

# The Yale Law Journal

Volume 91, Number 3, January 1982

## Laying the Dormant Commerce Clause to Rest

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Judging from the numbers alone, the dormant commerce clause<sup>1</sup> seems to be experiencing a renaissance. During the years 1953 through 1975, the United States Supreme Court issued only eight opinions that con-

† Professor of Law, Temple University. I wish to disclose at the outset my substantial role, albeit without compensation, in the preparation of petitioner's brief in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). At the same time, I wish to acknowledge my debt to Professor Archibald Cox of Harvard Law School, who inspired the creation of this Article, and to my colleagues Robert Reinstein, Sharon Harzenski, and Charles Rogovin who encouraged its development. The assistance of Kim Tulsy is similarly appreciated.

1. The commerce clause, U.S. CONST., art. I, § 8, cl. 3, reads: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." The commerce clause, on its face, is no more than a conferral of power on Congress to regulate commerce among the states. While this broad grant authorizes congressional displacement of state regulation of interstate commerce, the residuum of power left to the states in the absence of congressional legislation has been the subject of much litigation and academic debate. That the mere constitutional grant of authority to Congress places *some* restrictions on the states has, however, long been accepted doctrine. *Cf.* *The License Cases*, 46 U.S. (5 How.) 504, 578-79 (1847) (opinion of Taney, C.J.) (state may regulate interstate commerce in areas where Congress has abstained). Judges and scholars have applied a panoply of terms to this constitutional implication. Among the most popular adjectives that have been affixed to this aspect of the commerce clause are "silent," "negative," and "dormant." On the assumption that age is wisdom, I have selected the third of these, it having first appeared nearly a century and a half ago. *See Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) ("We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can . . . be considered as repugnant to the power to regulate commerce in its dormant state . . . .") In the interest of accuracy, our bastardization of Chief Justice Marshall's use of the term in *Wilson* should be pointed out. Webster's Third International Dictionary defines "dormant" as sleeping. The term connotes something with the potential for action, yet currently in repose. It is clear that what remains dormant is Congress, and not the commerce clause. The clause's limitation on state regulation can certainly be termed implicit, silent, or negative, but dormancy does not accurately describe the situation. Chief Justice Marshall properly recognized this by referring to the "power to regulate commerce in its dormant state." *Id.* (emphasis supplied). My own title reveals that I have departed from Marshall's proper use of the adjective, in part because it has become a recognized term of art, and in part because it serves both as useful shorthand for the concept discussed herein and differentiates the affirmative from the negative consequences that flow from the commerce clause. This footnote is designed, therefore, to attribute my inaccuracy to design rather than oversight.

cerned the validity of state regulations<sup>2</sup> challenged as discriminating against, or unduly interfering with, interstate commerce.<sup>3</sup> Yet, in its six most recent terms, the Court addressed such questions ten times.<sup>4</sup> Not since the 1940's has there been such a flurry of activity on the subject.<sup>5</sup> With so great an influx of fuel one might well have expected the fires of scholarship to be burning bright. That has not, however, been the case. Although occasional, albeit enlightening, sparks have appeared,<sup>6</sup> the anticipated combustion has not occurred.

2. Both these statistics and this Article in general are concerned solely with state regulatory measures. No attempt is made here to synthesize the equally confusing and often more complex problem of dormant commerce clause limitations on state taxation. *But see infra* p. 480 (briefly discussing *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977)). For excellent treatments of that elusive subject, see Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473 (1978) and Hellerstein, *State Taxation and the Supreme Court: Toward A More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426 (1977).

3. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Pike v. Bruce Church*, 397 U.S. 137 (1970); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129 (1968); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714 (1963); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963); *Eli Lilly & Co. v. Sav-On-Drugs*, 366 U.S. 276 (1961); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). These cases represent only those in which a dormant commerce clause challenge constituted the primary issue. Those in which the commerce question was a secondary issue—decided by the Court in a manner that suggests that it regarded the issue as subordinate to some other issue of federal law—have not been included in the numerical totals referred to in the text. See Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1744 n.134 (1978) (citing examples of ways in which such an attitude may be evidenced). The Court's decision in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), with its principal concern for the preemption question, is the most striking illustration of such a "secondary" case during this twenty-three year period.

4. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Lewis v. BT Inv. Managers*, 447 U.S. 27 (1980); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976). In at least four other instances the commerce clause challenge was a secondary issue. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Douglas v. Seacoast Prods.*, 431 U.S. 265 (1977). The Court's 1981 and 1982 terms promise still more decisions on the subject. See *Massachusetts Council of Constr. Employers v. Mayor of Boston*, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346 (1981), *cert. granted sub. nom.* *White v. Massachusetts Council of Constr. Employers*, 50 U.S.L.W. 3591 (U.S. Jan. 26, 1982) (No. 81-1003); *State v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614, *prob. juris. noted sub. nom.* *Sporhase v. Nebraska*, 102 S. Ct. 631 (1981); *Appeal of New England Power Co.*, 120 N.H. 866, 424 A.2d 807 (1980), *prob. juris. noted sub. nom.* *New England Power Co. v. New Hampshire Pub. Util. Comm'n*, 101 S.Ct. 2311 (1981).

5. During the 1940's the Court issued an average of nearly one opinion per term concerning the validity of state regulations under the dormant commerce clause. See *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *Robertson v. California*, 328 U.S. 440 (1946); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Union Brokerage v. Jensen*, 322 U.S. 202 (1944); *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943); *Parker v. Brown*, 317 U.S. 341 (1943); *Edwards v. California*, 314 U.S. 160 (1941); *California v. Thompson*, 313 U.S. 109 (1941).

6. By far the most illuminating has been Tushnet, *Rethinking the Dormant Commerce Clause*,

It may well be that the Court's renewed interest in state commercial regulation is simply too recent to be reflected in, or scrutinized by, legal literature. But, at the risk of ultimately being proven wrong, I believe the explanation for the paucity of scholarship lies instead in a trio of implicit assumptions regarding the Court's treatment of the dormant commerce clause. First is the assumption that the new opinions do not reflect an intent on the part of the Court to alter its approach to the problem. The proliferation of decisions, accordingly, is viewed as a product of fortuity—perhaps no more than a consequence of an increase in the number of docketed filings that raise substantial commerce clause challenges to state regulatory schemes. Seen in this light, the resurgence of commerce clause cases is numerical, and not doctrinal. There exists little material for original scholarship if the court's new decisions reflect no more than a continuation of its old approach. The second assumption is that the Court's new cases are themselves internally consistent. If the Court's results are predictable, and its decisional framework conspicuous, it needs no guidance from the academic community. Third, there is an assumption that this unswerving, well-marked path on which the Court treads leads where we wish to go. This view reflects a belief that the dormant commerce clause serves the same purposes in today's society that it served in the 1930's and 1940's.

Perhaps this trio of assumptions—continuity, consistency, and correctness—has lulled academia into silent acquiescence. It is the purpose of this Article to question each of these implicit hypotheses. The analysis proceeds in three stages. In Part I, I review the articulated justification for traditional dormant commerce clause jurisprudence, often referred to as ends-balancing,<sup>7</sup> and find it wanting. It serves neither as an adequate explanation of the Court's recent offerings nor as a satisfactory theoretical foundation for a consistent decisional framework. More important, its *raison d'être* has evaporated. In Part II, I articulate a new model for judi-

1979 WIS. L. REV. 125. See also Anson & Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980); Blumstein, *supra* note 2; Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Schwartz, *Commerce, the States, and the Burger Court*, 74 NW. U.L. REV. 409 (1979). For an excellent treatment of both the privileges and immunities clause of Article IV and the dormant commerce clause, see Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

7. The term "traditional" is perhaps not fair to those responsible for the development of this principle. When Professor Dowling proposed in 1940 that the Court's proper role under the commerce clause, in the absence of congressional legislation, was to balance national and local interests, the approach was innovative by any standard. See Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940). This balancing approach, however, has been traditional doctrine since Chief Justice Stone cited it as the cornerstone of his decision in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768-71 (1945). See, e.g., *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 440-48 (1978); *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

cial scrutiny of state commercial regulation. This new model is more comfortably embedded in the privileges and immunities clause of Article IV<sup>8</sup> than in the commerce clause of Article I, and is gauged to preserve processes rather than to protect products. Finally, in Part III, I scrutinize the Court's recent pronouncements and observe in them harbingers of change. Indeed, on more than one occasion, I find elements of a process-based structure in the words of several of the Justices.<sup>9</sup> The Court often uses the vocabulary of my model. Furthermore, it frequently reaches a result in congruence with my framework. When it does, however, it is seldom for the same theoretical reasons.

In the pages that follow, I proffer a radically diminished role for both the dormant commerce clause and the Court as its interpreter. Indeed, in those instances where judicial intervention appears warranted, it is only the anachronistic definition of the term "citizen" in the privileges and immunities guarantees of Article IV, Section 2<sup>10</sup> that justifies the preservation of the commerce clause's negative side at all. This proposal represents neither a flight of fantasy nor latent iconoclastic tendencies. Rather, it reflects recognition of the metamorphosis our federal system has undergone. Our needs today differ significantly from those of the 1940's when the Court embraced Professor Dowling's suggestion that its proper role, in the absence of congressional action, was to balance national and local interests in scrutinizing state commercial enactments.<sup>11</sup> Congress, the implied beneficiary of the Court's protection under that standard, no longer needs such assistance. My difference with the Court, therefore, lies in its failure to appreciate the consequences of our changed needs and to react to them. The time is overdue to modify our use of implicit constitutional restrictions on state-promulgated protectionism. The contemporary dangers of state parochialism lie in its evisceration of the democratic process, not in its impairment of free trade. The instruments of judicial intervention require reforging to reflect these changes. Those constitutional provisions that have historically been the tools of the national commercial interest would better serve us today as representation-enforcing implements.

8. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST., art. IV, § 2, cl. 1.

9. The elements of a process-based structure are equally apparent in Professor Tushnet's recent work. See Tushnet, *supra* note 6.

10. Courts have limited the term "citizens," within the meaning of Article IV, § 2, to natural persons, thereby excluding corporations from its scope. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839). *But cf. infra* pp. 449-54 (arguing that there is no longer any justification for such restrictive definition).

11. See *supra* note 7.

## I. Historical Perspectives and the Need for Re-evaluation of Traditional Thinking

The Framers did not explicitly protect free trade. Although the commerce clause conveys a grant of power to the federal government to regulate with respect to trade and commerce, our Constitution says nothing of the need for unfettered trade among the states.<sup>12</sup> In contrast, the Australian Constitution, adopted near the close of the nineteenth century, and largely modeled after our own,<sup>13</sup> contains two clauses dealing with commerce among the states of that federalist union. It grants the national government the power to regulate with respect to trade and commerce among the states,<sup>14</sup> and, in an attempt to deal with the pre-Federation commercial rivalry and retaliatory action among the several states,<sup>15</sup> guarantees that “trade, commerce, and intercourse among the States . . . shall be absolutely free.”<sup>16</sup>

The lack of any explicit articulation of a free market ideal in the United States Constitution has been described as one of the “great silences” of that document.<sup>17</sup> When our Constitution speaks, its words are frequently vague and ambiguous. In order to provide substance for its uncertain commands, we have traditionally turned first to the Framers’ intent. The task of gauging this state of mind often proves elusive. That task is much more difficult, however, when we seek to explain a constitutional silence.

12. Although the Constitution prohibits the laying of “Imposts or Duties on Imports or Exports” by any state without the consent of the Congress, U.S. CONST., art. I, § 10, the Court has long since limited this provision to international trade alone. See *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869). *But see* W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION 295-323 (1953) (Framers designed § 10 to deal with interstate trade barriers as well as barriers to international trade).

13. See *Baxter v. Commissioners of Taxation*, 4 C.L.R. 1087, 1112 (1907) (Australian Framers agreed to adopt, so far as regards distribution of functions and powers, scheme of American Constitution).

14. AUSTRALIAN CONST. § 51 provides in pertinent part:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) Trade and commerce with other countries, and among the States . . .

15. See *Duncan v. Queensland*, 22 C.L.R. 556, 571 (1916) (Griffith, C.J.).

16. AUSTRALIAN CONST. § 92 provides in pertinent part:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

It is clear from the cases that the Australian courts have always rejected the contention that § 92 concerns freedom from duties or taxes only. Its prohibition against regulations found burdensome to interstate commerce has never been seriously doubted. See *James v. The Commonwealth*, 55 C.L.R. 1, 56 (1936); *Duncan v. Queensland*, 22 C.L.R. 556 (1916). *But see* *Buck v. Bavone*, 50 Austl. L.R. 648, 656-57 (1976) (Murphy, J., dissenting) (free trade means only freedom from tariffs). Although it was unclear early on whether § 92 merely prevented discrimination against interstate trade or affirmatively protected the right of anyone in a position to engage in interstate trade to do so unhindered by government restriction, the debate has now clearly been resolved in favor of the latter interpretation. See C. HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW 286 (2d ed. 1972). See also P. H. LANE, THE AUSTRALIAN FEDERAL SYSTEM 755-847 (2d ed. 1979).

17. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

Surprisingly, few words were spent on the subject of free trade at the Constitutional Convention.<sup>18</sup> This has forced courts and commentators to focus on the events that precipitated the call for a convention rather than on what actually transpired at that gathering. America under the Articles of Confederation was marked by commercial warfare between the states with each legislating "according to its estimate of its own interests, the importance of its own products, and the local advantages and disadvantages of its position in a political or commercial view."<sup>19</sup> This situation threatened both the viability and peace of the union, and is almost uniformly conceded to be the primary, if not sole, catalyst for the convention of 1787.<sup>20</sup>

A century later, the Australians were to respond to a similar crisis by constitutionally commanding free trade among the states. The definition of free trade and the enforcement of the provision against nonconforming local or national legislation was, therefore, left in the hands of the Australian courts.<sup>21</sup>

Our Constitution, however, did not attempt to solve economic parochialism by an express prohibition against interference with free trade. Instead, it shifted legislative power over economic matters that affect more than one state to a single national body. The commerce clause does not expressly prohibit the states from enacting protectionist economic legislation. It merely gives Congress the power to rectify such excesses by superseding enactments.<sup>22</sup> Thus, judging from the constitutional language alone, one might tend to conclude that the Framers left protection of the national market to congressional supervision rather than judicial enforcement.<sup>23</sup>

18. See *id.* at 534. For an exhaustive examination of the metamorphosis of the commerce clause during the Convention and the subsequent ratification proceedings, see Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

19. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 259, at 240 (Boston 1833). See also J. FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-1789, at 144 (1889); C. WARREN, THE MAKING OF THE CONSTITUTION 567 (1937); Abel, *supra* note 18, at 448-49; Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337-38 (1934).

20. See *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949); Stern, *supra* note 19, at 1338.

21. But see *Buck v. Bavone*, 50 Austl. L.R. 648, 656-57 (1976) (Murphy, J., dissenting). Justice Murphy would place the power to void offending local statutes in the legislature rather than in the courts. Thus, if state law hindered interstate trade, it would be Parliament alone who could invalidate it. *Id.* at 658. Presumably, Murphy would still permit the courts to invalidate national legislation transcending § 92. In any event, on the former position, Murphy remains in the minority.

22. Edmond Randolph of Virginia proposed to make this congressional role yet more explicit. His attempt to articulate Congress' power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the Articles of Union," however, never found its way into the text of the Constitution. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (M. Farrand ed. 1937). See also Abel, *supra* note 18, at 433-37.

23. This literal reading has not been without its defenders. See, e.g., *The License Cases*, 46 U.S. (5 How.) 504, 578-79 (1847) (Taney, C. J.); *Livingston v. Van Ingen*, 9 Johns. 506, 572-80 (N.Y. 1812) (Kent, C. J.); 2 J. B. THAYER, CASES ON CONSTITUTIONAL LAW 2190 (1895). For a recent

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This, however, does not appear to have been the vision of the principal framer. As James Madison revealed nearly a half-century after the Constitutional Convention, Congress was considered incapable of doing much in the way of commercial legislation. Madison expected the competing economic interests represented in Congress to neutralize each other and prevent the enactment of regulation of interstate trade.<sup>24</sup> The transfer of power to Congress would not result in economic legislation from a less locally oriented government source, but instead would result in the absence of any commercial legislative commands altogether. The commerce clause would act “as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purpose of the General Government . . . .”<sup>25</sup> Under this impasse theory, Congress would be unable to act because of political impediments, and the states would be powerless to act because of limited authority.<sup>26</sup>

This theory did not answer, however, the question of who was to bring the states back in line when they transcended their authority. Logic points inexorably to the courts. If Congress were paralyzed in the face of potent and conflicting local interests, only the courts could protect the national interest in free trade.<sup>27</sup> Although initially reluctant,<sup>28</sup> the United States

expression of similar sentiments, see *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 690 (1981) (Rehnquist, J., dissenting) (“The Commerce Clause is, after all, a grant of authority to Congress, not to the courts.”). See also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (M. Farrand ed. 1937) (“The power of the U. States to regulate trade being supreme can control interferences of the State regulations (when) such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.”) (comments of Roger Sherman of Connecticut two days before the submission of the proposed Constitution to Congress).

24. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-3, at 321-22 (1978).

25. Letter of February 13, 1829, from James Madison to J. C. Cabell, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (M. Farrand ed. 1937). That Madison was not alone in this view is evidenced by the debate, however sparse, that surrounded the promulgation of the commerce clause. In the entire Constitutional Convention, this clause seems to have been mentioned only nine times. Abel, *supra* note 18, at 470. All nine refer to the potentialities of the clause as a means of preventing hostile state commercial regulations. On not a single occasion was the provision advanced as the basis for affirmative regulation by the federal government. *Id.* at 471. See also THE FEDERALIST NO. 22, at 141-42 (A. Hamilton) (M. Dunne ed. 1901). For a different historical perspective, see W. CROSSKEY, *supra* note 12, at 284-85, 313, 516.

26. This limitation on the states must, of course, be viewed in the context of the restrictive definition of “commerce” that prevailed in the late 18th and early 19th centuries. See Abel, *supra* note 18, at 446-64. See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824). *But see* W. CROSSKEY, *supra* note 12, at 84-114.

27. The critical role marked out for the Supreme Court in protecting the national interest is nowhere better articulated than in Oliver Wendell Holmes’ oft repeated warning of the peril to the Union were the Court to lose the power to invalidate state statutes: “[O]ne in my place sees how often local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.” O. W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 296 (1920).

28. In the *License Cases*, 46 U.S. (5 How.) 504, 578-79 (1847), Chief Justice Taney expressed the view that the Court was without power to strike down state regulations unless they conflicted with a valid federal law.

Supreme Court eventually took up the cudgel<sup>29</sup> and has continued to use it unsparingly ever since.

The Framers could hardly have anticipated the scope of legislative power Congress currently enjoys. Over the past thirty years Congress has converted the commerce clause into an affirmative tool of virtually limitless uses. Save for one notable exception,<sup>30</sup> the Court has placed no obstacles in Congress' path. To the contrary, the Court's expansive interpretations of the power to regulate commerce among the states<sup>31</sup> have prompted congressional enactments in such diverse areas as crime,<sup>32</sup> civil rights,<sup>33</sup> job safety,<sup>34</sup> drug manufacturing,<sup>35</sup> and endangered animals.<sup>36</sup> As significant as the growth of congressional authority is the frequency of its exercise. The Madisonian impasse model of a Congress deadlocked by competing geographic economic concerns is no longer reflected in reality. States seldom have the ability to block national legislation when they believe that their interests, or even their "separate and independent existence," are being threatened.<sup>37</sup>

To be sure, as with any decisional process, differences of perspective within Congress often prevent consensus. In the area of commercial regulation, however, Congress has developed a mechanism to circumvent stalemates. When impasses to the resolution of commercial problems occur in Congress, the problems are simply shifted onto the shoulders of regulatory agencies by broad, unbridled, and often standardless delegations of power.<sup>38</sup> The rapid growth in both number and power of these agencies

29. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (recognizing commerce clause limitation on state power to regulate commerce even in absence of conflicting national legislation). See also *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (first case to hold state's action violative of commerce clause in absence of controlling federal enactment).

30. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

31. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

32. See *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. §§ 1331-34 and scattered sections of Titles 7, 12, 15, 19, & 21 (1976)).

33. See *Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241 (42 U.S.C. § 1971 (1976)).

34. See *Occupational Safety and Health Act of 1970*, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. § 651 and scattered sections of Titles 5, 18, 15, 42, & 49 (1976)).

35. See *Drug Amendments of 1962*, Pub. L. No. 87-781, 76 Stat. 780 (codified at 21 U.S.C. § 351(a) (1976)).

36. See *Endangered Species Act of 1973*, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531 (1976)).

37. Illustrative is the passage of the 1974 Amendments to the Fair Labor Standards Act extending its minimum wage and maximum hour provisions to almost all state and municipal employees. See Pub. L. No. 93-259, 88 Stat. 55 (1974). Despite the fact that the Court was ultimately to characterize that legislation as posing a danger to the essentials of state sovereignty, see *National League of Cities v. Usery*, 426 U.S. 833 (1976), the "state's representatives" in the halls of the national legislature were unable to prevent its passage.

38. As Professor Kenneth Culp Davis has pointed out, there are times when the legislature does not really know what it wants or when political pressure makes it impossible for the legislature to accomplish its objectives. In these situations, argues Davis, if the job of regulating is to be done, it must be done by an agency under a broad delegation of discretionary authority. K. DAVIS, DISCRE-



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thus provides a huge repository for delegated authority. Our national commercial interest is energetically protected by such omnipotent agencies as the Interstate Commerce Commission, the Federal Trade Commission, and the Securities and Exchange Commission.<sup>39</sup> There is no evidence here of the pervasive influence of powerful, competing sectional interests and the resulting Madisonian image of national regulatory impotence.<sup>40</sup> The commonly expressed fear is, instead, that the regulatory agencies have so intruded into the fabric of commercial life that they have stifled economic growth.<sup>41</sup> Indeed, many now contend that free trade requires not greater protection of Congressional silences, but greater limitations on congressionally delegated regulatory expressions.<sup>42</sup>

The very existence of the deregulation debate highlights the critical differences between the Australian approach and our own. Its free-trade mandate binds the Australian central government, just as it does Australian lawmakers at the state level.<sup>43</sup> In contrast, the consummate ability of

TIONARY JUSTICE: A PRELIMINARY INQUIRY 46, 49 (1971). Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia has taken issue with this approach. See Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972). To be sure, admits Wright, "[w]hen Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with some vague language about the 'public interest' which tells the agency, in effect, to get the job done." *Id.* at 584-85. But, according to Wright, this ought not lead where Congress has let it or Professor Davis has directed it. Instead, Wright concludes that "[a]n argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." *Id.* at 585 (footnote omitted).

39. Few of these agencies predated the Roosevelt Administration. Even the notable exceptions that did, such as the Interstate Commerce Commission (1887), the Food and Drug Administration (1906), the Federal Reserve Board (1913), the Federal Trade Commission (1914), and the Federal Power Commission (1920), did not achieve their full panoply of powers until much later. The vast majority of the significant regulatory agencies, however, are more recent in origin, including the Securities & Exchange Commission (1934), the Federal Communications Commission (1934), the National Labor Relations Board (1935), the Civil Aeronautics Board (1940), the Small Business Administration (1953), the Atomic Energy Commission (later the Nuclear Regulatory Commission) (1954), the Federal Maritime Commission (1961), the National Transportation Safety Board (1966), the Environmental Protection Agency (1970), the Occupational Safety & Health Administration (1970), the Consumer Product Safety Commission (1972), and the Economic Regulatory Commission (1977).

40. It would, of course, be naive to deny either the role industry lobbies play in agency decision-making or the stalemate that such lobbying may produce. This, however, is not the impasse to which Madison referred. Indeed, it is the very success of such industry pressures that makes judicial invalidation of local regulation that burdens powerful corporations superfluous.

41. President Ronald Reagan has repeatedly argued that federal regulations have become so pervasive that they "impair the ability of industries to compete." BUSINESS WEEK, Feb. 2, 1981, at 81. See also White House Report: Program for Economic Recovery, 17 WEEKLY COMP. PRES. DOC. 140 (Feb. 18, 1981); Remarks announcing the Establishment of Presidential Task Force on Regulatory Relief, 17 WEEKLY COMP. PRES. DOC. 33 (Jan. 26, 1981).

42. See BUSINESS WEEK, Feb. 2, 1981, at 80-81.

43. *James v. Commonwealth*, 55 C.L.R. 1, 59-60 (1936) (overruling *McArthur v. Queensland*, 28 C.L.R. 530 (1920)). See generally Note, *The Commerce Power Under the Australian Constitution*, 42 COLUM. L. REV. 660 (1942). A 1936 attempt at amendment to exempt the national government from the free trade mandate proved unsuccessful. The Constitution Alteration (Marketing) Act of 1936 envisaged the following insertion into the Australian Constitution after § 92:

The provisions of the last preceding Section shall not apply to laws with respect to marketing made by or under the authority of the Parliament in the exercise of any powers vested in the

Congress to impose burdensome and restrictive regulations on interstate trade is beyond dispute. Congress' authority under the commerce clause is plenary and includes within it the power to regulate free trade as well as to burden it, to encourage commercial intercourse or to prohibit it.<sup>44</sup> Those who favor deregulation couch their cries in the language of desirability, not constitutionality. If Congress has spoken too often or the agencies too loudly, the response can only be political in nature.<sup>45</sup> As Chief Justice Marshall noted in *Gibbons v. Ogden*, "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this . . . [instance] the sole restraints . . . to secure them from its abuse."<sup>46</sup>

The commerce clause thus cannot be said to establish and protect free trade or a national marketplace as a fundamental constitutional value. What then explains the persistent judicial articulation of a free trade model in the Court's dormant commerce clause cases?<sup>47</sup> The answer is

Parliament by this Constitution.

Note, *Freedom of Interstate Trade*, 8 SYDNEY L. REV. 460, 475 (1977). Although enacted by Parliament, the Act failed to get the approval of a majority of electors as required by the Australian Constitution. *Id.*

44. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946). This power includes the ability to discriminate, except in ways the Constitution expressly forbids, against interstate commerce and in favor of local trade. *Id.* But see L. TRIBE, *supra* note 24, § 6-31, at 403 n.18.

45. Agency action is, of course, subject to judicial review where it is alleged that the agency has exceeded its delegated authority, improperly interpreted the applicable statute, failed to conduct a fair proceeding, or acted capriciously and unreasonably. See G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 33 (1974).

46. 22 U.S. (9 Wheat) 1, 197 (1824). As the Court stated in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946):

The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.

*Id.* at 434. See also *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 360 (1903). To be sure, Justice Harlan acknowledged limitations on the power when he observed in *Champion* that "[i]t would not be difficult to imagine legislation [prohibiting commercial intercourse] that would be . . . hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce . . ." *Id.* at 363. Perhaps it attests to the greater wisdom of Justice Harlan that I cannot visualize any realistic legislative efforts which would transcend those internal limitations of which he spoke. In any event, neither Congress nor the Court has provided concrete illustrations of such excesses in more than forty years. *Cf.* *National League of Cities v. Usery*, 426 U.S. 833 (1976) (finding external limitations on commerce power contained in the Tenth Amendment and structure of the Constitution itself).

47. See, e.g., *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 537 (1949) ("our economic unit is the Nation"); *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935) ("one state in its dealings with another may not place itself in a position of economic isolation"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923) ("in the matter of interstate commerce we are a single nation"). For more recent expressions of the same sentiments, see *Hughes v. Oklahoma*, 441 U.S. 322, 339 (1979); *City of*

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clear, and has been ably documented by others: the Constitutional Convention was prompted by commercial protectionism.<sup>48</sup> A uniform system of commercial regulations was seen as necessary for the preservation of national unity and tranquility.<sup>49</sup> Congress, accordingly, was provided a tool for encouraging this free trade ideal as a means of protecting the nation from self-destruction. There was no intent, however, to inject a philosophy of *laissez-faire* into the constitutional fabric. Where does all this lead? Perhaps, to an altered role for the dormant commerce clause.

## II. An Alternative Role, an Alternative Clause, and a Proposed Model

The time-honored rationales for traditional dormant commerce clause jurisprudence have become historical vestiges.<sup>50</sup> Because the Constitution does not protect free trade or a national market, the Court's current role as the trumpeter of these values can only be viewed as that of congressional spokesman. In 1789 Congress needed this crutch. Congress can now fend for itself. A number of commentators have suggested, however, that Congress cannot provide adequate or satisfactory guidance to the states.<sup>51</sup> This defense of an active judicial role under the dormant commerce clause ignores the obvious role played by the regulatory agencies in translating the general into the particular and thus fleshing out the commands of Congress. More important, Congress' inability to anticipate the diverse situations to which its guidelines may have to be applied is not a compelling argument for judicial usurpation of the law-making responsibility. It is one thing to say that courts often have to construe the scope and intent of federal legislative efforts under the preemption doctrine.<sup>52</sup> It is quite

Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 380-81 (1976).

48. See *supra* p. 430.

49. See, e.g., Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1140 (1978) ("In light of the inevitable tendency of sovereign states to protect their own, the survival of the United States turned on the creation and protection of a national market.")

50. When an explicit constitutional provision outlives its original purpose modernization should be conducted within the framework of the amendment process. But when (as with the dormant commerce clause) it is simply the lessons of history that have served as the springboard for a body of governing principles, we are not so constrained. Here it falls to the courts continually to reassess the justifications for such constitutional common law. Cf. Monaghan, *The Supreme Court, 1973 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14-17 (1974) (what has been fashioned under guise of dormant commerce clause is no more than federal common law).

51. See Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 222 (1957) (Congress has no mechanism to test state statutes for compatibility with the federal system). See also Choper, *The Scope of National Power Vis-à-Vis the States: The Disparability of Judicial Review*, 86 YALE L.J. 1552, 1586 (1977).

52. But see Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959), suggesting that the Supreme Court appears to use essentially the same reasoning process in a case nominally hinging on preemption as it does in a case where the question is whether state law has impermissibly burdened interstate commerce. *Id.* at 219-20; accord Choper, *supra* note 51, at 1586 n.191.

another to say that where Congress has refused or failed to enact guidelines at all, the courts may substitute their own formulations. The argument that Congress is too busy, that attention to state commercial legislation would divert it from its "usual" and "more pressing" business,<sup>53</sup> is similarly unconvincing. The national commercial interest ought to be the "usual" business of Congress and its regulatory agencies. After all, nothing could be "more pressing" than combating the threat to "the solidarity and prosperity of this Nation" posed by excessively burdensome or protectionist legislation.<sup>54</sup> If the internal machinery of Congress and its agencies is inadequate to deal with the "myriad of state and local rules" intruding on the national domain,<sup>55</sup> then Congress can modify that machinery.<sup>56</sup>

It no longer makes sense for the Court to invalidate evenhanded state legislation merely because it burdens interstate commerce too heavily.<sup>57</sup> Under the Court's present standard, the likelihood of judicial invalidation increases with the degree of burden imposed by state law, and the weight of the national interest. But this is precisely the situation in which action by Congress or administrative agencies is most likely. There is something fundamentally wrong with a judicial framework that prompts judicial intervention by the same trigger that induces political response.<sup>58</sup> One might

53. See *Brown*, *supra* note 51, at 222; *Choper*, *supra* note 51, at 1586. For a brief, penetrating response to this argument, see *Anson & Schenkkan*, *supra* note 6, at 85 n.59.

54. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

55. See *Choper*, *supra* note 51, at 1586.

56. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting). See also *Choper*, *supra* note 51, at 1587 n.194 (raising the possibility of establishing federal agency precisely to handle these challenges to burdensome local and state commercial regulations).

57. The conclusion expressed here that such invalidation does not make sense, of course, is not original. Justices Douglas and Black campaigned for such a position in many a dissent. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 784 (1945) (Black, J., dissenting); *McCarroll v. Dixie Lines*, 309 U.S. 176, 183 (1940) (Black, Frankfurter and Douglas, J.J., dissenting); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 442 (1939) (Black, J., dissenting); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 316 (1938) (Black, J., dissenting in part).

Justice Douglas' brief dissent in *Southern Pacific* is perhaps most analogous to the position articulated herein. Expressing doubts whether the courts should ever intervene to strike down state legislation on the sole ground that it unduly burdens interstate commerce, Justice Douglas viewed as inappropriate the *Southern Pacific* invalidation of Arizona's train length legislation: "For Congress has given the Interstate Commerce Commission broad powers of regulation over interstate carriers. . . . It is in a position to police the field. And if its powers prove inadequate for the task, Congress, which has paramount authority in this field, can implement them." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting).

Charles Evans Hughes' view has been described as a precursor of the Black-Douglas position. It has been said that, as an Associate Justice, he was prepared to dispose almost completely of the dormant commerce clause, not because he preferred state to federal power, but "because of his confidence . . . that Congress could, through active legislation, prevent interference with interstate commerce." Note, *Governor on the Bench: Charles Evans Hughes as Associate Justice*, 89 HARV. L. REV. 961, 980 (1976).

58. Professor Tushnet would have us inquire whether the specific interest group seeking to invalidate aberrational state commercial regulations "will be able to mobilize Congress to act." Tushnet, *supra* note 6, at 153. Here we part company. The National Government, not the corporation or individual seeking to engage in interstate trade, is the beneficiary of the protection traditionally accorded by the commerce clause. See *Choper*, *supra* note 51, at 1587 n.194 ("[T]he person attacking

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have thought that the revolutionary expansion of congressional power and the proliferation of federal regulatory agencies would prompt a re-examination of the role of the Court under the dormant commerce clause.<sup>59</sup> The Court, in fact, appears not merely to have continued its campaign to impart content to congressional silences, but to have significantly stepped up its effort. It has invalidated seven state commercial regulations over the past six terms<sup>60</sup> (a rate of more than one per term) as compared to four times over the preceding twenty-four terms<sup>61</sup> (a rate of one every six terms).

### A. *An Alternative Role*

Much attention has been paid in recent legal literature to the dichotomy between process-based interpretations of the United States Constitution and value-laden searches for fundamental rights protected by that docu-

state and local laws is asserting the interest of the central government, not his own constitutionally secured liberties.") Determining the subjects that require uniformity is a judgment that Congress alone ought to make. Asking the Court to speculate as to the ability of the complaining entity to secure preemptive federal legislation, *see* Tushnet, *supra* note 6, at 151-52, seems without purpose. If the inquiry is answered in the affirmative, judicial intervention becomes unnecessary. If the response is negative, judicial assistance toward ensuring national uniformity becomes inappropriate. The very fact that congressional or agency action appears unlikely should lead us to conclude that the burden imposed by the variant local approaches is acceptable. *See* Anson & Schenkkan, *supra* note 6, at 85 n.59. Of course, where the state legislation is attacked as discriminatory and not merely unduly burdensome, a different approach must be used. *See infra* pp. 455-74.

59. Justice Rutledge perceived such a cause and effect reflected in the Court's opinions of the late 1940's: "[J]ust as in recent years the permissible scope for congressional commerce action has broadened . . . the prohibitive effect of the clause has been progressively narrowed. The trend has been toward sustaining state regulation formerly regarded as inconsistent with Congress' unexercised power over commerce." W. RUTLEDGE, *A DECLARATION OF LEGAL FAITH* 68 (1947). However accurate Justice Rutledge's perception of the decisions of his tenure, the trend he identified is no longer apparent. *See infra* notes 60-61.

60. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (Iowa statute generally prohibiting the use of 65-foot doubletrailer trucks within its borders); *Lewis v. BT Investment Managers*, 447 U.S. 27 (1980) (Florida statute prohibiting banks, trust companies, and bank holding companies operating principally outside Florida from owning local businesses providing trust or investment advisory services); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (Oklahoma statute prohibiting transportation or shipment of minnows procured within the state for sale outside state); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey law prohibiting importation of most solid and liquid waste); *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978) (Wisconsin regulation generally barring trucks longer than 55 feet from state highways); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (North Carolina statute prohibiting labeling of apple containers with any but U.S. grade); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (Mississippi regulation permitting sale in state of milk from another state only if that other state accepted Mississippi milk on a reciprocal basis).

61. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974) (Mississippi statute barring maintenance of suits in state court by foreign corporations transacting business in state without certificate of authority as applied to transactions in interstate commerce); *Pike v. Bruce Church*, 397 U.S. 137 (1970) (Arizona requirement that Arizona-produced cantaloupes be crated inside the state); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (Florida regulatory scheme reserving to local producers a substantial share of the Florida milk market); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (Illinois statute requiring trucks operating on state highways to be fitted with contoured mudflaps).

ment. The seemingly cyclical revival of this jurisprudential schism<sup>62</sup> was no doubt precipitated by the Supreme Court's pronouncements in *Roe v. Wade*.<sup>63</sup> To one school of thought, that decision is no more defensible than the now discredited protection of liberty of contract in *Lochner v. New York*.<sup>64</sup> Both decisions make the same mistake. They purport to authorize judicial imposition of fundamental values that are not derived from the text, history or structure of the Constitution.<sup>65</sup> The process-based theorists reject the proposition that the Framers regarded jurists as "better reflectors of conventional values than elected representatives," and instead view the constitutionally envisioned judicial role as "policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent."<sup>66</sup> Accordingly, where the political system proves responsive, deference to the democratic structure is warranted. The opposing school of thought finds no inherent obstacle to judicial selection and application of contemporary norms that are neither demonstrably expressed nor implied by the Framers<sup>67</sup> and expresses puzzlement at the persistence of process-based constitutional theories.<sup>68</sup>

Surprisingly, the dormant commerce clause is seldom viewed as a productive battleground for academic warfare between the value-protectors and the process-preservers. Perhaps this can best be explained by the Court's unearthing of something for everyone in this invisible clause. For the process-oriented among us, the Court has found a prohibition against discriminatory or disproportional state legislative treatment of interstate

62. Historically, the schism could be more accurately portrayed as one between "interpretivists" and "non-interpretivists," the former believing "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," and the latter adhering to the contrary view that courts are obliged to "go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." J. ELY, *DEMOCRACY AND DISTRUST* 1 (1980). While the process-based view discussed at length herein may fairly be regarded as a third position, falling between the two traditional themes, its roots in interpretivism are unmistakable. The process-based view looks beyond the language and history of the specific clause under review, but it nonetheless derives its content from the structure and relationship of the Constitution as a whole rather than from some source entirely beyond the four corners thereof. Even its primary proponent, John Ely, therefore acknowledges that the process based constitutional theory may well be a form of interpretivism. *Id.* at 1, 12.

63. 410 U.S. 113 (1973).

64. 198 U.S. 45 (1905).

65. See, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973).

66. J. ELY, *supra* note 62, at 102. Professor Ely is certainly the most prolific and, to this writer, the most cogent contemporary advocate of this position. See also Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 *MD. L. REV.* 451 (1978); Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 5 (1978); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399 (1978).

67. See, e.g., L. TRIBE, *supra* note 24 § 8-7, at 450-55; Grey, *Do We Have an Unwritten Constitution?* 27 *STAN. L. REV.* 703 (1975); Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624 (1980).

68. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).

commerce. In an approach akin to that of his famous footnote in *Carolene Products*,<sup>69</sup> Justice Harlan Stone pointed out the defects inherent in a legislative scheme whose purpose or effect is to gain an advantage for those within the state at the expense of those without. “[W]hen the regulation, is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.”<sup>70</sup> This approach is hereinafter referred to as the “process” standard because of its focal concern for the integrity of the mechanics that produce the legislation rather than the desirability of the impact thus produced.<sup>71</sup>

The needs of the value-oriented have not been neglected either. In a distinct strand of the fabric of the commerce clause’s negative implications, the Court has mystically found a restriction against unduly burdening the free flow of interstate trade, even where an identical burden has been imposed on intrastate commerce.<sup>72</sup> Unlike the process-oriented approach, whose inquiry is directed at the *proportional division* of the burden, the focus of the value-oriented theme (hereinafter referred to as the “free trade” standard) is the *weight* of the burden imposed.<sup>73</sup> Four permutations

69. *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938).

70. *South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938).

71. The key word here is “focal,” for the process approach by necessity must scrutinize both the method and the product of the legislative effort. Frequently, it is only by examination of the impact and efficacy of the statutory scheme that the legislature’s motives can be divined. *See infra* pp. 472-74.

72. For an articulation of this theme, see Justice Stewart’s summary of the “general rule” in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits”). *See also* *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 678 n.26 (1981) (“Because the record fully supports the decision below with respect to the [undue] burden on interstate commerce, we need not consider whether the statute also operated to discriminate against that commerce.”)

73. One cannot fail to note, however, that the adjectives applied to an impermissible burden under the unfettered trade standard have always been “excessive” and “undue” rather than “heavy” or “onerous.” The focus here therefore is not merely on the degree of weight, but on whether the weight is warranted under the circumstances. By their very nature, the terms “excessive” and “undue” are comparative. They compare the weight of the burden with the need for its imposition in order to determine whether the benefits achieved are important enough to justify the burdens imposed. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The terms, therefore, envision a balancing. The discrimination inquiry, of course, proves comparative as well: Here, however, the burdens imposed on represented insiders are compared with the burdens imposed on unrepresented foreigners (proportionality) rather than the weight of the burdens with the weight of the benefits (necessity). On the surface, therefore, the discrimination inquiry seems to ignore consideration of benefits altogether. This, it turns out, is far from accurate. *See infra* pp. 455-74.

may be invoked<sup>74</sup> to illustrate the interrelationship between these two strands of dormant commerce clause jurisprudence.<sup>75</sup>

In the first, the burden of the state legislative effort is minimal in effect and evenhanded in distribution. This scheme encounters no commerce clause difficulties under either branch of review.<sup>76</sup> The second permutation, reflecting the opposite end of the scale, imposes a burden which is both "excessive" and disproportionately distributed. In other words, the heavy burden imposed falls either exclusively or predominantly on foreign interests not represented in the law-making body.<sup>77</sup> This legislative effort will be invalidated under either approach,<sup>78</sup> although it is by no means clear which the Court finds preferable or why.<sup>79</sup> In the third permutation, the impact is disproportional, but not excessive. This variation must overcome the considerable obstacles of a process-based inquiry,<sup>80</sup> but if it does so, it will encounter no problem under the value-based free trade standard.<sup>81</sup>

74. To a large degree these four variations represent only rough models. It would not be difficult, for example, to justify further subdivision. See Tushnet, *supra* note 6, at 131-41. More importantly, few statutory schemes are so simplistic as to fit neatly within any single one of my permutations. Because I use this classification merely to demonstrate the distinctive operations of the two dormant commerce clause branches I necessarily paint with broad strokes.

75. The "two-strand" metaphor is a modification of the two branch metaphor found in Professor Tushnet's fine article. See Tushnet, *supra* note 6, at 130-31.

76. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). My citation of this case (and those cited in notes 79, 81, & 83) reflects the appropriate classification of the case according to the Court's conclusions. The accuracy of these conclusions is a matter left for later. See *infra* pp. 455-84.

77. Disproportionality may either be demonstrated facially or empirically. The former is evinced by statutory schemes applicable only to foreign interests, see *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), or by broad legislative and administrative exceptions carved out for local industries, see *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 446 (1978). The latter may be shown either by the nature of the impacted industry, as in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 771 (1945), or by the nature of the restriction imposed, as in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-52 (1977). See *infra* pp. 461-68.

78. See, e.g., *Lewis v. BT Investment Managers*, 447 U.S. 27, 42-43 (1980); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

79. Compare *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 678 n.26 (1981) and *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 446-47 (1978) (expressing a preference for undue burden approach) with *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (preferring the discrimination route even though undue burden approach would have similarly invalidated legislative schemes under attack).

80. See *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979). Where facial discrimination can be shown, a virtual *per se* rule of invalidity is used. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

81. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest . . . A [facially] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause."

*Id.* at 473-74. See also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126-27 (1978).



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In the last of these simplistic categorizations, the burden, while “excessive,” falls evenhandedly on both represented local and unrepresented foreign interests. This final legislative permutation proves the most troublesome. While the legislation will survive the representation-reinforcing scrutiny of the process standard, it faces judicial veto under the free trade standard if the Court disagrees with the state’s accommodation of the competing demands of the state and national interests involved.<sup>82</sup> It is judicial commitment to such balancing that has so offended the adherents of the process strand.<sup>83</sup> The process standard and the free trade standard cannot be regarded as complementary, therefore, because they inevitably clash when an “excessive” state regulatory burden falls equally on represented and on unrepresented interests.

It is necessary to bifurcate the objection to such a “super-legislature” approach in order better to understand the nature of this conflict.<sup>84</sup> The challenge to judicial interest-weighting may be one of competence—that courts lack the tools to make such judgments,<sup>85</sup> or one of separation of powers—that making such determinations would transcend the judiciary’s proper constitutional role.<sup>86</sup> Both objections, of course, share the crucial assumption that judicial intervention is unnecessary in this fourth legislative permutation. Regardless of the correctness of such an assumption in the 1930’s and 1940’s when the “super-legislature” approach was first

82. See *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (“This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce.”)

83. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 784 (1945) (Black, J., dissenting); *McCarroll v. Dixie Lines*, 309 U.S. 176, 183 (1940) (Black, Frankfurter, and Douglas, JJ., dissenting); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 442 (1939) (Black, J., dissenting); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 316 (1938) (Black, J., dissenting in part).

84. The term, originated by Justice Brandeis in *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting), was first applied to the dormant commerce clause balancing process by Justice Black. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 788 (1945) (Black, J., dissenting).

85. See, e.g., *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 188-89 (1940) (Black, Frankfurter, and Douglas, JJ., dissenting) (judicial process inherently limited to “[s]pasmodic and unrelated instances of litigation” and bound by narrow rules of evidence, cannot be expected to produce integrated national rules adequate to protect interstate commerce); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting) (urging that invalidation of nondiscriminatory state legislation on sole ground that it burdens interstate commerce is better left to Congress and the federal agencies who, because of their expertise, can better “police the field”). For another view, see Choper, *supra* note 51, at 1586 (“[A]s a structural matter, Congress seems especially unsuited to the task of determining . . . the compatibility of isolated local ordinances with the broad demands of the federal system. This task . . . is the traditional work of adjudicative, not legislative, organs.”)

86. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 784, 794-95 (1945) (Black, J., dissenting) (“Representatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which govern the people. That at least is the basic principle on which our democratic society rests.”); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 455 (1939) (Black, J., dissenting) (“It is of equal importance . . . that the judicial department of our government scrupulously observe its constitutional limitations and that Congress alone should adopt a broad national policy of regulation—if otherwise valid [non-discriminatory] state laws combine to hamper the free flow of commerce.”)

opposed, its validity today seems far more certain. Determining that judicial response is superfluous in view of congressional omnipotence, however, is one step away from concluding that it is unwise. The competency objection to the balancing approach seems to fall considerably short of bridging the gap between lack of need and danger of usage. To begin with, accepting the proposition that courts lack the needed skills ignores the reality of modern constitutional decisionmaking. It is unavoidable that courts, faced with the application of nonabsolutist constitutional provisions, frequently must balance interests.<sup>87</sup> If skills are the product of experience, judges must, at the very least, be regarded as accomplished apprentices. The competency objection labors, however, under a more serious defect. If it is, as that objection implies, the *accuracy* rather than the *propriety* of judicial action that troubles us, the dormant commerce clause seems a strange target toward which to direct our concerns. Regardless of the rate of error here, Congress retains the right to correct any erroneous weighing because of the nonconstitutional nature of the court's ruling.<sup>88</sup>

It is, therefore, the alternative objection—that judicial invalidation of evenhanded state commercial legislation through the current weighing process is inconsistent with our constitutional system of representative democracy—that highlights the incompatibility of the process and value-based themes.

The representation-enforcing approach commands judicial intervention where the mechanisms of participatory government have failed to operate, but it also requires deference where no such defect appears. The failure to defer to the legislative product undercuts the democratic process in a multitude of ways. It permits substitution of judicially imposed policies for evenhanded and rationally based state legislative efforts.<sup>89</sup> It encourages politically influential interest groups to seek remedies in judicial rather than legislative tribunals.<sup>90</sup> It induces congressional and agency abrogation

87. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring); *Roe v. Wade*, 410 U.S. 113 (1973).

88. See Choper, *supra* note 51, at 1585-86. *But see* Tushnet, *supra* note 6, at 153-56 (noting that in certain instances the appropriate affected interests will be unable to mobilize Congress to act).

89. See *Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 138 (1968) (“[P]ublic policy can, under our constitutional system, be fixed only by the people acting through their elected representatives.”) Judge John J. Gibbons of the United States Court of Appeals for the Third Circuit maintains that commerce clause invalidation of state legislation by the Supreme Court is consistent with democratic theory because it is done in the name of “the true will of the national majority.” Gibbons, *Keynote Address, Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260, 265 (1981). This misses the point. What the will of the majority may be on a specific issue is secondary to the question of which branch of government appropriately serves as spokesman of that will. If democracy means anything, it is that the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges.

90. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 786-87 (1945) (Black, J., dissenting) (despite fact that Congress was contemporaneously considering uniform train length legislation, American rail-

of responsibility.<sup>91</sup> Finally, it subverts the silently expressed will of the majority by imposition of national uniformity despite Congress' considered refusal or inability to achieve legislatively the same result.<sup>92</sup>

In the commerce clause context, selecting between competing approaches, the process-based and value-oriented, ought to pose no serious dilemma. The Framers unquestionably rejected free trade as a constitutionally protected value.<sup>93</sup> Invalidation of state commercial legislation can only, therefore, be done on some basis other than its interference with the "right" of an individual or corporation to engage in interstate trade unhindered by government restriction. Two alternatives immediately suggest themselves. The legislation may be invalidated because its burdensome nature "invades or nullifies federal prerogatives"<sup>94</sup> or because its discriminatory or protectionist nature represents a breakdown of the mechanism of democratic government. The continued need for judicial intervention on the former ground, the reader will recall, was challenged earlier.<sup>95</sup> In the end, therefore, we are left with only a single justification for judicial displacement of state legislative judgments in the commercial area—the process-oriented protection of representational government. This theme, heralded in *McCulloch v. Maryland*,<sup>96</sup> has had,<sup>97</sup> and continues to have<sup>98</sup> its champions. What is not at all clear, however, is why this inquiry should take place under the umbrella of the dormant commerce clause.

roads, "for some unexplained reason," chose to attack Arizona regulation in court rather than to seek a legislative solution).

91. When Congress is too divided to articulate policy, the tendency is to let someone else make the decision. *But see* Wright, *supra* note 38, at 584-85 (to allow courts to decide when legislators cannot is to substitute paternalism for democracy).

92. *See* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 691 n.3 (1981) (Rehnquist, J., dissenting) (criticizing majority for striking down an Iowa ban against 65-foot trucks despite fact that Congress had, on several occasions, considered question of regulating truck length and had "consistently left the matter for state regulation"); S. REP. NO. 1111, 93rd Cong., 2d Sess. 10 (1974) ("The Committee believes that truck lengths should remain . . . a matter for state decision.")

93. In contrast, the Australian Constitution affirmatively protects the right of anyone to engage in interstate trade. *See supra* note 16. *See also* Anson & Schenkkan, *supra* note 6, at 78 n.31, for the altogether too rare recognition that "[t]he assumption that the [U.S.] commerce clause embodies a free trade value . . . is erroneous" (citation omitted). *But see* Monaghan, *supra* note 50, at 17 ("[The commerce] clause embodies a national, free-trade philosophy . . .") Professor Monaghan's position is difficult to accept in light of the acknowledged power to burden trade enjoyed by both Congress, *see* *Champion v. Ames (Lottery Case)*, 188 U.S. 321, 360 (1903), and the states when Congress has so authorized, *see* *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981).

94. Choper, *supra* note 51, at 1585.

95. *See supra* pp. 432-36.

96. 17 U.S. (4 Wheat.) 316, 435-36 (1819) (grounding invalidation of Maryland tax on federal instrumentality in part on fact that it operated on national population not represented in state legislature).

97. *See* *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

98. *See* Tushnet, *supra* note 6, at 125; *cf.* Hellerstein, *supra* note 2, at 1448-50 (addressing related problem of judicial review of state taxation of interstate commerce).

B. *The Inappropriate Commercial Focus*

Identifying process protection as the preferred goal in scrutinizing state commercial regulation admittedly raises as many problems as it purports to resolve. That judicial efforts ought properly to be directed toward ensuring a legislative process consistent with the concept of representational government sounds admirable in principle, but in practice it is often difficult to identify actual instances of the breakdown of representational democracy. In commerce clause jurisprudence, the traditional watchword has been "discrimination."<sup>99</sup> Those unsympathetic with the process theme have criticized the term "discrimination" as a mere "shibboleth," offering "not a great deal in either understanding or guidance."<sup>100</sup> To be sure, the term is not "self-defining,"<sup>101</sup> but a large part of the problem is the Court's failure to identify unambiguously who or what it is that state legislatures may not discriminate against. The Court's standard response—that it is "interstate commerce" which may not be discriminated against<sup>102</sup>—is of little help. It leaves unsettled whether the entities protected against discrimination are the articles of commerce themselves,<sup>103</sup> or those out-of-state individuals and corporations engaged in their production, shipment, and sale.<sup>104</sup>

The difficulties that flow from this uncertainty are particularly apparent in *Exxon Corp. v. Governor of Maryland*.<sup>105</sup> The appellants, who were out-of-state petroleum producers and refiners, challenged a Maryland statute prohibiting the operation of retail service stations within the state by any producer or refiner of petroleum products. The thrust of their attack centered on the alleged discrimination against interstate commerce. Justice Stevens, writing for majority, relied on the fact that Maryland's *entire gasoline supply* flows in interstate commerce to reach the decision that no discrimination against interstate commerce had been established.<sup>106</sup>

99. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-51 (1977).

100. *Brown*, *supra* note 51, at 228. Cf. L. TRIBE, *supra* note 24, § 6-5, at 327 n.7 (although it is no easy task for judges to frame criteria for assessing "political unrepresentativeness directly, it is not clear that the use of surrogate criteria like 'discrimination' is a wholly satisfactory alternative").

101. *Brown*, *supra* note 51, at 224.

102. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

103. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) ("[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State.")

104. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-51 (1977) ("The first, and most obvious [discrimination], is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected . . .")

105. 437 U.S. 117 (1978).

106. *Id.* at 125, 126 n.16.

Justice Blackmun, in dissent, focused on the complete absence of Maryland-based producers and refiners to arrive at the conclusion that the Maryland provision discriminated “against the transactions of *out-of-state actors* in interstate markets.”<sup>107</sup> The disparate results reached by Justices Stevens and Blackmun are due in no small part to their fundamentally different definitions of discrimination.

Underlying Justice Stevens’ reasoning is his assumption that the commerce clause has as its purpose the protection of the free flow of goods across state lines.<sup>108</sup> The validity of such a starting point was questioned in the preceding pages.<sup>109</sup> It will prove helpful, however, to revive the debate here for two purposes—to disavow the notion that the position taken herein will inevitably lead to significantly fewer invalidations of state commercial regulations, and to plead for scrutiny of such efforts under an alternative provision of the Constitution.

To be sure, the rejection of unfettered trade as an appropriate goal of judicial scrutiny of local legislative efforts and the transfer of the task of protecting the national market to congressional hands may spell greater freedom for state experimentation with commercial legislation. The consequence of the deference accorded should not, however, be overestimated. The net result of the adoption of the thesis presented herein may be more a change in the nature of judicial inquiry than an actual diminution in the number of statutes voided.<sup>110</sup> With judicial focus properly directed at representation-enforcement and not on product-protection the Court will be less likely diverted, as it was in *Exxon*, by the mere fact that the state regulatory efforts do not diminish the quantity of goods flowing into the state. Had the Court followed Justice Blackmun and properly addressed itself to a scrutiny of the Maryland legislative process, the result may well have been different. When regulations promulgated by a legislative body fall solely or predominantly on a group represented in the legislature there is cause to believe the enactment will be rationally based, efficacious, and no more burdensome than is necessary to achieve the proffered purpose. When the state enacts legislation, as Maryland did, falling principally on out-of-staters not represented in the regulating body, such a presumption is unwarranted.<sup>111</sup> Because the cost of compliance falls upon groups to whom the legislators are not answerable, there is no incentive to

107. *Id.* at 136 (Blackmun, J., concurring in part and dissenting in part) (emphasis supplied). See also Blackmun’s opinion at 145-46 n.13.

108. 437 U.S. at 127-28 (“[T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”)

109. See *supra* pp. 429-35.

110. See *infra* p. 475.

111. For a similar analysis in a different context, see Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) (“we-they” analysis).

minimize the burdens or maximize the efficiency of the regulation.<sup>112</sup> Indeed, quite to the contrary, protectionist impulses urge greater burdens to secure commercial advantages to represented groups. There is evidence to believe that this is what transpired in the Maryland legislature.<sup>113</sup> The majority in *Exxon*, led astray by its misdirected focus, ignored this facet of the legislation.

The continued judicial concern with the flow of commerce rather than with the nature of the process that produced the legislation<sup>114</sup> may well result from continued utilization of the commerce clause as the tool for curbing state protectionistic tendencies. The Framers were deeply concerned about the parochial attitudes of the individual colonies and believed that the new Constitution provided restraints on those impulses.<sup>115</sup> The Court chose to ground such restraints in the grant of commercial power to the Congress. This has inevitably involved gauging protectionism by measuring the quantity of commercial impact resulting from local regulation. The persistence of the free trade standard of scrutinizing state legislative efforts thus seems, in no small part, attributable to the commercial nature of the constitutional framework the Court has selected. We need not, however, be wedded to such a jurisprudence.

### C. *An Alternative Clause*

If we are willing to redirect judicial energies from preserving commerce to protecting process, the express commands of the "privileges and immunities clause" of Article IV of the Constitution<sup>116</sup> seem a more appropriate

112. See *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938), noting that the traditional political restraints normally exerted on legislative efforts are lacking when the state enactment achieves a benefit for those who are represented by placing a burden falling predominantly upon those who are not. See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-6 (1819).

113. *Exxon Corp. v. Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (Blackmun, J., dissenting).

114. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) ("The Clause requires that some aspects of trade generally must remain free from interference by the States. When a state ventures excessively into the regulation of these aspects of commerce, it 'trespasses upon national interests . . . .'" (footnotes omitted). Even in a case as clearly a product of the breakdown of democratic process as *Edwards v. California*, 314 U.S. 160, 171-72 (1941) (California statute making it a misdemeanor knowingly to bring nonresident "indigent person" into state), the Court rested its decision on the resultant interference with the flow of commerce, concluding that "the transportation of persons is 'commerce.'" *Id.* at 172. But see *id.* at 174 (indigent non-residents who are "the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy").

115. See *supra* p. 430.

116. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. At one time it was thought that this clause recognized a group of "natural rights" guaranteed to the citizens of every state. See *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (No. 3230) (Washington, Circuit Justice, C.C.E.D. Pa. 1823). This view, however, has not prevailed. It is now settled that the provision merely ensures "a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

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foundation from which to launch such an effort than the silences of Article I. Indeed, the possibility that the Framers had this in mind is not all that remote.

In its original form, contained in the fourth article of the Articles of Confederation, the privileges and immunities clause specifically treated the problem of commercial isolationism:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively . . .<sup>117</sup>

Little evidence exists on why the clause was pared down when carried over to the Constitution.<sup>118</sup> Charles Pinckney, who is generally believed to have drafted the shorter version, assured the Convention that no change in substance was intended.<sup>119</sup> It is not unlikely that the terms “privileges and immunities” were seen by the Framers as sufficiently comprehensive to obviate the need for the references to ingress, regress, trade, and commerce.<sup>120</sup> Subsequent judicial interpretations of the privileges and immunities clause bear out the validity of such thinking.<sup>121</sup> This theory is far

117. ART. OF CONFED. art. IV, in 9 J. OF CONTINENTAL CONGRESS 908 (W. Ford ed. 1906).

118. Justice Blackmun has recently suggested that the removal of the references to trade and commerce may have been “an assurance against an anticipated narrow reading of the Commerce Clause,” *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 379-80 (1978), although he provides no historical support for such a thesis. *Cf. Lemmon v. People*, 20 N.Y. 562, 627 (1860) (opinion of Wright, J.) (provisions of article in relation to commercial intercourse omitted to avoid implicitly mandating obligation on part of one state to recognize another state’s legitimation of slavery).

119. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (M. Farrand ed. 1937) (“The 4th article, respecting the extending [of] the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation . . .”) *Accord Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (“Fourth article carried over into the comity article of the Constitution in briefer form but with no change of substance or intent . . .”) A recent commentator has contended that Pickney was not, in fact, the draftsman of Article IV, § 2. *See W. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 123, 164 (1977).

120. Such at least was the sentiment of James Madison. *See THE FEDERALIST* No. 42, at 239 (J. Madison) (Glazier & Co. Ed., Hallowell, Maine (1826)) (reasons for adding the enumeration of trade and commerce to general protection of privileges and immunities in the Articles of Confederation not readily apparent).

121. *See, e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) (words “privileges and immunities” plainly secure right of citizen of one State to pass into another state to engage in lawful commerce); *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 394 (1978) (Burger, C.J., concurring) (Article IV’s “basic privileges include ‘all the privileges of trade and commerce’ which were protected in the fourth Article of the Articles of Confederation”) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975)).

more plausible than concluding that the Framers intended to split the original provision, and place the first half at Article IV, amidst the limitations of the so-called "States' Relations Article,"<sup>122</sup> while relegating the second half to a silent implication in Article I's<sup>123</sup> delineation of the national legislature's powers.<sup>124</sup> There is nothing startling, therefore, in concluding that the equality-oriented privileges and immunities clause of the Constitution, and not the commerce clause, was historically designed to define the scope of state legislative power in commercial matters where Congress has not yet acted.<sup>125</sup>

The theory of the dormant commerce clause evolved to fill what was perceived to be a gap in the articulated mandates of the Constitution. No such interstice, however, exists. Resort to negative judicial inferences would be unnecessary if the positive command of the privileges and immunities clause were given the broad scope that its predecessor enjoyed in the Articles of Confederation and that, in all likelihood, the Framers of the Constitution believed was carried over in the somewhat terser words of the later document. As Professor Tribe has asserted, the privileges and immunities clause as well as the dormant commerce clause provides "a setting for . . . judicial intervention to control state and local impositions upon the citizens and residents of other states."<sup>126</sup> There is no sound reason, therefore, for the litigation to be played out on a commercial stage, rather than on an equality-oriented one.

Transferring the constitutional reference point would leave little room for continued invocation of the free trade standard. Furthermore, it would appear that the process-oriented scrutiny urged herein fits more logically within the egalitarian theme of the privileges and immunities clause of Article IV than in its traditional lodging among the commercial trappings of Article I. The foregoing proposal is, however, not without serious im-

122. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 379 (1978).

123. U.S. CONST., art I, § 8.

124. While it may be argued that the Framers intended Congress to enjoy *exclusive* power to regulate matters of trade and commerce, that position was rejected long ago as historically inaccurate. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). *But see* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) ("great force" in argument that power of states to regulate commerce had been surrendered by grant of power to Congress).

125. The Court has frequently observed the common ancestry and parallel concerns of the dormant commerce clause and the privileges and immunities clause. See *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979); *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 379 (1978); *see also* L. TRIBE, *supra* note 24, § 6-2, at 320 (Framers "may have regarded the privileges and immunities clause of article IV as sufficient limitation upon state parochialism").

126. L. TRIBE, *supra* note 24, § 7-1, at 413. Although classifications based on "residence" have sometimes escaped examination under the privileges and immunities clause on the theory that only classifications based on "citizenship" are covered by the language of the clause, this distinction has "never had any real substance," Varat, *supra* note 6, at 489, and has been flatly rejected by the Court. *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975).



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pediments. The current judicial rendition of the privilege and immunities clause does not present a constitutional tool equal to the task of process-protection. Most serious of its shortcomings is the antiquated doctrine of *Paul v. Virginia*,<sup>127</sup> which excludes corporate entities from the protective arms of the clause.<sup>128</sup>

The privileges and immunities clause extends the umbrella of its guarantees to the "Citizens of each State."<sup>129</sup> Notwithstanding the construction of the Fourteenth Amendment's due process and equal protection clauses to encompass corporations as "persons,"<sup>130</sup> and the recognition of corporate citizenship for purposes of Article III's diversity provisions,<sup>131</sup> Justice

127. 75 U.S. (8 Wall.) 168 (1869). See also *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

128. Another potential difficulty is posed by the recent declaration in *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978), that only with respect to basic and essential activities "bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Id.* at 383 (recreational elk hunting held not to fit within this category of rights). There is much to be said for the dissenters' position that an inquiry into whether a given right is fundamental has no place in the analysis of whether a State's discrimination against those not represented in the legislative halls violates Article IV. *Id.* at 402 (Brennan, J., dissenting). Even the majority's stance, however, will pose little danger to the use of the clause proffered in the text so long as it remains clear that Article IV's fundamental rights "include 'all the privileges of trade and commerce.'" *Id.* at 394 (Burger, C.J., concurring). Accord *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978).

Perhaps a more serious question about Article IV's credentials for the job is posed by its literal inapplicability to municipal protectionism. Of course, a city ordinance discriminating on the basis of state citizenship would just as surely run afoul of the privileges and immunities clause as would a state statute. The difficulty is presented by a municipal order distinguishing between persons based upon residency in that municipality. See *Massachusetts Council of Constr. Employers v. Mayor of Boston*, 1981 Mass. Adv. Sh. 2039, 2051-52, 425 N.E.2d 346, 354 (1981), cert. granted on other grounds *sub nom.* *White v. Massachusetts Council of Constr. Employers*, 50 U.S.L.W. 3591 (U.S. Jan. 26, 1982) (No. 81-1003) ("In such circumstances it may be more difficult to find a violation of the privileges and immunities clause because the discrimination adversely affects citizens [within the state] as well.") But see *Construction & Gen. Laborers Local 563 v. City of St. Paul*, 270 Minn. 427, 134 N.W.2d 26, 30 (1965) (invalidating, partially on privileges and immunities grounds, a city ordinance requiring contractors on public buildings to hire only residents of the county in which the city was located). Logically, however, it seems that the impact of such an order on interests without the state can be measured just as effectively as can its impact on interstate commerce. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (municipal ordinance forbidding local sale of milk not pasteurized within five mile radius of city found to discriminate against interstate commerce despite inclusion of in-state but non-local interests). Where an ordinance predominantly affects out-of-state individuals or firms it should be subject to strict constitutional scrutiny. See *infra* pp. 455-57. If a municipality's action primarily affects interests within the state and the Fourteenth Amendment's equal protection clause has not been violated, any corrective action must emanate from state constitutions and state legislation.

129. U.S. CONST., art. IV, § 2. The Articles of Confederation used the phrase "free inhabitants." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 173-74 (M. Farrand ed. 1937). The draft submitted to the Committee of Detail at the Constitutional Convention changed the wording to "free citizens" but the Committee's final report omitted the term "free." E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 406 (1964).

130. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (equal protection clause); *Covington & Lexington Turnpike R. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (due process clause). Corporations have also been held to be "persons" whose property is protected by the due process clause of the Fifth Amendment. See *The Sinking Fund Cases*, 99 U.S. 700, 718-19 (1878).

131. When corporations first sought to invoke the diversity jurisdiction of federal courts, Justice Marshall rejected the idea that they could be regarded as "citizens." See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) ("That invisible, intangible, and artificial being, that mere

Field's view in *Paul v. Virginia*<sup>132</sup> that corporations are not citizens for the purposes of Article IV has prevailed.<sup>133</sup> This limitation of Article IV's application to natural persons would render it completely inadequate for the purposes I have suggested. Since the targets of parochial state commercial legislation are often corporate entities rather than natural persons,<sup>134</sup> the process orientation would provide little protection from such balkanistic tendencies if corporations were excluded from its scope. Consequently, modern scholars have paid scant attention to Article IV's potential as a sword to combat commercial isolationism.<sup>135</sup>

The contemporary acceptance of Justice Field's legacy, by both courts and commentators, is little short of remarkable. Except for the all too rare acknowledgement that "there would be nothing startling about interpreting the . . . privileges and immunities [clause] of the Constitution to protect corporations,"<sup>136</sup> invocations of *Paul v. Virginia* and its progeny have become Pavlovian responses to corporate efforts to invoke the clause's pro-

legal entity, a corporation aggregate, is certainly not a citizen . . .") Instead, said Marshall, the citizenship of the members of the corporation controlled. *Id.* at 91-92. Although several decades later the Court declared that a corporation was indeed a citizen of the state in which it was chartered, see *Louisville, Cin. & C. R.R. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844), this position was short-lived. In *Marshall v. Baltimore & O. R.R.*, 57 U.S. (16 How.) 314 (1853), the Court returned to Justice Marshall's view that, because corporations were artificial beings, the citizenship of the stockholders must control. Having done so, it then created a conclusive presumption that all of the stockholders of a corporation shall be deemed citizens of the incorporating state. *Id.* at 328. See also *St. Louis & S.F. Ry. v. James*, 161 U.S. 545, 554-55 (1896) (corporation deemed to be composed of citizens of incorporating state for purpose of diversity jurisdiction). This compromise, clearly a fiction, endured until 1958, when Congress amended 28 U.S.C. § 1332 to provide that a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c) (1976). It has been said that the statute does not accord corporations the status of "citizens" but merely deems them "to be the equivalent of citizens for purposes of federal diversity jurisdiction." *Eldridge v. Richfield Oil Corp.*, 247 F. Supp. 407, 409 (S.D. Cal. 1965), *aff'd*, 364 F.2d 909 (9th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967).

132. 75 U.S. (8 Wall.) 168 (1869).

133. See, e.g., *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981). Corporations are similarly held not to be "citizens" within the ambit of the Fourteenth Amendment's privileges and immunities clause. *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 561 (1899); *Hague v. CIO*, 307 U.S. 496, 514 (1939).

134. See, e.g., *Lewis v. BT Investment Managers*, 447 U.S. 27 (1980) (legislation directed at out-of-state banks, trust companies and bank holding companies); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (legislation directed at Washington apple industry); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974) (legislation directed at foreign corporations doing business in Mississippi).

135. See, e.g., *L. TRIBE*, *supra* note 24, § 6-2, at 320 n.3 ("[T]he typical beneficiary of the commerce clause's negative implications is a corporate entity and as such cannot claim the protection of article IV's privileges and immunities clause.") *But see* Varat, *supra* note 6.

136. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 44 n.246 (1977). *Cf.* Simson, *Discrimination Against Non-residents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 380 n.10 (1979) ("I assume for present purposes the validity of the Supreme Court's view that the nonresidents protected by the privileges and immunities clause do not include corporations . . ."); Varat, *supra* note 6, at 499 n.47 ("The notion that corporations are not 'citizens' . . . is more venerable than sound.")

tections.<sup>137</sup> Yet, the legal underpinnings of Justice Field's conclusion are no longer sound. Reflecting the thinking of his time, Field based his reasoning on the view that corporations were "mere creation[s] of local law" and could "have no legal existence beyond the limits of the sovereignty where created."<sup>138</sup> With no right of recognition in any other state, it followed that such recognition could be withheld entirely or "granted upon such terms and conditions as those States may think proper to impose."<sup>139</sup> Any reading of Article IV to include corporations within the ambit of its sanctuary would, concluded Field, result in "[t]he principal business of every State . . . be[ing] controlled by corporations created by other States."<sup>140</sup> At the time *Paul* was decided, "corporations really were instrumentalities of the state."<sup>141</sup> It is, therefore, hardly surprising that this argument received universal acceptance in the mid-nineteenth century. But things have decidedly changed. The erosion of Justice Field's pronouncement, first detailed by Justice Frankfurter,<sup>142</sup> has received significant attention during the Court's most recent term.

In *Western & Southern Life Insurance Co. v. State Board of Equalization*,<sup>143</sup> the appellant, an Ohio corporation, challenged the constitutionality of a California "retaliatory" tax imposed on some foreign insurance companies in response to the insurance tax laws of the insurer's home state. California responded to the equal protection attack<sup>144</sup> on its tax provisions by invoking *Paul v. Virginia*. Although the Court acknowledged *Paul's* holding "that a State may attach such conditions as it chooses upon the

137. See *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981); *Asbury Hosp. v. Cass County*, 326 U.S. 207, 210-11 (1945). The Burger Court has not, however, been reluctant to use the privileges and immunities clause when scrutinizing state commercial legislation directed at natural persons. See *Hicklin v. Orbeck*, 437 U.S. 518 (1978); cf. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978) (limiting the scope of the clause to activities that can be regarded as fundamental).

138. 75 U.S. (8 Wall.) 168, 181 (1869).

139. *Id.*

140. *Id.* at 182.

141. Ratner, *Corporations and the Constitution*, 15 U.S.F. L. REV. 11, 12 (1981). See also *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 660 n.11 (1981) ("In 1869, the year *Paul v. Virginia* was decided, the Commonwealth of Virginia did not permit general incorporation of insurance companies. . . . Thus, the Court's conception of the corporate franchise in that case as a 'grant of special privileges to the corporators,' . . . was an accurate portrayal of the corporation as it existed at that time.") (citation omitted) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869)).

142. *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 79-83 (1954) (Frankfurter, J., concurring). See also G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 69 (1918) ("Decisions which were based on the notion that a corporation is a special privilege cannot be considered authorities under general incorporation laws.")

143. 451 U.S. 648 (1981).

144. Although the Ohio insurance company had also alleged that the California tax violated the commerce clause, the Court held that the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1976), "removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance." 451 U.S. at 653.

grant of the privilege to do business within the State,"<sup>145</sup> it emphatically rejected the contemporary validity of the principle. Instead, said the Court, a state enjoyed no authority to impose burdens on foreign corporations other than those imposed on domestic corporations "unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."<sup>146</sup> Observing that the twentieth century had witnessed "'an almost complete disintegration' of the doctrine of *Paul v. Virginia*,"<sup>147</sup> the Court catalogued the metamorphosis of corporate status precipitated by the advent of general incorporation laws and the introduction of the constitutional requirement of equal protection.<sup>148</sup> The right to incorporate or do business within a state, noted the Court, has "cease[d] to be a privilege to be dispensed by the State as it sees fit . . . ."<sup>149</sup> Instead, the right has become one "generally available to all on equal terms . . . ."<sup>150</sup>

Line by line, the opinion in *Western & Southern Life* stripped Justice Field's position of every one of its legal underpinnings. One might well have believed, therefore, that the decision heralded the recognition of corporate citizenship under Article IV that has long been accepted under Article III.<sup>151</sup> At a minimum, Justice Field's dichotomous approach to the two provisions has become constitutionally suspect. Regretfully, however, renewed scrutiny of the privileges and immunities clause's applicability to corporations is not to be found in *Western & Southern Life*. In the very same opinion that sounds *Paul's* death knell, Justice Brennan enigmatically writes:

Ordinarily, there are three provisions of the Constitution under which a taxpayer may challenge an allegedly discriminatory state tax: the Commerce Clause; the Privileges and Immunities Clause; and the Equal Protection Clause. This case assumes an unusual posture, however, because the Commerce Clause is inapplicable to the business of insurance . . . and the Privileges and Immunities Clause is inapplicable to corporations, see *Hemphill v. Orloff*. . . . Only the

145. *Id.* at 657.

146. *Id.* at 668. The Court ultimately held that California satisfied this standard, finding both that its purpose of promoting the interstate business of domestic insurers by deterring other States from enacting excessive taxes was a legitimate one, *id.* at 668-71, and that the use of a retaliatory tax scheme to achieve this end was a rational legislative scheme. *Id.* at 670-74.

147. *Id.* at 662 (quoting G. HENDERSON, *supra* note 142, at 111).

148. *Id.* at 659-60.

149. *Id.* at 660.

150. *Id.*

151. See *supra* note 131. There is evidence to support the notion that the term "citizen" was used in the same sense in both Articles. Indeed, it has been persuasively argued that the diversity provisions of Article III were viewed as the procedural machinery for effectively securing the substantive rights conferred by the privileges and immunities clause. See G. HENDERSON, *supra* note 142, at 182-83.

Equal Protection Clause remains as a possible ground for invalidation of the California tax.<sup>152</sup>

In the first place, the reference to Article IV is gratuitous. Appellant raised no such claim. Far more surprising than the Court's inclusion of this dicta is the cavalier way in which it treats the issue. Justice Brennan's terse recitation of *Paul*'s legacy inexcusably ignores the damage done to the proposition by the remainder of his opinion. *Paul* has become a holding without a rationale. It is in this context that the citation of *Hemphill v. Orloff*<sup>153</sup> is so mystifying. *Hemphill* offers no independent analysis of corporate status under the privileges and immunities clause. It simply invokes *Paul v. Virginia* and *Bank of Augusta v. Earle*<sup>154</sup> for the proposition that the privileges and immunities clause's protections are not available to corporate entities and reproduces four paragraphs from the latter opinion.<sup>155</sup> It is indeed odd that Justice Brennan should choose this occasion to refer to an obscure case never previously cited by the Court for the proposition at issue. Perhaps the Court was cognizant of the inconsistent messages contained within the four corners of its opinion but remained unwilling to probe the questionable vitality of *Paul*'s holding because the issue had not been raised by the parties. Rather than call attention to the problem by incongruous citations to *Paul*, the Court may have attempted to mask the problem by utilizing one of *Paul*'s more obscure progeny. This hypothesis, however, fails to explain why the Court felt it necessary to mention the privileges and immunities clause in the first place.<sup>156</sup>

One can only hope that whatever the explanation for continued homage to *Paul*'s limited construction of the term "citizen," the issue will soon come to the forefront.<sup>157</sup> When it does, one hopes that the anachronistic

152. 451 U.S. at 655-56 (footnotes and citations omitted).

153. 277 U.S. 537 (1928).

154. 38 U.S. (13 Pet.) 519 (1839).

155. 277 U.S. 537, 548-50 (1928).

156. It is also hard to know what to make of the dissent in *Western & Southern Life*. In the face of a majority opinion embracing the view that a corporation is not a "citizen" within the meaning of Article IV, Justice Stevens opens his dissent by referring to Ohio insurance companies as "Ohio citizens." See 451 U.S. at 675. Since plaintiff's action was commenced in state court, the diversity of the litigants' citizenship was of no relevance. This reference to "citizens," therefore, was not made in the context of Article III. The brief dissent supplies no clue as to whether the use of the term was a slip or a message. Perhaps this reference is no more than a fortuitously placed illustration of how comfortable contemporary society has become with the concept of corporate citizenship.

157. *Paul v. Virginia* seems to have worked its charms on commentators as well as courts. No contemporary writer has voiced doubt about the continued vitality of its corporate exclusion for Article IV. But see *supra* note 136 (citing authors who question the soundness of the exclusion). Earlier writers who did raise such questions seem to have been ignored. See G. HENDERSON, *supra* note 142, at 186-87 ("Since the Supreme Court has already held that constitutional protection against arbitrary discrimination is as appropriate to corporations as to individuals, it seems a necessary conclusion from [this] principle . . . that corporations should now be entitled to the benefits of Article IV, section 2 of the Constitution."); Green, *Corporations as Persons, Citizens and Possessors of Liberty*, 94 U. PA. L.

position of Justice Field will be abandoned,<sup>158</sup> enabling the privileges and immunities clause to become the favored implement for judicial dissection of state commercial regulation.

The reader may well wonder why the privileges and immunities clause is preferable to the equal protection clause.<sup>159</sup> The reasons are threefold. The first is historical; the other two are practical. It is well within the realm of possibility that the privileges and immunities clause was actually designed by the Framers for the very purposes suggested.<sup>160</sup> In addition to its other attributes, the shift from Article I to Article IV to control state parochialism may effectuate original intent.<sup>161</sup> The equal protection clause, coming as it did nearly a century after the Constitution's ratification, can hardly be the subject of such a pretense.

The second reason is of far greater significance. The standard of review employed in the Article IV cases, "characterized by a shift in the burden of proof to the discriminating state and by an insistence on a fairly precise fit between remedy and classification," is at least as demanding as intermediate scrutiny under contemporary equal protection jurisprudence.<sup>162</sup> In contrast, because nonresidence and out-of-state citizenship have never been deemed suspect or even quasi-suspect classifications for equal protection purposes, the discriminatory legislation symbolic of state parochialism would be assessed solely under a minimum rationality test and, in all like-

REV. 202, 228-33 (1945) (arguing that holdings of the Supreme Court are not inconsistent with proposition that corporation is state citizen within meaning of Constitution); Holland, *Should a Corporation be Considered a Citizen Under the Privileges and Immunities Clause of the Federal Constitution?* (pts. 1-2), 36 W. VA. L.Q. 245, 330 (1930); Willis, *Corporations and the United States Constitution*, 8 U. CIN. L. REV. 1, 6 (1934) ("Natural persons are protected by the . . . privileges and immunities clause of Article IV . . . and corporations should receive this same protection.")

158. The reconstruction of Article IV's terminology need not necessarily entail a similar alteration of the privileges and immunities clause of the Fourteenth Amendment. While Article IV refers to "The Citizens of each State," the Fourteenth Amendment's version of the clause talks of "citizens of the United States." Ever since the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the former clause has been read to protect the rights of state citizenship while the latter has been limited to rights implicit in the citizen's relation to the federal government. It would take no leap in logic to conclude that corporations, while citizens of the state in which they were incorporated, were nonetheless not citizens of the United States. It is true, of course, that § 1 of the Fourteenth Amendment begins by establishing that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside" and that it is long since settled that corporations are "persons" within the scope of the Fourteenth Amendment's due process and equal protection clauses. See *supra* note 130. It does not follow, however, that being a "person" is the same as being a "person born or naturalized in the United States." A corporation may constitute the former, even if the fiction is not carried so far as to encompass the latter.

159. Cf. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 551 n.2 (1949) (Black, J., dissenting) (equal protection clause would seem more appropriate source of judicial power than commerce clause with respect to state legislation which discriminates against interstate commerce).

160. See *supra* pp. 447-48 & notes 118-26.

161. See L. TRIBE, *supra* note 24, § 6-2, at 320.

162. See *id.* § 6-33, at 411.

lihood, upheld.<sup>163</sup> Thus, as a tool to forge a process model, the equal protection clause lacks a cutting edge.

The final difference that results from the choice of the privileges and immunities clause concerns congressional power to modify judicial decisions in the area of commercial legislation. Were equal protection used as a model, the same yardsticks might well measure Congressional and state legislation. Congress is not only limited by the Fifth Amendment's equal protection component of its due process clause, but it clearly lacks the power to "authorize the states to violate the Fourteenth Amendment Equal Protection clause."<sup>164</sup> The privileges and immunities clause, on the other hand, has not been applied to limit federal power.<sup>165</sup> Congress therefore arguably enjoys broader scope to provide for resident/non-resident distinctions than do the states.<sup>166</sup> This would accord with the process model. In Congress, the citizens of all states are represented. Disparate treatment of a particular state's residents authorized by this broader-based body deserves a greater presumption of validity.<sup>167</sup>

#### D. *A Proposed Model*

Any attempt to construct a model for judicial review of state commercial regulation must begin by acknowledging that, in many cases, Congress has not remained silent. Recently, Professor Gunther has observed that objections to state law based on the congressional *exercise* of commerce power are, "with increasing frequency," supplementing those resting on the mere constitutional *grant* of that power.<sup>168</sup> So long as Congress acts

163. *Id.* at 411-12. Compare the articulation of the equal protection standard in *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657 (1981) ("California's retaliatory insurance tax should be sustained if we find that its classification is rationally related to achievement of a legitimate state purpose.") with the articulation of the privileges and immunities standard in *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) ("[The clause] does bar discrimination . . . where there is no substantial reason for the discrimination . . .") In all probability, the discriminatory tax upheld in *Western & Southern Life*, see *supra* note 146, could not withstand the more exacting scrutiny of Article IV.

164. *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969).

165. *Id.* at 666 (Harlan, J., dissenting).

166. *But see* Varat, *supra* note 6, at 568-71 (arguing that Congress should not have broader power to make such distinctions). Naturally, even were we to adopt a privileges and immunities model, congressional modifications of judicial invalidations of state legislation could not transcend the rational basis limitations of equal protection. This is no less true under the present dormant commerce clause approach. See L. TRIBE, *supra* note 24, § 6-31, at 403 n.18 (principle that Congress may authorize state legislation otherwise barred by the dormant commerce clause cannot properly be extended to a conclusion that Congress has limitless power to authorize state discrimination against out-of-state citizens.)

167. *But see* L. TRIBE, *supra* note 24, § 6-31, at 403 n.18 (privileges and immunities clause confers personal right against state action unjustifiably discriminating against out-of-state citizens whether or not such discrimination is congressionally authorized.)

168. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 343 (10th ed. 1980).

within the area delegated to it by the commerce clause,<sup>169</sup> state action in actual conflict with the federal enactment must give way under the supremacy clause of Article VI.<sup>170</sup> Indeed, Congress may, though it seldom does, elect to "occupy the field" and preempt any local legislation on the subject regulated.<sup>171</sup> The task of the Court, when it is confronted with a challenge to state regulation based on either form of federal preemption, is simply one of statutory construction. Here, the judiciary seeks to gauge congressional intent, not to assess national need.<sup>172</sup> The interpretation and application of legislation is "emphatically the province and duty of the judicial department."<sup>173</sup> Preemption analysis is consistent with the analysis presented in this Article. Indeed, traditional preemption analysis reinforces the notion that the responsibility for maintaining free trade rests with Congress.<sup>174</sup> The problems begin only when Congress has not spoken. It is in these interstitial silences that the role of the judiciary must be better defined.

Silencing the commerce clause's dormant facet will sharpen our focus, but the task reassigned to the privileges and immunities clause will nevertheless be formidable. A representation-enforcing approach requires a court to ascertain whether the mechanisms of participatory democracy have failed to function properly. When that failure appears, intensive judicial scrutiny of the legislative product is warranted. When no such defect appears, deference to the political processes is commanded. Of course, as many have recognized, it is "no easy task for judges to frame criteria adequate to the task of assessing political unrepresentativeness directly. . . ."<sup>175</sup> The condemnation, however, of "discrimination" as a less than wholly satisfactory surrogate criterion<sup>176</sup> is unduly harsh. It is the

169. For a detailed examination of the limits on this power, however minor they may be, see *L. TRIBE*, *supra* note 24, §§ 5-4 to 5-7, at 232-42, § 5-22, at 308-18.

170. *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913).

171. See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Campbell v. Hussey*, 368 U.S. 297 (1961). Alternatively, Congress may explicitly authorize state regulation by the removal of preexisting barriers. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

172. *But see Note*, *supra* note 52, at 220 (suggesting that, when none of the normal sources of interpretation are conclusive, "the Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce"). Modern commentators have continued to note the presence of "constitutional" criteria in what purport to be determinations of congressional preemptive purpose. See G. GUNTHER, *supra* note 168, at 344; Choper, *supra* note 51, at 1586 n.191. Such an approach exceeds the proper judicial role. In determining whether the continued existence of the state law is consistent with congressional intent the Court should limit itself to the text of the federal law, its history, and its administrative interpretations. See generally H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1413-16 (1958) (unpublished manuscript).

173. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

174. Tushnet, *supra* note 6, at 156.

175. *L. TRIBE*, *supra* note 24, § 6-5, at 327 n.7.

176. *Id.* It is of some note, however, that, while questioning the adequacy of "discrimination" as a point of reference under dormant commerce clause analysis, Tribe admits that it "is necessarily a



inadequacy of the definition and methods of identifying discrimination, rather than its selection as a central theme, that has been its undoing. Adoption of a privileges and immunities focus would do much in the way of providing a suitable definition.<sup>177</sup> It remains for our consideration how to measure legislative discrimination against unrepresented interests. To this end, I propose a model employing a series of presumptions and shifting burdens of production and persuasion. In order to enable the reader to conceptualize the entire sequence of steps, I have included a diagram of the model.

*Step One: The Search for a Legitimate End*

Judicial scrutiny of any legislative act should begin with the search for a legitimate end.<sup>178</sup> The Court must decide whether there is a legitimate purpose under the state's police power, or whether the state legislature has merely attempted discrimination to achieve commercial advantage for its constituents. Initially, the burden of articulating a valid purpose falls upon the state. This burden, however, is one of production, not persuasion. Here the state need not convince the court of the veracity of its articulated end. It will, at this point, be taken at its word.

On the other hand, the state's burden of production ought to require more than *post hoc* conjecture by its counsel.<sup>179</sup> The representation model is not served by fabrication of statutory goals.<sup>180</sup> Indeed, quite to the contrary, requiring the proffered legislative end to have some basis in reality puts "indirect pressure on the legislature to state its own reasons" for its conduct and furthers the political process by encouraging "the airing and critique of those reasons."<sup>181</sup> While the model offered herein calls for in-

central issue . . . in privileges and immunities litigation . . ." *Id.*

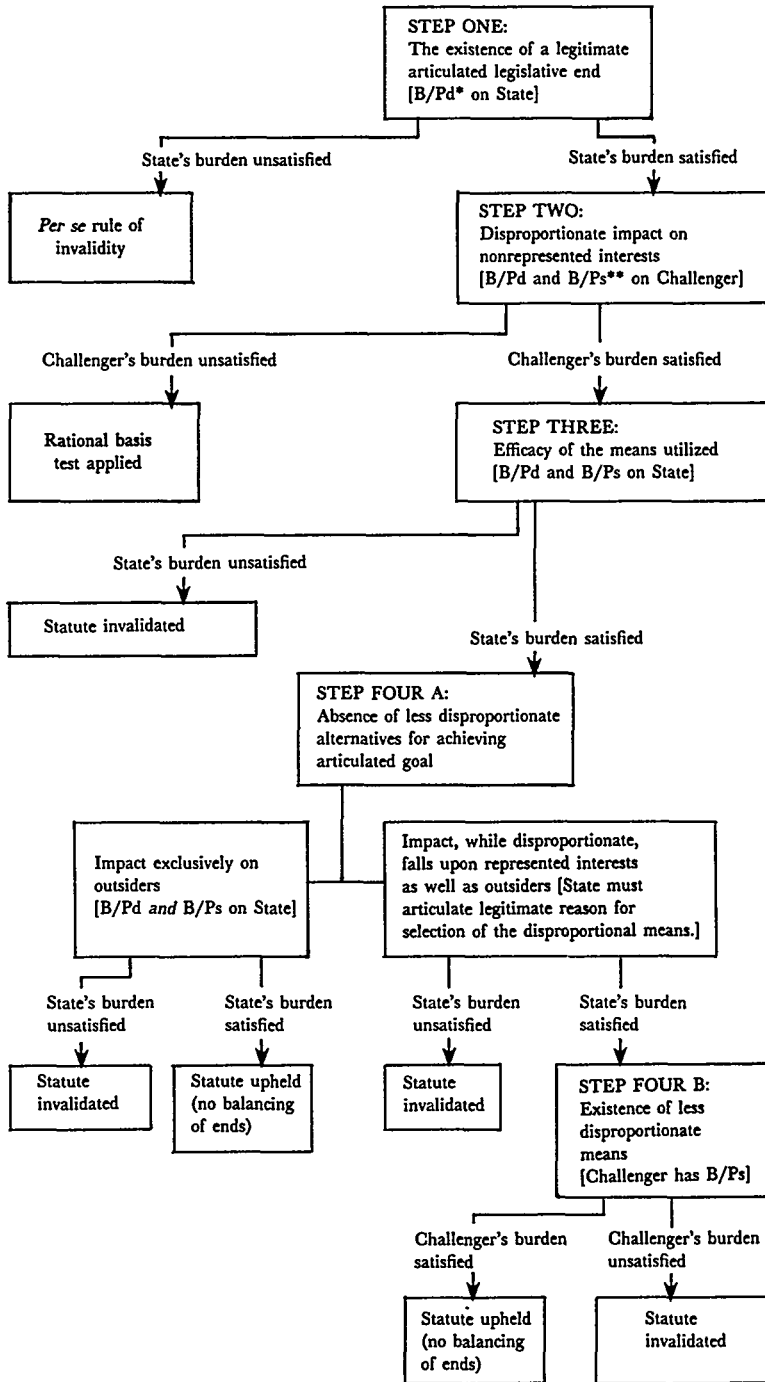
177. *See supra* pp. 444-54.

178. At this stage, the state needs only to justify its legislative end. It need not come forward to defend the means chosen to achieve that end.

179. When legislation has been challenged under the rational-based scrutiny of the due process or equal protection clauses, the Court has often permitted hypothetical or speculative purposes to suffice. *See, e.g.,* *McDonald v. Board of Comm'rs*, 394 U.S. 802, 809 (1969) (legislatures are presumed to have acted constitutionally unless no grounds can be conceived of to justify their action); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960) (constitutionally irrelevant whether hypothesized reasons for legislative action in fact underlie such action). *But see* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (court need not accept at face value assertions of purpose where examination of legislative history show that such purpose was not legislative goal). The Court seems, however, to be less willing to accept hypothetical purposes in dormant commerce clause cases. *See* *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring) (where only purpose articulated by legislature is illegitimate, it is contrary to sound principles of constitutional adjudication for courts to base analysis on purposes legislators never conceived of). *But see id.* at 702-03 & n.13 (Rehnquist, J., dissenting) (permitting *post-hoc* justifications by state's counsel to satisfy state's burden).

180. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 44, 47 (1972).

181. *Id.* at 47.



\* Burden of Production  
\*\* Burden of Persuasion

creased deference to the democratic process, little reason exists to defer to a legislative product for which a legitimate state purpose derives only from the imagination. There is nothing to be gained by presuming the constitutionality of such “majoritarian” efforts, for not much can be said on behalf of a democratic system where battle in the political arena over legislative goals is precluded by ignorance of those goals.<sup>182</sup> Where the legislature has set forth its goals in the preamble to, or body of, the enactment, the state’s burden is easily satisfied. Where that is not the case, the more difficult route of tracing legislative history for an expression of intent may have to be followed.<sup>183</sup> The sorry state of legislative materials in some jurisdictions may make such efforts excessively difficult. In such instances, reliance on a description of purpose from an authoritative source such as the highest state court,<sup>184</sup> or the state attorney general’s office<sup>185</sup> seems appropriate.

Naturally, if no legitimate state goal emerges,<sup>186</sup> the statute is invalid and the court’s inquiry ends.<sup>187</sup> Such incidents will, no doubt, be rare.<sup>188</sup>

182. *Id.* at 44.

183. Naturally, different legislators may vote for a single piece of legislation for widely different reasons. Like Professor Gunther’s model, my own would call on the Court to be initially receptive to all purposes, few or many, articulated by a state. *Id.* at 47.

184. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 481-82 (1981) (Stevens, J., dissenting) (factual conclusions drawn by Minnesota courts concerning deliberations of Minnesota legislature entitled to same deference as if drafted by legislators and incorporated in statute’s preamble).

185. See Gunther, *supra* note 180, at 47.

186. In the context of the proffered process model, illegitimacy is measured by an attempt to discriminate against non-citizens and non-residents, not by a desire to discriminate against interstate commerce. The two may, in most instances, be the same. If, on the one hand, the affected interstate commerce is incoming (e.g., a ban against shipping milk into the state), the disadvantaged group constitutes nonrepresented producers. If, on the other hand, the affected commerce is outgoing (e.g., a ban against exportation of cement), the disadvantaged group constitutes nonrepresented consumers. Yet, the two approaches may, on occasion, produce disparate results. See *supra* pp. 444-45.

187. Efforts to discriminate against non-residents for no other reason than to secure commercial advantages for those within the state are necessarily invalid *per se*. Although perhaps premature at this juncture, it seems worth noting that it is only discriminatory *purpose* and not *effect* that triggers the *per se* rule. The privileges and immunities opinions appear to recognize this. See *Toomer v. Witsell*, 334 U.S. 385 (1948):

[T]he privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.

*Id.* at 396. The commerce clause cases seem to suggest otherwise. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 625-28 (1978) (proffering virtual *per se* rule of invalidity for state statute seeking to achieve legitimate goal by use of discriminatory means). I shall take issue with this approach in step two of my model.

188. As previously noted, see *supra* note 183, reality forces us to recognize that legislatures act for a multiplicity of reasons. Judicial identification of the “primary purpose” is likely to prove unworkable. See *McGinnis v. Royster*, 410 U.S. 263, 276 (1973) (“The search for legislative purpose is often elusive enough . . . without a requirement that primacy be ascertained.”) Under the model advanced here, judicial invalidation at this embryonic stage would be warranted only if the authoritative sources failed to reveal a single permissible objective.

Seldom will scrutiny of legislative language, history, or authoritative state interpretations fail to reveal any permissible state end.<sup>189</sup> Few statutes are so inartfully drafted that they boldly reveal an intent to discriminate against non-citizens. The fact that the discrimination has non-residents, rather than a racial or religious minority, as its target may make it more socially acceptable, but legislatures are seldom less secretive in their efforts to carry it out. Nonetheless, no sound justification exists for approaching all proffered purposes as though they masked sinister ends. At the same time, however, the mere articulation of a legitimate purpose will not ensure final judicial imprimatur. Under the model proposed herein, the state's satisfaction of the burden of production merely invokes a presumption of constitutional validity. This presumption, naturally, is subject to rebuttal.

*Step Two: Gauging the Proportional Impact on Nonrepresented Interests*

The statute's challenger, of course, carries the burden of dislodging the presumption of legislative veracity. Under the proposed model, that burden would be satisfied by a clear showing of the statute's disproportionate impact on nonrepresented interests.<sup>190</sup>

It is not without significance that I have chosen to talk of disproportionality rather than discrimination. To begin with, our use of the latter in its verb form often causes us to associate it with intent. Although we have subdivided our consideration of discrimination into categories of motivation and effect, the word retains its negative flavor. Disproportionality, on the other hand, is a far more neutral label. Of greater importance, use of the term disproportionality emphasizes the point made earlier; judicial inquiry ought to be directed at the way in which the legislation's impact is divided between residents and nonresidents, and not at the sheer weight of the burden imposed on the latter group.<sup>191</sup> Disproportionality, in this context, means simply that a scrutinized statute has a greater effect on outsiders than on the enacting state's own citizens. For ease of reference (and at the risk of oversimplification), I shall represent the level of disproportionality by a measure denoted as "outsider impact percentage" ("OIP"). A statute whose effects fall exclusively on nonrepresented interests, for example, would have an OIP of 100%. A legislative enactment

189. *But see* *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 683 n.3 (1981) (Brennan, J., concurring) (concluding that *only* purpose articulated by Iowa lawmakers for their double-trailer ban was illegitimate).

190. The burden envisioned here encompasses both a burden of production and a burden of persuasion. Thus, it is not enough that the statute's attacker produces some evidence of the statute's disproportionate impact; he must prove to the court by a preponderance of the evidence that the impact falls disproportionately on unrepresented interests.

191. *See supra* pp. 437-43.

## Dormant Commerce Clause

which cast its weight equally upon those within and without the state would have an OIP of 50%. The latter, of course, would not constitute disproportionality. In order to carry his burden, the challenger must demonstrate that the impact of the statute being attacked is substantially greater on nonrepresented interests than on those to whom the legislature is accountable. Anything short of that will leave the presumption of permissible purpose standing. There is little reason to doubt the motives underlying a legislative measure that falls solely, predominantly, or equally on interests actually represented in the regulating body.<sup>192</sup> In such an instance, appropriate deference to the political process counsels that the state be asked to show no more than that the means it has chosen bears a rational relationship to the legitimate end it has articulated. It is only a disproportionate impact that justifies the triggering of a closer analysis.

Disparate impact may be evinced in a number of ways. The four methods described below are meant to be illustrative rather than exhaustive.<sup>193</sup>

(i) *Facial Disparity* There is little difficulty of proof posed for the statute's challenger where the legislature has distinguished between the represented and unrepresented interests on the face of the enactment. Laws that mandate hiring preferences for residents,<sup>194</sup> establish nonresident shrimping license fees at a level one hundred times higher than the resident fee,<sup>195</sup> or prohibit the ownership of an investment advisory service by out-of-state banks, bank holding companies, and trust companies,<sup>196</sup> provide illustrations of such facial disparity. The impact of these provisions falls entirely on those to whom the legislators are not answerable. The OIP is, accordingly, 100%.

While the existence of facial disparity will enable a challenger to dislodge the presumption of legislative veracity, such facial disparity should not trigger a *per se* rule of invalidity. It is one thing to hold that a state may never proceed when discrimination is its only end.<sup>197</sup> It is quite another to say that a state may never, when necessity commands, seek to achieve legitimate ends with discriminatory means. It is undoubtedly true that "the evil of protectionism can reside in legislative means as well as

192. See *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938). See also Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 39 MD. L. REV. 451, 468 (1978) ("[P]eople are not lemmings, and while they may agree to disadvantage themselves somewhat in the service of some overriding social good, they are not in the habit of *destroying* themselves en masse.")

193. For a more complete, albeit somewhat distinctive, delineation of the means used to measure disparate effects, see Tushnet, *supra* note 6, at 133-41. It is not entirely clear, however, whether Professor Tushnet is seeking to measure disparate effects on interstate goods or nonrepresented interests.

194. See *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

195. See *Toomer v. Witsell*, 334 U.S. 385 (1948).

196. See *Lewis v. BT Inv. Managers*, 447 U.S. 27 (1980).

197. See *supra* note 187.

legislative ends.”<sup>198</sup> On the other hand, there is little to be lost from permitting a state the opportunity to prove that its legitimate goal can *only* be achieved in the manner selected. The privileges and immunities cases set an even more liberal standard, suggesting that such discriminatory efforts may survive where “substantial reason[s] [exist] for the discrimination beyond the mere fact that they are citizens of other States.”<sup>199</sup> Although I question whether a “compelling” reason might not be a more desirable standard, I am in accord with the Court’s unwillingness to equate facial discrimination with a parochial purpose. Nonetheless, I am not content to propose a model that treats facially disparate legislative efforts (evinced a 100% OIP) identically with enactments that, while facially neutral, impact disproportionately, although not exclusively, on foreign interests.<sup>200</sup>

A caveat is in order before proceeding to the alternative methods for demonstrating disproportionality. Despite its apparent simplicity, the facial disparity method contains traps for the unwary. In *Hughes v. Oklahoma*,<sup>201</sup> for example, the majority describes a state statute prohibiting the transportation of natural minnows procured within the state for sale outside the state as facially discriminatory. While that description is accurate under the free trade standard currently employed by the Court, it cannot be viewed as *facially* disproportionate under the process standard advanced herein. Oklahoma’s legislative language discriminates against interstate commerce. It does not necessarily discriminate against noncitizens. Both residents and nonresidents are permitted to procure minnows for use within the state. Neither may ship them across state lines. To be sure, the Oklahoma enactment may be disproportionate in its impact on the out-of-state consumer desirous of purchasing minnows and unable to obtain them from alternative sources,<sup>202</sup> but this is several steps away from a 100% OIP. The fact that the statute prevents the Oklahoma minnow dealer

198. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

199. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

200. Accordingly, in steps three and four of the model, I have taken this into account in proposing the extent of the burden a state ought to carry once the disproportionate nature of its legislative attempt has been demonstrated. Both steps make the nature and magnitude of the state’s task dependent on the level of impact on outsiders that the challenger is able to establish. The existence of facial disparity will therefore pose an exceedingly difficult obstacle for the legislation’s defenders to surmount.

201. 441 U.S. 322, 336-37 (1979).

202. It should be noted, however, that Oklahoma’s ban only applied to naturally seined minnows. Anybody outside the state desiring Oklahoma minnows could obtain them from hatcheries in the state. This led two Justices to conclude that realistically no discrimination against interstate commerce existed. “[T]here is no showing in this record that requiring appellant to purchase his minnows from hatcheries instead of from persons licensed to seine minnows from the State’s waters in any way increases appellant’s costs of doing business.” *Id.* at 345 (Rehnquist, J. dissenting). *But see* Varat, *supra* note 6, at 501 (“The fact remains that the statute sought to embargo minnows for intrastate sale only. It was therefore a classic illustration of a law discriminating against interstate commerce by excluding from interstate commerce altogether a commodity available for intrastate commerce.”)

from doing business in neighboring states insures at least some local impact. This does not mean that the challenger will be unable to demonstrate the disproportionality. It will simply be more difficult here than in cases where the statute facially provides for differential treatment of foreign interests.

Another illustration of the differing consequences of testing for discrimination against commerce rather than against outsiders is *City of Philadelphia v. New Jersey*.<sup>203</sup> A New Jersey statute banned disposal of all waste originating beyond its borders in sanitary landfills located within the state, but placed no concomitant restriction on in-state waste. One might initially ascribe a 100% OIP to this legislative effort. Nothing could be further from the truth. The statute's greatest impact fell on New Jersey landfill owners and operators who wished very much to continue the sale of land space to Philadelphia and feared bankruptcy if prevented from doing so.<sup>204</sup> Indeed, despite the title of the case, the city of Philadelphia was a nominal party and filed no brief on its own in the Supreme Court. The statute did discriminate against the flow of commerce, but its burdens fell in significant measure on persons or entities represented in the legislative process. In many ways, therefore, this represents the flip side of *Exxon Corp. v. Governor of Maryland*.<sup>205</sup> The Court's model perceives a greater danger from the legislative effort impeding commerce than from the attempt at preventing outside oil refiners from operating retail gas stations in Maryland.<sup>206</sup> My perception is directly to the contrary. Congress may, and likely will, intervene to protect commerce where the national interest is at stake. It is far less likely to intervene on behalf of an unfairly treated outsider. It is in the latter area where the role of the Court is indispensable.

(ii) *Regulatory Exceptions and Administrative Exemptions* A subspecies of the facially disparate statute is the legislative scheme that, while superficially neutral in application, provides important exemptions obtainable only by local interests. These visually appealing, but substantially disproportionate, legislative efforts typically take one of two forms. In the less subtle of the two, the regulation itself restricts the availability of exemptions to represented interests. Illustrative of this technique is the recently invalidated Iowa prohibition against the use of trucks longer than

203. 437 U.S. 617 (1978).

204. See Joint Appendix at 141, 211, 362-63, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

205. 437 U.S. 117 (1978). See *supra* pp. 444-46.

206. This is not to say that the Court erred in invalidating New Jersey's efforts. It did, however, fail to note the adversely affected interests of those within the state and may well have applied a greater degree of scrutiny than was warranted.

sixty feet on "interstate" highways.<sup>207</sup> Although permits to ship trucks as long as seventy feet were available to truck manufacturers, only Iowa manufacturers were allowed to obtain such permits.<sup>208</sup> Similarly, permits to move oversized mobile homes, while available for any shipments originating within the state, could be granted to outsiders only if delivery was to be made to an Iowa resident.<sup>209</sup> In a more camouflaged form of a similar scheme, the statute may permit exemptions to anyone, but the administrative officer given the task of dispensing such permits limits their issuance to in-state concerns. In *Raymond Motor Transportation v. Rice*,<sup>210</sup> for example, the State Highway Commission was granted broad statutory authority to issue permits authorizing exemptions from Wisconsin's highway prohibition against sixty-five-foot double trailer units.<sup>211</sup> Despite the facial neutrality of many of the permit procedures, the Court found that permits, although readily afforded to Wisconsin industries, were denied with equal uniformity to industries located in other states.<sup>212</sup>

While the Justices have been particularly attentive to facial disparity in state commercial legislation, they have shown considerably less interest in scrutinizing these nonevenhanded exemption processes.<sup>213</sup> There seems little reason, however, to deny the statute's challenger the opportunity to satisfy his burden of persuasion by producing evidence of the disparate operation of such exception procedures. Where an OIP of nearly 100% can be demonstrated, it would exalt form over substance to recognize a distinction between the facially disparate legislation and the superficially neutral statute that conceals its discriminatory treatment of nonresidents in the trappings of restrictively afforded exemptions.

207. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). Although the majority treated the case as involving only interstate highways, *id.* at 672-73, the statute was not so limited, *id.* at 688-89 (Rehnquist, J., dissenting).

208. *Id.* at 666.

209. *Id.* Iowa also provided significant exemptions for trucks hauling livestock or farm vehicles and allowed cities abutting other states to enact local ordinances adopting the longer length limitations of the neighboring state. As the Court pointed out, these provisions "undoubtedly [were] helpful to local interests." *Id.* at 676.

210. 434 U.S. 429 (1978).

211. *Id.* at 432-434. Although one of Wisconsin's exemptions blatantly discriminated against out-of-state industries, most of the exemptions were facially neutral. It was evident, however, that a number of these seemingly neutral exemptions "were enacted at the instance of, and primarily benefit[ed], important Wisconsin industries." *Id.* at 447.

212. *Id.* at 446 n.24. In so finding, the Court rejected the conclusion of the three-judge district court that "all statutory and administrative overweight and overlength permit provisions are worded and applied in an evenhanded fashion." *Raymond Motor Transp. v. Rice*, 417 F. Supp. 1352, 1357 n.9 (W.D. Wis. 1976) (emphasis supplied).

213. See *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 447 n.24 (1978) (unnecessary to decide whether appellants should be entitled to relief solely on basis of discrimination embodied in permit procedures); *Brotherhood of Locomotive Firemen and Enginemen v. Chicago R.I. & Pac. R.R.*, 393 U.S. 129, 140-41 (1968) (finding that Arkansas statutory exemption effectively precluding all intrastate railroads from state "full crew" laws was rationally based and thus not discriminatory).



(iii) *Nature of the Regulated Industry* A state regulation that is facially neutral and allows no suspect exemptions may nonetheless have an OIP of 100% where the affected industry is entirely out-of-state. A hypothetical New York statute prohibiting the sale within the state of any orange juice product provides an illustration of such a legislative effort. To be sure, the statute is devoid of facial disparity. On the other hand, the presence of an adverse impact on any represented entity is doubtful. Oranges are not grown in New York.<sup>214</sup> If the state has articulated a health end for the legislation—for example, to stop the spread of the Mediterranean fruit fly—a presumption of constitutional validity would be in place. There is no reason, however, to blind ourselves to business realities. When a state legislature has attempted to preclude unrepresented industries from doing business within the state, economic protectionism is always apt to have been a motivating force. Perhaps, in the case of the instant hypothetical, the New York statute has been designed to benefit the apple industry, a mainstay of the upstate region. Such legitimate apprehensions ought to permit the challenger's demonstration of disproportionate impact<sup>215</sup> to trigger something greater than the traditional rational basis scrutiny. Where the absence of insider impact has been proven, a vital safeguard against legislative abuse has been removed. The wisdom of examining the nature and location of the regulated industry would, accordingly, seem beyond dispute. The present Court, however, has not shared this writer's perceptions.

In the *Exxon* decision,<sup>216</sup> the Court described a Maryland statute prohibiting producers or refiners of petroleum products from operating any retail service station within the state as “[p]lainly” nondiscriminatory,<sup>217</sup> thus ignoring the available statistical data showing that nearly all of the class of enterprises excluded from participation in the retail gasoline market were out-of-state firms.<sup>218</sup> Although Justice Blackmun's dissent

214. The absence of orange groves in New York is, however, not necessarily proof of an exclusively extraterritorial impact. Notwithstanding the lack of local growers, there may well exist New York packers, processors, or distributors adversely affected by the statutory prohibition. In calculating the OIP, courts ought not overlook such in-state checks on the legislature. *But see* Tushnet, *supra* note 6, at 160 (suggesting that examining political forces other than the industry “directly regulated” would unduly complicate judicial analysis). Less significant, the hypothetical New York legislation harms local consumers denied access to orange juice. Such an undifferentiated internal impact, however, cannot often be relied upon to alter legislative conduct. *See* Tushnet, *supra* note 6, at 133 (“[T]he general consumer interest is at a systematic disadvantage in legislative combat against organized groups.”)

215. The challenger here may bolster his proof of the disproportionate burden on outside interests—the orange producers—by showing a corresponding benefit to inside interests—the apple industry. This may, however, often entail difficult questions, not unlike those encountered in an antitrust context, regarding the relevant market.

216. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). *See supra* pp. 444-46.

217. 437 U.S. at 125.

218. *Id.* at 138 (Blackmun, J., concurring in part and dissenting in part).

would have permitted a showing of disproportionality to be founded upon evidence that "local dealers may continue to enter retail transactions . . . while the statute will deny similar opportunities to the class composed almost entirely of out-of-state businesses,"<sup>219</sup> the majority found no significance in this disparity. Out-of-staters, noted Justice Stevens for the Court, are not affected by the Act unless they produce or refine gasoline.<sup>220</sup> This misses the point. What makes a statute such as Maryland's suspect is the fact that nearly one hundred percent of the regulated group is composed of nonrepresented entities (100% OIP),<sup>221</sup> not that one hundred percent of outsiders are subject to the regulation. The statute at issue in *Exxon* affected *only* outsiders. The fact that it failed to burden *all* outsiders is scarcely evidence of an internal check on the state legislature.

A similar disregard of business realities was evinced recently in *Minnesota v. Clover Leaf Creamery Co.*<sup>222</sup> The legislative effort under attack there banned the retail sale of milk in plastic containers, ostensibly because they were nonreturnable and nonrefillable. No parallel limitation, however, had been imposed on the sale of milk in equally nonreturnable, nonrefillable paperboard containers made from pulpwood. The apparent purpose of this disparate treatment was revealed in the findings of the state trial court. The pulpwood industry was local. The plastics industry was not.<sup>223</sup> The Court's conclusion that the statute regulated evenhandedly, by prohibiting all sales of milk in plastic containers "without regard to whether the milk, the containers, or the sellers are from outside the State,"<sup>224</sup> manifests a base superficiality. Of course, the Minnesota legislation was facially neutral. No less clear, however, was the gross disproportionality of the statute's impact. The level of judicial scrutiny ought to depend upon the impartiality of the legislative process, not on the craftiness of legislative draftsmen.

219. *Id.* at 140 (Blackmun, J., concurring in part and dissenting in part).

220. *Id.* at 126.

221. It may overstate the case somewhat, however, to suggest as I did earlier, *see supra* pp. 445-46, or as Justice Blackmun did in *Exxon*, that a legislator is going to be completely "unresponsive" to an out-of-state entity. *Exxon Corp. v. Maryland*, 437 U.S. at 151 (Blackmun, J., concurring in part and dissenting in part). Maryland's ban was applicable to *Exxon Corp.*, *Gulf Oil Corp.*, and *Shell Oil Corp.*, among others. Such companies are not unfamiliar with lobbying techniques. Even in a state where they may be technically classified as outsiders, corporations have ways of making their interests known and their influence felt. In spite of statutes that limit their ability to make direct political contributions, indirect measures such as advertising aimed at influencing local consumers and mailings designed to induce shareholder and employee response may be employed. Accordingly, courts should weigh these factors when scrutinizing the political process preceding the enactment of challenged legislation. Nevertheless, the fact remains that the bottom line of the legislator's balance sheet is votes, and the out-of-state firms adversely affected by the Maryland ban lacked "sufficient local political clout to challenge the influence of local businessmen with their local government leaders." *Id.* at 141.

222. 449 U.S. 456 (1981).

223. *Id.* at 460. *See also id.* at 475 n.1 (Powell, J., concurring in part and dissenting in part).

224. *Id.* at 471-72.

(iv) *Nature of the Regulation* Despite its unwillingness to infer discriminatory intent from the nature of the regulated industry, the Court has permitted such inferences to be drawn from the nature of the regulation imposed. When it can be demonstrated that the consequence of the legislative effort will be the destruction of the competitive advantage enjoyed by outside entities, the Court has understandably been suspicious. In *Hunt v. Washington State Apple Advertising Commission*,<sup>225</sup> for example, North Carolina prohibited the sale of apples in closed containers displaying a grade other than the applicable U.S. Grade. Because North Carolina had no system of grading its own apples, the statute had no adverse impact on North Carolina producers. Washington, together with six other states, however, had adopted a system of grading which provided more information than the federal system. The new statute denied Washington producers the benefits of that system. In addition, by requiring crating modifications for apples sold in North Carolina, the statute raised the outside producers' cost of doing business in that market. Based on these findings, the Court concluded that the challenged statute had "the practical effect" of discriminating against Washington apples.<sup>226</sup> I have no dispute with such an approach.<sup>227</sup> Like Anatole France's famous proclamation that "the law in its majestic equality, forbids the rich as well as the poor to sleep under bridges,"<sup>228</sup> a state's regulatory measure, although facially neutral, may, in actuality, affect only a small subgroup of the regulated whole. If this subgroup can be shown to be composed exclusively or predominantly of unrepresented entities, the challenger will have satisfied the burden of proof necessary to dislodge the presumption of legislative veracity.

Admittedly, this final category of disproportional impact is substantially more difficult to prove than the earlier three. Evidence of the nature and degree of competitive advantage and the impact of legislation on that advantage is likely to be equivocal and hard to obtain. Without suggesting the multitude of ways in which the challenger may proceed, I should like to illustrate one of the threshold areas for exploration—actual conflict with the legislation of neighboring states.

In 1957, the Illinois legislature promulgated a regulation requiring con-

225. 432 U.S. 333 (1977).

226. *Id.* at 350.

227. The Court's willingness to consider practical effect in *Hunt* is curiously at odds with its ostrich-like approach in *Exxon and Clover Leaf Creamery*. See *supra* pp. 465-66. But see *Lewis v. BT Investment Managers*, 447 U.S. 27, 37 (1980) ("The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.")

228. See A. FRANCE, *LE LYS ROUGE* 117-18 (1934) ("la majestueuse-égalité-des lois, qui interdit au riche comme au pauvre de coucher sous les ponts").

toured mudflaps on all trucks operated on the highways of that state.<sup>229</sup> Disproportional impact could not have been demonstrated under any of the first three methods outlined herein. The statute was facially neutral, contained no disparately applied exemptions,<sup>230</sup> and affected an industry represented in great numbers both inside and outside of the state. These factors induced the Court in *Bibb v. Navajo Freight Lines*<sup>231</sup> to conclude that the statute applied "alike to vehicles in intrastate as well as in interstate commerce."<sup>232</sup> The Court's acknowledgement of an Arkansas Commerce Commission rule requiring straight mudflaps, however, belies that conclusion. These conflicting provisions rendered the use of the same motor vehicle equipment in both states impossible. While purely intrastate concerns only needed to modify their mudflaps to conform with Illinois' requirement, interstate truckers were forced to change mudflaps at each border crossing. The existence of this conflict imposed a disproportional burden on interstate concerns. The Court's labeling of Illinois' enactment as evenhanded ignores the very kind of practical effect relied upon in *Hunt*.<sup>233</sup> When a state's choice of means creates a conflict with the legislative commands of adjacent jurisdictions, reason exists for requiring the state to do more in the way of justification. By its very nature, such a conflict creates a disproportionately heavier burden on those who cross the state lines.

It may be, therefore, that the existence of actual conflict will go far toward the satisfaction of the challenger's burden of proof. Its effect, however, should not be overestimated. In *Bibb*, for example, evidence of the conflict simply established a disproportionate burden on interstate commerce. Whether this would ultimately translate into the requisite OIP depends on the percentage of interstate commerce carried on by truckers represented in the Illinois legislature. To modify somewhat the admonition contained in my treatment of *Exxon*,<sup>234</sup> a finding that the mudflap enactment burdened all outsiders is not the same as a finding that it burdened only outsiders. The existence of a substantial enough impact on represented entities may preclude the showing of the requisite OIP, leave the presumption of permissible purpose standing, and subject the state legislation only to the minimal rational basis standard of judicial scrutiny.

229. ILL. REV. STAT., ch. 95 ½, § 218b (1951).

230. *But see* *Rudolf Express v. Bibb*, 15 Ill. 2d 76, 153 N.E.2d 820 (1958) (striking down, as violative of Illinois Constitution, paragraph of statute exempting certain vehicles from mudguard requirements).

231. 359 U.S. 520 (1959).

232. *Id.* at 523 n.3. The Court eventually struck down the statute on the ground that it unduly burdened interstate commerce despite its finding that the mud guard requirements were "nondiscriminatory." *Id.* at 529.

233. 432 U.S. 333, 350 (1977).

234. *See supra* pp. 465-66.

*Step Three: The Efficacy of the Means Used*

The legislative process inevitably is one of balancing. One side of the scale contains the value of the legislative end. The other holds the costs, financial or otherwise, that the citizenry will be asked to bear for the achievement of that end. Each legislator votes on the basis of his own appraisal of the relative weight of the competing interests.<sup>235</sup> Only if a majority believes that the anticipated burdens are not excessive in relation to the perceived benefits will the legislation pass. Ideally, two inquiries precede this weighing process. The first, herein called the “efficacy inquiry,” asks whether the proposed legislative scheme is likely to achieve the proffered goal. The second, which may be described as a “cost-effectiveness inquiry,” seeks to ascertain whether the same level of benefit may be attained with the imposition of less of a burden. Only when likely benefits are placed upon one side of the scale, and the conclusion is reached that the burden is no heavier than necessary to achieve such a level of efficacy, can the ultimate question be asked—“Is it worth it?”

When legislation is evenhanded, both on its face and in its effect, the assumption that the legislative process has operated in the manner described above is justified. In such cases, judicial reexamination of the issues of efficacy and cost-effectiveness are not warranted. This deferential stance is mandated by prudential concerns. Our system of government counsels against second-guessing the legislative resolutions of these questions.<sup>236</sup> The judiciary, in this instance, should not demand more than a legitimate, articulated end and the selection of a means rationally designed to achieve such a goal.<sup>237</sup>

When the statute’s challenger has carried the burden of demonstrating the disproportional impact of the legislation, however, our assumptions regarding the nature of the process which preceded the passage of that

235. There is no intent here to suggest that political pressures play no role in the legislator’s decision. These considerations, however, are subsumed into the weighing process described. To the extent that constituents will be affected, either positively or negatively, by the proposed enactment, their views will be made known to their representatives who will place them on the appropriate side of the scale.

236. Thus, it is the constitutional structure and not the judiciary’s lack of the appropriate skills that prompts the restraint. The inquiries involved here are factual and well within the ambit of judicial competence. The same may not necessarily be said of the ultimate weighing. Here the question asked is inherently political and objections to judicial responses may focus on both ability, see *supra* note 85, and desirability, see *supra* note 86.

237. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 680-81 (1981) (Brennan, J., concurring) (“It is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.”) (emphasis in original); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959) (“If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective.”) (citation omitted).

legislation must be questioned. Disproportionality distorts both sides of the scale. Initially, the diminished impact upon represented entities raises legitimate doubts regarding the attention paid by the legislators to the burden side. Because burdens falling on nonrepresented interests pose no political liabilities, the legislative inquiry of "Is it worth it?" is likely to be replaced with a simpler "Do we want it?" Accordingly, the hypothesis that a state will not, through legislation, impose burdens that are excessive in relation to the benefits achieved, begins to lose its validity as the OIP climbs above 50%.

Regulations with a disproportionately high impact on outsiders pose dangers beyond the spectre of legislative inattention to the burden side of the scale. Burdens imposed predominantly or solely on outsiders necessarily provide those not similarly burdened with a competitive advantage. The disproportionate burden carries with it a concomitant benefit to the local citizenry. The statute's burden in such an instance may not merely cease to be a burden in the legislator's mind—it may effectively become a beneficial aspect of the legislation.<sup>238</sup>

Disproportionate legislation thus has the potential for distorting the legislative process. Efficacy inquiries may be neglected where the actual purpose behind the legislative effort is not to achieve the articulated benefit but simply to impose the consequent burden. Similarly, the cost-effectiveness inquiry loses its relevance when the legislature attempts to maximize rather than minimize the costs of compliance.

This analysis should not suggest that state legislation is defective merely because a disproportionate share of its impact falls on nonrepresented interests. Frequently, outside entities pose a disproportionate share of the evil legitimately aimed at by the legislature. It could hardly be argued, for example, that because a state has no factories producing toxic wastes, it can never seek to regulate the safety features of the vehicles shipping such wastes over state highways. A state is not bound to sit back helplessly while outside interests threaten the health and welfare of its citizens.<sup>239</sup> Realistically, however, balkanistic impulses frequently produce legislative response. Where the brunt of a legislative enactment falls upon the shoulders of the unrepresented, our confidence that the goal articulated by the legislature is not a pretense for parochialism is diminished significantly. Accordingly, the proffered model calls for the presumption of legislative veracity to dissipate upon proof of the requisite OIP. When state legislation disproportionately burdens outsiders, the state must demonstrate that its articulated end was in fact its actual purpose.

238. Cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 509 (2d ed. 1977) ("States may also use taxation not to raise revenue but to protect producers or sellers from nonresident competitors.")

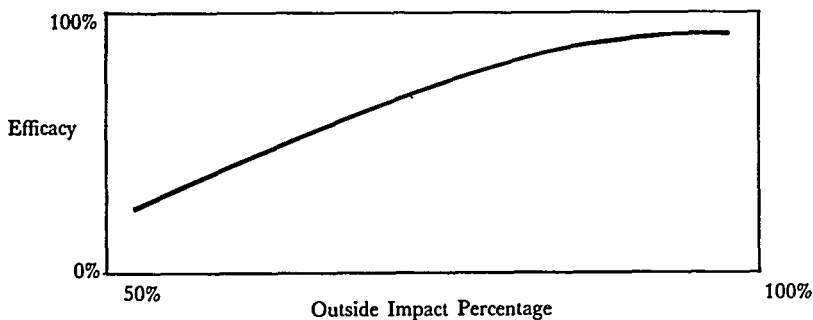
239. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) ("[C]ertain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce.")

## Dormant Commerce Clause

Ascertaining and proving a legislature's actual purpose is a difficult process. The difficulty of assessing intent is compounded by the problems inherent in assigning a consistent or unified motive to a pluralistic body. Intent, however, can legitimately be inferred from the legislative product. If a legislative enactment is unlikely to achieve the state's articulated goal, our worst suspicions are justifiably aroused.<sup>240</sup> Step three thus requires the state to demonstrate that it has in fact considered the efficacy of the promulgated means, that it has concluded that the end will be obtained by the means selected, and that its conclusion is empirically sound. The burden imposed upon the state, therefore, is one of both production and persuasion.

One cannot fail to recognize that legislation seldom eradicates problems. All we can legitimately expect is that the enactment will mitigate the perceived evil. Thus, it is normally unreasonable to expect 100% efficacy from a legislative effort. The most that can be demanded of a legislator is that his vote be premised upon a belief that the articulated end will be attained to a degree sufficient to justify the costs. So it should be with judicial scrutiny of state legislation. A court need not be convinced that the state's means are 100% efficacious, only that the degree of efficacy is sufficient to justify the cost. The cost here, however, is the disproportional impact on outside interests. Thus, as the percentage of disproportionality increases, so too should the showing of efficacy required of the state. A demonstrated OIP of 55%, for example, should place a lighter burden on the state than an OIP of 95%. Graphically portrayed, a "sliding scale" appears.

Figure One



240. Of course, if the legislation has been in effect for several years, the Court will have the benefit of "Monday morning quarterbacking." It must be careful not to misuse this hindsight. The proper inquiry is whether the legislature promulgated a statute that seemed unlikely to achieve its articulated end when passed. Of course, the state's motives in not repealing such legislation may be questioned if the period of experience is long enough to suggest that the anticipated benefits will never occur.

As the graph illustrates, the state's burden of proof is triggered only upon a showing of an OIP in excess of fifty percent.<sup>241</sup> Beyond that point, the state will be asked to demonstrate the extent to which its selected means are likely to achieve the legitimate end it has articulated. The proportional burden placed upon outside interests will affect the degree to which we require the targeted goal to be attained. At the lower levels of disproportionality the state's burden will be easily carried.<sup>242</sup> At the upper reaches, proof will not come without some difficulty.<sup>243</sup> Where such proof is not forthcoming, the statute will be invalidated, not because of judicial intolerance of ineffective legislation,<sup>244</sup> but because the poor fit between the articulated end and the selected means should lead us to reject the veracity of the former.

#### *Step Four: The Cost-Effectiveness Inquiry*

Although legislators ideally can be expected to seek cost-effective means—the greatest benefits with the least burdens—the pressure on the legislature for such impact minimization is reduced where the burdens are expected to fall primarily on unrepresented entities. Where the burdens are placed exclusively on outsiders the pressure for cost-effectiveness is removed entirely.

The Court has long recognized that “discriminatory” legislation, even that which effectively serves a legitimate state end, should be denied judicial imprimatur when there are available “nondiscriminatory alternatives adequate to preserve the local interests at stake.”<sup>245</sup> The existence and legislative rejection of such alternatives prompts understandable suspicion

241. See *supra* p. 461. Actually, the state does have a burden of proof even below the 50% level. This burden, however, is merely to show a rational basis for concluding that the means will achieve the ends articulated.

242. Indeed, if the legislative process has operated properly, the factfinding may well be found in the committee hearings.

243. Nonetheless, by permitting the state to justify its means, even when the impact thereof falls exclusively on outside entities, the standard falls significantly short of a *per se* rule. See *supra* pp. 461-62.

244. As the Court has often made clear, “it is up to legislatures, not courts, to decide on the . . . utility of legislation.” *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). The efficacy inquiry advanced by this model ought not be confused with the ends-balancing approach currently embraced by the Court. Scrutiny of the benefits likely to be achieved by the state's legislative efforts is undertaken in order to gauge legislative motive, not to weigh the benefits achieved against the burdens imposed. *Cf. Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945) (decisive question is whether total effect of law as a safety measure is so slight as not to outweigh national interest in keeping interstate commerce free from interferences which seriously impede it).

245. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). See also *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). Although at least one commentator has referred to this as the search for a less burdensome alternative, see G. GUNTHER, *supra* note 168, at 306, the Court's emphasis has been more on the existence of less discriminatory alternatives. The difference again is between concern for the weight of the burden on the one hand and the proportional division of the burden on the other.



of legislative motives. If the same end could have been achieved with less disproportional means, reason exists to believe that the legislative goal was the imposition of an out-of-state burden rather than the attainment of an in-state benefit.

Demonstrating the presence or absence of less disproportionate alternatives capable of achieving the identical degree of efficacy will not be easy. Much will rest, therefore, on which party is to carry the burden of persuasion. Recent decisions of the Court have suggested that when the legislation is discriminatory the state must bear this burden.<sup>246</sup> Even when no discrimination is involved, the Court seems to be willing to consider the availability of alternative statutory schemes (although the burden in such instances seems to sit with the challenger).<sup>247</sup> My own model is somewhat different. To begin with, I see no need to consider the existence or efficacy of alternative means when there is no disproportionality. When legislation is evenhanded in its effects, it is not for the courts to scrutinize whether the state has adopted the least burdensome statutory scheme. In such instances the “wisdom” of the legislature, its “identity with the people, and the influence which [its] constituents possess at elections” ought be enough to prevent abuse.<sup>248</sup> A state legislature is unlikely to burden its own citizenry beyond the degree needed to achieve the desired benefit.

When a showing of disproportionality has been made by the statute’s challenger, however, inquiry into the existence of less disproportional schemes is warranted. As with the efficacy inquiry, the burden placed upon the state to justify the selection of its means ought to vary with the degree of disproportional impact. When the effect of the statute is exclusively on out-of-state interests, the state must convince the court that no less disproportional scheme would have worked as well. The state will be unable to satisfy this burden in the absence of proof “that non-citizens constitute a peculiar source of the evil at which the statute is aimed.”<sup>249</sup>

It seems unduly harsh, however, to impose on a state the onerous burden described above merely because the impact of its enactment falls disproportionately, albeit not exclusively, on outsiders. On the other hand, disproportionality should not be justified by proof of efficacy alone. The proposed model, accordingly, adopts a stance between these two extremes. When the OIP exceeds 50% but is less than 100%, the state must articu-

246. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

247. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981).

248. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). That *Gibbons* spoke of congressional power should make no difference. Of course, an additional restraint available against state legislative abuse is the intervention of Congress which may, if the state-imposed burden is deemed too heavy, enact superseding statutory provisions.

249. *Toomer v. Witsell*, 334 U.S. 385, 398 (1948).

late a reason for the selection of the particular statutory scheme.<sup>250</sup> If the reason proffered is legitimate, rather than protectionist, the state's burden will be satisfied. The challenger will, however, be offered the opportunity either to disprove the validity of the articulated rationale or to demonstrate the existence of equally effective, yet less disproportional, means available to the state.<sup>251</sup> If either can be done, the statute will be struck down. Again, invalidation results not because of judicial endorsement of cost-effective legislation, but because the failure of the state to minimize the impact of its legislation belies the legitimacy of its motives.

### III. Harbingers of Change

It has been said that "the Court in deciding Commerce Clause cases today is not doing anything fundamentally different from what it has always done in resolving these controversies."<sup>252</sup> In the years since Professor Dowling's suggestion that the judiciary's proper task under the commerce clause is to balance national and local interests,<sup>253</sup> the Court has grown increasingly comfortable with such a role. At least that is the perception of most commentators.<sup>254</sup> Admittedly, much exists to support this view. The language of balancing is everywhere.<sup>255</sup> Furthermore, as articulated by the

250. This should not be confused with the burden placed upon the state in step one, *see supra* note 178. There, the state is being asked to explain why it has acted at all. Here, it is being asked to explain why it has acted in the manner chosen. The latter is a justification of means, not ends.

251. An illustration here may prove helpful. Suppose a state were to impose a prohibition against the importation of cattle for dairy or breeding purposes absent a certificate that the herd from which they came was free of a certain disease. At the same time, cattle from herds within the state were permitted to be so used as long as a certification could be made that the individual cow was free of the offending disease. My model would permit the state to justify the disproportional means by proffering an explanation. Here, let us assume that the state contended that the distinction was based upon the fact that local herds were constantly inspected. The challenger's response could take two forms. First, he could argue that such inspections were sporadic or ineffective, thereby rendering the articulated justification fallacious. Alternatively, the challenger could argue that requiring only the "individual cow" certificate from outsiders would result in no increase in diseased cattle entering the state. *Cf. Mintz v. Baldwin*, 289 U.S. 346 (1933) (Court upheld New York state prohibition on importation of cattle unless certified to be from a herd free of Bang's disease). The Court in *Mintz* made no mention of the allegation that the New York regulation was discriminatory. *See* Brief of Appellant at 24-25. *But see Mintz v. Baldwin*, 2 F. Supp. 700, 706, 715 (N.D.N.Y. 1933) (Cooper, J., dissenting):

But [the statute] does discriminate in favor of New York cattle dealers and against all others.

True, there is inspection provided by state law for New York state cattle, but there is no requirement in such inspection that to be sold in the state they shall come from a herd, all of whose members are free from Bang's disease. The October order requires this of imported cattle but not of domestic cattle.

252. Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 70.

253. Dowling, *supra* note 7.

254. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 252 (1978) ("The Court now accepts its judicial role of balancing conflicting economic policies until such time as Congress chooses to act.")

255. *See* *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 443 (1978) ("[W]e cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce.") *See also* Hughes

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Court, the balancing approach is resorted to even when the statute regulates evenhandedly to effectuate a legitimate local public end.<sup>256</sup>

Judging from appearances, therefore, my proposed model enjoys little hope for rapid judicial embrace. A closer examination, however, reveals that the gap between the process standard advanced here and the Court's recent offerings is somewhat less than first meets the eye. Disproportional impact already plays a significant part in commerce clause jurisprudence. Occasionally, the Court has candidly admitted the role of such disparity as a trigger for more intensive scrutiny.<sup>257</sup> For the main part, the effect of disproportionality has been more tacit. Yet, one cannot help but notice that each of the seven state commercial regulations struck down by the Court during its past six terms arguably manifested just the sort of differential impact identified by my model.<sup>258</sup> From this one might well infer that the Court's scrutiny intensifies whenever disproportionality is evident. Nonetheless, we must be on guard not to attribute undue significance to this observation. To begin with, a number of the statutory schemes upheld by the Court have escaped serious scrutiny despite the existence of significantly disproportional impacts.<sup>259</sup> More importantly, even when it has perceived "discrimination," the Court has often relegated this recognition to footnotes, preferring instead to engage in balancing the competing interests of the local community and the national economy.<sup>260</sup>

Thus, when the results under the competing models do converge, the road traversed has often been quite different. Identity of result in such instances may be no more than fortuitous, a product of the fact that impact is often both disproportionate and excessive. When disproportionality

v. Oklahoma, 441 U.S. 322, 331 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

256. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.") My objections to such an approach appear at *supra* pp. 441-43.

257. *See, e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses."); *Hunt v. Washington State Apple Comm'n*, 432 U.S. 333, 353 (1977) (state must justify disparate impact "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives . . ."); *cf.* *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 444 n.18 (1978) ("The Court's special deference to state highway regulations derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.")

258. *See supra* pp. 463-64 (*Kassel v. Consolidated Freightways Corp.*); p. 461 (*Lewis v. BT Investment Managers*); p. 464 (*Raymond Motor Transp. v. Rice*); p. 445 (*Hunt v. Washington State Apple Advertising Comm'n*); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976). *But see supra* p. 462 (*Hughes v. Oklahoma*); pp. 459-61 (*City of Philadelphia v. New Jersey*).

259. *See supra* pp. 465-66.

260. *See, e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 678 n.26 (1981); *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 446-47 n.24 (1978).

exists in the absence of "undue" burdens on interstate commerce, for example, the competing models have produced different results. *Exxon Corp. v. Maryland*<sup>261</sup> is a manifestation of such disparity. Here legislation, which would likely have faltered under a process approach, had little difficulty overcoming a balancing standard. Similarly, enactments invalidated under the unfettered trade approach that could have survived a process scrutiny are readily available. One of the starkest such examples is *H.P. Hood & Sons v. Du Mond*,<sup>262</sup> which illustrates the distinctive nature of the two frameworks. The case is reviewed here, however, for another purpose. Its recent treatment by the Court seems to reflect a changed attitude by the Justices. Although it is yet too early to tell, it may be that the Court has sounded its first tones of dissatisfaction with the unfettered trade philosophy embraced in the 1940's.

H.P. Hood & Sons, a Massachusetts corporation, had long distributed milk to the inhabitants of Boston. Because dairies located in New York were a major source of Hood's milk, it maintained three receiving depots there. In the mid-1940's Hood sought a license to establish a fourth depot in New York. Under New York law, the Commissioner of Agriculture and Markets could not grant a license unless he was satisfied "that the issuance of the license will not tend to a destructive competition in a market already adequately served," and that the issuance of the license was in the public interest.<sup>263</sup> Hood's license request was denied on the basis of this provision.<sup>264</sup> The Court struck down the statute by a five to four margin despite the facially neutral statutory language, a legislative history devoid of evidence of parochial intent, and nothing to suggest that the Commissioner had administered the Act with a hostile eye.<sup>265</sup> The volume of interstate commerce, concluded the Court, cannot be curtailed to aid local economic interests.<sup>266</sup>

Under my proposed process model, however, the New York legislation survives scrutiny. The end, protection of competition in the milk industry,

261. 437 U.S. 117 (1978). See *supra* pp. 444-46, 465-66.

262. 336 U.S. 525 (1949).

263. N.Y. AGRIC. & MKTS. LAW § 258-c (McKinney 1972 & Supp. 1981).

264. In denying the license, the Commissioner wrote:

If applicant is permitted to equip and operate another milk plant in this territory, and to take on producers now delivering to plants other than those which it operates, it will tend to reduce the volume of milk received at the plants which lose those producers, and will tend to increase the cost of handling milk in those plants.

If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season.

336 U.S. at 528-29.

265. 336 U.S. at 549 (Black, J., dissenting). See also *Bison, Economic Protective Powers of States Under the Commerce Clause*, 38 GEO. L. REV. 590, 602 n.58 (1950).

266. 336 U.S. at 532.

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cannot be treated as *per se* illegitimate.<sup>267</sup> The legislative scheme, viewed in its entirety, was neither designed nor applied in a disproportionate manner.<sup>268</sup> The means were rationally related to the achievement of the articulated end. Indeed, even under a stricter level of scrutiny, the state had acted in an efficacious and cost-effective manner. In spite of these factors the Court invalidated the New York legislation. *Hood* thus can be read for the proposition that evenhanded regulation<sup>269</sup> of interstate commerce, designed to achieve a valid state end,<sup>270</sup> may run afoul of the Constitution if it attempts to limit interstate shipments of goods. This protection of free trade is the very role appropriately vested in congressional rather than judicial hands.

Thirty years after *Hood*, the dispute over New York's Agriculture and Markets Law arose anew.<sup>271</sup> Tuscan Dairy Farms, Inc., a New Jersey processor and seller of milk that had long delivered milk into two New York counties, sought to extend its operation into a third. Invoking the identical statute involved in *Hood*, the Commissioner denied Tuscan's license application on the ground that Tuscan's entry into this new market would have a price-depressing effect and lead "to a destructive competition for sales of milk."<sup>272</sup> Armed with copies of *Hood*, Tuscan's legal team confidently turned to the New York courts. Remarkably, the New York Court of Appeals upheld the Commissioner's action. Over a lone dissent,

267. See *Milk Control Bd. v. Eisenberg Farm Prod.*, 306 U.S. 346 (1939); *Nebbia v. New York*, 291 U.S. 502 (1934); cf. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935) (protection of in-state milk industry from out-of-state competition held impermissible end). See *supra* note 186 (definition of illegitimate end under the process model).

268. Even if viewed in a vacuum, the Commissioner's action is evenhanded. *Hood* was in no way prevented from increasing its exports from the three existing depots. See *Bison*, *supra* note 265, at 602-03. It is arguable, therefore, that the Commissioner "was actuated not by preference for New York consumers, but by the aim of stabilizing the supply of all the local markets, including Boston as well as Troy, served by the New York milkshed." 336 U.S. at 575 (Frankfurter, J., dissenting).

269. But see *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 188 (1950) ("The vice in the regulation invalidated by *Hood* was solely that it . . . discriminated against interstate commerce.") There is no evidence to support the Court's conclusion in *Cities Service*.

270. Admittedly, the language of *Hood* suggests that New York's end was not a permissible one. It is not realistic, however, to view the case in this manner. To begin with, Justice Jackson's statement that the New York legislation was imposed "for the avowed purpose . . . of curtailing the volume of interstate commerce," 336 U.S. at 530-53, is completely without support in the record and, indeed, the state courts had unanimously found otherwise. See *H. P. Hood & Sons v. Du Mond*, 297 N.Y. 209, 215, 78 N.E.2d 476, 479 (1948) ("[A]ny interference with the free flow of interstate commerce was incidental only.") The New York provision was designed not to impair interstate trade but to prevent destructive competition in the milk industry. Such an end had already received the Supreme Court's approval. See *Milk Control Board v. Eisenberg*, 306 U.S. 346 (1939). Seen at its core, therefore, the Court's problem is with the state's means, not its ends. Cf. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) ("[T]he evil of protectionism can reside in legislative means as well as legislative ends.")

271. See *Tuscan Dairy Farms v. Barber*, 45 N.Y.2d 215, 408 N.Y.S.2d 348, 380 N.E.2d 179, appeal dismissed, 439 U.S. 1040 (1978).

272. *Id.* at 220, 408 N.Y.S.2d at 351, 380 N.E.2d at 182.

the court found *Hood* distinguishable. The majority is not persuasive.<sup>273</sup> The denial of the license to Tuscan, said the judges, "is not for the benefit of the dealers and distributors presently serving the market, but for the protection of the welfare of the customers . . . ."<sup>274</sup> There are two flaws in this reasoning. First, it proceeds upon the assumption that economic protectionism may be justified by concomitant contributions to public health. Admittedly, economic security for milk distributors may be a means of assuring consumers a steady supply of a food of prime necessity. The Supreme Court, however, explicitly rejected such reasoning in *Baldwin v. G.A.F. Seelig, Inc.*<sup>275</sup> "Economic welfare," said Justice Cardozo, "is always related to health, for there can be no health if men are starving."<sup>276</sup> "To give entrance to that excuse," he concluded, "would be to invite a speedy end of our national solidarity."<sup>277</sup> Second, the New York Court's effort at reconciling *Hood* completely ignores the fact that the Commissioner's action in that case was prompted by a concern that construction of another depot would result in a shortage of supply to consumers in Troy, New York.<sup>278</sup>

The stress on the evenhandedness of the Commissioner's action in *Tuscan Dairy Farms* similarly fails effectively to distinguish *Hood*. *Hood*, like Tuscan, was already engaged in, and was permitted to continue, conducting extensive interstate business. The Court of Appeals' findings that Tuscan's status as a foreign corporation "was in no way a factor on which the challenged determination was grounded,"<sup>279</sup> that "[n]o prohibition of goods traveling across State borders was sought to be accomplished,"<sup>280</sup> and that "[n]othing suggests that the [Commissioner's] negative response . . . would have been any different had the applicant been a New York wholesaler,"<sup>281</sup> reflect precisely the factual setting of the *Hood* litigation.<sup>282</sup>

The *Tuscan Dairy Farms* decision seemed destined for hard times in

273. My dispute here is not with the result reached in *Tuscan Dairy Farms*. Quite to the contrary, it comports well with my model. Were the New York Court of Appeals writing on a clean slate, its decision would be beyond reproach. But it was not, and its attempt to reconcile its result with that reached in *Hood* is not convincing.

274. *Tuscan Dairy Farms v. Barber*, 45 N.Y.2d at 226, 408 N.Y.S.2d at 354, 380 N.E.2d at 185 (1978).

275. 294 U.S. 511 (1935).

276. *Id.* at 523.

277. *Id.*

278. See *supra* note 264. The Court of Appeal's attempt to read the Commissioner's statement in *Hood* as addressing "possible shortages of milk supply to the local dealers rather than to consumers," see 45 N.Y.2d at 229, 408 N.Y.S.2d at 356, 380 N.E.2d at 187, is a groundless distinction. To place any significance on the fact that his order talked of "market" shortages without explicitly mentioning consumers is to exalt form over substance.

279. *Tuscan Dairy Farms v. Barber*, 45 N.Y.2d at 226, 408 N.Y.S.2d at 355, 380 N.E.2d at 186.

280. *Id.*

281. 45 N.Y.2d at 227, 408 N.Y.S.2d at 355, 380 N.E.2d at 186.

282. See *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 549 (Black, J., dissenting).

the Supreme Court. Tuscan's appeal, however, was dismissed, over two dissents, for want of a substantial federal question.<sup>283</sup> It seems that the only thing consistently predictable about the Court is its continued unpredictability. Naturally here, as in every summary disposition, the rationale behind the Court's decision is difficult to perceive.<sup>284</sup> It seems hard to believe that the Court was convinced by the tortuous logic of the New York judges. No straining is needed, therefore, to conclude that *Hood's* vitality has been undermined. Because alternative criticisms have been leveled against *Hood*, one can scarcely guess which has found its mark. Has the Court retreated from the position that economic ends are impermissible goals for state legislation where interstate commerce is incidentally burdened?<sup>285</sup> Has *Hood's* Achilles heel proved to be its almost absolutist invalidation of the New York legislation without the delicate balancing urged by Justice Frankfurter?<sup>286</sup> Or, has Justice Black's discourse on the evenhandedness of the Commissioner's action finally found an audience?<sup>287</sup> The answer cannot be found in the summary order rendered in *Tuscan Dairy Farms*.<sup>288</sup>

My analysis thus far has shunned consideration of the cases challenging state taxation under the dormant commerce clause. In the past, the unique complexities of tax legislation, and the continued inability of Congress to promulgate comprehensive national solutions to the problems of multiple and cumulative local taxation of interstate commerce,<sup>289</sup> counseled against attempting a synthesis of the regulatory and taxation cases.<sup>290</sup> Recent developments in the tax field, however, offer some insight into the Court's implicit disenchantment with *Hood*.

283. 439 U.S. 1040 (1978). Justices Powell and Stevens would have noted probable jurisdiction and set the case for oral argument. *Id.*

284. I have previously criticized the proliferating practice of dismissing for want of a substantial federal question. See Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L. REV. 637, 678 n.220 (1978).

285. For an attack on *Hood* on these grounds, see generally Bison, *supra* note 265.

286. See *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 564-76 (1949) (Frankfurter, J., dissenting). If this is the case, *Tuscan Dairy* represents no heralding of process protection.

287. *Id.* at 549 (Black, J., dissenting).

288. One cannot discount completely the possibility that the summary disposition of *Tuscan Dairy Farms* by the Court represents no more than judicial oversight. Perhaps the Justices' heavy workload caused the New York Court of Appeal's evisceration of *Hood* to go unnoticed. The excellent Jurisdictional Statement filed by Tuscan's counsel and the dissent of Justices Powell and Stevens, however, make this scenario unlikely.

289. Although Congress did conduct a comprehensive empirical study of the problem of state taxation of interstate business, culminating in a multi-volume report, see H.R. REP. NO. 1480, 88th Cong., 2d Sess. (1964), H.R. REP. NO. 565, 89th Cong., 1 Sess. (1965), H.R. REP. NO. 952, 89th Cong., 1st Sess. (1965), no legislation has resulted from the recommendations contained therein. See Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335, 340 (1976).

290. For comprehensive treatments of the state taxation cases, see Blumstein, *supra* note 2, and Hellerstein, *supra* note 2. See also L. TRIBE, *supra* note 24, § 6-14 to 6-19, at 344-69.

One of the stalwarts of traditional commerce clause jurisprudence has been the belief that a state could not impose a tax on any activity viewed as a part of interstate commerce.<sup>291</sup> Premised on the notion that the Constitution "by its own force created an area of trade free from interference by the States,"<sup>292</sup> this so-called "Formal Rule"<sup>293</sup> prohibited any tax "deemed to have the effect of impeding the free flow of trade between States" even when local commerce had been subjected to a similar encumbrance.<sup>294</sup> Of late, however, this "free trade" philosophy has suffered significant erosion. The trend culminated in *Complete Auto Transit v. Brady*,<sup>295</sup> where the Court explicitly rejected the absolute tax immunity previously afforded to interstate commerce as well as the philosophy underlying the immunity. Of necessity, the judicial role in assessing the validity of state tax legislation must now be redefined. Although acknowledging that interstate commerce must pay its own way, the Court remains understandably wary lest such commerce be taxed beyond its just share.<sup>296</sup> The emphasis here is on the apportionment rather than the weight of the tax imposed. "A State's constituents," notes the Court, "can be relied on to vote out of office any legislature that imposes an abusively high tax on them."<sup>297</sup> The obvious corollary is that they cannot be relied upon to so act when the tax burden is borne principally by out-of-state interests.<sup>298</sup> Having embraced this political check theory, the Court has assumed the role of assessing the practical operation of state taxes on nonrepresented corporate entities.<sup>299</sup>

291. See Hellerstein, *supra* note 2, at 1442-43; Lockhart, *A Revolution in State Taxation of Commerce?* 65 MINN. L. REV. 1025 (1981).

292. *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

293. Lockhart, *supra* note 291, at 1025.

294. *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). See also *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 609-10 (1951).

295. 430 U.S. 274 (1977).

296. See *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 748 (1978).

297. *United States v. County of Fresno*, 429 U.S. 452, 458-59 (1977).

298. *Id.* This reflects explicit adoption of the premise of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819) (grounding invalidation of Maryland tax on federal instrumentally in part on fact that it operated on national population not represented in state legislature).

299. The Court approaches this task by inquiring whether the state tax sought to be applied to interstate business (1) has a substantial nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. See *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978). Although, at first sight, only one of the four factors appears to be responsive to the political check philosophy, careful analysis suggests otherwise. A nexus requirement ensures a connection with the state, thus "increas[ing] the likelihood that persons paying the tax will be able to participate in the state's political decisions." *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 81 (1977) (footnote omitted). The mandate of fair apportionment checks disparity manifest in multiple taxation of a single tax base. It may even be that the benefits-received inquiry of the fourth prong is related to a political check theory. See *infra* note 300. Such inquiry appears to this writer, however, to be an inappropriate inquiry for judges to undertake. Whether taxes are too high, when viewed in light of the service provided, seems peculiarly a matter for legislative determination. If the tax falls to a large



Perhaps, in light of *Complete Auto Transit*, the recent challenge to the New York Agriculture and Markets Law did not raise any substantial federal questions. If the Court has rejected the “free trade” philosophy and redirected its attention to the fairness of the state’s treatment of interstate commerce,<sup>300</sup> *Tuscan Dairy Farms* poses no constitutional difficulties. Admittedly, interstate commerce has been burdened, but no evidence existed to suggest that it had been singled out or treated unjustly. Of course, *Hood* tells us that evenhandedness of application is not to be our yardstick for constitutionality, but it may be that the so-called “revolution” in the tax cases<sup>301</sup> has been paralleled by the silent overthrow of *Hood*.<sup>302</sup>

In contrast to the tax area, the Court’s methods in *Tuscan Dairy Farms* have left us in some doubt as to the prevailing philosophy.<sup>303</sup> It would be foolhardy, for example, to suggest that *Hood*’s demise sounds the death knell for ends-balancing. Decisions subsequent to *Tuscan Dairy Farms* provide adequate evidence of the continued vitality of this standard.<sup>304</sup> Indeed, it would be fair to conclude that some of the dissatisfaction with *Hood* stemmed from its failure to balance.<sup>305</sup> Yet both *Tuscan Dairy Farms* and *Complete Auto Transit* do significantly undercut the rationale for balancing. Both reject (although the message comes through more clearly in the latter) the concept that the Constitution, “by its own force,”<sup>306</sup> protects the free flow of trade. Stripped of its constitutional foundation, the Court’s intervention on behalf of free trade has become even more strained. In spite of the evisceration of the unfettered trade philosophy, however, the Court has seemed to step up its effort to protect

degree on those to whom the legislature is accountable, the voters can be expected to respond when the imposition is unjustifiably high.

300. It is still possible to argue, of course, that the Court means to measure fairness, in part, by comparing the tax burdens imposed against the service benefits acquired. The fourth prong of the *Washington Stevedoring* standard, see *supra* note 299, seems to suggest such a yardstick. One commentator, however, has concluded that the “criterion does not mean what it seems to say” and will be satisfied if there is a relationship between the tax and the activity, income, or property attributable to the taxing state. See Lockhart, *supra* note 291, at 1037. In this light, it is little different than the first prong of the “practical effects” inquiry. The more plausible reading of the Court’s new wave of tax opinions, therefore, is that fairness is to be measured by comparing the treatment of local and nonlocal interests and not by questioning the magnitude of the tax burden imposed.

301. See Lockhart, *supra* note 291.

302. Seeking to gain insight into regulation cases by scrutinizing tax cases is always risky business. The Court’s opinions have kept the two on distinct planes. Seldom does an opinion in one area cite to a case in the other. Nonetheless, common threads pass through both groups of cases. Cf. L. TRIBE, *supra* note 24, § 6-14, at 345 n.3 (“[A]lthough overarching themes . . . will be indicated at the appropriate points, this chapter treats taxation issues separately from issues of regulatory power.”)

303. The ten decisions of the past six terms cannot, of course, be ignored but, as pointed out earlier, many would come out identically under either a process or free trade standard. See *supra* p. 475.

304. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981).

305. See *supra* p. 479.

306. See *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

the national economy. There is reason to believe, nonetheless, that its involvement has not been entirely a matter of choice.

In the decade since the articulation of the *Pike* standard<sup>307</sup> the Court has struck down eight state regulatory statutes under the dormant commerce clause.<sup>308</sup> Not one of these cases was heard by writ of certiorari.<sup>309</sup> In fact, despite the significant increase in the number of certiorari petitions raising commerce clause challenges to regulatory schemes,<sup>310</sup> the Justices have, with two *sui generis* exceptions,<sup>311</sup> failed to grant such a petition in over thirty years.<sup>312</sup> The Court is, therefore, not reaching out to hear these cases. Instead, it is only the mandatory appellate routes provided by Congress that have sustained the steady parade of commerce clause problems passing before the Court.<sup>313</sup> The years to come should

307. See *supra* note 256.

308. In addition to the seven cases cited in note 60 *supra*, see *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

309. Six of these cases were appealed under 28 U.S.C. § 1253, three were appealed under 28 U.S.C. § 1257(2) and one was appealed pursuant to 28 U.S.C. § 1254(2). See *infra* note 313, for a discussion of these various procedural routes.

310. More certiorari petitions on this subject were filed in the five terms from 1975 to 1980 than in the fifteen preceding terms (from 1960 to 1975). In the interest of saving space, the citations to the numerous cases included in my statistical analysis have been omitted. They are on file with the author. The compilation was done by examining *United States Law Week*. For obvious reasons, therefore, the *in forma pauperis* filings that comprise the Court's Miscellaneous Docket could not be scrutinized. BNA reports only the filings on the Court's Appellate Docket, the so-called "paid" filings. The questions presented by actions commenced without prepayment of fees are not collected in any published form. Even resort to the petitions themselves, usually not printed, frequently reveals little about the questions raised.

311. The two exceptions are *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714 (1963) (state statute barring discriminatory hiring upheld), more appropriately labeled a civil rights case than a commerce clause case, and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), which the court ultimately concluded implicated no Article I problem since it involved the state as market participant rather than market regulator. See *infra* note 318.

As this Article went to press, the Court granted a certiorari petition to review the invalidation of an executive order of the Mayor of Boston. See *Massachusetts Council of Constr. Employers v. Mayor of Boston*, 1981 Mass. Adv. Sh. 2039, 425 N.E.2d 346 (1981), *cert. granted sub nom. White v. Massachusetts Council of Constr. Employers*, 50 U.S.L.W. 3591 (U.S. Jan. 26, 1982) (No. 81-1003) (Executive Order confining city's future public works construction contracts to firms that fill at least half of jobs on such projects with local residents held to violate dormant commerce clause). Although obviously a matter of speculation, it seems likely that the Court agreed to hear this case to clarify the commerce clause immunity used in *Reeves*. The Massachusetts court, contending that no one could seriously defend a city regulation preferring city residents on private construction jobs, viewed the applicability of the *Reeves* exception to such a preference on city-sponsored public works projects as the sole question before it. Its questionable conclusion that *Reeves* was distinguishable appears the motivation for the Supreme Court's grant of the writ. See *Petition for Writ of Certiorari* at 19-24. Viewed in this light, the Court's action is not a departure from its practice of denying certiorari in traditional dormant commerce clause cases—state regulation of purely private commercial activity. Final analysis, however, will have to await an opinion in *White*, not expected until 1983.

312. Only certiorari petitions in which the dormant commerce clause question constituted the primary issue have been considered here. See *supra* note 3. On rare occasions the court has granted a petition in which the commerce clause challenge was secondary to some other issue of federal law. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (although Minnesota Supreme Court had invalidated state plastic container ban solely on equal protection grounds, United States Supreme Court considered both commerce clause and Fourteenth Amendment challenges to that legislation.).

313. These are of three types. First, 28 U.S.C. § 1257(2) (1976) provides for right of appeal

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show a decline in the number of such appeals. In the past three decades fifty percent of the commerce clause cases resulting in full opinions by the Justices have come from three-judge federal courts.<sup>314</sup> Section 1253 of Title 28 provides for direct appeal to the Supreme Court from decisions of these courts. The recent repeal of the three-judge court<sup>315</sup> requirement for challenges to state statutes in federal court ought, therefore, significantly to diminish the number of commerce clause appeals. Naturally, if Congress ever acts on the perennial efforts of the Chief Justice to secure greater discretion for the Court in selecting cases to review,<sup>316</sup> such appeals may disappear altogether. The passage of such legislation, however, can be regarded as neither imminent nor inevitable.

It would be pure fantasy to conclude that the Court has begun to embark on the process path that I have urged herein. Its trumpeting of the virtues of unfettered trade and its invocations of balancing are too loud and too frequent to be ignored. Despite the expression by individual members of the Court of continued concern with the extent of judicial legislating,<sup>317</sup> the majority seems to pay them little heed. Nonetheless, as the foregoing pages reveal, cracks in the jurisprudential foundation are appearing.<sup>318</sup> Unfortunately, many of the harbingers of change seem as

where validity of state statute drawn into question "on the ground of its being repugnant to the Constitution" and the decision of the highest state court is in favor of its validity. Second, 28 U.S.C. § 1254(2) provides for appeals from decisions of the United States Court of Appeals invalidating state statutes under the United States Constitution. Third, 28 U.S.C. § 1253 provides for mandatory appeals from any decision "required by any Act of Congress to be heard and determined by a district court of three judges." Until its recent repeal, *see infra* note 315, 28 U.S.C. § 2281 required a three-judge court whenever an injunction seeking to restrain the enforcement of an allegedly unconstitutional state statute was sought in the federal courts.

314. Of the eighteen commerce clause decisions rendered by the Court since 1952, nine have been appeals from three-judge district courts. *See Lewis v. BT Investment Managers*, 447 U.S. 27 (1980); *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Pike v. Bruce Church*, 397 U.S. 137 (1970); *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129 (1968); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

315. Although the repeal, *see* Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976), does not affect actions commenced prior to August 12, 1976, appeals traveling the § 1253 route to the United States Supreme Court may have ended with *Lewis v. BT Investment Managers*, 447 U.S. 27 (1980) (complaint filed in district court October 24, 1973).

316. *See* Burger, *The State of the Federal Judiciary 1979*, 65 A.B.A.J. 358, 362 (1979) (urging elimination of mandatory appellate jurisdiction). Bills aimed toward this end are currently being considered by congressional committees. *See* S. 1531, 97th Cong., 1st Sess. (1981) (pending in Judiciary Committee); H.R. 2406, 97th Cong., 1st Sess. (1981) (pending in Judiciary Subcommittee).

317. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 US 662, 691 (1981) (Rehnquist, J., dissenting) (arguing that majority's approach would arrogate to the Court public policy functions that, in the absence of congressional action, were left by the Framers to state legislatures); *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 450 (1978) (Blackmun, J., concurring) ("Here, the Court does not engage in a balance of policies; it does not make a legislative choice.")

318. The Court's philosophical foundation seems to have been further weakened by its decision in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). *See also* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In *Reeves*, the court held that a state's proprietary activities are not subject to the negative

silent as the dormant commerce clause itself. Ideally, the Court will eventually articulate disenchantment with its role as protector of the national commercial interest and instruct all concerned that Congress is the proper entity to assume that burden. Perhaps the Court's participation in this area will die out more quietly. Congressional modifications of the routes to the Court have already, and may continue, to diminish the commerce clause cases which the Court *must* hear. If the Justices persist in their disinclination to take on these cases when the choice is up to them, it will make little difference in the Court's role which of the competing paradigms prevails.<sup>319</sup>

## Conclusion

Dissenting from his colleagues' most recent invocation of the national economic interest to strike down a state regulatory scheme, Justice Rehnquist protested:

The true problem with today's decision is that it gives no guidance whatsoever to [the] States as to whether their laws are valid or how to defend them . . . . We know only that Iowa's law is invalid and that the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused.<sup>320</sup>

A generation of law students and attorneys share Justice Rehnquist's frustration. Yet we ought not be surprised by the inability of the Court to construct a meaningful framework for its decisions. A coherent set of guidelines can only flow from an understanding of purpose. The Court's goals are badly in need of clarification. Before the Justices can erect a

constitutional restraints of Article I regardless of the burden it may impose on interstate commerce. If, in fact, the "creation of a free national economy was a major goal of the States" at the Constitutional Convention, the majority's decision "cannot be reconciled with that purpose." 447 U.S. at 454 (Powell, J., dissenting). It is possible, of course, to view the case as sharing the concern for state sovereignty voiced in *National League of Cities v. Usery*, 426 U.S. 833 (1976), but such a reading is significantly undercut by the Court's implicit suggestion that the South Dakota activities under attack in *Reeves* could be restricted by congressional action, 447 U.S. at 439. Of notable interest is the Justices' rationale for this judicial/legislative dichotomy. "[A]s a rule," concludes the five-justice majority, "the adjustment of interests in this context is a task better suited for Congress than this court." *Id.* Despite the obvious appeal that these sentiments contain for this writer, see *supra* pp. 435-36, 441-43, it is difficult to understand why the court should be better suited to assess a state's regulatory action than its proprietary conduct. For a comprehensive and cogent analysis of *Reeves* under both Articles I and IV, see generally Varat, *supra* note 6.

319. Although the Supreme Court's role will be equally modified by explicit abdication or subtle avoidance, one cannot underestimate the importance of which route it chooses. The former approach will signal change to state and lower federal courts. The latter will leave the model of judicial balancing etched in granite. The former approach will shift the ultimate burden of protecting the economy to Congress. The latter will merely pass the buck to another set of judges.

320. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).

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solid jurisprudential structure, they must ask why it should be built. As a realistic venture, this Article has been written to prompt the question. As an ambitious one, it has been undertaken to provide the answer.