The Dormant Commerce Clause and the Hormones Problem

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CHAPTER 4

The Dormant Commerce Clause and the Hormones Problem

Donald H. Regan

It is obvious that no anti-discrimination regime can stop at forbidding explicit discrimination of the relevant sort. If only explicit discrimination is forbidden, lawmakers who want to discriminate can hide their discriminatory intentions behind facially neutral classifications that are nonetheless chosen because they differentially burden the protected class. So, we must be prepared to invalidate some facially neutral laws that have "discriminatory effect" or, as American lawyers often call it, "disparate impact." On the other hand, we cannot possibly invalidate all laws which have a disparate impact on a protected class; many perfectly reasonable laws adopted for completely innocent purposes will have such disparate impact. So, some laws with disparate impact must be upheld, and some must be invalidated. The question is how to draw the line. (I have intentionally not used the phrase "de facto discrimination." This common phrase could be used simply as a synonym for "disparate impact" and could be similarly neutral on the ultimate issue of illegality. But my impression is that for many trade lawyers, "de facto discrimination" tends to mean laws with disparate impact that are in fact illegal, for whatever further reason is determinative. In contrast, in American constitutional law "de facto discrimination" normally connotes the absence of illegality. So the phrase seems best avoided.)

As I say, the central question for this conference is how to decide which laws with disparate impact are illegal and which are not. But the first question that would occur to an American lawyer about the Arimani duckmeat law (see Appendix, p. 359) is a different one, namely, whether the law is preempted by federal statute or administrative regulation. I suspect a strong case could be made that it is so preempted, although I have not pursued the matter, because that is obviously not the issue primarily relevant to this comparative exercise. I shall discuss the status of the Arimani law under the dormant commerce clause, on the assumption that it is not preempted by statute or regulation. Still, the issue of statutory preemption is worth mentioning, since the possibilities for statutory preemption may affect our approach to issues about preemption by fundamental law. The United States has a central legislature with regulatory powers and a history of using them that go far beyond any analogue in the European Union or the WTO. It is possible that differences of this sort may either explain (empirically) or
justify (normatively) different approaches to fundamental law preemption in the three systems.

In addition to the differences in institutional context, we cannot forget that the relevant legal texts in the three systems vary greatly in content and degree of specificity. The first duty of the judge is to apply the text that grounds her/his authority. The text the American judge is working with is so different from the texts that WTO tribunals are working with that there may not be much to be learned from American law about how disputes should be decided under, say, the SPS Agreement. (I would not say the same about the GATT itself.) If WTO tribunals were in the same situation as American judges—empowered by a text that is seen as giving them a mandate to create some trade-protective law but that offers no more specific direction—then I would recommend that WTO tribunals generally follow the American model (as I understand it) despite the differences in institutional context mentioned previously. As it is, I would merely urge, in the spirit of the American model and the text of the SPS Agreement itself, that the right of countries to choose their own level of SPS protection should not be reduced to an empty shell by excessively demanding standards for what constitutes a risk assessment, or scientific evidence, and so on. Given the text of the SPS Agreement, I find little to object to and much to praise in the Appellate Body's EU–Hormones decision,¹ but the result makes me uncomfortable.

So, I'm not sure whether comparison will prove useful. But my mandate is to discuss the American law, so on with it.

1. The Dormant Commerce Clause: Doctrine and Judicial Practice

Doctrine

The Commerce Clause of the United States Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."² The states, unlike Congress, have whatever powers the Constitution does not forbid them. There is no provision of the Constitution that contains any explicit general limitation on the regulatory power of the states in favor of openness in trade; in that respect the Constitution differs fundamentally from the Treaty of Rome and the GATT (and later WTO agreements). It is well established, however, that the existence of the commerce power in Congress imposes some limits on state power even in the absence of any relevant legislation by Congress. The phrase "dormant commerce clause" (like the synonymous phrase "negative commerce clause") refers to the Commerce Clause as a source of such constitutional preemption. As far as I know, the origin of the phrase "dormant commerce clause" is Marshall's opinion in Wilson v. Black Bird Creek Marsh
The Dormant Commerce Clause and the Hormones Problem

Co., where he says the Delaware law is not "repugnant to the power to regulate commerce in its dormant state."³

I can simplify the necessary discussion of the dormant commerce clause by observing that the Arimani law forbidding the sale of hormone-fed duck meat (a) is not a tax (nor a law that might run afoul of even a generalized "multiple burdens" analysis), (b) is not a regulation of the interstate transportation/communication system itself (railroads, telephones, and so on), and (c) presents no issue of extraterritoriality.⁴ Taxes, regulations of the transportation/communication system, and extraterritoriality all raise special issues which we would be required to attend to in a full discussion of dormant commerce clause doctrine. But in what follows I shall be discussing the dormant commerce clause as it applies to "core" cases that do not involve any such special considerations, like the Arimani duck case.⁵

The conventional wisdom takes as its scripture Justice Stewart's famous statement in Pike v. Bruce Church, Inc.: "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."⁶ Or, as the conventional wisdom would be more likely to state matters: (1) if the state law discriminates against interstate commerce, it is invalid; (2) if the state law does not discriminate against interstate commerce but nonetheless burdens interstate commerce, then we must balance the local benefits of the law against the burden on commerce to see if the law is justified.⁷

There are many difficulties with Stewart's formulation, and with the conventional wisdom based on it. The most obvious difficulty is that they do not tell us what it is for a law to regulate "evenhandedly," or conversely, what it is for a law to "discriminate." Some things are clear. First, a law that is motivated by protectionist purpose is invalid. Second, a law that discriminates explicitly against foreign commerce is "virtually per se illegal,"⁸ although the presumption of illegality may be overcome in the rare case where it can be argued that the explicit local/foreign discrimination is necessary to achieve a non-protectionist purpose.⁹ But what about facially neutral state laws that have a discriminatory effect? We have already seen that we cannot invalidate all such laws. How then do we decide which such laws to uphold and which to invalidate? One obvious answer (the right answer, to my mind) is that we should invalidate the law if and only if it was motivated by a bad purpose. I shall say more about that later. But the standard suggestion at this point is that we should balance the local benefits of the law against the burden on commerce represented by the discriminatory effect.¹⁰ Notice that this standard moves together the "discrimination" part of the conventional test and the "balancing" part. That is no great harm in itself, though it may lead us to wonder whether the view has been well thought
through. It also brings forward another issue, whether balancing should be limited to those cases where there is discriminatory effect, or whether we should balance whenever there is a significant out-of-state cost from the statute, even if the statute is not discriminatory in any sense at all. (Here's an example: if Michigan, which has no tobacco-related industry of any sort, completely prohibited the sale of cigarettes, that would be a significant loss to tobacco farmers in Virginia and cigarette manufacturers in North Carolina; but there is no discriminatory effect.) The Pike test, as stated, clearly requires balancing even here, and so does the "virtual representation" argument for balancing favored by adherents of public choice theory (discussed in section 2). But there is not a shred of evidence that the Court has ever actually engaged in balancing in "core" cases where there is no discriminatory effect. (As I shall explain, I don't think the Court actually balances in any core case, but there is at least some evidence for their balancing in discriminatory effect cases.)

Judicial Practice

We have been discussing some of the difficulties in expounding the conventional wisdom, but in my view the conventional wisdom is wrong at a much more fundamental level. There is no place at all for balancing in dormant commerce clause analysis (in the core cases), and the fundamental notion of discrimination which is relevant is purposeful discrimination. In the core area of the dormant commerce clause, a law is unconstitutional if and only if it has a protectionist purpose. It's that simple. (As I shall explain below, this leaves room for, indeed accounts for, the "virtual per se rule" against explicit discrimination.) This is not just what I think the law should be. It is what I think the law is. This is the best summary of what the Court has actually been doing for at least the last sixty years, despite their claims to the contrary.

Of course, when I say "it's that simple," I mean the theory is simple. I do not mean to suggest that it is always obvious whether there is protectionist purpose. No plausible theory can make every case an easy case. I shall say more in section 2 about how the purpose inquiry works, but one thing is worth saying immediately: outright assertions of protectionist purpose by legislators are neither necessary nor invariably sufficient for a finding of protectionist purpose. They are not necessary because the content and context of the law may make its bad purpose obvious even in the absence of any "smoking gun" in the legislative history. They are not invariably sufficient because a single statement by a single legislator, for example, may not reflect the thinking of her colleagues. Outright assertions of protectionist purpose are, of course, relevant, and they may in some cases be sufficient to show bad purpose. But in saying that the ultimate determinant of constitutional validity
is purpose, I am not remotely saying that this sort of evidence is all that matters.

My claim that in the core cases a law violates the dormant commerce clause if and only if it has a protectionist purpose raises two obvious questions: (1) Given that the Court has explicitly announced a balancing test, what are my grounds for thinking they do not actually engage in balancing? (2) Could I possibly be right? Is it really plausible that the Court should so misdescribe its own behavior?

Let me take the second question first. There is a very natural way for the Court to misdescribe its own behavior: it states the relevant test at too high a level of generality. There is a place for balancing in certain dormant commerce clause cases outside what I have called the "core," most particularly where the state law regulates the interstate transportation/communication system itself. In its statements of the dormant commerce clause test, the Court has generally not distinguished between such cases and my "core" cases, and a single test designed to cover both must necessarily mention balancing—but at the cost of misrepresenting the test the Court is actually applying to the larger part of the range of cases. Only recently has the Court noticed explicitly some of the distinctions among commerce clause cases that I suggest are crucial to understanding the Court's behavior; and in the process, the Court has intimated that balancing may indeed not be relevant in the core.

We have seen how the Court might misdescribe its own behavior, but does it? What are my grounds for thinking the Court does not balance in core cases? After all, the famous Pike balancing test was announced in a core case (though the only significant precedents Stewart cites in support of the test are transportation cases). My grounds are a close reading of all the cases of the modern era (post-New Deal), not just looking for quotable quotes, but trying to see where and how in the opinions the cases are really being decided. I have developed my readings of all the major cases up to 1986 at length elsewhere, and this is not the place for an extended recapitulation. But it may be useful to offer capsule discussions of some of the most famous cases, to give the flavor of my arguments.

The earliest core dormant commerce clause cases that are still regularly cited are Baldwin v. G.A.F. Seelig, Inc. and H. P. Hood & Sons v. Du Mond. In Baldwin, the Court struck down a New York statute which prohibited the sale in New York of out-of-state milk for which the producers had been paid less than New York's own domestic minimum price to producers. In Hood, the Court invalidated the New York Commissioner of Agriculture's refusal to allow a Massachusetts milk distributor that sold its milk in Boston to build a new milk receiving depot in New York; the Commissioner's nominal ground was that the new depot would cause "destructive competition." Baldwin and Hood are both regarded by most
modern commentators as balancing cases, but in fact the Court does not even claim to balance in either case. The opinions are by Cardozo (Baldwin) and Jackson (Hood), two of the Court's greatest prose stylists, and they contain many purple passages about the importance of "economic union." But these oft-quoted passages are interlarded with references to tariffs, embargoes, customs duties, and the like (references that are often omitted when the passages are quoted). Those protectionist devices are the specific threats to "economic union" that both Cardozo and Jackson discuss. I think it is clear on an unprejudiced reading that in both cases what the Justices were concerned about, and what they thought they had identified, was thinly disguised protectionism. 17

Consider next Pike v. Bruce Church, Inc. itself, where the Court famously does claim to balance. The facially neutral Arizona statute in the case required only that cantaloupes grown in the state be packed in approved containers. What Bruce Church, the cantaloupe grower, was actually challenging was an order under the statute by an Arizona official, requiring Bruce Church to pack their cantaloupes in Arizona instead of transporting them in bulk across the border to a packing shed in California. There was no claim that this order was necessary to ensure that the cantaloupes were packed in the proper sort of container; it was stipulated that California had an identical packing requirement. Rather, the Arizona official defended his order as necessary to ensure that the Arizona cantaloupes were labeled as grown in Arizona. This is an unusual set of facts, and Stewart's opinion meanders, despite its brevity. In the end, Stewart invalidates the order on the ground that it is an explicit local-processing requirement (as indeed it is), and that such local-processing requirements are "virtually per se illegal." This rationale is completely sound, but it is not a balancing rationale (not even if we have to decide at some point that there is no claim of local benefit adequate to override the presumption of illegality). The virtual per se rule which constitutes the case against the order is best understood as part of an anti-protectionism regime. The natural and best justification of the virtual per se rule is that explicit local-processing requirements, like other explicitly discriminatory commercial regulations, are virtually certain to be motivated by protectionist purpose. The reason is that non-protectionist purposes can normally be pursued without recourse to explicit discrimination. Pike announces a balancing test, but it is not a balancing case. 18

Another famous "balancing" case, Dean Milk Co. v. City of Madison, 19 also involved an explicit local-processing requirement—in this case an ordinance of the city of Madison, Wisconsin, requiring that milk sold in the city as pasteurized to have been pasteurized and bottled within five miles of the city center. Again, Clark's opinion for the Court is a bit of a jumble, but in the end, it turns on the same sort of per se rule against explicit discrimination as Pike. Obviously, a full discussion would need to explain why explicit local
geographical discrimination (as in Dean Milk) should be assimilated to explicit state-line discrimination (as in Pike); but equally obviously, the explanation would provide no support for a general balancing approach. 20

Of the standard "balancing" precedents, the hardest to encapsulate briefly is Hunt v. Washington State Apple Advertising Commission, 21 in which the Court struck down a North Carolina statute that prohibited the use of any grades other than USDA (U.S. Department of Agriculture) grades on closed containers of apples sold in North Carolina. The effect of the statute was both to deprive Washington apple growers of the advantage of their specially prestigious state grading system (arguably preferred by buyers to the USDA system), and also to impose on Washington growers the extra cost of printing up boxes without Washington grades on them for sale in North Carolina—all to the advantage of North Carolina apple growers. The statute was facially neutral, and Chief Justice Burger, writing for the Court, explicitly said he did not need to find a protectionist purpose. Nonetheless, to my mind the opinion makes it clear both that there was a protectionist purpose and that Burger thought so. (He may have been unwilling to rely on protectionist purpose because of the absence of any finding in the district court's opinion.) In the present context it must suffice to mention two features of the opinion. First, Burger goes out of his way to quote a "glaring" statement by the North Carolina Agriculture Commissioner which suggests the Commissioner thought the purpose of the statute was protectionist; 22 this is the only instance in which he goes behind the district court's opinion to the record. Second, Burger's eventual argument that the statute achieves little or (probably) no local benefit is a priori. He argues that the statute could not possibly produce better informed purchasers (since it allows the sale of ungraded apples) and that it could not possibly achieve its putative goal of aiding consumers (since they never see the relevant containers). A case that is decidable by this sort of a priori argument is no precedent for judicial balancing in cases where there are genuinely contestable empirical issues about the law's effects. Also, what the Court can know a priori, the North Carolina legislature must have known, too. If the legislature knew they could not achieve their asserted objects, we can infer that they were attempting to disguise protectionism. 23

Moving forward, Edgar v. MITE Corp., 24 decided in 1982, was regarded by some as an important precedent for balancing. The Court invalidated an Illinois anti-takeover statute that was drafted in such a way that it could apply to transactions occurring entirely outside Illinois in the shares of a non-Illinois corporation with non-Illinois shareholders (if the corporation had its principal executive office in Illinois and at least ten percent of its stated capital and paid-in surplus were represented in Illinois). Justice White wrote a plurality opinion advancing three theories for invalidation: statutory preemption (by the federal Williams Act), extraterritoriality, and Pike balancing. Only one part of this opinion received five votes and became the
official opinion of the Court, the part relying on Pike. Despite appearances, Edgar was not a significant precedent for Pike balancing. There would have been five votes for the result of invalidation even if only the preemption and extraterritoriality theories had been considered. The Justice whose vote made Pike the nominal theory of the Court (and the only Justice who relied solely on Pike) was Justice Powell, whose vote was not necessary to dispose of the case even though it was the crucial fifth vote for one particular theory. Powell actually thought the case was moot; furthermore, everything in his opinion suggests that he would have preferred to uphold the Illinois statute (!); and he says explicitly that his reason for voting for the Pike theory is that it is less restrictive of state power in this area than the other two theories in the running. So, Edgar is not a genuine endorsement of Pike or of balancing.

Further confirmation may be found in the next case involving a state anti-takeover statute, CTS Corp. v. Dynamics Corp. of America, decided in 1987. The Indiana statute in CTS Corp. differed from the Illinois statute in Edgar in that it regulated voting rights acquired by transactions in the shares of Indiana corporations. This is an important difference, but neither this difference nor any other difference between the statutes suggested that they should fare differently on a balancing analysis. The Court in CTS Corp. upholds the Indiana statute, without any citation of Pike (except when summarizing the opinion below that they are reversing) and without any balancing (indeed, disclaiming any intention to second-guess the empirical judgments of the state legislature). Powell writes for the Court, and in his opinion in CTS Corp. he never even acknowledges that there was an "opinion of the Court" in Edgar, although it was his vote that created it. He refers consistently to White's "plurality opinion." Perhaps even more remarkable, White, in his dissent in CTS Corp., never mentions Pike, despite having written the Pike-based "opinion of the Court" in Edgar five years before. Both Powell and White focus in CTS Corp. on an issue of extraterritoriality—who is entitled to regulate the internal affairs of corporations? White also thinks the statute has a protectionist purpose. Balancing is nowhere in the picture.

Since 1987, the Court has decided twenty-odd dormant commerce clause cases and invalidated eighteen statutes. In only one of those eighteen invalidations, Bendix Autolite Corp. v. Midwesco Enterprises, Inc., in 1988, does the Court even claim to balance; and it is doubtful whether there is really any balancing going on. The statute in issue tolls the statute of limitations for contract actions during any period when a defendant foreign corporation has not subjected itself to the general jurisdiction of the Ohio courts (even though the corporation may be amenable to suit during that period on all its Ohio-connected transactions under the Ohio long-arm statute). Kennedy, writing for the Court, says the Ohio law in question "might have been held to be a discrimination that invalidates without extended
inquiry" (in effect, it might have been held to be patently unjustified facial
discrimination, as Scalia says it is in his concurrence), but Kennedy says he
"chooses" to go on and balance anyway, without explaining why. There is, in
fact, reason to go on, though not in the balancing direction; the case is trickier
than it seems, and the facial discrimination claim by itself does not get right
to the heart of the matter. After all, if Midwesco (the foreign defendant)
simply submitted to the general jurisdiction of the Ohio courts, it would get
the full benefit of the statute of limitations, and it would be no worse off in
respect of susceptibility to suit than any Ohio corporation or any corporation
permanently present in Ohio. The problem is that it seems Midwesco, as a
foreign corporation with no permanent presence, is entitled to be somewhat
better off in respect of susceptibility to suit. But what is required to explain
this entitlement, and with it the vice in the Ohio statute, is not balancing; it is
arguments about due process and/or what we might call "multiple
administrative burdens." 31 Kennedy's opinion does not make all of this clear;
but his "balancing" discussion is as underdeveloped as Scalia claims in
concurrence, and his opinion also clearly manifests the sort of "fairness"
concerns I have indicated. I do not think it is balancing that really decides the
case.

Those (except for CTS Corp.) are the standard precedents for balancing
in "core" cases. All of them. I have necessarily given only capsule
discussions of each case, but those are all the cases. There are many other
cases in which the Court gives a general statement of dormant commerce
clause doctrine that refers to balancing, but then invalidates the law under
some other part of the test without claiming to balance. There are also a few
cases in which the Court claims to balance but upholds the law under review.
I do not count these as precedents for balancing. If the Court really engaged
in balancing, these cases would obviously be important in helping us to see
how balancing worked; but where the very existence of the balancing test is
in controversy, a case does not help to establish the reality of the test unless
balancing determines an invalidation. A test which never bites is no test at
all. Aside from that, even in the cases that claim to balance and then uphold
the law, there is no real balancing. The prime example is Minnesota v. Clover
Leaf Creamery Co., 32 in which the Court upheld a Minnesota statute which
forbade the sale of milk in non-returnable plastic containers. Although the
Court cites Pike and claims to balance, no "balancing" happens. Writing for
the Court, Brennan notes that there is some discriminatory effect from the
statute, which he says must be justified by some local benefit. But when it
comes to the crucial issue of identifying the local benefits of the statute,
Brennan refers back to his discussion of the benefits in the equal protection
part of the opinion. However, in the latter, he said repeatedly that it was not
for the Court to decide whether there really were any benefits, only whether
the legislature might have thought so. (This is standard equal protection
doctrine in the social/economic area.) In sum, Brennan never officially decides that there are any local benefits; nevertheless, he upholds the statute against dormant commerce clause challenge, and he upholds it in effect on the ground that the legislature thought there were benefits. That is not balancing; that is purpose analysis. The other cases that purport to apply *Pike* in the course of upholding a law do so even more cursorily.

One final observation. It is not always obvious in a particular case whether the Court is really applying a purpose test or balancing. This is not surprising, since all of the evidence that would be relevant to "discriminatory effect" balancing is relevant to a purpose inquiry as well. Evidence of discriminatory effect inevitably suggests discriminatory purpose; similarly, evidence that minimizes the claimed non-protectionist local benefit suggests that the real purpose was protectionism. If I conclude from the Court's somewhat equivocal record that they are looking at purpose and not balancing, one reason is that they often clearly don't balance and they never clearly do; another reason is that the purpose approach makes most sense, as I shall argue in the next section. I hope I have said enough about the cases to dispel the thought that I am merely imputing my own view to the Court in the face of the evidence. I have heard the suggestion that I am trying to read the Court's mind. In fact, I am reading their opinions—my radical idea is to pay attention to the whole opinion instead of just looking for the paragraph that is supposed to state "the test."

2. The Dormant Commerce Clause: Theory

I think the Court is right to eschew balancing and to rely entirely on an inquiry into legislative purpose in "core" dormant commerce clause cases. Since the most controversial part of my thesis is the rejection of balancing, it might seem natural to start with the case against balancing. But, in fact, there are surprising connections between the arguments for and against balancing and the arguments for and against purpose review—connections which go well beyond the crude point that if balancing and purpose review are alternatives, an argument against one is an argument for the other. In light of these connections, it makes best sense to start with the positive argument for purpose review.

Legislative Purpose, Efficiency, and the "Virtual Representation" Argument for Balancing

Why should we reject laws motivated by protectionist purpose? The central reason is that protectionism is inefficient. Protectionism can also embitter diplomatic relations and interfere with effective political integration, if that is a goal; but both in the contemporary United States, where political
integration has progressed beyond the Framers' wildest imaginings, and in the WTO, where political integration is not a goal at all, the threat to efficiency is surely the front-line objection to protectionism. So we shall focus on that. It is presumably not necessary to explain here in detail why protectionism is inefficient, but I want to remind the reader of the central point so that she will have it before her/his mind as we proceed. If the only purpose of a law is to transfer market share from foreign producers to local producers (the commonest protectionist scenario), then the law will normally be transferring business from low-cost foreign producers to high-cost local producers. This results in a misallocation of productive resources. Local consumers will lose, and the loss to local consumers will exceed any benefit to local producers; the law is Kaldor-Hicks inefficient. To be sure, the law might still be justified from a local perspective if it is the only politically feasible way to achieve a desirable redistribution; but when we then consider that protectionism invites retaliation (which may be simply irrational, or may be for bargaining purposes), we see that the overall consequences of collective behavior if protectionism is allowed are likely to be bad everywhere.

It is crucial to see that the inefficiency of protectionism depends on the assumption that the purpose of the law in question is protectionist. Discriminatory effect flowing from a law which aims at and achieves some non-protectionist purpose does not suggest inefficiency in any way. For example, the law in Minnesota v. Clover Leaf Creamery, discussed above, was not inefficient, despite its discriminatory effect. The law transferred business from low-cost foreign producers (of non-returnable plastic packaging for milk) to high-cost local producers (of paper packaging). But the low-cost foreign producers were actually higher-cost, and the high-cost local producers were lower-cost, once the external environmental costs of the two sorts of packaging, as evaluated by the Minnesota legislature, were taken into account. The point is quite general: if the law in question achieves some non-protectionist purpose of the legislature, then discriminatory effect which is unavoidably incidental to the achievement of that purpose raises no efficiency concern; it just reveals that foreign actors are greater contributors to the problem the law is aimed at.

I have said that the law in Clover Leaf is efficient if we take into account the environmental costs of different kinds of milk packaging as evaluated by the Minnesota legislature. But why is the Minnesota legislature the appropriate body to evaluate those costs? The first answer, of course, is that one of the primary objects of a federal or quasi-federal system is to allow for a variety of evaluative judgments at the lower level of government. It is perfectly in order for Minnesota to attach a higher value to its environment than, say, Illinois attaches to its own. And it is perfectly in order if Minnesota therefore forbids non-returnable plastic milk containers in Minnesota while Illinois allows them in Illinois. But there is still a possible objection. It is
often said that when the Minnesota legislature makes a decision that affects foreigners (out-of-staters), who are not represented in the Minnesota legislature, we need judicial oversight to take the interests of those foreigners into account. It is not enough, on this view, that Minnesota does not purposefully discriminate against foreigners; it is not enough that Minnesota acts on its own sincerely held non-protectionist values. If foreigners are made worse off by Minnesota's action, then even if that was no part of Minnesota's goal, courts must "balance" the foreign costs against the local benefits, to make sure the law is justified all things considered. We look to the court to give the affected foreigners "virtual representation" in the Minnesota legislative process.

This may seem like a strong argument, but in the present context, it is specious. To see why, forget about the dormant commerce clause for a moment, and consider a pair of simpler examples. Imagine Jones, who regularly buys his groceries at the Mom&Pop Grocery. If one day, while driving to the Grocery, Jones loses control of his car and drives through the front display window, we would regard it as appropriate for a court to intervene and to consider, perhaps by a sort of balancing of interests, whether Jones was negligent, and, if he was, to order compensation. Jones was not (or presumably not directly) taking Mom&Pop's interests into account in his decisions about how to drive, and in a sense the court forces the consideration of those interests. Here judicial "balancing" to protect interests other than the actor's makes sense. But consider now a different sort of interaction between Jones and the store. If Jones decides he wants a new breakfast cereal, which Mom&Pop don't carry, and if as a result he transfers his entire grocery shopping to the local Giant Supermarket, it would never occur to us to suggest judicial review of this decision, to see if the benefit to Jones really justifies the loss to Mom&Pop. We can stipulate that Jones neither consults Mom&Pop nor considers their interests when he transfers his custom to Giant, but even so we do not even consider intervening. Why not? One obvious reason is that the market context of the decision means that (unlike in the negligent driving case) an appropriate comparison of interests is actually being made, implicitly. By deciding what to stock and at what price to sell it, Mom&Pop effectively announce how much Jones's business is worth to them (even though they are not thinking of Jones in particular). By responding to Mom&Pop's price-and-availability announcement on the basis of his own interests, Jones makes the comparison between what it is worth to Mom&Pop to have him as a customer and what it is worth to him to shop elsewhere. The required "balancing" of interests is done by the parties' joint contributions, through the market mechanism, to the ultimate determination of where Jones will shop.

Now, Minnesota's decision not to buy non-returnable plastic milk containers is analogous, not to Jones's driving through Mom&Pop's window,
but to Jones's taking his grocery business elsewhere. What would be analogous to the negligence case is, say, Minnesota's sending some noxious effluent into Wisconsin's aquifers; such a case wouldn't actually be treated under the dormant commerce clause, but it would definitely invite federal intervention to balance the states' interests. But just as judicial intervention is not needed when Jones abandons Mom&Pop for Giant, neither is it needed when Minnesota decides, on non-protectionist grounds, not to purchase plastic milk containers because they simply do not want them at the offered price (or, in this case, at any non-negative price). Minnesota's decision is a simple consumption decision, made by the state on behalf of all of its citizens, not to purchase particular goods; the market context allows us to infer that it is worth more to Minnesota to eschew the plastic containers than it is worth to the other states to sell them, just as the market context allowed us to infer that it was worth more to Jones to leave Mom&Pop than it was worth to them to keep him as a customer. The invisible hand of the market achieves its amazing welfare effects precisely because every market decision embodies this sort of local comparison of interests. (And as our parables remind us, decisions not to transact are as important for these purposes as decisions to transact.)

It might be objected that I cannot properly rely on a market-based mechanism for comparison of the relevant interests when Minnesota is in fact interfering in the market. There may be individual Minnesota consumers who disagree with Minnesota's collective choice. That is true, but irrelevant. Minnesota is perfectly entitled to speak for all Minnesota consumers as a group; from the federal point of view, we presume that Minnesota efficiently promotes the various interests of its citizens. Minnesota is entitled to prevent some Minnesota citizens from inflicting externalities on other Minnesota citizens by buying the eco-noxious foreign containers—and in doing so it promotes efficiency even though it prevents some individual citizens from doing as they would like. Indeed, so far as the federal constitution is concerned, Minnesota is entitled to be paternalistic and to protect Minnesota citizens against themselves, if, for example, the buyers of the containers are the very people who will be hurt when the ecosystem is degraded—and in doing this also Minnesota is promoting efficiency, at least if the paternalistic intervention is well-judged. There are some limits, of course, on Minnesota's freedom to speak for its citizens. In the American system, there are constitutional limitations, though these are notoriously weak where economic regulation is involved. (In the international context there are basic human rights protections embodied in international agreements.) But in the present context the point is this: whatever Minnesota can impose on its citizens by way of a domestic economic restriction it can extend to interstate market transactions, provided the extension is not a disguise for protectionist motivation. The undoubted fact that Minnesota can impose the restriction at
home shows that it violates no basic constitutional right; and with that established, Minnesota is entitled to speak for its citizens as a group in the interstate economic arena. It can do this, as I say, to protect some citizens against others, or to protect citizens against themselves. And we properly regard Minnesota's collective choice as representing the relevant interests of its citizens.

I am not claiming that Minnesota invariably gets it right. But neither is Jones an infallible promoter of his own interests, nor Mom&Pop of theirs. Jones may be foolish to shop at Giant, or Mom&Pop may miscalculate. Still, no court is going to interfere. We sensibly presume Jones and Mom&Pop will do better at representing their own interests than a judge would. And we should presume the same of Minnesota. There may be failures in the political process, and, of course, such failures should be a matter of concern to Minnesotans. (Note, however, that we have set aside the sort of political failure which is most likely to affect interstate trade, by requiring that the law be motivated by something other than protectionism.) Even so, from the federal point of view we generally, and properly, presume that state political institutions do a better job of representing and reconciling in-state interests than federal institutions would. Absent some special reason for doubt (such as is reflected in various sorts of constitutional restriction), we should treat Minnesota governmental institutions as speaking authoritatively for Minnesota interests. And obviously, the mere fact that a state law has effects outside the state is not a reason to doubt that the law adequately represents the interests of citizens of the state. Of course, if the law has significant out-of-state effects, then pointing out that it authoritatively embodies in-state interests is not invariably a conclusive defense of the law. We would not allow Minnesota to dump untreated sewage into Lake Superior just because that is the best thing on balance for citizens of Minnesota. But now we are back to the main point of the last few paragraphs: when the out-of-state effects are mediated by a market context, as they are in the milk-packaging case, then it does suffice that the Minnesota law authoritatively embodies the interests of Minnesota citizens; the out-of-state interests are accounted for by the terms on which out-of-staters offer market transactions.

I think this is a powerful argument for why "virtual representation" by balancing is not required in "core" dormant commerce clause cases; powerful but simple in conception. Still, it took some years for it to filter gradually into my consciousness, and I can imagine that some readers may not be instantly persuaded. Let me therefore offer another argument, which is one of the intermediate forms in which this insight presented itself to me. If Minnesota dumps untreated sewage into Lake Superior, it is natural to say that it thereby harms or injures Wisconsin and Canada. In contrast, if Minnesota merely forbids the import of non-returnable plastic milk containers, it is not at all natural to say it harms or injures the manufacturers of such containers. To be
sure, the manufacturers of such containers are worse off as a result of Minnesota's decision, but this worse-off-ness is not the result of a harming or injuring. Minnesota neither denies nor infringes any right of its would-be suppliers, no more than Jones denies a right of Mom&Pop when he turns to Giant. We might say the manufacturers are denied a benefit, and that would be nearer the truth than claiming they were harmed; but even that doesn't sound exactly right. The truth is just that they have lost a (collective) customer. It's the same with Jones. If he drives his car through Mom&Pop's window, he injures them; if he takes his custom elsewhere, he disappoints them, no more. Courts are in the business of preventing harms, not preventing disappointments—which is why they deal with Jones's negligent driving and Minnesota's sewage, but not with Jones's and Minnesota's decisions about what goods to purchase and from whom. (There is much more that might be said about the fairly deep relation between the "harm/disappointment" argument and the "market accounting of interests" argument, and about their overlapping ranges of application. But no more here.)

One last point about this "market accounting" argument. I have implicitly assumed that the argument applies to all "core" dormant commerce clause cases, and therefore explains why there is no need for balancing in any core case. I confess I have not thought all the way through to a demonstration of that assumption. What I can say is that the assumption is true for all the actual core cases that have produced Supreme Court decisions, and it seems intuitively right that it should be true for all core cases. But that is a loose end for the moment. Notice, on the other hand, that the assumption is not true of transportation/communication cases. Arizona's maximum train-length law, invalidated in Southern Pacific Co. v. Arizona, may have reflected perfectly the interests of Arizona citizens, but there was no market context for Arizona's choice which gave the Court any reason to assume it reflected out-of-state interests as well.

The "Judicial Competence" Objection to Balancing, and Purpose Review as a Decision about Deference

Time to pause and take stock. We began with an argument in favor of purpose review, and that led us to a refutation of the standard argument for balancing. We saw that in core cases, balancing is unnecessary in principle; the protection it supposedly offers for out-of-state interests is not needed. At this point, the largely familiar judicial-competence argument against balancing may seem almost anti-climactic. But I want to rehearse it briefly, because it will lead us back to a richer understanding of purpose review.

In a nutshell, the Court should not balance because balancing requires judgments better left to the legislature. It is worth distinguishing two sorts of
judgment. If we are going to balance the benefits and the costs of a law, we must first identify the actual consequences of the law; that is an empirical question. Then we must attach values to the various consequences and decide whether the overall consequences are good or bad on balance; that is a normative question. The commonest objection to balancing is that the courts are not competent to make the empirical judgments required; and that is often true. But another objection, and one which to my mind has even more force, is that the courts have no warrant to make the normative judgments required. In general, deciding what consequences are worth pursuing, and at what cost, is just what we have legislatures for. And in a federal or quasi-federal system, the argument that courts should not make normative judgments in the standard run of cases is even stronger. As I have noted above, in such a system we have multiple legislatures at the lower level precisely so they can pursue different values. It would be inappropriate even for federal legislative institutions, if such exist, to impose a centralized value system without specific warrant. For courts to impose centralized values, without a clear necessity, is therefore doubly problematic.

Since I have particularly emphasized the case against judicial imposition of value choices by balancing, it is worth noting that there is one kind of case where the court might engage in a sort of degenerate "balancing" without being required to make any value judgment at all. That is the case where the court finds as an empirical matter that the law under review does not achieve any of the putative benefit. If there is really no benefit, then no normative judgment comparing values is required. Even here, however, we might think the court should not second-guess the legislature on the empirical judgment. The United States Supreme Court, for example, does not second-guess the legislature in applying the "rational basis/minimum scrutiny" test under the Equal Protection clause (applicable to social and economic legislation involving neither fundamental rights nor any suspect classification). As long as the Court does not believe the law was adopted for the bare purpose of discriminating against some unpopular group, then it suffices to uphold the law that "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." The Court does not decide for itself even the baseline empirical question of whether there is any actual benefit at all.

Perhaps this seems too draconian a self-limitation. Perhaps it seems there are some empirical judgments that the court can make as well as the legislature. Indeed, an example might be the question of whether, on the current scientific evidence, there is any danger at all to human health from eating hormone-added duck meat (or beef). I take it a central holding of the WTO Appellate Body's decision in EU – Hormones is that the SPS Agreement requires WTO tribunals to scrutinize legislative decisions on this sort of issue more closely than a United States court would do. Even so, the
requirement on the legislature is primarily procedural. The Appellate Body does not say either that the tribunal may substitute its own judgment for the legislature's, or that the legislature must follow the dominant scientific view. Provided there is a risk assessment, a minority scientific view may suffice to support a restriction. There is wisdom in the Appellate Body's restraint. To say the court can do as well as the legislature is not to say they can do better, and I see little reason to think they can. So, the case for judicial deference to the legislature may be at its weakest here, but it still seems preferable, other things being equal, that the decision be made by the more politically responsive body. This suggestion is strengthened when we remember that whatever danger the legislature is concerned with, it is unlikely that the tribunal can assert in good conscience that the probability associated with that danger is zero. Even the dominant scientific opinion of the moment may be wrong. As soon as there is a non-zero probability of harm, we have not just the empirical question of what the probability is, but also the normative question of how to respond to uncertainty. This seems to be a question the legislature should decide.

In sum, the argument against judicial balancing is an argument for deference to the legislature. We are now in a position to see that this deference argument against balancing and the efficiency argument for purpose review are like the negative and positive of a photograph. A finding of protectionist purpose on the part of the legislature does two things. It tells us that the law will result in inefficiency. It also undercuts the case for judicial deference: a legislative decision motivated by protectionism precisely fails to make empirical or normative judgments a court should respect. On the other hand, so long as the legislature's purpose is not protectionist, then their non-protectionist purpose, whatever it is, reflects their evaluation of the expected effects; their decision can be presumed efficient; and the court should defer. So, the inquiry into protectionist purpose determines at one and the same time whether there is an efficiency objection and whether deference is appropriate.

But can the courts identify protectionist purpose? In the American context, I unhesitatingly answer "yes". As I have said before, the evidence the court may consider is not limited to outright expressions of protectionist purpose. The court can consider the structure of the law; the intuitive plausibility of the distinctions the law makes; the similarity to laws elsewhere; the zeal of the legislature for pursuing the asserted goal in other contexts; whatever is known about the support for the law and the political context outside and inside the legislature; the timing of the law; all in addition to legislative history to the extent it is available. (It is also worth mentioning that legislators and other officials pursuing protectionism are often surprisingly candid about their motives—which becomes less surprising if we reflect that they want political credit.) It is irrelevant that the legislature,
or even the particular legislative majority, is not all of one mind; the question is how to characterize the decision of the body as a whole. The connection that we have pointed out between the issue of protectionist purpose and the argument for deference may suggest a helpful formulation of the question: Did the legislature, within the usual limitations of legislative decision-making, make a decision on grounds that should be deferred to? If the law was supported by legislators with a variety of different purposes, then I suggest the question is roughly whether the contribution of protectionist purpose was a but-for cause of the adoption of the law. If it was, then the legislature as a body has not endorsed non-protectionist empirical and evaluative judgments that the court can defer to. (And if it was not, then they have.) What if it appears the legislature did not think at all, that they merely rubber-stamped the proposal of some lobbyist, or of some small set of members, or the views of their constituents? Then it is appropriate to take as the motivation of the legislature the motivation of that source. It is the legislature's prerogative not to think, but if they choose not to, they are responsible for the motivations of whomever they let do their thinking for them. Notice also that the question of the overall purpose of some law is quite different from the question of the legislature's "purpose" with regard to some very specific question like whether motorized roller-blades count as a "vehicle in the park." About a question like that, there may indeed be no actual legislative "purpose" in any sense; it is possible that nothing like that question occurred to anyone, and that the general principles that were agreed on do not settle it. But a law never lacks for overall motivation, either on the part of those who voted for it or on the part of those who secured the others' votes.

Nothing will make the decision what the legislature was really up to a mechanical one; but American judges are much better prepared for identifying legislative purpose than for making the decisions required under a balancing test. Aside from legal doctrine, the one thing American judges as a group can be presumed to be informed about and to have a feel for is politics. They have all been either elected themselves (in many state systems) or appointed by politicians. Despite their separation from day-to-day politics, American judges are definitely members of the political class. This argument has less force in the international context. Members of international tribunals are not likely to be political innocents, but neither can they have the insider's view of most of the systems whose laws they must review. On the other hand, the argument for deference may be correspondingly strengthened; in the abstract, international judges have even less warrant than domestic judges to second-guess the legislature's evaluations, if those evaluations are free of the taint of protectionism. So I am left thinking that, absent specific treaty provisions to the contrary, purpose review is to be preferred to anything like balancing even in the international context. (Are there further possibilities to
consider, which are neither purpose review nor balancing? Obviously, there may be procedural requirements, such as the SPS Agreement imposes. Aside from that, I do not think there are other plausible substantive tests; but that is not a thesis I can argue here.)

3. The Dormant Commerce Clause and Dumb Duck Disease

Deciding the Arimani Duck Meat Case

So, after all that propaedeutic, is the Arimani law constitutional or not? Is it motivated by protectionist purpose? On this "record," it's hard to say (though I shall take a position presently). Some readers will take my hesitation as confirmation of the emptiness of the purpose test; but that would be a mistake. Aside from the fact that, as I said before, no plausible test can make every case an easy case, any judge faced with this case in the real world would know more about it than we are told. (I hope it is not necessary to say that while I express dissatisfaction as a "judge" with the "record" in the case, I am not in any way criticizing the authors of the hypothetical. Especially not, given how much I hate to write exams.)

For example, hormones are a real-world problem; there is no doubt that in some contexts the administration of hormones and hormone-like substances can cause or facilitate cancer and perhaps other morbid conditions. That means that, whether or not hormone residues in food pose a real danger, it is easy to imagine real-world anti-hormone laws like the EU's being adopted for non-protectionist reasons. But "dumb duck disease" is entirely hypothetical, which means it is impossible to have any feel at all for important aspects of the social and political context out of which this law is imagined to arise. It might be suggested that this lack of social and political context, even if it is far from the experience of the American judge, makes the hypothetical a good representation of the situation in which the international judge finds herself. That seems to me an exaggeration. International adjudicators are mostly citizens of the world. The basic sorts of danger that prompt countries to enact SPS measures are much the same around the world. Of course, there are local dangers, and local beliefs, and local politics—but I suspect that any record developed in an actual WTO proceeding would give the members of the tribunal more of a feel for the social and political background than can be gleaned from our hypothetical.

There is much else (aside from the general social/political context) that I would like to know about our case; but the one other thing I would most like to know about, and that I think I inevitably would know something more about in an actual case, is the nature of the Arimani "Institute for Public Health". Was their report produced by trained scientists attempting to do serious research (even if they may be self-selected for certain proclivities and
also be under perfectly appropriate systemic pressures to be sensitive to risk—all of which I suspect describes the United States Environmental Protection Agency, for example), or was it produced by bureaucratic hacks merely parroting the government line? Perhaps I will be told that, in the international context, there is no way I would know which of these descriptions better fit the relevant Institute, but I find that hard to believe—and in any event this is something I need to know not just to apply the purpose test, but to decide whether there is "scientific evidence" under the SPS Agreement.

My decision, on the record as it stands? The Arimani law is upheld. State laws are entitled to a presumption of constitutionality; there is simply no evidence of protectionist purpose adequate to overcome that presumption. I assume that the Arimani Institute for Public Health does genuine science. It is hard to imagine why there is such a divergence of scientific opinion. If I were compelled to decide the scientific question on this very problematic record, I might say there is no danger from dumb duck disease. But happily that is not the question I must decide. The question is whether the Arimani law embodies a protectionist purpose. Possible dangers from hormone residues in food are not a comic-book fantasy, even if the best scientific evidence of the moment may suggest there is no danger. If either Arimani consumers or the Arimani legislature believe there is a danger from hormone-fed ducks, and if that, rather than protectionism, is the motivation for the law, the law must be upheld. There is, to be sure, discriminatory effect that benefits most Arimani duck producers (though the only political action by Arimani duck producers that we are informed of is a protest against the law by hormone-using producers). It is not surprising that there should be a correlation between consumer preferences or beliefs and the dominant practice in the local industry—there will be causal influences in both directions (as well as joint causes of both phenomena). Consumer distrust of hormones and industry avoidance of them are likely to be found together, even without assuming that the industry has stirred up the fears. It would be ironic if, in such a situation, the mere fact of discriminatory effect prevented the government from acting on consumers' concerns. It is not the function of the court either to educate the legislature in "good science" or to educate society to the merits of foreign products, provided those products are not excluded just because of their origin. The law is upheld.

Additional Questions

Let me now address the specific questions posed to Panelists. I shall take them in groups, with some rearrangement. Many of my answers are mere applications of what I have already said, but there is some new substance scattered through.
Questions 1, 3, 4  
(About de facto Discrimination)  
It absolutely matters that we are dealing with discriminatory effect (which I take to be what the question means by de facto discrimination) and not explicit discrimination. Explicit discrimination is virtually per se illegal. Discriminatory effect is relevant only as one sort of evidence of discriminatory purpose; in itself, it is not even a prima facie violation calling for justification. Discriminatory effect therefore does not trigger any requirement of "exoneration" (Question 4). On the other hand, weak causal linkages may tend to "exonerate" in the sense that when we are considering discriminatory effect as evidence of bad purpose, it seems likely that the more indirect the link between the putative innocent purpose and the discriminatory effect, the less persuasive is the discriminatory effect as evidence of bad purpose. Minnesota v. Clover Leaf Creamery may be an example, since the principal discriminatory effect of the Minnesota law was not in the market for milk packaging but in the market for inputs to milk packaging (plastic resins versus wood pulp).

Questions 2, 5, 6, 7 (in part), 10, 18, 21  
(About the Relevance of Various Sorts of Evidence)  
Since the ultimate question is whether the law was adopted with protectionist purpose, the relevance of evidence is tested by its relevance to that question. It is relevant whether there are other dangers from ducks (such as from feeding them in the park) that the legislature has not acted against; but it is a commonplace that the legislature may proceed "one step at a time" and that there may be many reasons for attacking one source of a danger but not another. If feeding in the park accounts for 2% of dumb duck disease, that will do little to show bad purpose. If feeding in the park accounts for 82%, I would certainly want some good explanation of why the legislature acted against the food-borne danger but not this one. The same general ideas apply to the failure to act against hormones in beef (although I take it hormones in beef do not cause "dumb duck disease"—it could be that hormones are a danger in duck meat but not in beef). Evidence from other countries is relevant precisely insofar as it may affect our view of the sincerity of the Arimani legislature. Similarly with the comparison to international or other widely adopted standards; here I think Arimania has more to gain from a showing that its concern is widespread than it has to lose from a showing that it is not. There is no question of Arimania being categorically required to justify its "deviation" from any other standards (except, of course, a controlling federal law, in which case the Arimani law is just preempted, no further questions asked).
Questions 7, 8, 15, 16, 17
(About How Judges Should Choose between "Efficiency" and "Democratic Legitimacy"—or How Much to "Defer" to Legislatures—in Domestic and International Contexts)

It is definitely not the role of the court to require in general that governments be efficient (though it is the court's role to suppress the specific inefficiency of protectionism). I would also emphasize that often where trade lawyers think there is a conflict between national autonomy and efficiency, there is actually no conflict. Conflicts between autonomy and trade-maximization are endemic, because nations have many reasons, including many non-protectionist ones, for restricting trade. But trade-maximization is not the same as efficiency, for reasons I sketched in section 2. Efficiency normally requires that nations' non-protectionist choices be respected; in such cases, efficiency and autonomy point in the same direction, even if it is the direction of reduced trade.

As to the questions about the degree of deference, "deference" is a problematic concept; even what it might mean varies with different substantive views. In the purpose theory, for instance, "deference" is an all-or-nothing matter, and the crucial question about purpose is in effect a determination whether deference is appropriate or not. Pressed for an abstract answer to Questions 15 and 16 that might be relevant to other theories, I would be tempted to say there is no reason for international tribunals to be especially deferential, as long as they are exercising the powers delegated to them by treaty. (I admit to liking that deferential-seeming doctrine of treaty interpretation, in dubio mitius; but it seems to me there is a difference between, on the one hand, being restrained in the interpretation of the basic treaty obligation, as in dubio mitius recommends, but then enforcing the obligation straightforwardly, and, on the other hand, asserting a wide obligation but then being "deferential" case-by-case in enforcing it, which I find hard to justify. This distinction would obviously bear more discussion.) Tribunals should be careful not to overstep their authority; and they should be sensitive in applying the rules, whatever they are, to the variety of cultures. If the tribunals will do this, any remaining problems about the political acceptability of the world trading system must be dealt with by national governments: by improving the system, by educating people about its benefits, and by seeing that the benefits are in fact equitably distributed, both within and between nations.

Questions 9, 14
(The Seriousness of the Danger, the Precautionary Principle, and the Duty to Reexamine Legislation in Light of New Facts)

The seriousness of the danger matters precisely because it is relevant to the determination of purpose. Other things equal, the legislature is much more
likely to have been genuinely motivated by what they perceived to be a serious danger than by a trivial one. The "precautionary principle" as such (that is, as an exception to some other duty) has no role in a purpose-based theory. But obviously a legislature may plausibly and innocently act against dangers for which the scientific evidence is slim (or in a narrow sense of "evidence," non-existent).

Since there is no "precautionary principle" in the purpose theory, there is no duty of reexamination associated with the precautionary principle. But the question about reexamination does raise an interesting problem for a purpose-based theory. Suppose a law was adopted with no bad purpose, but circumstances have changed enough since the law was adopted so that if it were readopted now, would we be strongly inclined to view it as motivated by protectionism? Obviously, non-repeal consciously motivated by protectionism is as inimical to the basic values of the system as a new protectionist law. If the legislature is just unconscious, then we have in principle no ground of invalidity; but it is of course open to any injured party or nation to bring it to the legislature's attention that the law no longer serves any non-protectionist interest. At this point I think we might presume that non-repeal is motivated by protectionism and invalidate the law, unless the legislature acts in such a way as to persuade us that they genuinely believe in the continuing non-protectionist utility of the law. In this way, we can construct a limited "duty of reexamination" within the purpose theory.

Questions 11, 12, 13
(How to Decide Which Scientists to Believe)
The purpose-based theory does not require the judge to evaluate scientific reports in the sense of deciding who has the right answer. The only question is what the legislature might plausibly have relied on, a considerably easier question in most cases. Of course, considerations like the source and apparent persuasiveness of the report are relevant.

Questions 19, 20
("Less Restrictive Alternative" Analysis, and Labeling)
"Less restrictive alternative" analysis is relevant to both a purpose-based theory and a balancing theory, though it functions differently in the two contexts. It raises no new issue of principle in either. The existence of a less restrictive alternative is relevant in the purpose-based theory because the existence of an alternative which would achieve the full local benefit with less effect on trade suggests that the more trade-restrictive measure was chosen for its additional protectionist effect. But, of course, a crucial question is whether the legislature believed the alternative was fully adequate. Note that if they sincerely believed it was not, but the reviewing court is convinced that it is, then we have the same sort of situation as when the reviewing court
finds no benefit at all from a measure, contrary to the legislature's sincere belief. As I said before, judicial intervention is at its least objectionable here, since the result of invalidation can be reached by substituting the court's empirical judgment for the legislature's but without the need for an evaluative decision by the court. Even so, I would not intervene.

In the context of a balancing theory, where the court is already committed to making evaluative judgments, less restrictive alternative analysis has a wider scope, since the court can decide that even an alternative which does not achieve all the benefits of the local law should be preferred if the benefit that would be lost by moving to the alternative is less than the cost to trade that would be avoided. We might refer to this metaphorically as "balancing at the margin." This difference, between the way less restrictive alternative analysis fits into a balancing theory and the way it fits into the purpose theory, explains why less restrictive alternative analysis plays an independent role in, for example, American first amendment law (which involves balancing), but does not play an independent role, despite being regularly mentioned, in "core" dormant commerce clause cases.

Since Question 20 refers to labeling, let me close with a tendentious comment. Labeling is the all-purpose "less restrictive alternative" of the trade partisan. (Not specifically in this Question, where the point is implicitly made that the effects of labeling depend heavily on local conditions.) But it is a rare case in which labeling, even with a literate and consumer-conscious population, will fully achieve the goals of a broader prohibition. Labeling will do that only if (1) there are no concerns about external effects from the consumer's purchase or use of the product, and (2) any harm to the consumer herself is one the legislature is willing to let her suffer if she chooses it voluntarily (the legislature is not required to be willing—international trade law contains no anti-paternalism principle). In sum, labeling is often less restrictive, but it is rarely a fully effective alternative.

NOTES


2. Art. I, §8, cl. 3.


4. As to extraterritoriality, the law does classify duck meat according to the production process, and it is sometimes suggested that "process-based" restrictions are extraterritorial. This is a mistake, in my view, but we need not discuss that here. See Robert Howse and Donald Regan, The Product/Process Distinction—An Illusory Basis for Disciplining "Unilateralism" in Trade Policy, EJIL 11 (2000), No. 2, 249-89. In this case, it is clear that the process of using growth hormones is forbidden because it is thought to affect the constitution of the meat itself at the
point of consumption. Such a prohibition is generally understood to be product-based in its essence.

5. Aside from taxation, transportation, and extraterritoriality, there is also no issue in the Arimani duck case about the "state as market participant" or Congressional authorization, doctrinal variations which are even further from our present concerns.

These categories (tax, transportation, extraterritoriality) are not arbitrary exclusions designed simply to create a residual class of cases about which I can claim that the Court does not balance. I have explained elsewhere why these categories are theoretically significant. See "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," Michigan Law Review 84 (1986), 1091–1287, at 1182–92 (transportation and taxation), and "Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation," Michigan Law Review 85 (1987), 1865–1913, at 1873–84 (extraterritoriality). But even if the categories were not theoretically significant, they would be descriptively significant. The residual class that remains when these cases are excluded—what I now call the "core"—comprises most dormant commerce clause cases. If it is possible to identify by simple criteria a large class of cases in which the Court does not balance even though it says it does, that would be worth knowing even if the Court's behavior made no sense at all.


7. Stewart talks about a test for "statutes"; I have formulated the conventional wisdom in terms of a test for any "law." Although Stewart may have allowed himself to be temporarily distracted in *Pike* by the fact that the challenge was not to the controlling statute but to an administrative order under that statute, it is clear that any authoritative norm is subject to the same basic dormant commerce clause test.


11. For two minor additions that do not change the fundamental principle, see the discussions in IV.B below of less restrictive alternative analysis (comments on Questions 19, 20) and the puzzle of significantly changed circumstances (comments on Questions 9, 14).


13. See the long footnote 12 in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).


20. For fuller discussion, see Regan 1986, *supra* note 5, at 1228–33.

22. 432 U.S. at 352.

23. And what if the legislature never thought at all, simply rubber-stamping a proposal from some lobbyist? The point is that whoever drafted the statute must have been motivated by protectionism, and the legislature either endorsed that motivation or made no substantive decision at all. In either case, a protectionist motive can be attributed to the legislature; there is no decision deserving of judicial deference. See section 2.


25. 457 U.S. at 646 (Powell, J., concurring).

26. For fuller discussion, see Regan 1986, supra note 5, at 1278–83.


28. 481 U.S. at 92.

29. For fuller discussion, see Regan 1987, supra note 5, at 1865–84.


33. I simplify slightly. The primary discriminatory effect was actually in the market for inputs to plastic and paper packaging, that is, plastic resins and wood pulp.

34. The phrase "unavoidably incidental to the achievement of that purpose" is included in the statement in the text to leave room for "less restrictive alternative analysis," of which more below (section 3, the discussion of Questions 19, 20). The statement in the text also assumes that the law achieves its non-protectionist purpose. If the law is so misguided as to achieve no benefit, then it is inefficient, though, of course, it may still be that the court should defer to the legislature's empirical determination that there is some benefit, as I shall argue below. Notice that a law which is inefficient because there is no benefit at all is inefficient whether or not it has an interstate discriminatory effect, so interstate discriminatory effect still is not the real ground of objection.

   Incidentally, since I have argued that the inefficiency of protectionism is fundamentally tied up with purpose, I am moved to point out that even classic tariffs and import embargoes and the like are not inefficient if they are motivated by an intrinsic preference for autarky (which need not be based on crude xenophobia). In the real world, of course, protectionism is not normally the result of an intrinsic preference for autarky (which is why standard discussions never even mention this possibility); in the real world, protectionism is a collectively self-defeating attempt to secure local advantage at others' expense. Indeed, no state which joined the United States, and no country which has joined the EU or the WTO could possibly claim to have a significant intrinsic preference for autarky, so the point is of theoretical interest only. But it does remind us that, at bottom, efficiency is about satisfying preferences ("permissible" preferences, if you prefer, but there is no reason a non-xenophobic intrinsic preference for autarky should be impermissible).

35. Two further points: (1) Of course, the market mechanism will not work if there are significant third-party effects from Jones's decision to take his custom to Giant or from Minnesota's regulation of milk packaging (third-party effects which are not themselves mediated through further market relations). But there are not likely to be such effects in the Jones case, nor
in most cases like the Minnesota case. What the "virtual representation" theorist argues for in cases like this is virtual representation for the suppliers of plastic packaging to Minnesota, and that is just what we have shown is not necessary. - (2) Even if the market produces efficient results, we may, of course, disapprove of the distributive consequences. We might dislike the distributive consequences of Jones's taking his business to Giant, or of Minnesota's cutting off foreign plastics producers. But it would never occur to us to deal with the distributive consequences of Jones's decision either by saying he must continue to patronize Mom&Pop or by requiring him to compensate them for his defection. Nor should we deal with the distributive consequences of Minnesota's regulation by invalidating it (or requiring compensation).

36. Cf. the Note Ad Article III in the GATT.
37. 325 U.S. 761 (1945).
38. I speak of the general run of cases; there are cases, such as those involving basic rights or suspect classifications, where we precisely distrust the legislature to make acceptable normative judgments, and in such cases we turn to the courts as the only alternative.
40. Hormones, supra note 1, at 194.
41. It is worth mentioning that, aside from the dormant commerce clause, purpose review is an established element of suspect classification equal protection law, establishment clause law, and free speech law.
42. For a similar list of considerations relevant to showing purpose, see Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).
43. See also Howse/Regan, supra note 4, at 279–85.
44. For a rare real-world case where protectionist motivation for non-repeal may be identifiable, see Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).
45. "Purchase" is relevant because the purchase itself will encourage future use of the process by which the product was produced, and that process may be the cause of a relevant externality. See Howse/Regan, supra note 4, at 262, 272–73.