Getty Images/dszc

The Disappearance of the Dormant Commerce Clause

By Paul D. Cullen Jr.

The Commerce Clause, Article 1, Section 8, Clause 3, of the U.S. Constitution, grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Dormant Commerce Clause (DCC) is a judge-made rule inferred from the Commerce Clause. It recognizes the framers' intent to prohibit state laws that erect barriers to trade among the states. The rule has generally focused on state laws that discriminate against commerce from other states or favor in-state interests and those that impose unreasonable restrictions on the arteries of interstate commerce, particularly those related to transportation.

Without a precise formulation, the DCC has been a vehicle for the courts to express evolving views over the proper divide between state and federal lawmaking authority and sometimes over the wisdom of state laws and fees. The DCC's imprecision has given its detractors the opportunity to (attempt to) whittle away its scope and application, giving more power to the states to enact laws that impair interstate commerce. Significantly, federal court decisions in recent years challenging state highway tolling have given rise to arguments that the courts are narrowing the established DCC scope and identifying and expanding exceptions to its application.

The Commerce Clause and Modern Formulation of the DCC

The Founding Fathers drafted the Constitution, and the Commerce Clause in particular, to address a patchwork quilt of trade-stultifying state regulations, state-imposed tariffs, and other trade barriers that had sprung up under the Articles of Confederation. As described by Supreme Court Justice Samuel Alito, "removing state trade barriers was a principal reason for the adoption of the Constitution" (*Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. ___, 139 S. Ct. 2449, 2460 (2019)). Thus, the Supreme Court inferred from Article 1, Section 8, Clause 3 a prohibition on state laws burdening interstate commerce (*id.*).

The Constitution does not prohibit all state regulations, fees, or taxes imposed on interstate commerce, of course. The DCC evolved to forbid state laws that were unreasonably burdensome on or discriminatory against interstate commerce—or protectionist of in-state interests. Relevant to transportation, the Supreme Court has articulated three DCC tests to scrutinize various types of burdensome state laws: one to analyze state regulations, one to review state user fees (e.g., highway tolling), and one to analyze state taxes.

The DCC Rule for State Regulations

In 1970, the Supreme Court laid out the basic DCC test for scrutinizing state laws that burden interstate commerce but that do not exact fees or taxes. In *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), a cantaloupe grower in Arizona challenged that state's rule that required all cantaloupes grown in the state to be packed in facilities in Arizona. The rule effectively banned the bulk shipment of cantaloupes across state lines (to where the grower already had a packing facility) and would have required the grower to build a new packing facility in Arizona at a cost of $200,000.

The *Pike* Court articulated the basic DCC test: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits" (*id.* at 142). The Court found that the law's non-monetary benefits (protecting the reputation of other cantaloupe growers in the state) did not justify the burden of requiring a local grower to establish a local packing facility at an estimated cost of $200,000 (*id.* at 146).

The DCC Rule for State User Fees and Highway Tolls

User fees, such as highway tolls, violate the DCC unless they are reasonable: "[A] levy is reasonable . . . if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce" (*Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 715–20 (1972); *see also Nw. Airlines Inc. v. County of Kent*, 510 U.S. 355 (1994)).

While tolls need not match the facility's costs exactly, a fair approximation satisfies the Commerce Clause. But, for example, tolls exceeding costs by 9 to 14 percent "plainly" violate the DCC (*Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 199 F. Supp. 3d 855, 878–79 (S.D.N.Y. 2016), *vacated on other grounds*, *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 238 F. Supp. 3d 527 (S.D.N.Y. 2017), *aff'd*, 886 F.3d 238 (2d Cir. 2018)).

The DCC Rule for State General Revenue Taxes

The Supreme Court has set forth a third standard for measuring general revenue taxes against the DCC (*see, e.g., Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 277 (1987)). Under that standard, "A state tax on interstate commerce does not offend the Commerce Clause . . . if that tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate

against interstate commerce, and [4] is fairly related to the services provided by the state" (*Complete Auto. Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977)).

Exceptions to the DCC

Courts apply the DCC to curtail the exercise of state governmental authority. The DCC does not constrain states, however, when that activity is not governmental in nature but is akin to a private party's conduct in the marketplace (*see, e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 438–39 (1980)). Under this Market Participant Doctrine, states and local governments have been allowed to conduct activities that would otherwise have violated the DCC when they choose their contract partners, operate publicly owned businesses, and favor in-state entities when they engage in proprietary conduct within a specific market.

The State of Indiana used this doctrine to monetize its toll road to raise money for its general budgetary needs by increasing tolls on trucks traveling the Indiana Toll Road. In September 2018, Indiana Governor Eric Holcomb announced that, to fund his "Next Level Connections" program (an infrastructure initiative consisting of projects that bore no functional relationship to the toll road), the concessionaire that leased the Indiana Toll Road would pay the state another $1 billion in exchange for the right to impose a 35 percent toll increase only on heavy trucks using the toll road.

Most of the heavy truck traffic on the Indiana Toll Road is interstate, and the tolling increase was designed to, and does, fall most heavily on truckers engaged in interstate commerce. When announcing the increased truck tolls, Governor Holcomb declared, "The majority of traffic is from out-of-state. We're capturing other people's money" (Dan Carden, *State to Receive $1 Billion in Exchange for Allowing Higher Truck Tolls on Indiana Toll Road*, Nw. Ind. Times (Sept. 4, 2018)).

Truck drivers challenged the toll increase in federal court on DCC grounds. The plaintiff truck drivers argued that, even though the increased tolls did not discriminate on their face, they were unconstitutional because they far exceeded the cost of providing the toll road. In its defense, the state argued that it was acting as a marketplace participant in selling access to the toll road to truckers who were free to use it or not. Therefore, they could charge any price the market would bear (*Reeves*, 447 U.S. at 438–39). The truckers responded by arguing that applying this exception to this state conduct would greatly expand the limits of this doctrine: "[T]he doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity" (*South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98–98 (1984)).

When deciding whether a state is truly a mere "market participant," courts often look beyond the apparent marketplace activity to determine whether the state has brought to bear any of its unique governmental powers or authority—authority not otherwise available to private entities in the defined marketplace. If so, it engages in governmental conduct subject to DCC scrutiny, not mere market participation. The courts have found the imposition of excessive user fees as evidence that the state was exercising authority not available to regular marketplace participants (*New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1021, 1022 (5th Cir. 1989)).

Courts have also declined to apply the doctrine when "recognized transportation corridors for commerce" are at issue; the Second Circuit held in the context of highway and bridge tolls that the maintenance of roads is a governmental function, rejecting an argument that state actors compete "with other entities that are also seeking to build and maintain highway systems" (*Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 93 (2d Cir. 2009); *see also Cohen v. R.I. Tpk. Bridge Auth.*, 775 F. Supp. 2d 439, 443, 445 (D.R.I. 2011) ("[T]he mere fact that private property owners may charge fees for the use of their property does

not transform [the] operation of Rhode Island State bridges and tollways into private market activity. . . . [B]uilding and maintaining roads is a core government function")).

The plaintiff truckers in the Indiana case brought to the court's attention that in three sections of the statutory authority for the operation of the Indiana Toll Road, the Indiana legislature declared it to be "the performance of essential governmental functions." The plaintiffs also demonstrated the excessiveness of the 35 percent toll increase—one that could only be imposed by the government's approval—evidenced by the fact that the proceeds were to be used for the governor's non–toll road projects throughout the state. Finally, the truckers described how the Indiana law provided for state patrol policing of its economic activity (toll payment), governmental activity that the courts have found to disqualify the use of the Market Participant Defense. Nevertheless, the trial court held that Indiana's conduct was shielded from constitutional scrutiny (*see Owner-Operator Indep. Drivers Ass'n v. Holcomb*, No. 1:19-cv-00086-RLY-MJD, 2020 U.S. Dist. LEXIS 41138 (S.D. Ind. Mar. 10, 2020)).

Ultimately, in an opinion by Judge Frank Easterbrook, the Seventh Circuit found that Indiana's tolls were simply economic activity and that "[a] state, like, any private proprietor, can turn a profit from its activities" (*Owner-Operator Indep. Drivers Ass'n v. Holcomb*, 990 F.3d 565, 567 (7th Cir. 2021)). Judge Easterbrook further stated that "[t]he idea that transportation necessarily is a state function is untenable" (*id.*). The upshot of this holding based on the Market Participant Doctrine is that the Commerce Clause does not constrain the tolls on the Indiana Toll Road—whether in terms of burden *or* discrimination. This version of the Market Participant Doctrine would also allow states to discriminate in ways that the DCC would otherwise not permit.

By dismissing the law and evidence of how the functioning of the Indiana Toll Road would not exist but for the exercise of the state's unique authority not available to private market participants, the Seventh Circuit greatly expanded the scope of the Market Participant Doctrine and narrowed the application of the DCC.

Congressional Approval

When Congress authorizes states to impose what would otherwise be unconstitutional burdens on interstate commerce, "all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, [Congress's] decision to allow it is a collective one" (*South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984)). When it authorizes this state conduct, Congress must "affirmatively contemplate otherwise invalid state legislation" and express an unmistakably clear, unambiguous intent to approve such legislation in the text of a federal statute (*id.* at 91; *see also S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 769 (1945)).

This was the defense Pennsylvania gave when several motorists, truckers, and their associations challenged the constitutionality of Pennsylvania Turnpike tolls. In *Owner Operator Independent Drivers Ass'n, Inc. v. Pennsylvania Turnpike Commission*, 934 F.3d 283 (3d Cir. 2019), the plaintiffs challenged Pennsylvania's excessive tolls on the Pennsylvania Turnpike. By statute, the Pennsylvania Turnpike Commission was directed to monetize the turnpike by imposing tolls that ranged from 250 to 300 percent of the annual cost of maintaining and operating the Pennsylvania Turnpike and transferring $450 million annually in excess toll revenues to the Pennsylvania Department of Transportation to support infrastructure projects throughout the state. The plaintiffs, citing the user fee standard in *Evansville*, contended that the state was imposing an undue burden on interstate commerce in violation of the Commerce Clause.

Part of Pennsylvania's defense was that Congress had authorized the state to impose the toll amount in question. The statute cited by the state allowing it to impose excessive tolls is a section of the federal highway authorization statute, 23 U.S.C. § 129(a), which authorizes federal contributions to be made on highways, bridges, and ferries that are tolled, provided that many specific conditions are satisfied. This is a narrowly drawn exception to the general prohibition on the tolling of federally funded roads found in 23 U.S.C. § 301: "Freedom from tolls—Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from tolls of all kinds."

Of the many conditions provided in the highway law, Section 129(a)(3)(A) limits the use of toll receipts to five categories of spending: debt service, paying a reasonable return of investment to any private person who helped finance the project, paying costs related to the operation and maintenance of the tolled facility, payments to any private party if the tolled facility falls under a public/private partnership, and lastly, "if the public authority certifies annually that the tolled facility is being adequately maintained, any other purpose for which Federal funds may be obligated by a State under this title." The Pennsylvania defendants argued, and the U.S. Court of Appeals for the Third Circuit agreed, that the last provision ("any other purpose for which Federal funds may be obligated") authorized Pennsylvania's tolls at issue in the case.

The plaintiffs argued that this provision was far from an unambiguous statement by Congress authorizing Pennsylvania to impose turnpike tolls that exceeded the cost of operating the road by 250 percent to 300 percent, netting $450 million annually for Pennsylvania's use on projects other than the Pennsylvania Turnpike. By providing for the disposition of excess tolls, this provision simply acknowledged that the amount of user fees may be a fair approximation of the cost of providing the service while still exceeding exactly what is necessary to provide the road, and Congress wanted those excess funds to go to federally supported programs. Congress has never made an unambiguous collective decision to allow Pennsylvania to actively monetize its federal highway projects to collect tolls for the purpose of funding other projects.

The decision by the Third Circuit in favor of the defendants lowers the standard for discerning congressional intent from one that formerly required an unmistakably clear, unambiguous statement from Congress to approve state action to one that permits a court to interpret the wording of a federal statute to find congressional approval for state action not contemplated by the statute, no matter how attenuated the statutory language. The Third Circuit decision is an invitation for other states to monetize their tolled federal highway projects. Courts (at least in the Third Circuit) now have more leeway in discerning congressional authority for state laws impacting interstate commerce—thereby narrowing the application of the DCC.

The Shrinking DCC Rule

In a case still pending, the American Trucking Associations (ATA) has squared off against the State of Rhode Island, challenging RhodeWorks, the state's scheme to toll only large commercial trucks at various bridge locations along the state's major interstate corridors. The district court in Rhode Island observed, "[t]his plan had the obvious appeal of raising tens of millions of needed dollars from tractor trailers while leaving locals largely unaffected" (*Am. Trucking Ass'ns, Inc. v. Alviti*, 630 F. Supp. 3d 357, 363 (D.R.I. 2022)).

The Rhode Island bridge tolls were set at a level necessary to collect the revenue needed to maintain those bridges. Therefore, these tolls appear to fit appropriately within the 23 U.S.C. § 129 exception to the federal prohibition of tolls on federally funded highways. The DCC issues considered by the court included whether Rhode Island's tolling scheme discriminated against interstate commerce and whether

the toll amounts fairly approximated the users' use of the tolled bridges. The district court held that RhodeWorks failed both tests, violating the DCC (*Am. Trucking Ass'ns*, 630 F. Supp. 3d at 699).

Rhode Island has appealed this decision to the U.S. Court of Appeals for the First Circuit (the court's decision is pending). Rhode Island argued for a dramatically narrower interpretation of the DCC than precedent would suggest—that just because a state toll may fall disproportionately on out-of-state truckers rather than in-state truckers does not mean that the tolls are discriminatory.

The crux of this argument is the state's theory that the interstate truckers using the type of large trucks subject to Rhode Island's tolls are not in competition with companies using smaller trucks used by local drivers who are not tolled. And the point of the DCC was to eliminate state laws that unfairly benefit in-state interests to the competitive detriment of out-of-state entities. Thus, while the state's tolls may fall disproportionately on out-of-state truckers, because the state's tolls do not give unfair competitive advantage to its own citizens to the detriment of out-of-state truckers, Rhode Island argues its tolls are not discriminatory and do not violate the DCC.

The district court noted this argument but did not discuss it in length. On appeal, however, the state continues to make this argument, perhaps anticipating a further appeal. In a decision in spring 2023, the U.S. Supreme Court ruled on a challenge by pork producers to a California law requiring that all pork sold in the state be raised humanely (*Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023)). In a fractured opinion, with multiple concurrences and dissents, the court wrestled with the question of whether discrimination was a threshold question before the court analyzes the burden of state law, or whether a claim of undue burden could be brought independent of a discrimination finding.

Justice Neil Gorsuch and several other justices opined, in parts of the opinion that did not have majority support, that state discrimination is the primary interest of the DCC and that perhaps an unreasonable burden argument could not stand alone to support a DCC claim. This decision is similar to Judge Easterbrook's opinion in the Indiana Toll Road case, in which he opined that (if the Market Participant Doctrine had not applied) without a demonstration that the tolls were facially discriminatory against interstate commerce, the tolls would not violate the Constitution.

Conclusion

The Dormant Commerce Clause has long been the subject of shifting formulations and emphases on different issues and facts since it was first identified by the Supreme Court. Although instances of its application can denote individual judge's hostility to the doctrine, there is not a body of case law that articulates a unified controlling ideological philosophy behind that hostility. The recent *National Pork Producers Council* fractured opinion, concurrences, and dissents at the Supreme Court are a good example of the state of this doctrine. When it comes to transportation and states' efforts to rely on interstate commerce to fund their budgetary needs, the doctrine has been routinely discarded. The Rhode Island bridge tolls case has been submitted to the First Circuit, and a decision may be published at any time. Perhaps that decision will be the next piece of evidence as to whether the shrinking of the DCC is a trend or just the continuation of the DCC's unpredictable application.

Paul D. Cullen Jr. (paul@cullenlaw.com, cullenlaw.com, 202/298-4774) has practiced appellate law and administrative law in Washington, D.C., for more than 25 years. He has led challenges to state action under the Constitution, including challenges to state enforcement procedures, laws, fines, fees, and taxes. He is admitted to eight circuits of the U.S. Courts of Appeal and the Bar of the Supreme Court. With six years of experience on Capitol Hill, Cullen also counsels his clients on proposed legislation and rulemaking.