (discussing what *Mount Airy* explains for *Nextel*).

117. See *Mount Airy*, 154 A.3d at 274–80 (finding classifications based upon geographic location and gross revenue as invalid); see also *Valley Forge Towers Apartments v. Upper Merion Area School Dist.*, 163 A.3d 962, 978 (Pa. 2016) (finding classification based on property type as invalid).

118. See *Nextel*, 171 A.3d at 699 (discussing holding).

C. *Leaving Your Provider: How Nextel Departs from the Status Quo*

While *Nextel* conforms to judicial precedent, the decision still sent a shock by disrupting long-standing legislation.<sup>119</sup> While not as expansively nullifying as the Commonwealth Court's decision, by keeping the percentage cap in place rather than eliminating both caps, the *Nextel* decision still drastically disturbed the previous status quo.<sup>120</sup> For nearly forty years, corporations have had certain faith that a flat dollar cap would be in place.<sup>121</sup>

To that effect, the *Nextel* decision extinguishes a substantial advantage that had long been given to small businesses.<sup>122</sup> No more "de facto" full deductions will be granted to the 98.8% of corporations with taxable income.<sup>123</sup> The 1.2% of corporations with taxable income—being those with over \$3 million in taxable income—will no longer be left to undertake the entire corporate tax burden themselves.<sup>124</sup> Regardless of size, if a corporation has taxable income, then that corporation will have at least some tax liability.<sup>125</sup>

VI. HOLD THE PHONE: MEASURING THE IMPACT OF *NEXTEL*

The Supreme Court of Pennsylvania's decision in *Nextel* will most acutely affect small businesses in the state.<sup>126</sup> While not to the extent desired by *Nextel*, large businesses will experience some changes.<sup>127</sup> This, by extension, affects those practitioners advising these businesses, be they ac-

119. *See id.* at 703–04 (discussing history of deduction dating back to 1980).

120. *See Nextel Commc'ns of the Mid-Atl., Inc. v. Commonwealth of Pennsylvania*, 129 A.3d 1, 9–11 (Pa. Commw. Ct. 2015) (issuing elimination of both flat dollar cap and percentage cap).

121. *See* Act of December 8, 1980, 1980 Pa. Laws 1117§ 2 (promulgating first net loss carryover deduction complete with flat dollar cap).

122. *See Nextel*, 171 A.3d at 698–99 (detailing advantage given to corporations under \$3 million in taxable income with equivalent or greater net loss carryover).

123. *See id.* ("Thus, the NLC gives corporations with \$3 million or less in taxable income, and carryover losses equaling or exceeding their taxable income, a de facto total exemption from paying the corporate net income tax.").

124. *See id.* at 699 ("[A] much smaller class of corporate taxpayers, 1.2%, was required to shoulder the entire corporate net income tax burden for that tax year.").

125. *See id.* (explaining consequences of net loss carryover deductions corporations subject to percentage cap). Once 12.5% of a corporation's taxable income is deducted, the remaining 87.5% will be subject to the corporate income tax rate of 9.9%. *See id.* (detailing calculation). If Corporation X has taxable income of \$1 million and net loss carryover of \$1.5 million, Corporation X will still be responsible for tax based on the remaining \$875,000, or 87.5% of taxable income, after the deduction. *See id.* (explaining calculation). In that example, Corporation X would have a corporate income tax liability of \$86,625, or 9.9% of \$875,000, for that year. *See id.*

126. For a discussion on how small businesses will be impacted by *Nextel*, see *infra* notes 130–134 and accompanying text.

127. For a discussion on the impact that large businesses will potentially experience, see *infra* notes 135–137 and accompanying text.

countants or tax attorneys.<sup>128</sup> Lastly, by eliminating a deduction that once exempted over 19,000 corporations from any tax liability, the Commonwealth of Pennsylvania will see a tremendous increase in revenue.<sup>129</sup>

A. “Welcome to the Network”: Small Businesses Now Have to Pay the Tax

Corporations with taxable income of \$3 million or less will no longer be fully exempt from their corporate income tax burden.<sup>130</sup> For example, assuming for taxable year 2007 Corporation X had \$3 million in taxable income and had a net loss carryover of \$3 million from prior years, previously Corporation X would be fully exempt from its tax liability under the PRC.<sup>131</sup> With the *Nextel* decision, the corporation will now only be permitted to deduct \$375,000, or 12.5% of \$3 million, from its taxable income.<sup>132</sup> This change means \$2,625,000 of their income will be taxable, resulting in an ultimate tax liability of \$259,875 for Corporation X.<sup>133</sup> This will greatly affect the 98.8% of corporations that, according to the majority in *Nextel*, were not paying any corporate income tax.<sup>134</sup>

B. “Always Reliable”: Large Businesses’ Tax Burden Remains Unchanged

While the larger businesses will be paying the same percentage that they always have paid, they will no longer be the only ones “shoulder[ing] the entire corporate net income tax burden.”<sup>135</sup> In order to maintain political favor with small business owner constituents by enacting a tax advantage, the legislature will now necessarily have to give an equal advantage to their large business counterparts.<sup>136</sup> While it was ultimately unsuccessful,

128. For a discussion on what *Nextel* means for tax practitioners, see *infra* notes 139-141 and accompanying text.

129. See *Nextel*, 171 A.3d at 702 (reporting 19,303 corporations paid no taxes in 2007). For a discussion on the impact to the Commonwealth, see *infra* notes 142-144 and accompanying text.

130. See *Nextel*, 171 A.3d at 702 (discussing impact of decision on corporations).

131. See *id.* at 698-99 (demonstrating calculation).

132. See *id.* (demonstrating calculation). The corporate tax rate imposed on corporate net income for all taxable year 1995 and beyond is 9.99%. See 72 PA. CONS. STAT. § 7402(b) (2002) (imposing corporate tax rate).

133. See *Nextel*, 171 A.3d at 698-99 (demonstrating calculation).

134. See *id.* at 699 (noting 98.8% of corporations with taxable income avoid corporate tax in 2007); see also Marines, *supra* note 44 (discussing great impact that *Nextel* will have on small corporations).

135. See *Nextel*, 171 A.3d at 699 (discussing which corporations will bear tax burden). In 2007, the taxable year at issue in *Nextel*, 1.2% of corporations were responsible for the payment of the entire Pennsylvania corporate income tax revenue. See *id.* (comparing smaller and larger corporations in 2007).

136. See, e.g., 72 PA. CONS. STAT. § 7401(3)(4)(c)(1)(A)(VII)-(VIII) (2017) (promulgating caps for taxable years 2018, 2019, and beyond). In response to *Nextel*, the percentage cap has now been significantly increased from 12.5% to 30% for taxable year 2018 and to 40% for taxable year 2019 and beyond. See *id.*

Nextel attempted to use this proportionality dilemma to persuade the court in favor of an uncapped net loss carryover deduction.<sup>137</sup>

C. *"We'll Ring You!": How Practitioners Should Advise Business Owner Clients*

Regardless of size or total revenue, corporations need to be informed as to the status of their taxes.<sup>138</sup> If *R.B. Alden*, *Nextel's* sister case, is heard by the Supreme Court of Pennsylvania and the court remains consistent with its reasoning in *Nextel* and again strikes down the flat dollar cap, there is potential that many businesses with pending refunds—that is, refunds where the amount of tax originally owed is still in dispute between the Department of Revenue and the taxpayer—dating from 2006 and earlier may be eligible to yield even larger refunds.<sup>139</sup> If this occurs, while the Commonwealth will lose revenue, corporations will recover their taxes paid, allowing them to reinvest those funds into their businesses.<sup>140</sup> Therefore, advisors to these businesses, such as accountants and tax attorneys, would be wise to advise their clients of any potential refunds for which they may be eligible.<sup>141</sup>

D. *Growing & Expanding: More Tax Revenue for The Commonwealth of Pennsylvania*

While these smaller companies with taxable income of \$3 million or less, especially companies such as start-ups, may have net loss carryovers to deduct, the Department of Revenue will necessarily incur corporate tax revenue from these companies when they have net income, assuming no other deductions are available.<sup>142</sup> To the relief of many smaller corporations, the Department of Revenue announced that it would not pursue those businesses that filed in 2007 and deducted utilizing the flat dollar

137. See *Nextel*, 171 A.3d at 702 (discussing Nextel argument using burdensome effect on small business as defense). In its argument against severability, Nextel argued that there would be no cap on net loss carryover at all if not for the flat dollar amount due to the burden it would put on small businesses. See *id.* (arguing against severability, in favor of total elimination of caps).

138. See Wilk, *supra* note 17 (encouraging businesses to contact tax advisors).

139. See Sollie & Melniczak, *supra* note 19 (discussing potential impact of *R.B. Alden* decision). If the flat dollar cap is eliminated for tax years 2006 and before, there would be no caps on the amount of net carryover loss allowed to be deducted. See *id.* (detailing impact on net carryover loss). Without a cap, any corporation with net loss carryforward equal to or greater than its taxable income will be able to fully deduct and have no tax for that year. See *id.* (identifying consequences of elimination of flat dollar cap).

140. See Harrison, *supra* note 5 (discussing business possibilities with recovered taxes paid from refunds).

141. See *id.* (highlighting possibility of refund as result of favorable decision in *R.B. Alden*).

142. See *Nextel Commc'ns of the Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 698-98 (Pa. 2017), *cert. denied*, 86 U.S.L.W. 3614 (2018) (demonstrating calculation).



cap limitation.<sup>143</sup> Regardless, by extinguishing this advantage to smaller corporations, the Commonwealth anticipates millions for its annual budget moving into the future.<sup>144</sup> This means more money for infrastructure and revitalization projects, which may convince more corporations to move to Pennsylvania, which will, in turn, make the Commonwealth more prosperous.<sup>145</sup>

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143. See Andrea Muse, *DOR Won't Apply Nextel Decision to Prior Years*, TAX NOTES (May 28, 2018), <https://www.taxnotes.com/state-tax-notes/corporate-taxation/dor-wont-apply-nextel-decision-prior-years/2018/05/28/282x0> (detailing Pennsylvania Department of Revenue's decision to not apply Nextel retroactively to tax years before 2017). Other states, such as Michigan, have retroactively changed their corporate tax laws in order to gain billions in state revenue. See Andrew Chung, *Supreme Court Rejects Challenge to State Retroactive Tax Changes*, REUTERS (May 22, 2017, 9:51 AM), <https://www.reuters.com/article/us-usa-court-tax/supreme-court-rejects-challenge-to-state-retroactive-tax-changes-idUSKBN1811P4> [<https://perma.cc/W6KW-VMRC>] (noting Supreme Court denying cert to challenge from Michigan corporations in response to retroactive changes to tax laws).

144. See *Pennsylvania Tax Update*, *supra* note 143 (listing changes contributing to expected \$600 million increase to Pennsylvania's budget).

145. See Lamb, *supra* note 5 (discussing upcoming Pennsylvania multimodal projects); see also *Governor Wolf Approves Support*, *supra* note 5 (discussing upcoming Pennsylvania "Community Revitalization Projects"); *Governor Wolf Announces \$1 Billion*, *supra* note 5 (discussing Scranton, Pennsylvania revitalization project). Both Pittsburgh and Philadelphia made the list of the twenty finalists cities being considered by Amazon for their second headquarters. See Jan Murphy, *Pa. Bid to Win Amazon HQ2 in Philly or Pittsburgh May Be Among the Biggest Ever from the State*, PENN LIVE (Jan. 22, 2018), [http://www.pennlive.com/politics/index.ssf/2018/01/landing\\_amazons\\_hq2\\_in\\_philly.html](http://www.pennlive.com/politics/index.ssf/2018/01/landing_amazons_hq2_in_philly.html) [<https://perma.cc/QVB3-6WYE>]. Amazon has stated that it plans to invest more than \$5 billion and will employ around 50,000 workers for whichever city it ultimately selects for HQ2's location. See *id.* (describing potential impact of second Amazon headquarters).