1992

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Publication Information & Recommended Citation

Regan, Donald H. "State Regulation of Commerce (Update)." In *Encyclopedia of the American Constitution*, edited by Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, suppl. 1, 516-518. New York: Macmillan, 1992.

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Editors: Leonard W. Levy and Kenneth L. Karst
Date: 2000

From: Encyclopedia of the American Constitution(Vol. 5. 2nd ed.)
Publisher: Gale

Document Type: Topic overview
Length: 1,725 words

STATE REGULATION OF COMMERCE (Update 1)

In the period covered by this supplementary article, the Supreme Court has decided a case or two a year on state regulation of commerce. Considered individually, none of the cases through mid-1989 seeems destined to become a landmark in DORMANT COMMERCE CLAUSE doctrin. Collectively, however, the cases may indicate a decreasing emphasis on "balencing" and an increasing focus on preventing

states from intentionally discriminating against out-of-state interests.

As Edward Barrett pointed out in the original article on this topic for this Encyclopedia, the Court has always recognized that state regulations discriminating against INTERSTATE COMMERCE are unconstitutional. But in 1970, in *Pike v. Bruce Church, Inc.,* the Court stated a BALANCING TEST, under which even a nondiscriminatory state regulation is unconstitutional if it affects interstate commerce and if the burdens imposed on such commerce by the regulation outweigh the local benefits. For the next fifteen years, balancing was treated as the central element in dormant commerce clause analysis, both by the Court and by scholars, who had taken up the cause of balancing long before the Court endorsed it explicitly.

Similarly, the first expressions of disaffection with balancing appeared, not in judicial opinions, but in the scholarly literature. Starting around 1980, some scholars began to question whether there was any warrant in the Constitution for judicial balancing of economic interests and to suggest that such balancing was a task courts were not well qualified for. These commentators suggested that courts would be more faithful to the Constitution—and would be doing something they were better qualified for—if they concentrated on identifying and overturning state regulations that discriminated against out-of-state interests.

Unfortunately, discrimination is a chameleon among concepts. The first proponents of the new antidiscrimination theory tended to think that a regulation was discriminatory if it would not have been adopted had all affected out-of-state interests been represented in the state legislature equally with the affected in-state interests. In application, this test leads right back to balancing. Furthermore, the test is theoretically suspect because it presupposes that out-of-state interests are entitled to virtual representation in the state's legislature, a notion that seems at odds with the genius of a federal system.

If we look for a narrower definition of discrimination, we are naturally led to a choice between defining it in terms of the effects of a regulation and defining it in terms of the regulation's purpose. Both possibilities have their advocates. It may seem at first that discriminatory effects are easier to identify than discriminatory purpose, so we should focus on effects. But it is clear that

we cannot hold unconstitutional every state regulation that has any effect, however unintended, of (for example) moving business from out-of-state companies to their in-state competitors. Such a rule would plainly invalidate too much regulation. Thus, if we set out to focus on discriminatory effect, treating it as significant in itself and not just as evidence of discriminatory purpose, then whenever we find such an effect, we are led back to a version of balancing, as we try to decide whether the benefits of the regulation justify the discriminatory effect we have found.

The only test that does not lead back to balancing is a test that focuses on discriminatory purpose, invalidating a regulation when the legislature's motive was to prefer in-state over out-of-state interests. There is, of course, a longstanding debate, not limited to the dormant commerce clause, about whether the courts should review legislative motivation. The Court has spoken out of both sides of its mouth on this issue for two hundred years: on many occasions, the Court has said it would not engage in motive review, but on many others, it has engaged in it, covertly or openly. Motive review is now firmly ensconced in the SUSPECT CLASSIFICATIONS branch of equal protection doctrine and in the doctrine of the ESTABLISHMENT CLAUSE, and almost as firmly in the law on FREEDOM OF SPEECH. With regard to the dormant commerce clause, the Court explicitly reaffirmed the propriety, if not yet the centrality, of motive review in *Amerada Hess Corp. v. New Jersey* (1989).

To illustrate that there may be a trend away from balancing in the Court's opinions, one can compare the two most widely discussed recent cases, both involving statutes regulating corporate takeovers. In *Edgar v. MITE Corp.* (1982) the Court struck down an Illinois antitakeover statue. The statute applied only to corporations with significant Illinois connections, but even so, it covered some corporations that were incorporated outside Illinois and had mostly non-Illinois shareholders. Six Justices voted to overturn the statute, relying on three different theories (most of them relying on more than one of these theories). The theories were (1) that the statute was preempted by federal statutory law; (2) that the statute amounted to constitutionally forbidden extraterritorial regulation; and (3) that the statute failed the balancing test of *Pike v. Bruce Church, Inc.* (1970). Technically, the only theory supported by a majority of the Justices, and therefore the theory of the Court, was the *Pike* balancing theory, and *MITE* was widely read as a balancing case. Close reading would have cast doubt on this interpretation (as indeed close reading of the Court's other decisions, including *Pike* itself, raises doubt about whether the Court, whatever it has said, has ever actually engaged in balancing, except in cases involving regulation of the transportation system). In *MITE* the fifth vote for balancing, which made balancing the official theory of the Court, came from a Justice who seemingly disagreed with the result in the case and was voting with the sole object of making the holding of the case as little restrictive of state power as possible.

Five years later, in *CTS Corp. v. Dynamics Corp. of America* (1987), the Court reviewed an Indiana antitakeover statute. The most significant difference between it and the Illinois statute was that the Indiana statute was limited to businesses incorporated in Indiana. This difference is highly relevant to the extraterritoriality issue and arguably relevant to the preemption issue, but it is essentially

irrelevant to the balancing approach. Therefore, the standard reading of *MITE* as a balancing case suggested the Indiana statute should be struck down. Instead, the Court upheld it. Writing for the Court, Justice LEWIS F. POWELL began his commerce clause analysis with the statement that "the principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." In his analysis of the case, Powell never cited *Pike,* the standard citation for the balancing approach since 1970. Justice ANTONIN SCALIA, concurring in the result in *CTS,* vehemently attacked balancing under the dormant commerce clause, as he has in many cases since.

Justice Scalia has not yet carried the day. He wrote for a unanimous Court in *New Energy Co. of Indiana v. Limbach* (1988) when he relied on "the cardinal requirement of nondiscrimination." But then, in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), seven Justices reaffirmed the propriety of balancing and purported to invalidate the statute before them by balancing. The Court may have been right when it chose not to rely on a finding of discrimination in *Bendix Autolite,* but even so, it need not have claimed to balance. *Bendix Autolite* was one of those rare nontaxation cases like *Allenberg Cotton Co. v. Pittman* (1974), involving what we might categorize roughly as administrative requirements on businesses, that probably should be decided by a "multiple burdens" analysis similar to that used in state taxation cases.

As late as 1989, in *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas,* a unanimous Court cited *Pike* as authority for balancing. But many considerations suggest that this citation of *Pike* means little: the Court upheld the statute, the supposed balancing was a perfunctory coda to a long and complex discussion of statutory preemption, and even Justice Scalia did not bother to register disagreement. The Court as a body still seems much less confident about the role of balancing than it seemed ten years ago.

One other possible trend deserves mention. Since 1974, the Court has decided four cases under the dormant commerce clause that centrally involved EXTRATERRITORIALITY issues (the two cases on antitakeover statutes and two others on beer price-affirmation statutes). Extraterritoriality is a problem that has lurked in the background of many dormant commerce clause cases, but has rarely taken center stage. The Court has never produced anything like an adequate theory of when a regulation is impermissibly extraterritorial, and it is doubtful whether extraterritoriality should be viewed as a commerce clause problem at all. On the other hand, the Constitution undoubtedly prohibits extraterritorial state regulation, and this prohibition is not easily assignable to any particular clause of the Constitution. There is no harm in the Court's sometimes treating the prohibition as grounded in the commerce clause, provided the Court does not confuse extraterritoriality with other commerce clause issues.

For the most part, the Court has treated extraterritoriality as a distinct issue, even when assigning it to the commerce clause. The Court may have taken a step down a dangerous path in *Healy v. The Beer Institute, Inc.* (1989), when it emphasized that the Connecticut price-affirmation statute would make it economically necessary for beer distributors setting a price for one state to consider market conditions in various states. In a multistate economy most state regulations have effects of this kind, and to treat such an effect as establishing a presumptive violation of the extraterritoriality prohibition would require some further step, presumably balancing, to decide when the presumptive violation was an actual violation. On the other hand, the Court also said in *Healy* that price-affirmation statutes "facially" violate the commerce clause, which means balancing is not required to identify the violation. There is work to be done here to develop a doctrine.

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(SEE ALSO: Economic Due Process ; Economic Equal Protection ; Economic Regulation ; Legislative Intent ; Legislative Purposes and Motives .)

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Source Citation
REGAN, DONALD H. "State Regulation of Commerce (Update 1)." *Encyclopedia of the American Constitution*, edited by Leonard W. Levy and Kenneth L. Karst, 2nd ed., vol. 5, Macmillan Reference USA, 2000, pp. 2515-2517. *Gale In Context: U.S. History*, link.gale.com/apps/doc/CX3425002390/UHIC?u=umuser&sid=bookmark-UHIC&xid=3b2f6b83. Accessed 2 Dec. 2022.

Gale Document Number: GALE|CX3425002390