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JUDICIAL REVIEW OF MEMBER-STATE REGULATION OF TRADE WITHIN A FEDERAL OR QUASI-FEDERAL SYSTEM: PROTECTIONISM AND BALANCING, *DA CAPO*

*Donald H. Regan**

The topic of this Essay is not one Terry Sandalow has worked on, but he got me started on it by organizing, with Eric Stein, the Bellagio Conference on comparative constitutional economic integration in the United States and the European Community. For that, and for thirty-three years during which he has been an unfailingly stimulating and supportive colleague, Dean, and friend, I am deeply grateful.

I. INTRODUCTION

In many federal or quasi-federal systems, the member-states retain significant powers of commercial regulation. The exercise of such powers can threaten the efficiency of trade between member-states. In pursuit of efficiency, the system will normally impose systemic limitations on the member-states' regulatory powers. By "systemic" limitations, I mean limitations that are embedded in the basic principles of the system, that are enforceable by courts or other dispute-settlement organs [hereafter simply "courts"], and that do not depend on specific pronouncements of the central legislative organs, if there are any. All of this is true of the United States, Australia, the European Union, and the World Trade Organization (WTO), for example.

The most obvious systemic limitation, found in all the systems just named, is a prohibition on protectionism directed by one member-state against others. There is controversy, of course, about just how we should understand "protectionism." Is it primarily a matter of legislative purpose? What about discriminatory effect? Does nonprotection-

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ism require the use of least trade-restrictive measures? And so on. But those issues I shall set aside for now.

Another issue, no less controversial than the meaning of protectionism, is whether there should be any *other* systemic limitations on member-state trade regulation, over and above the prohibition on protectionism. One popular candidate for an additional sort of review is what I shall refer to as “balancing,” though I mean to include also true “proportionality” review. The feature that defines “balancing” as I use the term is that it requires the court to identify and compare the local benefits and foreign burdens that result from the regulation under review.¹ The standard theoretical argument for balancing goes as follows: Member-state laws, even if they are not protectionist, may be costly to foreigners (that is, to residents of other member-states). But those foreigners are not represented in the member-state legislature that adopted the law. Their interests are therefore not taken into account when the law is adopted, and the cost of the law to the foreigners may well be greater than the benefit to locals. In order to avoid that sort of cost-benefit failure or Kaldor-Hicks inefficiency, we need to have a court compare the local benefits and the foreign costs of the law, and invalidate laws, even nonprotectionist laws, if the foreign costs are greater than the local benefits (balancing) or if they are too much greater (proportionality review).²

I shall call this the “virtual representation” argument for balancing. On its face, it seems quite persuasive. The idea that when a social decision is made, all affected interests should somehow be taken into account is powerful and appealing, and it seems to require that when a legislative decision is made, interests that are not represented in the legislature should be given virtual representation by the courts. To be sure, we may well doubt courts’ competence to identify benefits and costs in practice, and we may doubt the propriety of courts’ deciding the *evaluative* issues that must be faced before, say, a local benefit to the environment can be weighed against a foreign loss of jobs. But to many people the theoretical case for judicial intervention seems so strong that they think we should suppress our doubts about judicial

1. Hence neither pure “rationality review” nor pure “less restrictive alternative analysis” is a form of balancing as I use the term. Both these modes of review focus on whether there are any benefits, either from the regulation in itself, or from the regulation as opposed to some alternative. Neither requires the *comparison* of benefits and burdens. I shall discuss the role of such versions of means-ends scrutiny in Section II.B.3 and Part III, and I shall discuss the relation between the pure and impure forms of these tests in Appendix 2.

2. *E.g.*, MIGUEL POIARES MADURO, *WE, THE COURT: THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION* (1998) (there is a great deal else in Maduro’s very interesting and useful book, which I like much better than this particular argument); Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT’L L. 32 (1998); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

fitness for the task and simply instruct courts to wade in and do the best they can.

There is a flaw in the argument, however — a flaw in the *theoretical* argument that judicial supervision is needed, over and above protectionism review. Although the virtual representation argument has force in some contexts, we shall see that it has no force in the most common types of trade regulation case. I am tempted to say it has no force in *any* trade regulation case. But since “trade regulation” is not a term of art, and some later examples will reveal that the boundaries of the term are unclear, I content myself with the less dramatic claim about the “most common types” of trade regulation case. As I shall explain, so long as the regulation under review is nonprotectionist, the foreign interests in (most or all) trade regulation cases, even though they are not represented in the regulating state’s legislature, are nonetheless fully and efficiently accounted for by another mechanism — essentially the same mechanism by which a failure-free unregulated market integrates consumer and producer interests and generates efficient outcomes. Since the foreign interests are fully accounted for, there is no need for judicial “virtual representation” in these cases. Judicial intervention in the form of balancing review is at best unnecessary and at worst counterproductive.³

Of course, eliminating the virtual representation argument does not by itself tell us what the rules for reviewing member-state trade regulation should be in any particular system. Each system has its own goals, and the judicial organs of the various systems must interpret different foundational texts in different institutional settings. Still, the foundational texts in all the systems named above leave a good deal to interpretation, and interpretation should be informed by sound theory. I am confident that many interpretive questions would look different if it were understood that balancing review is not necessary to protect out-of-state interests affected by the commonest sorts of nonprotectionist trade regulation.

Spelling out the limits on the virtual representation argument is the project for Part II. In Part III, I offer some related new thoughts on the meaning and identification of protectionism. The considerations canvassed in Part II help us to see why we should understand protectionism in terms of discriminatory *purpose*. A variety of other factors

3. My present claim goes a step beyond my 1986 article, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091. In that article I in effect conceded that the virtual representation argument did make a positive case for judicial balancing in trade regulation cases. I argued that there was a stronger case against balancing, based primarily on doubts about judicial competence and the value of state autonomy, but I did concede the virtual representation argument some force. My present view is that I conceded too much. The virtual representation argument has no force at all in this context. (Strangely, all the materials for my present understanding were there in 1986, dispersed through that article. Why I couldn’t bring them together I do not know.)

that are sometimes thought to be the essence of protectionism are relevant as *evidence* on the issue of discriminatory purpose — the use of an explicit domestic/foreign classification,⁴ the presence of a disparate impact on foreign competitors,⁵ the use of means that are not least trade-restrictive, and so on — but in the end what matters is discriminatory purpose.

Talking about the purpose of a corporate body like a legislature is to some degree metaphorical, and it makes many people uncomfortable. I shall explain in Section III.B how we can cash out the metaphor of legislative “purpose” in terms of other aspects of the legislative process. And doing so provides insight into a number of standard questions about purpose analysis: whether our concern should be with “subjective” or “objective” intent; how to deal with the fact that many individual legislators may have only “oblique” purposes like doing a favor for a political friend; what to make of cases where there are multiple purposes; and so on. I also explain in Section III.C why the inquiry into legislative purpose does not dissolve in hard cases into balancing, as is often claimed. Finally, there are two Appendices, one on “unconscious” discriminatory purpose and another on the logical relations between various forms of rationality review, less restrictive alternative analysis, and cost-benefit balancing or proportionality review.⁶

A comment added at the last minute: I may have written this Essay too much as if efficiency were the unique goal of every economic union. I do not believe that, and I hope the reader will not be distracted from my arguments by disagreement with a proposition I did not mean to suggest. The virtual representation argument is about efficiency. It says that in trade-regulation cases, judicial cost-benefit analysis to pro-

4. This may be such strong evidence that it triggers a formal presumption of illegality, like the United States Supreme Court’s “virtually per se” rule. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Similarly, if we leave aside the possibility of explicitly distinct treatment of foreign goods that is still not less favorable, explicit discrimination will violate Article III or Article XI of the General Agreement on Tariffs and Trade (GATT) (subject to justification under Article XX), or Article 30 or 34 of the Treaty of Rome (subject to justification under Article 36).

5. I intentionally do not use the phrase “de facto discrimination.” “Disparate impact” has the virtue of referring to differential effect on locals and foreigners, while remaining neutral on the issue of whether that differential effect amounts to a violation. In contrast, “de facto discrimination” tends to be nonneutral on that issue, and nonneutral in different ways for the trade law community (for whom “de facto discrimination” seems to connote the presence of a violation) and the American constitutional law community (for whom “de facto discrimination,” or its more often encountered analogue “de facto segregation,” connotes precisely the absence of a violation).

6. The central argument of Part II, explaining the limits of the virtual representation argument in the trade regulation context, does not depend on any specific understanding of protectionism or balancing. If I occasionally refer to protectionism and balancing in Part II, I shall be assuming only the roughest understanding of them, for heuristic purposes only (except in Section II.B.3, where I will anticipate some of the arguments of Part III).

tect foreign interests will promote efficiency. I explain why that is not so. Similarly, the most common reason given for suppressing protectionism is that it is inefficient. I explain why, if that is the objection to protectionism, protectionism should be understood in terms of legislative purpose. So, I am concerned in this Essay with the role of judicial review in promoting efficiency, which is surely a central value. I do not mean to suggest that efficiency is all that matters, or all that a court should ever aim at.

II. REFUTING THE VIRTUAL REPRESENTATION ARGUMENT

A.

Consider some simple examples:

1. Widgets are a consumer product that can be made out of cardboard or plastic. Cardboard widgets are produced in the state of Calivada, plastic widgets in the neighboring state of Nefornia. No widget producers have significant market power. There are no known health, safety, or environmental dangers from either cardboard or plastic widgets. Cardboard widgets and plastic widgets are close substitutes, but some consumers prefer one and some prefer the other. Obviously, there is no case here for legislative or judicial interference with consumer choice in either Calivada or Nefornia. If we let each consumer buy the sort of widget he prefers, at prevailing prices, the unregulated market will generate an efficient result. The one thing worth noticing about this case, because it presages future claims, is that we get an efficient result even though the consumer gives no thought at all to the interests of producers, neither those he buys from, nor those he does not. He reacts to prices, which contain information about producer interests, but the connection with producer interests need never occur to him. The only interests he considers as such are his own.

2. Now suppose the Calivada legislature is presented with new and convincing evidence that plastic widgets damage the Calivada environment in ways that cardboard widgets do not. The Calivada widget consumers don't actually care about this, but other citizens of Calivada, whom I shall call "environmentalists," do care. (Nefornia has no environmentalists.) We now have a textbook case of an externality, imposed by Calivada's plastic widget consumers on its environmentalists. In order to internalize the externality, the Calivada legislature investigates how much damage each plastic widget consumed in Calivada does to the interests of the Calivada environmentalists (all together). It decides that each plastic widget does damage in the amount T dollars, and it imposes a tax of T dollars on the purchase of each plastic widget. Since Pigou, we have believed, rightly, that if

the legislature has set the tax so that it accurately reflects the environmental damage from plastic widgets, we will again get efficient results. Plastic widget consumers are forced by the tax to internalize the interests of the environmentalists in their consumption decisions, and the rest of the work of bringing consumer and producer interests into the process is done by the same basic mechanism that generates efficient results in an unregulated market where there are no market failures. The crucial point to notice about this example is that *all the legislature needs to think about is the interests of the environmentalists*. If what we are concerned about is efficiency, there is no need for the legislature to give any thought at all to the interests of the consumers or of the producers.⁷ If the interests of the environmentalists are properly reflected in the tax, we will get efficient results.⁸

3. Now, suppose that when the legislature investigates the damage from plastic widgets, it concludes that the appropriate tax (the tax that accurately reflects the damage) is so high that it would drive away not just some marginal consumers of plastic widgets, but all or almost all inframarginal consumers, and that this would be true at any reasonably foreseeable price, even if producers of plastic widgets could lower their prices to some degree. In other words, the damage to the Calivada environmentalists and the interests of Calivada widget consumers are such that a tax that forced the consumers to internalize the damage to the environmentalists would destroy the market for plastic widgets at any reasonably foreseeable price. In these circumstances, the Calivada legislature might quite reasonably decide not to impose the efficient tax, but rather to impose a flat prohibition on the sale or use of plastic widgets in Calivada, which is administratively simpler. If, as we have supposed, the efficient tax would destroy or essentially destroy the market for plastic widgets, then the flat ban is efficient as a substitute.

In this scenario, the legislature does need to think about more than the interests of the environmentalists. For one thing, it needs to think about the interests of the Calivada plastic widget consumers; it needs

7. The point of the qualification "if what we are concerned about is efficiency" is to set aside cases such as, for example, where we are prepared to allow inefficient consumption of plastic widgets because plastic widgets are essential to the lives of plastic widget consumers who tend to be poor.

8. In case the reader is wondering, "Efficient in what sense?", the answer is, efficient in any sense we might care about. In some contexts, an arrangement might be Pareto-efficient with respect to the set of *accessible* alternative arrangements, without being Kaldor-Hicks efficient: there might be a Kaldor-Hicks superior alternative from which we cannot generate a Pareto-superior alternative because transaction costs prevent the payment of the necessary compensation to the losers. But with a functioning market, even subject to the green tax, there is no possibility of getting stuck in a situation where consumers buy too few plastic widgets (in the Kaldor-Hicks sense) but transaction costs prevent an appropriate bribe to get them to buy more. The producers can offer the required "bribe" just by lowering the price.

This example is developed in slightly more arithmetical detail in Section II.C.2 below.

in effect to estimate the consumer surplus being reaped by various inframarginal consumers at prevailing prices. But the interests of the Calivada widget consumers, like the interests of the environmentalists, are *local* interests, represented in the Calivada legislature. The significance of that will emerge in a moment. The legislature also needs to think about the producers of plastic widgets, at least to the extent of estimating the limits of “reasonably foreseeable” price reductions. We could think of this as a purely empirical inquiry, or we could think of it as an inquiry into how robustly the prevailing price reflects the producers’ interests — but in either event it is not likely to be a terribly demanding inquiry. The legislature will surely be justified in assuming that it will not see drastic price reductions, and in many cases it will be clear from consideration of the environmentalists’ interests and the consumers’ interests that without drastic price reductions, the efficient tax will destroy the market. In the remaining cases, where less-than-dramatic price reductions might preserve some market share for plastic widgets, the legislature should prefer the efficient tax to the ban. It should put the tax in place, and let the market mechanism take its course.

I have said that if there is doubt about whether the efficient tax would leave some market share for plastic widgets, the legislature should eschew a flat ban and prefer the tax. What is more, *they have an incentive to do so*. It might seem that the legislature would not mind making the mistake of imposing an inefficient ban, since the ban operates against the interests of foreign producers. But an inefficient ban would be against the interest of some local consumers as well. It would prevent transactions by inframarginal consumers whose preference for plastic widgets is strong enough that they would buy them, even with the substantial efficient tax in place, at prices the producers can manage to offer. If we assume the legislature is not motivated by protectionism, that it is merely trying to prevent inefficient damage to the environment, it will not want to prevent these transactions, which would be efficient and would benefit local consumers. So, if the Calivada legislature responds correctly to all *local* interests, any ban it imposes will also be *globally* efficient.

The crucial point that we have established regarding our three examples is this: *If the legislature adopts legislation that optimizes with respect to all the affected in-state interests, then the overall result will be efficient with respect to all interests, local and foreign.*⁹ I shall refer to

9. This is true even in the first example, somewhat trivially. The legislature’s nonintervention is a decision, and it is a decision that could be mistaken if, for example, there is some externality the legislature overlooks or does not respond to. But if nonintervention is right for the local interests, it will be efficient overall.

Notice that although I have sometimes included in the text a qualification like “provided the legislation is not protectionist,” that qualification is not strictly necessary here. It is already implicit. Protectionist legislation does not optimize over local interests (except per-

this property of our examples as “local/global equivalence.” To say that a sort of regulation exhibits “local/global equivalence” is to say that if a regulation of that sort optimizes “locally” (over all in-state interests), it will necessarily optimize “globally” (it will lead to an outcome that is efficient with respect to *all* interests, local and foreign). Now, I do not suggest that all sorts of regulation exhibit local/global equivalence; it is easy to think of cases where regulation that is best for local interests is not efficient overall. There is even room for dispute at the boundaries about whether all “trade regulation” cases exhibit local/global equivalence. I shall discuss a variety of examples that will give us a better picture of the scope of the phenomenon in the next section. But for now, I want to stick with our three examples, which represent a wide range of trade regulation cases. I want to focus on the *consequences* of local/global equivalence, specifically the consequences for the virtual representation argument.

In a nutshell, local/global equivalence, where it exists, completely undercuts the virtual representation argument. The proponent of the virtual representation argument says we need judicial intervention to protect foreign interests. But even the proponent of the virtual representation argument does not suggest that there should generally be judicial intervention to protect *local* interests against economic or social legislation they do not like. Rather, because local interests are represented in the political process, we generally presume that the legislature will do better at optimizing over local interests than a court would do, unless there is some specific reason to suspect a failure of the political process (with regard to local interests). Now the crucial point: In regulatory contexts that exhibit local/global equivalence, presuming that the legislature will do better than a court at optimizing over local interests amounts to presuming that it will do better than a court at optimizing over all interests, local and foreign, even though it does not care directly about the foreign interests at all. And if the legislature will do better than a court at optimizing over *all* interests, even though it does not consider foreign interests, there is no need for the court to intervene to protect foreign interests. In sum, where there is local/global equivalence, the virtual representation argument has no purchase.

I am not claiming legislatures always succeed in getting it right for local interests. Of course they don't. But the issue here is one of relative competence. Our general assumption, as I say, is that in the sphere of social and economic legislation, legislatures do better than courts at promoting local, represented interests; courts should not intervene to second-guess the legislature on behalf of local interests un-

happens in special cases we ignore, *see infra* note 10); hence, conversely, legislation that optimizes over local interests is necessarily not protectionist. I shall have more to say about protectionism and local welfare below.

less there is some specific reason to suspect a failure of the political process (with regard to local interests). It follows that in cases like our examples, where getting it right for locals entails getting it right for everyone, the courts also should not intervene to protect *foreign* interests unless there is specific reason to suspect a failure of the political process *in the treatment of local interests*.

Notice that what I have just said is perfectly consistent with the idea that courts should intervene to suppress protectionism. Protectionist legislation normally does *not* optimize over all local interests. It normally does result from a failure of the political process with respect to *local* interests.¹⁰ Protectionist legislation standardly results from local producer interests wielding excessive power in the political process, which allows them to exploit disorganized consumer interests. So, in any case where there is a significant suggestion of protectionism, it is appropriate for the court to consider whether the political process has gone awry in its treatment of local interests. But if the answer is no (if the law is not protectionist), there is no justification for balancing to protect foreign interests.

Notice also, my claim is that the legislature does not need to weigh, or even to think explicitly about, *foreign interests*. That is to say, it does not need to try to ascertain and evaluate the effects of its regulation on foreign producers. That is not at all to say that the legislature should or may refuse to hear *evidence and argument* from foreign producers about the empirical questions that it does need to think about — in the present context, questions about what effects plastic widgets have on the local environment and, if a ban is being considered, whether the efficient tax would destroy the market. For the legislature to refuse to receive relevant submissions on these questions, even from foreign producers, would strongly suggest a process failure resulting from excessive control of the legislature by local producers (in other words, protectionism).¹¹

The proposition that optimizing over local interests entails optimizing over all interests may seem paradoxical, even when it is limited to our examples. One way to account for the paradoxical result is to suggest that the interests of foreign producers receive vicarious con-

10. Where this is not true — where protectionism in the short run might be efficient, on infant industry grounds, for example — it is not clear in principle that protectionism should be suppressed. If we enforce an absolute prohibition on protectionism, that reflects a plausible choice of prophylactic rule.

11. This seems as good a time as any to insert the general point that, just as I use “court” to include other quasi-judicial dispute-settlement organs, so I use “legislature” to include administrative agencies in their rule-making capacity. Administrative agencies are subject to somewhat different political forces than legislatures, but even so they have much more in common with legislatures than courts do. And we think courts should normally defer to administrative agencies in their rule-making capacity for approximately the same reasons of expertise and political responsiveness that call for deference to legislatures — in addition to the fact that the legislature created the agency and retains supervisory control.

sideration through their connection with the interests of local consumers who want to buy from them. This is the right explanation, subject to certain further conditions, but it might seem that this sort of explanation cannot be enough in any circumstances. Local consumers and foreign producers both have interests in the transactions that might take place between them, but these are separate interests. So it might seem that even if the legislature weighs the local consumers' interests in these transactions, that still leaves the weight of the foreign producers' interests out of the balance.

But "weighing" is the wrong metaphor here. If the legislature were engaged in a command-and-control exercise, trying to figure out for itself what should be produced, and how, and by whom, and who should then consume it, then indeed the legislature would have to identify and weigh for itself all the relevant interests. But that is not what the legislature is doing. Rather than entirely displacing the market, the legislature is trying to *adjust* the market mechanism (or avoid adjusting it when no adjustment is needed, as in our very first example) so that the market mechanism, as adjusted, will produce efficient results. This is obviously what is going on in the second example, with the green tax, and it is also what is going on in effect in the third example if we remember that the legislature will adopt a ban only if it mimics the effect of the efficient tax. The crucial point about our examples is that the appropriate *adjustment* to the market mechanism, which will lead to globally efficient outcomes, can be identified solely on the basis of local interests.¹²

This leads us to a broader, very important lesson: Talk about balancing the "value of trade" against other values — whether it be substantive values like health or the environment, or institutional values like local regulatory autonomy — is often dangerously misleading. At least insofar as we are concerned with the short term and with static efficiency, there is no general "value of trade." We want to promote efficient exchanges, but we also want to prevent inefficient exchanges (such as consumption of environmentally damaging plastic widgets by marginal Calivada consumers). The problem in designing the trade system is not to decide where to strike the balance between the value of trade and other values. Rather, the problem is to structure the system so that it generates all and only efficient exchanges (or as close as we can come to that ideal). Member-state governments have impor-

12. It is important that in our examples *all* significantly affected foreign interests are in a market relationship (direct or indirect) with the local actors. If, for example, the consumption of plastic widgets in Calivada has negative external effects in the neighboring state of Washegon, then the Calivada legislature's optimizing over local interests does not guarantee global efficiency. But this does not save the virtual representation argument as it is standardly deployed in discussions of trade regulation. Virtual representation theorists argue that we need judicial protection (over and above the protectionism inquiry) for the interests of the *foreign plastic widget producers*. That is just what our examples show is not needed.

tant contributions to make to the project of optimally structuring the trade system, often by facilitating exchange, but sometimes by actively preventing it, as in our second and third examples. The specific problem for the creators and interpreters of the systemic limitations on member-state regulation is to devise rules that will allow member-state governments to make local adjustments to the trading system that *improve* the performance of the system in generating efficient results (even when that involves preventing exchange), while preventing member-state governments from making adjustments that *undermine* the efficiency of the system (some of which, export subsidies for example, may promote exchange). It is impossible to think about this problem sensibly if one tries to cast it as balancing a putative “value of trade” against other values.

It might be said that in any individual instance of exchange — for example, any individual purchase by a Calivada consumer of a foreign plastic widget — there is a clear “value of [this] trade,” namely the consumer surplus created by the purchase. And it might be said further that we do precisely want this “value of trade” to be balanced against the harm to the environment the transaction causes. In a sense, this is all true. But ideally the way we would like this balance to be struck in the individual instance is by the consumer, and we can get him to do it by imposing a green tax that just reflects the harm to the environment. With the tax in place, no one but the consumer needs to think about the value of the widget to the consumer. So there is still no call for the legislature to think about the “value of trade,” in the individual instance or in the aggregate. *A fortiori*, there is no call for a reviewing court to think about or balance such a value. Of course, if the legislature is considering a ban, it must consider the consumer surplus (and its distribution), but only crudely. The efficient tax should be preferred to the ban if there is any real doubt about the tax’s effect on the market. And to the extent the legislature thinks about consumer surplus, this is a standard local value of the sort the legislature is presumed to deal with better than a court, provided it is not engaged in protectionism. References to “the value of trade” suggest the presence of a distinct federal systemic value that requires special judicial protection. But other than anti-protectionism, there is no such value in the present picture.¹³

13. It should also be clear why there is no need to balance the “value of trade” against the value of local regulatory autonomy. Provided the member-state is not engaged in protectionism, there is no conflict. As we have seen, member-states as regulators have an essential role to play in fine-tuning the trading system to achieve efficiency — that is, in guaranteeing that trade is in fact valuable. Local regulatory autonomy, absent protectionism, supports the value of trade. For similar observations in a different context, see Robert L. Howse & Donald H. Regan, *The Product/Process Distinction — An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L LAW 249, 285 (2000).

Things look somewhat different if we broaden our view, so that we consider the long term and dynamic efficiency. In that perspective, trade may do many useful things besides promoting statically efficient exchange. It may promote technological progress, growth, and economic development; it may spread ideas, open cultures and help to subvert undemocratic regimes; it may reduce the likelihood of war. The multifariousness of these possible benefits and the uncertainty of their connection to any particular trade-promoting measures make it natural and sometimes even reasonable to speak of a general "value of trade." But that same multifariousness and uncertainty raise grave doubts about whether *courts* should engage in balancing with this "value of trade" in the course of elaborating and applying the systemic limitations on member-state regulation. The treaty-makers or constitution-writers may balance this "value of trade" against other values, including static efficiency, when they are formulating specific rules on member-state regulation to be enforced by courts in specific systems. The treaty-makers and constitution-writers plainly *should* think about dynamic efficiency, and other matters such as international distribution, in some way or other. If the rules the treaty-makers come up with require courts to look at considerations other than static efficiency, so be it. But I am skeptical of the suggestion that courts should consider any general "value of trade" on their own initiative, when they are enforcing rules whose primary object is plainly the suppression of protectionism.¹⁴ (If I am wrong about this, it does not matter to my central project, which is to clarify the role of judicial review in promoting static efficiency. The balancing with the "value of trade" that we are discussing in this paragraph is not the cost-benefit balancing recommended by the virtual representation argument.)

Let us return to the specific examples. If local/global equivalence still seems paradoxical, let me offer two further suggestions to make it less so. First, as a possibly useful metaphor, we can think of the state of Calivada as a collective consumer, and the Calivada legislature as making a collective consumption decision.¹⁵ If, as we assume, this collective consumption decision reflects the overall interests of the Calivada collectivity, then it interacts with the producers' offers to generate a result that is efficient for Calivada and the producers in the same way that an individual consumer's decision interacts with pro-

14. It is a fair question to ask of me, "And where would the European Union be if the Court of Justice had taken your view?" A fair question, but not a fair rhetorical question. The answer is not obvious, especially since a great deal of what the Court did could have been done under the rubric of anti-protectionism.

15. By this I mean a collective decision about what shall be consumed in Calivada, *not* a collective decision made only on behalf of consumers, since the whole point was to reflect nonconsumer interests as well.

ducers' offers to generate an efficient result for consumer and producers in a failure-free unregulated market.¹⁶

Second, it may be useful to point out that it makes no difference to the argument about balancing where the plastic widget producers are located. The primary *economic* point of our examples is that if the legislature optimizes over the interests of consumers and environmentalists, then it will optimize over all interests, including those of producers. This economic point does not depend on the location of any of the relevant interests (except insofar as it presupposes that the legislature has the necessary territorial jurisdiction over the consumers). It is because the consumers and environmentalists are in-state that we can go on to say that if the legislature optimizes over all *in-state* interests, it will optimize over all interests, wherever located.¹⁷ And this reference to location is of course crucial when we turn to the *political process* argument that we should presume the legislature optimizes over in-state interests absent some specific suggestion to the contrary. But still, the central point is the economic point that in order to make the right adjustments to the market system, the legislature only needs to consider the interests of environmentalists and consumers. Even if the plastic widget producers were in-state, and therefore fully entitled in the abstract to political consideration by the legislature, there would still be no need for the legislature to think explicitly about their interests in this context.¹⁸ And if there would be no need for the legislature to think explicitly about the interests of the plastics producers if they were in-state, moving them out-of-state can hardly create such a need.¹⁹

16. Talking about a collective consumption decision may raise worries about whether this collective decision is an exercise of market power. The short answer is, not if the legislature is just protecting the environment. Even if Calivada is big enough to have market power, and even if its decision has a significant impact on Nefornia producers, it does not follow that Calivada is exercising market power in any standard sense. It is not doing anything which interferes with efficiency (as genuinely monopsonistic behavior would). It may help to see this if we reflect that the result brought about by the Calivada green tax or tax-mimicking ban is exactly the same result we would get without any regulatory intervention at all (hence, no hint of a collective decision) if it was the *consumers* who cared about the environment instead of a separate group of environmentalists.

17. Once again, we assume that all external effects are in-state. *Cf. supra* note 12.

18. Remember the distinction I drew a few pages back between weighing their interests and hearing their voice on relevant empirical questions. Also, if the legislature is considering a *ban*, it needs to make some empirical prediction about possible price reductions in the face of an efficient tax; but as we have seen, if consumer interests are properly accounted for, they provide an adequate incentive for not biasing this prediction against the producers. And the *interests* of the producers need not be otherwise considered.

19. Notice I am not saying the location of the plastic widget producers is totally irrelevant. I am saying only that it is irrelevant to the question of whether there is any need for a *substantive weighing* of their interests by a legislature motivated to promote efficiency. The location of the plastic widget producers may be highly relevant to how the legislature is in fact motivated. If the plastic widget producers are out-of-state, that creates an opportunity for the local cardboard widget producers to secure protectionist legislation, exploiting con-

B.

Let us now consider some further cases, including some to which the argument of Section A clearly applies, some to which it clearly does not, and some that may be uncertain.

1. A sort of case that is just like our original examples with respect to the irrelevance of the virtual representation argument is the case where the regulating government is trying to protect its consumers against themselves. Sometimes consumers make decisions that are against their own interests, and this is a species of market failure. It may result from inadequate information, in which case labeling requirements may solve the problem if the society is literate and consumers are accustomed to paying attention to labels. Or it may result from the fact that consumers are either unwilling or inadequately motivated to act on their own best interests.

It may seem that while inadequate information is a species of market failure, self-destructive choice by well-informed consumers is not. But how we view such self-destructive choice depends on what we view as the ultimate goal of the market-cum-regulatory system. If the goal is to optimize over the revealed preferences of informed agents, then obviously (informed) self-destructive choice is not a market failure. But if we view the goal as optimizing over agents' true interests, then it is. In this view, the system counts on consumers to be effective agents for their own interests, which for the most part they are. But when they fail in their role as agents-for-themselves, that is a system failure. Some people may think that government should never indulge in paternalism vis-à-vis adults — it should never interfere with their free and informed choices. But I do not think an absolute anti-paternalism principle can be grounded in sound political philosophy, and it is certainly not a principle of international law, trade law or otherwise. So, governments are entitled to paternalize their citizens as consumers, and when they do so with good cause, they are correcting a market failure.

Now, if a member-state government prevents a consumer from buying something that she would otherwise buy from a foreign producer (or if the government merely discourages the purchase by a tax), this will leave the foreign producer worse off than he would have been otherwise. It should be clear, however, that judicial intervention to give virtual representation to the producer's interest would be inappropriate, for exactly the same reason it is inappropriate in our original examples. As before, absent specific reason to suspect a failure of the political process with respect to local interests (including, as be-

sumers in a way that they would be unable to do if the plastic widget producers were in-state. In sum, it may indeed matter that the plastic widget producers are out-of-state, but it matters only by providing a possible occasion for protectionism review.

fore, protectionism), we presume that the legislature does at least as well a court would at optimizing over local interests — in this case, looking out for consumers. And if it is best for the consumer that she not purchase the product the producer is offering, or that she not purchase it at the producer's price as modified by an efficient paternalistic tax, then efficiency requires that there be no exchange. There is no occasion for further consideration of the producer's interest. In this sort of case, as in our original examples, the member-state government is attempting to correct a market failure that imposes costs on its citizens, and the affected foreign interests are in a market relationship, actual or potential, with local actors. The regulatory problem exhibits local/global equivalence. Virtual representation of the foreign interests by the court is not required.

2. Now we turn to a quite different example. Suppose Calivada dumps raw sewage into waters it shares with Nefornia, or just allows local businesses to dump noxious effluents into those waters. That imposes costs on Nefornia. Does my argument entail that we should have no judicial review in such a case? Plainly it does not. It is not true in this situation that if the Calivada legislature optimizes over local interests it will optimize over all interests, local and foreign. The legislature is not responding to a market failure (the costs of the failure fall out-of-state), and the relationship between the local actors and the relevant foreign interests is not a market relationship. There is still a question, of course, whether we should empower *courts* to deal with this sort of case, but my present argument says nothing against it; in principle some sort of intervention to protect foreign interests would be appropriate. However, cases like this would not normally be thought of as involving “trade regulation” at all, so we are still left to wonder whether there are any trade regulation cases where the virtual representation argument has force.

3. Probably many readers have already been thinking about a sort of case that has been a staple of European Court of Justice jurisprudence under Article 30 — cases involving divergent or conflicting product standards (about labeling, packaging, composition, additives, and so on). The issue is to what extent each country should be required to recognize other countries' standards.

Actually, we have already considered some cases involving product standards. In the third of our original examples, the Calivada ban on plastic widgets was a product standard for widgets;²⁰ similarly the paternalistic consumer-protection regulations considered in subsection 1 are likely to take the form of product standards. But in the widget case as I imagined it, the difference between Calivada and Nefornia standards reflected a difference in underlying values. Calivada had envi-

20. The second example, involving a tax, is formally different, but not substantively.

ronmentalists who disliked the damage caused by plastic widgets; Nefornia did not. Similarly, the primary cases I had in mind in subsection 1 were cases where there is a difference in underlying values — where different jurisdictions have different views about what consumers should be protected from or significantly different views about acceptable levels of risk.

Where differing regulatory standards reflect different values, there is no serious case for requiring recognition. Uniformity of standards is not a value in itself, as the widget example makes clear: to require Calivada to recognize Nefornia's standards for widgets (which allow plastic widgets) would reduce welfare. A standard argument for uniformity is that it allows the achievement of economies of scale, but even those are sometimes false economies. We do not forbid the sale of skis because that might lead to greater economies of scale in the production of snowboards. The structure of the widget case is different because we have to interfere with consumer choice (by Calivada consumers) to internalize an externality and promote overall welfare, but the basic point is the same. It would be a mistake to prevent that internalization just because doing so might permit greater economies of scale in the production of plastic widgets.

So, the interesting problem is what the court should do when countries have divergent product standards and refuse recognition despite seeming agreement on underlying values (including the acceptable level of risk). One possibility is to require recognition, or at least to have a strong presumption in favor of requiring recognition, on the ground of comity or some such. The foundational text may of course create a duty of comity, but I doubt whether a court should create such a duty on its own. I wonder if the argument from comity doesn't really reflect rather different considerations. It will seem most plausible for courts to require comity on their own when the various countries in the system are generally similar in their values, economic development, and political systems. But this is also just the sort of case in which we will be most inclined to think that a refusal of recognition is motivated by protectionism or by some other more inchoate form of political failure such as I shall discuss presently. The more alike two countries are in their values and political systems, the more likely it is that a standard adopted by one would be adequate for the other. In sum, judicial protection of comity is most appealing precisely when nonrecognition is most likely to result from a process failure and to result in inefficiency. So I shall treat the argument for judicially originated protection of comity as a process/efficiency argument in disguise.

Comity aside, when should the court require recognition? Notice that this is still a context that manifests local/global equivalence: if the regulating legislature optimizes over local interests, it will be optimizing over all interests, local and foreign. The legislature claims to be

protecting local health, or safety, or freedom-from-deception against a threat from foreign goods — and so they may be. But consumers have an interest in access to those goods, if the protection is not actually necessary. Hence, there is no need for judicial intervention specifically to protect the foreign producers. If the refusal to recognize the foreign standard is best for local interests, it will be efficient overall. The virtual representation argument, with its focus on protecting foreign interests, is irrelevant.

We could stop here, insofar as our goal is just to refute the virtual representation argument. But that would leave us with a very incomplete treatment of an important class of cases, so let us press on. If we ask whether the court should actually count on the legislature to optimize over local interests in this sort of case, we may not be quite so confident as in other contexts we have discussed. By hypothesis, there is no issue about what *values* to protect, and that eliminates the strongest reason for regarding the legislature as the best protector of local interests.²¹ What could explain the refusal of recognition in the absence of value disagreement? On the one hand, the nonrecognizing legislature might honestly believe, as an empirical matter, that the standard it refuses to recognize is inadequate to protect the relevant values.²² On the other hand, the legislature might be engaged in covert protectionism. In some contexts, like our example of the Calivada legislature adopting a new green tax when it learns that plastic widgets damage the environment, these two possibilities seem to pretty much cover the field. But one of the reasons cases on lower-profile product standards are so intractable is that in many of them, there seems to be a third possibility: that in one way or another, the legislature has hardly attended to the problem at all. The regulation in question may be an old one that was nonprotectionist and made sense when it was adopted, but that makes no sense now. Even such a regulation may be hard to get rid of if it suits some special interest. Or the legislature may have codified local consumer preference as of some particular time, or local producer methods, without much thought.²³

Let us consider first this last possibility, “legislative apathy.” When the legislature is not paying an issue much attention, even the slightest

21. Of course, the court should be circumspect in deciding that there is no value disagreement. Divergent standards are *evidence*, even if not conclusive evidence, of just such disagreement.

22. For the reader who is troubled by the reference to the legislature’s “beliefs,” such references can be cashed out in terms of legislative process in the same way I explain in Part III for references to legislative purpose.

23. Sometimes, of course, the adoption of existing consumer preferences or habits makes sense. There may be good reason for not trying to get consumers to change. The legislature is likely to be much better informed than the court about consumers’ ability to understand labels, or to resist advertising, or the like. Where these are important considerations, the case for upholding the legislature is much strengthened.

protectionist impulse in the political process may be the determining cause of some regulatory act or (especially) omission.²⁴ So we might often be justified in regarding even the “apathetic” decision or nondecision as deliberately protectionist. But instead of trying to find actual protectionist motivation, it might better reflect the political realities in this context to take a “hypothetical” approach. We might ask what would happen if the legislature did seriously consider the issue anew. And we might say that if the court is convinced that *if* the legislature considered the issue anew, it could not adopt or continue the challenged product standard except on protectionist grounds, then the court should treat the regulation as protectionist and strike it down without reference to the actual history of its adoption or continuation.

This approach is designed primarily to deal with cases where circumstances have changed since the regulation was adopted, or significant new information about regulatory possibilities has come to light, so that the refusal of recognition now seems to achieve no valid goal. But notice that the hypothetical approach is still not equivalent to the rational basis test or less-restrictive-alternative analysis, where the court formulates its own view on the empirical question of whether the regulation does any good and upholds or invalidates the regulation accordingly. The question under the hypothetical approach is not just what the technical facts are, but what the possibilities are for reasonable disagreement. Only if there could be no plausible explanation other than purposeful protectionism for the legislature’s disagreeing with the court should the court overturn the regulation. In standard contexts, like the Calivada widget examples, it will often be easier to find protectionism by direct consideration of the actual adoption of the regulation than by this “no plausible explanation other than purposeful protectionism” test. But in cases where the legislative process, or recent legislative process, hardly exists, which may include many low-level product standards cases, the hypothetical “no plausible explanation other than purposeful protectionism” test is a significant alternative.

I pointed out that the hypothetical approach is not equivalent to the rational basis test or less-restrictive-alternative analysis, where the court formulates its own view about whether the regulation does any good and upholds or invalidates the regulation accordingly. That brings us back to the first of the three explanations of nonrecognition that I mentioned above. What if the nonrecognizing legislature honestly believes, after deliberation, that the standard it refuses to recognize is inadequate to protect the relevant values, but the court disagrees? Where there is no issue about values, but merely a scientific

24. I explain in Section III.B why this would be enough to make the legislative decision count as protectionist.

issue, it might be argued that the court can hear expert evidence and decide as competently as the legislature.

Now, even if we think the court should engage in rational basis review or less-restrictive-alternative review, this is not “balancing” in the sense of this Paper. It is not balancing of the sort the virtual representation argument is supposed to justify. If the court sticks to the narrow question whether the regulation achieves *some* benefit, either in itself or in comparison to some less restrictive alternative, it is never called upon to weigh costs against benefits. If the court finds itself balancing local benefits and foreign costs, it will have gone off the rails.²⁵

Granted that rational basis review and less-restrictive-alternative analysis are not balancing, the question remains whether the court should engage in them. My own view is that the court should not engage in rational basis review or less-restrictive-alternative analysis. Commentators who recommend rational basis review or less-restrictive-alternative analysis often talk as if the question of the efficacy of the means had never been asked before the court asks it. But sometimes the legislature has asked it, and has selected the means it did precisely because it regarded them as efficacious. If the legislature has made such a decision, the question arises why the court should feel entitled to substitute its judgment for the legislature’s on the empirical question of the efficacy of the means. I can see no adequate ground for the court to substitute its own view.²⁶

Notice I do not say the court should exclude *evidence* on whether a law achieves any of the benefit claimed for it, or on whether it achieves any more benefit than some less trade-restrictive alternative. Such evidence may be relevant to the question whether there is covert, purposeful protectionism. But the question about the legislature’s purpose is distinct in principle from the question whether the law achieves any benefit, even if some evidence about effects is relevant to both. Also, the court has no choice but to inquire into the legislature’s purpose. It cannot accept the legislature’s supposed empirical determination without considering whether it is disguised protectionism; but it also cannot simply rely on its own determination of the empiri-

25. There is more discussion of pure and impure versions of these tests in Appendix 2.

26. Remember that I speak in generalities. Of course it could be that in some system the foundational texts *require* the court to decide the substantive issue for itself, and to substitute its judgment for the legislature’s in case of disagreement. For example, the central question in the interpretation of the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) under the WTO is whether or to what extent they require such substantive review, as opposed to requiring only review of aspects of the legislative process. Although a literal reading, especially of the TBT, might seem to require substantive review, I think it is fair to say neither text is completely clear. I shall say no more about them in this Essay.

cal issue without begging the question of whose judgment should control.²⁷

It might be said that in cases of disagreement, the presumption should be that the court is right, since the legislature may have slighted foreign interests. But that ignores the central point we have established — that provided the legislature is not motivated by protectionism, it does not need to consider foreign interests in this sort of case. In contrast, it seems to me there is a real danger that the courts, as federal institutions, will be biased in favor of trade-for-trade's-sake and will thus be *too* solicitous of foreign interests. Courts may be subject to biases just as much as legislatures, even if the court's biases are not for or against any particular nationality.

It might also be suggested that the disagreement here is not just between the court and the legislature whose refusal of recognition is under review. There is also the legislature that adopted the standard that is being denied recognition. There is a disagreement between two legislatures on the empirical issue, and the court appeals to its own view only to break the tie. This probably makes the case for judicial requiring of recognition about as strong as it can be, at least when the countries involved are very similar. To my mind, it still gives too little weight to the primary responsibility of the local legislature for the protection of local interests.²⁸

4. The last class of cases I want to discuss are borderline both as to whether they are “trade regulation” cases and with regard to the applicability of the virtual representation argument. We will take our examples from the real world. *Commonwealth Edison Co. v. Montana*²⁹ involved a challenge to Montana's thirty percent ad valorem severance tax on coal, ninety percent of which was shipped out of state. Even though the tax did not discriminate in any way between in-state and out-of-state purchasers of coal, it was challenged under the dormant commerce clause, essentially on the ground that Montana's high tax was exploiting foreign purchasers to fill the state treasury. *Parker v. Brown*³⁰ involved a dormant commerce clause challenge to a California state marketing scheme for raisins, designed to raise and stabilize prices to raisin producers. Again, ninety percent or more of the raisins eventually went out of state. *Cities Service Gas Co. v.*

27. Remember there is a fuller discussion of the meaning and ascertainment of legislative purpose in Part III.

28. Nonbinding international standards may also be relevant to the issue of the nonrecognizing legislature's actual purpose. But it seems obvious that if the legislature has not agreed to be bound by the standards, it should not be bound indirectly by the court's treating divergence from such standards as *dispositive* of the case, under either the less restrictive alternative rubric or the protectionism inquiry.

29. 453 U.S. 609 (1981).

30. 317 U.S. 341 (1943).

*Peerless Oil & Gas Co.*³¹ involved a dormant commerce clause challenge to Oklahoma's minimum-price-at-the-wellhead for natural gas, ninety percent of which was shipped out of state. The minimum price was defended as a conservation measure. The original of this line is *Milk Control Board v. Eisenberg Farm Products*,³² involving Pennsylvania's minimum price for milk producers. As in all the rest of these cases, the regulation made no distinction between milk purchased for in-state distribution and milk purchased for shipment out-of-state, but in this case only ten percent of the milk was destined for interstate commerce.

As I say, these are borderline "trade regulation" cases. The Supreme Court upheld all of these regulations without much difficulty, but it nonetheless treated them as genuine dormant commerce clause cases. In contrast, it seems unlikely that any of these cases would give rise to a colorable challenge under the basic trade regulation provisions of the Treaty of Rome or the GATT — not under the GATT because the provisions are internal measures that are nondiscriminatory even in effect, and not under the Treaty of Rome because, in addition, any effect on trade falls on exports.³³

As to whether the virtual representation argument has any force as applied to these cases, that also seems unclear. The severance tax in *Commonwealth Edison* and the minimum-wellhead-price in *Cities Service* can both be defended as attempts to prevent the inefficiently rapid depletion of nonrenewable resources. If that is how we regard them, then it seems that regulation that optimizes over local interests, which includes the producers, will optimize over all interests. If, on the other hand, these regulations really are an attempt to exercise market power, then optimizing over local interests will not optimize over all interests, and protection of foreign interests by some central institution would be appropriate in principle. Much the same can be said about *Parker v. Brown*. The marketing scheme may be an attempt simply to stabilize the market, in which case it seems plausible that what is best for the local producers is best for foreign purchasers as well. But not if the scheme is an attempt to exercise market power, which California certainly has in raisins.³⁴

My remarks about these cases are tentative, but I do not propose to try to sort them through further. Suffice it to say that these are the

31. 340 U.S. 179 (1950).

32. 306 U.S. 346 (1939).

33. The Court of Justice has limited Article 34 to discriminatory measures. Case 15/79, *Groenveld* [1979] ECR 3409. Incidentally, specialized provisions or agreements relating to agriculture might be relevant to *Parker* and *Eisenberg*, but those are by definition not the basic general rules about trade.

34. I ignore *Eisenberg*, since Pennsylvania seems not to have significant market power in milk.

cases that prevent me from saying categorically that the virtual representation argument has no force in the trade regulation context. Whether I am over-scrupulous, or how important the limitation on my claim is, I leave to the reader to decide for himself.

One final word. In the cases I have been discussing that involve regulation affecting exports, the law was nondiscriminatory even in effect. So it is worth noting specifically that if we are confronted with a law that has a discriminatory effect — a law that discourages exports more than local sale (whether of processed or unprocessed goods) — my refutation of the virtual representation argument still applies. Provided the law regulates economic relations between locals and foreigners, addresses market failure, and is nonprotectionist, there is no need for balancing to protect foreign buyers. The regulation will exhibit local/global equivalence. The local producers who have an interest in selling to foreign buyers now play the same role that was played by the local consumers, with their interest in buying from foreign producers, in our *Calivada* cases. They stand in, in effect, for the burdened interests.³⁵

C.

The reader who is now persuaded that the virtual representation argument is irrelevant to most or all trade regulation cases could skip directly to Part III. For the reader who is not persuaded, I include this

35. Thinking about cases involving exports does draw our attention to a fiction embedded in both the virtual representation argument and my refutation. Consumers are natural persons, and they are normally represented in the legislature of the territory where they consume. Some producers are also natural persons, but many producers are corporations or other business organizations. (For convenience, I shall speak simply of “corporations.”) Now, corporations are not formally represented in any legislature I am familiar with, not even local corporations. And yet the virtual representation theorist does not argue that we should have judicial balancing review of all laws that burden corporations. He still wants to distinguish between local and foreign corporations. I agree that this makes sense (where the virtual representation argument itself makes sense, as I concede it does in some kinds of cases). Corporations can exert political influence even without formal representation, and some will have more influence than others. With regard to local corporations, we tend to worry more about their having excessive influence than about their interests being slighted. But if the virtual representation theorist is going to distinguish between local corporations, who do not need balancing protection, and foreign corporations, who do, the criterion for distinguishing cannot be formal representation. Nor can we plausibly suggest that the court should examine particular corporations’ political influence in particular legislatures case by case. Some proxy is needed. The obvious proxy is the territorial location of the activity that represents the particular interest of the corporation on which we are focusing. That proxy seems to be implicit in the virtual representation theorist’s claim, for example, that we should balance to protect “foreign” plastic widget producers but not “local.” There is obviously much more to be said about this issue, but it is not my project to develop the best version of the virtual representation argument. I can say for now that whatever criterion the virtual representation theorist uses to distinguish between local and foreign corporations, it is accompanied by the assumption that local corporations’ interests are effectively accounted for by the political process, and I can therefore rely on the same criterion in my response to the virtual representation argument.

section of episodic remarks prompted by audience reactions to earlier versions of the Essay. Perhaps something here will speak to the reader's doubts.

1. Consider again our very first example, where there are no environmental harms from plastic widgets, and where the unregulated market achieves an efficient division between cardboard-widget consumption and plastic-widget consumption in Calivada. I want to remind the reader, at greater length than before, how and why the market generates an efficient result. The market accounts for all interests by combining decisions of separate decisionmakers, none of whom considers any interests but his own. In our present example, the cardboard-widget producers and the plastic-widget producers each consider their own interests, and they embody those interests in decisions about what products to offer for sale and at what price. Consumers consider their own interests, and they embody those interests in decisions about what they wish to buy and at what price. Each consumer will buy from the producer whose offer best comports with his preferences. The final pattern of transactions is efficient because it is determined by a process that evokes information about and compares all affected interests, even though no single actor in the process considers all interests. This is the crucial point: *In appropriate contexts, it is possible to have a process that optimizes over the interests of all parties affected, even though no single party or agency ever considers all those interests.*

Indeed, there may be a variety of processes with this property. When the government intervenes in the market, as it does in our second and third examples, it need not actively consider all the interests affected by its decision. The government can make adjustments to account for interests not otherwise properly accounted for (in our example, the interests of environmentalists, or in some other case, the interests of consumers who require paternalistic supervision). But once those adjustments are made, considering only certain interests, the rest of the work of accounting for other interests and producing an efficient outcome can still be left to a market-type mechanism.

I have heard the objection that my appeal to a hybrid government/market mechanism is incoherent. The market registers preferences, but when government intervenes (so goes the objection), it intervenes to protect interests. Hence the market and government do essentially different things, and it is a category mistake to think government might ever properly rely on a market-type mechanism to achieve governmental ends. Now, it is true that the market directly registers only preferences, and that sometimes (in cases of paternalism) the very reason for government intervention is that people's preferences and their interests diverge. Still, preferences are often a good proxy for interests, both because people tend to prefer what is in their interest, and because in many contexts their only relevant inter-

est is in the satisfaction of their preferences. So, even if government's proper and actual concern is with interests, it may be perfectly justified in leaving the protection of some interests to the market when there is no reason to suspect that the relevant preferences and interests diverge. In our first Calivada example, when the government decides not to intervene in any way, it is relying on the market to optimize over everyone's *interests*, through the proxy of preferences. In the second and third examples, when the government intervenes to protect the interests of the environmentalists, we can assume that there is no divergence between the environmentalists' preferences and their interests; the problem is that the environmentalists' *preferences* are not even being registered by the market, since the environmentalists are not parties to the transactions that affect them. And insofar as the government leaves it to the market to protect consumers (second example) or plastic-widget producers (second and third examples) it is assuming that those parties' preferences adequately reflect their own interests.

2. Let me now spell out the second example, involving the green tax, to make it clearer why the legislature need not consider any interests but the environmentalists' when it sets the tax. Suppose that in order to set the tax, the legislature investigates the physical consequences of the use of plastic widgets and decides how much those consequences damage the interests of the environmentalists. In the end they decide, let us say, that each plastic widget in Calivada damages the interests of the environmentalists (all of them together) in the amount of T dollars. So they impose a tax of T dollars on each plastic widget.

Consider what happens with the tax in place. A Calivada consumer who buys a plastic widget at price P (tax not included) will have to pay $P+T$. Therefore she will buy that widget only if its value to her is at least $P+T$. But now, if the legislature has set the tax right, so that the disvalue of that widget to the environmentalists is in fact T , the *net* value of the widget to all Calivada citizens together is at least $P+T$ (the value to the consumer) - T (the disvalue to the environmentalists) = P . If the plastic-widget producers offer the widget for sale at P , then the value to them of the widget (production costs, or opportunity costs, as the case may be) is less than P . In other words, we will have a transaction if and only if the net value of the widget to all Calivada citizens together is greater than the value of the widget to the producers. Everyone's interests are taken into account, and the result is an efficient transaction or nontransaction. (In illustrating the virtues of the market, we often point to the Pareto-improving properties of completed voluntary exchanges, so it is worth emphasizing that appropriate nontransactions are as important to the achievement of efficiency as appropriate transactions.)

The above example is crude and oversimplified, but it should suffice to make the point. *All the legislature has to think about to secure this efficient result is the interests of the environmentalists.* It does not have to think about the interests of the plastic-widget producers, nor about the interests of the Calivada widget consumers. The interests of the environmentalists were the only interests unaccounted for by the unregulated market, and when the legislature intervenes to protect those interests by adopting the tax, it does not somehow create a situation where it needs to investigate all the other relevant interests *de novo* and compare them for itself.

3. I have pointed out that an efficient tax might eliminate all transactions in plastic widgets, and that if the legislature believes this will be the effect of an efficient tax, it might prefer a formal ban, which is easier to enforce. It might be objected that legislation (tax or ban) that eliminates all transactions deprives the producers of a fair chance to compete. This is not so. The producers are not being denied a fair chance to compete, even if their market share is reduced to zero. All a “fair chance to compete” can plausibly mean is that one should not be excluded from the market by measures that prevent *efficient* transactions. Fairness does not require that the plastic widget producers be allowed to conspire with consumers to impose negative externalities on the environmentalists. The producers are not entitled to a regime that leaves them some business, nor even to a regime that leaves them some business so long as they are prepared to make modest concessions from their pre-intervention prices. What they are entitled to is a regime that leaves them some business if it is efficient that they have some business, and they are getting that here.

Analogously to the “fair chance to compete” argument, the plastic widget producers might say that if they have no chance at all to make a transaction, as under the ban, then they have no chance to make an offer that reflects their interests, so my underlying argument, which depends on the producers’ market participation to reveal their interests, collapses. There is a glimmer of sense in this, but no more. It is true that before the legislature can impose the ban, as opposed to an efficient tax, it must have some empirical expectation about the range of foreseeable prices for plastic widgets. Of course, on many assumptions about the interests of the environmentalists and the consumers, all we need to assume to justify the ban is that the price of plastic widgets will be positive — not an adventurous assumption. If the decision is a closer call, then the legislature may look for guidance to historical prices for plastic widgets in its own territory, or prices in other markets, or common sense. And, as I have pointed out, the legislature motivated solely by the pursuit of efficiency has an incentive, in the interests of its own consumers, not to impose a ban when the efficient tax would leave plastic widgets with some market share.

If the plastic-widget producers still claim to be unfairly excluded by an efficient ban, we might point out that the actual persons (natural or legal) who produce plastic widgets are not excluded by the ban. In principle, they could switch to producing cardboard widgets. This may not be a realistic choice; but if it is not, the only reason it is not a realistic choice is that it is inconsistent with the producers' interests. If what it would take to complete a transaction that reflects everyone else's interests (consumers' and environmentalists') is inconsistent with the plastic-widget producers' interests, then there should be no transactions with them. In that conclusion, the producers' interests are fully reflected.

I said earlier that fairness did not require that the plastic widget producers be allowed to conspire with consumers to impose negative externalities on the environmentalists. The producers might say that fairness does require them to be allowed to impose that externality if they have done so undisturbed in the past. They should not be disrupted by sudden changes. Now, this raises a different sort of issue. This is not about a "fair chance to compete." This is a plea for relief from transition costs, or for favorable redistributive measures. No doubt in some cases the producers should have such relief, or such redistributive concessions. But I think we can say rather briefly in the present context that neither transitional relief nor redistribution is so generally appropriate that we should achieve it by a systemic rule limiting the sort of taxes or bans we are considering.³⁶ Nor should we invite courts to evaluate the need for transitional relief or redistributive measures on a case-by-case basis, except perhaps in such special circumstances as are contemplated by the GATT's Article XXIII:1(b) on nonviolation impairments of interest.

4. I suspect that even now some readers will have the unshakable feeling that courts should intervene to protect foreign producers when they would not intervene to protect locals. After all, the foreigners are unrepresented, they cannot protect themselves! There is of course one hugely important judicial protection for foreign producers, and it is protectionism review.³⁷ In contrast, if a trade regulation is not protectionist, then we have seen that the foreigners' lack of representation does them no harm. In the trade regulation context, the legislature

36. For related observations, see Howse & Regan, *supra* note 13, at 277-78, 282-83, 287-88.

37. I have said that protectionism review can be justified as a way of preventing failures of the political process in the treatment of local interests, and that is true. But it is also true both that foreign producers are indirect beneficiaries of protectionism review so justified, and that it is precisely their being foreign and unrepresented that invites exploitation of consumers by local producers. It is also the international dimension of protectionism that makes it possible to discourage protectionism by international agreements, which seem to be more effective against it than local politics. In this context, local consumers are largely indirect beneficiaries of the political efforts of local producers-for-export.

that optimizes over local interests will optimize over all interests, including those of foreign producers.

Of course, legislative mistakes are possible. Granting that the legislature will get it right for foreign interests if it gets it right for local interests, still the legislature may get it wrong even for *local* interests, and foreign interests may suffer in consequence. Might we not think that a mistake against foreign interests is worse than a mistake against local interests? And that we need judicial balancing review specifically to prevent such mistakes against foreign interests?

Perhaps, but remember two points. First, we are talking about mistakes, not intentional local preference. It is not clear to me why genuine mistakes should be worse when they harm foreigners.³⁸ Second, judicial balancing review is not the straightforward cure for legislative mistakes that it may sound like. The reason we generally leave things to legislatures is that they are more likely to correctly identify and weigh the various competing interests than courts. And my central point has been that this is true in the trade regulation context also, despite the involvement of foreign interests. Introducing judicial balancing review of nonprotectionist regulation will tend to reduce the accuracy of the system.³⁹ Therefore it only makes sense if reducing the accuracy of the system seems a reasonable price to pay for biasing the system against mistakes that harm foreigners. For myself, I do not think we should bias the system this way, but I have no more to say for now against someone who thinks we should — except to caution him to be sure he is not still in the grip of the immensely seductive virtual representation argument.

III. PROTECTIONISM, LEGISLATIVE PURPOSE, AND LEGISLATIVE PROCESS

A.

There is controversy about how we should understand protectionism, but even so, it is clear that suppressing protectionism is the most widely accepted goal for systemic limitations on member-state trade regulation. Why is it universally agreed that protectionism should be suppressed? The answer, clearly, is that protectionism is inefficient. That is not the only reason one might have for suppressing protec-

38. For my response to one suggestion about why mistakes against foreigners might be specially problematic, see the discussion in Section III.B of the “appearance of protectionism” test.

39. We might wonder whether we can bias the balancing inquiry itself in such a way that it will (statistically) improve on legislative results. I suggest in Section III.C that the standard attempts to bias the balancing inquiry in this way turn it into purpose review.

tionism, but it is by far the most salient argument in the general theoretical discussion of trade regulation (not specific to any one legal system) that this Essay addresses.⁴⁰

If the primary reason to suppress protectionism is that it is economically inefficient, the question about the meaning of protectionism becomes the question of what sort of regulation causes inefficiency: regulations with protectionist purpose? regulations with discriminatory effect? regulations that use means that do not achieve their objectives, or that achieve no more of their objectives than some less trade-restrictive alternative?

Let us start with the last of these candidates. There is no doubt that a law that restricts trade and achieves no benefit is inefficient. So is a law that restricts trade more than some alternative that would achieve the same benefit.⁴¹ But even though laws that are more trade-restrictive than necessary are inefficient, it does not follow that the court should investigate and decide for itself whether a law is more trade-restrictive than necessary and invalidate laws that it finds are so. As I pointed out in Section II.B.3, that begs the question of whose judgement should prevail when the court and the legislature disagree about the necessity of the law. If the legislature genuinely believes that the law is necessary — that no less restrictive alternative would achieve the same benefit — I can see no justification for the court's substituting its judgment (unless, as I suggested above, circumstances have changed, or new technological information has come to light, since the legislature acted). Rather, the court should rely on its own judgment only when it is persuaded that the legislature has not genuinely made a conflicting judgment (or could not do so now in light of the current situation), which is to say, only when the court is persuaded that the legislature was motivated by protectionist purpose (or would be so motivated if it made the supposed judgment of necessity now). So, let us set aside the question whether the legislature has cho-

40. Examples of other reasons for suppressing protectionism: (1) One might object to protectionism on the ground that it involves discrimination against non-nationals or nonresidents. But it is clear that there is no general principle forbidding countries to favor their own citizens or residents. So we need a special explanation of why such discrimination is objectionable in the context of market regulation, to which the obvious answer is the interference with efficient allocation. (2) Another reason to oppose protectionism is that it may undermine attempts to increase political integration. That is relevant only in systems where political integration is a goal. (3) Anti-protectionism can also be part of the broader project that Miguel Maduro usefully calls "market-building" in his very interesting study, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION* 88-102 (1998).

41. The first situation is a special case of the second. If a law achieves no benefit, then the "same benefit" could be achieved by the less restrictive alternative of having no law at all.

sen apt means for its ends, which leads us back indirectly to an inquiry into legislative purpose.⁴²

If we assume the legislature is achieving what it intends, the question remains whether protectionism should be defined by reference to protectionist *purpose* or by reference to “protectionist *effect*,” by which I mean disparate impact on foreign competitors of local economic actors. To pose the question thus clearly is virtually to answer it, if we remember that the objection to protectionism is on efficiency grounds. Protectionist purpose causes inefficiency; disparate impact on foreign competitors does not. Consider our example of the Calivada regulation taxing or banning plastic widgets. If the purpose of the Calivada legislature is to internalize the environmental harm caused by the use of plastic widgets in Calivada, then, as we saw in Part II, the law is efficient. (Remember we are assuming the legislature’s means achieve the actual ends.) The law is efficient despite its disparate impact on foreign widget producers. The reason for the disparate impact is just that foreign producers produce more harmful widgets; it would be inefficient to buy from them. In contrast, if the purpose of the Calivada legislature is not to protect the environment, but only to advantage local cardboard widget producers, then the law is not efficient. It causes a misallocation of resources and reduces overall welfare. The legislative purpose is the key.

Here is another way to make the point. Notice that in our two scenarios — where the Calivada legislature either does or does not have a genuine environmental purpose — the economic circumstances of the law, the text of the law, and the physical effects of the law — both on the environment and on patterns of trade — may be *identical*. And yet in one scenario the law is efficient, in the other it is not. The reason is that efficiency is determined not just by physical effects, but by people’s *preferences* about physical effects. Whether the law is efficient depends on whether it reflects actual environmental preferences of Calivada citizens, which we assume it does if the legislature’s purpose is to protect the environment, and which it does not if the legislature’s purpose is mere protectionism.⁴³

42. Of course, *evidence* about the aptness of the means to the ends is highly relevant — as I have said before and will say again — because it is relevant to the purpose inquiry. But the question for the court is not the ultimate question about means and ends; it is what the legislature thought.

43. Notice I have implicitly excluded constituents’ preferences from the “economic circumstances” of the law. Of course in a sense they are the crucial circumstances for determining efficiency, as the text makes clear, but they are not normally among the circumstances that judges who are trying to avoid a purpose analysis talk about as relevant to whether a regulation is protectionist. The WTO Appellate Body took a step in the right direction in *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11, WT/DS135/AB/R (Mar. 12, 2000), when it said consumer preferences about health risk are relevant to a determination of what are “like” products under Article III:4. ¶122. (It also said the health risk was relevant to the “physical properties” criterion of likeness, but perhaps only because of the effect on “competitive relationship”, ¶114, which

Anyone who has thought seriously about the meaning of “protectionism” (or of “discrimination” more generally) must have asked himself at some point: “Why should the court worry about legislative purpose? Surely it is the *effects* of laws that matter in the end.” We now have the answer to this question. In one sense, it is the effects that matter, the consequences of the law in operation.⁴⁴ But it does not follow that the *court* should focus on effects. To decide whether a law has good effects, we must decide both what its physical consequences are and how those consequences matter — how they comport with people’s preferences, how they should be valued. The legislature is a better body than the court to make both of these judgments, especially the second, *provided it actually makes the relevant judgment*. So, when the court considers legislative purpose, what it is really considering is whether the legislature has made a decision (regarding what *effects* to pursue and how) that the court can defer to. If the legislative purpose is protectionist, then the legislature’s decision is one the court should not defer to; whereas if the purpose is genuinely to protect the environment (or health, safety, informed consumer decision, or so on), then judicial deference to the legislature is in order.

B.

So far I have been making free use of the concept of legislative purpose. Some people doubt that the concept is intelligible; they doubt that we have any clear meaning in mind when we speak of the purpose of a corporate body. The short response is that beliefs about the purposes of groups and corporate bodies are deeply and indispensably entrenched in our ways of thinking about such entities.⁴⁵ In sup-

gets us back to consumer preferences.) But the majority of the Appellate Body said nothing to suggest that the preferences of third parties, like the environmentalists, are relevant to “likeness” or are part of the relevant circumstances. (The concurring member left more room for this. ¶154.) The majority’s position confirms my claim about judicial behavior, although I think it is wrong-headed as an interpretation of “like.” If plastic widgets harm the environment in a way cardboard widgets do not, and if the legislature acts on environmentalists’ concerns, then plastic widgets and cardboard widgets should not be regarded as like products even if widget *consumers* are environmental philistines who regard them as perfect substitutes. (In the majority’s defense, it did not need to consider third-party preferences in order to reach the correct result, which it did.)

44. I ignore the point that a discriminatory purpose may have direct bad effects of its own — as when a venture into protectionism poisons other diplomatic relations, or when discrimination by a legislature between its own citizens on grounds of race, or sex, or religion creates feelings of second-class citizenship.

45. A number of central doctrines of American constitutional law are explicitly formulated in terms of legislative purpose. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise of religion); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (establishment of religion); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (sex discrimination); *Washington v. Davis*, 426 U.S. 229 (1976) (race discrimination). For two centuries American Supreme Court justices have denied their concern with legislative motive, when it suited their purposes to do so, at the same time that they have built up a

port of this short response, remember that what we are concerned with here is the *general* motivation behind a statute or regulation. If a city council adopts an ordinance forbidding “vehicles in the park,” there may indeed be no answer to the question whether they intended to exclude battery-powered roller-blades. But that is not the sort of question we are asking when we ask whether the legislature was motivated by protectionist purpose.

For those who are still skeptical, let me suggest a way to reanalyze the concept of legislative purpose that should make it more palatable and much harder to reject. First, imagine that in our Calivada widget example, the plastic widget producers as well as the cardboard widget producers are in Calivada. Even in these circumstances, with the plastic widget producers in-state, the Calivada legislature might adopt a statute banning plastic widgets. The primary political support for such a ban would almost certainly come from citizens’ concern for the environment.⁴⁶ This concern might be mediated through environmental groups, but those groups would not be powerful without genuine citizen support. So there is some possible causal process in the legislature, describe it how you will in the most positivistic political science terms, that would count as the plastic widget ban’s being occasioned by environmental concern. Now move the plastic widget producers out-of-state. Surely it is still possible that if Calivada adopts a ban on plastic widgets, the causative political forces are the same ones that operated to produce the ban when the plastic widget producers were in-state. It is also possible, of course, that a new causal process has taken over — that the cardboard widget producers are using their position as the only in-state producers to exploit local consumers by denying them access to foreign plastic widgets. But if there are two possibilities, it is sensible to ask which of these possibilities is realized. Which set of causal forces is responsible for the ban? That, I suggest, is the very same question I have referred to as the question about “legislative purpose” — which indeed seems to me the most natural way to refer to it.⁴⁷

This analysis of legislative purpose in terms of legislative process, specifically in terms of the political forces that account for the adoption of the law, helps us to deal with a number of standard questions

constitutional jurisprudence in which questions about legislative motive play a central, explicit role. I suspect every individual justice who sat for any length of time could be quoted on both sides of the issue. The proof of the pudding, however, is in the actual purpose-based doctrines.

46. It is possible of course that the ban would be adopted just to advantage cardboard widget producers vis-à-vis (in-state) plastic widget producers, but that is relatively unlikely — certainly not sufficiently likely that the court should worry about it, especially since any distortion is likely to be corrected by the further political activities of similar parties.

47. And what if both environmental forces and protectionist forces are at work? I discuss that in the next paragraph but one.

and objections concerning the purpose approach. One standard objection points to the possibility that individual legislators may have only "oblique" intentions. In the Calivada case, for example, some individual legislator may not care either about the environment or about protecting cardboard widget producers. Of course, his having no purely *personal* view is not a problem, if he votes in his representative capacity to advance the views of his constituents. But he may not be doing even that; his constituents may be indifferent or inattentive. If so, the legislator may care only about toeing his party's line, or doing a favor for a friend in the legislature, or settling a score with an enemy. But in every one of these cases, even if the individual legislator has no personal (or representative) view about the issue at all, he is casting his vote on behalf of someone who does.⁴⁸ Since our basic question is not about the personal views of the legislators but about what political forces are at work in the legislature when it produces the regulation, we can simply regard the legislator as a conduit. The important question is what forces are at work through him, whatever his personal reasons for putting his vote at their disposal.

Another standard problem that our process analysis helps to resolve is the problem of multiple motivation. Suppose the legislature is moved by both environmental and protectionist purposes; that is to say, suppose both environmental and protectionist forces are at work in the legislature. When do we count the result as protectionist? The answer is that the law should count as having been adopted with a protectionist purpose when the contribution of the protectionist forces was a but-for cause of the decision. If the protectionist impulse was *not* a but-for cause, then a majority of the legislature voted for the regulation on environmental grounds, and the court should defer to that majority. If the protectionist impulse *was* a but-for cause, so that without it the regulation would not have been adopted, then there was no majority of the legislature that voted for the regulation on environmental grounds, and there is no majority for the court to defer to.⁴⁹ Notice I do not assume that individual legislators have unmixed purposes; some may have been moved only by environmental considerations, some only by protectionist considerations, and some by both. But in theory we can ask about each legislator how she would have voted if any protectionist impulse actually affecting her vote had been absent. In practice we cannot undertake a legislator-by-legislator inquiry. But the question how the legislature as a whole would have acted if there had been no protectionist forces at work is sufficiently

48. Or who does indirectly: if the legislator is doing a favor for a friend, and the friend is trying to please his constituents, then our legislator is pleasing those constituents at one remove.

49. The but-for test is adopted, without this explanation, in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

well-defined and, I think, sufficiently amenable to judicial decision for our purposes. (I shall say more about the judicial tractability of the process inquiry later on.)

Even some people who are sympathetic to the view that protectionism should be understood in terms of legislative purpose worry about whether we should be concerned with “subjective” or “objective” intent. Our suggestion about analyzing purpose in terms of process casts some light on this matter. With regard to natural persons, the basic distinction, I take it, is between what is in the mind of the actor (subjective intent) and something else (objective intent) that is supposed to be inferable just from externally observable circumstances, including both the context and consequences of the action. Now, with regard to the legislature, we cannot refer to its collective “mind” as comfortably as we refer to the mind of a natural person, but the obvious analogue to concern with the “subjective intent” of a natural person is concern with the *internal workings* of the legislature, concern with what goes on in the legislative halls. If we are concerned with “objective intent,” in contrast, we treat the legislature as a black box and try to infer the relevant intent just from the inputs (the external circumstances) and the outputs (the text of the regulation and its observable consequences). If this is the distinction, then it is clear that what we should be concerned with is “subjective” intent. We have analyzed purpose in terms of the legislative process, specifically in terms of the causal factors that operated in the legislature to produce the legislation. But this process is *internal* to the legislature. It is a matter of what happens in the legislative halls in the generation of the law, not a matter of the consequences.

I have not just chosen arbitrarily to define protectionism in terms of “subjective” legislative intent. I have shown that we *must* define protectionism this way if we are to preserve the relationship between protectionism and efficiency. Whether a law is efficient depends, in the sort of case we are concerned with, on the purpose with which it was adopted.⁵⁰ To put the point the other way around, no understanding of “objective intent” can possibly do the job. We have not said just what “objective intent” is — its proponents never do — but it is supposed to be inferable somehow just from the economic circumstances in which the law is adopted, the text of the law, and its physical effects. But we have seen that these factors are not enough to determine whether the law is efficient. There may be two laws, one of which is efficient and the other not, which are adopted in identical economic circumstances, which are identical in their texts, and which have identical physical effects. Hence no possible understanding of “objective

50. In practice, of course, the court may rely partly on presumptions and per se rules, but for now we are trying to identify the ultimate question for which the presumptions and per se rules should be designed as heuristics.

intent” can distinguish between efficient and inefficient laws. Despite this general demonstration, I shall return in a moment to the question whether there is any useful way to spell out the notion of objective intent. But first there is another issue that has probably become pressing in many readers’ minds.

In addition to the distinction between subjective and objective intent, let me distinguish between what I shall call subjective and objective *evidence*. By “subjective evidence,” I mean express avowals or denials of protectionist purpose by individual legislators or other relevant officials, or in corporate documents like committee reports. “Objective evidence” is everything else that might be relevant to the determination of legislative intent, including evidence about economic circumstances, the text of the regulation, and evidence about effects. With this distinction between kinds of evidence in hand, we can state two common objections to the subjective intent test. On the one hand, some people regard it as improper for the court to consider subjective *evidence* at all, even though it would seem to be the most persuasive evidence on the issue of subjective intent. The argument is that the legislature is not responsible to the court for its internal processes, but only for its results (or something like that). On the other hand, many people worry that if the court is limited by the focus on subjective intent to considering *only* subjective evidence, it will be unable to ferret out many instances of covert protectionism, and regulations that should be invalidated will be upheld.

As to the first objection, concerning the impropriety of considering subjective evidence, I shall merely observe that even courts that claim to have scruples about considering subjective evidence seem to consider it whenever it is available.⁵¹ And rightly so. Purpose is the crucial question, and the court should consider whatever evidence there is. As to the second objection, that if the court is limited to considering subjective evidence it will be hamstrung in its attempts to ferret out covert protectionism — that is true enough, but irrelevant. There is no reason at all for the court concerned with subjective *intent* to limit itself to considering subjective *evidence* as I have defined it. Lots of objective evidence (evidence other than express avowals regarding purpose) is relevant to the issue of subjective intent, including of course the text and the effects of the regulation under review. As I just said in a different context, the court should consider all relevant evidence, of whatever sort.

51. See, for example, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352 (1977), where Chief Justice Burger makes a point of quoting subjective evidence of protectionist purpose from the record even as he denies the necessity of finding protectionist purpose, and *Canada — Certain Measures Concerning Periodicals*, Report of the Appellate Body, AB-1997-2, WT/DS31/AB/R, at Part II.B.3 (June 30, 1997). As I pointed out in note 45 *supra*, courts that claim not to be interested in legislative motive or in subjective evidence cannot be taken at their word.

So, courts should consider subjective evidence, but they are not limited to it. The use of subjective evidence should create no problem if we keep in mind a few obvious precepts:

(1) Courts can find protectionist subjective intent even when there is no smoking gun in the form of subjective *evidence* of such intent, indeed even when there are explicit legislative denials of protectionist purpose. In some cases, the objective evidence of language, circumstances, and effects is enough to establish subjective intent (still *defined* in terms of the internal legislative process) by itself.

(2) Pointing in the other direction, a court should not be *over-*impressed by subjective evidence of intent that may reflect the purposes of only one or two legislators without reflecting the purpose of the legislature as a whole. The question is not whether there was a “taint” of bad purpose in the legislative process. The question is about what political forces actually determined the result.

(3) Finally, it is perfectly consistent with a subjective intent approach to have a “virtually per se” rule (as the United States Supreme Court calls it)⁵² against explicit local/foreign discrimination — in other words, to presume that explicit discrimination in favor of locals is protectionist unless some strong justification is positively demonstrated.⁵³

Let me now return to the question whether we cannot make something out of the notion of “objective intent,” despite my argument above that a satisfactory interpretation is impossible. The impulse to try to find a useful “objective intent” test is strong. The name itself is seductive. If we believe in the rule of law, we would like legal tests to be as objective as possible, rather than subjective. And it is easy to suppose that the “objective intent” test must be more objective, in the relevant sense, than the “subjective intent” test. But this is an illusion. What makes a test objective in the rule-of-law sense is (crudely) that it poses a clear question that has relatively clear answers in most cases, which different judges and observers can be expected to agree on. In fact, the “objective intent” test does not pose a clear question at all; instead, it is a sort of Rorschach test. The judge looks at all the “objective” evidence — the text of the statute, external circumstances, effects — and then simply announces whether there is protectionism or not. Consider the inability of commentators on the American dormant commerce clause who defend a non-purpose-based “discrimination” test to tell us just what constitutes discrimination.⁵⁴ Or consider the

52. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). With regard to the WTO and the European Union, see *supra* note 4.

53. As Justice Souter explains in his dissent in *C & A Carbone, Inc., v. Town of Clarkstown*, 511 U.S. 383, 422 (1994) (Souter, J., dissenting), it makes sense to presume that explicit discrimination has a protectionist purpose for the simple reason that nonprotectionist purposes can normally be achieved without explicit discrimination.

54. E.g., Robert A. Sedler, *The Negative Commerce Clause 25 v. Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L.

difficulty GATT and WTO dispute-settlement organs have experienced in giving any definite substance to the closely related question of when products are “like” under Article III:4. We have seen why this happens. The objective evidence is inadequate in principle to distinguish properly in all cases between regulations that should be upheld and regulations that should be invalidated. No coherent objective intent test is possible.

And still we may ask, is there not some way to make the “objective intent” test more specific? One natural suggestion would be to interpret “objective intent” as something like “the intent we would attribute to an ideal legislature that adopted this law in these circumstances with these effects.” Aside from the fact that we cannot afford to idealize the legislature to the point where protectionist intent becomes impossible, this definition presupposes that there *is* a unique intention we would attribute to a more-or-less-ideal legislature satisfying these conditions. But in any serious case the problem arises precisely from the fact that such a legislature might or might not value the nonprotectionist benefit enough to justify the regulation. In the *Calivada* case, for example, the question cannot be whether an ideal legislature would value the environment enough to ban plastic widgets; there is no answer to that question. The question is whether the *Calivada* legislature actually did value the environment that much, or whether it was just pretending. What was their subjective intent?⁵⁵

Another possible reading of the “objective intent” test would turn it into what I shall call the “appearance of protectionism” test: roughly, a court should strike down a regulation if it reasonably *appears* to foreign interests to be motivated by protectionism at their expense. One reason the “appearance of protectionism” test did not suggest itself sooner is that it is obviously not the right test if what we are trying to do by the inquiry into protectionism is to weed out inefficient regulation. How the regulation appears to foreigners is irrelevant to its efficiency. But even though inefficiency is the central theoretical objection to protectionism, there are other possible objections to protectionism that suggest other tests. For example, protectionism suggests a sort of hostility to outsiders, and if the federal system in question is concerned with cementing political bonds or encouraging cooperation across a range of contexts, protectionism may be damaging to that enterprise. For that matter, once a *rule* against protectionism has been

REV. 885 (1985); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986).

55. In any particular case, of course, the evidence about actual legislative process or purpose may be so thin as to leave us with little more than a guess about what most legislatures would have been doing in such circumstances. But even that is different from the question of what an *ideal* legislature would have been doing, and it is simply our best approach to the question of what the actual legislature was actually doing.

adopted in any federal or quasi-federal system, then violations of that rule may undermine the trust between member-states on which the system must to some extent rely. In either of these cases, what may be damaging is not just actual protectionism, but the appearance of protectionism. Hence the appeal of the “appearance of protectionism” test.

If we now consider the choice between the subjective intent test and the appearance-of-protectionism test, which test should judges employ? Not surprisingly, I recommend the subjective intent test. My reason is that providing a neutral perspective — neither that of the actor nor that of the affected nonactor — is what we have judges for. If we had no neutral dispute-settlement organs, then how the regulation appeared to affected foreigners would determine their diplomatic or legislative reaction (whether, for example, they would retaliate, or scuttle other cooperative projects). Even the *appearance* of protectionism would tend to undermine future cooperation. But if there are courts in place, the situation is changed. Trust in the central institutions can to some extent replace trust in the other parties. Instead of having the court take the perspective of the affected foreigners in order to prevent damage from the appearance of protectionism, we should encourage the affected foreigners to take the perspective of the court. Indeed, we should require them to do so. The central institutions should make their own interpretations of events, and both parties should be expected to accept those interpretations. That, as I say, is what the courts are for. The upshot is that the courts should decide for themselves what the regulating legislature’s subjective intent was, not how it appears to the other parties.⁵⁶

C.

Our last topic comprises a bundle of questions: Can courts adequately ascertain legislative purpose? Will courts be reluctant to accuse the legislature of protectionist purpose? Does the inquiry into protectionist purpose collapse into balancing?

⁵⁶ I say judges should decide “what the intent was.” There is a sense, of course, in which all the judges can decide is how it appears *to them*. Consider: There is a clear difference in principle between the statements “Verdi composed *Oberto*” and “I believe Verdi composed *Oberto*”; even I can see that logically either might be true while the other is false. But in practice, I am never in a position to actually recognize a divergence of truth value between these statements. In the same way, judges cannot distinguish in application between the “subjective intent” test and what we might call the “appearance of protectionism *to judges*” test. But there is still a difference between the “subjective intent” test and the *original* “appearance of protectionism” test, which was not about the appearance to judges, but about the appearance to foreigners disadvantaged by the regulation. Judges applying the original “appearance of protectionism” test could recognize and give some weight to a difference between their own perspective on the law and the perspective of parties negatively affected by the law. This is just what they will not do if they apply the “subjective intent” test for themselves, as I have argued in the text they should.

As to the first question, remember that even the “subjective intent” version of the protectionist purpose test does not require the court to peer into the minds of individual legislators. The question is what political forces determined the legislative result. There may be “subjective evidence” of protectionist purpose, if there are any legislative materials. It is surprising how often sponsoring legislators or committee reports will explicitly state a protectionist purpose. (Perhaps not so surprising when we remember that politicians want credit for their efforts on behalf of constituents or contributors.) Even in the absence of subjective evidence, the objective evidence about the context and timing of the legislative action, the text of the regulation itself, and the effects, may suffice to establish that the point of the regulation is protectionism.⁵⁷ And the court may be assisted by presumptions and per se rules, such as the presumption that explicitly discriminatory regulations are the result of bad purpose.

I do not claim that the decision about whether or not protectionism was the determining political impulse is always easy, or that the answer is always clear. Indeed, I have conceded above that sometimes the court may be reduced to deciding what would have moved a “typical” legislature to produce such a regulation in such circumstances.⁵⁸ No plausible test can make every case an easy case. I do claim that judges are well-suited to the task of deciding whether protectionism was the determining political impulse, and that as a class they are likely to be more competent at making this decision than at making the technical and evaluative decisions required by balancing or even just the technical decisions required by rationality review or less restrictive alternative analysis. As a class, what the sort of people who sit on high-level national or international tribunals know about (aside from legal doctrine) is politics. Nobody gets to such a position without being acutely sensitive to how political institutions work. The positive reason why judges should ask whether there is protectionist purpose is that, as we have seen, that is the right question in principle. But the case is strengthened by the fact that judges can do at least as well by this question as by any other that has been suggested.⁵⁹

57. Consideration of such evidence does not mean the inquiry into purpose has collapsed into balancing, as I shall explain further below.

58. See *supra* note 55.

59. It is perhaps worth emphasizing that although I recast the question of purpose in terms of the political process, and although I have argued that judges are likely to be good critics of the political process in the legislature, I am not suggesting that the court should engage in “free-form” process review, looking for distortions of the political process behind just any law. Rather, judicial inquiry into the possibility of distortion should be triggered by certain phenomena that make the presence of such distortion especially likely and especially problematic — such as explicitly discriminatory legislation or significant disparate impact on a disfavored group.

A standard objection to the purpose test is that judges will be reluctant to accuse the legislature of protectionist purpose, and so too few laws will be invalidated. This seems to me quite implausible. Finding that a legislature was motivated by protectionism is not at all like, say, finding that some local school board in the United States was motivated by racism. In the latter case, there may be some substance to the worry that courts will be too reluctant to accuse a very small group of people of a heinous attitude. But the accusation of protectionism is hardly such a grievous charge, and a finding about the behavior of a large body normally says nothing about any individual. It should also be remembered that *any* judicial invalidation of a regulation, on any ground, entails some criticism of the regulator. If the invalidation is based on a finding that the regulatory means do not achieve the putative end, or that they achieve less of it than some less restrictive alternative, then the regulator is criticized as irrational, or ill-informed, or as motivated by protectionist purpose (even if the court does not say so). If the invalidation is based on balancing, supposedly justified by the virtual representation argument, then the regulator is implicitly criticized as insensitive to, if not callously disdainful of, foreign interests. I see no reason to think the court will be, or should be, more reluctant to find protectionist purpose, which is a very natural and understandable temptation for legislatures, than to accuse the legislature of these other failings.

This brings us to our final point. We have seen that balancing is not required in principle in trade regulation cases. The proponent of balancing might still claim, as a last gasp, that even if balancing is not required in principle, it provides the criterion of validity in practice. He might say that the attempt to identify protectionism collapses into balancing in any hard case. This is a misunderstanding, occasioned by the fact that the evidence relevant to protectionism overlaps with the evidence relevant to balancing. But the overlap is only partial, and the questions on which the evidence bears remain distinct.

The principal evidence that is relevant to both inquiries is evidence about local benefits from the law. The existence and magnitude of local benefits is obviously central to the balancing inquiry. It is also relevant to the protectionism inquiry. If a law that transfers business from foreigner producers to local producers does not appear to achieve the nonprotectionist local benefit claimed for it, that suggests that the law is protectionism in disguise, because it suggests that the only local group benefited by the law is the local producers. But even here, the proper question under the protectionism approach is whether the enacting legislature *thought* there would be a (nonprotectionist) benefit. If the legislature sincerely believed in the benefit, the court normally

has no warrant to second-guess that empirical judgment.⁶⁰ Inevitably, and properly, the court's view about the likelihood of the benefit will affect its judgment about the legislature's actual beliefs and goals. Still, the ultimate question for the court is not whether there are benefits, but whether the legislature thought there were.

Local benefits aside, what about evidence regarding the foreign costs of the law? Here there are two differences between the balancing inquiry and the protectionism inquiry. First, *all* foreign costs are relevant to balancing, whereas it is clear that many foreign costs have no relevance at all to the protectionism inquiry. If Michigan forbids the sale of cigarettes, that has enormous costs in North Carolina and Virginia, costs that would figure prominently in a balancing inquiry.⁶¹ But those costs do not even begin to suggest a protectionist motivation, since Michigan produces neither tobacco, nor cigarettes, nor any close substitutes. The only foreign costs relevant to the protectionism inquiry are costs resulting from the transfer of business from foreign producers (in the standard case) to their local competitors. In the absence of such costs (that is, if there is no such transfer of business), we are not going to believe the law was intended as protectionism.⁶²

Even with regard to the costs associated with the transfer of business, there is a further difference between the protectionism inquiry and balancing. In the balancing inquiry, it is not enough to know that there are such costs, or even that they are significant. In principle, we need to know just how big they are. Only then can they be balanced, at least if the balance is at all close. In contrast, in the protectionism inquiry, once we find that there are such costs, and that the correlative benefits to local producers are significant enough so that they might plausibly have mobilized local producers behind a protectionist agenda, the inquiry shifts to whether the costs *did in fact* mobilize such a protectionist agenda and whether that was what carried the legislature. Further precision about the actual magnitude of the transfer is of little or no importance. There may be some positive correlation between the size of the transfer of business and the likelihood of protectionist motivation, but once we are over a threshold, the correlation is a very loose one, and the ultimate question is about what moved the

60. Except where circumstances have changed significantly since the adoption of the law. See the latter part of Section II.B.3.

61. Lest we forget: there is no *justification* for a balancing inquiry here, as my refutation of the virtual representation argument has shown. If it is good for Michigan consumers to ban cigarettes, there is no need to worry about the interests of the tobacco farmers and cigarette manufacturers, at least in the context of deciding whether or not Michigan can have its law (that is to say, setting aside issues about transitional aid or welfare redistribution). But my point for the moment is how the protectionism inquiry differs from a balancing inquiry, however unjustified the latter would be.

62. It could have been a totally misguided attempt at protectionism, in which case it hardly matters whether we strike it down or not, but such cases we can ignore.

legislature, not the size of the transfer. Rather than more precision about the size of the costs, what we will want is evidence about whether any *non*protectionist interests might have provided the political impetus for the law.

So, protectionism review does not collapse into balancing, even though it looks at some of the same evidence. Actually, a better case might be made that balancing collapses, or should collapse, into protectionism review.⁶³ The classic statement of the balancing test for the American dormant commerce clause, in *Pike v. Bruce Church, Inc.*,⁶⁴ does not say that the law under review should be struck down if the foreign costs are greater than the local benefits. It says that the law should be struck down if the foreign costs are “clearly excessive” in relation to the local benefits.⁶⁵ This is similar to the question under proportionality review whether the costs are “disproportionate.” What is the justification for these deviations from pure balancing? One natural suggestion is that they amount to a sort of “manifest error” rule. We recognize that legislatures are generally better suited to the balancing inquiry than courts, but even legislatures make mistakes, so we say that a court should overturn the legislative result when and only when the court is strongly convinced that the legislature got it wrong.

That still leaves the question of how strongly convinced the court needs to be. My own suggestion is (crudely) that the court needs to be sufficiently strongly convinced that the legislative result does not represent a correct balancing so that it thinks the reason for the legislature’s error was protectionist purpose. My reason is this: given that the legislature in general does better than the court at balancing, the court should displace the legislative decision only if it has some *explanation* of why the legislature was mistaken in the particular case. Just believing they were mistaken, just disagreeing with them, is not an explanation; believing they were motivated by protectionist purpose is. So, the court should not displace the legislative decision unless they believe there is protectionist purpose (or unless there has been a significant change of circumstances since the law was adopted, which would also explain the legislature’s “mistake,” and the law fails the “hypothetical” purpose test outlined in Section II.B.3).

63. I have argued elsewhere that in the practice of the United States Supreme Court, balancing “collapses” into the purpose inquiry in trade regulation cases — that the language of balancing disguises a concern with purpose and nothing more. Regan, *supra* note 3; Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987). Sometime I will publish an update, arguing that the jurisprudence from 1987 to 2001 confirms — indeed strengthens — my claim.

64. 397 U.S. 137 (1970).

65. *Id.* at 142.

There is another way balancing collapses into purpose review. In many contexts, we concede too much to the balancing idea when we speak of the issue as whether the legislature is “mistaken.” Insofar as the issue is an *evaluative* one, it is unclear what it could *mean* for the legislature to be mistaken, except that they did not actually make the evaluation claimed because they were motivated by a covert protectionist purpose. The court cannot decide whether some foreign cost is “excessive” or “disproportionate” in comparison to a local benefit without knowing how much that local benefit is worth. But there is no canonical answer to that question. Different regulatory jurisdictions are entitled to have differing views about the worth of such a benefit and to embody their differing views in their own legislation, and it is efficient that they do so, provided the legislature reflects the preferences of all its constituents. It follows that a court cannot displace the legislature’s decision without saying (at least implicitly) either, “This legislature’s claim to find a sufficiently large local benefit is insincere,” which means there is a disguised impermissible purpose, or else, “It is not plausible that any legislature could sincerely find a sufficiently large local benefit.” The second formulation may sound like a less direct criticism of the particular legislature, but actually it entails the more direct complaint. In sum, the court cannot carry through on the balancing inquiry without explicitly or implicitly reviewing the legislature’s purpose.

APPENDIX 1: UNCONSCIOUS PROTECTIONISM?

Since I endorse the subjective intent test, I ought to say something about the problem of “unconscious motivation,” which has occasioned considerable discussion recently in connection with the American constitutional law of race discrimination.⁶⁶ Unconscious motivation is not an issue that is often raised in connection with the protectionism inquiry, perhaps because subjective intent is not well established as the correct basic test. As we shall see, there are reasons why the issue of unconscious motivation can be ignored in the trade regulation context; but it is certainly worth explaining why. Consider an example from the sphere of race discrimination, a schematized version of *Memphis v. Greene*.⁶⁷ The City of Memphis, Tennessee, erected traffic barriers on a major street to reroute commuter traffic around a residential neigh-

66. E.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

67. 451 U.S. 100 (1981).

borhood. On the face of things, there is no problem here; this is the sort of thing cities do all the time. But in this case the residential neighborhood was predominantly white, and the commuters who were forced to detour around the neighborhood were predominantly black. The city's action was challenged under the Thirteenth Amendment to the Constitution on the ground that this race-correlated exclusion was a "badge or incident of slavery." The Supreme Court upheld the road closure, on the ground that the city officials who made the decision had no intention of disadvantaging blacks because of their race; they simply were not thinking about race at all. One common criticism of the Court's reasoning is that they should have considered the possibility that the decision was the result of *unconscious* racism.

Suppose we ask ourselves whether the Memphis officials would have closed the road if the commuters had been white and the neighborhood black, with everything else the same. It is easy to suppose that in these circumstances the officials would have kept the road open, still without thinking consciously about race. There is much evidence that in current American society, minorities' interests are undervalued by decisionmakers, even when those decisionmakers do not consciously think in terms of race (or sex, or whatever) at all.⁶⁸ Now, if the road would not have been closed for the benefit of a black neighborhood in the same way it was for a white neighborhood, it is clear that race is determining the city's decision even if no official is thinking consciously about race. We may say that the outcome is the result of "unconscious racism," which I now define in terms of this "party-reversal" test. Unconscious racism, so defined, is surely troublesome even if it is not clear what doctrinal role such a potent concept should have.⁶⁹

Notice a point that will be crucial when we return to the issue of unconscious protectionist motivation in the trade regulation context: Even in *Memphis v. Greene*, the fact that the original road closure was motivated by unconscious racism in the sense we have described does *not* entail that it was a bad law from the point of view of cost-benefit analysis or Kaldor-Hicks efficiency. It could perfectly well be that the benefit to the white homeowners of the closure was greater than the cost to the black commuters (considered just as commuters, any feelings of racial victimization aside). Of course, that means that in the race-reversed case, the right result would also be to close the road, now for the benefit of the black homeowners. By hypothesis, that would not happen. But the reason it would not happen would not be

68. E.g., Jersey Chen et al., *Racial Differences in the Use of Cardiac Catheterization After Acute Myocardial Infarction*, 344 NEW ENG. J. MED. 1443 (2001).

69. It should be noted that the Court in *Memphis v. Greene* specifically said that "there is no reason to believe that [the city] would refuse to confer a comparable benefit on black property owners." 451 U.S. at 119.

that the closure was undesirable; the reason would be that the white commuters could use their excessive political weight to block a desirable law. So, unconscious racist motivation does not entail inefficiency.⁷⁰

The same is true in the protectionism context. Someone might easily believe that even though the Calivada legislature was not consciously trying to protect local cardboard widget producers when it banned plastic widgets, still it would not have banned the plastic widgets if the plastic widget producers had been in-state. But even if this were true, it would not follow that the ban was inefficient. The alternative is that the ban is efficient, and would be efficient even if the plastic widget producers were in-state, but that if the plastic widget producers were in-state, they would have used their political muscle to block the enactment of this efficient law because of its costs to them. So, if we allow the concept of “unconscious protectionism,” we must recognize that a law might be unconsciously protectionist and still be perfectly efficient.

This conclusion casts no doubt on my earlier argument about the connection between *conscious* protectionism and inefficiency. There is a real distinction here between conscious and unconscious protectionism. If the protectionism is conscious — that is, if protectionist political forces were positively active and responsible for the law — then we have seen that the law is inefficient because it interferes with trade without achieving any other benefit (as seen by the legislature). Conscious protectionism is *itself* a distortion of the political process. In contrast, unconscious protectionism need not reflect any *actual* distortion of the political process. It may only reflect the fact that foreign producers who are *properly* disadvantaged in the actual situation by an efficient regulation, could themselves have distorted the process and blocked the regulation if they had been in-state.

So, what should we do with a finding, in some particular case, of unconscious racism or unconscious protectionism? I think the answer may be different in the two contexts. In the race context, it seems quite plausible to say that we care more about preventing any sort of racism, even unconscious racism, than we care about efficiency, and therefore we should strike down laws that are unconsciously racist even if they are efficient. (“Plausible,” I say. I’m not sure I believe it.) The same claim does not seem so plausible in the protectionism context. Indeed, I think we can ignore the issue of unconscious protectionism entirely. Why the difference?

70. Another way to see that unconscious racist motivation does not entail inefficiency (racial feelings aside) is this: given our definition of unconscious racism, if the road closure for the benefit of white homeowners is unconsciously racist, so also is the hypothesized non-closure for the benefit of white commuters. But on our assumption that everything else is held constant as the race of the parties is changed, those decisions cannot both be inefficient. So one of them must be efficient despite being unconsciously racist.

One reason we care more about unconscious racism than about efficiency is that even *unconscious* racism reveals that the officials are not representing all their constituents even-handedly. If the officials' conscious motivation is nonracist, they may be trying to be even-handed. But if they are unconsciously racist, they are not succeeding in being even-handed; race is still determining the outcome. In the trade regulation context, however, we do not require even-handed representation; the foreign interests have no right at all to representation. They do have a right to not be excluded from the market by inefficient regulation, but that obviously gives them no right to the invalidation of an *efficient* regulation even if it is, in our sense, unconsciously protectionist. In the race context, if we strike down an efficient but unconsciously racist regulation, we are saying in effect that black citizens ought to be guaranteed the same opportunity as white citizens to block efficient governmental decisions. The courts ought to duplicate for blacks even the *distortions* of the political process that whites would be able to accomplish in the blacks' situation. It makes no sense, to my mind, to say that foreigners are entitled to have the courts duplicate for them the distortions that they would be able to accomplish if they were in-state.

There is another difference between the race context and the trade regulation context. In the race context it is easy to see how unconscious racism might result in an inefficient law even in the absence of conscious racism. The Memphis city officials who closed the road might have done so inefficiently because they responded only to the (perfectly genuine) interests of the white homeowners and did not respond appropriately to the even stronger interests of the black commuters. Even without consciously depreciating the interests of the black commuters, the officials may simply have failed to appreciate them properly because of their (unconsciously) disfavored status. In the trade regulation context, however, there is no room for an analogous failure. So long as we retain the standard assumption that the well-motivated legislature does right by local interests, there can be no inefficiency without *conscious* protectionism.⁷¹ In our standard example, if Calivada's adoption of the plastic widget ban is not motivated by subjective protectionist intent, that means that the political force behind the law was the environmental interest; the legislature decided

71. Of course, we do not assume in the *race* context that the legislature does right by all local interests; we make that assumption only in the absence of some specific reason for doubting it, such as the social and political significance of race. In the race case, what corresponds pragmatically to the assumption (in the trade context) that the legislature does right by all local interests is the assumption that the legislature does right by all white (or majority) interests. Now the difference between the contexts, as I explain in the next paragraph of the text, is that in the trade context getting it right for the favored (i.e. local) interests entails getting it right for disfavored (foreign) interests as well, whereas in the road-closure case, getting it right for the favored (white) interests does not entail getting it right for the disfavored blacks as well.

that the environmental interest was stronger than the consumer interest in plastic widgets. Furthermore, as I have argued, the ban is efficient. If the legislature has done right by local interests, then the result is efficient for all interests, local and foreign. It could still be that the law is “unconsciously protectionist” in our sense; it could still be that if the plastics producers were in-state, the ban would not have been adopted. But it remains true that in the trade regulation context, the absence of subjective protectionism entails efficiency. Which is to say, there can be no inefficiency resulting from unconscious protectionism in the absence of conscious protectionism.

At the risk of belaboring the not-so-obvious, let me make sure it is clear *why* there is this difference between the race context and the trade context. In the race context, there is (normally) no favored (white) interest that vicariously stands in for the disfavored (black) interests in the way that local consumers stand in for foreign producers they would like to deal with in the trade context. In our example, there are no white homeowners whose interests are economically linked with those of the black commuters. As we have said, the city officials may just have failed to appreciate the black commuters’ interests, without conscious prejudice. But the black commuters’ interests could not have been similarly ignored, except as a result of conscious prejudice, if they were vicariously represented by some favored white interest, as the interests of foreign producers are vicariously represented by local consumers.

We can now summarize why we need not worry about unconscious protectionist motivation in the trade regulation context, using both of the differences we have identified between the trade context and the race context. In the trade context, if there is no conscious protectionist motivation, the law is efficient (second difference); and if the law is efficient, we do not care that it may be unconsciously protectionist (first difference). So, unless there is conscious protectionism, there is no failure we care about.⁷²

72. I am not aware of any trade case that discusses unconscious protectionism, but the Panel in *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report of the Panel (Oct. 16, 1989), decided under the Free Trade Agreement between Canada and the United States, does discuss the sort of hypothetical party-reversal that we have used to define unconscious favoritism. The Panel uses the party-reversal idea as the *tertium quid* in a logical maneuver that appears to convert what begins as a purpose inquiry (§ 7.04) into what is ultimately stated as a balancing inquiry (§§ 7.10, 7.14), by way of the party-reversal idea (§ 7.09). But a plausible reading of the Panel report is that the “balancing” inquiry is really just a heuristic for the party-reversal inquiry, and the party-reversal inquiry in turn is just a heuristic for a (logically distinct) inquiry into whether Canada would have adopted the 100% landing requirement independently of its protectionist effect. This last is the very question of actual protectionist motivation. I do not assert that this heuristic cascade is what was going on, but the entire present Essay is an argument about why it should have been. (I am prepared to believe the Panel got the right result, but I do wonder: If the landing requirement was Kaldor-Hicks inefficient (and non-party-reversible, and protectionist), why were the Canadian fishermen or exporter-middlemen who wanted to sell to

APPENDIX 2: A CLOSER LOOK AT RATIONALITY REVIEW, LESS
RESTRICTIVE ALTERNATIVE ANALYSIS, AND
BALANCING/PROPORTIONALITY REVIEW

The question posed by rationality review is whether the regulation achieves its asserted (or imputed) nonprotectionist goal to any degree. The idea is that a law that does not achieve its goal to any degree is completely irrational and may be invalidated on that ground. But I would suggest that, except where circumstances have changed or new information has become available since the time of enactment, laws are hardly ever irrational in the sense that they have no tendency at all to advance their *actual* goals. If a law has no tendency to advance an asserted nonprotectionist goal, the preferred inference is normally not that the law is irrational, but that it is protectionist. I have suggested previously that if the legislature and the court genuinely disagree on the empirical question of means-end efficacy, the court should defer (except in cases of changed circumstances).⁷³ In sum, rationality review only makes sense as purpose review in disguise.

Whatever its defects, rationality review (as officially stated) is the least objectionable of the non-purpose-based tests we are considering. If the court invalidates a law on the basis of a finding that there are no good effects at all, then although it is relying on its own empirical judgment (and preferring its own empirical judgment to the legislature's if it is not persuaded of the legislature's bad purpose), it is not required to make any normative judgment; it is not required to weigh a bundle of benefits against a bundle of costs, since there are no benefits to weigh.

Turning now to less restrictive alternative analysis, the basic idea is clear enough: Even if a law has nonprotectionist benefits, if the same benefits could be achieved by another law that is less trade-restrictive (the "less restrictive alternative"), that other law should be preferred, and the original law will be invalidated. At this point we need to distinguish two versions of less restrictive alternative ("LRA") analysis. One version, which I shall refer to as "strict LRA analysis," operates as just described: a law will be invalidated only if there is an alternative that achieves *all* the same benefits at lower cost. But true LRAs, which achieve all the same benefits (or even virtually all the same benefits) at lower cost, are relatively rare. Much more common are alternatives that achieve *most* of the benefits at lower cost. LRA analy-

United States processors, and who were hurt along with the United States processors, unable to block it?)

73. See the latter part of Section II.B.3.

sis is often applied to invalidate laws when there are alternatives that achieve most of the benefits at lower cost and where the benefits sacrificed by the change to the alternative are judged by the court to be of less value than the cost-avoidance achieved by the change. This I shall refer to as “loose LRA analysis.” (Notice that “strict LRA analysis” is not stricter in the sense of invalidating more laws; it invalidates fewer. It is “stricter” in the sense of interpreting more strictly the basic notion of an eligible “alternative.”)

Now, strict LRA analysis is really just rationality review applied, not to the rationality of the choice “this law or nothing,” but rather to the choice “this law or that one,” where “that one” may be any less trade-restrictive alternative.⁷⁴ Accordingly, everything I have said about rationality review is applicable here also. The evidence that tends to show the existence of a (strict) LRA also tends to show protectionist purpose: why would the legislature choose a more trade-restrictive way of achieving precisely the same benefits unless it in fact attached positive value to the trade-restriction? Strict LRA analysis makes best sense if viewed as a heuristic for purpose analysis. Still, even as officially stated, strict LRA analysis is *relatively* unobjectionable in the same way rationality review is. Even if it (problematically) involves preferring the court’s judgment to the legislature’s on an empirical question (the question whether the “alternative” is really fully adequate), strict LRA analysis does not require the court to make comparisons of value.

“Loose” LRA analysis is much more problematic because, by definition, it does require the court to make comparisons of value. This distinguishes it sharply from purpose analysis. In fact, loose LRA analysis is a form of balancing or of proportionality review *stricto sensu* — balancing if the question is whether the costs of preferring the actual law to the alternative are greater than the benefits, proportionality review *stricto sensu* if the question is whether the costs are disproportionate to the benefits. We shall return to the idea that loose LRA analysis is a version of balancing/proportionality review presently.

Moving on to true balancing/proportionality review, we must again distinguish between two variants. If we look at a law and ask whether the costs of the law outweigh the benefits (balancing) or whether the costs are disproportionate to the benefits (proportionality review), we are implicitly taking as the *alternative* to the law “no legislative action.” That is the benchmark from which costs and benefits are measured. Balancing/proportionality review of this form I shall call “total effects” review. But of course, we could also consider any alternative

74. One “less trade-restrictive alternative” is of course the “no legislative action” alternative specified by rationality review itself, so strict LRA analysis includes rationality review as a special case.

law with lesser costs, and inquire whether the extra costs of the actual law *as compared to that alternative* outweigh (or are disproportionate to) the extra benefits of the actual law as compared to that alternative. This I shall refer to as “marginal effects” review, where different “margins” for evaluation are defined by different alternatives. Marginal effects review includes total effects review as a special case, where the relevant alternative is “no legislative action.”

Now, *marginal effects* balancing/proportionality review is equivalent to *loose* LRA analysis (which may be of either balancing form or proportionality form). *Loose* LRA analysis, as opposed to *strict* LRA analysis, is “*balancing/proportionality* at any margin” as opposed to “*rationality review* at any margin”; and *marginal effects* balancing/proportionality review, as opposed to *total effects* review, is “*balancing/proportionality at any margin*” as opposed to “*balancing/proportionality where the alternative is no legislative action.*” The oppositions are different, but loose LRA analysis and marginal effects balancing/proportionality review are the same.

All of this leads me to a suggestion about how the various tests should be understood. (Mind you, I do not endorse all the tests I discuss. I am just making a suggestion about terminology that I think would clarify thinking about which tests to endorse.) We should mean by “LRA analysis” what I have called “*strict* LRA analysis,” and we should mean by “balancing/proportionality review” what I have referred to as “*marginal effects* balancing/proportionality review.” The reason is that if we adopt these specifications, then we have a nested sequence of tests. In the sequence <rationality review, strict LRA analysis, marginal effects balancing/proportionality review>, each test invalidates everything invalidated by its predecessor, and something more. In contrast, if we use “LRA analysis” to mean “loose LRA analysis”, then the nesting fails, however we interpret the balancing/proportionality test at the third stage. Remember that loose LRA analysis is equivalent to marginal effects balancing/proportionality review. So, if “LRA analysis” refers to “loose LRA analysis,” then total effects balancing (one candidate interpretation for the third-stage) is actually a less restrictive test, while marginal effects balancing (the other third-stage candidate) is no more restrictive. So, on either interpretation of “balancing/proportionality review” at the third stage, we lose the nesting. The reason is that the useful notion of *strict* LRA analysis has been left out entirely.⁷⁵

75. For completeness, notice that at each of the second and third stages, we have two possible interpretations of the test (loose or strict LRA analysis and marginal effects or total effects balancing/proportionality review). So there are four possible sequences (at the last two stages) in all. Three are discussed in the text: <loose LRA, marginal effects>, rejected because these are equivalent; <loose LRA, total effects>, rejected because the latter is less restrictive than the former; and <strict LRA, marginal effects>, which is what I recommend. The remaining possibility is <strict LRA, total benefits>. As the reader can easily verify,

Of course, all this logical analysis matters only if it is an open question which tests to adopt and why. If the relevant court is committed in any event to marginal effects balancing/proportionality review (or the equivalent loose LRA analysis), then all the other tests are included and need no separate statement, except for whatever heuristic value they may have in particular cases in focusing the inquiry on particular modes of invalidity subsumed under the master test.

these two tests are not comparable in terms of our ordering; each invalidates some laws not invalidated by the other. And this sequence never includes in any form what balancers should regard as the best all-round test, loose LRA = marginal effects review.

For completeness in a different direction, notice that an alternative *nested* sequence, but one not suggested at all by the standard terminology, would be <rationality review, total effects balancing, loose LRA analysis>. In effect, this sequence moves from the same starting point to the same end point as the nested sequence in the text (<rationality review, strict LRA analysis, marginal effects balancing>), but by a different route. The sequence in the text goes from “rationality as compared to no legislative action” via “rationality as compared to any alternative” to “acceptable balance/proportionality as compared to any alternative,” whereas the new sequence goes from “rationality as compared to no legislative action” via “acceptable balance/proportionality as compared to no legislative action” to “acceptable balance/proportionality as compared to any alternative.” The two dimensions of the test are changed in different orders.