The Dormant Commerce Clause: A Sensible Standard of Review

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THE DORMANT COMMERCE CLAUSE: A SENSIBLE STANDARD OF REVIEW

I. INTRODUCTION

The commerce clause\(^1\) affirmatively grants Congress the power to regulate commerce among the states. Congressional acts pursuant to this power are pre-emptive. The extent of state power becomes an issue only in the absence of congressional legislation. The Constitution does not specify what the states may do if Congress has not acted, nor does it specify what qualifies as commerce among the states.\(^2\) From this "great silence"\(^3\) it is inferred that, if Congress has not spoken, the states have a "residuum of power" to regulate local affairs even though their actions may affect or regulate interstate commerce.\(^4\)

The commerce clause requires that some aspects of trade generally remain free from state interference. When a state ventures excessively into the regulation of these aspects of commerce, it "trespasses upon national interests."\(^5\) The commerce clause implicitly limits states' authority by its explicit grant to Congress. This constitutional negative implication is the specter known as the "dormant"\(^6\) commerce clause.

Much litigation and debate has transpired in the name of the dormant commerce clause. The United States Supreme Court has defined and refined several methods to determine if state regulations trespass upon national interests. Courts seeking guidance on dormant commerce clause analysis will find little consistency in these deci-

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\(^1\) U.S. CONST. art. I, § 8, cl. 3, reads: "The Congress shall have Power . . . [t]o regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes . . . ."


\(^3\) Id.


\(^6\) Webster's Third International Dictionary defines "dormant" as sleeping. This suggests something with the potential for action, but currently at rest. Thus, one commentator noted, dormancy does not accurately describe the clause's limitation on state regulation; that which remains dormant is Congress, and not the commerce clause. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425, 425 n.1 (1982).
sions. When considering the validity of state laws, courts have
depressed their frustration with the Court’s inconsistencies.7

Section II of this comment examines the history and divergent
views of dormant commerce clause jurisprudence. Next, section III
discusses the breadth and consequences of the confusion. Section IV
analyzes the key United States Supreme Court cases which articulate
the “modern standards.” Section IV also highlights the unsettled
state of modern commerce clause principles. Finally, section V pro-
poses a sensible solution to the problem.

II. A History of Recurrent Themes

Dormant commerce clause jurisprudence has never been consist-
ent. The present state of dormant commerce clause analysis is the
latest stage in a process that has been repeated several times.8 The
Supreme Court’s first analysis of the limits of state action in Gibbons
v. Ogden9 was premised on the belief that the states were powerless
to regulate and tax interstate commerce.10 Chief Justice Marshall
adopted the Madisonian view11 that the states’ inevitable tendency to
pursue their separate interests at the expense of each others’ interests
necessitated the national body of Congress to neutralize biased state
actions.12

Marshall’s successor, Roger Brooke Taney, espoused the oppo-
site view,13 believing that the “mere grant of power to the general
government cannot . . . be construed to be an absolute prohibition to
the exercise of any power over the same subject by the States.”14 In
his opinion, state commerce regulations were valid unless they con-
flicted with a law of Congress. Thus, the only negative implications

7. “It is when the Court, in the name of the Commerce Clause, has invalidated state
regulation that a consistent rationale has been more difficult to find.” American Trucking
8. Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125, 126.
“The Court states some relatively coherent theory of what state regulations of interstate
commerce are permitted; that theory is seen to have consequences that the Court regards as
undesirable; a new theory is developed although the Court pays lip service to the older one.”
Id.
10. Id. at 209.
11. THE FEDERALIST Nos. 41, 42 (J. Madison).
stated, “It is well known that upon this subject a difference of opinion has existed, and still
exists, among the members of this Court.” Id. at 578 (five Justices concurred with Chief
Justice Taney, but each wrote a separate opinion).
14. Id. at 579.
of the commerce clause came from Congress' power to pre-empt state action which conflicted with the actual exercise of its legal authority. ¹⁶

A. The Cooley Doctrine

These conflicting views and the tension they aroused in the mid-nineteenth century¹⁸ were finally resolved by the Supreme Court in Cooley v. Board of Wardens.¹⁷ In Cooley, litigants challenged the constitutionality of a local Pennsylvania law requiring ships entering or leaving the state to engage a local pilot or pay a fee into a pilot retirement fund. The Court distinguished between areas involving commerce in which the states have constitutional power to regulate and areas in which the states are constitutionally forbidden to act. It invoked a federal statute which provided that "all pilots . . . shall continue to be regulated in conformity with existing laws of the States" to support its conclusion that the "subject" of regulation in Cooley, pilotage, was "local" rather than "national."¹⁸

The Cooley doctrine rejected the view that congressional commerce power is exclusive and that the states have no power to regulate commerce. However, it did not propose that the states enjoy limitless power in the absence of congressional legislation.¹⁹ Cooley dictated that states could regulate in matters of commerce so "local" in character as to demand diverse treatment, and Congress alone could regulate matters so "national" in character that a single, uniform system or plan was necessary.²⁰

This Cooley subject matter analysis is often cited as a guide in modern decisions. The most important case of the post-Cooley era is Wabash, St. Louis & Pacific Railway Co. v. Illinois.²¹ The Court

¹⁵. L. Tribe, supra note 12, at 322.
¹⁶. Id. at 323-26. The search for some kind of standard to determine the validity of state actions and alleviate existing doctrinal confusion led the Court to use a series of distinctions: 1) police power regulations = commerce power regulations, 2) direct-indirect action, and 3) national-local. These imprecise labels were weak in predictive value and were abandoned. The latter of these distinctions, national-local, however, is helpful in creating a modern standard of review.
¹⁷. 53 U.S. (12 How.) 299 (1851).
¹⁸. Id. at 318-19.
²⁰. 53 U.S. at 318.
²¹. 118 U.S. 557 (1886). See L. Tribe, supra note 12, at 325. Other applications in-
held that a state’s ban on freight rate discrimination by railroads could not be enforced on interstate shipments. Following Cooley principles, the Court determined that the regulations were of a “national” rather than “local” character, though Congress had not acted in the area. It reasoned that if states were free to fix their own rules, all states would do so and commerce would be disrupted.

Cooley’s “local/national” distinction, however, needed refinement. It was unclear what limitations, if any, would be imposed on the states once the “subject” of regulation was determined to be of a “local” nature. The post-Cooley Supreme Court attempted to refine the guidelines for permissible state action by formulating the distinction between “direct” and “indirect” burdens, but eventually abandoned them as labels “remote from actualities” and “mechanical.”

B. A Series of Balancing Tests

The quest for a more adequate articulation of the applicable criteria led to Southern Pacific Co. v. Arizona. Justice Stone’s interpretation of the dormant commerce clause involved a detailed approach to determine which state action would be allowed and which would not. State regulation affecting interstate commerce would only be upheld if it was rationally related to a legitimate state end and if the burden imposed on interstate commerce was outweighed by state interest. The Court invalidated a statute limiting the length of trains operating within the state, deeming it an unconstitutional burden on commerce. After “balancing” state and national

include Ex parte McNeil, 80 U.S. (13 Wall.) 236 (1872), and Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866).

22. L. TRIBE, supra note 12, at 325. By the time of the Wabash decision, it had already become clear that the classification of regulatory subject matter as “national” or “local,” like the earlier dichotomy between “police” and “commerce” regulations, was more conclusory than explanatory.

23. Di Santo v. Pennsylvania, 273 U.S. 34 (1927). The Court labelled “direct” those state actions whose burden on interstate commerce was considered invalid and “indirect” those which were allowable.

24. Id. at 44 (Stone, J., dissenting).


26. Tushnet, supra note 8, at 128-29. Stone failed to complete the task of reconstructing dormant commerce clause doctrine which he began with United States v. Carolene Prods. Co., 304 U.S. 144 (1938). Professor Tushnet believes Stone failed to understand what sorts of justifications were needed for judicial intervention, noting that, “the result has been doctrinal confusion as discredited doctrines are covertly relied on and sensible doctrines are only fleetingly glimpsed.” Tushnet, supra note 8, at 128-29.

27. 325 U.S. at 770-71.
interests, the Court concluded that the obstruction to interstate train operation was far greater than the alleged safety factor which was not even lessened by the regulation.

In *Bibb v. Navajo Freight Lines, Inc.*\(^{28}\) this balancing test was applied to an Illinois statute requiring the use of special mudguards on trucks. Evidence indicated that these mudguards may have been more dangerous than the conventional mudguards. Also, because conventional mudguards were required in Arkansas, trucks traveling between Arkansas and Illinois would have had to change equipment at the border. After balancing the interests involved, the Court found that the burden on interstate commerce outweighed the professed safety interest of the state.\(^{29}\)

The Court further delineated its view of "balancing" in *Pike v. Bruce Church, Inc.*\(^{30}\) *Pike* set the modern standard for analysis of state action affecting interstate commerce. Arizona required that all cantaloupes grown in the state be packed in standard crates identifying them as Arizona-grown. The state was trying to enhance and protect the reputation of local melon growers. The Court dictated that:

> 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. 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 interests involved, and on whether it could have been promoted as well with a lesser impact on interstate activities.\(^{31}\)

The Court found that, although Arizona had a legitimate local purpose, the burden it imposed on interstate commerce (requiring *Pike* to spend $200,000 for a packing plant in Arizona to pack his $700,000 crop) was unacceptable.\(^{32}\)

In 1979, the Supreme Court, in *Hughes v. Oklahoma*,\(^{33}\) restructured the *Pike* analysis. It developed a three-prong test to strike down an Oklahoma statute that prohibited minnows procured in Oklahoma waters from being transported outside the state. The

\(^{28}\) 359 U.S. 520 (1959).
\(^{29}\) Id. at 527, 529-30.
\(^{31}\) Id. at 142 (citations omitted).
\(^{32}\) Id. at 145-46.
Court stated that it would judge the state regulation according to the same general rule which applied to state regulations of other natural resources. 34

Cases where state highway regulations are challenged under the commerce clause reveal yet another "balancing" approach in modern commerce clause jurisprudence. The Supreme Court has often stated that it is reluctant to use the commerce clause to invalidate state regulations in the field of safety. 35 Deference to state regulation is greater in the field of highway safety regulations than in any other field. 36 Challenges to safety regulations must overcome a "strong presumption of validity." 37

In the last thirty terms, the Court has invalidated state regulations purportedly enacted in the name of highway safety in only three cases. 38 The most recent of these cases, Kassel v. Consolidated Freightways Corp., is generally considered the standard of review for highway safety regulations challenged under the commerce clause. 39

34. 441 U.S. at 329. The Court quoted:
If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why not the products of the field be brought within this principle? Thus, enlarged, or without enlargement, its influence on interstate commerce need not be pointed out.

Id. (quoting West v. Kansas Natural Gas Co., 221 U.S. 229, 255-56 (1911)).

35. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443 (1978). The Court held that a Wisconsin statute that precluded the use of 65-foot double trucks violated the commerce clause. See also cases cited infra note 36.


38. Eule, supra note 6, at 437. These cases are Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (the Court held unconstitutional an Iowa statute prohibiting the use of 65-foot double trailer trucks within its borders); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (the Court held unconstitutional a Wisconsin regulation generally barring trucks longer than 55 feet from the state highways without a permit); and Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (the Court held unconstitutional an Illinois statute requiring trucks operating on state highways to be fitted with contour mudguards).

39. The specific issue considered in Kassel, however, has been largely mooted by subsequent congressional action. Both the Surface Transportation Assistance Act of 1982 (Pub. L. No. 97-424, 96 Stat. 2097) and the Department of Transportation Appropriations Act of 1983 (Pub. L. No. 97-369, 96 Stat. 1765) displace state law regarding truck weight, length, and
The Court struck down an Iowa statute banning most trucks measuring more than 55 feet long. The Court, however, was never able to render a majority opinion. A four-justice plurality opinion, written by Justice Powell, used a balancing approach, weighing the asserted safety purpose against the degree of interference with interstate commerce. Acknowledging the strong presumption of validity the Court gives to regulations that touch upon safety, especially highway safety, the plurality noted that these regulations "nevertheless may further the purpose so marginally and interfere with commerce so substantially as to be invalid under the commerce clause." The plurality found that the regulation discriminated against interstate commerce because it bore "disproportionately on out-of-state residents" due to exemptions favoring local interests.

The plurality also quoted Justice Blackmun's concurrence in Raymond Motor Transportation, Inc. v. Rice, stating that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce."

Justice Brennan's concurrence never balanced the interests involved. He considered the protectionist legislation to be per se unconstitutional. In the dissenting opinion, Justices Rehnquist and Stewart and Chief Justice Burger gave even stronger deference to the states, stating that they will automatically uphold a transport regulation if the safety interests asserted by the state are more than "slight or problematical."

After years of vacillation and striving for a coherent theory, this is the current foundation upon which to rest dormant commerce clause analysis.

III. CONFUSION BREEDS CONFUSION

"[A]fter all is said and done . . . the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly
confused.  

Everything from coal to cantaloupes can be an article of interstate commerce. It is not surprising, then, that the courts are increasingly faced with determining the validity of state regulations affecting interstate commerce. The Supreme Court in the last decade has interpreted the dormant commerce clause as a primary issue in fourteen cases. This is more than triple the Court's previous annual rate for addressing such cases. Since interstate commerce is the root of so much activity, in both a litigious and an economic sense, it is important to have a clear and sensible dormant commerce clause analysis. Lower courts currently lack a coherent commerce clause doctrine upon which to judge these important cases.

This comment does not propose to herald the beginnings of a "Justice-malpractice" petition. Indeed, the Supreme Court somehow always manages to achieve justice in deciding these cases. But it is not the court's correctness that confuses; it is its methodology. With-

45. _Id._


49. One commentator suggests another reason for rethinking dormant commerce clause theory. Professor Tushnet, suggests that because of the remoteness of the cases from areas of major constitutional controversy and because "no one can get very excited over dormant commerce cases," they provide a handy ground for developing general ideas about federalism, the separation of powers, and judicial review. Tushnet's well-developed comment concludes that the Court has overreached the justification for judicial review, and should adopt a political theory of review, reviving the notion of substantive due process. _Tushnet, supra_ note 8, at 125.
out having the benefit of the guidance of coherent theory, lower courts often render incoherent — or incorrect — opinions.

The following survey of the pertinent Supreme Court cases exposes the variances of the Court's rationale in deciding the constitutionality of state actions. These cases both reveal the Court's goals in balancing state and federal interests and provide a practical solution to the problem.

IV. MODERN STANDARDS

Lower courts faced with a dormant commerce clause issue confront several purported "modern standards" for review. Although these standards differ, they are often used interchangeably because of Supreme Court vacillation from test to test. Such casual application is legally unsound.

A. *Pike v. Bruce Church, Inc.* and *Hughes v. Oklahoma* Detail an Approach to Dormant Commerce Clause Analysis

By 1978, the Supreme Court's approach to the dormant commerce clause was thought to have coalesced in *Pike v. Bruce Church, Inc.*[^50^] *Pike* focused on the purpose of the legislation in question. The Court allows state and local governments to promote local objectives which have little or no effect on interstate commerce.[^51^] If a legitimate local purpose is found which affects interstate commerce, the court must balance the burden imposed upon interstate commerce against the benefits professed by the state's lawmakers.[^52^] If the court finds the state law to have an impermissible purpose, *Pike* mandates that the court apply a per se rule of invalidity.[^53^] The final stage of the *Pike* analysis states that the degree to which a state's burden on interstate commerce will be tolerated depends on the availability of less restrictive alternatives.[^54^] If the reviewing court finds a less restrictive alternative to be available to the states, it will invalidate the more oppressive state law.

*Hughes v. Oklahoma*[^55^] reaffirmed the language of *Pike* and afforded the Court a chance to restate the *Pike* precedent into a convenient three-prong test. The *Hughes* test considers: 1) whether the

[^51^]: Id. at 142.
[^52^]: Id.
[^53^]: Id.
[^54^]: Id.
challenged statute regulates even-handedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; 2) whether the statute serves a legitimate local purpose; and if so, 3) whether alternative means could promote this local purpose as effectively without discriminating against interstate commerce. In sum, Pike and Hughes mandate that states be permitted to promote their legitimate purpose only in ways consistent with the basic principle that "our economic unit is the Nation." 67

B. Kassel v. Consolidated Freightways Offers a Derivative Test of Lesser Scrutiny

Commerce clause analysis involves factors beyond those stated in Pike and Hughes. Specifically, the Court is reluctant to use the commerce clause to invalidate state regulations in the "local" field of safety. 68 States have the right to promote safety interests, especially those concerning highway safety and public health and life. 59 Thus, challengers of safety regulations have the burden of overcoming a stronger presumption of validity. 60

In light of this stronger presumption of validity, it stands to reason that states regulating an area of safety will be forced to meet less stringent criteria to prove a regulation's constitutionality. This was the case with Iowa's ban on double-bottom trucks measuring more than 55 feet in Kassel v. Consolidated Freightways, Inc. 61 Though Iowa's ban was found to be unconstitutional, the Court's criteria differed from the three-prong Hughes or Pike tests. In Kassel the Court derived its analysis from Pike in much the same fashion as it had done in the precedential highway case Raymond Motor Transportation, Inc. v. Rice. 62 Justice Powell's plurality opinion in Kassel focused on the regulation's safety objectives and weighed the state regulatory concern in light of the extent of the burden imposed on interstate commerce. 63 Powell concluded that the

56. Id. at 337.
57. Id. at 338-39 (quoting Du Mond, 336 U.S. at 537).
58. See supra note 35 and accompanying text.
60. Bibb, 359 U.S. at 524.
61. 450 U.S. 662 (1981). Note, however, that the Court warned that the mere incantation of a purpose to promote the public health or safety does not insulate a state law from commerce clause attack. Id. at 670.
63. 450 U.S. at 668.
Iowa law imposed a disproportionate burden on out-of-state interests. In this case the special deference traditionally accorded a state's safety judgment was unwarranted. Evidence revealed that 65-foot trucks were as safe as 55-foot or 60-foot trucks, thus rendering the 60-foot limitation an illusory safety interest.

But the Court in Kassel split three ways, affirming the lower court's decision six to three. The concurring and dissenting opinions varied considerably from the plurality opinion. Justice Brennan's concurrence suggested three principles which commerce clause challenges should take into account. These principles consider the burden imposed on commerce and the local benefits sought to be achieved by the state's lawmakers. Stating his disagreement with Justice Powell's "weighing or balancing," Justice Brennan noted that in the field of safety, the court must first establish that the intended safety benefit is not illusory, insubstantial, or nonexistent. It must then defer to the state's lawmakers on the appropriate balance of interests.

The dissenting opinion also rejected the "weighing" approach of the plurality. Justice Rehnquist's dissent agreed with Justice Brennan's opinion that the validity of the Iowa statute did not turn on whether long trucks were less safe than short trucks. Rehnquist focused on states' rights and on whether the legislation had a rational relation to its desired ends. His analysis is comparable to that of the second prong of the Hughes test and the rational basis aspect of Pike. Rehnquist suggested that if there is a valid reason for the legislation, the details should be left to the Legislature, not the judiciary.

64. Id. at 671.
65. Id. at 678.
66. Id. at 675.
68. Id. at 679-80 (Brennan, J., concurring). The three principles are: 1) the courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation; 2) the burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the state's lawmakers, and not against those suggested after the fact by counsel; and 3) protectionist legislation is unconstitutional under the commerce clause, even if the burdens and benefits are related to safety rather than economics.
69. Id.
70. Id. at 681 n.1.
71. Id. at 697 n.8 (Rehnquist, J., dissenting).
72. Hughes, 441 U.S. at 327. See supra text accompanying note 55.
73. Pike, 397 U.S. at 142. See supra text accompanying note 51.
74. Kassel, 450 U.S. at 699 (Rehnquist, J., dissenting).
In *Kassel*, none of the Justices embraced the strict *Pike/Hughes* standard. A few relied on parts of the *Pike* analysis, but none advocated using the *Pike* and *Hughes* criteria that consider the availability of less restrictive standards. Nevertheless, the availability of a less restrictive alternative is an important aspect of the stricter *Pike/Hughes* tests. Since it is difficult to imagine a regulation that could not be substituted with a less severe or less restrictive alternative, the state Legislatures will invariably be unable to satisfy the stricter scrutiny of this prong.

Perhaps it was this strict scrutiny that the Justices were trying to avoid when none of them added this prong to their dormant commerce clause analysis in *Kassel*. It appears the Justices were formulating a variation of the *Pike/Hughes* test which was adaptable to regulations concerning safety and "perhaps other fields where the decisions of State lawmakers are deserving of a heightened degree of deference."*

C. The Conflicting Guidance Confuses Lower Courts

Justice Rehnquist feared that, since none of the *Kassel* opinions commanded the adherence of a majority of the Court, the case would "further unsettle" what certainty there may be in the legal principles which govern decisions of commerce clause cases. His fears were confirmed by the following cases.

*American Trucking Associations, Inc. v. Larson* epitomizes a confused court. The case concerned the validity of a Pennsylvania statute requiring motor carrier vehicles to be inspected periodically. It would seem that, because the case's issue was the "local" one of highway safety, the Court of Appeals for the Third Circuit should follow *Kassel*. But the court had to choose between applying Justice Powell's balancing approach or Justice Rehnquist's "highly deferential" standard. The majority chose the latter and concluded that

75. See generally Dowling, Interstate Commerce and State Power, 27 VA. L. REV. 1, 22 (1940). Professor Dowling noted that this factor tips the scales back against the statute. In this innovative article, Dowling developed the theory that, in the absence of congressional action, courts should balance national and local interests in scrutinizing state legislation. Dormant commerce clause history reveals that the Court later adopted his approach in *Southern Pac.*, 325 U.S. at 768-71.
77. *Id.* at 703 n.13 (Rehnquist, J., dissenting).
79. See supra note 7.
80. *American Trucking Ass'ns*, 683 F.2d at 794.
81. Interestingly, the lower court, hesitant to follow the plurality's approach because of
the Pennsylvania statute did not violate the dormant commerce clause.\footnote{82}

The dissent in \textit{American Trucking Associations}, however, did not realize that, given the case's subject, \textit{Kassel} was the most fitting guide. It applied a \textit{Pike} balancing test, suggesting that a reviewing court engage in a careful "weighing of the asserted safety purpose against the degree of interference with interstate commerce."\footnote{88}

In another case, \textit{Smith v. District of Columbia},\footnote{84} judges also wavered from one standard to another. The issue in this case, the constitutionality of a police regulation prohibiting the possession of a police radar detector in a motor vehicle, also seems to lend itself to a \textit{Kassel} highway safety analysis. The appellants argued that the regulation violated the supremacy clause, the commerce clause, and the due process clause. When addressing the commerce clause challenge, the District of Columbia Court of Appeals ran into the muddy waters of dormant commerce clause analysis.

Relying first on "principles enunciated" by the Supreme Court in \textit{Kassel}, the court found that the District of Columbia could forbid the possession of a radar detector in a motor vehicle without offending the commerce clause.\footnote{86} The court dismissed the controversies among the \textit{Kassel} Justices in a footnote to the opinion.\footnote{86} It did not regard the critical differences between the plurality and concurring opinions as "particularly relevant" to the principles it relied on from the plurality opinion or the facts of the case before it.\footnote{87}

If the court had understood dormant commerce clause analysis, it would have ended its discussion with \textit{Kassel}. The case concerned highway safety, just as in the case of \textit{Kassel}; there was no need to satisfy the stricter \textit{Pike} standards. But the court mistakenly attempted to do so. Citing \textit{Pike}, it announced that the extent of the permissible burden depended on the benefit of the regulation to the state measured against its impact on interstate commerce.\footnote{88} Then,
getting deeper into trouble, it continued to satisfy the strictest prong of the *Pike/Hughes* test, asserting that "lesser measures were not available to accomplish the legislative goal of providing safe streets."\(^8\) It would be difficult to conclude from the Supreme Court's past decisions that it ever intended a court considering a highway safety issue to satisfy this strict scrutiny. It is not difficult, however, to understand the *Smith* court's mistake, given the unsettled state of dormant commerce clause doctrine.

V. A PROPOSED APPROACH TO DORMANT COMMERCE CLAUSE CASES

The preceding analysis highlights the effects of defective dormant commerce clause jurisprudence on lower courts. The discussion reveals the general patterns adopted by the Supreme Court, which the states should follow when deciding these cases. These patterns suggest a sensible standard for dormant commerce clause doctrine.

A. The State Statute's Purpose

The Supreme Court began each of its case analyses by considering the state statute's purpose.\(^9\) If the purpose was permissible, the Court continued its review. But at this point the Court diverged in developing its theory. Since the Court never explained its divergence,\(^9\) it is important to concentrate on this crux.

It appears that the route chosen depends on the nature or purpose of the state regulation. In *Pike* and *Hughes*, the matters considered were evaluated according to their consistency with the basic principle that the economic unit is the nation.\(^9\) That is, states may not promote their purpose if doing so only benefits those within their borders, to the detriment of the nation as a whole. *Hughes* rendered a standard derived from the general rule applied to state regulation of natural resources.\(^9\) When the regulation of natural resources is at issue, each state must not selfishly consider its individual needs. It must defer to that which is best for the entire

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89. *Id.*
90. *See supra* text accompanying notes 50-51, and notes 61-71 and accompanying text.
91. Professor Tushnet agrees that "[t]he Supreme Court, in attempting to describe what the courts should do, has done little more than state that, where intervention is appropriate, the courts should balance local and national interests. But balancing can take many forms." Tushnet, * supra* note 8, at 140.
92. *See supra* text accompanying note 57.
nation. These cases, then, involve matters of national concern.

On the other hand, Kassel concentrated on matters of a local nature. In this case, the Court began its discussion by stating that the power to regulate commerce is "never greater than in matters traditionally of local concern . . . for example, regulations that touch upon safety — especially highway safety." Courts normally afford "special deference" to regulations of a local nature because their burden usually falls on local economic interests and does not unduly burden interstate commerce. Thus, when the interest is local, the strict prong is disregarded.

B. Effective Use of the Local/National Distinction

This distinction between national and local subjects echoes the Cooley v. Board of Wardens doctrine. Cooley, however, stated that local statutes regulating subjects peculiar to local interests are valid, and statutes regulating national subjects are invalid. Though drawing a rigid conclusion from this local/national differentiation no longer makes sense, the distinction itself is useful.

Courts should consider which of the two categories, local or national, best describes the case before them. If a matter is so local in nature as to demand diverse treatment, it should be deemed local. This occurs where the local knowledge and needs demand different systems of regulation, often in areas such as safety and public health. If the issue is one of national concern or one which demands a single, uniform system or plan under national standards, it should be considered national. This flexible "test" would allow advocates to argue the necessity of either a local standard or a national plan.

C. The "Tests"

Once the court identifies the category into which the case falls, it can invoke an appropriate test for that category. There should be two distinct tests. An examination of past Supreme Court decisions,

94. Kassel, 450 U.S. at 670.
95. Id. at 675.
96. 53 U.S. (12 How.) 299 (1851). See also supra notes 17-20 and accompanying text.
97. 53 U.S. at 318.
98. Id. at 299. An example of such a "local" area of regulation would include automobile and truck equipment standards. See supra note 46.
99. See supra notes 35-37 and accompanying text.
100. See supra note 98. Examples of such "national" areas of concern would include regulation of water, coal, and timber. See supra note 46.
namely Pike, Hughes, and Kassel, guides the determination of the appropriate test. The Hughes three-prong test should govern matters of national concern. It invokes a stricter scrutiny befitting the great importance of a regulation affecting a national interest. States advocating such a regulation would have to convince the court that less restrictive alternatives were not available. This would be a difficult task. Oppressive regulations affecting interstate commerce, then, could not survive this strict scrutiny.

Less scrutiny should be given to regulations of local matters, which have a lesser impact on the nation. Kassel is an appropriate guide for deciding the constitutionality of “local” regulations. To formulate a “local” test, it makes most sense to adopt the “highly deferential” standard of Justice Rehnquist’s dissent and thus not subject the state to the stricter Hughes scrutiny. Though the Supreme Court has not been able to agree upon the standard for determining the constitutionality of a state’s safety-related legislation, aligning the Justices shows that five Justices rejected the balancing approach in the area of safety regulations. Also, a more deferential standard seems better suited to the commonly local safety issues. A state can best evaluate the health and safety needs particular to its borders. Finally, courts have been reluctant to superimpose judicial values over legislative values in safety areas. The “local” test, then, should measure whether the “strong presumption” of validity accorded the “local” statute overcomes any evidence that the law’s benefits are “slight or problematical” or “illusory.” In sum, a regulation of a local matter would trigger a rational basis scrutiny. If the state’s action is rationally related to its desired end, it would be valid.

D. The New Standard in Use

Washington State Building & Construction v. Spellman was decided in accord with the above proposal. The case involved a

101. Hughes, 441 U.S. at 336. See supra text accompanying note 56.
102. In his Kassel dissent, Justice Rehnquist noted that, “a majority of the Court goes on record today as agreeing that courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory.” 450 U.S. at 692 n.4. See also American Trucking Ass’ns, 683 F.2d at 795 n.6. The court in this case did not believe that the Supreme Court’s recent decision in Sporhase, 458 U.S. 941 (1982), suggested that a majority of the Justices would adopt a balancing approach in a case involving a non-discriminatory highway safety regulation. Contra American Trucking Ass’ns, 683 F.2d at 801 n.1 (Adams, J., dissenting).
103. See supra note 82 and accompanying text.
Washington storage ban on all non-medical radioactive waste generated outside the state. The court cited Kassel's warning that a mere incantation of a purpose to promote "public health or safety" is not enough to insulate a state from commerce clause attack.\(^\text{106}\) The court no doubt realized that the matter before it, radioactive waste, necessitated a single, uniform national plan or standard. It was a matter of national concern. Though the court never specified why it did so, it opted to use the *Pike* stricter scrutiny standard.

Since the Supreme Court has never clarified the matter, the *Washington* court floundered from precedent to precedent in its reasoning. But the term "public health and safety" did not deceive the court into applying a mere rational basis test. Because a national standard for storing radioactive waste is desirable, the court was correct in subjecting the regulation to the strict *Pike* scrutiny.

VI. Conclusion

Perhaps the framers of the Constitution should not have been quite so mute regarding the "great silence" of the Constitution, the dormant commerce clause. With all the confusion that abounds, it is no wonder some experts have proposed that we all but do away with the dormant commerce clause theory.\(^\text{107}\)

This comment has shown that sense can be made of the muddle by giving substance to the bodiless Supreme Court precedent. As Justice Cardozo wrote, the commerce clause "was framed upon the theory that peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."\(^\text{108}\) The states will have a better chance of swimming if the Supreme Court gives some semblance to the strokes.

*Lisa J. Petricone*

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106. *Id.* at 934.
107. *See*, e.g., Eule, *supra* note 6. Professor Eule proffers a radically diminished role for the dormant commerce clause. *Id.* at 428.