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Recommended Citation

Christopher Hudock (2011) "Traffic Jam Equality: Evaluating the Constitutionality of Congestion Pricing," *Sustainable Development Law & Policy*: Vol. 11: Iss. 1, Article 7.

Available at: <http://digitalcommons.wcl.american.edu/sdlp/vol11/iss1/7>

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TRAFFIC JAM EQUALITY:

EVALUATING THE CONSTITUTIONALITY OF CONGESTION PRICING

by Christopher Hudock*

Air pollution and roadway congestion have become increasingly problematic in urban environments,¹ forcing lawmakers to search for an effective solution.² Governments around the world have turned to taxation and pricing schemes, both as a means of funding and behavior control,³ however, the ability of these methods to limit negative behavior by reducing traffic and curbing automotive emissions remains in question.⁴ Programs that assess fees on drivers for using urban roadways ensure a financial imposition on people traveling through cities but may not effectively reduce congestion or air pollution.⁵ Lawmakers must also consider the Constitutional and economic implications of such laws in addition to their environmental benefits.

In 2007, New York City Mayor Michael Bloomberg proposed an initiative that would tax motorists entering certain parts of the city in an effort to reduce both congestion and air pollution.⁶ From a business perspective, the tax is a viable method of reducing damage to the environment from automotive emissions and finances the program itself.⁷ However, the tax could face several Constitutional challenges, specifically claims brought under the Commerce Clause and 42 U.S.C. § 1983.⁸ Under Mayor Bloomberg's proposal, New York City would charge "an \$8 fee on cars entering the busiest part of Manhattan on weekdays."⁹ Presumably this regulation would affect not only those individuals who live in New York, but would disproportionately affect people commuting to and from Manhattan from neighboring states, including members of the service sector.¹⁰ Therefore, not only does the policy fail to curb the targeted behavior, but members of adjacent states face an unequal burden to those individuals located within New York.¹¹

In 1887, the U.S. Supreme Court laid the foundation for this issue in *Philadelphia and Southern Steamship Company v. Pennsylvania* by addressing the question of whether a state may impose upon a company incorporated under its laws a tax on their gross receipts for the transport of persons and property.¹² The court defines what constitutes a restriction on interstate commerce, stating, "[t]axing the transportation . . . would certainly be a regulation of the commerce, a restriction upon it, a burden upon it."¹³ The Court then notes that even in the event Congress does not make "express regulations with regard to interstate commerce, its inaction . . . is equivalent to a declaration that it shall be free" of further regulation.¹⁴

Under a similar line of reasoning, the Court in *Dennis v. Higgins* reversed a decision by the Supreme Court of Nebraska, holding that retaliatory taxes and fees imposed by one state against "motor carriers" registered in another state violated the

Commerce Clause.¹⁵ Both the Nebraska Supreme Court and the U.S. Supreme Court agreed that in this particular instance, the nature of the tax did violate the Commerce Clause, as it imposed a fee only on carriers "registered outside the state of Nebraska"¹⁶ The Court clarifies that while the Commerce Clause only addresses Congressional authority to regulate commerce, the Court has historically accepted the interpretation that this delegation of power acts as a prohibition against state "barriers against interstate trade."¹⁷ However, the courts split as to whether this issue was an actionable claim under 42 U.S.C. §1983, with the final decision in *Dennis* finding the claim actionable under §1983.¹⁸ Like the plaintiff in *Dennis*, out of state commuters could face retaliatory taxes since congestion initiatives disproportionately affect commuters in order to offset the traffic burdens on the city.¹⁹

In addition to Constitutional obstacles, the tax could also impose disproportionate economic burdens. Supporters of the tax suggest that the burden primarily falls on the wealthy, as they constitute a majority of the inner city commuters.²⁰ However, in a report by the Committee on Corporations, Authorities and Commissions of the New York State Assembly, the Committee separated the cost of the tax in relation to income, finding that for residents of the Bronx, Brooklyn, or Queens, the tax would amount to 4.5 percent of their annual income as compared to 2.5 percent for residents of Westchester or Manhattan.²¹ The Committee also found that despite the claims of tax advocates, "[r]esidents of Queens, the Bronx, Brooklyn and Staten Island who drive in the Zone [would] pay 47% of the total fees [compared to] residents of Manhattan who drive in the Zone [and would] pay 42% of the total fees."²² Therefore, according to the Committee, the burden in proportion to income would be nearly double for residents of the Bronx, Brooklyn, and Queens.²³ Therefore, the tax could disproportionately disadvantage the commuting populations of neighboring states and the urban poor.²⁴

Initiatives on congestion pricing such as Mayor Bloomberg's and those in place in London, Singapore, and Stockholm pigeonhole environmental initiatives into a tax and punish format, placing an inordinate focus on the ends of environmental protection without appreciating the opportunity for innovation and the costs on the local population.²⁵

Endnotes: Traffic Jam Equality on page 61

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- ¹ Christian Iaione, *The Tragedy of Urban Roads: Saving Cities From Choking, Calling on Citizens to Combat Climate Change*, 37 *FORDHAM URB. L. J.* 889, 891-96 (2010).
- ² *Id.* at 919-22.
- ³ *Id.* at 908, 917-24.
- ⁴ *Id.* at 911. *But see* KIRAN BHATT, THOMAS HIGGINS, & JOHN BERG, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., LESSONS LEARNED FROM INTERNATIONAL EXPERIENCE IN CONGESTION PRICING, at 4-1, 4-3 (2008), http://www.ops.fhwa.dot.gov/publications/fhwahop08047/Intl_CPLessons.pdf (noting the positive environmental effects of congestion pricing in London, Singapore, and Stockholm).
- ⁵ Iaione, *supra* note 1, at 911.
- ⁶ *See* CITY OF NEW YORK, PLANYC: A GREENER, GREATER NEW YORK 88-90 (2007), http://www.nyc.gov/html/planyc2030/downloads/pdf/full_report.pdf. *But see*, Mireya Navarro, *Mayor's Environmental Record: Grand Plans and Small Steps Forward*, N.Y. TIMES, Oct. 22, 2009, http://www.nytimes.com/2009/10/23/nyregion/23green.html?pagewanted=2&_r=3 (noting that Mayor Bloomberg's congestion pricing initiative did not advance out of the New York State Legislature).
- ⁷ Navarro, *supra* note 6.
- ⁸ In this case, the essence of the legal complaint against Mayor Bloomberg's tax scheme would be grounded in the basis of the Commerce Clause; however, because the policy constitutes a state action, the petitioner may also raise the issue under 42 U.S.C. Section 1983. Specifically, 42 U.S.C. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress" 42 U.S.C. § 1983 (2010). Under this section, because the Commerce

Clause violation occurred as a result of a state action, the state itself may face legal action under Section 1983.

- ⁹ Navarro, *supra* note 6.
- ¹⁰ N.Y. STATE ASSEM., INTERIM REPORT: AN INQUIRY INTO CONGESTION PRICING AS PROPOSED IN PLANYC 2030 AND S.6068 11 (2007).
- ¹¹ *Id.*
- ¹² *Phila. & S. Steamship Co. v. Pennsylvania*, 122 U.S. 326, 335 (1887).
- ¹³ *Id.* at 336.
- ¹⁴ *Id.*
- ¹⁵ *Dennis v. Higgins*, 498 U.S. 439, 440-41 (1991).
- ¹⁶ *Id.* at 441.
- ¹⁷ *Id.* at 446.
- ¹⁸ *Id.* at 441-42.
- ¹⁹ N.Y. STATE ASSEM., *supra* note 10, at 11.
- ²⁰ Jeremy Elton Jacquot, *Is Congestion Pricing Right for Car-Happy Los Angeles?*, TREEHUGGER (Apr. 30, 2008), <http://www.treehugger.com/files/2008/04/congestion-pricing-los-angeles.php>.
- ²¹ N.Y. STATE ASSEM., *supra* note 10, at 11.
- ²² *Id.*
- ²³ *Id.*
- ²⁴ *Id.* In the New York State Assembly Committee on Corporations, Authorities and Commissions Report, the authors note that the real motivation for the taxation scheme is behavior modification, with the hope that an \$8 fee on commuters will encourage those commuters to change their habits in favor of environmentally friendly alternatives such as public transportation. However, as the study goes on to note, the likelihood that an \$8 fee will affect the habits of the wealthy commuters traveling into Manhattan is improbable, with the likely result being an additional burden on middle to low income families. *Id.* at 8.
- ²⁵ Richard C. Feiock & Christopher Stream, *Environmental Protection versus Economic Development: A False Trade-Off?*, 61 *PUB. ADMIN. REV.* 313, 318 (2001).