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Balancing and Proportionality in US Commerce Clause Cases

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Abstract

The US dormant commerce clause doctrine allows for a true balancing test between legitimate state objectives and the burdens placed upon commerce. However, the doctrine relies strongly on 'pre-screening' facts to determine whether or not a law is discriminatory. The difference between a law that is de facto discriminatory and one which is 'even handed' but incidentally burdens commerce is a fine line, and it is not clear in the US practice that the courts have been able to give the doctrine a consistent effect over time.

I. Introduction

The term 'proportionality' is not used in the judicial examinations made by US federal courts. Nor is the full doctrine of proportionality (suitability, necessity, and proportionality *stricto sensu*) applied in the same manner and sequence as it is understood in EU law. If the term 'proportionality' is drawn for its more general meaning to encompass the balancing tests used by judicial and arbitral bodies to rule between different sets of competing values, then US judicial opinions can certainly be examined and compared to both the EU and the WTO regimes. A similar basis for a discussion is possible when the term is drawn from its international law meaning where proportionality is about discerning the limits of unilateral state action necessary to pursue legitimate objectives.[1] All three legal systems mentioned apply their own respective doctrines for this purpose and, in the somewhat narrower context of international economic law; these constructs seek to provide some coherent means for assessing the legitimacy of governmental objectives that interfere with the trading and commercial rights of other states or economic actors.

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1. M. Andenas and Z. Zleptnig, 'Proportionality: WTO Law In Comparative Perspective', *Texas International Law Journal*, 42 (2007): p. 371 at 402.

This article examines the use of balance testing as applied by the US Supreme Court (and lower federal courts). What is evident for the US practice is that the court-created doctrine is clearly capable of examining the ultimate question of balance between the local benefits of a legitimate state act relative to the burdens the enactment places upon interstate trade and commerce.

This is not to suggest that the US doctrine is necessarily so clear or even that well settled, as evidenced by the long debate over whether or not the courts should be engaged in assessing non-discriminatory state laws.[2] Moreover, the manner by which state laws are initially screened and invalidated on the basis of their discriminatory effects *prior* to reaching the point of a true balancing examination remains, for this author, a difficult aspect of the doctrine. Much of the implicit battle going on in the US commentary deals with the fine-line distinctions being attempted to be drawn by the courts between two types of measures – the *de facto* discriminatory laws, which once so categorized are then easily invalidated and not subject to any real balancing, and a second group of 'even-handed' (non-discriminatory) laws which place some 'incidental' burdens on commerce. It is only this latter category of laws that receive the benefit of a true balancing test (*stricto sensu)*.

Some of the cases in the non-discrimination category, as raised below, actually seem to present discriminatory elements. In addition, there are also cases where the Supreme Court only by a narrow majority determines that a law is or is not discriminatory. Thus, in US law, one might say that it is the 'getting there' that seems to draw the most fire and arguably the place where the doctrine appears to be most criticized.[3]

Once a law is found to be in the 'even-handed' category and the balance test is conducted, one may also see that there is not always such a detailed attention paid to critically examining the balancing factors themselves. This may reflect the courts' cautionary approach where a state's legitimate interest is given more than adequate weight.

These themes are developed following a brief overview of the dormant commerce clause doctrine and the tests that are applied when a state law is either discriminatory or non-discriminatory and subject to a balancing examination.

2. On the debate on judicial activism in dormant commerce cases see, M.A. Lawrence, 'Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework', *Harvard Journal of Law & Public Policy*, 21 no. 2 (1998).
3. For examples see E. Trujillo, (2007), 'Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures And The WTO', *Suffolk University Law School Faculty Publications*, Paper 42, pp. 227-8, and J. Baker and M.K. Konar-Steenberg, (2006), 'Drawn From Local Knowledge … and Conformed To Local Wants: Zoning And Incremental Reform Of Dormant Commerce Clause Doctrine', *Loyola University Chicago Law Journal*, 38 (2006): pp. 7-9.

II. The US Dormant Commerce Clause

Article 1 Section 8 of the US Constitution grants a clear pre-emptive power to the Congress to regulate commerce between the states.[4] The Constitution also provides an express prohibition against states enacting tariff duties on the goods of other states.[5] However, the Constitution is also silent on the legality of state *regulatory* enactments that either discriminate against out of state operators or unduly burden interstate commerce. From an EU law perspective, one might say that the US Constitution lacks a prohibition against state-imposed quantitative restrictions, or 'measures having an equivalent effect.' This oversight was not necessarily accidental. One view is that the drafters were unable to resolve a text that delineated a reserved zone of local (police power) regulatory authority. Granting to Congress a clear and exclusive power to regulate interstate commerce bypassed this issue by providing the future means for Congressional pre-emption when state laws became too burdensome and demanded correction.[6]

As an historical matter, however, Congress was (and still is) not always willing to harmonize regulatory aspects at the federal level, thus leaving a long history and a large variety of state laws subject to individual challenges in the federal courts as interfering with interstate commerce – even while the Constitution also provided no explicit textual basis for judicial intervention to rule on the legality of a state law in the sense of the commerce clause.[7]

Thus, the basis for court intervention when a state measure is regulatory in nature (not a tariff duty) and when Congress has taken no pre-emptive legislative action is somewhat of a 'gap filling' exercise where the Supreme Court has developed its own doctrine to reflect the 'negative' or 'dormant' commerce clause that is implied by the Congressional power to regulate interstate commerce.[8] While the doctrine has gone through several permutations since its origins, the core of the concept today is that the express commerce clause (the power granted to Congress to act) cannot tolerate state laws which favour local

4. Art. One, Section Eight, 'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'.
5. Art. One, Section Ten, '(N)o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws …'.
6. The Congressional power is said to be inherently 'corrective' rather than 'affirmative' A. Abel, 'The Commerce Clause in the Constitutional Convention and in Contemporary Comment', *Minnesota Law Review*, XXV, (1941), pp. 432-344.
7. J. Eule, 'It is clear that what remains dormant is Congress and not the commerce clause.' in: 'Laying the Dormant Commerce Clause to Rest', *Yale Law Journal* 91 no. 3 (1982): pp. 425-485, at p. 425, n. 1.
8. The origin of the term is attributed to Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. 1 (1824), that the power to regulate interstate commerce, 'can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.'

economic interests at the expense of other states (are discriminatory), or that otherwise unduly burden interstate commerce.[9]

III. Judicial Application – Discrimination Cases

The US court approach as it has evolved is to first seek to characterize a state law for its discriminatory purpose or effects on interstate commerce, and then to apply an appropriate level of judicial scrutiny accordingly. Laws that are explicitly (de jure) discriminatory against foreign (other states') operators are under a 'strict scrutiny' and are nearly (or absolutely) per se invalidated absent some compelling state interest that cannot be given effect other than by the discriminatory enactment.[10] Laws that are found to be 'purposefully' discriminatory in favour of state economic interests are the easiest to invalidate. A lesser but also very strict level of scrutiny is also applied to facially neutral acts that have the ultimate effect of discriminating against foreign operators (de facto). Such laws are also very difficult to justify, and the burden remains upon the enacting state to demonstrate the necessity of a discriminatory law in light of its identified local and legitimate objective.

The most cited case for this de facto category is the *Hunt v. Washington Apple Commission* case. Here, North Carolina enacted a rule requiring that all apples (imported or otherwise) either carry a USDA (US Department of Agriculture) grading designation or carry no designation. The objection was made by the state of Washington, which operated a state-approved grading system. By imposing a prohibition on state-grading systems, the Court noted that this not only burdened Washington producers in interstate commerce but also discriminated against them as compared to North Carolina producers.[11] North Carolina therefore had the resulting burden to 'justify it both in terms

9. 'Thus, where Congress has not regulated commerce, "courts are left to balance the need for laws that allow commerce to freely occur between the states against the power of the states to regulate matters that affect the health, safety, and security of their citizens."' Quoting *Gibbons v. Ogden* in C. Pann, 'The Dormant Commerce Clause And State Regulation Of The Internet: Are Laws Protecting Minors From Sexual Predators Constitutionally Different Than Those Protecting Minors From Sexually Explicit Materials?', *Duke Law And Technology Review*, 0008 (2005): para. 5.

10. For example, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). '[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'

11. '[T]his disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all, as they had done prior to the statute's enactment.' *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1997), p. 351.

of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake.'[12]

The test applied for a discriminatory measure may be approximate to a 'necessity test' whereby, for whatever local benefits are claimed, the state is required to identify why a non-discriminatory alternative cannot be applied to satisfy those benefits. This test is not viewed by the literatures as a true balancing test where the local benefits sought would be weighed against the burdens on commerce. A discriminatory means of meeting a state objective is rarely (very rarely) deemed to be necessary. Effectively, the 'discrimination track' of the dormant commerce clause doctrine invalidates a class of measures nearly outright, but in the process of doing so, appears to allow for some examination of necessity.

IV. Judicial Application – 'Incidental Burdens' and Balancing

The second prong in the dormant commerce clause doctrine is when a state law is not discriminatory (is even-handed) but has some discernable (incidental) impact on interstate commerce. Here the doctrine is said to apply a 'true' balancing test. Although not the first case to apply balancing, most commentaries attribute the modern doctrine to the following expression found in *Pike v. Church* (1970):

> 'Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' (Citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443.) 'If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'[13]

In *Pike*, the State of Arizona required that all cantaloupes grown in the state be shipped into interstate commerce in packaging that clearly indicated the state of origin of production. The producer did not maintain a packing facility in the state, but shipped its cantaloupes to the adjoining state to be packed and

12. Ibid., *Hunt v. Washington,* at p. 353.
13. *Pike v. Bruce Church, Inc.*, 397 US 137 (1970), p. 142.

then distributed, and the final packing containers did not denote the origin state. The law enjoined the producer from either shipping its produce out of state or to provide for a packing facility within the state that could meet the requirements of the law. The Court's analysis of the law accepted at face value that the enacting state had a legitimate interest in promoting the state's origin for its quality produce, but found a much more significant burden on interstate commerce posed by a law that required producers to establish operations within the state that could be more efficiently operated elsewhere.

Perhaps the leading case on non-discriminatory state laws and the use of the balancing test remains *Minnesota v. Cloverleaf Creamery* (1981). Here the Minnesota law prohibited the sale of milk in plastic containers. While both Minnesota state courts invalidated the law, the US Supreme Court reversed the Minnesota Supreme Court and upheld it. While much of the reversal took place on equal protection grounds and the Supreme Court's determination that the distinction between plastic and non-plastic containers was rationally related to the law's statutory objectives, the law was also assessed for its stated purposes and as compared to the burdens placed on commerce.

> Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis. (cite omitted). We find these local benefits ample to support Minnesota's decision under the Commerce Clause. Moreover, we find that no approach with 'a lesser impact on interstate activities' (cite omitted) is available. Respondents have suggested several alternative statutory schemes, but these alternatives are either more burdensome on commerce than the Act …'.[14]

The Court makes it additionally clear that the commerce clause is intended to protect interstate market and particular interstate firms from burdensome regulations:

> A non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause.[15]

14. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981), p. 473.
15. *Minnesota v. Cloverleaf*, ibid., at p. 474.

V. Discussion

On its face the doctrine can be easily stated – that non-discriminatory laws are entitled to a balancing examination. Both *Pike* and *Minnesota Cloverleaf* demonstrate the balancing test employed in the US approach. However, whether these are actually non-discrimination cases can also be argued. In *Pike,* the law was directed at local producers only, but by requiring that certain types of processes occur within the state, one would think that this type of requirement discriminated against out of state operators. In *Minnesota*, there appears to be some recognized discrimination against out of state plastic producers at the expense of local pulpwood producers, although the Court appears to characterize this more as a 'burden' on commerce then a *de facto* discrimination.[16]

While this suggests that the Court at times has sought to categorize state laws as non-discriminatory in order to get to the actualities of a balancing test, any tendency to adopt a more pro-active balancing test has also been met with a reaction. First, there remains a minority of the Court that does not support any balancing intervention for laws that are non-discriminatory. From this view, the active (not the dormant) commerce clause requires that only the Congress should be intervening in regulating non-discriminatory state laws. From Justice Scalia:

> (A) state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. When such a validating purpose exists, it is for Congress and not [the Court] to determine it is not significant enough to justify the burden on commerce.[17]

Aside from the *Pike* and *Minnesota* examples, it is also possible that the balancing test has been avoided (in favour of finding discrimination) in some cases where it might have been appropriate. The reason for this is that the Courts may perceive that a true balancing test provides a stronger judicial recourse then the Constitution would appear to support. As according to Farber and Hudec:

> (T)he most logical approach would be balancing. A cost-benefit analysis would insure that the rules were optimal, and also that regulators had

16. 'Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry…' *Minnesota v. Cloverleaf*, as n. 14 above.
17. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* 486 U.S. 888, 898 (1988), cited in M.A. Lawrence, 'Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework', *Harvard Journal of Law & Public Policy*, 21 no. 2, , p. 395, at n. 37.

> taken regulatory burdens on outsiders into account. At least some language in *Pike* seems to lean in this direction. But open-ended balancing is widely perceived to give far too much power to federal judges at the expense of legislatures.[18]

The suggestion being made is that by using the filters of scrutiny, the pre-characterizations of discrimination allow the courts to avoid an assessment of the actual local benefits (or lack of benefits) achieved by the state law. If so, then one cannot conclude that the US doctrine on balancing is operating on a very strong foundation.

The 1994 *Carbone* case would appear to validate this critique. Here a local flow control ordinance required that all local waste be processed at a local facility and pay a local tipping fee. A local waste hauler was enjoined from shipping the waste out of state to less expensive facilities. The law was overturned by the Supreme Court in a five to four decision, but the rationale of the Court and its characterizations of the law have been criticized as fragmented if not incoherent. Five judges voted to overturn the law on the basis of the discrimination prong, while three judges voted to uphold it on the basis of the *Pike* (non-discrimination) balancing test, with a final judge voting to overturn it on the basis of the *Pike* test.[19]

The difficulty of pre-screening on the basis of discrimination can be illustrated by any state law that imposes a degree of harmonization. Consider an 'even handed' law that imposes a new requirement for all sellers. This act of harmonization will result in a *de facto* discrimination in the case where local operators are already conducting their processing according to that new standard and foreign operators have to change their processes to accommodate it. But the distinction between a case like *Hunt* (discrimination found) and *Minnesota Cloverleaf* (no discrimination found) may implicitly rest more on the degree to which interstate commerce was burdened then on the actual degree of discrimination involved.

When the US approach turns to the ultimate balancing test, then another criticism is identified, that being whether the balancing is seriously conducted. Again from Farber and Hudec:

> In contrast to strict scrutiny, the balancing test in practice seemingly has become rather lax. Indeed, there is some argument that it requires only

18. D.A. Farber and R.E. Hudec, 'Free Trade and the Regulatory State: A GATT's-eye View of the Dormant Commerce Clause', *Vanderbilt Law Review* (1994), pp. 1401-1440, at p. 1416. See also, Baker, *supra* n. 3, saying that the Court is confusing discrimination 'in effect' with 'incidental burdens' on interstate commerce, at p. 38.
19. Baker, *supra* n. 3, at p. 9, and therein citing Lawrence, at footn. 35. Baker also notes that two justices in the opinion re-cast the *Pike* case as a one demonstrating facial discrimination. Baker, ibid., at p. 10.

> that the state present some evidence of a regulatory benefit, particularly when public health or safety is at stake. Courts have been reluctant to second-guess the empirical judgments of lawmakers concerning the utility of legislation.[20]

VI. Conclusion

The US system of 'pre-filtering' cases on the basis of discrimination generates the expected difficulties that arise in any substantive system examining for economic discrimination. However, it also appears that the US doctrinal complexities may be enhanced when the less severe alternative of a true balancing test is undertaken only after a non-discriminatory law is found to only 'incidentally burden' interstate commerce. On any set of facts, the distinction between the two concepts of de facto discrimination and 'incidental burden' can be nearly microscopic. However, the dormant commerce clause balancing test significantly turns upon this kind of characterization.

What may also be distinct about the US doctrine is that once a law is found to be evenly applied, and with only incidental burdens upon commerce, that finding alone appears to weigh very strongly in favour of the state's enactment. This also seems to be the residual message of cases like *Minnesota Cloverleaf*, where the Supreme Court overturned lower Minnesota courts to find a rationale relation between the state's objectives and the law it was defending. That is a form of deference that reflects the US Constitutional system and the rather tentative foundations underlying the dormant commerce clause doctrine.

20. Farber and Hudec, *supra* n. 18, at p. 1414, footn. cites omitted.

Bibliography

Abel, A., (1941), 'The Commerce Clause in the Constitutional Convention and in Contemporary Comment', *Minnesota Law Review*, XXV, pp. 432-344.

Andenas, M., & Zleptnig, S., (2007), 'Proportionality: WTO Law In Comparative Perspective', Texas International Law Journal, 42, p. 371.

Baker, J., & Konar-Steenberg, M. K., (2006), 'Drawn From Local Knowledge . . . and Conformed To Local Wants': Zoning And Incremental Reform Of Dormant Commerce Clause Doctrine', *Loyola University Chicago Law Journal*, Vol. 38.

Eule, J., (1982), 'Laying the Dormant Commerce Clause to Rest', *Yale Law Journal*, 91:3, pp. 425-485.

Farber, D.A. and Hudec, R.E., (1994), 'Free Trade and the Regulatory State: A GATT's-eye View of the Dormant Commerce Clause', *Vanderbilt Law Review*, pp. 1401-1440.

Lawrence, M., (1998), 'Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework', *Harvard Journal of Law & Public Policy*, Vol. 21:2.

Pann, C., (2005), 'The Dormant Commerce Clause And State Regulation Of The Internet: Are Laws Protecting Minors From Sexual Predators Constitutionally Different Than Those Protecting Minors From Sexually Explicit Materials?' *Duke Law And Technology Review*, 0008.

Trujillo, E., (2007), 'Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures And The WTO', *Suffolk University Law School Faculty Publications*, Paper 42.