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The Economic Liberty Rationale in the Dormant Commerce Clause

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I. INTRODUCTION

This article is an attempt to understand the direction the Court has taken under the dormant Commerce Clause. Through recent decisions, the same rationales, or variations of them, have appeared.[1] Prior to the 1990s, two of the rationales had been longstanding in dormant Commerce Clause jurisprudence: national economic solidarity and political process.[2] The rationale that has emerged and contends with equal voice is based on economic liberty.[3] This has been described as "the judicial *protection of persons* involved in interstate commerce."[4] The emergence of this doctrine has been linked to the expansion of the dormant Commerce Clause doctrine in order to broaden the associated protections it affords.[5] With that basis in mind, the foundation of the economic liberty rationale will be explored.

In Section II a necessary definition of economic liberty will be presented with a brief history and explanation of economic liberties. Section III will compare other rationales that have been offered as explanations for the dormant Commerce Clause doctrine. There will also be an attempt to "discount" those rationales in order to substantiate the emergence of the economic liberty rationale. In Section IV economic liberty in action within the framework of the Supreme Court will be discussed. In addition, examples of the "overlapping"[6] of rationales will be demonstrated. Finally, in Section V a conclusion will be sought regarding the emergence and effectiveness of the economic liberty rationale within the dormant Commerce Clause doctrine.

II. WHAT IS ECONOMIC LIBERTY?

As a preliminary first step, the phrase "economic liberty" can be viewed within the definition of its two sub-parts. The term "economic" is not a particularly legal term. However, it is associated with many other secondary terms in order to attach a legal meaning.[7] As every good student of English

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1. David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier* (forthcoming 2004) (manuscript at 1-2, copy on file with author). (This unpublished article was provided by the author during the Summer of 2003. I would like to thank Professor Day for providing such insight into a doctrine that has as many proponents as critics.).
2. *Id.*
3. *Id.* at 2.
4. *Id.* (emphasis added).
5. *Id.*
6. *Id.* at 1.
7. BLACK'S LAW DICTIONARY 530-31 (7th ed. 1999). The list, as follows: "economic coercion,"

knows, the adjective "economic" has several appropriate definitions:

> 3a: of or relating to economics; 3b: of, relating to, or *based on the production, distribution, and consumption of goods and services*; 3c: of or relating to an economy; 4: having practical or industrial significance or uses: *affecting material resources*; 5: *profitable*.[8]

Conversely, the term "liberty" has definite legal implications. *Black's* defines it as "[f]reedom from arbitrary or undue external restraint, esp[ecially] by a government," and "[a] *right*, privilege, or immunity *enjoyed by prescription* or by grant; the absence of a legal duty imposed on a person."[9] A practical definition of "economic liberty" could be "a right enjoyed by prescription of the profitable production, distribution, and consumption of goods and services affecting the material resources of persons."[10] However, while there is no agreement to a single definition, there appears to be agreement on the elements of "economic liberty" which include "(1) [s]ecure rights to property (legally acquired); (2) [f]reedom to engage in voluntary transactions, inside and outside a nation's borders; (3) [f]reedom from governmental control of the terms on which individuals transact; and (4) [f]reedom from governmental expropriation of property (e.g., by confiscatory taxation or unanticipated inflation)."[11] This definition gives us the proper focus of a rationale based in the day-to-day importance of a nation driven by industry and information. The focus needs to be placed within the framework of dynamics that are ordered under an inertia of oscillating economic growth and decline. The apparentness of those dynamics are not only perceived by the Court, but may also explain an acceptance for the rationale.[12] It could be argued that no other institution is as dynamic as the Supreme Court.[13] Decisions in dormant Commerce Clause doctrine, like the Court's dynamic nature, have a similar inertia.[14] As a result, a history of economic liberty before its utilization in dormant Commerce Clause

"economic discrimination," "economic duress," "economic frustration," "economic indicator," "economic life," "economic loss," "economic obsolescence," "economic rent," "economic strike," "economic substantive due process," "economic warfare," and "economic waste."

8. MERRIAM-WEBSTER ONLINE, *available at* http://www.m-w.com/ (emphasis added).

9. BLACK'S LAW DICTIONARY, *supra* note 7, at 930 (emphasis added).

10. *See supra* notes 8 and 9. Author's note: combining individual term definitions to produce combined definition for purposes of describing "economic liberty."

11. Steve H. Hanke & Stephen J.K. Walters, *Economic Freedom, Prosperity, and Equality: A Survey*, 17 THE CATO JOURNAL 117, 119 (Fall 1997), *available at* http://www.freetheworld.com/papers/Hanke_and_Walters.pdf (numbering added).

12. See *infra*, Section IV, "Economic Liberty at Work" for an explanation of the Court's apparent acceptance of the "economic liberty" rationale regarding the impact of state legislative regulations and taxing schemes on in-state and out-of-state challengers.

13. *See generally* James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO STATE L.J. 149 (2003); Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233 (1999); and Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93 (1996).

14. *Compare, e.g.*, South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (upholding South Carolina's truck and semi-trailer weight and width regulations for safety reasons) with Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (striking down a Wisconsin regulation alleged to be based on safety reasons that generally limited trailers to 55 feet or less in length).

jurisprudence and within the Court's decisions may give a better understanding of its apparentness and acceptance.

We need only travel approximately 790 years back in time to properly address the history of economic liberties.[15] Similar to the appearance of the United States as a new nation, a revolt over the oppression forced upon persons of property was the impetus for recognizing economic rights.[16] In a telling passage of the *Magna Carta* of 1215, "the King agreed that if anyone 'has been *dispossessed* or removed by us, *without* the *legal judgment* of his peers, from his lands, castles, franchises, or *from his right, we will* immediately *restore them* to him.'"[17] Clearly, the outcome and efforts of industry was something to be protected. But of greater importance in tying economic liberty with natural liberty, the *Magna Carta* further guaranteed that "'[n]o freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed . . . except by the lawful judgment of his peers or [and] by the law of the land.'"[18] The protection of personal industry and against personal imprisonment within the context of what is called due process was born.[19] Guarantees of those protections, with the exception of loss by the judgment of peers, elevate the value of property and person.[20] The *Magna Carta* of 1225 would give permanence to the protections of economic and personal liberty and have a far reaching affect on the founders of our country.[21]

With the institution of liberty in place, interpretation and expansion followed. Edward Coke[22] is attributed with that interpretation and expansion such that common-law, good and bad, placed a great dependence upon his

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15. Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 43-44 (2003).
16. *Id.* at 43.
17. *Id.* at 44 (emphasis added).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 45-46.
22. Sir Edward Coke [kook], 1552–1634:

> English jurist, one of the most eminent in the history of English law. He entered Parliament in 1589 and rose rapidly, becoming solicitor general and speaker of the House of Commons. In 1593 he was made attorney general. His rival for that office was Sir Francis Bacon, thereafter one of Coke's bitterest enemies. He earned a reputation as a severe prosecutor, notably at the trial of Sir Walter Raleigh, and held a favorable position at the court of King James I. In 1606 he became chief justice of the common pleas. In this position, and (after 1613) as chief justice of the king's bench, Coke became the champion of common law against the encroachments of the royal prerogative and declared null and void royal proclamations that were contrary to law. Although his historical arguments were frequently based on false interpretations of early documents, as in the case of the Magna Carta, his reasoning was brilliant and his conclusions impressive. His constant collisions with the king and the numerous enmities he developed : especially that with Thomas Egerton, Baron Ellesmere, the chancellor : brought about his fall. Bacon was one of the foremost figures in engineering his dismissal in 1616. By personal and political influence, Coke got himself back on the privy council and was elected (1620) to Parliament, where he became a leader of the popular faction in opposition to James I and Charles I. He was prominent in the drafting of the Petition of Right (1628). His most important writings are the Reports, a series of detailed commentaries on cases in common law, and the Institutes, which includes his commentary on Littleton's Tenures.

ALLREFER ENCYCLOPEDIA, *at* http://reference.allrefer.com/encyclopedia/C/Coke-Sir.html.

interpretation and expansion of economic liberty.[23] Those expansions, interpretations and the resultant common law were not only the basis of our common law, but "were required reading for most colonial lawyers."[24] There may be some argument about the nature of due process, but it is generally considered that Coke found the economic liberties at stake were of a substantive nature.[25] Thus substantive due process purported to guarantee that if an individual had any property or money taken illegally they would be returned.[26] This is a sure foundation for the protections of all economic liberties.[27] Therefore, the stage was set for the proper challenges to define with detail what economic liberties would be considered by courts.

In 1610 a London physician was prohibited and subsequently punished for practicing medicine in contravention of statute.[28] In that case, the London College of Physicians were given the authority to both approve and penalize physicians that were not part of their membership.[29] Chief Justice Coke ruled that the statute was an "improper infringement on economic liberties."[30] As an added benefit, this statute had implications for both procedural and substantive due process.[31] But of even greater significance, the decision provided a standardized test for balancing the interests with the means to protect those interests. The test involved the interest of "protecting the public health — [which] was legitimate, [but] its means were both overinclusive because it applied to graduates of very prestigious medical schools, as well as underinclusive because it applied only to persons who practiced medicine in London for more than thirty days."[32] This decision contains important jurisprudential elements: the interpretation of a majoritarian law, the effects of its enforcement, an alleged infringement of economic liberties, and a decision that combines a balancing of governmental interests with the burden those interests place on individuals.[33] These are the seeds of a broad rationale necessary to protect economic interests under a range of doctrines. Most importantly, it is the foundation of applying "the broader and more protective rationale[]" of economic liberties to the dormant Commerce Clause doctrine.[34]

Besides protecting the economic liberties of an individual to practice their chosen profession without an infringement, the English common-law also found

23. Siegan, *supra* note 15, at 46. Coke's interpretation and expansion are considered mistakes in either understanding or misinterpreting the documents used as the basis of his "common law." *Id.*

24. *Id.*

25. *Id.* at 49.

26. *Id.*

27. *Id.*

28. *Id.* at 49-50.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Day, *supra* note 1, at 2.

impermissible the application of a fee for finishing cloth that could lead to the inevitability of a monopoly.[35] Again there was a regulation that provided that half of the finishing of cloth be done by guild members or, as an alternative, the merchant could pay the guild a nominal fee for each cloth.[36] Here the court provided a holding that has modern day ramifications in that the ordinance in question could lead to all cloth requiring guild finishing and as such would be:

> against the common law, because it was against the liberty of the subject: for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly; and, therefore, such ordinance, by colour of a charter, or any grant by charter to such effect, would be void.[37]

We can liken this type of monopoly to any invidiousness that might be perpetuated by a state within the context of the dormant Commerce Clause. The economic liberties of a merchant have been significantly shackled by a regulatory scheme that treats all merchants the same and yet it places a burden upon those liberties.[38] This type of nondiscriminatory scheme is the beginnings of the type of conduct that will be investigated within the dormant Commerce Clause.

Coke's contributions are where the literal foundation of economic liberties, found within the *Magna Carta*, are derived. The rights of today can be traced directly to his scholarship and English common-law.[39] Willam Blackstone,[40] another great scholar of the law, echoed the sentiments of Coke regarding the need for protection of economic liberties.[41] However, Blackstone also was the progenitor of the concepts for both Congressional supremacy and the rational

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35. Siegan, *supra* note 15, at 51.
36. *Id.*
37. *Id.* at 52 (emphasis added).
38. *See id.*
39. *Id.* at 58-59.
40. *See id.* at 59-64.

> Sir William Blackstone 1723–80, English jurist. At first unsuccessful in legal practice, he turned to scholarship and teaching. He became (1758) the first Vinerian professor of law at Oxford, where he inaugurated courses in English law. British universities had previously confined themselves to the study of Roman law. Blackstone published his lectures as *Commentaries on the Laws of England* (4 vol., 1765–69), a work that reduced to order and lucidity the formless bulk of English law. It ranks with the achievements of Sir Edward Coke and Sir Matthew Hale, Blackstone's great predecessors. Blackstone's *Commentaries*, written in an urbane, dignified, and clear style, is regarded as the most thorough treatment of the whole of English law ever produced by one man. It demonstrated that English law as a system of justice was comparable to Roman law and the civil law of the Continent. Blackstone has been criticized, notably by Jeremy Bentham, for a complacent belief that, in the main, English law was beyond improvement and for his failure to analyze exactly the social and historical factors underlying legal systems. Blackstone's book exerted tremendous influence on the legal profession and on the teaching of law in England and in the United States. In his later life Blackstone resumed practice, served in Parliament, was solicitor general to the queen, and was a judge of the Court of Common Pleas.

ALLREFER ENCYCLOPEDIA, *at* http://reference.allrefer.com/encyclopedia/B/BlackstoW.html.

41. Siegan, *supra* note 15, at 62.

basis standard of judicial review.[42] With that in mind, and with his unwavering guidance in protecting economic liberty, it is clear that the concept of other forms of judicial review were within his vision of jurisprudence.[43] If that is true, then there must be corresponding rationales to justify the restraint of Congressional authority when economic liberties are at stake.

It was with a concept of protecting economic liberties that brought about our Constitution and Bill of Rights.[44] Even though many believed that the silence of the Constitution regarding specific rights was protected by common law, others saw the necessity of enumerated rights.[45] Thus the Bill of Rights was created "to allay fears that the United States government might some day seek to apply powers that had not been delegated."[46] Although there have been many challenges to the power of government over protected rights, much of the protection of economic rights was provided by common law dating back to Blackstone and Coke.[47]

From this background emerged the guarantees of the original Bill of Rights with the guarantees of those rights in the context of the Fourteenth Amendment.[48] The Due Process Clause found in the Fifth Amendment is the same as that applying to the states in the Fourteenth Amendment.[49] Many early cases regarding due process applied the principles passed from English common law.[50] The power of the Due Process Clause to protect economic liberties is summed well in the words of Judge John Catron from an 1829 state case when he stated that:

> [t]he right to life, liberty and *property*, of *every individual*, must stand or fall by the same rule or law that governs every other member of the body

42. *Id.* at 63-64.
43. *Id.*
44. *Id.* at 64-70.
45. *Id.* at 68.
46. *Id.*
47. *Id.* at 72-74.
48. *Id.* at 75.
49. *Id.*
50. *Id.* at 75-78. One Supreme Court, one Federal Circuit Court, and five state cases referred to Coke and English common law regarding due process: Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (citing an exception to due process found within the Magna Carta which allowed the United States Treasury to collect delinquencies from a collector of Customs without judicial proceedings); Greene v. Briggs, 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764) (voiding a law that denied a defendant a trial by jury unless a bond was posted to insure payment of penalty and court costs); Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843) (striking down a law that allowed for private roads to be built on private land without due process even if just compensation had been made); Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59 (1836) (negating a law that allowed court appointed guardians of infants to sell land inherited from the parents to pay the debts of the child's parents without judicial proceedings); Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833) (invalidating a law that kept an elected officeholder from his duties when there was no judicial determination that a law had been violated in order to take such prohibitive action); Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599 (1831) (finding unconstitutional a law that allowed a special tribunal to dispose of lawsuits against banks and their customers who wrote bad checks because it denied due process in that no appeal from the tribunal was allowed); Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260 (1829) (upholding a law that allowed special remedies for a holder of notes from two banks to summon persons as garnishees of the banks instead of waiting until the judgment is recovered in the normal course of due process).

> politic, or "Land," under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void . . . [t]he idea of a people through their representatives, *making laws whereby are swept away the life, liberty and property of one or a few citizens*, by which neither the representatives nor their other constituents are willing to be bound, *is too odious to be tolerated in any government* where freedom has a name.[51]

Hence, the early stages of jurisprudence aimed at protecting economic liberties against both discriminatory and nondiscriminatory governmental conduct can be seen in cases as far back as the early 1800s.[52]

In order to understand the concepts embodied in the Constitution and Bill of Rights there must be an understanding of James Madison.[53] During the creation of those great documents, Madison was guided by the ideal of economic liberty "that would depend on freedom of the markets and not on the authority of the state."[54] It appears that Madison distrusted both pure democracy and the one chosen and in use today, representative democracy.[55] Regardless of the form, government must be restrained as to the protection of economic rights, such as property rights.[56] In fact, Madison believed that government must be charged with protecting economic liberties as defined by Blackstone.[57] The restraint on government that was of importance to Madison was in the area of regulation.[58] In this regard, Madison equated economic liberties with the rights associated with speech and religion.[59] His thoughts on economic liberties are crystal clear in a speech he made to the First Congress when he said:

> I own myself the friend to a very free system of commerce, and hold it as

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51. Slegan, *supra* note 15, at 80 (quoting *Vanzant*, 10 Tenn. (2 Yer.) at 270-71 (1829) (Catron, C.J., concurring)) (emphasis added).

52. *See generally supra* notes 50 and 51 and accompanying text.

53.

> Madison played [an] important role in bringing about the conference between Maryland and Virginia concerning navigation of the Potomac. The meetings at Alexandria and Mt. Vernon in 1785 led to the Annapolis Convention in 1786, and at that conference he endorsed New Jersey's motion to call a Constitutional Convention for May, 1787. With Alexander Hamilton he became the leading spokesman for a thorough reorganization of the existing government, and his influence on the Virginia plan, which advocated a strong central government, is evident.
>
> At the convention his skills in political science and his persuasive logic made him the chief architect of the new governmental structure and earned him the title "master builder of the Constitution." His journals are the principal source of later knowledge of the convention. He fought to get the Constitution adopted. He contributed with Alexander Hamilton and John Jay to the brilliantly polemical papers of The Federalist, and in Virginia he led the forces for the Constitution against the opposition of Patrick Henry and George Mason.

ALLREFER ENCYCLOPEDIA, *at* http://reference.allrefer.com/encyclopedia/M/MadisonJ-master-builder-of-the-constitution.html.

54. Siegan, *supra* note 15, at 81.

55. *Id.* at 82.

56. *Id.*

57. *Id.* at 83.

58. *Id.*

59. *Id.* at 84.

a truth, that commercial shackles are generally unjust, oppressive, and impolitic; it is also a truth, that if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out.[60]

In summarizing the background of economic liberties, it can be readily agreed that the concept has its roots in due process jurisprudence. Where the rights of individuals to own property in the pursuit of commerce conflict with regulation, the government must be restrained from infringing upon those rights.[61] To the extent necessary, those economic liberties can be protected within other areas of the law.[62] Consequently, it is not a stretch to incorporate the protections of economic liberties within the dormant Commerce Clause.

III. COMPARISON OF OTHER RATIONALES AND DISCOUNTING THEIR VALUE

Before the other rationales can be adequately discounted in favor of the economic liberty rationale, there must be a set of suitable definitions as a first step. With definitions in hand, the rationales can then be compared. The two prominent rationales have been previously mentioned: national economic solidarity and political process.[63] Therefore, our list of rationales is limited to those generally accepted as applicable to the dormant Commerce Clause.

A. NATIONAL ECONOMIC SOLIDARITY RATIONALE

National economic solidarity rationale has also been called the structural rationale[64] and economic union rationale.[65] This rationale is generally accepted as the original basis upon which the dormant Commerce Clause doctrine has been analyzed.[66] Economic union substantiates the Court's use of the dormant

60. *Id.* (emphasis added).

61. See *supra* Section II, "What is Economic Liberty?"

62. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (sustaining the economic liberty of a landowner under the Fifth Amendment Just Compensation Clause to protect the right to develop property as he saw fit or be adequately compensated); Saenz v. Roe, 526 U.S. 489 (1999) (safeguarding the economic liberty "right to travel" under the Fourteenth Amendment Privileges or Immunities Clause allowing welfare recipients immediate entitlement privileges); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (protecting the economic liberty of out-of-state lawyer to be licensed in New Hampshire under Article IV Privileges and Immunities Clause); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (upholding Congressional Act that protected Due Process Clause economic liberty of power companies who invested in nuclear power plants).

63. See *supra* notes 2 through 4 and accompanying text.

64. Day, *supra* note 1, at 1, 64 n.7.

65. Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 44 (1988).

66. *Id. See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 406 (1994) (O'Connor, J. concurring) (explaining that "over 20 states have enacted statutes authorizing local governments to adopt flow control laws . . . [that] impose the type of restriction on the movement of waste that Clarkstown has adopted, . . . result[ing] in the type of balkanization the [Commerce] Clause is primarily intended to prevent"); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-326 (1979) (finding that charging $1.40 per ton

Commerce Clause in order to "resolv[e] commercial conflicts between states."[67] The converse of conflict is that of a common market where goods can move in interstate commerce without interference by the states.[68]

To eliminate many conflicts between states, Congress has used its affirmative commerce power to unify certain aspects of government.[69] However, when it comes to the mobility of goods across state borders the conflicts have been numerous.[70] The form that the conflict takes centers on both state taxes and regulations.[71] Nevertheless, any thoughtful understanding of the obstructions created by the states has a direct link to the economic integration of the states.[72] This economic integration is based on a national interest under the commerce clause.[73] This interest can only be harmed when states "restrict market allocations of resources across state borders or in other states."[74] Not all state tax and regulatory schemes restrict interstate commerce.[75] Some of the regulatory schemes attempt to differentiate one state from the next in a form of

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more for out-of-state waste compared to in-state waste was one of the reasons why the "Framers granted Congress plenary authority over interstate commerce '... to avoid the tendencies toward economic Balkanization that had plagued relations among ... the States ... '"); Dennis v. Higgins, 498 U.S. 439, 453-54 (1991) (extending 42 U.S.C. § 1983 civil rights remedies to out-of-state individuals injured for violations of the commerce clause where the Court concluded that the "Framers of the Commerce Clause had economic union as their goal ... [with] intent to secure personal rights under this Clause"); Healy v. Beer Institute, Inc., 491 U.S. 324, 335-37 (1989) (expressing concern for the "national economic union unfettered by state-imposed limitations on interstate commerce" where one state's extraterritorial beer-price affirmation regulation imposing limitations on commerce would lead to other state's adopting similar regulations); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 223-25 (1824) (offering exclusive navigation rights on New York state waterways violates the commerce clause as regulation to be protected by "national measure" against individual states).

67. Collins, *supra* note 65, at 46.

68. *Id.* at 60.

69. *Id.*

70. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (removing charitable organization exemption from in-state land owners who catered almost exclusively to out-of-state summer campers); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (subsidizing in-state dairy producers with tax on in-state and out-of-state dairy producers); *Oregon Waste Sys.*, 511 U.S. 93, (charging more to dump out-of-state waste than in-state waste); Wyoming v. Oklahoma, 502 U.S. 437 (1992) (requiring the burning of in-state coal causing loss of revenue to out-of-state coal producers and the state of Wyoming); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (prohibiting hydroelectricity exports); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (restricting all trailer lengths while traveling on state highways); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (barring out-of-state bank holding company services); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (prohibiting waste imports); Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977) (restricting all apple producers to use only USDA apple quality grading); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (requiring trucks to have unusual mudflaps).

71. Collins, *supra* note 65, at 60.

72. *Id.* at 61.

73. *Id.*

74. *Id.*

75. *See, e.g.*, Exxon Corp. v. Maryland, 437 U.S. 117 (1978) (prohibiting all oil producers and refiners from owning retail gas stations did not violate the commerce clause even though there were no in-state oil producers and refiners); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (state regulation to pay bounties for automobiles abandoned within the state favoring in-state scrap processors over out-of-state scrap processors licensed to do business within the state did not violate the commerce clause).

commerce competition.[76] Unfortunately, most state tax and regulation schemes do interfere with the normal flow of interstate commerce.[77] This interference might be categorized as only a "burden" which may or may not be invalidated upon judicial review.[78] Regardless, there is a national interest that surrounds the dormant Commerce Clause and no state may unduly interfere with that interest.[79]

Competing with a national interest are the individual interests of each state.[80] Supporting a national interest is the notion that private markets are better served when they are efficient.[81] The efficiency of the national market is in direct competition with the efficiency of the localized lawmaking of the states.[82] This puts the courts in the position of determining which of those state laws are valid and which are impermissible under the dormant Commerce Clause.[83] If economic union is the dominant rationale, then market efficiency is secondary to interstate commercial harmony.[84] Consequently, commercial harmony in the pursuit of a national interest must outweigh individual state tax and regulatory schemes in order to eliminate interference with the "policy choices of other states."[85]

B. POLITICAL PROCESS RATIONALE

The other major dominant rationale is the political process or representation reinforcement rationale.[86] This rationale considers that individual state

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76. Collins, *supra* note 65, at 61.

77. *Id. See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 203 (1994) ("State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional. *The idea that a discriminatory tax does not interfere with interstate commerce 'merely because the burden of the tax was borne by consumers' in the taxing State was thoroughly repudiated* .... More fundamentally... Massachusetts dairy farmers are part of an integrated interstate market [and] *the purpose and effect* of the [tax and subsidy scheme] are to *divert market share to Massachusetts dairy farmers.* This diversion necessarily *injures the dairy farmers in neighboring States.*") (citations omitted, emphasis added); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 595 (1997) ("The history of our Commerce Clause jurisprudence has shown that *even the smallest scale discrimination can interfere with the project of our Federal Union.*") (emphasis added).

78. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (affirming the District Court's holding that Arizona law requiring packing cantaloupe at in-state facilities did "burden interstate commerce, and the question then becomes whether it does so unconstitutionally").

79. Collins, *supra* note 65, at 61.

80. *Id.*

81. *Id.* at 63.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 64.

86. Day, *supra* note 1, at 1-2, 64 n.8. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994) ("[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy."); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (finding that where trucking companies were generally prohibited from using trailers longer than 55 feet, the burden fell on out-of-state truckers even though the Court stated that "where such regulations do not discriminate on their face

lawmakers are "unlikely to take into account the effects of their laws on out-of-state interests."[87] Along with that, many states fail to appreciate that the true cost of their tax and regulation schemes are allotted throughout all other affected states.[88] Along with states not recognizing the effects of their tax and regulation schemes, the states have historically demonstrated a lack of consideration of constituency, both in-state and out-of-state.[89]

Generally, in-state constituents have access to the political process in order to influence tax and regulations schemes.[90] On the contrary, out-of-state "non-constituent" market participants do not have access to the political process in another state.[91] Consequently, it is important to determine "whether an in-state interest that is meaningfully represented in the political process ensures functional representation for the relevant out-of-state interests."[92] When the political process fails, it is more likely to adversely affect the out-of-state person instead of the in-state constituent.[93] This failure in the political process can be overcome through dormant Commerce Clause jurisprudence.[94] But courts must first determine the degree to which the tax and regulation scheme benefits the in-state constituent and discriminates against the out-of-state commerce participant.[95]

The discrimination that affects out-of-state commerce participants is considered the direct result of the conduct of legislators more willing to put the burden elsewhere than on constituents within their own state.[96] In the case of regulation schemes, the Court takes the approach that if a state decides to protect the economic interests of its constituents by increasing the costs of out-of-state commerce participants, then the state where they reside could reciprocally request a regulatory decrease for their constituents in retaliation.[97] This type of

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against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations"); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (noting that where out-of-state truckers were subject to state width and weight regulations "of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state").

87. Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 150 (1979).

88. *Id.* at 141.

89. *Id.* at 134-41.

90. *See West Lynn Creamery*, 512 U.S. at 200.

91. Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 40-41 (2003). See *supra* note 86, quoting Justice Stevens in *West Lynn Creamery.*

92. Stearns, *supra* note 91, at 41.

93. *Id.*

94. Tushnet, *supra* note 87, at 164.

95. *See West Lynn Creamery*, 512 U.S. at 203-04.

96. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1051-52 (3d ed., Found. Press).

97. *Id.* at 1052-53. *See, e.g.*, Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) (holding that state public utility commission's interference with rates charged according to contract between utility generating power within its borders and an out-of-state customer violated the dormant commerce clause). *But see* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 390-96 (1983) (holding that under "balancing test" states may regulate rates, regardless of

discrimination would be pervasive if the Court was not able to protect the out-of-state commerce participants "unrepresented in the [offending] state's political process."[98] But the worst transgression of state lawmaking authority is when the out-of-state commerce participant is discriminated against by bearing the whole burden of tax and regulatory schemes.[99]

C. THE "DISCOUNT"

Both the economic union and political process rationales have their proponents and critics. Both rationales must be evidenced by some type of impermissible tax or regulation scheme that results in obstructing interstate commerce.[100] The effects of the obstruction most probably result in potential or actual economic burdens being placed beyond the borders from those who will directly benefit.[101] In both rationales there continues to be present an underlying theme of economic burdens.[102] Generally, those burdens can be measured in tangible costs that the out-of-state commerce participant must bear.[103] It seems

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whether wholesale or retail, to members of cooperatives that participate on the interstate electric "grid," effectively modifying *Attleboro*'s "mechanical test").

98. TRIBE, supra note 96, at 1052. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945) (noting "that to the extent that the burden of state regulation falls on interests outside the state, *it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected*") (emphasis added); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (commenting that "[s]tate regulations affecting interstate commerce, *whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within*, have been thought to impinge upon the constitutional prohibition") (emphasis added).

99. TRIBE, supra note 96, at 1053. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 675-76 (1981) (proving that trailer length "regulation *bears disproportionately on out-of-state residents* and businesses . . . [and] [s]uch a disproportionate burden . . . has several exemptions *that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use*") (emphasis added); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 445 (1978) (showing "that the regulations impose a substantial burden on the *interstate movement of goods . . . substantially increase*[ing] *the cost of such movement* . . . by forcing [out-of-state haulers] to haul doubles across the State separately, to haul doubles around the State altogether, or to incur the delays caused by using singles instead of doubles to pick up and deliver goods") (emphasis added).

100. *See* Collins, *supra* note 65, at 75-81. *See generally* Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Tushnet, *supra* note 87.

101. Collins, *supra* note 65, at 75-81.

102. *Id.*

103. *See, e.g.*, South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 169 (1999) (average in-state corporations paid approximately one-fifth the franchise tax that an out-of-state corporation would pay); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 567 (1997) (the camp paid $20,000 per year in real property taxes because of loss of charitable exemption); Fulton Corp. v. Faulkner, 516 U.S. 325, 329 (1996) (Fulton paid $10,884 in intangibles tax based on out-of-state stock ownership); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 190-91 (1994) (out-of-state dairy producers West Lynn & LeComte paid $1 per hundred weight (cwt) or $100,000 per month added cost to subsidize in-state producers); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 387, 424 (1994) (Souter, J., dissenting) ($81 per ton tipping fee was approximately $11 per ton higher than other out-of-state tipping fees); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 96 (1994) (Oregon Waste paid $2.25 per ton for out-of-state generated waste as compared to $0.85 per ton for in-state waste); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 338-39 (1992) (Chemical Waste paid $72 per ton surcharge for all hazardous waste generated outside of Alabama); Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 395 (1984) (Westinghouse, out-of-state corporation, paid additional franchise tax of $71,970 plus interest for 1972 and $151,437 plus interest for 1973); Bacchus Imps., Ltd. v. Dias, 468

no small leap to see both rationales pointing to another more consistent rationale. Since discriminatory tax and regulatory schemes can be measured in costs that burden out-of-state commerce participants, then the unifying rationale in dormant Commerce Clause doctrine is economic liberty.[104]

Thus, it would be easy to discount both the economic union and political process rationales by a broader rationale that affects each of them.[105] When an out-of-state commerce participant can evidence the discriminatory effect of a state's tax or regulatory scheme in terms of costs, then the Court should be prepared to protect the out-of-state participant's economic liberty or validate that state's conduct.[106] The discounting in favor of economic liberty allows the Court to standardize its rationale in line with that of due process.[107] In a sense, the protections afforded by the dormant Commerce Clause doctrine are more similar than distinct with due process doctrine.[108] In both doctrines the challenger has not been afforded any protection from the state and courts must step in if there is to be any remedy.[109] Due process gives the challenger his day in court when states overreach and deprive him of his economic liberty.[110] In that same way, a challenger asserting his economic liberties within the dormant Commerce Clause is also given his day in court when a state unduly burdens market participants.[111]

IV. ECONOMIC LIBERTY AT WORK

A. *PIKE V. BRUCE CHURCH, INC.*

The factual bases in dormant Commerce Clause cases invariably concern a challenger's unwillingness to pay more than is necessary. A seminal case to begin with involves fresh fruit, a regulation, a regulator, and a desert in which to produce it.[112] In *Pike v. Bruce Church, Inc.*, an Arizona regulation requiring

U.S. 263, 266 (1984) (importers of out-of-state liquor paid approximately $45,000,000 in taxes over a five-year period where in-state produced liquor was exempted); *Kassel*, 450 U.S. at 674 (out-of-state truckers proved added costs of approximately $12,600,000 each year to comply with state law banning truck lengths greater than sixty feet); Great Atl. & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 369, 375 n.7 (1976) (inability of A&P to use its out-of-state facility in which it invested $1,000,000 for improvements caused it to incur an additional $195,700 annually in reliance on other sources of product); Toomer v. Witsell, 334 U.S. 385, 390-91 (1948) (out-of-state shrimpers must incur the unquantified costs associated with docking, unloading, packing, stamping and reloading the shrimp before leaving South Carolina and must pay $2,500 for each boat license as compared to $25 for in-state shrimpers).

104. *See* Day, *supra* note 1, at 2, 64 n.9; Tushnet, *supra* note 87, at 141-44.
105. Day, *supra* note 1, at 2.
106. *See West Lynn Creamery*, 512 U.S. at 188-92.
107. *See supra* notes 15 through 51 and accompanying text.
108. *See* Tushnet, *supra* note 87, at 147-50.
109. *Id.*
110. *Id.*
111. *Id.*
112. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 138-40 (1970).

packing to be done within its state borders is challenged by a producer who is unwilling to let his cantaloupe crop rot in the desert.[113] The regulation in question was facially non-discriminatory in that all Arizona cantaloupe growers were treated "even-handedly."[114] The Court devised a balancing test where a regulation that "effectuate[s] 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."[115] In the Court's decision is a list of references to the costs associated with compliance and an implied desire by the state to see that those associated costs are spent inside the state.[116] The grower had a perfectly good packing operation thirty-one miles across state lines in California that met similar regulations.[117] Ultimately, the cantaloupe grower would need to expend $200,000 for an identical packing shed within Arizona in order to comply.[118] Also, the Court found that this was too great a burden when balancing the state's requirement to package cantaloupe within Arizona with Bruce Church's economic costs of compliance.[119]

This *burden* had nothing to do with a national economic union rationale.[120] Arizona had argued quite properly and accurately that compliance with the regulation would not involve interstate commerce.[121] Also, since Bruce Church was a constituent of Arizona, the political process rationale would not seem to be a factor in the Court's decision.[122] Since compliance was costly and burdensome, the only rationale left to explain this decision is that Bruce Church's *economic liberty* was a greater burden.[123] Consequently, the $200,000 expenditure played a very large role in expanding the power of the dormant Commerce Clause. Later decisions would have a similar outcome, but it is necessary first to review an earlier decision that directly affected the outcome in *Pike*.[124]

113. *Id.*

114. *Id.* at 142. Thus, the Court created a two-tier analysis of the Dormant Commerce Clause separated into Discrimination and Non-discrimination, or Undue Burden. *See* Tushnet, *supra* note 87, at 125-31.

115. *Pike*, 397 U.S. at 142.

116. *See id.* at 138-40.

117. *Id.*

118. *Id.* at 144-45.

119. *Id.*

120. *Id.* at 146.

121. *Id.* at 140-41.

122. *Id.* at 139.

123. *See id.* at 145-46.

124. Here the Court compares Arizona's requirement that Bruce Church package his in-state grown cantaloupe within its borders to that of the shrimp fishermen in *Toomer v. Witsell*. *Id.* *See infra* notes 125-133.

B. *TOOMER V. WITSELL*

In *Toomer v. Witsell*,[125] the Court discussed the material effect of the costs of certain state enforced regulations.[126] The state of South Carolina wanted all shrimp caught within its maritime waters to be unloaded, packed, and stamped in their state ports.[127] Unlike Bruce Church, here the challengers were out-of-state entities.[128] But the significant aspect of this decision is the Court's clear fix of the economic burdens upon these shrimp fishermen when:

> [t]he record shows that a high proportion of the shrimp caught in the waters along the South Carolina coast, both by appellants and by others, is shipped in interstate commerce. There was also uncontradicted evidence that *appellants' costs would be materially increased* by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, *even though that be economically disadvantageous to the fishermen*, is to divert to South Carolina employment and business which might otherwise go to Georgia; *the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.*[129]

The Court needed little more to find that this regulatory scheme violated the dormant Commerce Clause even though the law, unlike *Pike*, did facially discriminate against out-of-state shrimp fishermen.[130] Although the national economic union rationale is at work, the Court's illustration of the additional costs upon the challenger had an impact on the decision.[131] The relevance of the challenger's economic liberty focused the outcome on those added costs.[132] The Court implied, somewhat, that if the costs had been minimal or advantageous to the challenger, the state might have prevailed.[133]

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125. 334 U.S. 385 (1948). Note that the Court protected economic liberties in *Toomer v. Witsell* by invalidating South Carolina's discriminatory statute that allowed for a $25 license per boat for in-state shrimp fishermen and a $2,500 license per boat for out-of-state shrimp fishermen based on Article IV, section 2, Privileges and Immunities. *Id.* at 389-90.

126. *Id.* at 403-04.

127. *Id.* at 403-07.

128. *Id.* at 387.

129. *Id.* at 403-04 (emphasis added).

130. *Id.* at 389-91.

131. *See id.*

132. *Id.*

133. *Id.* See the Court's explanation regarding out-of-staters qualifying for either $150 or $2,500 license per boat.

> Prior to 1947 there was imposed on resident and non-resident shrimpers alike a boat tax of $1.50 per ton; a personal license tax of $5; and a tax of $5 for each shrimp trawl net . . . was amended [to] . . . [a]ll owners of shrimp boats, who are residents of the State of South Carolina shall take out a license for each boat owned by him, and said license shall be Twenty-five ($25.00) dollars per year, and all owners of shrimp boats who are non-residents of the State of South Carolina, and who have had one or more boats licensed in South Carolina during each of the past three years, shall take out a license for each boat owned by him and said license shall be One hundred and fifty ($150.00) (sic) dollars per year, and all owners of shrimp boats who are nonresidents of the State of South Carolina and who have not had one or more boats licensed during each of the

C. OTHER NON-DISCRIMINATION TIER CASES

In *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell,*[134] the Court looked at the challenger's costs associated with not being able to sell, in retail, milk products from an out-of-state plant it owned.[135] The Great Atlantic and Pacific Tea Co. (hereinafter A&P) had thirty-eight stores in Mississippi and a milk products plant in Kentwood, Louisiana.[136] The plant in Kentwood represented an over $1,000,000 investment by A&P with one of its purposes to provide milk products to the Mississippi stores.[137] It was denied a permit to ship milk products from the plant in Louisiana to the Mississippi outlets because the state of Louisiana had not yet signed a reciprocal agreement to accept each other's processed milk products even though the Kentwood plant's products met Mississippi standards.[138] The Court eventually stated that Mississippi's reciprocity requirement "justified by the State as an economic measure"[139] was "'hostile in conception as well as burdensome in result.'"[140]

In another case, the costs associated with re-labeling Washington apples for sale in North Carolina "burdened the Washington apple industry by increasing its costs of doing business in the North Carolina market and causing it to lose accounts there."[141] Because Washington had its own "equivalent of, or superior to," grading standards, growers in that state already incurred nearly $1,000,000 annually of added expense as a matter of statutory compliance.[142] In *Hunt v. Washington State Apple Advertising Commission*, the Court then illustrated the additional cost of $1,750,000 per year that Washington growers were willing to incur for marketing, research, and education in external markets.[143] Addressing the real economic liberties at stake, the Court stated:

> [h]ere the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types. For example, there is evidence supporting the District Court's finding that individual growers

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> past three years, shall take out a license for each boat owned by him and said license shall be Two thousand five hundred ($2,500.00) dollars per year . . . [t]he appellants *cannot qualify for $150 licenses and hence are subject to the $2,500 provision.*

Id. at 391 n.11 (emphasis added).

134. 424 U.S. 366 (1976).

135. *Id.* at 368-69, 375 n.7.

136. *Id.* at 368-69.

137. *Id.*

138. *Id.* at 369-70.

139. *Id.* at 381.

140. *Id.* (quoting Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 377 (1964) (citations omitted)).

141. Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 348-49 (1977).

142. *Id.* at 336.

143. *Id.* at 337. The yearly figure was for the year that this litigation had begun. *Id.* In a most telling way regarding North Carolina's procedural attempts to prevail concerning the "$10,000 amount-in-controversy requirement," the Court further illustrated the economic plight of the Washington growers. *Id.* at 346. In discussing the requirements of 28 U.S.C. § 1331, the Court stated that the Commission "has standing to litigate the claims of its constituents [and] it may also rely on them to meet the requisite amount in controversy." *Id.*

> and shippers lost accounts in North Carolina as a direct result of the statute. Obviously, those lost sales could lead to diminished profits. There is also evidence to support the finding that *individual growers and dealers* incurred substantial costs in complying with the statute. *As previously noted, the statute caused some growers and dealers to manually obliterate the Washington grades from closed containers to be shipped to North Carolina at a cost of from 5 to 15 cents per carton.* Other dealers decided to alter their marketing practices, not without cost, by repacking apples or abandoning the use of preprinted containers entirely, among other things.[144]

Ruling contrary to North Carolina's arguments, the Court characterized the form of discrimination against the growers' economic liberties as "the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected."[145]

Elsewhere, the Court weighed the insignificant additional annual cost of tug boat escorts to the overwhelming retrofitting costs for oil tankers to comply with Washington state laws in rendering its decision.[146] In *Ray v. Atlantic Richfield Co.*, the Court upheld Washington law requiring pilots and tug boat escorts for tankers in excess of 40,000 dead weight tons (hereinafter DWT).[147] However, part of that same law that the state of Washington passed required tanker designs of 40,000 DWT to 125,000 DWT to be modified substantially from designs required by Congress.[148] Over ninety percent of all tankers used by Atlantic Richfield had been delivering crude oil with 125,000 DWT tankers and, possibly soon, tankers two times that size, also outlawed by the Washington statute, would be used.[149] The Court found that only Congress can act regarding tanker design and that states cannot limit the size of tankers within its coastal waters.[150] Clearly the costs upon challengers, like Atlantic Richfield, associated with Washington's laws played a significant factor in the Court determining that the economic liberties of those directly affected were at stake.[151]

Finally, in *Kassel v. Consolidated Freightways Corp.*,[152] the substantial costs to either reroute trucks or send trailers through the state of Iowa separately was extensively highlighted by the Court.[153] The challenger was a large transportation company providing large truck freight services throughout the contiguous forty-eight states.[154] Here the Court highlighted testimony regarding

144. *Id.* at 347 (emphasis added).
145. *Id.* at 351.
146. *See* Ray v. Atl. Richfield Co., 435 U.S. 151, 172-73 (1978).
147. *Id.* at 160.
148. *Id.* at 160-61.
149. *See id.* at 155-56.
150. *Id.* at 177-78.
151. *See id.* at 177-79.
152. 450 U.S. 662 (1981).
153. *Id.* at 674.
154. *Id.* at 664-65.

the substantial costs that Iowa's law burdened the trucking industry by adding $12,600,000 annually to all carriers, $2,000,000 of which Consolidated alone incurred.[155] Consequently, this testimony provided the Court with a considerable reason to analyze Iowa's law as *burdening* interstate commerce under an economic liberty rationale.[156]

D. RECENT DISCRIMINATION TIER CASES

"Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[157] The Court took a hard look at the effects of a garbage flow control ordinance that appeared to only affect a solitary challenger engaged in interstate commerce.[158] In *C & A Carbone, Inc. v. The Town of Clarkstown*, the Court found it necessary to educate the makers of the trash ordinance on the changing "concept of what constitutes interstate commerce."[159] The challenger, Carbone, provided recycling of solid wastes of which he would then transport the sorted output of value to others for further processing.[160] The regulation involved in this arrangement was that the non-recycled waste was to be sent to the town's new transfer station and transporters were to pay a tipping fee.[161] The Court provides a dormant Commerce Clause definition for the economic liberty rationale when it stated that:

> [w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, *its economic effects are interstate in reach.* The Carbone facility in Clarkstown receives and processes waste from places other than Clarkstown, including from out of State. *By requiring Carbone to send the nonrecyclable portion of this waste to the Route 303 transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste.* Furthermore, even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. *These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause.* It is well settled that actions are within the domain of the Commerce Clause if

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155. *Id.* at 674.

156. *Id.* The Court highlights "that Iowa's law substantially burdens interstate commerce [when] [t]rucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them through separately [or] [a]lternatively, trucking companies must use the smaller 55-foot singles or 60-foot doubles permitted under Iowa law [which] . . . *engenders inefficiency and added expense.*" *Id.* (emphasis added).

157. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (citations omitted).

158. *Id.* at 387-88.

159. *Id.* at 389.

160. *Id.* at 387-88.

161. *Id.*

they burden interstate commerce or impede its free flow.[162]

This new concept affords a broader rationale for invoking the dormant Commerce Clause based upon economic liberties denied to challengers.[163] In a further enlightening statement regarding the dormant Commerce Clause, the Court seemed to highlight the breadth of the economic liberty rationale when it stated that "the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its *practical effect and design*."[164] The *design* was clearly based upon impacting the economic liberty of the challenger in order to create the singular, practical effect of providing enough revenue to pay for the town's new waste transfer station.[165]

Finally, in *Camps Newfound/Owatonna, Inc. v. The Town of Harrison*,[166] the Court recognized the economic burdens that states can and will place upon in-state and out-of-state challengers.[167] Similar to *Pike* in the non-discrimination tier, the challenger here is an in-state resident that could avail itself of Maine's political process.[168] However, unlike *Pike*, the challenger was not faced with an undue economic burden regarding large capital expenditures.[169] Rather Camps Newfound/Owatonna faced mounting operating deficits partially attributable to losing its charitable and religious property tax exempt status at issue in this case.[170] The camp catered almost exclusively to out-of-state campers and operated with an annual deficit of approximately $175,000.[171] The burden created by the loss of their tax exempt status amounted to a little over $20,000 each year.[172] With that, the Court appeared to find that the national economic union is not implicated and then quickly does an about face when it stated that

> the facts of this particular case, viewed in isolation, do not appear to pose any threat to the health of the national economy [and yet] . . . even the smallest scale discrimination can interfere with the project of our Federal Union . . . [a]s Justice Cardozo recognized, to countenance discrimination of the sort . . . would invite significant inroads on our "national solidarity."[173]

Therefore, to allow the small amount of discrimination that affects the economic liberty of the challenger would imply the inevitability that the national economic union would be concerned.[174] This allowed the Court to use a broader rationale

162. *Id.* at 389 (citations omitted) (emphasis added).
163. *See id.*
164. *Id.* at 394 (emphasis added).
165. *Id.* at 387.
166. 520 U.S. 564 (1997).
167. *Id.* at 567-72.
168. *Id.* at 567.
169. *Id.* at 570.
170. *Id.*
171. *Id.* at 567.
172. *Id.*
173. *Id.* at 595.
174. *Id.*

to implicate a more narrow rationale.

V. CONCLUSION

The economic liberty rationale can be used as a standalone or to broaden the scope of the more traditional rationales. The Court may highlight the effects of denial of economic liberty by implying its adverse effect on the national economic union. Consequently, the three dormant Commerce Clause rationales appear to broaden concentrically from economic union on the inside, outward to political process, and then terminating with economic liberty, which encompasses the other two.

Application of the rationale affects more individualized challengers. In both *C & A Carbone* and *Camps Newfound*, the singularity of the affected challengers did not appear to persuade the Court to disregard the effects they alone were burdened with by the state. This acceptance of the economic liberty rationale by the Court can be directly traced to the *Pike* decision. Accordingly, it is apparent that the Court has shown a willingness to protect an individual's economic liberty in the context of the dormant Commerce Clause.

The effects that the Court has considered in the context of individuals centers upon added costs associated with compliance of state regulation and taxing schemes. In each of the cases cited, the overall costs associated vary widely in the effect on the challenger. Regardless of quantifying the effect, the presence of additional costs made an apparent impression on the decision by the Court. In turn, the added costs that burdened the challenger were a deprivation of economic liberty, similar to due process, that the Court seemed most willing to protect.

The broadening of the rationale will aid both individualized and generalized challengers. Using the economic liberty rationale, with its corresponding inclusion of other dormant Commerce Clause rationales, validates the protection of each challenger's right to not be interfered with by state actions when it pertains to interstate commerce. Instead of limiting protection to finding state interference beyond its borders, the Court can use the economic liberty rationale to restrict potential interference that would be inevitable if not for judicial review.