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# Holding Your Horses: A Violation of the Dormant Commerce Clause

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## INTRODUCTION

Upton Sinclair may as well have been referring to state judicial behavior under the dormant Commerce Clause when he penned, "It is difficult to get a man to understand something when his salary depends upon his not understanding it."[1] Indeed, state judges are far more likely to uphold local and state laws than their federal counterparts.[2] In a widely praised piece of scholarship, Professor Mehmet K. Konsar-Steenberg suggests that such "home team" treatment is exacerbated by modern readings of the dormant Commerce Clause doctrine that invite, if not demand, judges to express policy bias in their decisions.[3] Such "ideological bias," however, is generally stifled when a law is deemed discriminatory and consequently reviewed under strict scrutiny.[4]

Recently, in *Jamgotchian v. Kentucky Horse Racing Commission*, the Kentucky Supreme Court upheld a regulation prohibiting a horse claimed in Kentucky from racing elsewhere until the close of entries of the meeting at which the horse was claimed, finding that the regulation did not violate the dormant

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[1] UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (1935).

[2] Mehmet K. Konar-Steenberg & Anne F. Peterson, *Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior Under the Dormant Commerce Clause Doctrine*, 80 UMKC L. Rev. 139, at 140 (2011) (Study noted that although state courts "are not so much influenced by the need to cultivate a strong constituency for re-election, judges' decisions do tend to reflect the state's general policy priorities.").

[3] *Id.* at 144(The author particularly referenced the *Pike* balancing test developed by the Supreme Court); *see generally* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[4] Konar-Steenberg & Peterson, *supra* note 2, at 144 (However, even where laws were alleged to be facially discriminatory or discriminatory in effect, "state courts upheld challenged laws 82% and 92% of the time, respectively ... while the corresponding uphold rates in federal courts [were] lower: 74% and 77%."); *see also id.* at 155.

Commerce Clause.[5] In reviewing the regulation, Kentucky employed the simple balancing test articulated in *Pike v. Bruce Church, Inc.*[6] The *Pike* balancing test ("balancing test"), in weighing a law's burdens on interstate commerce against its benefits, holds that a law *will* be found unconstitutional if the court decides that the law's burdens on interstate commerce exceeds its benefits.[7]

In determining that the regulation was non-discriminatory, the court opted not to apply strict scrutiny and instead applied the balancing test; yet the facts presented in *Jamgotchian* seem emblematic of the very types of issues that should require the most exacting scrutiny. This Note takes issue with the Kentucky Supreme Court's application of the balancing test in lieu of strict scrutiny, a decision which was flawed in three respects: (1) it rests on the court's declaration that the regulation was not *meaningfully* discriminatory; (2) it dismisses the protectionist nature and extraterritorial impact of the regulation; and (3) it fails to require the Commission to establish that the regulation was the least discriminatory alternative to reaching its regulatory goal. This Note does not argue *what* the court's disposition should have been, but only *how* it should have been reached. The goal of this Note is to underscore an arguably analytically deficient application of the dormant Commerce Clause doctrine to a state regulation.

This analysis proceeds as follows: Part I more formally reviews the dynamic history of the dormant Commerce Clause and its analytic structure. Generally, the threshold issue under the dormant Commerce Clause is whether the state regulation at issue affects interstate commerce. For the purpose of such analysis, the Supreme Court has broadly defined the scope of commerce among the states. In fact, the court has expansively stated that "all objects of interstate trade merit Commerce Clause Protection."[8]

Part II explains the historical background of thoroughbred racing in Kentucky. Specifically, this section will address the development of claiming races and claiming jail, respectively, as well as the regulatory agency that promulgated those laws. Part III describes *Jamgotchian*, and the basis of the trial, appellate, and

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[5] Jamgotchian v. Kentucky Horse Racing Comm'n, 488 S.W.3d 594, 620 (Ky. 2016).

[6] *Pike*, 397 U.S. 137 (1970).

[7] *Id.* at 142.

[8] City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978).

state supreme court's rationale in reaching their conclusions. Part IV proposes that the court should have applied a strict scrutiny line of analysis. This part explains why strict scrutiny provides theoretical clarity to the dormant Commerce Clause, and consequently a more definite evaluative framework of the regulation while removing the unpredictability and arbitrariness of the balancing test. Accordingly, this analysis captures the rationale as to why the balancing test was an inappropriate method for assessing the burdens the regulation imposed on interstate commerce. Moreover, it stresses that the *Jamgotchian* court's attempted importation of the balancing test illustrates a break from firmly established jurisprudential thought.

## I. THE DORMANT COMMERCE CLAUSE DOCTRINE

The Commerce Clause expressly grants Congress the authority "[t]o regulate commerce ... among the several States."[9] The federal courts have consistently construed this positive grant of authority to include a "restriction on permissible state regulation," commonly known as the dormant Commerce Clause.[10] The dormant Commerce Clause has been interpreted to invalidate state statutes that impose economic or commercial burdens, or "discriminate against an article of commerce by reason of its origin or destination out of state."[11] The Supreme Court has devised a number of tests to preempt such state laws.

The dormant Commerce Clause is primarily concerned with economic protectionism—regulatory actions "designed to benefit in-state economic interests by burdening out-of-state competitors."[12] If a law is declared discriminatory, because it expressly draws a distinction between in-staters and out-of-staters (i.e., facial discrimination), it is presumed unconstitutional and "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives."[13] The Court has observed that "State [regulations] that discriminate

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[9] U.S. CONST. art. 1, §8, cl. 3.

[10] Dep't of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008).

[11] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

[12] *Davis*, 553 U.S. at 337-38. (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).

[13] Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

against interstate commerce face a virtually *per se* rule of invalidity."[14] Such discriminatory state regulations rarely satisfy the standard needed to prove a legitimate local purpose or absence of alternative measures.[15]

An alternative dormant Commerce Clause analysis is applied when a court determines that a particular regulation is non-discriminatory but nevertheless intrudes upon interstate commerce. In this context, a simple balancing test is used. "Where the statute regulates evenhandedly 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."[16]

Both tests—strict scrutiny and balancing—form the core of dormant Commerce Clause jurisprudence. In addition, the Court requires that state regulations, subjected to either test, endure a "least restrictive means" analysis.[17] Notably, the Court has never struck down a non-discriminatory state regulation on the basis that its goal could have been achieved through a less burdensome measure.[18] Only discriminatory state regulations have been invalidated under the dormant Commerce Clause due to the presence of a less restrictive alternative.[19] Thus, in reality, the "least restrictive means" test is only used in conjunction with strict scrutiny.[20]

The dormant Commerce Clause also prohibits state laws that regulate extraterritorially. Admittedly, however, the scope of the extraterritoriality doctrine is somewhat unclear. The Supreme Court has provided that "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[21] The Court has further provided that state laws directly or indirectly regulating commerce occurring

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[14] Granholm v. Heald, 544 U.S. 460, 476 (2005) (internal quotations removed).

[15] Maine v. Taylor, 477 U.S. 131 (1986) (Rare exception which held that a ban on the importation of a particular type of bait fish did not violate the dormant Commerce Clause).

[16] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[17] *Id.*

[18] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 455 (4th ed. 2011).

[19] *E.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[20] *See id.*

[21] Healy v. Beer Institute, 491 U.S. 324 (1989).

"wholly outside of the State's borders" are invalid *per se*, "*whether or not the commerce has effects in the state.*"[22]

## II. THE THOROUGHBRED RACING REGULATORY REGIME

### *A. The Kentucky Horse Racing Commission*

Since 1906, public acceptance of thoroughbred racing and oversight of industry related gambling has been a legislative concern of the Kentucky Horse Racing Commission (Commission)—an agency created by the General Assembly pursuant to KRS 230.[23] In a lengthy statement of legislative intent, the General Assembly charged the Commission with prescribing administrative regulations and conditions for "all legitimate horse racing and wagering," to ensure that all meets were "free of any corrupt, dishonest, or unprincipled horse racing practices ...."[24]

Indeed, in the early twentieth century, establishing the Commission was necessary to combat public opposition to gambling—a resistance stemming from the expansive temperance movement that gripped the country.[25] But, despite this movement leading many states to abandon horse racing,[26] the General Assembly's creation of the Commission allowed Kentucky to stave off that fate by promoting public confidence in the industry. To promote such confidence, it was particularly necessary that the races were fair and genuinely competitive.[27] To fulfill that necessity, the industry developed an elaborate system for grading thoroughbred racing ability.[28] Simply put, the grading systems were designed to make racing more transparent, by publicizing the caliber of horses involved in a given race, and to insure that races consisted of horses of roughly equivalent ability.[29] For higher-graded classes, entry conditions and handicapping by track officials were implemented to further ensure competitiveness.[30]

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[22] *Id.* at 336.
[23] KY. REV. STAT. ANN. § 230.215(2) (LexisNexis 2017) (emphasis added).
[24] *Id.*
[25] Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594, 612 (Ky. 2016).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

Tracks were limited, however, in their ability to provide adequate handicapping.[31] Enter the claiming race.

### *B. Claiming Races*

The Commission, in its capacity as a Kentucky regulatory agency, has defined a claiming race as "any race in which every horse running in the race may be transferred" subject to further regulations.[32] Moreover, "[i]n claiming races a horse shall be subject to claim for its entered price by a licensed owner in good standing."[33] As commentators have noted, "[t]he purpose of the claiming race is to keep owners from entering superior horses in mediocre fields ... and to foster competitive races."[34] This purpose is achieved by clearly establishing a price prior to a race, with an understanding that any horse entered into that race is being offered for sale at that price. For example, if the claim price for a field in a given race is set at $30,000 and an eligible claimant makes a valid claim prior to the running of the race, the animal must be sold at $30,000. The general effect is that owners tempted to gain an advantage by running a superior horse against an inferior field are deterred by the risk of losing their horse for less than its value.[35]

### *C. Claiming Jail*

The claiming rule, however, fell victim to claimants who treated such races as "sales ring[s] in which ... clever [horsemen] or [dealers could] pick up a bargain and sell it at will."[36] In fact, stewards expressed that the rule had exposed owners "to claims by out-of-state horsemen who came to ... meets with the purpose of claiming large numbers of horses in order to take them to other racing States and sell them."[37] Accordingly, what are commonly referred to as "claiming jail" restrictions were adopted across

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[31] *Id.* at 612.

[32] *Id.* (citing 810 KY. ADMIN. REGS. 1:001(12) (2011)).

[33] *Id.*

[34] United States Trotting Ass'n v. Chi. Downs Ass'n, Inc., 665 F.2d 781, 784 (7th Cir. 1981).

[35] TOM BIRACREE & WENDR INSINGER, THE COMPLETE BOOK OF THOROUGHBRED HORSE RACING 217 (1982).

[36] Jacobson v. Maryland Racing Comm'n, 274 A.2d 102, 104 (Md. 1971).

[37] *Jamgotchian*, 488 S.W.3d at 614.

several states, including Kentucky, to mitigate what were perceived as abusive claiming practices.

In relevant part, Kentucky's claiming jail regulations (i.e., Article 6) establish that claimed horses are prohibited from: (1) being transferred within thirty days after they were claimed except by entry in other claiming races; and (2) racing elsewhere prior to the close of entries of the meeting at which the horse was claimed unless otherwise granted permission by a steward to enter overlapping and conflicting races *in Kentucky*.[38] Persons who violate Article 6 regulations are subject to fines, license suspension, and other sanctions.[39]

## III. THE *JAMGOTCHIAN* CASE

### *A. Lower Courts*

In 2011, Jeremy Jamgotchian claimed a horse at Churchill Downs.[40] Notwithstanding Article 6, however, Jamgotchian attempted to enter his claimed horse in several out-of-state races.[41] He was barred from doing so and consequently brought suit in state court, claiming that Article 6 regulations violated the dormant Commerce Clause "either because they discriminate against interstate commerce or because they burden that commerce unreasonably."[42] The trial court granted summary judgment in favor of the Commission.[43] The court supported its decision by invoking what is considered a standard two-tiered dormant Commerce Clause analysis.[44] The initial question was whether the challenged state regulation discriminated against interstate commerce. The court concluded that it did not, reasoning that it applied evenhandedly between Kentucky residents and non-residents.[45] Next, since the challenged regulation was declared non-discriminatory, the court then applied the balancing test—asking whether "the burden imposed on interstate commerce

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[38] 810 KY. ADMIN. REGS. 1:015, §1(6) (2007) (emphasis added).
[39] *See* 810 KY. ADMIN. REGS. 1:028 (2016).
[40] *Jamgotchian*, 488 S.W.3d at 600.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 601.
[44] *Id.*
[45] *Id.*

[was] clearly excessive in relation to putative local benefits."[46] The court reasoned, because of its limited duration, that the regulation had a nominal effect on interstate commerce, whereas its benefit to Kentucky's thoroughbred racing industry was substantial.[47] According to the court, the regulations served to mitigate abusive claiming practices, that depleted the supply of horses at a given meet, and encouraged larger racing fields.[48]

The trial court fortified its conclusion by citing a line of cases which hold,[49] as characterized by the court, that "government action[s] in discharging traditional government functions are outside the scope of the restrictions of the Commerce Clause."[50] The court interpreted this holding to apply to the horse racing industry, reasoning that for more than a century the horse racing industry "has been so heavily regulated and infused with a public interest as to meet the broad criteria for traditional government function contemplated by the Supreme Court."[51] This suggests that even if there were some question about the constitutionality of Article 6 under the dormant Commerce Clause, any doubt would yield to the Supreme Court's deference to states' "traditional governmental functions."

The trial court's decision was affirmed by the Court of Appeals.[52] That court more fully embraced the lower court's traditional government function line of analysis. In fact, the court expressly stated that the promulgation of Article 6 by the Commission constituted "a traditional governmental function because it directly satisfied every factor the United States

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[46] *Id.* at 604.

[47] *Id.* at 606.

[48] *Id.* at 611.

[49] *See* United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (holding that "laws favoring government can be deemed non-discriminatory for Commerce Clause purposes, and can be upheld without the rigorous scrutiny typically applied to laws favoring in-state businesses vis-à-vis out-of-state competition, since '[l]aws favoring local government... may be directed toward any number of legitimate goals unrelated to protectionism); *see also* Dep't of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008) (arguing that the rationale of *United Haulers* applies with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function, with venerable history").

[50] Jamgotchian v. Ky. Horse Racing Comm'n, Judge. Action No. 11-CI-01-01047 (Franklin Cir. Ct. Nov. 29, 2012).

[51] *Jamgotchian*, 488 S.W.3d at 602.

[52] Jamgotchian v. Ky. Horse Racing Comm'n, 2014 Ky. App. LEXIS 851, at *1 (Ky. Ct. App. Feb. 7, 2014).

Supreme Court articulated in *Davis*."[53] The Court of Appeals, having concluded that the Commission was engaged in their "traditional governmental function," enthusiastically declared that the "benefits of the Regulation outweigh the trivial burden the Regulation may place on interstate commerce."

### *B. Kentucky Supreme Court*

The Kentucky Supreme Court affirmed much of the lower court's ruling, but rejected the courts' reliance on the "traditional government function" line of analysis. A unanimous bench agreed that thoroughbred racing did not constitute a traditional government function.[54] Rather, the Court reasoned that Churchill Downs,[55] along with other licensed racing associations in Kentucky, were "private enterprises ... [whose] main concern [was] their shareholders."[56]

The Kentucky Supreme Court, however, generally embraced the lower courts' application of the two-tiered analysis, opting to apply the balancing test rather than strict scrutiny. The court reasoned that in spite of Article 6 containing a "modicum of discrimination," it was only a portion of a larger, non-discriminatory *racing*—as opposed to *trade*—regulation and its protectionist effect was negligible relative to its benefits to Kentucky's thoroughbred racing industry.[57] The court further noted that Jamgotchian grossly overstated the protectionist intent and effect of Article 6, explaining that its purpose was not to insulate Kentucky's race tracks from non-resident competition but rather to preserve a practice in which thoroughbred racing remains sustainable and publicly acceptable.[58]

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[53] *Id.* at *12.

[54] *Jamgotchian*, 488 S.W.3d at 608.

[55] Track where Jamgotchian claimed his horse.

[56] *Jamgotchian*, 488 S.W.3d at 609 (The Kentucky Supreme Court went on to further reject the Commission's claim that Kentucky's regulation of horse racing was itself a traditional government function. The Court reasoned that "regulation by itself cannot be what the Supreme Court meant in United Haulers by the phrase 'traditional government function,' because... [it] would call into question every case in which a regulation has been invalidated under the sort of strict scrutiny frequently applied to regulations that discriminate against interstate commerce").

[57] *Id.* at 610.

[58] *Id.* at 611 (To stress the accuracy of its conclusion, the bench belabored the long history and central importance claiming races as a staple in the thoroughbred racing industry).

The court next concluded that the *effect* of Article 6 was also not protectionist.[59] The court determined that claiming "jail" did not give Kentucky's tracks any sort of meaningful advantage over non-resident tracks because, even while Kentucky maintains "access to horses jailed in-state, it loses access to horses jailed elsewhere."[60] The court noted that the very "mutuality of such restrictions is undoubtedly the explanation" for Jamgotchian challenging Article 6 as opposed to one of the "elsewhere tracks at which a claimed horse" is restricted from leaving.[61] The bench, however, distinguished this happening from the sort of protectionist retaliation that the Commerce Clause was meant to preclude.[62] The court reemphasized that the rule was not protectionist in its intent, and that the Commission had "compelling reasons ... that [had] nothing to do with Kentucky's competition with out-of-state businesses adopting some form of the claiming rule,"[63] and thus had an independent motivation for establishing Article 6.[64]

Additionally, in observing a line of Supreme Court export embargo cases, the court made another distinction. The court noted that in the export embargo cases, compliance with the regulation was unavoidable for each Commerce Clause litigant.[65] In contrast, the bench reasoned that Article 6 constituted a "voluntarily-encountered regulation," as it applied only to claiming races and had no application to private sales or public auctions of thoroughbreds in Kentucky.[66] Thus, Jamgotchian could have avoided the Article 6 restrictions altogether.[67] The court held that the temporary restrictions imposed by Article 6, by which purchasers voluntarily avail themselves, are not "protectionist in any meaningful way" and do not run afoul of the dormant Commerce Clause.[68]

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[59] *Id.* at 615.

[60] *Id.* (internal quotations removed).

[61] *Id.*

[62] *Id.*

[63] *Id.* (The court only made an oblique reference to "racing integrity reasons," in supporting the Commission's alternative reasons—as opposed to protectionism—for adopting Article 6).

[64] *Id.*

[65] *Id.* at 618.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 620-621.

In fact, the temporal element of Article 6 seemed to deliver the coup de gras to Jamgotchian's claim. The court concluded that the facts presented, while mostly analogous, were dissimilar from a line of other export embargo cases decided by the Supreme Court.[69] Specifically, that "the differences are those between *permanent and temporary*, between total and partial, between serious and slight and between inescapable and voluntary."[70] As characterized by the court, the cases referenced disallowed the exportation of an item of commerce entirely or disallowed it if the exporter failed to fulfill some local requirement.[71] The bench reasoned that Jamgotchian "simply having to wait thirty days to transfer his Kentucky-claimed horse ... or forty-two days to race in another state" was hardly analogous.[72] It did, however, cite a case that it concluded was more factually analogous: *Tennessee Scrap Recyclers Association v. Bredesen.* There, the Sixth Circuit upheld a city ordinance requiring scrap dealers to "tag and hold scrap metal for a period of ten days so that victims of metal theft and law enforcement officials could inspect it."[73] Although offering little support for its claim, the court reasoned that Article 6, "similarly limited in temporal scope and designed to advance a legitimate, non-protectionist local interest,... [was] even less objectionable."[74]

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[69] *Id.* (The Supreme Court has routinely struck down export embargoes. See, e.g., New England Power Co. v. New Hampshire, 455 U.S. 331, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982) (striking down a state's attempt to disallow export of electricity generated within the state); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (striking down a requirement that state-grown cantaloupes be packed within the state); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (striking down an Alaska statute that required timber taken from state land be processed in Alaska before export). Despite admitting to the similarities, such as Article 6 restrictions being triggered by acquiring property in Kentucky, and restricting the export of that property so that it may be used in Kentucky, the court explained that the listed cases were not controlling).

[70] *Id.* (emphasis added).

[71] *Id.*

[72] *Id.*

[73] *Id.* (The analogized regulation grew from the wake of a historic metal theft crime wave in Tennessee—a state where scrap metal recycling is big business. Tennessee Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442 (6th Cir. 2009) (holding that an ordinance likely to increase storage costs and result in a competitive disadvantage for dealers did not violate the Commerce Clause because the restriction was temporary, and did not unduly burden interstate commerce or outweigh the interest in combatting theft)) (internal quotations removed).

[74] *Id.*

## IV. THE TEST: STRICT SCRUTINY

### *A. Facial Discrimination*

The result reached by the Kentucky Supreme Court not only demonstrates that the court applied the wrong test, but also that it disregarded the Supreme Court's jurisprudence under the dormant Commerce Clause doctrine. This is not one of those thorny cases where the challenged statute regulates evenhandedly "with only incidental effects on interstate commerce."[75] In fact, the discriminatory nature of the regulation at issue in *Jamgotchian* is not even one that can only be known by its "discriminatory effect."[76] On its face, Kentucky's intent is clear: "Unless the stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting *in Kentucky*, a horse *shall not race elsewhere* until the close of entries of the meeting at which it was claimed."[77] As Justice Brennan explained in *Hughes*, "[s]uch facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends.'"[78] The Justice further explained that "[a]t a minimum, such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives."[79]

Notwithstanding the fact that the Kentucky Supreme Court acknowledged that Article 6 was discriminatory—even if ever so slightly—it nevertheless refused to undertake a strict scrutiny analysis. The court concluded that the effects were "negligible" relative to the benefits offered to the racing industry.[80] They declared, however, that a law found to be discriminatory "invokes the strictest scrutiny of any purported legitimate local

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[75] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[76] *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (invalidating an Oklahoma law that prevented the transport of minnows obtained in Oklahoma for sale outside the state).

[77] 810 KY. ADMIN. REGS. 1:015 (1975) (emphasis added).

[78] *Hughes*, 441 U.S. at 322 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978)).

[79] *Id.*

[80] Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594, 610 (2016).

purpose" and "face[s] a virtually per se rule of invalidity."[81] While acknowledging that any analysis involving the dormant Commerce Clause doctrine is inherently perplexing, Article 6 constitutes a quintessential type of regulation that the Supreme Court has identified as discriminatory towards interstate commerce: laws that limit access to in-state resources.[82] Regulations attempting to preserve an article of commerce—land, minnows, milk, electricity—for state residents by limiting use to non-residents have not only required the application of strict scrutiny, but also have been invalidated as violating the Dormant Commerce Clause.[83]

### *B. Economic Protectionism*

As the abovementioned cases illustrate, the Supreme Court requires more than simply a legitimate purpose; a regulation attempting to prohibit access to resources must serve an *important* purpose in order to be upheld.[84] Erwin Chemerinsky, a prominent United States Constitutional scholar, stated that "[a]t the very least, a state law that discriminates against interstate commerce must be justified by a purpose that is unrelated to economic protectionism."[85] Moreover, the Supreme Court has stated that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose."[86] The Kentucky Supreme Court not only failed to undergo a strict scrutiny analysis after identifying that the regulation was discriminatory, but it also failed to identify an important purpose unrelated to economic protectionism. Although the court reasoned that the Commission did not adopt Article 6 with a "protectionist intent,"[87] the only

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[81] CHEMERINSKY, *supra* note 18, at 455.

[82] *Id.* at 457; *see* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidated a law attempting to reserve its scarce landfill space for in-state refuse); Fort Gratiot Sanitary Landfill v. Mich. Dep't of Nat. Res., 504 U.S. 353 (1992) (invalidated a law that prevented a landfill operator from accepting out-of-county waste); *Hughes*, 441 U.S. 322 (1979).

[83] CHEMERINSKY, *supra* note 18, at 458.

[84] *Id.* at 456 (emphasis added).

[85] *Id.* (internal quotations removed); *see also* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988).

[86] Maine v. Taylor, 477 U.S. 131,148 (1986) (upheld a state ban on the importation of live baitfish because it served a legitimate purpose that could not adequately be served by available non-discriminatory alternatives).

[87] Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594,611 (2016).

abstract rationale it provided of a "compelling" purpose was "racing integrity reasons," and "deterring frivolous claiming practices."[88] Even as the court stressed the history of the claiming race, and its many evolutions, it consistently expressed that its central purpose was "to ensure the integrity and viability of thoroughbred racing...," which is one of Kentucky's most vital industries.[89]

The true motivation behind the court's decision was best articulated by the former vice president of racing at Del Mar: "We don't want people coming in raiding our horses."[90] Clearly, it is difficult to divorce the intent of Article 6, as articulated by the Kentucky Supreme Court itself, from the very form of "evil"—economic protectionism—that invokes a strict scrutiny analysis. Yet, by apparent misapplication of Supreme Court precedent, the court applied the balancing test.

The Kentucky Supreme Court further reasoned that strict scrutiny was inapplicable to Article 6 and that the regulation was not protectionist in any *meaningful* way because the restriction's temporary nature.[91] Aside from the claim being seemingly irrelevant, the court overstated the disposition of *Tennessee Scrap Recyclers Association v. Bredesen* in attempting to support it. In *Bredesen*, although the Sixth Circuit did elude that the temporary nature of Memphis's "tag and hold" regulation was a relevant consideration, it was in no way deemed dispositive.[92] Rather, the court emphasized the fact that the regulation had an exceptionally narrow scope—it did not apply to parties outside the city of Memphis, and was plainly directed at curving a *historical* metal theft crime wave.[93] Additionally, the Sixth Circuit explained that "if [the] law [had] any out-of-state effect at all, that effect [was] beneficial to out-of-state scrap dealers, as the ordinance burden[ed] their competitors in Memphis."[94] Moreover, the court provided a clear line of reasoning as to why the "tag and hold" regulation was not protectionist. These were the dispositive

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[88] *Id.* at 615.

[89] *Id.* at 621.

[90] Tracy Gantz, *Claiming Jail*, THOROUGHBRED OWNERS OF CAL., http://www.toconline.com/publicationsmedia/article-archives-2/racing-your-horse/claiming-jail/ [perma.cc/374G-N859].

[91] *Jamgotchian*, 488 S.W.3d at 618.

[92] Tennessee Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442, 451 (6th Cir. 2009).

[93] *Bredesen*, 556 F.3d at 450 (emphasis added).

[94] *Id.*

considerations taken by the court in reaching its holding—not the length of the ten-day holding period itself.

Given the nature of the argument that Kentucky looked to advance through *Bredesen*, that the restrictions were non-protectionist due to being temporary in nature, it should be noted that the U.S. Supreme Court has never clearly articulated any sort of "*de minimis*" exception to the dormant Commerce Clause. Rather, the only relevant consideration is whether the given regulation is justifiable. To whatever extent *Bredesen* may be relevant, however, its "tag and hold" regulation is distinguishable from Article 6.

First, the temporal scope of Article 6 is much broader. It applies to all tracks in the state, not just the subdivisions thereof. Also, Article 6 restrictions may lead to a prohibition of transfers for up to 60 days, as opposed to the ten days required under the "tag and hold" restriction. Though notable in and of itself, the impact of that distinction is magnified when one considers the industries to which each restriction applies. Not only does the restriction under Article 6 bar claimants from using their property to pursue earnings outside of Kentucky, but it also prohibits other states from acquiring earnings in Kentucky—a state whose second-largest track is located in a city nicknamed the "Horse Capital of the World."

Second, Article 6 does not clearly advance a legitimate, non-protectionist purpose—that is, Article 6 is not aimed at curtailing any "historic" criminal activity. Rather, Article 6 is designed to keep Kentucky's resources in-state for a specified period of time in order to bolster its thoroughbred racing industry. Third, Article 6 is designed to do the aforementioned while protecting against out-of-state competition. The regulation at issue in *Bredesen* cannot be credibly analogized to Article 6 as a means of supporting the proposition offered by the Kentucky Supreme Court in any meaningful way. Also, it is no safe harbor for the court to argue that Article 6 is not protectionist because "the vast majority of tracks ... elsewhere" have similar restrictions.[95] As declared by Justice Robert Jackson, the dormant Commerce Clause is principally concerned with states acting to help themselves at the expense of other states, resulting in those affected states

[95] *Jamgotchian*, 488 S.W.3d at 615.

subsequently retaliating with their own protectionist legislation.[96] Ironically, in anticipation of this accusation, the court states "lest this situation be mistaken for the very sort of protectionist tit-for-tat the Commerce Clause ... obviate[s]," before it went on to reemphasize the purpose of Article 6.[97] Not only does this reasoning seem circular, as if it should be accepted as some self-evident proposition, but it begs credulity.

The argument that the regulation's limited duration dilutes protectionism is also an insufficient defense. In fact, similar arguments have been rejected by other state officials whose states have regulations akin to Article 6. In a letter to the California Horse Racing Board (CHRB), the Attorney General of California penned "*the proposed 60-day post-race meeting prohibition* of out-of-state racing of a California claimed horse would have the effect of controlling commercial activity occurring wholly outside the ... state."[98] He continued on to say that "the restriction is plainly proposed only for economic reasons, as an effort to keep more horses from leaving the state. *California plainly cannot assert extraterritorial jurisdiction such as here being considered.*"[99] Although this letter was crafted by the CHRB in response to a proposed extension of California's claiming jail by the CHRB, its logic ultimately undermined the practice altogether. Not only did the CHRB refuse to amend their claiming rule, but it disposed of its claiming jail rules entirely shortly after receiving the Attorney General's letter. Notably, Jamgotchian actually attached a copy of this letter to his motion for summary judgment. Yet, in the face of such clear language, the court simply disregarded the letter and subsequent determination by the CHRB in the footnotes of its opinion.[100] Cue Upton Sinclair.

### *C. Extraterritorial Reach*

Pursuant to the logic of the Attorney General of California, it would seem difficult to argue that Article 6 does not assert

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[96] *See generally* H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534-539 (1949).

[97] *Jamgotchian*, 488 S.W.3d at 615.

[98] Letter from Bill Lockyer, Attorney General of California, to Roy C. Wood Jr., Executive Director of the California Horse Racing Board (Sept. 8, 2003) (emphasis added).

[99] *Id.*

[100] *See Jamgotchian*, 488 S.W.3d at 615.

extraterritorial jurisdiction as well. It is clear, just as the CHRB was made aware, that the Commission was regulating economic activity occurring wholly outside of the state of Kentucky.[101] Persons who violate Article 6 regulations are subject to fines, license suspension, and other sanctions.[102] Accordingly, by enforcing these penalties, the state effectively placed a barrier between claimants and other states hosting meets for a period of up to a quarter of a year. This means that no state's track will have access to any claimant's horses because of the claimant's natural desire to avoid facing penalties.

Moreover, just as it was observed by the Attorney General, Article 6 was proposed for economic reasons. In fact, there is no doubt because the court not only said just that, but belabored the point in its opinion.[103] The court, however, arguably strained to distinguish the claim before it from well-settled Supreme Court precedent by reasoning that "Article 6 is not an attempt by Kentucky, directly or *indirectly*, to regulate horse racing (or any other) activities in other states."[104] This rationale appears to reflect the notion that a state must have intended to indirectly regulate the commerce of other states—it does not. Indeed, if the extraterritoriality doctrine declares state laws that indirectly regulate commerce occurring wholly outside of that state as invalid *per se*, regardless of the regulation's effects in that state, then it would appear that Article 6 warrants greater evaluation under the doctrine than what the court credited it.

Similar to the rationale that it must be the states intention to regulate extrastate commercial activity, it would appear equally irrelevant that an "elsewhere state" did not *require*, as argued by the court, in *Jamgotchian*, to violate Article 6.[105] The extraterritorial doctrine is principally concerned with the effects on commerce caused by the state promulgating the challenged regulation; not the actions of outside states.

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[101] Reply Brief for Plaintiff-Petitioner at 3, Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594 (2016) (No. 16-171).

[102] *See* 810 KY. ADMIN. REGS. 1:028 (2016).

[103] *Jamgotchian*, 488 S.W.3d at 604.

[104] *Id.* at 620.

[105] *Id.* at 615.

*D. Least Restrictive Alternative*

The court further departed from Supreme Court jurisprudential thought by not requiring the state to prove that it employed the "least restrictive alternative" to achieve Article 6's regulatory goal. The "least restrictive alternative" component is an essential inquiry to the Dormant Commerce Clause doctrine regardless of whether a court declares the challenged regulation discriminatory, or non-discriminatory.[106] The Kentucky Supreme Court gave the state a pass in large part because, as characterized by the court, Article 6 is "knowingly and voluntarily agreed to" rather than an "unavoidable governmental regulation affecting all commerce."[107] Aside from being analytically deficient, this argument is beside the point. First, the rule was not established by the private sector, but by the Commission acting under the authority of the General Assembly. This qualification alone removes Article 6 from that which is "knowingly and voluntarily agreed to."

Second, a claimant is subject to Article 6 the moment they chose to purchase a horse through a claiming race. The fact that the claimant could have purchased a horse by other, *private* means is immaterial. This proposition is supported by the logic of Supreme Court cases that involve attempts by states to limit access to in-state resources. In *Hughes v. Oklahoma*, Hughes would not have been subject to Oklahoma's regulation had he purchased commercially farmed minnows, as opposed to fishing them out of public waterways.[108] Similarly, in *South Central Development Inc. v. Wunnicke*, if South-Central had decided not to directly purchase state-owned timber, it would not have been required to have it semi-processed in Alaska.[109] Both *Hughes* and *South-Central*, however, having alternatives was irrelevant to the findings of the Supreme Court "because [its] proper focus [was] on

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[106] *See generally* CHEMERINSKY, *supra* note 18, at 450 (Yet the court has never struck down a non-discriminatory law on the basis that the goal could have been achieved by less burdensome means).

[107] *Jamgotchian*, 488 S.W.3d at 610.

[108] *See* Hughes v. Oklahoma, 441 U.S. 322, 345-46 (1979).

[109] *See generally* South-Central Development Inc. v. Wunnicke, 467 U.S. 82 (1984) (plurality opinion).

where the state *does discriminate*, not where it does not."[110] In short, there is no legal framework that provides a loophole—as suggested by the Kentucky Supreme Court—around the "least restrictive alternative" component.

The Supreme Court has clearly ruled when a state chooses to discriminate against interstate commerce, the "burden falls on the government" to establish the absence of either non-discriminatory or less discriminatory alternatives.[111] By placing that burden on the government the court is able to detect where "the evil of protectionism ... reside[s] in the legislative means [as opposed to] legislative ends."[112] Although the Commission had every opportunity to do so, it failed to explain the lack of available non-discriminatory options. Acting in total disregard, the Commission failed to articulate why it had no way, other than that which overtly discriminates against interstate commerce, to serve its putative local purpose.[113] In not requiring the Commission to explain the absence of non- or less-discriminatory alternatives, the court seemingly reasoned that the restrictions of claiming races were necessary to "deter aggressive claiming practices" (e.g., raiding a state's thoroughbred horses).[114]

If the Commission is concerned about maintaining fuller fields by discouraging claimants from entering claimed horses in out-of-state meets, why not simply increase the purchase price of horses entered into claiming races? Alternatively, why not increase the price of claiming races? Paraphrasing a basic economic principle, the Law of Demand states that, all else being equal, a higher price leads to a lower quantity demanded.[115] Moreover, this principle captures the idea that for a sufficiently high price, each owner would be more willing to risk losing their horse to a claimant. The effectiveness of either alternative is unclear, but it is unacceptable that the Commission refused to explain why they had no other option to maintain racing integrity than that which precisely discriminates against interstate commerce.

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[110] Reply Brief for Plaintiff-Petitioner, *supra* note 101, at 3.

[111] *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).

[112] *See* Reply Brief for Plaintiff-Petitioner, *supra* note 101, at 3 (citing *Hughes*, 441 U.S. at 322 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978))).

[113] *See Hughes*, 441 U.S. at 337-38.

[114] Jamgotchian v. Kentucky Horse Racing Comm'n, 488 S.W.3d 594, 614 (Ky. 2016).

[115] *Law of Demand*, INVESTOPEDIA, https://www.investopedia.com/terms/l/lawofdemand.asp (last visited Feb. 20, 2018).

If the Commission had explained why they selected their choice, it appears unlikely that they would have been able to establish that Article 6 constituted the least discriminatory alternative given its protectionist qualities. As briefly discussed *supra*, the Kentucky Supreme Court itself seemingly spoke to the protectionist nature of Article 6. The court reasoned that:

> Article 6 restrictions, because of their limited duration—about three months maximum—have a minimal effect, if any, on interstate commerce, whereas their benefit to Kentucky's thoroughbred racing industry, an industry, of course, in which Kentucky takes a keen interest, both economically and culturally, is substantial. As the trial court saw it, *the Article 6 restrictions, by tending to counteract one of the drains on the supply of horses competing at a given meet, encourage larger race fields at that meet, which in turn increases the interest in and the amount of money wagered on races, a benefit resulting in larger purses, payoffs, handle, and tax receipts to all the interests involved.*[116]

Given such a glaring concession, the court's misapplication of Supreme Court precedent seems clear.[117] Hindering "the reallocation of economic resources to their highest-valued use" for a period of up to three months is no minimal effect, and it is no answer to generally claim that your state has a substantial economic interest in that resource.[118]

## CONCLUSION

This Note proposed the appropriate test that the Kentucky Supreme Court should have applied in its dormant Commerce Clause analysis. Whether Article 6's claiming jail requirement would have survived a strict scrutiny analysis is unclear; what is

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[116] *Jamgotchian*, 488 S.W.3d at 601 (emphasis added).

[117] New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988) (noting that state statute that clearly discriminates against interstate commerce is "unconstitutional unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism ... ").

[118] Edgar v. MITE Corp., 457 U.S. 624, 644 (1982).

clear, however, is that Article 6—as observed by the Kentucky Supreme Court—is discriminatory and protectionist. It is also clear that the Kentucky Supreme Court failed to require the Commission to address possible non- or less discriminatory alternatives to the Article 6 restrictions. Consequently, it is abundantly clear that Kentucky's application of the *Pike* balancing test was inappropriate. The state's highest bench applied the test which conveniently permitted them to express their own policy bias. Such ideological bias is the very reason why several Supreme Court justices—objecting to applications of the balancing test—have argued that it is a mechanism "ill-suited to the judicial function."[119]

Most notably, Justice Scalia expressed that "this process is ordinarily called balancing, but the scale analogy is not really appropriate, since the interests on both sides are incommensurate."[120] Rather, he continued, "it is more like judging whether a particular line is longer than a rock is heavy."[121] The goal of the dormant Commerce Clause is to prevent states from discriminating against or unduly burdening interstate commerce—particularly in the form of economic protectionism. Here, foregoing the arbitrariness of the balancing test in favor of a strict scrutiny analysis would have removed the Kentucky Supreme Court's judicial bias and better served this goal.

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[119] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., dissenting).

[120] *Id.* (internal quotations removed).

[121] *Id.*