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Constitutional Limits on State Regulatory and Protectionist Policies

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Because our times appropriately can be termed a "deregulation era"—an era marked by increasing faith in the competitive market and increasing skepticism about the wisdom of government regulation1—it is timely to explore whether and how the deregulation philosophy is embodied in constitutional interpretation—specifically to see in what way the Constitution limits state restrictions on competitive markets.

For a backdrop to this discussion, of course, we must go back to the mid-1930s, a time when faith in the market system was significantly less than it is today. Faced with a perceived need for government intervention to regulate the vigors of competition, the Supreme Court rejected

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1 See National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 177 (1979); American Bar Association Commission on Law and the Economy, Federal Regulation: Roads to Reform (1978) (Exposure Draft); Airline Deregulation Act of 1978, Pub. L. No. 95-504, preamble, 92 Stat. 1705 (1978) ("To . . . encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services, and for other purposes.").

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the doctrine of economic due process and thus stopped reviewing the reasonableness of regulatory legislation to see whether that legislation was consistent with the judges' view of constitutionally protected competitive freedom. Since then, the Court has refused to review the wisdom of state economic regulation, upholding it against every substantive challenge by finding some connection, no matter how tenuous, between the regulation and an asserted proper state purpose.5

I mention this at the outset to emphasize that competitive values are given only a limited scope of constitutional protection. But I also want to suggest that the jurisprudential thought underlying the rise and fall of substantive, economic due process still influences the Court's interpretation of other constitutional provisions. Indeed, I believe that the Court is still living within the shadow of the economic due process cases; still reacting to the criticism of the 1930s and 1940s that exposed the institutional and antidemocratic weaknesses of economic due process review.4


4In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court "emphatically refuse[d] to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" 372 U.S. at 731-32, quoting *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 488 (1955). In *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), the Court overruled *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928), which it described as belonging to "that vintage of decisions which exalted substantive due process" and as "a derelict in the stream of the law." 414 U.S. at 164, 167. The Court found "little discussion" necessary to reject the substantive due process arguments raised, but virtually abandoned, in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 122 (1978), discussed in other respects in the text accompanying notes 58 to 84 infra.

I will develop this theme, and add another to it, by briefly outlining four constitutional provisions that do limit state regulatory powers: (1) the First Amendment protection of commercial speech; (2) cases invalidating state regulation as an undue burden on interstate commerce; (3) the concept of procedural due process; and (4) the supremacy clause, focusing today on the preemptive effect of Federal Trade Commission (FTC) rules.

My theme throughout is this: Although the Supreme Court's sometimes timid review of state regulatory legislation may be explained by its continued allergic reaction to economic due process review, that timidity is often unwarranted because the Constitution does embody several principles that protect the free market from some forms of state intervention.

PROTECTION OF COMMERCIAL SPEECH

I will not spend much time with the First Amendment cases already discussed by Stanley, but those cases do illustrate my themes. Commercial speech is protected because of its importance in a competitive

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market, so the commercial speech cases do elevate free market principles to constitutional level, at least insofar as commercial speech is perceived to be important to efficient markets and the state has not made the underlying competitive activity unlawful. But the balancing test used by the Court to decide commercial speech cases looks very much like a repackaged economic due process analysis, inviting Supreme Court reconsideration of the state's determination that it is wise to sacrifice market efficiency for some other purpose. Given the Court's premise that commercial speech is a protected value, their balancing test is appropriate. But because the balancing test looks so much like substantive, economic review, I suspect that the Court will apply its balancing test gingerly, leaving states plenty of leeway to intervene in the marketplace of words. Indeed, I believe this may be the message of the last three cases decided by the Court, all of which upheld state regulation of pure commercial speech.

For example, last term in Friedman v. Roger, the Court upheld the

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6Friedman v. Rogers, 440 U.S. 1, 8 (1979); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976). ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.")

Protection of commercial speech may also be based on other, non-economic values. Virginia State Bd. of Pharmacy, for example, noted the social value of getting important price information to "the poor, the sick, and particularly the aged," emphasizing that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 425 U.S. at 763. The Court also tried to support the commercial speech doctrine as necessary to "enlightened public decision making in a democracy," citing A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). 425 U.S. at 765. See generally Tribe, American Constitutional Law 654-55 (1978).


Texas Optometry Act, which forbids the practice of optometry under a trade or corporate name. Consumers claimed that because trade names communicate information concerning price, quality and the availability of routine services, the ban on trade names violated their right to receive information about optometric services. The state defended by arguing that, in personal service industries, trade names potentially mislead the public by creating an artificial distinction between the source of services and the identification of that source, thus disguising changes in personnel; absolving optometrists from dependence on their personal reputation; and, if different trade names are used for essentially similar services, creating the false impression of competition where none exists.

To balance these competing contentions, the Court had to determine whether, in a competitive system, using trade names is so much more valuable than using personal names that freedom to use a trade name outweighs the state's interest in avoiding the risk of misuse and deception. The Court held that trade names do not have such value; that, in fact, the significant competitive benefits of trade names can be achieved with personal names, and that the risks of deceptive use are significant.

By refusing to give constitutional protection to the inherent attractiveness of names, the Court leaves the states free to continue to develop the common and statutory law of trademarks as they desire. The suppression of trademarks through antidilution statutes, for example, remains unfettered by the Constitution. To the extent that this allows the states to remain "laboratories for experiment" in regulating trademark rights, Friedman appears to be a wise decision.

One cannot escape the conclusion, however, that the Court has taken a fundamental turn away from the aggressive protection of efficiencies

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13 Id. at 6–7.
14 Id. at 12–13.
15 In the Court's view, the kind, price, and quality of services that the public normally associates with a trade name can be communicated directly just as easily as through trade name association. Id. at 16.
from unrestrained commercial speech that was apparent in earlier commercial speech cases. The Court acknowledged that in a competitive market trademarks serve to indicate common ownership and to affix responsibility. For the highly mobile American public, trademarks provide a quick and sure index to service, quality, and price, and thus achieve considerable efficiencies for consumers by reducing search costs. Trademarks facilitate the growth of multimarket enterprises by allowing advertising dollars to cover more locations and by permitting the good will of one outlet to enhance the competitive potential of other outlets. In turn, multimarket enterprises can achieve economies of scale and standardized services that benefit consumers.

Rather than deciding that such efficiencies support First Amendment protection, however, the Court decided just the opposite: namely, that a state could validly prohibit the use of trade names to “discourage” those “large scale commercial practices with numerous branch offices.” In other words, because states are permitted to supplant unfettered competition with other forms of economic ordering, they should be permitted to restrict commercial speech as a means to that end.

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17 The Court seems to have acknowledged as much. Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978) (commercial speech occupies a subordinate position in the scale of First Amendment values; overbreadth analysis does not apply to commercial speech). Friedman v. Rogers, 440 U.S. 1, 10 (Court will “act with caution” in this area and will not automatically extend traditional First Amendment protection “to this as yet unchartered area”).

18 440 U.S. 1, 11 (1979). See also Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942) (“A trademark is a merchandising short cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value”); Smith v. Chanel, Inc., 402 F.2d 562, 566 (9th Cir. 1968). (“Preservation of the trademark as a means of identifying the trademark owner’s products ... serves an important public purpose. It makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. Without some such method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist.”) Compare Leeds, Trademarks from the Government Viewpoint, 44 CAL. L. REV. 489 (1956) and Rogers, The Lanham Act and the Social Function of Trademarks, 14 LAW & CONTEMP. PROB. 173 (1949) with Brown, Advertising and the Public Interest: Legal Protection Symbols, 57 YALE L.J. 1165 (1948) and Papandreou, The Economic Effect of Trademarks, 44 CAL. L. REV. 503 (1956).

19 440 U.S. at 13.

20 Id. at 13.
Although this conclusion flows naturally from the principle that states have wide latitude to determine their internal economic organization, and can thus be seen to follow from the demise of economic due process analysis, the logic seems to be at odds with the premise of both Virginia Board of Pharmacy and Bates, which adopted the principle that if the underlying competitive activity is lawful, a state may not restrict truthful descriptions of that activity.\(^{21}\)

This emphasizes that if the rationale behind the protection of commercial speech is the protection of economic efficiency, a conflict is inevitable between the state's "right" to regulate and the First Amendment protection of efficiency-producing commercial speech. In the absence of some other principle supporting the protection of commercial speech—one that is more neutral because it raises no question about the wisdom of the state's decision to forego economic efficiency\(^{22}\)—the commercial speech cases necessarily must be decided against a backdrop of conflict with economic due process doctrines. My guess is that the result will be fewer limitations on state regulation of commercial speech than had originally been anticipated.\(^{23}\)

**STATE BURDENS ON INTERSTATE COMMERCE**

If Supreme Court deference to the regulatory autonomy of the states is understandable in the commercial speech cases, it is less necessary, and sometimes inexplicable, in interstate commerce cases, the second source of constitutional restriction on state regulation. The Court, of

\(^{21}\)See supra note 7.

\(^{22}\)Policies other than economic efficiency have been proposed to support the protection of pure commercial speech, see note 6 supra, but they are of questionable substance. See Jackson and Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 (1979), Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 436 (1971). Indeed, in *Friedman* the Court may have moved away from a social-political rationale for protecting commercial speech. 440 U.S. at 10-11, n.9.

\(^{23}\)Of course, commercial speech that does more than propose a commercial transaction will continue to be protected, without regard to an efficiency rationale, because of the importance of its content in a democratic society. *In re Primus*, 436 U.S. 412 (1978) (lawyers' solicitation to advance political belief is protected); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (bank's attempt to influence result of state referendum entitled to full protection); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (political expression through a For Sale sign protected); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraceptive information concerns activity with which state may not interfere); Bigelow v. Virginia, 421 U.S. 809 (1975) (ad for abortion clinic).
course, has long struck down state regulation that unduly burdens interstate commerce; those cases, premised on the notion that the Constitution protects free competition between the states, do give constitutional footing to free market principles.

Under its negative commerce clause cases, the Court balances the burdens on interstate commerce from state regulation against the nature of the state interest in protecting its citizens. When a state adopts health or safety measures, such as weight restrictions or product standards, and those measures have only a minimal effect on interstate

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24See U.S. Const. art. I, § 8, cl. 3: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States." The negative implications of this affirmative grant of power were assumed from the beginning. See generally The Federalist Nos. 41, 42. See also 3 M. Farrand, Records of the Federal Convention of 1778, at 547; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (dictum); Brown v. Maryland, 25 U.S. (12 Wheat.) 262, 268 (1827) (state taxation). See also the several opinions in The License Cases, 46 U.S. (5 How.) 513 (1846) and The Passenger Cases, 48 U.S. (7 How.) 122 (1848). See generally Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125 (1979); Schwartz, Commerce, the States, and the Burger Court, 74 Nw. L. Rev. 409 (1979).

25That premise was articulated by Justice Jackson in H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949): "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and that no foreign state will by customs duties or regulation exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." See also Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974) (refusal of Mississippi to enforce contract for goods destined out of state violates commerce clause); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) ("national 'common market'"). Although the immediate rationale of the commerce clause cases is economic, the underlying concern is often perceived to be political—namely, the preservation of federal interests against local, and often parochial, legislative protectionism. The function of the Court is thus seen to be to preserve the status quo until Congress has addressed the proper balance between competition and protectionism from a national perspective. Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L.J. 219 (1957); McAllister, Court, Congress and Trade Barriers, 16 Ind. L.J. 144 (1940).

26The test most frequently cited is from Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970): "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 . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

commerce, the regulation is generally upheld.27 On the other hand, when the state regulation is perceived to discriminate in either purpose or effect against out-of-state goods, the state regulation survives only upon a strong showing of compelling local interest that cannot be achieved by other, less restrictive, means.28 Even state regulation that is neutral, however—regulation that evenhandedly affects in-state and out-of-state goods—will be struck down if firms are subject to such widely different standards of conduct in different states that compliance with all standards is either impossible or unduly expensive,29 or if the state is attempting to keep business that would otherwise go elsewhere.30

Under these standards, the Court must determine whether the end sought to be achieved by the state is significant enough to justify the burden on, or discrimination against, interstate commerce. Significantly, the Court has held that the protection of state citizens from competition with products of other states is never a legitimate state goal.31 In other words, under the Constitution, state regulation whose purpose or

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30397 U.S. at 145. See Toomer v. Witsell, 334 U.S. 385 (1948) (state may not require shrimp caught off its coast be locally packed); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (state may not forbid export of shrimp that had not undergone processing).

natural effect is to protect state producers or sellers from competition with out-of-state products is per se unlawful.\textsuperscript{32}

Often, the Court avoids a frontal examination of the state purpose by analyzing not the end sought to be achieved by the state but the means employed to reach that end. Thus, as in standard rule of reason analysis,\textsuperscript{33} the Court determines whether other means of achieving the state interest would have a less burdensome impact on commerce; if so, the regulation will be struck down.\textsuperscript{34} Moreover, the Court applies the so-called means-ends test, determining whether the means chosen by the state are reasonably likely to achieve its goal.\textsuperscript{35} If they are not, the Court is likely to overturn the state action, reasoning that burdens on interstate commerce should not be tolerated if it is unclear whether the purported local purpose will be achieved.\textsuperscript{36}

These tests put significant limits on state regulatory authority. Although they do not give the Court freedom to review directly the wisdom of state regulation, nor to apply directly the competition standards of the Sherman Act,\textsuperscript{37} they do permit the Court to strike down legislation that impedes formation of a more perfect economic union.\textsuperscript{38}

Indeed, in the last ten years the Court has been vigilant in its review of

\textsuperscript{32}By contrast, nondiscriminatory state regulation that protects local interests by limiting production has been upheld. Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1939) (state price regulation where most products sold intrastate); Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179 (1950) (state price regulation where most products sold interstate; justified as conservation measure); Parker v. Brown, 317 U.S. 341 (1943) (state production controls upheld as consistent with federal policy).


\textsuperscript{34}The classic case is Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (local health interests could be protected by reasonable nondiscriminatory alternatives.) Two recent cases relying, in part, on an analysis of the means chosen by the state are Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977), discussed in the text accompanying notes 51-56 infra, and Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976), discussed in the text accompanying notes 48-50 infra.

\textsuperscript{35}See, e.g., Southern Pacific Co. v. Arizona, 325 U.S. 761, 779 (1945) (Arizona regulation limiting train length "viewed as a safety measure, affords at most slight and dubious advantage, if any, over unregulated train lengths").

\textsuperscript{36}Id. at 775-76, 781-82.


\textsuperscript{38}[The Constitution] was framed upon the theory that the 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.” Baldwin v. Seelig, 294 U.S. 511, 523 (1935).
state regulation, striking down economic regulation in six cases, a nearly perfect record until it decided the Exxon case in 1978. I will discuss the Exxon opinion at some length today, but for contrast let me first outline what I call the cornucopia cases, cases in which the Supreme Court applied the commerce clause to liberate trade of, first, cantaloupes, then milk, then apples, and finally fish.

In its 1970 decision in *Pike v. Bruce Church, Inc.*, the Court invalidated an order of an Arizona agriculture official that prohibited the plaintiff, a local grower, from transporting uncrated cantaloupes to California for packing and processing. The order purported to effectuate an Arizona consumer protection statute requiring Arizona fruits and vegetables to be packed in state-approved containers prior to interstate shipment. The practical impact of the order, however, was to require plaintiff to build an Arizona packing facility, and this violated the commerce clause principle that states may not require business operations to be performed within the state. Moreover, given the acknowledged superiority of plaintiff’s cantaloupes, the real purpose of the order was not to protect consumers, but to enhance the reputation of Arizona growers by identifying plaintiff’s high quality products with Arizona, a more tenuous state purpose when viewed against the “straitjacket” in which plaintiff’s business was placed by the order.

The “milk” case is *Great Atlantic & Pacific Tea Co. v. Cottrell*.

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40 *But see* Hughes v. Alexandria Scrap Corp., 426 U.S. 797 (1976) (state subsidy program slightly favoring in-state businesses is justified and not unlawful).

41 Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).


43 *Id.* at 138.

44 *Id.* at 140.

45 *Id.* at 145. *See cases cited in note 30 supra.*

46 *Id.* at 144. The Court did not consider whether Arizona could order plaintiff to identify his California-packed cantaloupes as Arizona grown, but that was clearly a less restrictive way of achieving the same end.

47 *Id.* at 145–46.

Mississippi regulations required other states to sign a reciprocity agreement with Mississippi before that state's milk could be sold in Mississippi. A&P challenged the regulation when Mississippi refused it permission to ship milk from Louisiana, which would not sign a reciprocity agreement, to Mississippi stores. Although the proposed reciprocity agreements incorporated minimum health standards, the Court, looking to the regulations as a whole, rejected Mississippi's "protection of health" argument as "frivolous" because the agreements permitted a reduction of standards by mutual consent. Moreover, in the Court's view, health standards could be enforced by less burdensome measures—including inspection of milk at the state border. At any rate, the milk A&P wanted to import did meet Mississippi standards, and Mississippi could not deny it entry as a way of bludgeoning Louisiana to accept Mississippi milk.  

The starkest contrast to the Exxon opinion is the searching examination of the facially neutral statute at issue in Hunt v. Washington State Apple Advertising Commission, decided just one year before Exxon. Washington state officials challenged a North Carolina requirement that closed containers of apples sold in or shipped into North Carolina bear only the U.S. Department of Agriculture (USDA) grade. The requirement purported to standardize grades in order to prevent consumer deception allegedly caused by inconsistent grading systems of several states. The facts revealed, however, that Washington apple grades were in all cases at least the equivalent of, and in some cases more stringent than, USDA standards, so the consumer was being protected from a possible confusion that could only benefit him. Moreover, because apples rarely reach consumers in closed containers, it was doubtful that the statute was a consumer protection measure at all; it directly protected only wholesalers and brokers, who presumably have the intellectual and financial resources to untangle any confusion. More significantly, the Court detected an "insidious" effect of the statute. Although Washington apple growers had worked hard to promote both their products and their grading program, the statute had a "leveling" 

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50 Id. at 369, 380–381.
52 Id. at 349.
53 Id. at 351.
54 Id. at 352.
55 Id. at 351.
effect, requiring them to downgrade their products, an effect which operated to the great advantage of North Carolina apple growers. This effect, together with the acknowledgment by a state agriculture official that the statute was passed at the behest of local apple growers, convinced the Court to invalidate the statute.

Finally, as if to emphasize the potency of the commerce clause, just last term the Court overruled an eighty-year-old precedent to hold that a state may not prohibit the out-of-state shipment or sale of minnows originating in natural streams in the state.

In contrast with those cases, the analysis adopted by the Supreme Court in *Exxon* is disappointing. At issue there was the Maryland statute prohibiting gasoline refiners and producers from owning retail gas stations in Maryland, a statute allegedly designed to preserve competition by protecting independent dealers from so-called unfair competition with their dual distributing suppliers. The Court upheld the statute.

Because there are no Maryland producers or refiners, only out-of-state firms were required to divest ownership of retail outlets, but the statute was said to be nondiscriminatory because it would have applied in the same way to in-state refiners and producers had there been any. No burden on interstate commerce was found because the statute did not change the volume of gasoline purchased and sold by Maryland retailers and therefore, according to the Court, did not have the forbidden effect of inhibiting the flow of products across state lines. Finally, the Court rejected the argument that vertical relationships in the gasoline industry have such an essentially interstate character that they may be regulated only by Congress.

By asserting that the case involved neither a burden on interstate commerce, nor discriminatory treatment, nor subject matter that requires a uniform, national standard, the Court turned its back on the intricate analysis and balancing process of its prior commerce clause decisions. The Court avoided analyzing Maryland's interest in protecting independent service station operators from vertical integration and

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56 *Id.* at 352.
58 437 U.S. at 125.
59 *Id.* at 127.
60 *Id.* at 128.
never questioned whether the means adopted by Maryland were either reasonably likely or reasonably necessary to achieve its end. I believe this is unfortunate. In an area of law touched by so many important, yet ephemeral, interests, conclusions should not be reached, or labels applied, until after sensitive analysis of the interests is completed. By substituting conclusory labels for hard analysis the Court failed to illuminate the scope or underpinnings of its decision.

For example, several small, independent refiners claimed that the divestiture statute would force them to stop selling gasoline in Maryland. Without ownership and control of their retail outlets, they claimed, they could not continue their successful nonbrand, low-price marketing. The Court did not address the factual accuracy of this contention; nor did it attempt to balance the damage from the alleged forced eviction from Maryland’s markets against Maryland’s asserted interests in regulating vertical relationships. Rather, the majority said that even if independent, out-of-state refiners did stop selling in Maryland, commerce would not be burdened because those sellers would be replaced by other refiners.

This is a troubling conclusion. If, as the Court has repeatedly said, the commerce clause is to protect the freedom of traders to enter interstate markets, the proper analysis should be to determine whether the restriction on the freedom of the independent refiners to sell in Maryland—if in fact there is a significant restriction—should be sacrificed to protect Maryland’s local interests. It is only a bloodless abstraction to say, as the Court did, that the commerce clause protects commerce and not individual competitors, because free interstate competition depends on the freedom of individual competitors. It was only competitors who were protected when the Court struck down state regulation in *Hunt* and *Cottrell*, and but a single interstate competitor was protected from the heavy hand of the state in *Pike*.

In addition, to say, as the Court does, that a “valid” regulation is not

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61 *Id.* at 127.

62 *Id.* at 127. According to the Court: “Interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.”

63 See note 25 *supra*.


invalid simply because business shifts from one interstate supplier to another is a truism only because it assumes the answer to the central issue. Because the Court never analyzed what makes a regulation "valid," it was unable to say whether the eviction of these competitors from a state's commerce would infringe the values protected by the commerce clause.

The Court also mishandled the plaintiffs' contention that because vertical integration in the oil industry is a matter of national, not local, concern it requires a uniform national policy and thus precludes state regulation. One of the established purposes of the commerce clause is to ensure that firms are not subject to state-imposed standards of conduct so conflicting that compliance with the laws of one state materially increases the burden of complying with the law or policy of another state. Where uniformity is essential, Congress and not the states must set the standard. Following this principle, plaintiffs argued that conflicting state policies concerning the permissibility of vertical integration posed just such a conflict. Although correct in noting that state legislation is rarely invalidated on this ground, the Court missed the point, I believe, when it replied that the plaintiffs actually feared uniform divestiture requirements in many states rather than inconsistent requirements between states. If vertical integration in some states depends on management and distribution efficiencies from vertical integration in several states, Maryland's ban on vertical integration may effectively inhibit integration in those states that do not ban it, states that may therefore be presumed to favor vertical integration. I doubt

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67 437 U.S. 127.
68 Moreover, by focusing on whether state regulation changes the amount of commerce crossing state lines, the Court does itself a disservice by seeming to suggest that statutes that increase output are permissible, while those that decrease output by decreasing competition are suspect. Yet that analysis seems directly at odds with the Court's desire to preserve some state autonomy to select internal economic goals, including the right to substitute anticompetitive regulation for competition. See, e.g., Parker v. Brown, 317 U.S. 341 (1943) (upholding California plan for regulating the supply of raisins even though 95 percent of raisins destined for interstate market); Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) (upholding state fixing of price paid by natural gas pipeline to local suppliers); Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939) (upholding state's fixing of price charged by local milk dealers to state-based firm selling milk in interstate commerce).
69 See cases cited in note 29 supra.
70 Cooley v. Board of Wardens, 53 U.S. (12 How.) 143 (1851).
71 The Court cited Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557 (1886), and Cooley, supra note 70, in support of its view.
72 437 U.S. at 128.
whether economies of multistate vertical integration are such that Maryland's ban on vertical integration would impede vertical integration in a neighboring state, but this is an issue that should have been addressed directly on the facts, not by ignoring the effect of Maryland's statute on the policy of those states that permit, and that presumably want to take advantage of, the efficiencies of vertical integration.

Even more troubling is the Court's treatment of the discrimination issue. In the context of the Exxon case, of course, the term "discrimination" is a linguistic toy. The majority found no discrimination because the statute applied to both in-state and out-of-state firms. Justice Blackmun, in his solo dissent, argued that the legislation was discriminatory because it affected only out-of-state firms; no Maryland producers or refiners exist and thus none are affected. Both, of course, are correct in their own way: Maryland should not be barred from legitimately regulating vertical relationships within the state merely because there are no in-state firms to regulate. On the other hand, attempts to forestall competition from out-of-state sources should not be permitted to hide behind the label of "even-handedness" when in fact no in-state competition could be suppressed by the regulation. But trying to analyze the concept of discrimination linguistically or semantically tells us nothing about what should be the central focus: determining the permissible scope of state regulatory power by analyzing the state's objective and the relationship between that objective and the nature of the interstate competition being regulated.

Although state anticompetitive regulation is not itself barred by the commerce clause, I believe analysis should start from the proposition that the commerce clause forbids a state from adopting economic regulation that takes away the advantages of out-of-state production or interstate distribution. This was the central message of Judge Cardozo in his venerable 1935 opinion in Baldwin v. Seelig, where the Court struck down part of the New York Milk Control Act that required purchases of Vermont milk for resale in New York to be made at the price fixed for New York milk. Although the regulation of New York milk prices had earlier been held to be constitutional, and the restriction on Vermont competition was arguably necessary to support that regulation, the

73 Id. at 125.
74 Id. at 135.
75 294 U.S. 511 (1935).
restriction could not stand because it was "equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin." 77. Following this wisdom, a commerce clause interpretation that protects the competitive advantages of out-of-state production and interstate distribution furthers the central purpose behind the commerce clause—to keep freedom of interstate trade untrammeled. 78

That interpretation would not diminish a state's authority to regulate competition within the state by, for example, proscribing unfair practices or substituting regulation of in-state activity for competition. 79 And such state power would not be diminished merely because out-of-state firms must comply with the regulation. In Exxon, the Court evidently felt that protecting unintegrated retail dealers from the risks associated with dual distribution was just such a permissible exercise of state police power, 80 and insofar as the risks being protected against arise from local activity or conduct, the Court was undoubtedly correct.

But, I believe the Court should also have asked whether Maryland's protection against dual distribution was essentially regulating local competition and practices or was in effect protecting local competitors from the competitive advantage that others have because they are out-of-state or interstate traders. In short, was Maryland really protecting against the dangers of a price or supply squeeze of local independents—which I assume to be local activities subject to state regulation—or was it protecting state citizens from having to compete against efficiencies of multistate or interstate integration—which I would expect to be unlawful under the commerce clause.

Objective evidence suggests that the latter was true. First, the divestiture statute applied to the out-of-state independent refiners, even though those refiners distributed only through company-owned stations and thus presented no danger that dual distribution would result in a price or supply squeeze. 81 Second, and conversely, independent Maryland wholesalers, who distributed through both company-owned and

77 294 U.S. at 527.
79 See California v. Thompson, 313 U.S. 109 (1941) (upholding statute requiring that all local ticket agents for auto tours, whether intrastate or interstate, obtain a license and a bond).
81 Brief of Petitioner Exxon Corp. at 249, 259, Law Reprints Trade Reg. Series, Vol. 11, No. 5.
independent stations, were not required to divest their company-owned stations, even though their dual distribution systems conceivably gave rise to the conduct the divestiture statute purported to protect against.\textsuperscript{82} Certainly, the failure to provide any explanation for including interstate traders who presented no dual distribution risks and excluding in-state traders who did, suggest that the legislation was not designed to protect against vertical integration itself, but only against \textit{interstate} vertical integration. Finally, as Justice Blackmun's dissent shows, the fact that Maryland could have directly prohibited the conduct it purported to fear, but chose instead more broadly to prohibit vertical integration, suggests that Maryland was concerned with more than just local conduct.\textsuperscript{83}

In sum, I believe the Court, in \textit{Exxon}, failed to perceive the vital interstate interests at stake, or to understand the role of the commerce clause in mediating those interests. Whether from fear of reviving economic due process analysis or overemphasis on state regulatory autonomy, the Court's opinion appears to be a disservice to commerce clause principles. Significantly, however, the \textit{Exxon} opinion purported to distinguish, not overrule, prior commerce clause cases, and thus casts no doubt on the validity of those cases in which the Court has closely scrutinized state regulation under the commerce clause,\textsuperscript{84} cases that continue to stand as a substantial limitation on state regulatory authority.

\textbf{PROCEDURAL DUE PROCESS}

Procedural due process is the third constitutional principle limiting state regulation.\textsuperscript{85} Before depriving anyone of constitutionally protected

\textsuperscript{82}437 U.S. at 140, n.7 (dissenting opinion).

\textsuperscript{83}Id. at 144-45. Interestingly, one year after the Supreme Court decision in \textit{Exxon}, the Governor of Maryland suspended operation of the divestiture statute for fear that the closing of even the few company-owned stations in Maryland would further lengthen the gas lines and shorten tempers in that energy-hungry state. \textit{Washington Post}, June 27, 1979, at 10, col. 1.

\textsuperscript{84}In addition to the cases discussed in the text accompanying notes 42-57 supra, see \textit{Raymond Motor Transp., Inc. v. Rice}, 434 U.S. 429 (1978) (although statute is facially neutral, regulation is unconstitutional where impact is discriminatory); \textit{Nelson v. Sears, Roebuck & Co.}, 312 U.S. 359 (1941) (burden on interstate commerce determined by facts, not abstractions); \textit{Best & Co. v. Maxwell}, 311 U.S. 454 (1940) (court must determine whether statute will, in practical operation, work discrimination against interstate commerce).

\textsuperscript{85}U.S. Const. amend. XIV, § 1: "... nor shall any State deprive any person of life, liberty, or property, without due process of law ..."
liberty\textsuperscript{86} or property,\textsuperscript{87} a state must follow procedures that are fundamentally fair,\textsuperscript{88} procedures shaped to take into account the nature of the interests affected, the importance of procedural formality in reaching a correct and acceptable result, and the government interest in achieving its goals without undue delay or expense.\textsuperscript{89}

In the context of competition policy, the 1973 Supreme Court decision in \textit{Gibson v. Berryhill}\textsuperscript{90} provides a fundamental principle: The determination whether, and to what extent, unfettered competition should be restrained may not be made by one with a "substantial

\textsuperscript{86}See generally Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (interest in discretionary parole is not protected liberty); Meachum v. Fano, 427 U.S. 215 (1976) (transfer to less desirable prison is not deprivation of liberty in absence of state-created expectancy); Wolff v. McDonnell, 418 U.S. 539 (1974) (loss of good time credits is loss of liberty where right to credits is given by state law); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation is deprivation of liberty); Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole is deprivation of liberty); Paul v. Davis, 424 U.S. 693 (1976) (adverse publicity not deprivation of liberty when not accompanied by government change in status); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (adverse publicity deprives one of liberty when accompanied by separate deprivation of prior status); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (mere refusal to rehire, without stated reasons, invades no reputation interest); Bishop v. Wood, 426 U.S. 341 (1976) (deprecating comments not made public after discretionary firing do not invade liberty interest); Codd v. Velger, 429 U.S. 624 (1977) (due process not required to contest injurious but true statements).

\textsuperscript{87}See generally Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (state law creates entitlement property interest in discretionary parole); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) (state law creates entitlement property interest in utility services); Goss v. Lopez, 419 U.S. 565 (1974) (property includes state-guaranteed entitlement to schooling); Arnett v. Kennedy, 416 U.S. 134 (1974) (concurring and dissenting opinions: continued employment is property interest created by Congress); Perry v. Sindermann, 408 U.S. 595 (1972) (entitlement property interest in continued employment may be derived from informal rules and understandings).

\textsuperscript{88}The theme of fundamental fairness was espoused by Justice Frankfurter in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951): “[T]hus to maim . . . an organization . . . [ostensibly] engaged in lawful objectives is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment” (concurring opinion). See also his dissent in Solesbee v. Balkcom, 339 U.S. 9, 16 (1950).


\textsuperscript{90}411 U.S. 564 (1973).
pecuniary interest" in the outcome of the decision.91 In Gibson, the Court enjoined the Alabama Board of Optometry from determining whether the sale of optometric services through a corporation was "unprofessional conduct." Because the Board consisted solely of single practitioners, who would benefit if competition from corporate practitioners were suppressed, the Board was deemed to be too interested in the outcome of the controversy to render a fair judgment.92 Without acknowledging it, the Supreme Court seemed to resurrect under due process principles a moribund line of cases standing for the proposition that "one [private] person may not be entrusted with the power to regulate the business of another, and especially of a competitor."93

Last term, however, in New Motor Vehicle Board v. Orrin W. Fox Co.,94 the Court seems to have withdrawn, at least slightly, from that principle. In Fox, the Supreme Court reviewed and upheld California legislation that permits established franchised dealers, by filing a protest with the state New Motor Vehicle Board, to delay the establishment of new, competing franchises until the state board holds a hearing and determines whether the new franchise is in the public interest.95 General Motors and two of its new, prospective franchisees challenged the statute after a protest by competing franchisees delayed one new franchise for over fifteen months.

The Fox opinion is encrusted with ambiguity, so much so that three Justices signed two concurring, explanatory opinions96 taking contrary views of the proper basis for upholding the legislation. In an attempt to straighten out this ambiguity, let me outline and comment on the applicable principles. First, it is clear—and all the Justices agreed—that the Constitution does not prohibit a state from requiring a company to secure permission from a state agency before franchising a new dealer.97

91Id. at 579.
92Id. at 570, 579.
95Id. at 103. The "good cause" determination, like the licensing authority exercised by the Interstate Commerce Commission under the "public interest" standard, required the board to consider the adequacy of existing competition and customer care, the permanency of investment, the effect on the retail motor vehicle business, and whether the new dealer "would increase competition and therefore be in the public interest." 439 U.S. at 109, n.13.
96Justice Blackmun wrote a concurring opinion in which Justice Powell joined. 439 U.S. at 113. Justice Marshall wrote a separate concurring opinion. Id. at 111.
97Id. at 106 (opinion of the Court), 111 (Marshall, J.), 113 (Blackmun and Powell, JJ.), 119, n.31 (Stevens, J.).
The demise of economic due process has freed the states to invade liberty and property interests in order to promote the public welfare, regardless of the wisdom or economic effect of the legislation. Thus, those portions of the majority opinion indicating that there is no "right" to freely franchise are certainly correct; any interest in unfettered franchising may be taken away by the state. However, although there is no right to franchise, there is a right to procedural due process when a liberty or property interest is taken away, and the plaintiffs claimed that it is a denial of due process to allow a competitor to decide whether free franchising should be permitted pending a state determination.

That position raises the issue of whether or not the interest in freely franchising is a liberty or property interest protected by the procedural guarantee of the Constitution. Although the majority's opinion is ambiguous on this point, the concurring opinion of Justices Blackmun and Powell is perfectly clear, and in my view, perfectly wrong. To them, plaintiffs "demonstrated . . . no liberty or property interest" to which due process applied. But, as even these Justices admit, long-standing constitutional doctrine has defined "liberty" to include "the right to engage in any of the common occupations of life," and should therefore have been interpreted to encompass the liberty to establish new franchises. None of the cases marking the end of economic due process purported to deny those liberty and property interests, and it was precisely that liberty and property interest that was protected by the

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99 439 U.S. at 107–108: "California's Legislature was . . . constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions . . . States may . . . require businesses to secure regulatory approval before engaging in specified practices." (emphasis in original)

100 The requirements of procedural due process can be triggered by even slight deprivations of protected liberty or property. Goss v. Lopez, 419 U.S. 565, 576 (1975) (suspension from school for 10 days is protected interest).

101 439 U.S. at 114.


103 See cases cited in note 3 supra. In other words, the demise of the Lochner era, supra note 2, resulted not from a redefinition of the liberty interests protected by the Constitution, but from a reappraisal of the nature of the protection given those interests. With the demise of substantive, economic due process, the substantive standards for taking away liberty interests are now primarily a legislative matter, governed by the Constitution only to the extent that other constitutional provisions (such as the equal protection clause) or the weak minimum rationality test are controlling. The procedural framework within which liberty interests may be taken away, on the other hand, should be protected by the Constitution. Board of Regents of State College v. Roth, 408 U.S. 564 (1972).
Court in *Gibson*.

Therefore, although they have no right to franchise at will, or without delay, or without seeking prior government approval, automobile manufacturers and their new franchisees do have a right to procedural due process before their liberty interest in establishing a new business is taken away.

The central question is thus: What procedures are due? Clearly, California legislation forbidding new franchising would comply with due process. But equally clearly, California could not, consistent with due process, forbid new franchising until a license had been obtained from a board consisting of existing automobile franchisees; *Gibson v. Berryhill* prohibits a state from establishing a licensing board made up of persons with a "substantial pecuniary interest" in the outcome of the licensing proceedings, and it takes no imagination to see that existing franchisees have a pecuniary interest in suppressing competition from new franchisees.

California, of course, did something different. It established an impartial board with the power to halt new franchising if good cause for doing so were shown by existing dealers. This, too, comports with due process, provided the board is truly impartial and follows reasonable procedures for notice and an opportunity to be heard. But California went further—it gave existing franchisees the authority to invoke state power by automatically blocking new franchising pending the state agency's good cause determination. The majority upheld this aspect of the California scheme, reasoning that because the state itself could halt new franchises pending a hearing—and could decide not to invoke its power if nobody protested—the state could also decide that it would temporarily block new franchising only when a protest is filed.

While logically appealing, this conclusion, it seems to me, fails to recognize the important difference between governmentally imposed

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104 *Gibson v. Berryhill*, 411 U.S. 564 (1973). Although the Supreme Court did not define the property or liberty interests protected in *Gibson*, and, if it had, could have applied the "entitlement" theory, note 87 *supra*, it affirmed the district court decision in *Gibson*, which relied squarely on the *Meyer* rationale. See 331 F. Supp. 122, 126 (N.D. Ala. 1971).


106 411 U.S. 564, 579 (1973);

107 439 U.S. at 103.
and privately imposed restraints. Under the California scheme, no
legislature or state administrator determined that franchising should be
halted pending a hearing; as Justice Stevens pointed out in his dissent,
the "uninformative words I protest"^{108} are enough to enjoin new
franchising temporarily. The only state determination made prior to the
good cause determination of the board was a legislative determination
that new franchising should be halted whenever a protesting person
decided it should be, and that seems to me to be delegating the decision
to one who is least qualified to make the decision on behalf of the state.
Maybe the time has come when a state interest in protectionism is
sufficient to allow the state to delegate decision making to the persons to
be protected, but I would have thought that notion was barred by a long
line of constitutional jurisprudence.^{109}

My point, of course, is a narrow one, perhaps one with more
philosophical than practical content. In the context of the Fox
case, the
restraint imposed was temporary, the state board had jurisdiction over
the conflict as soon as the protest was filed, and the board could then
adjust the conflicting interests as it saw fit. Moreover, because it is
acknowledged that the state could pass legislation blocking all new
franchising, the scheme actually adopted by California might seem like a
less restrictive alternative. But I believe an important difference exists
between restraints imposed by government decision and restraints
imposed by private decision, especially where the private person has an
obvious personal stake in the outcome of the decision. It is not enough to
say that the legislature made a policy choice when it entrusted the
decision to a private interest. That is true in all procedural due process
cases—the legislature makes a choice as to the procedures for enforcing
the rights and obligations it created.^{110} But in all cases, the procedures
adopted are subject to the procedural restraints of the due process
clause, and I would have preferred an outcome that forces California
itself to take responsibility for denying the liberty to franchise.

\(^{108}439\ U.S.\ at \ 121.\)

\(^{109}\)See cases cited in note 93 supra.

\(^{110}\)A majority of the Court has never adopted the position, advanced by Justice
Rehnquist in Arnett v. Kennedy, 416 U.S. 134 (1974), that a state's authority to define
the scope of property interests protected by due process necessarily gives the state authority to
determine the procedures by which the property may be taken away. Compare Goss v.
did not recognize it, in many ways the Fox rationale resembles the Rehnquist view—namely,
that the state's authority to take away the liberty to franchise also gives it the authority to
condition that liberty on any procedural basis it finds appropriate.
SUPREMACY CLAUSE

The fourth source of constitutional restraint on state regulation is the supremacy clause, under which federal law displaces inconsistent state law and regulation. Because it depends on congressional enactment, of course, this source of constitutional restraint is not self-executing; but it is potentially powerful. The only limitation on Congress's preemptive power is that Congress must act within the sphere of its authority, authority delimited primarily by the commerce power and the concept of state sovereignty.

Thus far, Congress's preemptive power in the field of competition policy has been restrained by the Supreme Court's judgment that Congress never intended the Sherman Act to apply to state action. This, as you know, is what is now affectionately called the Parker-Goldfarb-Cantor-Bates-Lafayette-Fox doctrine, so named because the doctrine appears to have as many facets as a dowager's diamond. Although I will not examine the Parker doctrine itself today, I do want to discuss briefly the relationship between the Parker doctrine and FTC preemption authority, an issue raised by the program of preemption the FTC has initiated under its Magnuson-Moss rulemaking power. As you know, the most notable example of the FTC's preemption activism is the

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111 U.S. Const. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; anything in the Constitution or Laws of any State to the Contrary notwithstanding."

112 See National League of Cities v. Usery, 426 U.S. 833 (1976) (Congress may not extend minimum wage provisions to state and local government employees). Chief Justice Burger has noted the "strikingly similar" language in Usery and Parker, infra note 113, which established the antitrust state action doctrine, Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 423 (1978) (concurring opinion), and some have argued that the Usery doctrine may prohibit Congress from reversing Parker by seeking to apply the antitrust laws to state action. See Davidson and Butters, Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action, 31 VAND. L. REV. 575 (1978). In view of the narrow interpretations of Usery by lower courts, however, this seems unlikely. See e.g., City of Philadelphia v. SEC, 434 F. Supp. 281 (E.D. Pa. 1977) (three-judge court), appeal dismissed, 434 U.S. 1003 (1978) (SEC may investigate offer and sale of securities by a city); Public Service Co. of North Carolina v. FERC, 587 F.2d 716 (5th Cir.) cert. denied, 100 S. Ct. 166 (1979) (requirement of FERC approval for abandonment under Natural Gas Act is applicable to state-owned gas); Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), cert. denied, 434 U.S. 902 (1977) (federal Clean Air Act may be applied to compel enforcement of city transportation control plan).


eyeglass rule,\textsuperscript{115} which attempts to nullify state laws that prohibit price advertising of eyeglasses by making their enforcement an unfair act or practice.

The FTC claim of preemptive power is founded on a straightforward supremacy clause argument: Trade regulation rules have the force and effect of federal law and thereby preempt conflicting state or local laws.\textsuperscript{116} The premise of this argument is true; validly adopted legislative rules have the same preemptive effect as congressional legislation.\textsuperscript{117} But the more fundamental question is the \textit{Parker} question: Did Congress ever intend the FTC Act to apply to state action? Clearly, if the FTC Act itself does not apply to state action, no rule promulgated under the Act can apply to, or displace, or preempt state action. Thus, the issue is whether Congress intended state regulatory legislation to be subject to review by a five-person Commission sitting in Washington.

We will not have a definitive answer to this question, of course, until one of the cases challenging the new rules is decided,\textsuperscript{118} but it seems to me inconceivable that Congress intended this form of economic due process review. Although most commentators have assumed that the \textit{Parker} doctrine applies to the FTC Act and Clayton Act,\textsuperscript{119} a view

\textsuperscript{115}16 C.F.R. § 456.9(2) (ophthalmic goods and services). \textit{See also} 16 C.F.R. § 436.3, n.2 and 43 Fed. Reg. 59,719 (Dec. 21, 1978) (franchising); 16 C.F.R. § 438.9 (vocational and home study schools) ("trade regulation rule preempts any provision of any state law, rule, or regulation which is inconsistent or otherwise frustrates the purpose of . . . this trade regulation rule. . . .")


\textsuperscript{118}Pending cases are listed in \textit{4 TRADE REG. REP.} (CCH) ¶ 38,001 (1979). After the preparation of this article, two courts of appeals raised a question about, but did not decide, the scope of the FTC's preemption power. Katharine Gibbs School v. FTC, 1980-1 Trade Cas. ¶ 63,077 (2d Cir. 1979), \textit{reh. denied}, 1980-1 Trade Cas. ¶ 63,254 (2d Cir. 1980); American Optometric Ass'n v. FTC, 1980-1 Trade Cas. ¶ 63,165 (D.C. Cir. 1980).

supported by sixty years of FTC inaction against state action, there is no particularly strong precedent,\(^{120}\) the closest being a 1974 California district court decision, taking what I believe to be the correct position and barring the FTC from challenging state action.\(^{121}\) As for legislative history, if we are guided by the Parker Court's admonition that "an unexpressed purpose to nullify a state's control . . . is not lightly to be attributed to Congress,"\(^{122}\) legislative history is singularly unsupportive of FTC power. Although some have snatched minutiae of legislative history to support the FTC's preemptive power, their citations rarely refer directly to the FTC's power to overturn state action.\(^{123}\)

\(^{120}\) Goldfarb v. Virginia State Bar, 497 F.2d 1, 7, n.15 (4th Cir. 1974) (dictum: Parker applies to FTC Act), rev'd on other grounds, 421 U.S. 773 (1975); Asheville Tobacco Board of Trade v. FTC, 263 F.2d 502 (4th Cir. 1959) (same dictum, but no state action so applicability of FTC Act to state action not raised). Cases stating that state authorization of activity does not override an FTC prohibition are inapposite because, under Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (state may not authorize Sherman Act violations), they involve no Parker state action. Chamber of Commerce v. FTC, 15 F.2d 767 (8th Cir. 1926); Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959); Peerless Prods., Inc. v. FTC, 284 F.2d. 825 (7th Cir. 1960), cert. denied, 365 U.S. 844 (1961).

\(^{121}\) California ex rel. Christensen v. FTC, 1974-2 Trade Cases ¶ 75,328 (N.D. Cal. 1974), rev'd on other grounds, 549 F.2d 1321 (9th Cir.), cert. denied, 434 U.S. 876 (1977).

\(^{122}\) 317 U.S. 341, 351 (1943).

\(^{123}\) See Verkuil Article, supra note 119, at 233-243, Harvard Note, supra note 119, at 742-3, n.167. Preemption is not necessarily the same question as the applicability of the FTC Act to state action. The FTC Act surely preempts inconsistent state law that does not amount to state action (e.g., when a state merely approves an antitrust violation), but if the FTC Act does not apply to state action, no question of preemption arises. Thus, references to preemption in the legislative history of the Magnuson-Moss, FTC Improvement Act do not necessarily address the state action question.

Moreover, even if references to preemption in the legislative history were taken as references to state action, the evidence supporting the Verkuil position is meager. The earliest version of the FTC Improvement Act, S. 3201, 91st Cong., 2d Sess. (1970), was reported out of the Senate Commerce Committee with an explicit provision for preemption of state law in cases of conflict, but this bill did not pass the Senate. In 1971, the Senate passed a bill enlarging FTC jurisdiction and rule-making powers, S. 986, 92d Cong., 1st Sess. (1971). It contained no preemption provision, but the report accompanying the bill did assert that the bill empowered the FTC to specify the extent to which state law was preempted by its rules. S. REP. No. 269, 92d Cong., 1st Sess. 28 (1971). This bill received no House consideration. A similar Senate bill introduced in 1973 again contained a provision allowing the FTC to specify the extent to which state law was preempted, S. 356, 93d Cong., Cong., 1st Sess. (1973), but the bill was reported out of committee without a rule-making or preemption provision. The present rule-making section, which is silent on the preemption issue, was then added by the House. The report accompanying the House bill notes that the expanded power granted the FTC is "not intended to occupy the field or in any way to preempt state or local agencies from carrying out consumer protection or other activities within their jurisdiction..." H.R. REP. No. 1107, 93d Cong., 2d Sess. 45 (1974). This final reference to preemption in the legislative history states only that FTC rules do not "occupy to field," Harvard Note, supra note 119, at 742-43, n.169, but says nothing about the applicability of FTC rules to state action.
Some have pointed out that the FTC Act, in contrast to the Sherman Act, has only prospective remedies, no private enforcement and broader substantive reach; and have argued that these differences should render the Parker doctrine inapplicable to FTC actions. It has also been argued that the FTC’s rulemaking procedures provide a forum in which the state regulatory interests may be balanced against federal interests in vigorous competition.

But these differences do not speak to the essential concern of Parker: That the state, as a sovereign entity within the federal system, has a right to regulate its intrastate competition unless Congress expressly mandates otherwise.

In short, although prediction is risky, I would be surprised if any court were to uphold the FTC’s authority to prohibit or nullify state action.

To reach this conclusion is not to say, however, that the FTC has no power to preempt state law. If the state action doctrine does not protect state regulation, then state law is preempted whenever it conflicts with federal law or valid federal rules. Thus, a state statute authorizing private restraints of trade, without active state supervision, is not protected by the state action doctrine and may be preempted by a valid rule. Similarly, under the reasoning in Lafayette, regulatory or anticompetitive proprietary action of a municipality or other state subdivision is immune from FTC supervision only if the conduct is authorized in powers delegated by the state legislature. But the precise contour of the state action doctrine is itself an intricate subject, and I will duck it today.

One final, perhaps academic point: Even if the state action doctrine does not insulate a state regulatory scheme from FTC review, FTC

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125 See Harvard Note, supra note 119, at 738, 745–49.
preemption power extends only insofar as the FTC has jurisdiction under the "in or affecting commerce" standard. If any purely local commerce is left, it is subject only to state regulation.

CONCLUSION

You have no doubt recognized an ambiguity in my talk. On the one hand, I read several constitutional principles as continuing to limit state anticompetitive regulation. On the other hand, I focus on several recent cases that have eschewed an intensive review of state regulation. In part this may come from the professorial aptitude for declaring some cases to be wrongly decided and then dismissing them as unimportant in the development of the law. But I believe my view results more from a belief that both the commerce clause and the due process clause do contain principles that limit state autonomy to interfere with competitive freedom, and that as the Court moves away from the hovering shadow.


of the economic due process era, and as more challenges to state regulation are brought before it, the Court will find those principles.

MR. POLLOCK: I suggest that, in conjuring up an appropriate mental image for our next topic, you think now, not of an argument before the Supreme Court, but rather of a crowded conference room in a lawyer's office, where a deposition is going on in a treble damage case. You know what these depositions are. They frequently are boring, going on for days. Now, what possible constitutional issue could arise in that kind of context? I think our next speaker, Josef D. Cooper, will make very clear how that situation in some cases may almost bristle with constitutional issues.

Joe Cooper practices in San Francisco. He is a lawyer with an extensive background in treble damage litigation, primarily on the plaintiff's side. He currently is completing his term as chairman of this Section's Private Litigation Committee. After graduating from the University of Chicago Law School, Joe spent his apprenticeship as a staff attorney for the Coordinating Committee for Multidistrict Litigation, where he participated in drafting the very first version of the now celebrated *Manual for Complex Litigation*, and also as a special assistant to Judge Pence in the *West Coast Pipe Cases*.

For the past ten years, while he has been engaged in private practice, he has been frequently confronted with the question that is at the core of his remarks today on “Fifth Amendment Rights/ in Private Treble Damage Litigation.” Joe Cooper.