Judicial Review of State Regulation Which Impacts Foreign Trade: A Second Look at South-Central Timber Development v. Wunnicke

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I. INTRODUCTION

The paths followed by courts in resolving federal-state regulatory conflicts have led the nation through its history of federalism and have encircled the states' ability to intrude into areas of national interest. Judicial resolution of commercial regulatory conflicts between federal and state governments is ultimately a question of constitutional concern. Article I section 8 of the Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." When Congress has acted within a field of foreign or interstate commerce, the Constitution leaves little doubt that the congressional action preempts state commercial regulations.1

Courts are faced with a much more difficult problem, however, in reviewing state commercial regulations in the face of congressional inaction.2 When legislative history is slim or nonexistent, courts must predict the degree to which Congress would have limited state power to regulate commerce.3 In re-

1. U.S. CONST. art. I, § 8, cl. 3.

Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention "because of their local character and their number and diversity." In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.

Id. at 623 (quoting South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938)) (citations omitted).
response to congressional inaction, the courts have developed a self-executing rule of commerce known as the "dormant commerce clause" which defaults to a presupposed congressional trade policy. Professors Hay and Rotunda explain that "[w]hen the Court seeks to decide the extent of permissible state regulation in light of a 'dormant' Commerce Clause power, it is, in effect, attempting to interpret the meaning of congressional silence when it intervenes in an area where the primary power is that of Congress."5

In reviewing state intrusions into areas of congressional silence, the courts have speculated that if Congress had acted, it would have eliminated the states' ability to burden interstate commerce. Under dormant commerce clause review, courts ask if a state's action unduly burdens interstate commerce without express authorization or without furthering a legitimate state interest.6 Thus, state actions favoring intrastate trade over interstate commerce are targets for dormant commerce clause invalidation.

Differences between the national interests involved in interstate trade and those at stake in foreign commerce present reasons to criticize the application of a dormant commerce clause analysis to state regulations which primarily impact foreign trade. The dormant commerce clause preference for unburdened trade is contrary to many of the nation's foreign trade policies.7 Furthermore, the fairness of the dormant commerce clause rule diminishes when it is applied to state actions which impact foreign trade. Under the rule, states are required to open their borders to foreign commerce without any assurance of reciprocal treatment from their foreign trading partners.8

In reviewing state regulations which primarily impact foreign trade, courts should allow the states to exercise the full measure of the regulatory power reserved them by the Constitution. In other words, the states should be allowed to regulate

6. See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). A state statute is invalid "when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." Id. at 522.
7. See infra text accompanying notes 33-35.
8. See infra text accompanying notes 36-40.
foreign commerce concurrently with the federal government to the extent that the action is not expressly prohibited by the Constitution or by Congress. In order to preserve the external affairs power of the federal government, state regulatory power should be limited to actions which are not contradictory or repugnant to national foreign policy. Under the concurrent powers analysis, the validity of state commercial regulations would not depend upon the magnitude of its discriminatory effect. Rather, the regulation's validity would depend upon its consistency with United States foreign trade policy.

II. APPLICATION OF THE DORMANT COMMERCE Clause

A. A Second Look at South-Central Timber Development v. Wunnicke

The Supreme Court’s decision in South-Central Timber Development v. Wunnicke illustrates the difficulties of applying the dormant commerce clause to state commercial regulations which primarily impact foreign trade. The conflict before the Court in South-Central concerned the validity of an Alaskan administrative regulation which required all timber purchased from state lands to undergo primary processing within Alaska prior to export from the state. The require-

9. See infra text accompanying notes 42-63.
10. See infra text accompanying notes 64-70.
13. The major method of complying with the primary-manufacture requirement is to convert the logs into cants, which are logs slabbed on at least one side. In order to satisfy the Alaska requirement, cants must be either sawed to a maximum thickness of 12 inches or squared on four sides along their entire length.

South-Central, 467 U.S. at 85.
14. Alaska is not alone in its attempt to regulate log exports. Oregon has adopted a Joint Senate Resolution which imposes similar restrictions on log exports from the State. The resolution was designed to recognize at least two things:

(2) [T]he importance of maintaining employment in local mills and community stability . . .

(8) When a state exports logs instead of lumber, it is functioning similar to the developing nations of the world that rely on their unprocessed natural resources as a primary means of generating foreign exchange revenue. By exporting raw material, we lose the value added by manufacturing, the jobs involved directly . . . and the related spin-off jobs. . . .
ment was intended to protect the state lumber industry, increase revenues from the state's timber resources, and manage the state's forests. The regulation's effect was limited to contracts for timber taken from state lands and in no way inhibited contracts for privately owned timber.

The primary processing requirement was challenged by South-Central Timber Development, a logging company dealing almost exclusively with Japanese buyers. South-Central challenged the regulation on the grounds that the requirement violated the "negative implications of the Commerce Clause." The district court ruled in South-Central's favor and enjoined the state from enforcing the primary processing requirement. The Ninth Circuit reversed, finding implicit congressional authorization in a similar federal regulation that the resolution is to become "operative when federal law is enacted allowing this state to exercise such authority or when a court or the Attorney General of this state determines that such authority lawfully may be exercised." S.J. Res. 8, 65th Leg., Reg. Sess., 1989 Or. Laws 2224.

To date, Oregon has not received authorization to implement its resolution, but authorization from Congress may be forthcoming. In April of 1990, the "Senate passed an amendment to a trade bill offered by Senator Bob Packwood, Republican of Oregon, that would allow states to ban the export of logs. . . . A similar bill is before the House, and prospects appear good for Congressional passage." Timothy Egan, 10,000 Are Expected to Lose Jobs to Spotted Owl, N.Y. TIMES, Apr. 28, 1990, § 1, at 8, col. 3.

15. South-Central, 467 U.S. at 85. Since Alaska's motivation for adopting the primary processing requirement was to preserve an economic interest in its lumber industry, the state could not claim that its statute was a proper use of its police power to protect the health and safety of its citizens. See also infra text accompanying note 39.

16. For a discussion of the applicability of the commerce clause to state-owned natural resources see, Thomas K. Anson & P. M. Schenkan, Federalism, the Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71 (1980) (explaining that state regulations designed to protect state-owned natural resources should be valid unless expressly invalidated by Congress).

17. South-Central, 467 U.S. 82. The suit arose when South-Central learned that the Alaska Department of Natural Resources announced that it would sell 49 million board feet of timber in the area of Icy Cape, Alaska on October 23, 1980 and that the primary processing requirement would be part of the contract. Id. at 84-87.

18. Id. at 85 n.4. The majority noted that Alaska does not have an interstate timber trade. Practically all of its timber is sold abroad and at least 90% of the timber is exported to Japan. Id.

19. Id. at 86 n.5.


21. Unprocessed timber from National Forest System lands in Alaska may
requires primary processing of all timber taken from federal lands in Alaska. The Supreme Court reversed the Ninth Circuit's decision. The Court held that the parallel federal primary processing requirement did not implicitly authorize Alaska to impose its own requirement on state owned timber. The Court applied the dormant commerce clause and concluded that the regulation unduly burdened commerce and, thus, without express authorization from Congress, violated the negative implications of the commerce clause.

B. The Dormant Commerce Clause and Foreign Trade

The Court in South-Central failed to recognize that the dormant commerce clause is imbued with policies unique to domestic trade and should not be readily applied to matters of foreign commerce. The rule developed largely in response to individual state attempts to exploit trade among neighboring

not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.


The federal government has in the past sought to limit access to federally owned forests in a variety of ways. From 1969 to 1973, Congress imposed a maximum export limitation of 350 million board-feet of unprocessed timber from federal lands lying west of the 100th meridian. See 16 U.S.C. § 617(a) (1988).


23. South-Central, 467 U.S. at 87-93.

24. The Supreme Court noted:

On those occasions in which consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been "expressly stated. . . ." There is no talismanic significance to the phrase "expressly stated" however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear.

Id. at 90-91 (citations omitted).

25. Id. at 99-101. A plurality of the Court also rejected Alaska's contention that it merely imposed the primary processing requirement as a market participant and not in any regulatory capacity. The plurality reasoned that Alaska's conduct could not acceptably fall within the market participation exception to the commerce clause since the requirement imposed significant downstream effects on commerce. Id. at 93-99 (plurality opinion).
states. In Hughes v. Oklahoma, the Supreme Court explained that the commerce clause was designed "to avoid the tendencies toward economic Balkinization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

The Court elsewhere explained another purpose of the commerce clause:

"When the regulation is 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." On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others.

Thus the commerce clause allows Congress to promote economic fairness by ensuring representation of local interests and by providing an even playing field that subjects all participants to the same rules of commerce. While this set of objectives resonates well with our system of domestic trade and government, the realities of foreign trade policy require a distinction between national and interstate borders.

1. Harmony between federal and state trade regulations

In South-Central, the Supreme Court required Alaska to export raw logs from state lands despite the long established federal primary processing requirement. In reaching its decision, the plurality reasoned, "It is crucial to the efficient execution of the Nation's foreign policy that 'the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments.'"

The Court's decision created the opposite effect. Instead of

28. Id. at 325.
29. South-Central, 467 U.S. at 92 (quoting South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185, n.2 (1938)).
30. See id.
31. Id. at 100 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)) (plurality opinion).
presenting foreign buyers with a uniform log export policy, the Court's decision created a dual policy. Foreign buyers may now purchase raw logs from private and state-owned lands but only processed lumber from federal lands. This fragmented policy illustrates the weakness of the dormant commerce clause "as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on ... commerce."32 The Court's decision should not have rested solely upon the magnitude of the regulation's discriminatory effect on foreign trade. Rather, the Court could have reached a much more coherent result had it reviewed the validity of Alaska's regulation on the basis of its consistency with federal regulations and foreign trade policies.

2. International commerce and free trade preferences

For a variety of security and economic reasons, many Americans have welcomed governmental intervention into foreign import and export markets.33 Reflecting these sentiments, the United States does not have an established preference for free international trade. Instead, Americans have approached uninhibited international trade with a great deal of caution and concern.

Dormant commerce clause analysis does not entertain these concerns but is instead biased in favor of free trade. Often, national interests in noneconomic foreign policy shape foreign trade policy.34 In this regard, even state regulations that facilitate foreign commerce can do damage to national for-

32. Id. at 87.
33. Arguments for governmental intervention in foreign commerce include the need for:
   1. protection against dumping practices,
   2. protection against foreign export subsidies,
   3. protection of infant industries,
   4. protection of domestic jobs,
   5. promotion of industry vital to the national defense,
   6. improved terms of trade,
   7. diversification of domestic industry.
34. See generally Charles W. Kegley, Jr. & Eugene R. Wittkopf, World Politics Trend and Transformation (1985) "[L]inkage concept mean[s] that the entire range of [foreign]-American relations [are] interdependent and that therefore concessions in any one problem area could and must be compensated for by roughly equivalent concessions in others." Id. at 58.
eign policies if the trading partner has been disfavored or if the traded goods are sensitive to vital security interests. For example, in the summer of 1989, the efforts of Governor Guy Hunt to establish a trade agreement between Alabama and the Hubei Province in central China were threatened when President Bush considered economic sanctions in response to the military suppression of Chinese protestors.35

3. Fora and fairness

Under the commerce clause, congressional power to act in regulating foreign and interstate trade to the exclusion of state regulatory power is clear and unquestioned.36 Though the states must subordinate to federal regulation, they are usually not left without a voice in the policy decisions that affect them. Local interests participate in congressional regulatory actions via their elected representatives, through whom they are able to exert a measure of influence upon national trade policy. The system of representation breaks down, however, when Congress does not act in a field of local concern. Congressional inaction forms an important dimension of national trade policy and often affects state interests as much as an affirmative intrusion into local matters.37 When Congress is silent, it implicitly rejects active state participation in national policy-making. The federal government's exclusive power under the Constitution to negotiate and make treaties with foreign nations further limits the states' ability to seek redress for alleged economic harm in international fora.38

The dormant commerce clause also restricts the states' ability to represent their own economic interests in an alternative judicial forum. Under the commerce clause, a state may regulate commerce without congressional authority when the action is a valid exercise of the state's police power.39 Howev-

36. See supra notes 1-2 and accompanying text.
37. See, e.g., Powell, supra note 4.
38. See U.S. CONST. art. I, § 10.
39. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (stating that 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). See also Hunt v. Washington State Apple
er, actions motivated primarily to protect state economic interests are outside the state's police power and are invalid under the commerce clause. Consequently, states are effectively barred from judicial fora in protecting legitimate economic interests.

Lack of state participation in all matters of domestic commerce is not critical. When the dormant commerce clause is uniformly applied to all states, the even application serves as a proxy for state participation in a national forum. In return for the restrictions placed on state freedom to exploit interstate trade, the commerce clause ensures each state protection from the opportunistic behavior of neighboring states. In this manner, interstate fairness is achieved not through a system of active state participation in national fora but rather through the uniform application of a domestic trade policy under the commerce clause.

The commerce clause fails as an adequate proxy for state representation in matters touching foreign trade. When Congress is silent in areas sensitive to state economic interests, the states are left with neither active representation in national and international fora nor adequate protection. Though the dormant commerce clause prohibits state actions that unduly burden foreign commerce, it does not require foreign countries to reciprocate the benefits of unfettered trade extended by their state trading partners.

Dormant commerce clause review of state actions that impact foreign trade may potentially extend the benefits and protections of the commerce clause to foreign trading partners at the expense of legitimate state economic interests. It is doubtful that the framers of the Constitution intended to subjugate valid state interests to those of foreign nations.

III. AN ALTERNATIVE SOLUTION: LIMITED CONCURRENT POWERS ANALYSIS

Since the courts cannot ensure that foreign trading partners will treat the states fairly, the states should be allowed to


exert the full measure of their regulatory powers reserved under the Constitution. Professor Kallenbach explains that the drafters of the commerce clause contemplated a system of concurrent powers that would not wholly deprive states of the ability to influence commerce:

So far as the commerce clause was concerned, there was nothing in the history of its adoption in the Convention that gave any clear indication that the framers regarded it as conferring an exclusive power on Congress. . . . In vesting control over interstate commerce in Congress the principal objective was the prevention of trade restraints, which, if permitted to continue, would disrupt the nation’s internal commerce and lead to disunion. . . .

The conclusion seems warranted that it was generally held by members of the Convention that the *grant* of the commerce power to Congress did not in itself deprive the states of authority to legislate on matters relating to commerce, but that *positive action* by Congress under the grant was necessary to control such state legislation.41

Though the commerce clause provides a system of concurrent powers between the federal and state governments, it fails to delineate clearly the scope of permissible state regulatory powers. Alexander Hamilton outlined three factors that would preclude the exercise of concurrent state regulatory power. He wrote:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercis-

ing the like authority; and where it granted an authority to
the Union, to which a similar authority in the States would
be absolutely and totally contradictory and repugnant.\textsuperscript{42}

Hamilton's test for state concurrent power can be divided
into two parts: a power prong and a scope prong. Under the
power prong, states may exercise concurrent regulatory power
with Congress unless the Constitution has granted Congress
exclusive power or unless the Constitution prohibits concurrent
state power in a regulatory field. Under the scope prong, state
regulatory powers are limited to actions that are neither repug-
nant nor contradictory to congressional authority.

A. Power Prong

1. Express terms

Under Hamilton's test, the states are precluded from exer-
cising commercial regulatory powers if the Constitution
grants exclusive regulatory powers to the federal government. Article I
of the Constitution gives Congress the power to regulate inter-
state and foreign trade but stops short of excluding the states
from exerting similar powers. As the Supreme Court pointed
out in \textit{Goldstein v. California},\textsuperscript{43} the mere grant of power to
Congress by the Constitution is not itself enough to deprive the
states of concurrent powers. In \textit{Goldstein}, the Court upheld a
California statute that provided state copyright protection to
sound recordings.\textsuperscript{44} The Court concluded that Article I does
not grant Congress the exclusive power to establish copyright
law.\textsuperscript{45}

In limited settings, the Supreme Court has historically
recognized state authority to regulate commerce. In \textit{Gibbons v.
Ogden},\textsuperscript{46} the Court explained that states enjoy a limited scope
of power but stopped short of denying states any concurrent
powers.\textsuperscript{47} Later, in \textit{Cooley v. Board of Wardens},\textsuperscript{48} the Court

\textsuperscript{42.} \textit{The Federalist} No. 32, at 241 (Alexander Hamilton) (Benjamin F. Wright
\textsuperscript{43.} 412 U.S. 546 (1973).
\textsuperscript{44.} \textit{Id.}
\textsuperscript{45.} \textit{Id.} at 552-61 (Article I, Section 8, Clause 8, does not expressly or by
inference vest all power to grant copyright protection exclusively in the Federal
Government).
\textsuperscript{46.} 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{47.} \textit{Id.} (limiting the states to the exercise of their police power in regulating
affirmed that the "mere grant to Congress of the power to regulate commerce, did not deprive the States of the power to regulate pilots" of ships bound for foreign ports.⁴⁸ There, the Court preserved concurrent state regulatory powers by adopting a rule of "selective exclusiveness" which focused upon the subject matter of the challenged regulation rather than the nature of the exercised power.⁵⁰ The Court distinguished between subjects of commerce that require uniform treatment and subjects of local interest warranting a diversity of treatment.⁵¹ Under the Cooley rule, Congress has exclusive power over subjects which require uniform treatment but only concurrent power with the states over matters of local interest.⁵²

Though the Cooley doctrine presented an appealing dichotomy between local and national interests, the rule proved to be unworkable. Some doubt existed that courts could properly distinguish between matters of local and national interest as well as a fear that state regulation of local concerns would lead to commercial discrimination among the states.⁵³ To date, the Supreme Court has not overruled Cooley, but "it has exhibited a tendency to rely less frequently upon the local-concurrent-powers concept and more upon a broader view of state police and revenue powers as a basis for upholding state acts relating to interstate and foreign commerce."⁵⁴

-commerce); see also supra text accompanying note 34.
  49.  Id. at 320.
  50.  Id. at 318-21.
  51.  Id.
  52.  Id. Attorney General Wirt first proposed this rule in Gibbons when he argued:

Some subjects are, in their nature, extremely multifarious and complex. The same subject may consist of a great variety of branches, each extending itself into remote, minute and infinite ramifications. One branch alone, of such a subject, might be given exclusively to Congress, yet, on other branches of the same subject, the States might act, without interfering with the power exclusively granted to Congress. Commerce is such a subject. It is so complex, multifarious and indefinite that it would be extremely difficult, if not impracticable, to make a digest of all the operations which belong to it. One or more branches of this subject might be given exclusively to Congress; the others may be left open to the States. They may, therefore, legislate on commerce, though they cannot touch that branch which is given exclusively to Congress.

  53.  See HAY & ROTUNDA, supra note 5, at 82.
  54.  KALLENBACH, supra note 41, at 45.
2. Granted and prohibited powers

Hamilton noted that a power reserved for the states in one part of the Constitution could be limited or denied by other sections of the Constitution.55 Article I, Section 10 is a prominent example of a constitutional limitation on the powers of states to deal with foreign trading partners. The section provides, in part, that “[n]o State shall enter into any Treaty, Alliance, or Confederation,” or “without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports.”56

The external affairs power is perhaps the broadest limitation on the states’ power to influence their relationships with foreign trading partners. The Supreme Court explained that “[t]he power over external affairs is not shared by the States; it is vested in the national government exclusively.”57

Di Santo v. Pennsylvania58 is one of the first Supreme Court cases to hold that state attempts to influence foreign commerce were per se violations of the federal external affairs power.59 Justice Stone’s dissenting opinion in Di Santo has done much to soften the majority’s rigid approach to state intrusions into foreign commerce.60 In his opinion, Justice Stone reminded the majority that “the purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.”61

Relying on Stone’s dissenting opinion, Professor Dowling later wrote that “the dormant commerce clause’s unreasonable burden test implicitly requires application of the Cooley doctrine, i.e., deliberately balancing national and local interests and making a choice as to which should prevail.”62 Accord-

55. See supra text accompanying note 42.
59. Id. at 37.
ingly, the external affairs interest at stake in foreign commerce should not form the basis of absolute preemption of state regulations that impact foreign trade. Rather, courts should consider the external affairs interest as one factor, *inter alia*, limiting the permissible scope of state regulatory powers.63

B. *Scope Prong*

Hamilton explained that states should be given the ability to regulate commerce to the extent that the state exercise of power is not "absolutely and totally contradictory and repugnant" to a power granted the union.64 Limiting the scope of state power in this manner allows the states to exercise the full measure of their regulatory powers without hampering the supremacy of the federal government in controlling interstate and foreign trade. Hamilton's "contradictory and repugnant" test has been judicially developed under the Supremacy Clause of the Constitution.65

The purpose of Supremacy Clause analysis is to prohibit individual states from frustrating the exercise of congressional power.66 Under the Supremacy Clause, a state's exercise of regulatory power is void if it "collides" with a federal exercise of power.67 The Supreme Court explained in *Goldstein* that care must be given "to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone may possibly lead to conflicts and those situations where conflicts will necessarily arise."68

A court may also invalidate state actions if it finds evidence of congressional intent to "occupy the field of regula-

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63. *Cf.* NOWAK ET AL., supra note 60 at 274-275.
64. THE FEDERALIST, supra note 42 at 261.
65. U.S. CONST. art. VI, § 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*
67. *Id.*
Typically, courts will not find congressional intent to occupy a field of regulation unless Congress has clearly expressed its intention to abrogate state regulation of the field or unless the court can imply that intention from a pervasive congressional regulatory scheme. Accordingly, the scope of state regulatory powers should be limited to avoid conflicts with existing legislation and collisions with Congress' external affairs powers.

IV. ADVANTAGES OF LIMITED CONCURRENT STATE POWERS

The dormant commerce clause was developed to interpret congressional silence in matters concerning domestic trade. However, foreign trade issues are often complex and involve a variety of noneconomic policy considerations. Concurrent powers analysis allows the courts to base their decisions firmly upon a review of all relevant local and national concerns.

As illustrated by the Supreme Court's decision in South-Central, strict application of the dormant commerce clause can diminish rather than enhance the uniformity of national trade policy. The dormant commerce clause blinded the Court to the fact that Congress had an established primary processing requirement for all logs taken from federal lands. In striking down Alaska's primary processing requirement, the Court gave more deference to its own judicially created free trade policy than to a national policy that had sought for several years to protect both the local processing industry and the nation's timber supply.

The dormant commerce clause favors free trade to the exclusion of many important policy concerns. Congress has historically acted to preserve local industries through protective trade practices. This protection has often been justified by the need to preserve industries vital to national defense, protect jobs, and promote fairness by retaliating against foreign export subsidies and dumping. Furthermore, the United States' trade policy is often inexorably linked to diplomatic concerns that place foreign trading partners in a disfavored status.

71. See RUFFIN & GREGORY, supra note 33.
72. See KEGLEY & WITTROFF, supra note 34.
The concurrent powers analysis allows courts to consider the validity of state actions on the basis of their consistency with national trade and foreign policy.

Concurrent powers analysis further provides a state with representation in a judicial forum in two instances: first, when congressional silence implicitly bars active representation in Congress and, second, when the commerce clause fails to protect the state from its foreign trading partner. The commerce clause limits state power over foreign commerce to the exercise of its police power. The broader concurrent powers analysis allows the states to regulate beyond their police power as long as the Constitution does not prohibit state action or the state action does not collide with congressional regulations or policies. Under this broader scope of review, a state is allowed to admit that its regulatory efforts are aimed at protecting local economic interests. However, the states carry the burden of showing that their actions are consistent with an existing congressional regulatory scheme. The advantages provided by broader state powers ensure that states will not be forced to extend the benefits of free trade to foreign trading partners without promise of reciprocity or adequate representation in a decision-making forum.

V. APPLICATION OF CONCURRENT POWERS ANALYSIS TO South-Central

The concurrent powers analysis would have allowed the Court in South-Central to travel a more favorable path in reviewing Alaska's log export policy. Unburdened by the dormant commerce clause, the Court could have considered the validity of Alaska's regulation in light of all policy concerns and could have effectively balanced the state's interest in preserving its local lumber industry with the federal interest in maintaining a uniform national trade policy.

The first step in reviewing Alaska's primary processing requirement under the concurrent powers analysis requires the state to establish that the regulation's burden falls primarily upon foreign trading partners. Alaska could have easily met the foreign commerce requirement. The Court in South-Central pointed out that Alaska does not have an interstate timber trade. Almost all of Alaska's timber is exported abroad and at
least ninety percent of the timber is exported to Japan.\textsuperscript{73}

A court might invalidate Alaska's regulation if it found the requirement "repugnant" to a national interest. The \textit{Goldstein} Court explained that state regulations are repugnant when they attempt to exercise powers which Congress has reserved exclusively for itself or when the state's exercise of power will necessarily conflict with congressional power or policy.\textsuperscript{74} The Court in \textit{South-Central} described Alaska's regulation as "parallel" with the federal requirement. The state requirement was no more stringent than the long established federal practice. The consistency between the two regulations suggests that it is unlikely that a court would find a necessary collision between the federal and state regulations.

A court applying the concurrent powers analysis to the facts of \textit{South-Central} would next have to determine whether Congress had intended to occupy the field of log export regulation. The federal primary processing requirement is silent as to Congress' intent to regulate timber from nonfederal lands.\textsuperscript{75} Since the congressional regulation was limited to timber taken from federal lands and in no way controlled timber exports from state and private lands, it is doubtful that a court would find congressional intent to occupy the entire field of log exports.

The facts of \textit{South-Central} do not imply a collision with the federal government's external affairs powers. The consistency of the Alaskan administrative rule with the federal rule would allow a reviewing court to conclude that Alaska's regulation enhances rather than diminishes the uniformity of federal timber policy in the Northwest. Application of the concurrent powers test to the facts of \textit{South-Central} reveals that a court could reasonably overturn the majority's decision without injuring the federal interest in a uniform trade policy.

\section{VI. Conclusion}

The growing importance of foreign trade to individual state economies increases the likelihood that the states will intervene to obtain favorable terms of trade and to protect local economic interests. States' attempts to regulate their own com-

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\item \textsuperscript{73.} South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 85 n.4 (1984).
\item \textsuperscript{74.} See supra text accompanying notes 67-68.
\item \textsuperscript{75.} See 36 C.F.R. § 223.161 (1990).
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Commercial activities with foreign trading partners will call upon the courts to redefine the relationship between federal and state government. The path that courts choose in reviewing state actions which impact foreign commerce will not only affect the future of federalism in the United States but will also demarcate the states' ability to maximize the benefits of foreign trade. The dormant commerce clause offers courts a narrow course of review and is ill-suited to encompass the complexities of foreign trade. Alternatively, the concurrent powers test clears the path by allowing the courts to consider all local and national concerns in reviewing state commercial regulations which impact foreign trade.

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