Understanding the Dormant Commerce Clause

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The "dormant commerce clause" is the name for a set of doctrines that prohibit states from discriminating against interstate commerce, or, under some circumstances, burdening it.

Where does it come from?

The first thing we have to ask about the dormant commerce clause is: is it textually justified? States, after all, have a general police power, and it does not follow from the mere fact that Congress is allowed to regulate interstate commerce that states are not so allowed—states and Congress might have concurrent authority over lots of things, so long as the Constitution does not divest states of authority over them. Article I Sec. 10 specifically divests states of certain powers, including to enter into alliances, coin money, start wars, etc., but it does not explicitly divest states of the power to regulate commerce within its borders in ways that discriminate against interstate commerce.[1]

In the early cases, we see some talk about the possibility that the Commerce clause granted an exclusive power in Congress. But it's not obvious why that should be the case, particularly if we think that Congress always has the power to preempt contrary state laws within its domain if it disagrees with a state regulation (we'll discuss preemption next week). After all, the Constitution already prohibited states from doing stuff that the framers thought was *so dangerous* that we couldn't wait for Congressional preemption to put it down (like starting their own wars).

However, there is reason to think that nonetheless the framers meant to forbid it. After all, there's a ton of stuff in the Federalist Papers, especially from Hamilton, about how bad it is if states interfere with interstate commerce.

Federalist 7 argues it would be really bad if states could have distinct commercial policy:

> The competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country, would give

[1] There's one textual argument that one might make here: Art. I Sec. 10 prohibts states from taxing imports or exports. But that's usually read to only mean taxing *international* imports and exports. *Woodruff v. Parham*, 75 U.S. 123 (1868), though this case contradicts dicta from an earlier Marshall opinion.

a keener edge to those causes of discontent than they would naturally have independent of this circumstance. WE SHOULD BE READY TO DENOMINATE INJURIES THOSE THINGS WHICH WERE IN REALITY THE JUSTIFIABLE ACTS OF INDEPENDENT SOVEREIGNTIES CONSULTING A DISTINCT INTEREST. The spirit of enterprise, which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.

The opportunities which some States would have of rendering others tributary to them by commercial regulations would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut, and New Jersey would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets. Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit? Should we be long permitted to remain in the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and, in their opinion, so oppressive? Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New Jersey on the other? These are questions that temerity alone will answer in the affirmative.

Federalist 11 argues that part of the Constitution is to promote united commercial markets:

An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation contributes to the activity of foreign commerce. It can be conducted upon much better terms with a large number of materials of a given value than with a small number of materials of the same value; arising from the competitions of trade and from the fluctations of markets. Particular articles may be in great demand at certain periods, and unsalable at others; but if there be a variety of articles, it can scarcely happen that they should all be at one time in the latter predicament, and on this account the operations of the merchant would be less liable to any considerable obstruction or stagnation.

> The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.
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> It may perhaps be replied to this, that whether the States are united or disunited, there would still be an intimate intercourse between them which would answer the same ends; this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes, which in the course of these papers have been amply detailed. A unity of commercial, as well as political, interests, can only result from a unity of government.

In **Federalist 22**, Hamilton claims trade wars have already happened during the Articles of Confederation, and that they've led to political dissension:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intcrcourse between the different parts of the Confederacy. "The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless." Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

Ok, enough theory, tell me some law.

There's a little uncertainty around the margins of the doctrine, but most people would summarize the rule as:

1. If states discriminate against interstate commerce, the regulation is struck down unless it passes something like what you'll learn in con law II is called "strict scrutiny";
2. If states adopt regulations that do not discriminate against interstate commerce but do burden interstate commerce, the regulation is subject to a balancing test that weighs the burden on interstate commerce against the state's interest in regulating.

What's a discrimination against interstate commerce?

The easiest case is where a state flat-out makes a law treating interstate commerce differently. Examples: *Philadelphia v. NJ*, you can't import garbage from out of state, *Granholm*, different rules for in-state and out-of-state alcohol, and so forth.

The cases we've read reveal a few subtle issues, however. First, it isn't just regulations like "nobody shall bring their dirty trash in to dump in a landfill in New Jersey" that count. Discriminatory taxes count as well.[2] Subsidies out of general revenue *do not* count (Iowa can pay the pig farmers), but they cannot be structured as discriminatory tax exemptions or taxes on an industry that are earmarked to be rebates to local producers.[3]

Second, what's "discrimination?" The casebook talks about "protectionist purpose or effect," but some of the cases that it describes under that rubric sound a lot like what we might want to call facial discrimination—like Hawaii's law exempting from taxation only a kind of alcohol made from a Hawaiian fruit. (Really? Really?) Rather than talking about the difference if any between "facial discrimination" and "protectionist purpose or effect," it will be most helpful to think about two issues[4]:

1. Does the law exclude everyone out of state from its benefits/injure everyone out of state in the industry, or just some people?

2. Does the law have some plausible public purpose other than protectionism?

See how these two rules of thumb help us out with the collection of note cases in this section (pp. 259-263).

Hunt: The law didn't injure everyone out of state, just those in Washington, but Washington was clearly the major competitor, more to the point, it was hard to imagine any purpose that the law would achieve other than to prefer in-state growers to Washington's.

Bacchus: The law had one special tax exemption only for an in-state industry, and the court couldn't come up with anything it did other than subsidize local industry.

Exxon: The law benefited not only in-state independent fuel dealers but also out-of-state independent fuel dealers, at the expense of vertically integrated oil companies (which were out of state, to be sure). Also, the law had a purpose to it other than protectionism: to keep vertically integrated suppliers from unfairly favoring their own dealers.

Minnesota v. Clover Leaf: The law benefited out-of-state as well as in-state pulpwood producers, plus the law had an environmental protection purpose.

What's this "strict scrutiny" business?

In Con Law II, you'll learn a lot more about "strict scrutiny." For present purposes, it's enough to know the basic formulation: when we say a law is subject to "strict scrutiny," we mean that:

[2]Also, it doesn't just have to be a law, like on the statute books. Discriminatory application of non-discriminatory laws can count too, like if a licensing authority just *by an amazing coincidence* exercises its discretion to grant licenses to in-staters but not out-of-staters.

[3]If you think this sounds like a formalist distinction, you'd have a lot of sympathy. But one potential justification of it is that subsidies out of general tax revenue burden a state's own citizens; subsidies to local players out of a tax that's only applied to that industry are indistinguishable from just taxing foreigners.

[4]Note: this isn't really formal "doctrine," as such, but I do think these are helpful rules of thumb.

1. It must be justified by a *compelling government interest* – this means something really important, like winning wars or stopping murderers – and

2. The law must be *narrowly tailored* to achieve that interest – this means that if the court can come up with an alternative law that would achieve that interest, but is less naughty with respect to whatever constitutional principle got the law in to trouble (e.g., less discriminatory-against-interstate-commerce), then the law is not narrowly tailored, and will be struck down.

This formulation of strict scrutiny mostly applies in the Con Law II context, particularly when we get to the Equal Protection Clause of the 14th Amendment. It's not completely clear that this is *exactly* the same thing that happens with protectionist legislation in dormant commerce clause cases (sometimes the Court talks about "important" interests, for example), but it's close enough to use as a general working idea of what's going on.

In the dormant commerce clause case, this mostly means that very few cases of actual protectionism will go through. One likely exception would be quarantine laws, like those prior cases discussed in *Philadelphia v. New Jersey*, because of the compelling interest in preventing, e.g., the movement of diseased cattle.

What's the market participant exception?

Sometimes states act like ordinary economic actors—owning factories, buying and selling products, hiring construction workers, etc. The market participant exception allows states to discriminate in favor of their own residents. If Iowa owns a car repair shop, for example, it can give free oil changes to Iowans but not to Illinoisans (Illinoisese? Illinoisoids?). It can even refuse to sell oil changes to Illinoisites altogether.

However, *South Central Timber Development v. Wunnicke* stands for the proposition that the state can't go too far—in particular, it can't leverage market power to take substantial downstream control over what people do with their product to favor in-stateers. I read that case to have come out that way in part because Alaska was selling raw materials that it really controlled as sovereign—it's not like a private landowner could have had similar amounts of control over the amount of timber-bearing land that the state of Alaska does in its forests.

Tell me more about burdening interstate commerce.

Sometimes a state imposes a regulation that doesn't treat people from in-state and out-of-state differently at all, but that still makes it harder to conduct interstate commerce. The clearest example is one of the note cases, *Bibb v. Navajo Freight Lines*, where the Court struck down an Illinois law requiring curved mudguards. The issue here wasn't that Illinois trucks tended to have curved mudguards while out-of-state trucks tended to have straight mudguards or anything like that—there was no reason to think the law favored local interests at all. Rather, the problem was that all the other states allowed straight mudguards and one state required them, so any truck passing through Illinois —wherever it came from — would have to change its mudguards at the state line.

What happens next is a balancing test. And in balancing tests, courts have a lot of discretion, so there's not a lot that I can say to help you resolve these cases. In Bibb, there was substantial

skepticism about the idea that it had any benefit for the state at all (it was alleged to be a safety benefit), and it was massively inconvenient for trucks to carry two sets of mudflaps, so it was struck down.

Is there anything else I need to remember?

Yes, two important things.

1. Recall that the dormant commerce clause is the negative space created by Congress's power over interstate commerce, and its role as the regulator of the national economic market. It follows from this, and the Court has consistently held, that Congress has the power to authorize states to violate the dormant commerce clause. For example, Congress could pass a law providing that "states may forbid the importation of milk from out of state," and then states that did so would be safe from dormant commerce clause challenge for doing so.

2. The privileges and immunities clause (to be discussed next week) also forbids some kinds of state economic discrimination ((as well as various kinds of non-economic discrimination) against out-of-staters. There's some overlap (some stuff violates both), but there's not complete overlap: some things might violate privileges and immunities but not the dormant commerce clause, or vice versa. Pay special attention to the paragraph at the top of p. 274 in next week's reading, which lists some important differences between privileges and immunities and the dormant commerce clause.

For your extreme convenience, here are some differences between P&I and dormant commerce clause:

- P&I is an independent constitutional prohibition, Congress *does not* have the power to authorize violations of the privileges and immunities clause.
- P&I only appliess to "citizens," which, most importantly, does not include corporations.
- P&I doesn't cover all kinds of commerce, although it does cover important individual economic activity like practicing a profession; it also covers the individual "fundamental" rights that you'll learn about in con law II.
- There's no market participant exception to P&I
- Also, do not confuse the privileges and immunities clause of Article IV with the privileges and immunities clause in the Fourteenth Amendment. They're totally different things (and the latter is almost, though not quite, a dead letter for unfortunate historical reasons).