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TRASH, TRAINS, TRUCKS, TAXES—AND THEORY

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The first-year Constitutional Law course that I teach focuses on the “structural” Constitution, leaving the subject of individual rights for a later course offering. The major substantive themes in the course concern the manner in which the Constitution allocates governmental power and authority, both horizontally (at the federal level) and vertically (national vis-a-vis state governments), within our federal republic. The familiar horizontal themes include the availability of, and justification for, judicial review and the division of responsibility for domestic and international affairs between the Congress and the executive branch. The vertical themes also track familiar territory: the doctrine of enumerated powers, the limits of federal power vis-a-vis the states, and the restrictions placed by the Constitution, explicitly or implicitly, on the activities of the states. More general discussion about methods of constitutional interpretation is fostered throughout the course.

Many of the Supreme Court’s decisions considered throughout the course are historically and politically engaging. With cases featuring such historically prominent individuals and events as Thomas Jefferson and James Madison,¹ Harry Truman,² Richard Nixon,³ The Iran Hostage Crisis,⁴ and, of course, the 2000 election contest between George W. Bush and Al Gore,⁵ most students carefully consider the material at hand and appreciate its importance to our national political structure and identity.

The intensity of student interest begins to wane a bit in that portion of the course that concerns the so-called “dormant Commerce Clause.” The manner in which the Constitution constrains the states as they regulate trash,⁶ trains,⁷ trucks,⁸ milk,⁹ and other articles of, or activities in, commerce does not quite

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1. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
2. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
3. *See* *United States v. Nixon*, 418 U.S. 683 (1974).
4. *See* *Dames and Moore v. Regan*, 453 U.S. 654 (1981).
5. *See* *Bush v. Gore*, 531 U.S. 98 (2000).
6. *See* *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).
7. *See* *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945).
8. *See* *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981).
9. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

stir the imaginations or emotions of most students in the same way as the cases considered elsewhere in the course. There are, of course, exceptions to this generality, but most of the dormant clause cases considered in the course lack political or historical salience for most students. Indeed, it has been described as “the dullest subject in constitutional law.”¹⁰ Moreover, from a doctrinal perspective, the students (and, confessedly, their teacher) can quickly become tired and frustrated in their efforts to assemble the puzzle-like components of the Court’s dormant Commerce Clause jurisprudence into something approaching a coherent picture. Indeed, the phrase “dormant” is pregnant with implications about the challenges caffeine-infused students face in dealing with this area of constitutional law.

To address these challenges, I emphasize constitutional theory more forcefully and take some refuge in recurring and (hopefully) now familiar theoretical moves. Most students have little interest in whether states may limit “double” trucks to sixty feet,¹¹ but discussion intensifies when the question shifts to whether constitutional law should proceed by tightly drawn rules, “balancing tests,” flexible general standards, or whether different constitutional contexts might support different answers to this question. Similarly, students tend to yawn when confronted with constitutional challenges to the way states regulate milk production,¹² but they liven to the discussion of continuity in principle running from much older cases to the decisions on such challenges. And interest can be quickened by noticing those circumstances when technological and social change move the boundary between appropriate state “police” action and constitutionally forbidden “protectionism.”¹³ Lively discussion about methods of constitutional interpretation such as “original intent” or “original meaning,” on one hand, and those that emphasize dynamic constitutional interpretation or a “living Constitution,” on the other hand, can also bring some luster to this otherwise “dull” subject matter.

In this Essay, I consider how the challenges associated with teaching the dormant Commerce Clause might be faced. I explore a few of the themes and connective tissue that link this rather dry area of constitutional law with more engaging materials. Making these themes and connections more prominent may energize students to undertake the difficult, yet wonderful, critical work of appreciating and understanding our country’s rather unique brand of constitutional law.

10. Daniel Farber, *The Zapp Complex*, 5 CONST. COMMENT. 13, 14 (1988).

11. *See Kassel*, 450 U.S. at 666.

12. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

13. *Compare S.C. State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938), with *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981).

I. INTRODUCING THE DORMANT COMMERCE CLAUSE: *GIBBONS V. OGDEN*¹⁴

Having considered the Supreme Court's struggle to identify appropriate limits on Congress's expansive power "[t]o regulate Commerce . . . among the several States,"¹⁵ class attention then shifts to considering the relation between that expansive power and the "police powers" reserved to the several states. *United States v. Lopez*,¹⁶ *United States v. Morrison*,¹⁷ and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,¹⁸ all seem keen to preserve for the states regulatory power over "traditionally" local subjects, but it is doubtful that, notwithstanding these cases, there is a whole lot of regulation that cannot be considered to "affect interstate commerce" in some more or less "substantial" manner. Does the national government's near limitless power to regulate interstate commerce leave any room for effective and meaningful, diverse and experimental, regulation by state and local governments? Is there any basis for judicially enforced limitations on the states' general regulatory powers to be found in the Constitution prior to the passage of the Thirteenth, Fourteenth, and subsequent amendments?

Aside from the short list of explicit restrictions contained in Article I, section 10, and Article IV, the original Constitution is silent on this question—almost. There is, of course, one important, and explicit, general limitation placed on the operational effectiveness of all state law. That limitation is found in Article VI's Supremacy Clause, which declares that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution and Laws of any State to the Contrary notwithstanding."¹⁹

*Gibbons v. Ogden*²⁰ is a good starting point for considering constitutional constraints on state regulation and the general force of the Supremacy Clause. From the beginning of the course with *Marbury v. Madison*, most students find Chief Justice Marshall's opinions engaging. *Gibbons* is not quite as gripping as the opinions in *Marbury* or *McCulloch v. Maryland*,²¹ but it still exudes Marshallian enthusiasm and rhetorical prowess in the process of judicial review. In addition, *Gibbons* provides an opportunity to frame a range of options the Court might consider in interpreting the Constitution's allocation of regulatory power between the states and the national government.²²

14. 22 U.S. (9 Wheat.) 1 (1824).

15. U.S. CONST. art. I, § 8, cl. 3.

16. 514 U.S. 549 (1995).

17. 529 U.S. 598 (2000).

18. 531 U.S. 159 (2001).

19. U.S. CONST. art. VI, cl. 2.

20. 22 U.S. (9 Wheat.) 1 (1824).

21. 17 U.S. (4 Wheat.) 316 (1819).

22. See, e.g., Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1408 (1994).

One set of options presented by *Gibbons* specifically involves the Supremacy Clause. Students easily grasp that the Constitution limits any state's regulatory options when relevant federal legislation has been enacted.²³ I reserve more detailed discussion of preemption doctrine for a bit later in the course, but *Gibbons* nicely permits students to appreciate that the Constitution embraces at least one method for allocating regulatory authority: The Supremacy Clause gives the national government a trump card, which it may or may not choose to play.

Gibbons also invites consideration of whether state regulation might successfully be challenged even when the national government has not chosen to play its regulatory trump card. This is, of course, the question of whether the Constitution's assignment to Congress of power to regulate interstate commerce restricts state activity even when the federal authority lies "dormant." I ask students to imagine that the issue has never been decided and that *Gibbons* comes to the Court stripped of any possible preemptive federal legislation.

Discussion may be advanced by considering various approaches to constitutional interpretation. For some, the absence of textually explicit limitations on state regulatory power (save for the few mentioned above) is decisive. I push students to consider whether the Constitution, while not addressing the question in terms, might nonetheless provide important textual clues that aid the Court in resolving the issue. I remind them of Chief Justice Marshall's opinion in *McCulloch v. Maryland* and how Marshall used "structure and relationship" arguments to support an expansive view of congressional power and reject a restrictive interpretation of the Necessary and Proper Clause of Article I, section 10.²⁴ In this respect, students can start their analysis by pointing to words of the Constitution, the placement of particular terms in the Constitution's structure, and the overall design of our basic plan of government.

Approaching the issue in this way can generate some creative and surprising arguments. For example, students might argue that the Tenth Amendment is the place to start precisely because the amendment addresses, albeit in grossly general terms, how power is to be allocated vertically within the federal structure: "The powers not delegated to the United States by the

By its terms, [the Commerce Clause] is purely a grant of legislative power to Congress rather than a restriction on the states. This is in contrast to some other portions of the Constitution that explicitly limit state power (for instance, in the areas of tariffs and export fees). A not unreasonable inference could be that the clause has no direct effect on state regulatory power, though it indirectly could affect state regulation by providing the basis for a federal statute, which might in turn preempt state laws.

Id.

23. See *Gibbons*, 22 U.S. at 209–11.

24. See generally GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 67 (4th ed. 2001).

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁵ From prior cases, students have learned that, when considered as a restriction on federal power, this amendment is sometimes a mere “truism” with little or no independent force,²⁶ and at other times, may perhaps be more than that.²⁷ But what about the flip side? Can the Tenth Amendment plausibly be read as a general limitation on *state* power? Though no case explicitly adopts such a view, the amendment’s language might reasonably be interpreted to mean that *only* those “powers not delegated to the United States . . . are reserved to the States respectively” (or to the people). If so, the amendment supports the conclusion that Congress’s power to regulate interstate commerce is exclusive and preemptive of any form of state regulation of interstate commerce, even when federal power is not exercised in a way to raise standard preemption issues.

On the other hand, the Constitution does include explicit limits on state regulation of commerce, prohibiting, for example, any state from laying “any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws” (unless Congress consents to such impostos or duties).²⁸ The inclusion of such a particular prohibition on state regulation makes a restrictive interpretation of the Tenth Amendment somewhat problematic. The explicit restrictions imply something not prohibited—i.e., other forms of state commercial regulation (unless, of course, they are preempted by national legislation). One may refer all the way back to Marshall’s admonition in *Marbury* that, sometimes, “exclusive sense must be given to [constitutional provisions] or they have no operation at all.”²⁹ Thus, the textual limitations on state regulation of commerce might serve little or no purpose if states’ regulatory power were more generally limited by the preemptive force of the Commerce Clause, just as in Marshall’s view it would make little sense for the Constitution to demarcate the Court’s original jurisdiction if Congress was free to alter it without restriction.³⁰ Notice, too, that the Tenth Amendment is part of the Bill of Rights, amendments which, of their own force, limit only *national*, not state power. Students may remember

25. U.S. CONST. amend. X.

26. *United States v. Darby*, 312 U.S. 100, 124 (1941).

27. *See New York v. United States*, 505 U.S. 144, 156–57 (1992).

28. U.S. CONST. art. I, § 10, cl. 2. For the argument that this clause relates to interstate, as well as foreign, commerce, see William Winslow Crosskey, 1 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 295–323 (1953). In *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), however, the Court held that the Export-Import Clause applies only to foreign commerce. Justice Thomas has recently urged that *Woodruff* be abandoned and that the clause be given more play in its relation to state power to regulate interstate commerce. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 624–38 (1997) (Thomas, J., dissenting).

29. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

30. *Id.*

from *McCulloch* that the placement of a particular provision in a particular part of the constitutional structure may bear importantly on how that provision is to be interpreted.³¹

None of these specific arguments appear in *Gibbons*, but Justice Johnson, in a rare Marshall-era concurrence, took the position that the Commerce Clause should be understood to deprive the states of *any* power to regulate interstate commerce. On this view, it did not matter that the federal government had legislated on the subject.³² The state-conferred monopoly was an unconstitutional attempt on the part of the state to arrogate to itself power that belongs exclusively to the national government.³³ Justice Marshall, too, found “great force in this argument,” noting that federal commercial regulation “produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.”³⁴

The “exclusive power” reasoning of *Gibbons* is breathtaking in its implications for the scope of state regulatory authority, especially in light of the Court’s general unwillingness to narrowly construe the scope of national authority under the Commerce Clause. Students may immediately question the exclusive power theory’s apparent and severe limitations on the states’ ability to pursue important values or serve as laboratories for innovative regulatory programs. Perhaps an unstated political preference for free markets is at work in the reasoning of the exclusive power theory—a preference that, if given constitutional stature, might preclude a wide variety of progressive social and economic legislation. The exclusive power theory may, in short, create a regulatory void that the federal government may not choose to fill, or cannot do so effectively. The ghost of *Lochner*³⁵ (or, in the structural Constitutional Law I course, *Bailey v. Drexel Furniture*³⁶) haunts this concern. When presented with this possibility, students become much more engaged, sensing that something significant may be at hand.

Discussion of the implications of the exclusive power theory of the Commerce Clause also leads many students to see that the “great force” of Marshall’s (and Johnson’s) reasoning might depend on what is deemed to be

31. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419–21 (1819) (discussing placement of the Necessary and Proper clause).

32. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231–32 (1824) (Johnson, J., concurring).

33. *Id.* at 232.

34. *Id.* at 209. See also *Welton v. Missouri*, 91 U.S. 275, 282 (1876) (presuming that congressional silence is “equivalent to a declaration that inter-State commerce shall be free and untrammelled”).

35. *Lochner v. New York*, 198 U.S. 45 (1905).

36. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

the proper scope of Congress's power to regulate interstate commerce.³⁷ It is, of course, devilishly difficult to nail down Marshall's views on the latter issue and how those views would play out in modern contexts. In *Gibbons*, for example, Marshall noted that the Constitution does not grant Congress any "direct general power" to enact "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads [and] ferries."³⁸

The federal government's lack of a "direct general power" of the sort described by Marshall suggests a categorical distinction between the power to regulate interstate commerce and the "police powers" reserved to the states. Such a distinction might be thought to drive Marshall's opinion for the Court in *Willson v. Black-Bird Creek Marsh Co.*³⁹ One may question whether the "exclusive power" theory would retain "great force" for Marshall given the modern collapse, at least since *United States v. Darby*,⁴⁰ of any sharp categorical distinction between "commercial" regulation, on the one hand, and the more pervasive public health, safety, and environmental regulation that characterizes the modern regulatory state, on the other hand. *Willson* also promotes discussion of the manageability of a constitutional "test" that requires federal courts to determine the objectives or purposes at which a state may have aimed when choosing to regulate activities in a way that substantially affects interstate commerce. This is a theme that crops up in many cases. Students may be reminded of the inconsistent positions assumed by the Court on whether this sort of inquiry is constitutionally appropriate.⁴¹

A robust version of the exclusive power theory falls by the wayside with the Court's decision in *Cooley v. Board of Wardens*,⁴² replacing it with a

37. See STONE ET AL., *supra* note 24, at 258 ("[T]he acceptability of the 'exclusive power' argument may turn on the scope one gives to the affirmative grant of power to Congress.").

38. *Gibbons*, 22 U.S. at 203.

39. 27 U.S. (2 Pet.) 245, 251–52 (1829).

40. 312 U.S. 100 (1941).

41. Compare *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), and *Darby*, 312 U.S. at 115 ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."), with *Bailey*, 259 U.S. at 38 (striking down tax on goods produced by child labor because the tax's "primary motive" was not to raise revenue, but to regulate workplaces), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819):

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not [e]ntrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

42. 53 U.S. (12 How.) 299 (1851).

doctrine of “selective exclusivity.”⁴³ The Court concluded that “[e]ither absolutely to affirm, or deny that the nature of [Congress’s power to regulate interstate commerce] requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part.”⁴⁴ But rather than asking whether the state’s regulation is designed to achieve permissible police power objectives, as in *Willson*, the Court adopts a standard that rests on a new pair of categories. If the “nature of the subject” is such as to require national treatment, then only Congress may regulate that subject. If national treatment is not required (or desirable?), then it may be permissible for the states to regulate the subject.⁴⁵ But what sorts of categories are these—formal ones, like those used to distinguish “production” from “commerce,” or more functionally oriented criteria that take shape only from the facts of particular cases?

At this point, I ask students to consider whether the *Cooley* categories are an improvement from, or more manageable than, the *Willson* categories. This can be both a descriptive and normative question. The Court’s largely unsuccessful efforts to create workable analytic categories in delimiting congressional power under the Commerce Clause help students appreciate the difficulties that attend more formal categorical moves. It is also worth noting that the Constitution’s commitment to Congress of power to regulate interstate commerce is by its terms not limited to subjects that require national treatment; nothing in the Constitution purports to preclude Congress from taking into account local conditions and variables when designing an effective program of commercial regulation. Thus, it is useful to remind students that the interpretive choices are not necessarily limited to state regulation that accounts for the diversity of local conditions and uniform, one-size-fits-all, national regulation.

In the same vein, *Cooley* invites discussion about whether the national/local distinction serves not only as a way to demarcate the appropriate scope of state regulatory power but also whether the distinction limits Congress’s power to authorize state regulation of commerce. That is, may Congress authorize states to regulate commerce if the nature of the regulated subject demands local variation but not authorize state regulation when national treatment is, in the Court’s view, imperative? How much deference is owed to Congress’s choice? Is it possible that Congress can “cure” unconstitutional state action by authorizing such action? If that result seems anomalous to students, they may be asked to consider again Article I, section

43. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 507 (1997).

44. *Cooley*, 53 U.S. at 319.

45. See *id.*

10. The prohibition against state imposts or duties is limited to those enacted “without the Consent of Congress.”⁴⁶

These issues can be explored usefully by asking students to think about what the Court had in mind when it spoke of subjects requiring national treatment, and more specifically, to ask students for what purposes or objects national treatment might be deemed necessary. Posing the question in this way invites students to broaden their focus a bit and to explore themes relative to broader constitutional purposes that perhaps may not be achievable through state regulation and that might be served by granting Congress the power to regulate interstate commerce. If such broader purposes can be viewed as having constitutional significance, perhaps judicial review of state commercial regulation is an appropriate means of securing these purposes, even if Congress has not acted. At least two justifying possibilities might manageably be explored at this point.⁴⁷

One possibility is a process-based view. Local regulation of interstate commercial activities might not be subject to significant political oversight, especially if the costs of regulation are visited mostly on out-of-state transactions or entities—i.e., if states engage in cost externalization. Courts in such circumstances may be less confident that deference to legislative decisions is warranted and may conclude that those who are structurally excluded from the relevant political process are in need of what Donald Regan calls a “virtual representat[ive].”⁴⁸ The courts may serve as such a representative, striking down regulatory measures that impose costs on out-of-staters that are deemed unwarranted after giving some appropriate consideration to the measure’s benefits.⁴⁹ In this respect, the class’s attention

46. U.S. CONST. art. I, § 10, cl. 2.

47. The discussion that follows builds on the standard justifications for judicial enforcement of a dormant Commerce Clause. These justifications (and others) are discussed in STONE ET AL., *supra* note 24, at 261–66. For an extended catalog, see Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1206–10 (1986).

48. Donald H. Regan, *Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing, Da Capo*, 99 MICH. L. REV. 1853, 1854 (2001) [hereinafter Regan, *Judicial Review*].

The idea that when a social decision is made, all affected interests should somehow be taken into account is powerful and appealing, and it seems to require that when a legislative decision is made, interests that are not represented in the legislature should be given virtual representation by the courts.

Id.; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1161 (1986) [hereinafter Regan, *State Protectionism*].

49. See Regan, *Judicial Review*, *supra* note 48, at 1854 (“A court [would] compare the local benefits and the foreign costs of the law, and invalidate laws, even nonprotectionist laws, if the foreign costs are greater than the local benefits (balancing) or if they are too much greater (proportionality review).”).

can be directed back to Marshall's opinion in *McCulloch* and the beginnings of a "representation-reinforcement" strategy of constitutional interpretation. Students may recall Marshall's concern that persons lack "a sufficient security" against oppressive or unwise regulation that may be imposed upon them by a state in which they lack representation.⁵⁰ State regulation of commerce may thus, in some instances, subject out-of-staters to regulation for which they have no political recourse in the regulating state.⁵¹ Authorizing both national regulation and judicial review of state measures might be deemed appropriate given the lack of this, most basic, structural security against tyranny.

Another broad theme generally associated with the decision to vest power over interstate commerce in the national government or to authorize judicial review of state commercial regulation harkens back to the very beginning of the course. One impetus for the adoption of the Constitution and its grant of national power to regulate commerce concerned the general economic conditions prevailing under the Articles of Confederation. Specifically, the grant of power to the federal government to regulate interstate commerce is often explained as a measure designed to eliminate trade barriers enacted by the states and to discourage "economic Balkanization."⁵² In loose terms, it might be thought that the Constitution was adopted, in part, to create an American free-trade zone—at least until such time as federal legislation to the contrary might be enacted.⁵³ To provide a national solution to internecine economic conflict was viewed by many as a fundamental necessity in nation-building. Indeed, perhaps this very point is made in the Constitution's preamble, which states as a constitutional objective the formation of "a more perfect [u]nion."⁵⁴ At stake, then, are interpretive choices that may tend to foster national identity and economic prosperity, on the one hand, or those that may tend to reinforce pre-existing regional or state loyalties on the other.

50. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819).

51. See *S.C. Highway State Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938) ("[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.").

52. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) ("The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.") (referencing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533–34 (1949)).

53. See *H.P. Hood & Sons, Inc.*, 336 U.S. at 538 (speaking of a "federal free trade unit" established by the Commerce Clause).

54. U.S. CONST. pmb1.

Following the lead of the casebook I use,⁵⁵ we can see the force of these political and economic themes as they begin to make appearances in Supreme Court decisions, sometimes in mutually reinforcing ways. I ask students to view these larger theories with caution, for neither is necessarily compelling, and it is difficult in many cases to ascertain what consequences particular state actions may have in terms of these highly general themes.⁵⁶ This latter concern can be emphasized forcefully; many students are prone to generalize and discount the importance of confounding variables. It is also useful here again to explore the tension between judicial review and citizens' aspirations for self-government—the counter-majoritarian difficulty. Paradoxically, a court's serving as a "virtual representative" for those unrepresented in a regulating state may present counter-majoritarian problems at the very same time that it purports to compensate for structural defects that make majoritarian outcomes suspect. A court may strike down commercial regulation which, after appropriate consideration is given to the relevant affected interests, would be favored by a majority. Admittedly, a judicial decision of this sort is subject to correction through ordinary legislative processes; Congress's commerce power might tend to serve as an appropriate corrective when the courts get it wrong. But that same power provides precisely the sort of political safeguard that is otherwise unavailable for those who are subject to oppressive or unfair state regulation. The political solution in such circumstances is preemptive federal legislation. Congress could always use its preemptive power to override state regulatory measures that unduly and adversely impact the functioning of particular economic sectors or the national economy as a whole.⁵⁷

55. See STONE ET AL., *supra* note 24, at 261–62.

56. For targeted criticism of the political, representation-reinforcement justification for judicial review, see Regan, *State Protectionism*, *supra* note 48, at 1160–67. One exception to general criticisms of these theories involves those cases in which a state "directly" regulates out-of-state transactions or activities as a condition for permitting the regulated entity to conduct business within the state. See, e.g., *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986) (holding that a state statute that effectively regulates transactions in other states violated the Commerce Clause). In these cases, the political explanation for the Court's treatment of this sort of conditional regulation is a bit more persuasive. In these cases the state is attempting to exert regulatory power beyond its geographical jurisdictional limits. While a congressional fix is also possible in such cases, requiring regulated entities to pursue that corrective mechanism and denying judicial relief is simply too much of a burden in the face of what may be described as ultra vires exercises of state regulatory power.

57. For an argument that the judiciary should not intervene to address protectionist or otherwise discriminatory state regulation of commerce because Congress is the institution charged with making judgments about how interstate commerce should be regulated, see Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987).

Why, then, should the Court provide a remedy and frustrate a state's political preferences when a political fix is available in circumstances where Congress, weighing the costs and benefits of various options, deems it appropriate to act? Should congressional silence presumptively be interpreted as a Marshallian "design to leave untouched" a particular field of commercial activity such that some forms of state regulation should be deemed preempted by such silence?⁵⁸ If so, and if congressional intent is to control outcomes, could the presumption be rebutted? How? Contrariwise, should congressional silence in the face of questionable state regulation be interpreted as an expression of assent to such state regulation? Are there persuasive reasons to give constitutional warrant to either of these "design in silence" postures? Is it possible to divine a constitutional preference for a particular default rule that operates to permit or prohibit state regulation in the absence of congressional action? These questions set the stage for exploring modern dormant Commerce Clause doctrine.

II. TRASHING THE ANTI-DISCRIMINATION PRINCIPLE, MILKING PROTECTIONIST MOTIVES

My class's first in-depth exposure to modern dormant Commerce Clause jurisprudence comes with *City of Philadelphia v. New Jersey* and the Court's summary of the doctrine in that case.⁵⁹ Before introducing this case, however, I find it useful to briefly describe doctrinal development from *Cooley* to *Philadelphia*. A simplified story provides students with context for considering the direction of doctrinal commitment and concomitant jurisprudential concerns. The story, in brief, is encapsulated in two decisions authored by Justice Stone, *South Carolina State Highway Department v. Barnwell Brothers*⁶⁰ and *Southern Pacific Co. v. Arizona*.⁶¹ In *Barnwell Brothers*, the Court pays passing service to the local/national distinction embraced by *Cooley*, affirmatively concluding that "[f]ew subjects of state

58. For a period, the Court so held. See *Welton v. Missouri*, 91 U.S. 275, 282 (1876) (Congressional "inaction . . . is equivalent to a declaration that inter-State commerce shall be free and untrammelled."); *Hall v. DeCuir*, 95 U.S. 485, 490 (1878).

This power of regulation [of interstate commerce] may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution.

Id.

59. 437 U.S. 617 (1978).

60. 303 U.S. 177 (1938).

61. 325 U.S. 761 (1945).

regulation are so peculiarly of local concern as is the use of state highways.”⁶² Interestingly, however, the Court suggests that the “localness” of a particular subject of regulation—and hence, the permissibility of state regulation—is a judgment that Congress, not the courts, are constitutionally authorized to make.⁶³ Critically, and subject to some important qualifications, the Court now appears to read congressional silence not as a “design to leave untouched” commercial activity that falls within the now-enlarged area of concurrent state and federal authority, but rather as an acquiescence in state regulation of that activity.

This aspect of *Barnwell Brothers* is just a piece of the very modest role Justice Stone’s opinion embraces for the judiciary in policing state regulation for consistency with the dormant Commerce Clause. True enough, the Court is ready and willing to enforce the principle that “[t]he commerce clause by its own force, prohibits discrimination against interstate commerce, whatever its form or method.”⁶⁴ It also posits a judicial responsibility to give the Commerce Clause “like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state.”⁶⁵ But for cases in which neither of these factors are present, the Court unmistakably adopts a standard that is highly deferential to legislative choice. When considering whether the measures selected by the state were sufficiently tailored to the achievement of legitimate state objectives so as not needlessly to burden interstate commerce, the Court says that “the judicial function, under the commerce clause, . . . stops with the inquiry . . . whether the means of regulation chosen are reasonably adapted to the end sought.”⁶⁶ The means of regulation will be considered “reasonably adapted” unless, after considering “the whole record,” the Court can “say that the legislative choice is without rational basis.”⁶⁷

The modest judicial role contemplated by *Barnwell Brothers* is also apparent in Justice Stone’s refusal to place the Court in the position of utilizing a calculus for assessing the reasonableness of state regulation that includes, as one of its principal variables, a judicial assessment of the extent to which a particular regulation burdens interstate commerce. The Court concluded that these incidental burdens on interstate commerce are “one[s] which the Constitution permits because [they are] an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the

62. *Barnwell Bros.*, 303 U.S. at 187.

63. *See id.* at 189.

64. *Id.* at 185.

65. *Id.* at 185–86.

66. *Id.* at 190.

67. *Barnwell Bros.*, 303 U.S. at 191–92.

states.”⁶⁸ The Court quickly added that such burdens need not inevitably and irresistibly be borne by the citizenry. Where citizens deem such incidental burdens excessive, their recourse lies not in the judicial system, but in the halls of Congress:

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state’s regulatory power. But that is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest.⁶⁹

The modest role for the courts articulated in *Barnwell Brothers* was short-lived.⁷⁰ Less than a decade later, in *Southern Pacific*, Justice Stone again wrote for the Court, but he had a significant change of heart. In *Southern Pacific*, Justice Stone ushered in what has become known as judicial “balancing” in dormant Commerce Clause jurisprudence.⁷¹

Again, Justice Stone paid homage to *Cooley*’s national/local distinction,⁷² but the heart of his opinion embraces a substantially enlarged role for the courts in assessing the permissible scope of state power to regulate commerce in the absence of controlling federal legislation.⁷³ Justice Stone notes that

68. *Id.* at 189.

69. *Id.* at 189–90.

70. For a discussion of the movement in dormant Commerce Clause jurisprudence from *Barnwell Brothers* to *Southern Pacific*, see Gardbaum, *supra* note 43, at 521–32.

71. See Regan, *State Protectionism*, *supra* note 48, at 1183 (“The case in which a majority of the Supreme Court first endorsed a balancing approach was a transportation case, *Southern Pacific Co. v. Arizona*.”).

72. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 766–68 (1945).

73. *Id.* at 769–70. Justice Stone’s change of heart on the appropriate judicial role in enforcing dormant Commerce Clause restrictions on state regulation may have been influenced by the strong views of Justice Jackson. Jackson, who like Stone, deplored judicial “activism” in discerning limits on Congress’s commerce powers, held a decidedly different view of the judicial role in respect of state regulation. See *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring). In *Duckworth*, Justice Jackson wrote an impassioned concurrence severely criticizing the Court’s assumption of a minimalist role in dormant Commerce Clause matters:

The extent to which state legislation may be allowed to affect the conduct of interstate business in the absence of Congressional action on the subject has long been a vexatious problem. Recently the tendency has been to abandon the earlier limitations and to sustain more freely such state laws on the ground that Congress has power to supersede them with regulation of its own. It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and

while some forms of regulation will plainly be beyond state authority (e.g., regulation that discriminates against interstate commerce) and other forms will plainly be appropriate exercises of state power,

between these extremes lies the infinite variety of cases in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.⁷⁴

In *Barnwell Brothers*, as noted above, Justice Stone seemed to say that this “appraisal and accommodation” was peculiarly within the province of Congress, which could achieve a nice balance through appropriate legislation if corrective action were deemed necessary or desirable.⁷⁵ And if Congress had not yet spoken to the issue, it was not the province of the courts to fill the void, if there was a void.⁷⁶ In *Southern Pacific*, however, Stone distances himself from this position, stating that, “where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests.”⁷⁷ And further, “in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn.”⁷⁸ As a consequence,

the matters for ultimate determination [for the Court] are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.⁷⁹

too local to get the attention of a Congress hard pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry.

Id. For a review of Justice Jackson’s influence on Justice Stone, see Gardbaum, *supra* note 43, at 528–29. Gardbaum also traces Stone’s change of heart to the influence of Professor Dowling’s article, Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 19–28 (1940), arguing for “balancing” in dormant Commerce Clause cases. See Gardbaum, *supra* note 43 at 528.

74. *Southern Pacific*, 325 U.S. at 768–69.

75. See 303 U.S. 177 (1938).

76. *Id.*

77. *Southern Pacific*, 325 U.S. at 769.

78. *Id.* at 770.

79. *Id.* at 770–71. See also *id.* at 779–80 (“The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by ‘simply invoking

The shift from *Barnwell Brothers* to *Southern Pacific* is interesting for a number of reasons. First, *Southern Pacific*'s embrace of a strong judicial role in policing state commercial regulation comes at a time when the Court has retreated significantly from close supervision of congressional power under the Commerce Clause.⁸⁰ At this time, federal regulatory power is expanding. Perhaps the Court is drawn to the centralizing tendencies then at work in the political culture; a vigorous, and judicially enforced, dormant Commerce Clause, may promote more favorable regulatory outcomes by unburdening Congress of the task of policing state regulation for significant barriers to interstate commerce. Second, by turning to "balancing," *Southern Pacific* is a retreat from the rigidity of a rules-based constitutional jurisprudence, advancing a more dynamic and flexible, functional approach informed by very generalized standards. This signals an end to the view that *Cooley*'s local/national distinction is to be given controlling weight, though it does not eliminate these categories as an important factor for judicial consideration.⁸¹ Third, although the Court purports to adopt a balancing test, it ultimately seems to apply a different sort of test. Finding that the state action in question "viewed as a safety measure, afford[ed] at most slight and dubious advantage,"⁸² the Court concluded that the safety benefits that might have been secured by the state action, if any there were, were of no real consequence because the regulation was not "essential" in securing such benefits.⁸³ Thus, rather than *Barnwell Brothers*' deferential standard that merely required a state regulatory measure to bear a rational relation to a legitimate state interest, the Court in *Southern Pacific* now demands a showing from the state that the means selected are "essential."⁸⁴

This kind of least-restrictive means test is not balancing, at least not of the cost-benefit sort.⁸⁵ If the prospect of judicial balancing of state and federal

the convenient apologetics of the police power . . .") (quoting *Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 79 (1914)).

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

81. Indeed, it may be tempting to try to harmonize *Barnwell Brothers* and *Southern Pacific* along the lines demarcated by the *Cooley* categories. But as later cases make clear, *Southern Pacific* eroded to some extent the deferential stance of the Court in *Barnwell Brothers* on both sides of the local/national divide. See *infra* notes 85–86, 93–94 and accompanying text.

82. *Southern Pacific*, 325 U.S. at 779.

83. *Id.* at 781–82.

84. See *id.*

85. Professor Regan, discussing *Southern Pacific* and other cases, concluded that the Court has probably not been balancing in the fullest possible sense. Quite possibly the effective rule for the whole of the modern era has been the rule Justice Powell states in *Raymond* and *Kassel*, namely, that the state law will be upheld unless the purported safety justification is totally illusory. Obviously this rule does not require the Court to balance in the sense of comparing costs to (nonzero) benefits. On the other hand, it still involves

interests nonetheless seems certain after *Southern Pacific*, students can be asked to evaluate that prospect critically. They can be reminded of Justice Marshall's admonition in *McCulloch* that, "to undertake here to inquire into the degree of [a given measure's] necessity [to achieve a legitimate governmental objective], would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."⁸⁶ It is not apparent why the Court will not countenance inquiries into the necessity of a federal enactment but will embrace such an inquiry when state legislation is being challenged. Is the legislative nature of such judgments transformed into an appropriate judicial function simply because a state legislature, not Congress, has acted?

The lingering questions after *Barnwell Brothers* and *Southern Pacific* hover over the most basic of questions in dormant Commerce Clause jurisprudence: Who is to police the conduct of the states in their nondiscriminatory efforts to secure legitimate local benefits while incidentally burdening interstate commerce—the federal courts or Congress?

With *Barnwell Brothers* and *Southern Pacific* as background, class attention then turns to the decision in *Philadelphia*. Justice Stewart structures his opinion for the Court around the "free market" theory of the dormant Commerce Clause, emphasizing the "evils of 'economic isolation' and protectionism," including the prospect of retaliatory measures by states in response to another state's discriminatory regulation of commerce.⁸⁷ With *Philadelphia* it becomes clear that *Southern Pacific* and the default rule favoring judicial scrutiny—even when congressional power lies dormant—have carried the jurisprudential day. At the same time, it is also apparent that *Cooley's* "local/national" categories will no longer suffice to distinguish state action that may be subject to strict scrutiny and state action that will not, though the categories may retain some indeterminate measure of influence on the judicial mind. *Philadelphia*, most importantly, shows that the chief concern of the Court in dormant Commerce Clause cases, foreshadowed in *Southern Pacific*, is to prevent state discrimination against interstate commerce that services protectionist interests.

More clearly than in cases previously considered in the course, *Philadelphia* also reveals a canonical theme in constitutional law—i.e., the *Carolene Products*⁸⁸ idea that judicial scrutiny should be calibrated, perhaps according to certain categorical rules, with strict scrutiny reserved for those

"balancing" in the general sense of being effects-based. It requires the Court to look at the actual consequences of the legislation, not just at what the legislature intended.

Regan, *State Protectionism*, *supra* note 48, at 1184.

86. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

87. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978).

88. 304 U.S. 144 (1938).

occasions when governmental action falls into a category (either overtly or in its primary effect) that is offensive to some basic constitutional norm.⁸⁹ This tiering of judicial scrutiny might provide a basis for harmonizing *Barnwell Brothers* and *Southern Pacific*; strict scrutiny was appropriate in *Southern Pacific* because, unlike the state action in *Barnwell Brothers*, the Arizona law did not deliver real safety benefits; the safety justification for the Arizona law might, as a consequence, be viewed as pretextual.⁹⁰ Of course, we might worry about how to identify the constitutional norm that is deemed to have been offended in *Southern Pacific* but not in *Barnwell Brothers*.

In *Philadelphia*, the norm supporting strict scrutiny is more or less clearly identified: The Constitution embraces as a fundamental norm an integrated economy uninhibited by protectionist state measures. Thus, given this norm, coupled with fears of economic balkanization and interstate disharmony and all the political implications that follow in train, instances in which state regulation seeks “simple economic protectionism” are subject to a “virtual[] *per se* rule of invalidity.”⁹¹ “Protectionism” in this sense contains a sort of equal protection component—namely that a state may not regulate interstate commerce in a manner that favors in-state enterprise over its out-state competition.⁹²

With *Philadelphia*, students learn that impermissible protectionism is most likely to be found in instances where state regulation discriminates between in-state and out-state activities or entities and favors the in-staters. In these cases, the state may be attempting to isolate itself from the national economy,⁹³ giving rise to potential retaliatory measures by other states.⁹⁴ The result could be the very sort of economic balkanization and interstate rivalry that the Commerce Clause was designed to eliminate.

The Court suggests that more deference to state regulatory choices may be appropriate when those choices “credibly advance[]” legislative objectives other than simple economic protectionism and the burdens placed on interstate commerce are an unintended and unfortunate byproduct of the state’s efforts to

89. *Id.* at 152–53 n.4.

90. This is a position adopted by Chief Justice Rehnquist. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 692 (1981) (Rehnquist, J., dissenting). The *Kassel* decision is discussed in detail *infra* Part IV.

91. *Philadelphia*, 437 U.S. at 624.

92. See Regan, *State Protectionism*, *supra* note 48, at 1094–95 (explaining that cases reveal that state action will be deemed unconstitutionally “protectionist” if it is “adopted for the purpose of improving the competitive position of local (in-state) economic actors, just because they are local, vis-a-vis their foreign ([meaning] out-of-state) competitors.”).

93. *Philadelphia*, 437 U.S. at 627.

94. See *id.* at 629.

achieve legitimate goals.⁹⁵ In such circumstances, the “much more flexible approach” set forth in *Pike v. Bruce Church*⁹⁶ is utilized:

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. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden [placed by state regulation on interstate commerce] that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.⁹⁷

All this seems straightforward from a doctrinal perspective, even if the Court does not provide a compelling constitutional basis for judicial, rather than congressional, intervention. But the doctrinal clarity of the two-tiered level of judicial scrutiny is obscured by the doctrine’s application in *Philadelphia*. The New Jersey ban on-out-of-state trash clearly discriminated, but didn’t the state “credibly advance” a legitimate state objective in support of the discriminatory treatment? Justice Rehnquist, dissenting, clearly thought so.⁹⁸ Should the focus on discriminatory state action be viewed as a means to uncovering illegitimate state motives or purposes, or should it be deemed per se unconstitutional—even if discrimination serves otherwise legitimate state objectives? The Court suggests the latter rule, concluding that it is unnecessary to determine whether the state’s purposes are benign or illicit; the vice of protectionism, the Court declares, may be discerned not only in the objectives sought by state regulation but also in the means selected to achieve otherwise legitimate state objectives.⁹⁹ Where the means selected by the state discriminate solely on the basis of an article’s geographic origin, the Court appears to hold that the “virtual per se rule of invalidity” applies.¹⁰⁰ Thus, scrutiny is ratcheted up not only in cases where economic protectionism infects state regulatory objectives but apparently also where a state discriminates in service of non-protectionist objectives.

On the other hand, the Court does make a point of emphasizing that New Jersey’s alleged legitimate objective could be achieved by non-discriminatory alternatives, noting that the state “may pursue those ends by slowing the flow of *all* waste into the State’s remaining landfills, even though interstate commerce may incidentally be affected.”¹⁰¹ This analysis suggests the

95. *See id.* at 624.

96. 397 U.S. 137 (1970).

97. *Philadelphia*, 437 U.S. at 624 (quoting *Bruce Church*, 397 U.S. at 142).

98. *Id.* at 633 (Rehnquist, J., dissenting).

99. *Id.* at 626.

100. *Id.* at 624, 626–29.

101. *Id.* at 626. It is interesting to note that in *Bruce Church*, the Court suggests the existence of a virtual per se rule of invalidity applicable to local processing requirements. *See* 397 U.S. at

application of the second-tier analysis of *Bruce Church*. Moreover, the Court acknowledges and affirms the so-called “quarantine” cases, in which some forms of geographic discrimination were sustained without much consideration of alternative, less discriminatory measures that might achieve the posited state purposes.¹⁰²

The quarantine cases make the analysis in *Philadelphia* tricky. Trash bears at least a family resemblance to the materials against which states may properly discriminate under the terms of the quarantine cases. On its face, then, the ban on out-of-state waste looks a lot like bans that the Court has considered constitutionally acceptable. The Court’s effort to distinguish the quarantine cases is, at best, strained. One may properly be dubious of the Court’s suggestion that it is the greater health and safety risks incident to interstate movement of the quarantine case materials that accounts for the constitutional difference between diseased meats and trash.¹⁰³ Indeed, if “movement” is what poses the risk, might not the state be required to pursue the less discriminatory alternative of regulating that movement through, for example, highway safety standards?¹⁰⁴

145. But the Court then applies a somewhat more “flexible” balancing analysis to find that Arizona’s (sort of) local processing requirement violates the dormant Commerce Clause. *See id.* at 146. In application, the Arizona statute, like the New Jersey statute in *Philadelphia*, deployed discriminatory means to achieve an otherwise legitimate state objective. *Id.* The constitutional defect in *Bruce Church*, the Court concluded, was that the burden on commerce could not be justified because the state’s interest was “minimal at best.” *Id.* Had Arizona come up with a “more compelling” interest, the Court suggested that the discriminatory application of its regulatory standard could be salvaged. *Id.* By contrast, in *Philadelphia*, the Court does not consider the weight of New Jersey’s interest in protecting its remaining “open lands” from the creeping need for more landfills. 437 U.S. at 626–27.

102. In some of the quarantine cases, the Court disposed of Commerce Clause challenges by simply defining the regulated activity as something other than “commerce.” *Philadelphia*, 437 U.S. at 621–22. *See, e.g.,* *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935); *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 489 (1888).

103. *See Philadelphia*, 437 U.S. at 628–29 (“[T]hose quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils.”). Professor Richard Epstein has criticized the Court’s decisions in the waste cases for implicitly accepting the notion that trash ought to be analyzed like any other commodity for purposes of the dormant Commerce Clause. *See* Richard A. Epstein, *Waste & the Dormant Commerce Clause*, 3 GREEN BAG 2d 29, 35 (1999). He concludes that, “[t]he default position for the market for bads [like trash] looks quite different from the vibrant competitive equilibrium (even with uniform sales taxes) in the markets for goods.” *Id.* at 37.

104. Of course, it may be that the costs of complying with such appropriately established safety standards—that is, standards that are no more or no less stringent than necessary—are so high that it would effectively amount to a de facto ban, in which case the state should be permitted to impose a ban as a more cost-effective measure. *Cf. Regan, Judicial Review, supra* note 48, at 1857–59 (discussing circumstances in which a ban on certain articles of interstate commerce may be nonprotectionist and justified). It is doubtful, however, that this is an inquiry

Many students may also puzzle over the Court's conclusory statement that the "noxious articles" involved in the quarantine cases are not appropriate articles of interstate commerce.¹⁰⁵ That interpretation is faithful to the reasoning in the quarantine cases,¹⁰⁶ but it seems to depend on categories long abandoned by the Court in its affirmative Commerce Clause cases. This raises the prospect that "commerce" may be understood to mean something different when the scope of congressional power is questioned than it does when state regulatory measures are challenged. The New Jersey Supreme Court read the Court's decisions to support such differing meanings of commerce; it relied on the older cases to suggest that trash is not commerce for purposes of assessing the state's regulation.¹⁰⁷ Earlier in the opinion, Justice Stewart addressed this question but resolved it in favor of treating trash as an article of commerce. He reinterprets the quarantine cases to be applying a balancing test; those cases were really just saying that noxious "articles" worth in interstate commerce was far outweighed by the dangers inhering in their very movement."¹⁰⁸ If that is right, shouldn't a similar balancing test, perhaps the "flexible" test of *Bruce Church*, be employed to assess the New Jersey ban?

In the end, then, there is some doubt about precisely why the New Jersey law is constitutionally invalid. Is it because the discriminatory means selected by the state are simply impermissible per se? Or is it because New Jersey could achieve its purposes through nondiscriminatory alternatives to the ban, and thus the ban cannot survive strict judicial scrutiny? Or is it because any dangers trash's movement posed to public health or welfare were outweighed by the protectionist effect incidental to the ban on out-state trash? May a state choose "discriminatory" means to achieve important, non-protectionist state objectives if the resulting burden on interstate commerce is negligible? Do the answers to these questions lie in the "virtual" part of the "virtual per se rule of invalidity"?

At this stage, it may be useful to ask students to consider whether the Court in *Philadelphia* is cautiously moving toward a more rule-based approach in dormant commerce cases and away from the more generalized balancing test purportedly embraced in *Southern Pacific* and the quarantine cases and

that the judiciary could undertake effectively. See *id.* at 1860 (discussing relative competence of legislatures and courts to make such judgments).

105. See *Philadelphia*, 437 U.S. at 629 ("Those [quarantine] laws . . . did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.").

106. See *Bowman*, 125 U.S. at 489 (identifying articles like germ-infected rags and diseased meats as not being merchantable because "they are not legitimate subjects of trade and commerce").

107. See *Philadelphia*, 437 U.S. at 621–22 (discussing the New Jersey court's decision).

108. *Id.* at 622.

elaborated on in *Bruce Church*.¹⁰⁹ Aside from this general theme, students can gain a bit of comfort by observing that at least some of the ambiguity in *Philadelphia* is cleared up by the Court in *Hughes v. Oklahoma*¹¹⁰ and in *Maine v. Taylor*.¹¹¹

In *Hughes*, the Court struck down an Oklahoma statute forbidding the transportation of natural minnows out of state if the purpose of such transport is to sell the small fish.¹¹² The Court clarified the analytic framework to be applied when a statute overtly discriminates against interstate commerce. In such cases,

[t]he burden to show discrimination rests on the party challenging the validity of the statute, but “[w]hen discrimination against commerce...is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”¹¹³

Moreover, when discrimination is shown, the Court applies “the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”¹¹⁴ *Maine v. Taylor* applies this framework to a similar state statute¹¹⁵ but demonstrates that the strict scrutiny reserved for discriminatory regulation is not fatal in fact.¹¹⁶

Given the heightened judicial scrutiny of discriminatory state regulation, it becomes important to know how to tell whether a state regulation is, in fact, discriminatory. In *Philadelphia*, *Hughes*, and *Maine*, there is not much disagreement among the Justices that discrimination is present, so these cases seem rather easy to place within the “virtual per se rule of invalidity” and the principles articulated in *Hughes*.¹¹⁷ Other cases demonstrate, however, that it

109. In 1986, Professor Donald Regan argued that a generalized balancing approach, typically associated with *Bruce Church*, did not adequately describe what the Court was, in fact doing in dormant Commerce Clause cases: “[t]he Court has indeed claimed to balance,” but “[d]espite what the Court has said, it has not been balancing.” Regan, *State Protectionism*, *supra* note 48, at 1092.

110. 441 U.S. 322 (1979).

111. 477 U.S. 131 (1986).

112. *Hughes*, 441 U.S. at 338.

113. *Id.* at 336 (quoting *Hunt v. Washington Apple Adver. Comm’n*, 432 U.S. 333, 353 (1977)) (second alteration in original).

114. *Id.* at 337.

115. *Maine v. Taylor*, 477 U.S. at 140 (ban on the importation of live baitfish).

116. *Id.* Cf. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361–62 (1978) (noting that “our review under the Fourteenth Amendment should be strict—not “strict” in theory and fatal in fact”) (quoting Gerald 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, 8 (1972)).

117. That is not to say, however, that there was complete agreement among the Justices on the question of discrimination against interstate commerce. In *Hughes*, Chief Justice Burger joined a

is not always so easy to determine whether a state regulatory measure is discriminatory in the relevant sense, or is otherwise “protectionist” in purpose or effect.¹¹⁸

*C & A Carbone, Inc. v. Town of Clarkstown*¹¹⁹ vividly illustrates the difficulties in making a determination of discrimination.¹²⁰ This difficult case also invites discussion about the advantages and disadvantages of constitutional analysis that favors a rules-based approach over more functionally oriented assessments of state action. In addition, the case can usefully serve as an exemplar to explore the tension within the Rehnquist Court’s “federalism” decisions.¹²¹

dissenting opinion penned by Justice Rehnquist that expressly rejected the Court’s conclusion that such discrimination was present. See *Hughes*, 441 U.S. at 344–45 (Rehnquist, J., dissenting).

118. See, e.g., Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 793 (1996) (“The concept of discrimination, however, is not self-defining, and the Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes.”); Farber & Hudec, *supra* note 22, at 1414 (“One problem is that the term ‘discrimination’ is hardly self-explanatory, and the courts have not developed a clear test.”).

119. 511 U.S. 383 (1994).

120. Another useful case for exploring what should count as forbidden discrimination is *Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232 (1987), in which the Court, over Justice Scalia’s objection, found a state tax to be discriminatory in the forbidden sense. Because I do not generally discuss the Court’s dormant commerce cases involving state taxation in any depth in my class, I do not use this case. Others may, however, find it useful.

121. Another teaching option that I have considered, but not yet adopted, is to use *Clarkstown* as a vehicle for exploring the scope of the so-called “market participant” doctrine, which I will not address further in this Essay. One may usefully compare the outcome in *Clarkstown* with the decision in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). There, the Court distinguished state action that may properly be characterized as placing the states in the position of “market participants” from action that makes them “market regulators.” *Id.* at 436. When a state acts as a market participant, the Court noted, considerations of sovereignty and federalism weigh more heavily than they do when the state acts as a regulator:

Restraint in this area is also counseled by considerations of state sovereignty, the role of each State “as guardian and trustee for its people,” . . . and “the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” . . . Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. . . . Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

Id. at 438–39 (internal citations omitted). It might be interesting to explore the extent to which these factors counseling restraint should apply when the state acts both as regulator and as a participant, as is arguably the case in *Clarkstown*. The lower courts have struggled to some

Clarkstown concerned a “flow control” program—a local ordinance required that all solid waste in the city be processed at a designated facility.¹²² The city ultimately intended to own and, presumably, operate the facility but financed its construction in a somewhat unconventional manner.¹²³ Rather than issuing municipal bonds or imposing some sort of direct tax, the city agreed to an arrangement whereby a private contractor would construct the facility and operate it for five years, and then sell it to the city for one dollar.¹²⁴ The contractor in turn was guaranteed a minimum flow of waste and a minimum per-ton price for the service of managing that waste.¹²⁵ The requirement that all waste in the city be processed at the facility was intended to ensure that the guaranteed minimum amount of waste would indeed make its way to the facility.¹²⁶

In applying the dormant Commerce Clause framework described earlier, the majority found the flow control ordinance to be discriminatory,¹²⁷ notwithstanding that the ordinance did not treat out-of-state waste or out-of-state processors *as a class* any differently from in-state waste or in-state processors *as a class*.¹²⁸ This feature distinguishes the flow-control ordinance from prior state actions in which the Court had found local processing requirements discriminatory; in each, articles of commerce or those engaged in activities affecting interstate commerce were classified according to some geographic criteria.¹²⁹ In the *Clarkstown* majority’s view, however, the ordinance was even more protectionist than local processing requirements considered in prior cases: “The flow control ordinance . . . squelches competition in the waste-processing service altogether, leaving no room for investment from outside.”¹³⁰

extent with this problem in the context of flow control measures. *See, e.g.*, *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996). For a nice overview, see John H. Turner, *Solid Waste Flow Control: The Commerce Clause and Beyond*, 19 MISS. C. L. REV. 53 (1998); John Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone and Its Progeny*, 7 VILL. ENVTL. L.J. 203 (1996).

122. *Clarkstown*, 511 U.S. at 386.

123. *See id.* at 387.

124. *Id.*

125. *Id.*

126. *Id.* at 393.

127. *Clarkstown*, 511 U.S. at 394.

128. *See id.* at 403 (O’Connor, J., concurring).

129. *See, e.g.*, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Res.*, 504 U.S. 353, 367–68 (1992) (striking down waste import restrictions based on whether waste originated in a county or somewhere else); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (striking ordinance requiring all milk sold in city to be pasteurized within 5 miles of city). *See also Clarkstown*, 511 U.S. at 416–18 (Souter, J., dissenting) (discussing and distinguishing prior cases).

130. 511 U.S. at 392.

This conclusion of “discrimination” was challenged in a concurring opinion by Justice O’Connor and a dissenting opinion by Justice Souter, who was joined by Chief Justice Rehnquist and Justice Blackmun. Justice O’Connor acknowledged that “there is no bright line separating those enactments which are virtually *per se* invalid and those which are not,” but concluded that “the fact that in-town competitors of the transfer facility are equally burdened by” the flow control ordinance should support a finding that the ordinance “does not discriminate against interstate commerce.”¹³¹ Justice O’Connor then applied the balancing test of *Bruce Church* to conclude that the ordinance unduly burdened interstate commerce.¹³² Her chief concern was the possibility that, should such ordinances be deemed constitutionally acceptable, “pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent.”¹³³

Justice Souter’s dissenting opinion also characterized the ordinance not as discriminatory, but as a measure that “directly aids the government in satisfying a traditional governmental responsibility” and which “bestows no benefit on a class of local private actors.”¹³⁴ Perhaps even more interesting is Justice Souter’s observation that because the favored facility “is essentially an agent of the municipal government,” the flow control ordinance “fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist.”¹³⁵ Also, Justice Souter was concerned that the record failed to show “that any out-of-state trash processor has been harmed, or that the interstate movement or disposition of trash will be affected one whit.”¹³⁶

In short, the dissent essentially found that the sort of discrimination practiced by the city was not the sort of discrimination that can properly be used as a surrogate for protectionism, and thus, strict judicial scrutiny associated with the virtual *per se* rule of invalidity was not warranted.¹³⁷ This conclusion was based on a view that “[w]hile a preference in favor of the government may incidentally function as local favoritism . . . a more particularized enquiry is necessary before a court can say whether such a law

131. *Id.* at 404–05 (O’Connor, J., concurring).

132. *Id.* at 405–07 (O’Connor, J., concurring).

133. *Id.* at 406 (O’Connor, J., concurring) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949)).

134. *Id.* at 411 (Souter, J., dissenting).

135. *Clarkstown*, at 416 (Souter, J., dissenting). Consider in this respect, the market participant doctrine discussed *supra* note 121.

136. *Id.* at 411 (Souter, J., dissenting).

137. *Id.* at 422 (Souter, J., dissenting) (noting that “[t]he justification for subjecting the local processing laws and the broader class of clearly discriminatory commercial regulation to near-fatal scrutiny is the virtual certainty that such laws, at least in their discriminatory aspect, serve no legitimate, nonprotectionist purpose” and that this justification was not clearly applicable to the flow control ordinance).

does in fact smack too strongly of economic protectionism.”¹³⁸ Upon making that enquiry, Justice Souter concluded that the ordinance served a legitimate purpose and was not protectionist in purpose or effect.¹³⁹ The majority, of course, found it unnecessary to consider whether the local benefits of the ordinance might outweigh the burdens it placed on interstate commerce or even to consider precisely what effects on interstate commerce the measure may have had. In this respect, the disagreement between the majority and the dissenters (and Justice O’Connor, concurring) may usefully be viewed as preference for easily applicable “rules” on the one hand,¹⁴⁰ versus a preference for more finely tuned approaches that purport to ensure that measures challenged as “protectionist” can, in fact, properly be regarded as such. These competing preferences may usefully be discussed as a particular example of the tension in constitutional law between approaches favoring “rules” and those favoring “standards” and the pros and cons of each approach.¹⁴¹

Justice Souter’s dissent also sounds themes that invite a comparison between the Court’s dormant commerce cases and its other “federalism” decisions. Despite the general “pro-federalism” stance taken by the Rehnquist Court in various doctrinal contexts, *Clarkstown* suggests that the same stance seems not to have made its way into the Court’s dormant Commerce Clause decisions.¹⁴² Justice Souter hinted at the apparent inconsistency. He echoed the “traditional state functions” theme that is featured prominently in the Court’s pro-federalism decisions, describing the flow-control ordinance as

138. *Id.* at 422 (Souter, J., dissenting).

139. *Id.* at 424–30.

140. The rule treating discrimination as virtually per se invalid is supported by Justice Scalia precisely because of its rule-like qualities. *See, e.g.,* *Pharm. Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 674–75 (2003) (Scalia, J., concurring) (describing dormant Commerce Clause doctrine as “having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action.”); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (“[O]nce one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a ‘quagmire.’ . . . The object should be, however, to produce a clear rule”); *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring) (supporting majority opinion on grounds that the statutes discriminated against interstate commerce but objecting to the *Bruce Church* balancing test because “[w]eighing the governmental interests of a State against the needs of interstate commerce is . . . a task squarely within the responsibility of Congress . . . and ‘ill suited to the judicial function.’”) (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring)).

141. *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing differences among Justices concerning preferences for rules or standards).

142. *See* Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 432 (2002) (“[T]he Court has done more to tighten than to loosen the restrictions that the so-called dormant Commerce Clause imposes on state and local governments.”).

“perform[ing] a municipal function that tradition . . . recognize[s] as the domain of local government. Throughout the history of this country, municipalities have taken responsibility for disposing of local garbage to prevent noisome smells, obstruction of the streets, and threats to public health . . .”¹⁴³ Indeed, Justice Kennedy, the author of the majority opinion in *Clarkstown*, had concurred in *Lopez* primarily because the federal legislation in that case “tende[d] . . . to displace state regulation in areas of traditional state concern.”¹⁴⁴ Alluding to the apparently disharmonious stances of the Court in its various federalism cases, Justice Souter pointedly argued that

if “we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position,” . . . then surely this Court’s dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.¹⁴⁵

From *Clarkstown*, class discussion moves to the topic of state subsidies for local enterprise and the Court’s decision in *West Lynn Creamery v. Healy*.¹⁴⁶ The result in *West Lynn Creamery* seems to flow effortlessly from the strong endorsement of an anti-discrimination rule in *Philadelphia* and *Clarkstown*. The practical effect of the tax and subsidy program at issue in the case was no different than a differential tax program favoring in-state producers over out-of-state producers.¹⁴⁷ Such discriminatory taxes have long been considered unconstitutional under the dormant Commerce Clause.¹⁴⁸

143. *Clarkstown*, 511 U.S. at 419 (Souter, J., dissenting). Cf. *Nixon v. Missouri Mun. League*, 541 U.S. 125 (2004) (“Congress needs to be clear before it constrains traditional state authority . . .”); *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 325 (1997) (“[W]here federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (internal quotations and citations omitted); *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001) (refusing to give deference to administrative interpretation because “concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power”); *United States v. Morrison*, 529 U.S. 598, 615 (2000) (rejecting reasoning offered in support of congressional regulation of violence against women under Commerce Clause because such reasoning “will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation”); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (striking down federal law touching “areas such as criminal law enforcement or education where States historically have been sovereign”).

144. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

145. *Clarkstown*, 511 U.S. at 421 (Souter, J., dissenting) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985)).

146. 512 U.S. 186 (1994).

147. See *id.* at 194 (noting that the tax and rebate program was “effectively a tax which makes milk produced out of State more expensive”). For an example of a subsidy in the form of a tax

What makes *West Lynn Creamery* interesting is the Court's willingness to make a categorical distinction between subsidies that are not coupled to a general tax and those that are. Intriguingly, the Court suggests that a different outcome might be warranted if the payments to Massachusetts dairy farmers were drawn from general state revenues instead of from revenue generated from the tax on all milk dealers. In the majority's view, "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business."¹⁴⁹ By contrast, "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax," a difference of constitutional dimensions may be justified.¹⁵⁰ Invoking a representation-reinforcing style of argument, the Court noted that such when this sort of coupling happens, "a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the most powerful in-state interests which would otherwise lobby against the tax has been mollified by the subsidy."¹⁵¹ Justice Scalia's concurring opinion echoed this theme but, like the dissent, deemed it inappropriate to use interest-group political analysis as a basis for determining the scope of the dormant Commerce Clause.¹⁵²

It is difficult to understand the categorically different treatment the Court apparently is willing to give to subsidies, on the one hand, and discriminatory taxes, on the other hand. The two forms of state action are certainly capable of yielding exactly the same result—lowering the costs of in-state enterprise

exemption deemed by the Court to be discriminatory, and thus invalid under the dormant Commerce Clause, see *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

148. See, e.g., *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992); *Welton v. Missouri*, 91 U.S. 275 (1875).

149. *W. Lynn Creamery*, 512 U.S. at 199.

150. *Id.* at 200.

151. *Id.*

152. *Id.* at 211–12 (Scalia, J., concurring); *id.* at 214–15 (Rehnquist, C.J., dissenting). The majority's analysis of the political dynamics put in play by the tax and subsidy scheme is a bit sloppy, as the dissent points out. The majority contends that one of the in-state groups that might provide virtual representation for out-of-staters subject to the tax would not do so because they had "been mollified by the subsidy." *Id.* at 200. But as Justice Rehnquist correctly points out, it is not milk producers who were subject to the tax; it was milk dealers. *Id.* at 214–15. There is no reason to think that these dealers would be mollified by a subsidy paid to producers; to the contrary, they would seem to offer the kind of virtual representation for out-of-staters that might be deemed sufficient to ensure an appropriately representative political process. *Id.* On the general weaknesses of the majority's analysis, see Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 MICH. L. REV. 2167, 2174–75 (1997).

relative to out-state enterprise.¹⁵³ Perhaps the distinction can be premised on the notion that subsidies may, but are not inevitably or perhaps most often, the product of protectionist motives. It is difficult to make the same statement about discriminatory taxes. For example, a subsidy may give an in-state enterprise an advantage over out-staters by lowering in-staters' overall costs, but it also may not; the advantage is premised on the assumption that the out-stater does not receive a similar subsidy from its own state—an assumption that may or may not be true.¹⁵⁴

Moreover, some subsidies may be primarily directed at non-protectionist objectives, such as urban revitalization or making a state more attractive to capital investment. In addition, direct subsidies are subject to very different political dynamics than discriminatory taxes, as both Justice Stevens and Justice Scalia pointed out in *West Lynn Creamery*.¹⁵⁵ The array of political forces at work when subsidies are being considered may provide a Marshallian “sufficient security” not available when discriminatory taxes are being considered. Thus, we might attribute the difference in treatment between subsidies and discriminatory taxes to considerations of judicial manageability: When the Court is relatively confident that protectionist motives are animating state action (discriminatory taxes), it will apply the rule of per se invalidity. Where that confidence is lacking (subsidies), a more cautious analysis might be warranted.¹⁵⁶

At this point it is sometimes useful to remind students that states often do and are expected to favor their own citizens over others. This favoritism, sometimes constitutionally unobjectionable, takes many forms—from reduced tuition at state universities for residents to free admission to facilities that are open to non-residents only at a price. Many of these forms of state favoritism are so closely related to the provision of public goods that they can safely be placed far removed from the protectionist practices with which the Commerce Clause is centrally concerned. At the same time, *West Lynn Creamery* introduces students to the notion that facially neutral schemes—such as the general tax on all milk dealers—may often, when their practical effects are considered, yield protectionist outcomes just as surely as more overtly

153. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (noting that direct subsidies are “no less effective in conferring a commercial advantage over out-of-state competitors” than a discriminatory tax exemption).

154. Professors Coenen and Hellerstein make a similar point about property tax exemptions for new construction. See Hellerstein & Coenen, *supra* note 118, at 807 (the “Commerce Clause Restraints” article).

155. See *W. Lynn Creamery*, 512 U.S. at 199.

156. Cf. *STONE ET AL.*, *supra* note 24, at 306 (suggesting that notions of judicial manageability might inform the Court’s decisions). For a general consideration of how issues of judicial manageability affect Commerce Clause doctrine, see Smith, *supra* note 47, at 1211.

discriminatory mechanisms.¹⁵⁷ But if protectionist objectives may be hidden within facially neutral regulatory measures, how might such objectives be discerned? It is to that question that the course next turns.

III. HUNT-ING FOR PROTECTIONISM WITHIN FACIALLY NEUTRAL REGULATORY PROGRAMS

When overt discrimination is not discernible on the face of a state regulatory measure, the *Bruce Church* approach is somewhat ambiguous about the appropriate level of judicial scrutiny to be applied. Flexibility may be an inherent feature of the balancing test adopted in *Bruce Church*, but its application hinges on a determination that a state's "purpose" in creating a challenged regulatory program is "legitimate." If not, the test suggests that the program will be invalid even if (an admittedly unlikely event) the legitimate local benefits that may incidentally be realized in the program's implementation "outweigh" the burden placed on interstate commerce. Guilty motives, it seems, can shame even those state programs that yield net overall benefits. This suggestion seems to be borne out in the Court's other decisions.¹⁵⁸

There is also the well-known difficulty associated with most balancing tests: the problem of incommensurate variables. Exactly how is the Court to "weigh" a state's legitimate interest in certain regulatory measures and place it in the scales opposite the burdens on interstate commerce imposed by those regulatory measures? What is to count as a legitimate interest and how is the Court to tell whether one such interest is weightier than another one? Similarly, what is to count as a "burden on interstate commerce?" Consider Justice Scalia's view that "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."¹⁵⁹

Begin with the question of what may be considered a legitimate state interest. The Court's approach to this issue is very difficult to nail down with any precision. Students can be reminded of the rather schizophrenic pronouncements the Court has made concerning the appropriateness of judicial scrutiny of legislative motives.¹⁶⁰ And yet, the notion that legitimate forms can

157. See *W. Lynn Creamery*, 512 U.S. at 200–01.

158. See Smith, *supra* note 47, at 1245–46 (discussing cases and concluding that "[o]nce the Supreme Court has gone behind a state's allegations to find a discriminatory purpose, it need do no more to conclude that the state's actual interest is illegitimate").

159. *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

160. Compare *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("We are not at liberty to inquire into the motives of the legislature."), with *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (basing a decision that an act of Congress was unconstitutional on an assessment of the intent and motive of the Congress in enacting it).

hide illegitimate purposes is a notion deeply entrenched in constitutional analysis, going back to Justice Marshall's oft-quoted statement in *McCulloch*: "Should congress . . . under the pretext of executing its powers, pass laws for the accomplishment of objects not [e]ntrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land."¹⁶¹

In the dormant Commerce Clause context, a somewhat simple approach to evaluating the legitimacy of a state regulation might involve an assessment of who primarily bears the costs of the state's regulatory effort. If those costs are borne disproportionately by out-staters engaged in interstate commerce, perhaps a presumption of illegitimate purposes is warranted.¹⁶² Such an approach might fairly explain the Court's decision in *Hunt v. Washington State Apple Advertising Commission*.¹⁶³ It is less helpful when considering, and does not explain, *Exxon Corp. v. Governor of Maryland*.¹⁶⁴ The tensions between these two cases are well-known,¹⁶⁵ and they present serious challenges to students, most of whom, if not already numbed by the cases discussed above, will be convinced that the best description of the Court's dormant Commerce Clause cases is the one provided by Justice Scalia in *West Lynn Creamery*: "once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a 'quagmire.'"¹⁶⁶

The most obvious difficulty in attempting to reconcile *Hunt* and *Exxon* involves divining an adequate response to Justice Blackmun's demonstration that the Maryland divestiture statute in *Exxon* had the same sort of protectionist

161. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

162. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."

Id. (quoting *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938)). As a way to identify protectionist purposes or effects, the approach of considering how the costs and benefits of state regulatory measures are allocated as between in-staters and out-staters is a theme sounded at various points. *See STONE ET AL.*, *supra* note 24, at 266–67, 273–75, 281, 302, 318–20. A variant of this approach, which is described as "protectionist effect balancing," is explored in Regan, *State Protectionism*, *supra* note 48, at 1105 (suggesting that a weighing of the protectionist effects against the good results of a state measure might serve "as a means of smoking out protectionist purpose").

163. 432 U.S. 333 (1977).

164. 437 U.S. 117 (1978).

165. *See, e.g.*, Smith, *supra* note 47, at 1218–19 (noting apparent inconsistency between *Hunt* and *Exxon*).

166. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (Scalia, J., concurring) (citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

effect as the labeling restrictions declared unconstitutional in *Hunt*. Justice Blackmun observed that the statutes in *Hunt* and *Exxon*, properly may be viewed as state attempts “to insulate in-state interests from competition by identifying the most potent segments of out-of-state business, banning them, and permitting less effective out-of-state actors to remain.”¹⁶⁷ Indeed, the statute in *Exxon* may be viewed as more protectionist than the statute in *Hunt*, for in *Hunt* Washington apples were not excluded from the in-state market but merely deprived of one of their more potent competitive advantages—i.e., their superior grade. In *Exxon*, by contrast, producers and refiners were categorically denied entry into the retail gasoline market.¹⁶⁸

The *Exxon* majority never really addressed Justice Blackmun’s point, except to say that the Maryland statute “does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market[,]” and that “[t]he absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce.”¹⁶⁹ As a formal matter, the majority is right; nothing in the statute distinguished between producers or refiners of gasoline on the basis of geographic origin—all were banned from the retail market. But the same was true in *Hunt*. Indeed, one would have thought that the point of *Hunt* was that facial neutrality does not shield state action from rigorous, if not strict, judicial scrutiny once a discriminatory effect is demonstrated through an examination of the practical operation of the statute.¹⁷⁰ And in *Exxon*, there is no dispute that the divestiture requirements, in operation, only applied to out-state entities. What, effectively, could be more discriminatory than that?

One effort to harmonize these cases is to focus on protectionist purpose, not merely protectionist effects, as the evil with which the dormant Commerce Clause ought to be concerned. Professor Donald Regan has done work in this respect.¹⁷¹ He explains *Exxon* as a case in which the state told a plausible story about why a state requirement that yields protectionist effects was not the product of a protectionist purpose.¹⁷² Professor Regan observes that in the

167. *Exxon*, 437 U.S. at 147 (Blackmun, J., dissenting).

168. See Regan, *State Protectionism*, *supra* note 48, at 1236 (comparing *Hunt* with *Exxon* and concluding that “the Maryland statute is worse in one way: it flatly excludes the most important foreign competitors, while the North Carolina statute merely hampers them”).

169. *Exxon*, 437 U.S. at 126.

170. In *Hunt*, the Court applied this standard: “When discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.” *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 353 (1977).

171. Regan, *State Protectionism*, *supra* note 48.

172. *Id.* at 1235. The same can be said about the Court’s decision in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), in which despite evidence of discriminatory effects,

majority's effort in *Exxon* to distinguish *Hunt*, “[Justice] Stevens says North Carolina discriminated and Maryland does not. There is only one thing he can possibly have in mind, namely, that the North Carolina legislature was motivated by protectionist purpose, while the Maryland legislature was not.”¹⁷³

This conclusion gains force when another distinction between *Exxon* and *Hunt* is considered. There is no suggestion by the Court in *Exxon* that the measures selected by the state were not conducive to the achievement of a legitimate purpose offered by the state in support of its action. By contrast, in *Hunt*, the Court found that “the challenged statute does remarkably little to further th[e] laudable goal” offered by the state in support of the statute.¹⁷⁴ Students can begin to see that the combination of significant protectionist effects and very little fit between the choices made by a state and the goal that state purports to be pursuing combine powerfully to point in the direction of an illicit protectionist purpose.

The focus evident in these cases on the presence or absence of protectionist purposes reinforces the point that formalities sometimes matter. Unlike *Philadelphia*, the statutes in these cases did not explicitly distinguish in-state products or services from out-state products or services. Again, this may explain why the Court in *Philadelphia* found it unnecessary to resolve the question of whether the statute served legitimate state interests; when facial discrimination is present, a state may rightly be called upon to explain why such discrimination is necessary. By contrast, when such facial discrimination is absent, only a strong demonstration of protectionist effects, perhaps coupled with a showing that the state's choices are not really conducive to achieving its alleged purposes such that an inference of a hidden protectionist purpose becomes irresistible, will the Court rigorously scrutinize the need for the state's choices in relation to the avowed purpose of the state's actions.

Justice Brennan explicitly rejected suggestions that a Minnesota ban on the sale of milk in plastic disposable containers was animated by protectionist purposes. *See id.* at 471 n.15. The ban was sustained as a legitimate attempt by the state to achieve certain environmental objectives with only “incidental effects” on interstate commerce that were not “clearly excessive,” *see id.* at 472–74, notwithstanding a district court finding that the “‘actual basis’ for the Act ‘was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.’” *Id.* at 460 (quoting portions of the district court opinion).

173. *Regan, State Protectionism, supra* note 48, at 1236.

174. *Hunt*, 432 U.S. at 353.

IV. THE WEIGHTS AND MEASURES OF INTERSTATE COMMERCE: *KASSEL*,
CONFUSION, AND THE TRAJECTORY OF DORMANT COMMERCE CLAUSE
JURISPRUDENCE

My class's exposure to dormant Commerce Clause jurisprudence comes to a close with *Kassel v. Consolidated Freightways Corp.*¹⁷⁵ This case, coupled with some brief references from other cases, provides a good opportunity to consider the trajectory of the Court's dormant Commerce Clause cases. It also permits discussion of some larger themes in constitutional analysis.

The most striking aspect of *Kassel* is the serious fragmentation of the Court and its inability to generate an opinion garnering a majority of the Justices. This fragmentation is all the more striking because, just three years earlier, the Court *unanimously* struck down a nearly identical Wisconsin statute, with Justice Powell authoring the opinion for the Court.¹⁷⁶ The plurality opinion in *Kassel*, also written by Justice Powell, is a classic in multi-factor constitutional analysis in which no single factor seems to be determinative. Justice Powell phrased his conclusion in terms of "balancing:" "Because Iowa has imposed this burden without any significant countervailing safety interest, its statute violates the Commerce Clause."¹⁷⁷ Yet, Iowa claimed that the length limitations promoted safety—a not irrational position, as Justice Rehnquist pointed out in dissent.¹⁷⁸ For Justice Powell, the usual deference extended to state legislative judgments concerning state highway safety was not appropriate in *Kassel* because Iowa included several exemptions in the legislation that resulted in a disproportionate effect on out-state interests relative to in-state interests.¹⁷⁹ Moreover, the legislative history of Iowa's law "suggest[ed] that Iowa's statute may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic."¹⁸⁰ Both of these features of the legislation hint at protectionist motives on the part of the Iowa legislature. Given the cumulative effect of these factors, Justice Powell concluded that the district court's independent assessment of the evidence, that court's conclusion that "there is no valid safety reason" for Iowa's law,¹⁸¹ and "the substantiality of the burden on interstate commerce" were "[t]he controlling factors."¹⁸²

175. 450 U.S. 662 (1981).

176. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978). Justice Stevens did not participate in *Raymond* but joined Justice Powell's opinion in *Kassel*.

177. *Kassel*, 450 U.S. at 678–79 (footnotes omitted).

178. *Id.* at 701 (Rehnquist, J., dissenting).

179. *Id.* at 675–76.

180. *Id.* at 677.

181. *Id.* at 667 (quoting *Consol. Freightways Corp. v. Kassel*, 475 F. Supp. 544, 549 (S.D. Iowa 1979)).

182. *Kassel*, 450 U.S. at 678.

A majority for holding the Iowa statute unconstitutional in *Kassel* was formed with the concurring opinion of Justice Brennan.¹⁸³ His opinion focused on a single factor.¹⁸⁴ In Justice Brennan's view, the evidence showed that Iowa's truck length limitations were not motivated by safety considerations, and as a consequence, such considerations were irrelevant to the law's constitutionality.¹⁸⁵ Iowa placed limits on truck length simply to decrease the number of trucks passing through the state and avoid the attendant costs of such traffic—a purpose Justice Brennan considered “*protectionist*” and “*impermissible*” under the Commerce Clause.¹⁸⁶

Justice Rehnquist dissented, as he is apt to do in dormant Commerce Clause cases. He took issue with the plurality's assessment of the evidence concerning safety, arguing that the district court's findings were based on a comparison of improper benchmarks.¹⁸⁷ For Justice Rehnquist, the question was not whether Iowa's law yielded safety benefits in excess of those realized by other states' more relaxed truck length standards. In his view, “[l]ines drawn for safety purposes will rarely pass muster if the question is whether a slight increment can be permitted without sacrificing safety.”¹⁸⁸ For Justice Rehnquist, the relevant question was “whether the Iowa Legislature . . . acted rationally in regulating vehicle lengths and whether the safety benefits from this regulation are more than slight or problematical.”¹⁸⁹ His point was that for purposes of the Commerce Clause, Iowa was free to ignore what neighboring states were doing and to determine for itself where the regulatory line should be drawn. To hold otherwise “would essentially be compelling Iowa to yield to the policy choices of neighboring States.”¹⁹⁰

The disagreement between Justice Powell and Justice Rehnquist on the appropriate baselines to be considered in assessing whether Iowa's choice could be said to yield safety benefits is just a piece of a much deeper disagreement about the appropriate role of the Court in dormant Commerce Clause cases. The unstated problem in *Kassel* is that any difference among neighboring states' regulation of truck lengths will burden interstate commerce, so long as trucking companies choose to invest in trucks that satisfy only the more generous state standard and do not meet the divergent state's standard. In such cases, uniformity, at least at a regional level, may be necessary to ensure that interstate commerce is not “unduly” burdened. This conclusion echoes the national/local distinction in *Cooley*, but with a twist:

183. *See id.* at 679–87 (Brennan, J., concurring).

184. *Id.* at 680 (Brennan, J., concurring).

185. *Id.* at 681–82 (Brennan, J., concurring).

186. *Id.* at 685 (Brennan, J., concurring).

187. *Kassel*, 450 U.S. at 695–96 (Rehnquist, J., dissenting).

188. *Id.* at 697 (Rehnquist, J., dissenting).

189. *Id.* at 696 (Rehnquist, J., dissenting).

190. *Id.* at 699 (Rehnquist, J., dissenting).

Where uniformity of regulation is regionally necessary to protect the federal interest in having interstate commerce unburdened by unnecessary inconsistency among the states, the states are free to regulate so long as their regulatory choices are coordinated with the policies of other states. In *Kassel*, the Court takes upon itself the responsibility to determine whether inconsistent state regulation of truck lengths imposes too large a burden on interstate commerce.¹⁹¹ Justice Rehnquist, by contrast, invokes *Barnwell Brothers* to make the point that, so long as the policy choices of the respective states can be said to be rational when considered independently of other states' choices, the responsibility for assessing whether those choices impose unreasonable burdens on interstate commerce is entrusted to Congress, not the courts.¹⁹²

Because the burden on interstate commerce in *Kassel* is the product of a coordination problem among the states, Justice Rehnquist's position has much to commend it. One problem with the plurality's approach is that it might yield unstable outcomes. Suppose Iowa enacted truck-length limitations that permitted trucks to be five feet longer than those permitted in sister states. Suppose further that trucking companies, relying on the Iowa law, invested in longer trucks and convinced a few additional states to adopt the Iowa standards. Wouldn't the length limitations imposed by the sister states who refused to follow Iowa's lead be vulnerable to constitutional attack? It seems doubtful, though perhaps possible, that such states could demonstrate to a court's satisfaction that maintaining their existing standards yields significant incremental safety benefits over the standards adopted by Iowa and its followers. Consider the possible outcomes of a state prevailing or not prevailing in its efforts to demonstrate such safety benefits. First, suppose the safety demonstration is made effectively. The Court would then be faced with the question of how much of an incremental benefit in safety would be needed to "outweigh" the burdens placed on interstate commerce. How, exactly, is the Court supposed to make such a judgment? The need for such a judgment was avoided in *Kassel* simply because the plurality refused to recognize that Iowa's law yielded any net benefits in safety.

Now consider the other possibility. Suppose the state is unable to convince a court that its shorter truck-length requirements yield incrementally more safety benefits than the standards adopted by its more permissive neighbor states. In this situation, neither the plurality's opinion nor Justice Brennan's concurring opinion in *Kassel* directly supports a conclusion that the law violates the dormant Commerce Clause. As noted above, the plurality viewed the evidence of protectionist purposes as an important factor in its overall assessment of the Iowa statute. For Justice Brennan, it was only the evidence of protectionist motivations that moved him to vote for the outcome proposed

191. *See id.* at 671.

192. *Kassel*, 450 U.S. at 699-700 (Rehnquist, J. dissenting).

by the plurality. It is doubtful, though certainly not impossible, to suggest that the mere failure of a state to alter its longstanding truck length regulations in response to changes made by other states is, in itself, evidence of protectionist purposes. Without such evidence it is entirely unclear whether the Court would rely heavily and exclusively on the logic of *Southern Pacific* to declare the state's refusal to change its regulations unconstitutional under the dormant Commerce Clause.

Consider also where the logical stopping point would fall in this potentially iterative game sequence of state action easing truck-length limitations—private investment in reliance on this regulatory relaxation—and judicial intervention. Would this game sequence repeat itself until a court finally decides what the “optimal” length of trucks should be—i.e., the point at which the safety benefits from size regulation just equal the costs?¹⁹³

Perhaps it is the prospect of this presumably undesirable scenario that moves Justice Powell to adopt a multi-factor analysis, emphasizing the protectionist-leaning aspects of the legislation in addition to the evidence of insignificant safety benefits yielded by that legislation. But, as suggested above, it may well be that in other circumstances no such evidence of protectionist motives is present, leaving nothing but the balancing test to determine the constitutionality of challenged legislation. In *Kassel*, however, five Justices rejected the notion that this sort of balancing was an appropriate role for the federal judiciary.¹⁹⁴ For these five Justices, evidence that safety benefits are not trivial ends the judicial inquiry, at least in the absence of any evidence of protectionist state motives.¹⁹⁵ It thus appears that, *Southern Pacific* notwithstanding, *Barnwell Brothers* retains vitality, at least in cases where state regulation is premised on the protection of public health and safety.

At the same time, *Kassel* demonstrates that precedent in this area can sometimes be affected by changes in the relative importance of the state and federal interests involved. In *Kassel*, it is relatively clear that the federal interest in maintaining channels of interstate commerce relatively free of state obstructions plays a more commanding role than it did in *Barnwell Brothers*. This change in the relative strength of the federal interest may be explained in part by technological change—the growth of interstate trucking operations—and political change—the relative increase in federal financial support to the

193. Perhaps it is only state action that alters the *status quo ante* in ways that impose burdens on interstate commerce that are subject to scrutiny by the courts. If that is so, it is not entirely clear that Iowa's law fits this description. It does not appear that the legislation challenged in *Kassel* decreased the permissible lengths of trucks in Iowa. Neither the district court nor the Court of Appeals nor the Supreme Court emphasized that the legislation altered a *status quo ante*.

194. See *Kassel*, 450 U.S. at 681 n.1 (Brennan J., concurring) (rejecting balancing); *id.* at 691–92 (Rehnquist, J., dissenting) (same).

195. *Id.* at 686–87 (noting that courts must defer to legislative choice where safety benefits are not shown to be “illusory”); *id.* at 692 (same).

states in maintaining public highways. The technological change increases the relative burden placed on interstate commerce by divergent regulatory standards. The increased role of federal funds severely undercuts one aspect of *Barnwell Brothers* not heretofore considered in this Essay. In concluding that highway safety was a traditional local function, Justice Stone relied rather heavily on the fact that the state built, owned, and maintained its local highway system.¹⁹⁶ The vulnerability of precedent to technological, social, and political change can provoke lively discussion about the possibilities of meaningfully adhering to an “original intent” or “original meaning” approach to constitutional interpretation.

The fragmentation in *Kassel* also facilitates discussion concerning the possibility of doctrinal movement in this area of constitutional law. Four of the five justices who rejected balancing in *Kassel* have since left the Court but so, too, have two of the Justices who supported balancing.¹⁹⁷ At this point, I discuss in summary fashion some of the Court’s dormant Commerce Clause cases in the years since *Kassel*, excluding those that are decided explicitly on grounds of discrimination against interstate commerce or other protectionist motives. The Court continues to apply a balancing test,¹⁹⁸ but such balancing continues to generate passionate dissents from those Justices, particularly Justice Scalia, who believe that the judiciary is ill-suited to conduct this kind of analysis. In *Bendix Autolite*, for example, Justice Scalia echoed the view of Justice Stone in *Barnwell Brothers*, stating that “[w]eighing the governmental interests of a State against the needs of interstate commerce is . . . a task squarely within the responsibility of Congress . . . and ‘ill suited to the judicial function.’”¹⁹⁹ It is unlikely that the tensions within the doctrine and among the members of the Court will yield a consistent and defensible approach to even the most basic of issues surrounding the meaning, and effect on the states, of the constitutional grant of power to Congress “[t]o regulate Commerce . . . among the several States.”²⁰⁰

196. See *S.C. State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 187 (1938) (noting that, “[u]nlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions”).

197. The five Justices who rejected balancing were Justices Brennan, Marshall, Rehnquist, Stewart, and Chief Justice Burger. The four Justices who supported balancing were Justices Powell, White, Stevens, and Blackmun.

198. See, e.g., *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 891 (1988) (applying balancing test).

199. *Id.* at 897 (Scalia, J., concurring) (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring)).

200. U.S. CONST. art I, § 8, cl.3.

V. CONCLUSION

The dormant clause presents two serious pedagogical problems. First, the subject matter of regulation in the principle cases often involves problems and policies in which most students have no abiding interest. The cases are, in short, dry and somewhat dull. Second, the doctrinal commitments expressed in the cases are often inconsistent, puzzling, and simply incoherent. Nonetheless, the dull edges of the material can be sharpened by turning to questions of theoretical fit and continuity of principle. The relative doctrinal chaos also can be used to demonstrate a dynamism that is often not so apparent in other areas of constitutional law. Of course, this dynamism may leave students with a rather hopeless sense of frustration about ever being able to state a defensible “rule” that is consistent with the cases, or at least one that will reward them with a respectable grade on a final examination. I try to use this very frustration to good advantage and turn it on its head. I urge my students to view the indeterminacy in this area (and others) of constitutional law as a liberating moment for them as attorneys who will soon participate in the continuing drama of constitutional governance. In the face of this confusion lies the possibility of creative constitutional argument, perhaps made on behalf of a client, with the force to shape the very roughness of the doctrine into an elegant and workable array of principle. Even so, that elegance must be recognized for its fragility and context-dependence. It may only last for the space of one case or a short line of cases. It is, however, an opportunity that a well-trained and creative lawyer may embrace. If we, as lawyers, do not take up the challenge of fashioning constitutional law, it is a safe bet that our republic will be the poorer for such restraint. The dormant Commerce Clause, with its richness and subtlety can be a useful area in which to drive that message home.

