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Brown v. Hovatter: Announcing the Death of Rights for Out-of-state Parties in Fourth Circuit Dormant Commerce Clause Jurisprudence

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Recent Decisions

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BROWN v. HOVATTER: ANNOUNCING THE DEATH OF RIGHTS FOR OUT-OF-STATE PARTIES IN FOURTH CIRCUIT DORMANT COMMERCE CLAUSE JURISPRUDENCE

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In *Brown v. Hovatter*,[1] the United States Court of Appeals for the Fourth Circuit relied upon a very narrow interpretation of dormant Commerce Clause jurisprudence to hold, in favor of the State, that the Maryland Morticians and Funeral Directors Act[2] did not violate the Commerce Clause of the United States Constitution in prohibiting funeral homes established after 1945 from operating in the corporate form.[3] The Fourth Circuit reasoned that the Act's implication of services rather than goods made it an unlikely candidate for dormant Commerce Clause protection, and that it further failed to violate Maryland's balancing test or to necessitate the use of the discrimination test.[4] In failing to properly apply the United States Supreme Court's established three-part inquiry for cases implicating a state's alleged infringement upon interstate commerce, the *Hovatter* court disregarded precedent and significantly limited the reach of the dormant Commerce Clause.[5] By doing so, the court failed to recognize the Act's blatant discrimination against the rights of those the dormant Commerce Clause was designed to protect and the out-of-state interests

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1. 561 F.3d 357 (4th Cir. 2009).
2. MD. CODE ANN., HEALTH OCC. §§ 7-101–7-602 (LexisNexis 2009).
3. *Hovatter*, 561 F.3d at 359–60.
4. *Id.* at 363–64.
5. *See infra* Part IV.A.

unable to lobby on their own behalf.[6] If the *Hovatter* court had properly applied a broad interpretation of the Court's balancing test, it would have appropriately concluded that the Act is unconstitutional and would have refrained from creating such dangerous precedent.[7]

I. THE CASE

Charles Brown, Brian Chisholm, Joseph B. Jenkins, III, and Gail Manuel ("plaintiffs") brought suit against David Hovatter, President of the Maryland State Board of Morticians ("Board"), and multiple members of the Board in their official capacities (collectively "defendants").[8] The plaintiffs alleged that sections of the Maryland Morticians and Funeral Directors Act[9] requiring that owners be licensed by the Board[10] and prohibiting the grant of new corporate licenses[11] violated their rights under Article I, Section 8, and the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and 28 U.S.C. § 2201.[12]

A. The Language of the Act

The Maryland Morticians and Funeral Directors Act ("Maryland Morticians Act" or "Act") seeks to "protect the health and welfare of the public" by creating a comprehensive regulatory scheme for the funeral home industry in the State of Maryland.[13] The Act is enforced by the State Board of Morticians.[14] Under the current version of the Act, as amended in 1971, a funeral home must receive a license from the State Board of Morticians prior to commencing business,[15] which

6. *See infra* Part IV.B.

7. *See infra* Part IV.C.

8. Brown v. Hovatter, 516 F. Supp. 2d 547, 549 (D. Md. 2007). Specifically, the plaintiffs sued Board members Faye Peterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffery Pope, and Vernon Strayhorn, Sr. *Id.*

9. MD. CODE ANN., HEALTH OCC. §§ 7-101–7-602 (LexisNexis 2009).

10. *Id.* § 7-310.

11. *Id.* § 7-309(a)–(b).

12. *Hovatter*, 516 F. Supp. 2d at 549. The plaintiffs sought declaratory and injunctive relief against the defendants. *Id.* The plaintiffs sought a declaratory judgment, pursuant to 28 U.S.C. § 2201, alleging the following: (1) Section 7-310 of the Maryland statute violates the Due Process and Equal Protection Clauses as it only allows "licensed individuals" to own funeral homes; and (2) Section 7-309(a) violates the Due Process and Equal Protection Clauses and the dormant Commerce Clause. *Hovatter*, 516 F. Supp. 2d at 555 (internal quotation marks omitted).

13. *Hovatter*, 516 F. Supp. 2d at 550 (internal quotation marks omitted) (quoting Maryland Morticians Act § 7-103).

14. *Id.* (citing Maryland Morticians Act §§ 7-201–7-205).

15. *Id.*

requires that a "licensed individual" who is also "the owner or co-owner of the establishment to be licensed" sign the application.[16] To receive licensure as a mortician, one must do three things: (1) complete an associate of arts degree, (2) complete a one- or two-year apprenticeship under a licensed Maryland mortician, and (3) pass both the American Board of Funeral Service Education national examination and a Maryland law and regulations examination.[17]

Since 1945, the Maryland General Assembly has prohibited the State Board of Morticians from granting corporate rights to applicants.[18] Those Maryland owners who possessed corporate ownership as of June 1, 1945, however, may continue to hold such status so long as they have continuously renewed their license since that date and pay all required fees.[19] The corporate rights are also transferable, without any apparent restrictions upon state residence or whether the purchaser is a "licensed individual" within the meaning of Section 7-310(b)(2), and there is no existing sunset provision on the title; thus, all of the currently existing corporate funeral homes in the State of Maryland may be sold to another owner indefinitely.[20] Maryland and New Hampshire are the only two states that currently employ restrictions upon corporate ownership.[21]

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16. *Id.* (internal quotation marks omitted) (quoting Maryland Morticians Act § 7-310(b)(2)). The term "licensed individual" originally encompassed four categories of people: (1) a licensed mortician; (2) a licensed funeral director; (3) a surviving spouse of a deceased mortician or funeral director; or (4) a personal representative of an estate of a deceased mortician. Maryland Morticians Act §§ 7-302, -307, -308, -308.1. To obtain a surviving spouse license, the applicant need only pass the Board-administered Maryland State law examination. *Id.* § 7-308(b). The executor license is valid for only six months and has no examination requirements; however, the business can only be operated "under the direct supervision of a licensed mortician or funeral director." *Id.* § 7-308.1.

17. *Hovatter*, 516 F. Supp. 2d at 550 (citing Maryland Morticians Act § 7-303(b)).

18. *Id.* at 550–51 (citing Maryland Morticians Act § 7-309(a)–(b)). The Act currently provides that "[e]xcept as otherwise provided by law, a corporation may not operate a mortuary science business and the [State Board of Morticians] may not issue a license to or list any corporation as licensed to operate a mortuary science business." Maryland Morticians Act § 7-309(a).

19. *Hovatter*, 516 F. Supp. 2d at 551 (citing Maryland Morticians Act § 7-309(b)). Prior to 1937, there were no restrictions upon the corporate ownership of funeral homes in Maryland. *Id.* at 551 n.7 (citation omitted). In that year, however, the Maryland General Assembly amended the Act to prohibit the Board from granting any further corporate licenses. *Id.* (citation omitted). Eight years later, in 1945, the Maryland General Assembly granted corporate licenses to those licensed Maryland funeral directors "engaged in the business of funeral directing or embalming at the time of induction into the Armed Forces of the United States during World War II." *Id.* (citation and internal quotation marks omitted).

20. *Id.* at 551.

21. *Id.* at 551–52. The New Hampshire Code states that "[n]o corporation . . . shall be issued a license as a funeral director," but excludes from its prohibition those "licensed

In 2007, within the State of Maryland, there were 283 licensed funeral homes.[22] Of those 283, corporations owned 58, surviving spouses held 11, and licensed morticians or funeral directors held the remaining 214.[23] Because of the relative rarity of corporate licenses within Maryland, the existing licenses are very valuable and are estimated at $150,000 to $200,000, excluding assets.[24]

B. The Plaintiffs' Challenge of the Act

The United States District Court for the District of Maryland heard the case on cross-motions for summary judgment, granting the plaintiffs' motion as to Sections 7-309(a)–(b), addressing corporate ownership, and the defendants' motion as to Section 7-310, creating a licensing scheme for funeral home operators.[25] Because the Maryland General Assembly could have rationally decided that Section 7-310 of the Act furthers the legitimate purpose of protecting the "public's health, safety and welfare," the court reasoned that it does not violate the Due Process or Equal Protection Clauses of the United States Constitution.[26]

In reaching this conclusion, the district court noted that Sections 7-309(a)–(b) failed to implicate either a fundamental right or a suspect classification, and under a rational basis review, the Maryland General Assembly could have found it rational to "require the presence of licensed individuals in the ownership structure of a corporation practicing mortuary science."[27] The district court, in so

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prior to January 1, 1953." N.H. REV. STAT. ANN. § 325:15 (LexisNexis 2003). Pennsylvania, though it permits corporate ownership, restricts funeral homes in possession of corporate licenses to those whose shareholders are licensed funeral directors. 63 PA. STAT. ANN. § 479.8(b) (West 2010) ("[S]hareholders [must be] licensed funeral directors or the members of the immediate family of a licensed funeral director . . . .").

22. *Hovatter*, 516 F. Supp. 2d at 551 (citation omitted).

23. *Id.* (citation omitted).

24. *Id.* at 553 (citations omitted). Furthermore, the average funeral in Maryland costs around $800 more than the national average, part of which is due to the anti-competitive nature of the funerary industry in the State. *Id.* at 554 (citation omitted).

25. *Id.* at 549, 554–55. On October 11, 2006, the district court dismissed count four of the complaint, pursuant to the defendants' motion, which alleged a violation of the Privileges and Immunities Clause of the Fourteenth Amendment due to the "arbitrary and unreasonable restrictions" imposed on the applicants' ownership of funeral homes. *Id.* at 555. The court denied the rest of the defendants' motion to dismiss. *Id.*

26. *Id.* at 557–58.

27. *Id.* at 558–59. In making its decision, the *Hovatter* court looked to *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003) (stating that there is "a strong presumption of validity so long as [the state statute does] not discriminate against any protected class or burden any fundamental right" (citation omitted)), and *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (asserting that the Supreme Court will uphold legislation that is rationally related to a legitimate end of some kind (citation omitted)). *Hovatter*, 516 F. Supp. 2d at 555–56.

concluding, questioned how a permanent corporate exemption in a skilled profession could rationally further the public's health and safety when permanent exemptions create an "indefinite classification system that benefits some to the exclusion of all others," raising serious equal protection concerns.[28] The court recognized, however, that pursuant to the Full Faith and Credit Clause, deference was due to the Maryland Court of Appeals and thus it was not necessary to hold that Sections 7-309(a)–(b) violated the Due Process and Equal Protection Clauses.[29]

Finally, the district court determined that the defendants' proffered benefit, that of consumer protection, was "entirely speculative" and thus not sufficient to outweigh the burden that Sections 7-309(a)–(b), such "clearly anti-competitive" and "unique" statutes, have upon interstate commerce.[30] In reaching this conclusion, the district court looked to *Pike v. Bruce Church, Inc.*,[31] which states that even where a statute regulates evenhandedly, the statute may still violate the dormant Commerce Clause if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[32] Though deference to the state legislature is required by the *Pike* test, the court interpreted Fourth Circuit precedent, *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*,[33] and *Medigen, Inc. v. Public Service Commission*,[34] as giving less leeway than the defendants suggested.[35]

Under this analysis, the court disagreed with the defendants' consumer protection concerns, stating that "Maryland consumers have been negatively affected by the lack of competition resulting from the corporate prohibition."[36] In looking at the expense of funerals in Maryland, the district court determined that the burden far outweighed

28. *Hovatter*, 516 F. Supp. 2d at 559 (citation omitted).

29. *Id.* at 559–60. In *Brooks v. State Board of Funeral Directors & Embalmers*, 233 Md. 98, 113–17, 195 A.2d 728, 737–39 (1963), the Maryland Court of Appeals found that the Act did not violate the Due Process and Equal Protection Clauses, thus directing the district court's decision in the instant case. *See Hovatter*, 516 F. Supp. 2d at 559–60 (applying *Brooks* to the case at bar).

30. *See Hovatter*, 516 F. Supp. 2d at 563–64 (citations and internal quotation marks omitted).

31. 397 U.S. 137 (1970).

32. *See Hovatter*, 516 F. Supp. 2d at 562–64 (internal quotation marks omitted) (quoting *Pike*, 397 U.S. at 142).

33. 401 F.3d 560 (4th Cir. 2005).

34. 985 F.2d 164 (4th Cir. 1993).

35. *See Hovatter*, 516 F. Supp. 2d at 562–63 (describing this pair of Fourth Circuit cases (citations omitted)).

36. *Id.* at 563.

the benefit, amounting to a violation of the dormant Commerce Clause.[37]

The district court subsequently clarified its decision and refused to amend the judgment, upon the plaintiffs' motion, holding that its decision only enjoined the State from denying corporate rights to those "capable of owning a funeral home in Maryland."[38] In so reasoning, the district court pointed to the State's inclusion in the Act of the requirement that a "*licensed individual* own or co-own a corporate funeral home," for evidence supporting the basis for its conclusion.[39] The district court cited to *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*[40] for the constitutionality of the statutes requiring corporately owned businesses in highly specialized fields to have licensed owners, despite defendants' indication that pursuant to Section 7-310(c) of the Maryland Morticians Act, the Board would not mandate that a licensed individual own or co-own a corporate funeral home.[41] On appeal, the Fourth Circuit sought to determine whether the Maryland Morticians Act violates the dormant Commerce Clause.[42]

II. LEGAL BACKGROUND

Courts have interpreted the dormant Commerce Clause in a variety of conflicting ways, though they have always held true to one tenet: The protection of out-of-state interests should be the focus of such jurisprudence.[43] The dormant Commerce Clause has a rather lengthy

37. *See id.* at 564–65.

38. Brown v. Hovatter, 525 F. Supp. 2d 754, 759 (D. Md. 2007). By contrast, the plaintiffs were unsure whether the district court's decision was meant to extend the right to obtain corporate ownership to all "non-mortician entrepreneurs and companies." *Id.* at 758 (citations and internal quotation marks omitted). The district court refused to grant Plaintiffs' Motion to Amend because of the following reasons: (1) the plaintiffs presented no "intervening change in controlling law" to support their request that the court require that the defendants "allow an unlicensed individual to own a corporate funeral home"; and (2) the plaintiffs failed to establish that a change was necessary to "correct a clear error of law or prevent manifest injustice." *Id.* at 759 (internal quotation marks omitted) (citing and quoting Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998)).

39. *Id.* at 758–59 (citation omitted).

40. 414 U.S. 156 (1973); *see Hovatter*, 525 F. Supp. 2d at 758 (summarizing succinctly *North Dakota Board of Pharmacy* (citation omitted)).

41. *Hovatter*, 525 F. Supp. 2d at 758–59 (citing *N.D. Bd. of Pharmacy*, 414 U.S. at 156, 166–67; MD. CODE ANN., HEALTH OCC. § 7-310(c) (LexisNexis 2009)).

42. Brown v. Hovatter, 561 F.3d 357, 359–60 (4th Cir. 2009). Though the court of appeals did not explicitly state why it elected to address this case, it indicated agreement with the lower court as to the decisions regarding the Due Process Clause and Equal Protection Clause. *See id.* (suggesting that the Fourth Circuit heard this case to illustrate its view of the dormant Commerce Clause).

43. *See infra* Part II.A.

history of precedent.[44] Though much is unpredictable in dormant Commerce Clause assessment, courts seeking to determine the constitutionality of cases implicating the dormant Commerce Clause apply a three-part inquiry to determine the following: (1) what is the conduct regulated;[45] (2) whether the legislation discriminates against interstate commerce;[46] and (3) whether the regulation imposes an excessive burden when balanced against the local benefits.[47]

A. The History of the Dormant Commerce Clause Indicates that the Supreme Court's Interpretation Is Intended to Protect Out-of-State Interests

The Commerce Clause of the United States Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States."[48] Though only applicable to the federal government, the United States Supreme Court has since 1852[49] interpreted the Commerce Clause as impressing a complementary, negative burden upon state power to refrain from hindering interstate commerce, even in the absence of congressional action.[50] In the landmark case of *Cooley v. Board of Wardens*,[51] the Court first conceived of the need for a restriction upon state power.[52] In recognizing the congressional right to regulate interstate commerce, it noted "[i]f the States were divested of the power to legislate . . . by the grant of the commercial power to Congress, it is plain this [state legislative] act could not confer upon them power thus to legislate."[53] In the century and a half since this case, the Supreme Court has abided by its original intentions, interpreting legislation and cases to ensure protection of congressional power granted by the Constitution as well as those out-of-state interests unable to protect themselves.[54]

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44. *See infra* notes 48–54 and accompanying text. **R**

45. *See infra* Part II.B.

46. *See infra* Part II.C.

47. *See infra* Part II.D.

48. U.S. CONST. art. I, § 8, cl. 3.

49. *See* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318 (1851) (creating the dormant Commerce Clause as an extension of the Commerce Clause).

50. *See, e.g.*, Dennis v. Higgins, 498 U.S. 439, 446 (1991) ("[T]he Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." (internal quotation marks omitted) (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980))).

51. 53 U.S. (12 How.) 299.

52. *Id.* at 318–19.

53. *Id.* at 318.

54. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1993) ("The central rationale for the rule against discrimination is to prohibit state or municipal

B. An Equitable Interest in the Protection of All Goods and Services Underlies Dormant Commerce Clause Jurisprudence

When a court hears a dormant Commerce Clause issue, it initially classifies the conduct as a good or service.[55] To do so, courts must determine the form of the conduct or product regulated by the controversial legislation.[56] The Supreme Court requires that courts "eschew[ ] formalism for a sensitive, case-by-case analysis of purposes and effects" because Commerce Clause jurisprudence "is not so rigid as to be controlled by the form by which a State erects barriers to commerce."[57] In alignment with this principle, the Court has found that the dormant Commerce Clause protects two categories: (1) goods, traditionally sheltered by the Clause,[58] and (2) services, a more modern expansion upon the doctrine.[59] The expansion of the doctrine reveals a need to protect out-of-state interests unable to protect themselves, a common thread running throughout Commerce Clause jurisprudence.[60]

1. Traditional Commerce Clause Jurisprudence Seeks to Protect the Free Flow of Goods in Interstate Commerce

From the origins of the dormant Commerce Clause in the nineteenth century, the Supreme Court has consistently interpreted it to complement the power granted to Congress by the Commerce Clause—that states may not interfere impermissibly in the interstate flow of goods. In *Welton v. Missouri*,[61] the Court examined a statute requiring peddlers of out-of-state goods to obtain a license to peddle.[62] The statute further imposed a penalty for a failure to procure such a license prior to peddling goods from out of state; however, it included no similar licensure requirement for peddlers of in-state goods.[63] The Court determined that the offensive statute amounted to a tax on out-of-state goods and held that Congress maintains power over commerce until the article "has ceased to be the subject of dis-

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laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

55. *See infra* note 56 and accompanying text. R

56. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) (commencing analysis by classifying the regulation by analogy to a tariff on goods).

57. *Id.* at 201.

58. *See infra* Part II.B.1.

59. *See infra* Part II.B.2.

60. *See supra* Part II.A.

61. 91 U.S. 275 (1875).

62. *Id.* at 275.

63. *Id.*

criminating legislation by reason of its foreign character" because "[t]hat [commerce] power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."[64] Thus, the Supreme Court concluded that acts regulating the sale of goods would be subject to this new negative power, the dormant Commerce Clause.

2. *Modern Commerce Clause Jurisprudence Recognizes the Need to Protect Interstate Provision of Services*

Recent dormant Commerce Clause jurisprudence demonstrates that the Supreme Court envisions the Clause as imposing a negative restraint upon States seeking to regulate the interstate provision of services, in addition to traditionally viewed goods. In the 1994 case of *West Lynn Creamery, Inc. v. Healy*,[65] the Court reviewed a Massachusetts regulation requiring out-of-state milk dealers to pay a monthly premium payment for selling products in-state.[66] In so doing, Massachusetts sought to assist in-state dairy farmers by placing a burden upon the provision of services by out-of-state parties.[67] In rejecting the State's argument that the State's intent was to protect its struggling dairy industry, the Court noted that "[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits."[68]

More recently, in the 2007 case of *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,[69] the Court examined county "flow control" ordinances that required county waste-hauling businesses to bring waste to a public processing facility.[70] In finding the ordinances constitutional because of an exception for publicly-run service providers, the Court reasoned that the residents of the impli-

64. *Id.* at 279, 282.

65. 512 U.S. 186 (1994).

66. *Id.* at 188–92.

67. *See id.*

68. *Id.* at 205. In *West Lynn Creamery, Inc.*, the Court looked to the situation preceding the creation of the pricing order for context and found that Massachusetts dairy farmers had lost considerable market share due to significant competition from surrounding states. *Id.* at 189. In an effort to study Massachusetts's dairy industry, the Governor appointed a Special Commission, which determined that if prices paid to the dairy farmers were not increased "significantly" in the near future, a large number of the remaining farmers would be forced out of business. *Id.* The Court found particularly enlightening the purpose and effect of the pricing order, noting that the order "enable[d] higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States." *Id.* at 194.

69. 550 U.S. 330 (2007).

70. *Id.* at 334–37 (internal quotation marks omitted).

cated counties had chosen to allow their local government to provide waste management services.[71] Thus, the Court's recent decisions recognize that services deserve equal protection under the dormant Commerce Clause as those long-afforded to goods. This expansion of the original protection afforded solely to goods demonstrates the Court's understanding that the purpose of the Clause is to defend the rights of out-of-state interests by ensuring that Congress alone, a neutral body, retains the power to regulate commerce among the several States.

C. Courts Conduct an Inquiry into Whether the Statute Discriminates Against Interstate Commerce

After classifying the regulation as implicating goods or services, a court must inquire as to whether the statute discriminates against interstate commerce in any way. The Supreme Court has dictated that an initial analysis of the statutory language is necessary because "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[72] In completing this analysis, courts look initially to whether the statute is discriminatory on its face, which is generally per se unconstitutional.[73] In expanding upon Supreme Court jurisprudence, the Fourth Circuit has consistently required an additional analysis into whether the practical effects or purpose of the regulation are discriminatory as well.[74] Upon a showing of discrimination, the State bears the burden of overcoming strict scrutiny by demonstrating either (1) a non-discriminatory effect upon the possible markets affected, or (2) a dearth of other non-discriminatory alternatives.[75]

1. Courts Seek to Determine Whether the Language of the Statute Is Discriminatory

An examination of Supreme Court jurisprudence demonstrates that statutes blatantly discriminating against interstate commerce gen-

71. *Id.* at 343. The Court, in basing its decision upon the government-run-services exception to dormant Commerce Clause jurisprudence, stated, "It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services." *Id.* at 344.

72. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

73. *See infra* Part II.C.1.

74. *See infra* Part II.C.2.

75. *See infra* Part II.C.3.

erally fall into one of two categories: (1) economically protective legislation, or (2) legislation in response to a threat of death or disease.[76] Cases implicating economically protective statutes with prohibitive language are rarely seen, which courts have suggested may be due to the well-accepted unconstitutionality of legislation worded to discriminate against interstate commerce.[77] Furthermore, courts have generally only upheld statutes employing discriminatory language if they were enacted due to a threat of death or disease.[78]

Though rarely addressed, the Supreme Court's jurisprudence on economically discriminatory statutes clearly demonstrates the Court's stance on such legislation. In 1875, the Court decided *Welton v. Missouri*,[79] in which it declared unconstitutional a Missouri statute subjecting unlicensed peddlers to a fine.[80] The statute defined peddlers as those engaged in the sale of selected goods produced out-of-state by traveling from "place to place."[81] The statute, however, neither required a license nor provided a fine for peddling the products of the state itself.[82] In so holding, the Court expressed the fear that in permitting a State to exact a tax so discriminatory against the other states, "no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive."[83]

Similarly, the Court has ruled favorably in only a handful of cases implicating non-economically discriminatory statutes, all of which involved protecting the public from death or disease. In the 1939 case of *Clason v. Indiana*,[84] the Court upheld restrictions on the disposition of dead animals due to the fear of spreading diseases.[85] The Court

76. *See infra* notes 79–93 and accompanying text. In addition, courts have from time to time addressed legislation employing grandfather clauses. *See, e.g.*, Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1012, 1015 (9th Cir. 1994) (noting in a Commerce Clause case that "[the grandfather] clauses [implicated in the case] allow[ed] Washington residents to continue to possess and sell animals that were legally held within the state prior to the passage of the regulations" and that the plaintiffs "failed to show that the regulations may have impacts of federal concern [and] failed to offer evidence that could support a finding of anything more than a minimal economic impact on interstate or foreign commerce"). R

77. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) (suggesting that the lack of examples of tariffs, imposing "distorting effects on the geography of production," in legal precedent is because they "have long been recognized as violative of the Commerce Clause"); *see also infra* text accompanying notes 79–83. R

78. *See infra* notes 84–93 and accompanying text. R

79. 91 U.S. 275 (1875).

80. *Id.* at 278, 282.

81. *Id.* at 278.

82. *Id.*

83. *Id.* at 281.

84. 306 U.S. 439 (1939).

85. *Id.* at 441–42, 444.

reasoned that the statute, permitting the interstate disposal of dead horses only by licensed operators, was permissible as part of a scheme to protect the public health by ensuring the prompt disposal of decaying carcasses.[86] In upholding the statute, the Court stated, "The mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people."[87]

Similarly, almost half a century later in *Maine v. Taylor*,[88] the Court upheld a prohibition on the importation of live baitfish because of the threat of destruction of the State's fisheries.[89] In rendering its decision, the Court questioned whether the passage of the statute could have been due to "protectionist intent," noting that laws amounting to "simple economic protectionism" remain subject to a "virtually per se rule of invalidity."[90] The Court determined, however, that there was "little reason" to find the State's proffered legitimate reason to be a sham.[91] Ultimately, the Court concluded that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible."[92] As a result of these cases, Supreme Court jurisprudence indicates that discriminatory language is per se unconstitutional, unless the State can demonstrate that the legislation was passed to further a matter of public health.[93]

2. *The Fourth Circuit Looks to Whether the Purpose or Practical Effects of the Regulation Are Discriminatory*

Due to the lack of cases involving discriminatorily-worded statutes, the Supreme Court has from time to time hinted at a broader interpretation of the purpose of the facially discriminatory test, and the Fourth Circuit has developed a more in-depth analysis. In the 1994 case of *C & A Carbone, Inc. v. Town of Clarkstown*,[94] the Court attacked the town's argument that it did not regulate interstate com-

86. *Id.* at 443–44.
87. *Id.* at 444.
88. 477 U.S. 131 (1986).
89. *Id.* at 132–33, 151–52.
90. *Id.* at 148 (citation, internal quotation marks, and italics omitted).
91. *Id.* at 148–49.
92. *Id.* at 148.
93. The State must ensure that it meets this burden. *See, e.g.*, Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977) ("The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades.").
94. 511 U.S. 383 (1994).

merce by requiring that all waste "only" within its jurisdiction be processed at additional cost at a transfer station to prevent unsafe waste from flowing into the stream of interstate commerce.[95] The Court stated that the defendant-town employed "an outdated and mistaken concept of what constitutes interstate commerce."[96] Instead, the Court looked to the economic effects of the legislation and determined that the town transfer facility processed both out-of-state and in-state waste, thus indicating that the town was driving up costs for out-of-state interests by requiring their own facility to serve as a checkpoint, an impermissible restraint upon interstate commerce.[97]

Perhaps seizing upon this language, the Fourth Circuit, in the 1996 case of *Environmental Technology Council v. Sierra Club*,[98] stated that the discriminatory test, "a virtually per se rule of invalidity, applies where a state law discriminates facially, *in its practical effect, or in its purpose*."[99] The court, finding the statute blatantly in violation of all three tests, noted that if the State implemented the offending laws, the effect would be to "clearly discriminate" against waste created out of state.[100] Finally, turning to whether the State had a discriminatory purpose in passing the legislation, the court found that the laws at issue involved "an integrated and interconnected discriminatory program"[101] by which South Carolina had "attempted to isolate itself from a problem common to [the nation] by erecting a barrier against the movement of interstate trade."[102]

In 2001, the Fourth Circuit reiterated its stance in *Waste Management Holdings, Inc. v. Gilmore*,[103] evaluating whether plaintiffs were entitled to summary judgment regarding, inter alia, their dormant Commerce Clause claim.[104] In conducting an analysis of the effects of the Virginia statute governing regional landfills, the court was guided by the principle that "[t]he obvious focus of the practical effect inquiry is upon the discernable practical effect that a challenged statutory provision has or would have upon interstate commerce as

95. *Id.* at 389.

96. *Id.*

97. *Id.*

98. 98 F.3d 774 (4th Cir. 1996).

99. *Id.* at 785 (emphasis added) (citation and italics omitted).

100. *Id.* at 785–86.

101. *Id.* at 786 (internal quotation marks omitted) (quoting Envtl. Techs. Council v. South Carolina, 901 F. Supp. 1026, 1029 (D.S.C. 1995)).

102. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991)).

103. 252 F.3d 316 (4th Cir. 2001).

104. *Id.* at 328–29.

opposed to intrastate commerce."[105] As a result, the court concluded that the plaintiffs had met their burden of showing that the enforceability of two statutory provisions would "negatively impact interstate commerce to a greater degree than intrastate commerce."[106] Regarding two other provisions, however, the court found a genuine issue of material fact as to whether they would discriminate against interstate commerce and municipal solid waste generated out of state.[107] The parties both admitted that the statute did not employ discriminatory language, thus the court did not address the issue.[108]

As to whether the State had a discriminatory purpose in passing the legislation, the Fourth Circuit looked to a number of factors that it recognized courts had previously viewed as "probative of whether a decisionmaking body was motivated by a discriminatory intent," including:

> (1) evidence of a "consistent pattern" of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.[109]

Based upon these factors, the court concluded in favor of the plaintiffs, explaining that the State clearly had a discriminatory purpose in mind when enacting the legislation, as evidenced by the actions of the governor and sponsoring senator.[110] In particular, the court determined that the statements of the senator demonstrated that the General Assembly was far more concerned by the total volume of out-of-state municipal solid waste ("MSW") entering the State than that of in-state generated MSW deposited in Virginia landfills.[111]

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105. *Id.* at 334–35.

106. *Id.* at 335.

107. *Id.*

108. *Id.* at 334.

109. *Id.* at 335–36 (internal quotation marks omitted) (quoting Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995)).

110. *See id.* at 335–41. The court recounted, in some detail, the events and statements by both individuals leading up to the enactment of the legislation in question. *Id.*

111. *Id.* at 340–41 (explaining that the senator's statements "unequivocally show[ed] that the volume of MSW generated outside Virginia flowing into Virginia triggered *more concern* on the part of Virginia's General Assembly than the volume of MSW generated in Virginia being deposited in landfills located in Virginia").

In 2005, the Fourth Circuit affirmed its reasoning in *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*[112] In determining the effect of the legislation upon interstate commerce, the court used a "probable effect" test to conclude that the plaintiffs had not introduced sufficient evidence to show that the legislation would "have any probable or discernible discriminatory effects on interstate commerce."[113] The court also acknowledged the "purpose" element of the analysis.[114] As a result, collective Fourth Circuit precedent indicates additional concerns to be considered under the facial discrimination test in the hope of adequately protecting out-of-state interests: The purpose and effects of the legislation allegedly in violation of the dormant Commerce Clause.

3. Courts Primarily Look to Two Types of Evidence Produced by States Hoping to Survive Strict Scrutiny: The Possible Markets Affected and a Lack of Other Non-Discriminatory Alternatives to Advance a Legitimate Local Purpose

Courts have generally found discrimination to be per se unconstitutional unless a State can "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[115] States have overcome the strict scrutiny required by a finding of per se discrimination in the Supreme Court by showing one of two things: (1) the effects upon relevant markets and the necessity of the challenged legislation,[116] or (2) a dearth of other non-discriminatory alternatives to accomplish the permissible local objective.[117]

a. Courts Look at the Markets Purportedly Affected by the Challenged Legislation to Determine Its Effects

According to this first approach, a State may try to ascertain all affected markets and then prove the beneficial effects of the legislation upon those markets. In the 2008 case of *Department of Revenue of Kentucky v. Davis*,[118] the Supreme Court looked to the specific markets affected by the questionable statute, which permitted a tax exemption

112. 401 F.3d 560 (4th Cir. 2005).

113. *Id.* at 568–69 (citation and internal quotation marks omitted).

114. *See id.* at 568 (explaining that the legislation had a "legitimate general purpose," which was to shield motorcycle dealers in Virginia from unfair manufacturing practices).

115. Or. Waste Sys., Inc. v. Dept. of Envtl. Quality of Or., 511 U.S. 93, 100–01 (1994) (alteration in original) (citation and internal quotation marks omitted).

116. *See infra* Part II.C.3.a.

117. *See infra* Part II.C.3.b.

118. 128 S. Ct. 1801 (2008).

solely for income derived from Kentucky bonds.[119] This analysis, according to the Court, both "confirm[ed] the conclusion that no traditionally forbidden discrimination [was] underway and point[ed] to the distinctive character of the tax policy."[120] Rather than leading to a conclusion in the plaintiffs' favor, the Court determined that the effects of the statute were such that, without the current tax scheme in place, there was "little doubt that many single-state funds would disappear."[121] As such, the Court determined that the legislation was essentially indispensable to the maintenance of "single-state markets serving smaller municipal borrowers."[122] The necessity of the statute suggested that the State's objectives were far from impermissible local protectionism and also explained why Kentucky kept a tax system that scholars believed to create a net loss of revenue to the State over the interest expense saved.[123] Thus, a finding of indispensability or high worth of the legislation weighs greatly in favor of upholding the constitutionality of the statute, regardless of whether that statute fails the per se discrimination test.

b. A Lack of Other Non-Discriminatory Alternatives May Support Constitutionality If the Rationale Is Permissible

Although a State may attempt to demonstrate that there are "no other means to advance a legitimate local interest," the Supreme Court has suggested that this is a very high burden to meet.[124] In *C &*

119. *Id.* at 1805, 1815. In classifying the market at issue, the Court looked to three possible definitions: (1) the market for "issuers and holders of all fixed-income securities, whatever their source or ultimate destination"; (2) "commerce solely in federally tax-exempt municipal bonds, much of it conducted through interstate municipal bond funds"; and (3) "the [market] for bonds within the State of issue, a large proportion of which market in each State is managed by one or more single-state funds." *Id.* at 1815–16. In the first category, the Court noted that Kentucky "treat[ed] income from municipal bonds of other States just like income from bonds privately issued in Kentucky or elsewhere," and gave no preferential treatment to local issuers or holders. *Id.* at 1815. In the second category, the Court recognized that the difference between the State's treatment of its own bonds versus those from other states was at its greatest; however, nearly every other State "believe[d] its public interests [were] served by the same tax-and-exemption feature." *Id.* This suggested that no State saw any impermissible advantage or disadvantage. *Id.* at 1815–16. In the last category, the Court recognized that "[t]here is little doubt that many single-state funds would disappear if the current differential tax schemes were upset," which weighed greatly in favor of upholding the statute. *Id.* at 1816–17.

120. *Id.* at 1815.

121. *Id.* at 1816.

122. *Id.* at 1817.

123. *Id.*

124. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (noting that such a demonstration would only apply to a "narrow class of cases" and would undergo "rigorous scrutiny").

A Carbone, Inc. v. Town of Clarkstown,[125] the Court addressed the municipality's argument that a flow control ordinance, requiring that waste passing through the area be processed and taxed at their local plant, served an environmental interest by ensuring that waste did not end up in harmful out-of-town disposal sites.[126] The Court rejected this argument, noting that the "central purpose" of the municipality's passage of the ordinance stemmed from the desire to fund their new waste transfer facility, not from an environmental concern.[127] Refusing to accept the municipality's proffered argument because generation of revenue was not a sufficient basis to allow such discrimination against interstate commerce, the Court stated that, otherwise, "[s]tates could impose discriminatory taxes against solid waste originating outside the State."[128] The Court thus set the bar for this test fairly high, suggesting that rarely would challenged legislation be deemed constitutional solely because it would effectuate the achievement of a permissible local interest, an understandable conclusion given the need to protect out-of-state interests unable to speak for themselves.

D. Upon Survival of the Initial Inquiries, Courts Employ a Balancing Test of the Benefits Against the Burdens to Ensure the Protection of Interstate Interests

For non-discriminatory regulations, courts employ a balancing test to ensure that the benefits to the local area are not outweighed by the burdens upon the interstate market. Where the statute treats all parties "even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, [the legislation] will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[129] In conducting a balancing inquiry, courts look to (1) the effects of the legislation locally and interstate,[130] and (2) the acceptability of the regulation.[131]

125. 511 U.S. 383.

126. *Id.* at 392–93.

127. *Id.* at 393.

128. *Id.* at 393–94.

129. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

130. *See infra* Part II.D.1.

131. *See infra* Part II.D.2.

1. Courts Evaluate the Effects of the Legislation upon Interstate and Intrastate Commerce

Courts must look to the total effects of the legislation, not merely to the area addressed, because favoritism for in-state over out-of-state providers of services is expressly prohibited. In *Exxon Corp. v. Governor of Maryland*,[132] the Court in 1978 examined a statute prohibiting producers or refiners of petroleum products from also owning in-state service stations.[133] In holding for the State, the Court reasoned that although a consumer may change their source of supply from "company-operated stations to independent dealers," the shift from an interstate supplier to another supplier does not create an impermissible burden upon interstate commerce where the regulation is otherwise valid.[134] The Court consequently rejected the plaintiffs' argument that the effect of the statute upon interstate commerce was impermissible because it "protect[ed] in-state independent dealers from out-of-state competition."[135] The Court stated that though consumers may be injured from the loss of competition, "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[136] Thus, in its first discussion of the importance of the effects of the offending statute, the Court set forth a fairly narrow rule: Though the effects are important, legislation will only be found unconstitutional if it harms interstate commerce, rather than some marketers operating within interstate commerce.

In 1994, the Court addressed the effects analysis in *West Lynn Creamery, Inc. v. Healy*,[137] where out-of-state milk dealers brought suit for the monthly payment the State required them to pay in order to sell their products within the state.[138] The Court, in responding to the State's argument that only in-state consumers felt the effects of the price increase, determined that the pricing order at issue had an "obvious impact" on out-of-state parties rather than burdening only consumers and dealers in Massachusetts.[139] In so holding, the Court determined that the effect of the pricing order was to "divert market share to Massachusetts dairy farmers," which unavoidably harmed

132. 437 U.S. 117 (1978).
133. *Id.* at 120 & n.1.
134. *Id.* at 127.
135. *Id.* at 125–27.
136. *Id.* at 127–28.
137. 512 U.S. 186 (1994).
138. *Id.* at 188–92.
139. *Id.* at 203–04.

such out-of-state farmers.[140] Thus, the Court has indicated a refusal to tolerate legislation where the effects upon interstate commerce and out-of-state dealers are far greater than those upon in-state dealers.

2. *Courts Examine the Acceptability of the Regulation in Completing the Balancing Analysis*

Courts also look at the acceptability of the regulation to determine the context of the benefits and burdens alleged by the parties. Indeed, courts endeavor to ensure that an equitable result is reached, both for interstate commerce and individual states and municipalities. In conducting their analyses, courts look to (1) the standard practice in the industry,[141] and (2) the legitimacy of the concern.[142]

a. The Standard Practice in the Industry Informs Courts' Analyses

The Supreme Court has indicated that an examination of standard industry practices is appropriate to ensure that the challenged legislation does not "adversely affect interstate commerce by subjecting activities to inconsistent regulations."[143] Starting in 1945 in *Southern Pacific Co. v. Arizona*,[144] the Court recognized that "confusion and difficulty" as well as an "unsatisfied need for uniformity" would result from the statute at issue.[145] The law in question limited the length of trains operating in-state.[146] Observing that "[if] one state may regulate train lengths, so may all the others," the Court declined to permit the law, which would potentially enable other states to pass similar legislation and seriously hinder the flow of interstate commerce.[147]

The Court has not wavered from its attentiveness to uniformity. In the 1986 case of *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[148] the Court expressed concern that New York's "lowest-price" regulation of liquor would "interfere with a distiller's operations in other States," thus effectively forcing the distiller to change its policies or other States to change their regulations.[149] By so "project[ing] its legislation into other States," the Court found that New York had "directly regulated commerce therein," and thus the law

140. *Id.* at 203.
141. *See infra* Part II.D.2.a.
142. *See infra* Part II.D.2.b.
143. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987).
144. 325 U.S. 761 (1945).
145. *Id.* at 773–74.
146. *Id.* at 763.
147. *Id.* at 775.
148. 476 U.S. 573 (1986).
149. *Id.* at 583–84.

could not be upheld.[150] Therefore, the Supreme Court has consistently looked to the relevant practice within an industry to determine whether the legislation at issue would interfere with that tradition or create conflicting regulations between states.

b. The Legitimacy of the Concern and Unavailability of a Less Invasive Alternative Often Dictate a Conclusion of Constitutionality

Closely tied to an analysis of the standard industry practice is the judicial inquiry into whether the concern purportedly addressed by the legislation is legitimate. In so doing, courts seek to determine the impetus for the legislation and provide support for their conclusions in favor of the state or municipality.[151] The first case to explicitly state this concern was *Pike v. Bruce Church, Inc.*,[152] in which the Court held that Arizona could not enforce legislation prohibiting a cantaloupe grower from transporting uncrated Arizona cantaloupes to a California packing plant.[153] In so holding, the Court stated that a statute will be upheld where that statute "regulates even-handedly" in accomplishing a "legitimate local public interest" and the effects upon interstate commerce are "only incidental," unless the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[154] Upon a finding of a legitimate local purpose, the Court stated that "the question becomes one of degree," as one must then look at "the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities."[155]

The Court has consistently upheld and referred to these concerns in cases since *Pike*. In the 1987 case of *CTS Corp. v. Dynamics Corp. of America*,[156] the Court found in favor of a statute regulating takeovers of in-state companies, holding that a State has an interest in "promoting stable relationships among parties involved in the corporations it

150. *Id.* (citations and internal quotation marks omitted); *see also* Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) ("It is . . . apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce . . . would be thoroughly stifled.").

151. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91, 94 (1987) (upholding the statute at issue and noting that the State's interest in "promoting stable relationships among parties involved in the corporation it charters" was undoubtedly reflected in the legislation).

152. 397 U.S. 137 (1970).

153. *Id.* at 139–40, 146.

154. *Id.* at 142.

155. *Id.*

156. 481 U.S. 69.

charters," and also "in ensuring that investors . . . have an effective voice" in those corporations.[157] The Court, failing to find any issues with the constitutionality or effects of the legislation, did not reach the issue of other, less invasive alternatives.[158] The determination of a legitimate local interest and a possible reasonable alternative thus has long been an important part of the Court's examination of challenged legislation that does not fail the initial discrimination test.

To summarize, in conducting analyses of dormant Commerce Clause issues, courts look to a number of factors established by the Supreme Court over the past century and a half. The Court's jurisprudence has evolved to afford protection for interstate services as well as the traditionally viewed goods.[159] In conducting an initial survey of the statute for facial discrimination, the Fourth Circuit abides by Supreme Court precedent in first looking at the language of the statute and then adding its own examination of the effects of the law prior to considering any evidence that the defendant has presented to rebut a presumption of illegality.[160] Finally, the Fourth Circuit looks at whether the benefits outweigh the burdens inherent in the statute by analyzing the effects upon interstate and intrastate commerce and the acceptability of regulation.[161] The Supreme Court has therefore designed a court's analysis to include a thorough inquiry of all the potentially discriminatory language and effects upon interstate commerce.

III. THE COURT'S REASONING

In *Brown v. Hovatter*,[162] the Fourth Circuit affirmed in part and reversed in part the decision of the district court, holding that the lower court's analysis that the Maryland Morticians Act did not violate either the Equal Protection Clause or the Due Process Clause was correct.[163] The court, however, found the lower court's conclusion that the Act violated the dormant Commerce Clause to be incorrect, ruling instead that the Act did not impose an excessive burden upon interstate commerce.[164]

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157. *Id.* at 91.

158. *See id.* at 88–94 (failing to find fault with the Illinois statute and thus not addressing the issue of other permissible alternatives).

159. *See supra* Part II.B.

160. *See supra* Part II.C.

161. *See supra* Part II.D.

162. 561 F.3d 357 (4th Cir. 2009).

163. *Id.* at 359–60.

164. *Id.* Judge Shedd, concurring in the judgment, concurred only insofar as the court found the burden upon interstate commerce to be incidental and justifiable in the interest

Judge Niemeyer, writing for the court, began by explaining that the Commerce Clause, by creating affirmative authority in Congress to "regulate Commerce . . . among the several States,"[165] also impliedly establishes a well-known "negative or dormant constraint" upon the power of state legislatures to "enact legislation that interferes with or burdens interstate commerce."[166] Therefore, the dormant Commerce Clause seeks to prevent "economic protectionism" in states anxious to favor their own commercial interests "by burdening out-of-state competitors."[167]

The court then explained that the analysis used to determine whether state legislation violates the dormant Commerce Clause consists of two steps: (1) considering whether the law "*discriminates* against interstate commerce";[168] and (2) if no discrimination is present, ascertaining whether the law "unjustifiably . . . burden[s] the interstate flow of articles of commerce."[169] As neither party contended that the Act discriminated against interstate commerce, the court proceeded to address the second inquiry according to the *Pike* test, whereby the disputed law will be upheld unless it imposes a "'clearly excessive'" burden in comparison to the "'putative local benefits.'"[170]

Judge Niemeyer first determined that the practice implicated by the Act was that of mortuary science, an inherently local practice that does not implicate interstate commerce in any real manner.[171] Furthermore, the court observed that the Act did not treat out-of-state

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of the "public health, safety, and welfare by encouraging familiarity of the owner of a funeral business" with the daily operations of that business and ensuring accountability. *Id.* at 369–70 (Shedd, J., concurring).

165. U.S. CONST. art. I, § 8, cl. 3.

166. *Hovatter*, 561 F.3d at 362 (majority opinion) (internal quotation marks omitted) (citing Dennis v. Higgins, 498 U.S. 439, 447 (1991)).

167. *Id.* at 363 (internal quotation marks omitted) (quoting Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1808 (2008)). According to Judge Niemeyer, however, only those economic harms that "*unjustifiably burden*[ ] interstate commerce" may be remedied by use of the dormant Commerce Clause, as even burdensome legislative measures may be permissible where they are in the interest of local benefits. *Id.* (emphasis added).

168. *Id.* If the State cannot justify the discrimination by "a factor unrelated to economic protectionism," the law is effectively per se invalid. *Id.* (internal quotation marks omitted) (citing *Davis*, 128 S. Ct. at 1808).

169. *Id.* (first alteration in original) (internal quotation marks omitted) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 98 (1994)).

170. *Id.* (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

171. *Id.* at 363–64. Judge Niemeyer admitted that those engaged in mortuary science practices did provide caskets from outside of Maryland, but insisted that the out-of-state caskets were the only items that moved in interstate commerce and furthermore did not implicate the Act. *See id.* at 364.

individuals any differently, either by purpose or in practice.[172] As such, the plaintiffs sought principally to challenge the manner in which Maryland authorized them to conduct intrastate business in "a profession regulated by the State."[173] Because the dormant Commerce Clause purports only to protect interstate commerce, however, the court reasoned that the plaintiffs' claim was misplaced and thus that the court could not appropriately invalidate the Act regardless of any burden the law may place on the manner of Maryland's professional practice.[174]

In reaching this conclusion, the court reasoned that the Act neither implicated the travel of interstate goods nor distinguished between out-of-state and in-state companies, thus suggesting that it did not violate the dormant Commerce Clause.[175] Furthermore, even if it were to conclude that the Act placed an "incidental burden upon commerce," the court determined that the burden would not outweigh the "putative benefits from the Act's regulation" in the form of "individual liability and therefore more direct accountability for owners of funeral establishments."[176]

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172. *See id.* at 364. The court explained that anyone, regardless of residency, may own a funeral establishment and practice mortuary science in Maryland, so long as they meet the restrictions concerning "education, experience, and accountability." *Id.* As evidence for this proposition, Judge Niemeyer pointed to the fact that publicly held out-of-state corporations own over half of the grandfathered corporations in Maryland. *Id.*

173. *Id.* at 365. The court, by reference to the plaintiffs' statements, demonstrated that the plaintiffs complained about the "particular structure or methods of operation in the Maryland retail market for funeral services," and not the burden upon interstate commerce. *Id.* at 364–65.

174. *Id.* at 365, 369.

175. *Id.* at 366. The court found this to be consistent with the holding in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which was that a state law does not violate the dormant Commerce Clause simply because it shifts business "from one interstate supplier to another," even if it "change[s] the market structure by weakening independent refiners." *Hovatter*, 561 F.3d at 365–66 (internal quotation marks omitted) (quoting *Exxon Corp.*, 437 U.S. at 127).

176. *Hovatter*, 561 F.3d at 367. The court admitted that Maryland does not have "extensive records" detailing the intentions of the Act; however, Judge Niemeyer asserted that Supreme Court precedent requires only the acknowledgement of a need to "promot[e] familiarity between an owner and his business in a licensed and regulated industry" to show a "legitimate local interest." *Id.* (citing N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 166–67 (1973); Goldfarb v. Supreme Court of Va., 766 F.2d 859, 862 (4th Cir. 1985)). Indeed, the court explained, a State has great desire to prevent the "corporate form from becoming a shield for unfair business dealing." *Id.* at 366–67 (internal quotation marks omitted) (quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987)). These principles, according to the court, were what the district court identified to support the view that states should have the ability to regulate corporations with respect to "highly skilled occupations." *See id.* at 367 (internal quotation marks omitted). Furthermore, the court asserted that the "benefit" it identified, the creation of "more direct ac-

Finally, the court rejected the plaintiffs' Due Process and Equal Protection Clause claims, finding a sufficient legitimate state interest that survived the relatively weak standard applied to challenges to economic regulations.[177] Judge Niemeyer stated that mortuary science, like the pharmaceutical industry, implicates a practice requiring a high level of knowledge, which thus would support state regulation and the encouragement of highly involved and learned owners.[178] Because the court saw the plaintiffs' case as essentially "a disagreement with the General Assembly's judgment in refusing to authorize a different structure for practicing mortuary science in Maryland," it concluded that the plaintiffs' challenges to the licensure requirements could not succeed with respect to the dormant Commerce Clause, thus reversing the district court in that regard.[179]

IV. ANALYSIS

In *Brown v. Hovatter*, the Fourth Circuit found the Maryland Morticians Act to be constitutional by applying the dormant Commerce Clause doctrine with a narrow view of the type of conduct protected by the Clause, as well as of the effects of the Act in question.[180] In so holding, the court failed to initially classify the regulated activity as a service worthy of dormant Commerce Clause examination, creating a dangerous and wholly unsupported new standard whereby the interstate travel of goods is protected but services are only sheltered when courts deem it necessary and appropriate.[181] The *Hovatter* court further completely failed to address the second step, a determination of whether the statute is discriminatory, erroneously indicating instead that an in-depth examination of the discriminatory nature of a statute

countability for owners of funeral establishments," was exactly the kind of liability that the plaintiffs sought to avoid, a result that the court refuse to permit. *Id.*

177. *See id.* at 368–69 ("Because the Morticians Act is an economic regulation, we may not strike it down unless it is wholly arbitrary, without any basis in reason. In other words, to survive such challenges, the Act need only be rationally related to a legitimate state interest." (citation and internal quotation marks omitted)).

178. *Id.*; *see also id.* (applying the rationale of *North Dakota State Board of Pharmacy*, 414 U.S. at 164–67, which explained that a rational relationship existed between professions and limiting corporate ownership). In *North Dakota State Board of Pharmacy*, the Supreme Court determined that there was a rational relationship between the protection of the public health and safety and the regulation, requiring that pharmacy owners be "pharmacist[s] in good standing or a corporation or association" where the majority of the stock was owned by registered pharmacists active in the daily administration of the pharmacy. *Id.* at 158, 164–67 (internal quotation marks omitted).

179. *Hovatter*, 561 F.3d at 369.

180. *See id.* at 363.

181. *See infra* Part IV.A.

is not required.[182] Finally, in the context of its balancing test inquiry in the third step, the court's assertion that protection should not be afforded to this type of activity failed to recognize the effect that a narrow interpretation would have—an imbalance between the out-of-state and in-state interests.[183]

A. By Improperly Concluding that Mortuary Science Constituted a Local Service and Thus Was Not Subject to a Dormant Commerce Clause Analysis, the Hovatter *Court Disregarded Precedent and Created a Confusing Standard*

The Fourth Circuit, in reviewing the decision of the district court, immediately sought to classify the services that were the subject of the law as local and intrastate in nature.[184] Because the services were "'inherently'" local in nature, the court determined that the lack of any goods traveling in interstate commerce suggested that the services were not subject to dormant Commerce Clause protection.[185] In so doing, the court effectively organized its analysis around the decision it wished to reach rather than recognizing that the provision of funerary services in Maryland is inherently local in nature because legislation prevents out-of-state parties from playing a significant part in the industry.[186] The *Hovatter* court's reasoning creates dangerous and confusing precedent both for lower courts and for otherwise unprotected out-of-state interests.[187]

The *Hovatter* court neglected to consider the significant protection afforded services, instead creating a confusing standard based upon the traditional protection of interstate travel of goods. The Supreme Court has historically based its dormant Commerce Clause jurisprudence upon protection of the interstate movement of goods.[188]

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182. *See infra* Part IV.B.

183. *See infra* Part IV.C.

184. *Hovatter*, 561 F.3d at 363–65 ("The practice of mortuary science is inherently a local profession, typically used by relatives to have the bodies of dead family members prepared for burial or other disposition and to provide a facility for visitation, mourning, and services. Indeed, other than providing out-of-state caskets, which are not in any way regulated by the Morticians Act, the service provided through the practice of mortuary science begins and ends within the State.").

185. *See id.*

186. *See infra* notes 188–92 and accompanying text. **R**

187. *See infra* note 193 and accompanying text. **R**

188. *See, e.g.*, Welton v. Missouri, 91 U.S. 275, 282 (1875) ("It is sufficient to hold now that the commercial power [of the federal government] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.").

Within the last century, however, the Supreme Court has extended its interpretation of the dormant Commerce Clause to also afford protection to the provision of services by out-of-state parties.[189] Thus, although the Maryland Morticians Act does not regulate goods, the State's regulation of services falls within the ambit of dormant Commerce Clause protection and the court's conclusion provides a platform upon which to conduct further examination.

Secondly, the court concluded erroneously that the provision of funeral services is an "inherently . . . local profession" and thus the Act applied only to intrastate, rather than interstate, commerce.[190] This is inconsistent with the Supreme Court's analyses. For example, laws involving waste management, an "inherently local" matter, have been permitted on one occasion under a narrow exception to the dormant Commerce Clause and declared unconstitutional on the other.[191] The *Hovatter* court's failure to consider the statute solely because of its "inherently local" character indicates a misunderstanding of Supreme Court and Fourth Circuit precedent. Even where the industry appears to be purely intrastate in nature, the provision of services by out-of-state persons dictates analysis under the dormant Commerce Clause.[192]

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189. *See, e.g.*, Or. Waste Sys., Inc. v. Dept. of Envtl. Quality of Or., 511 U.S. 93, 96, 108 (1994) (holding unconstitutional a statute that imposed a significantly higher fee on out-of-state waste disposed in Oregon as a violation of the dormant Commerce Clause).

190. *See Hovatter*, 561 F.3d at 363–64. The court also failed to cite any precedent in drawing its conclusion that a profession that is by nature local implicates only intrastate and not interstate commerce. *See id.* at 363–65. Supreme Court precedent indicates that the dormant Commerce Clause applies even where a statute would appear to implicate a profession of local sensitivity. *See, e.g.*, N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 157–58, 167 (1973) (finding constitutional a statute that required all applicants wishing to operate a pharmacy to be "a registered pharmacist in good standing" (internal quotation marks omitted)). Though the *Hovatter* court itself relied upon this case later in its opinion, it failed to consider that the Supreme Court's consideration of a local service, that of the supplying of pharmaceutical drugs, suggested that such businesses are protected under the dormant Commerce Clause. *See Hovatter*, 561 F.3d at 368–69 (failing to observe this point).

191. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1798 (2007) (finding constitutional a regulation requiring that all waste pass through the local disposal plant only under an exception to the dormant Commerce Clause for publicly-run service providers); *Or. Waste Sys., Inc.*, 511 U.S. at 96, 108 (invalidating under the dormant Commerce Clause a statute that imposed a substantially larger fee on out-of-state waste disposed in Oregon).

192. *See supra* notes 190–91 and accompanying text. The *Hovatter* court also improperly used its conclusion about the "inherently local" nature of the mortuary science industry to bolster its argument that the plaintiffs were complaining of "the particular structure or methods of operation in the Maryland retail market for funeral services . . . not about a burden on the flow of articles of commerce across state lines." *Hovatter*, 561 F.3d at 364–65. Although this case is an example of the inability of out-of-state interests to success- R

By failing to follow or overrule its own precedent, the court left in the dark lower courts attempting to determine the state of the goods-versus-services analysis applying to the dormant Commerce Clause. If the court had abided by precedent, it would have instead concluded that in our increasingly global economy, it is becoming more common for out-of-state persons and businesses to step into traditionally local roles, even when the regulation implicates a traditionally local industry.[193] Thus, the court could have affirmed the need for protection of these out-of-state entities that receive no representation in the legislative branches of other states and municipalities.

B. The Court Erroneously Concluded that the Act's Grandfather Clause Did Not Present Evidence of Discrimination Subjecting It to Per Se Illegality, Thereby Protecting Discriminatory Legislation

The Fourth Circuit only cursorily addressed whether the Act was discriminatory, deferring instead to the district court's conclusion that there was insufficient evidence of a discriminatory purpose and to the parties' failure to argue the point.[194] In so doing, the Fourth Circuit assumed the validity of the district court's conclusions on the matter, which was an error because the lower court mistakenly determined that the Act regulated in-state and out-of-state interests "evenhandedly."[195] By contrast, the Grandfather Clause in the Act provides the opportunity for morticians to own funeral homes in the corporate form only if they were so owned *in Maryland* as of 1953, thus violating dormant Commerce Clause jurisprudence against discriminatory leg-

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fully lobby the Maryland General Assembly to change the legislation, the court incorrectly assumed that the complaint could only be classified as challenging the regulation of the intrastate market because the case did not implicate the travel of *goods* in interstate commerce. *Id.* at 364–65; *see also* Brown v. Hovatter, 516 F. Supp. 2d 547, 552–53 (D. Md. 2007) (discussing "Efforts to Amend the Act"). The court based its argument upon a flawed premise—the inapplicability of the dormant Commerce Clause to anything that does not involve the interstate flow of goods—and, as a result, concluded that the plaintiffs complained about a subject entrusted to the legislature. *Hovatter*, 561 F.3d at 364–65.

193. *See Special Interview: Alan Creedy, Trust 100*, WALL ST. TRANSCRIPT, Aug. 2009 (explaining that funeral homes use the Trust 100 business to either "market prepaid funerals to their customers" or "outsource the entire program . . . so that [Trust 100] manage[s] it from soup to nuts").

194. *See Hovatter*, 561 F.3d at 363 ("[N]o contention is made that the Morticians Act discriminates against interstate commerce, and the district court concluded that there was no evidence of any discriminatory purpose.").

195. *Hovatter*, 516 F. Supp. 2d at 562 ("The practical effect of section 7-309(a) . . . is to prevent all corporations without an exempt corporate license from owning a funeral home, regardless of whether the corporation is a Maryland one or not. The Mortician's Act regulates evenhandedly by treating in-state and out-of-state interests the same."). It is to be noted that the district court did not consider the constitutional implications of the Grandfather Clause, but rather considered the Morticians Act as a whole. *Id.* at 561–62.

islation.[196] As a result, the *Hovatter* court relied upon faulty reasoning at the district court level, and it did not take advantage of an opportunity to protect out-of-state interests by addressing three indicators typically analyzed by courts in drawing a conclusion as to whether a discriminatory statute can overcome the bar of per se invalidity.[197]

1. *The* Hovatter *Court Mischaracterized the Language of the Statute at Issue and Failed to Recognize the Discriminatory Effects of the Legislation*

In failing to recognize the implications of the Act, the district court and the Fourth Circuit missed the opportunity to consider a source of potentially discriminatory legislation—the Grandfather Clause. In the realm of dormant Commerce Clause jurisprudence, grandfather clauses, as they apply to commerce, would appear to be a potential source of discrimination against out-of-state interests.[198] In the instant case, the Grandfather Clause permits the continuation of all funeral homes owned in corporate form as of 1945.[199] The district court itself pointed out the discriminatory implications, but without recognizing them as such.[200] It appears that as of the adoption of the Clause in 1937, the ability to incorporate was unavailable to out-of-state persons because they could not fulfill the requirements of owning a Maryland funeral home without essentially moving to the state.[201] Despite these discriminatory effects essentially granting cor-

196. *See infra* Part IV.B.1.

197. *See infra* Part IV.B.2.

198. Cases have appeared to address dormant Commerce Clause issues as they apply to Grandfather Clauses, but no plaintiff has been able to demonstrate that the clause in question sufficiently benefits in-state over out-of-state interests, as required to meet this burden. *See, e.g.*, Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1012, 1015 (9th Cir. 1994) (explaining that the grandfather clauses found in the law at issue permitted State residents "to continue to possess and sell animals that were legally held within the state prior to the passage of the regulations" and that regarding the law in general, the plaintiffs had not established proof that "could support a finding of anything more than a minimal economic impact on interstate or foreign commerce").

199. Maryland Morticians and Funeral Directors Act, MD. CODE ANN., HEALTH OCC. § 7–309(b) (LexisNexis 2009). For relevant language, see *supra* notes 18–20 and accompanying text. R

200. *See Hovatter*, 516 F. Supp. 2d at 551 n.7 ("Before 1937, [when the initial clause was adopted,] *Maryland* funeral homes could freely incorporate . . . ." (emphasis added)).

201. For the extensive requirements necessary to obtain a Maryland funerary services provider license and a discussion of the difficulty of fulfilling them as an out-of-state citizen, see *infra* notes 227–30 and accompanying text. The plaintiffs also made the argument that the Grandfather Clause and ban on corporate ownership was "tantamount to an unconstitutional residency requirement," which the Supreme Court has consistently held to be unconstitutional. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 20–21, *Hovatter*, 516 F. Supp. 2d 547 (No. 1:06-CV-00524-RDB) (citing cases). R

porate licensure solely to Maryland funeral home operators, the district court and Fourth Circuit effectively disposed of the plaintiffs' arguments on this point.[202]

In contrast to the scant attention paid to the Grandfather Clause by the *Hovatter* courts, precedent suggests that the Fourth Circuit looks unfavorably upon statutes with discriminatory effects.[203] Where a statute is challenged under the dormant Commerce Clause, courts must complete an analysis extending beyond the potentially discriminatory language and look to the effects of the statute as well.[204] In considering the Morticians Act, the district court characterized the legislation as regulating "evenhandedly" by focusing on the Act's effective prohibition of corporate funeral homes—regardless of the state of origin—if not in existence in the corporate form as of 1945.[205]

The court's analysis ignores the implications of the Grandfather Clause and the fact that essentially the only funeral homes able to obtain corporate licenses prior to 1945 were Maryland corporations,[206] thus skewing in favor of in-state interests from the very inception of the rule. By failing to consider the implications of the Grandfather Clause, the *Hovatter* courts disregarded years of precedent suggesting that courts must inquire as to the language, effects,

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202. *See* Brown v. Hovatter, 561 F.3d 357, 363 (4th Cir. 2009) ("In this case, no contention is made that the Morticians Act discriminates against interstate commerce, and the district court concluded that there was no evidence of any discriminatory purpose."); *Hovatter*, 516 F. Supp. 2d at 561–62 ("There is no question that the Morticians Act, and especially the provision restricting corporate ownership, is at minimum a protectionist piece of legislation. The Morticians Act does not, however, 'negatively impact interstate commerce to a greater degree than intrastate commerce.'" (citations omitted)).

203. *See, e.g.*, Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 335 (4th Cir. 2001) ("The obvious focus of the practical effect inquiry is upon the discernable practical effect that a challenged statutory provision has or would have upon interstate commerce as opposed to intrastate commerce. . . . [Plaintiffs have shown that certain provisions at issue], if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce . . . . Defendants have not created a genuine issue of material fact on the issue.").

204. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194–96 (1994) ("Massachusetts' pricing order is clearly unconstitutional. . . . [I]ts undisputed effect [is] to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States."). The plaintiffs in *Hovatter* attempted to analogize its case to *West Lynn Creamery, Inc.*, but the district court summarily dismissed their argument. *See Hovatter*, 516 F. Supp. 2d at 561–62 ("Plaintiffs' comparison to *West Lynn Creamery* . . . is . . . misguided. . . . The Morticians Act regulates evenhandedly by treating in-state and out-of-state interests the same.").

205. *Hovatter*, 516 F. Supp. 2d at 562 ("The practical effect of section 7-309(a) of the Morticians Act, however, is to prevent all corporations without an exempt corporate license from owning a funeral home, regardless of whether the corporation is a Maryland one or not.").

206. *See supra* note 201 and accompanying text. **R**

and purpose of the legislation.[207] In so doing, the court misinterpreted the intentions of the discrimination test, narrowly interpreting the implications of the Act rather than policing state invasions upon interstate commerce and the rights of out-of-state persons.[208]

2. *The Fourth Circuit Failed to Address Criteria Typically Used by States to Overcome Per Se Invalidity*

Neither the district court nor the Fourth Circuit spoke to the inherently discriminatory nature of the Act's Grandfather Clause; thus, neither court needed to address any of the State's arguments in opposition to the rule of per se invalidity for discriminatory statutes.[209] As a result, the courts failed to address how a State or municipality typically attempts to overcome per se invalidity—by showing a lack of non-discriminatory alternatives.[210]

In looking at whether other non-discriminatory alternatives are available, courts must look to what the purported or actual goal of the State or municipality was in passing the legislation, and then determine whether another feasible and less discriminatory alternative exists.[211] In the instant case, the true purpose of the legislation would appear to be one of economic protectionism for Maryland funeral homes.[212] The Maryland General Assembly appears to have had two admirable goals in mind when amending the Grandfather Clause in

207. *See* Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996) ("The first tier [of dormant Commerce Clause inquiry], a virtually per se rule of invalidity, applies where a state law discriminates facially, in its practical effect, or in its purpose." (citation, internal quotation marks, and italics omitted)).

208. Brown v. Hovatter, 561 F.3d 357, 363 (4th Cir. 2009) (stating that the plaintiffs made "no contention" that the Act was discriminatory and that the issue related to whether restrictions in the Act placed an excessive burden on interstate commerce).

209. *See id.* at 363–64 (addressing the scope and purpose of the Maryland Morticians Act); *Hovatter*, 516 F. Supp. 2d at 561–62 (discussing the effects without acknowledging the Grandfather Clause as to this point).

210. Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 333 (4th Cir. 2001) (citation omitted).

211. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392–93 (1994); *Waste Mgmt. Holdings, Inc.*, 252 F.3d at 335–36.

212. The plaintiffs put forth an abundance of evidence on this point. *See Hovatter*, 516 F. Supp. 2d at 554 (noting that the plaintiffs' data included the following: (1) data from the United States Census Bureau demonstrating that a Maryland funeral costs about $800 more than the national average; (2) a letter from various federal agencies to a delegate indicating that "consumers would likely benefit from having increased competition in the market for funeral home service," and reforming the legislation would not "undermine Maryland's efforts to ensure that consumers are served by capable and professionally run funeral homes"; and (3) statements that, at a minimum, fifty-one percent of funeral homes in the United States are registered in corporate form (citations and internal quotation marks omitted)).

1945—to provide a benefit to all licensed funeral directors "engaged in the business of funeral directing or embalming at the time of induction into the Armed Forces of the United States during World War II," and also, as the State's arguments suggest, to increase accountability to consumers.[213]

Under the second part of this test, however, the court must look to whether other legislative alternatives would have likely achieved the State's constitutional goal.[214] Such permissible options were available to the Maryland General Assembly; for example, Pennsylvania provides that a license issued to a corporation incorporated by a licensed funeral director for the purpose of funeral directing remains valid only if the corporation engages solely in funeral directing, and further mandates that the licensed funeral director generally cannot hold stock in any other funeral establishment unless a statutory exception is met.[215] This exemplifies one alternative available to the Maryland General Assembly beyond permitting corporate ownership of funeral homes solely to those in existence as of 1945.[216] Thus, the Fourth Circuit should have concluded that the Act was unconstitutional and that no argument proposed by the State to rebut the presumption of per se invalidity could succeed.

C. The Court Misinterpreted Dormant Commerce Clause Precedent in Reaching Its Conclusion Under the Pike *Balancing Test*

The balancing test developed in *Pike v. Bruce Church, Inc.*[217] as a means for courts to weigh the benefits and burdens of a challenged statute where the legislation demonstrates no initial discrimination for a "forbidden purpose."[218] In attempting to find a happy medium between the interests of states and out-of-state persons, courts look to a number of factors to ensure that the burden upon out-of-state inter-

213. *See id.* at 551 n.7, 563 (citations and internal quotation marks omitted).

214. *See supra* text accompanying note 211. R

215. 63 PA. STAT. ANN. § 479.8(b), (d) (West 2010).

216. For other alternatives, see, for example, ALA. CODE § 34-13-110 (LexisNexis 2007) ("Any person, corporation, partnership, society or group owning or operating a funeral establishment . . . may do so only through the services of a licensed funeral director or embalmer."); CONN. GEN. STAT. ANN. § 20-212 (West 2008) ("[N]o person, firm or corporation shall enter, engage in, carry on or manage for another the business of caring for, preserving or disposing of dead human bodies until each person, firm or corporation so engaged has obtained from the Department of Public Health and holds a license . . . .").

217. 397 U.S. 137 (1970).

218. Dept. of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1808 (2008) (citing *Pike*, 397 U.S. at 142).

ests does not overwhelm the benefits to the local industry.[219] Given the concern implicit within the dormant Commerce Clause jurisprudence that the court must act on behalf of those unable to speak for themselves in the state legislature, including out-of-state persons and businesses, courts tend to conduct a thorough examination of the parties' arguments with the following factors in mind: (1) the effects of the regulation,[220] and (2) the acceptability of the regulation.[221]

1. By Incorrectly Categorizing the Effect of the Act upon Interstate Commerce, the Court Failed to Protect Both Out-of-State Businesses and Maryland Residents

Unfortunately, the *Hovatter* court failed to analyze the Maryland Morticians Act with a concern for the potential abuse of out-of-state interests.[222] Indeed, the Fourth Circuit should have approached this case in accordance with Supreme Court precedent, which requires an in-depth judicial determination of the effects of the legislation, rather than a cursory reading of the law for the state legislature's underlying intentions.[223]

The Act notably meets the very narrow test for unconstitutionality laid out in *Exxon Corp. v. Governor of Maryland*.[224] Even where a piece of state legislation may appear to be burdensome to interstate commerce, the Court's decision in that case suggests the law will be upheld if it harms only some, but not all, businesses.[225] In the present case, the Act hinders all out-of-state parties from opening funeral homes in Maryland, thus substantially favoring in-state interests.[226]

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219. *See Pike*, 397 U.S. at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

220. *See infra* Part IV.C.1.

221. *See infra* Part IV.C.2.

222. The *Hovatter* court neglected to mention that suggesting that an out-of-state party must meet the requirements of the Act's licensure provisions is effectively stating that the party must essentially move to Maryland. *See supra* notes 15–17 and accompanying text. R

223. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 188–94 (1994) (looking to the impact of a statute requiring milk dealers to essentially pay a surcharge to sell their products in-state in order to determine the effects of the statute upon interstate versus intrastate commerce).

224. 437 U.S. 117 (1978).

225. *Id.* at 127–28 (noting that consumers may switch their business from one business to another, but there is no impermissible burden upon interstate commerce solely "because an otherwise valid regulation causes some business to shift from one interstate supplier to another").

226. *See* Brown v. Hovatter, 516 F. Supp. 2d 547, 562–65 (D. Md. 2007) (finding that the "corporate prohibition severely limits the ability of out-of-state businesses from opening a funeral home in Maryland" given that "any person wishing to own a corporate funeral

The language of the opinion itself demonstrates the court's failure to conduct an in-depth analysis of the Act's effects: "Any person—out-of-state or in-state—may obtain a license to practice mortuary science and own and operate a funeral establishment in Maryland."[227] In order to obtain a Maryland funeral home license, the out-of-state individual who is not previously licensed must meet a number of requirements, including a minimum one-year Maryland apprenticeship and completion of an in-state test.[228] If the out-of-state person is licensed, he may waive some of these requirements, but must still complete an apprenticeship for 1000 hours in Maryland and earn a passing grade on the Maryland written examination.[229] Beyond that, if the out-of-state party wishes to live outside of Maryland, he must employ a licensed mortician to "operate[ ]" the funeral home in his absence.[230] It is impracticable to expect out-of-state individuals to meet these requirements given that they necessitate considerable time within the State. Thus, though an initial reading of the statute may suggest that it does not approach persons from out-of-state any differently from those in-state, an analysis of the effects demonstrates that the opposite is true.

Under current Supreme Court jurisprudence, the Fourth Circuit should have conducted a thorough analysis of the effects of the Mary-

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home in Maryland must wait until one of the fifty-eight corporate licenses is for sale"). Short of purchasing one of the fifty-eight transferable corporate licenses, any out-of-state person interested in owning a Maryland funeral home must fulfill the same requirements as an in-state resident. *See infra* notes 228–30 and accompanying text (explaining the process of obtaining a Maryland funeral home license). R

227. Brown v. Hovatter, 561 F.3d 357, 364 (4th Cir. 2009). The court added that "there is no limit on the number of licenses that the State may issue." *Id.* This misrepresents the ease of obtaining a license in Maryland, which appears to be at least a two-year process when factoring in the requisite in-state internship and test. *See Hovatter*, 516 F. Supp. 2d at 550–51 (explaining the difficulty of obtaining a funeral home license in Maryland).

228. Maryland Morticians and Funeral Directors Act, MD. CODE ANN., HEALTH OCC. § 7-303(b) (LexisNexis 2009) (requiring that the applicant satisfy the following standards: (1) be of "good moral character"; (2) complete "not less than 1 year and not more than 2 years of licensed apprenticeship"; (3) graduate with an "associate of arts degree in mortuary science or its equivalent" from an accredited school; (4) pass the "national board examination"; (5) pass the relevant written and practical Maryland examinations; and (6) submit an application and pay the required fee).

229. *Id.* § 7-305(b) (stating that the Board may only grant a waiver if the applicant pays a required license fee, "[w]as a licensed mortician or funeral director in good standing in the other state," "[s]erves an apprenticeship consisting of 1000 hours," and passes the Maryland written examination).

230. *See id.* § 7-310(c) (stating that to maintain a Maryland license, a funeral home must, in relevant part, "be owned and operated in accordance with this title by at least one licensed mortician or one licensed funeral director, or a holder of a surviving spouse or corporation license").

land Morticians Act.[231] By only conducting a cursory examination of the law, the *Hovatter* court hurt those unable to protect themselves—the out-of-state parties desiring to open Maryland funeral homes but with no lobbying rights within the State. By failing to adequately consider both sides' arguments, the court created a dangerous precedent, chipping away at the extensive analysis required by Supreme Court precedent.[232]

2. In Creating Its Own Support for the Act When Examining the Acceptability of the Law, the Court Created a Dangerous Precedent

By essentially creating support for the Act, the Fourth Circuit ignored Supreme Court precedent. The Court requires conclusions regarding the dormant Commerce Clause to be based upon (1) standard practices in the industry in question,[233] or (2) the legitimacy of the concern and unavailability of a less invasive alternative.[234] By failing to adequately consider either of these factors, the Fourth Circuit only added to the confusion surrounding dormant Commerce Clause jurisprudence.

a. If the Court Had Looked to Standard Practice in the Industry, It Would Have Determined that Corporations Are the Most Acceptable Form of Funeral Home Ownership

In determining whether the statute in question is an anomaly or alters the status quo, the Supreme Court has explained that one may look to the standard practice within the industry.[235] Within the funerary industry, Maryland is one of only two states to prohibit corporate ownership of funeral homes.[236] New Hampshire, the only other state that also forbids funeral home operation in corporate form, similarly states that "[n]o corporation . . . shall be issued a license as a funeral director," except for "any corporation licensed prior to January 1,

231. The district court's analysis includes a brief examination of the effects. *Hovatter*, 516 F. Supp. 2d at 564 (finding that the Act "has had a 'chilling effect' on the ability of out-of-state corporations to enter the Maryland market").

232. *See supra* notes 222–23 and accompanying text. R

233. *See infra* Part IV.C.2.a.

234. *See infra* Part IV.C.2.b.

235. *See, e.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761, 773–74 (1945) (noting the "confusion and difficulty" and "unsatisfied need for uniformity" in the railroad industry that would result if the Court were to declare constitutional a law limiting the length of trains traveling within the state).

236. *See Hovatter*, 516 F. Supp. 2d at 551 ("The Morticians Act's restriction on corporate ownership is unique. The only other state that has a similar prohibition on the corporate ownership of funeral homes is New Hampshire.").

1953."[237] The fact that these are the only two states to employ such restrictions upon the ownership form of funeral homes suggests that the Act attempts to artificially change the industry to conform to its own guidelines.[238]

The Supreme Court has indicated its disapproval when there is evidence that the state assembly may be "project[ing] its legislation" onto other states.[239] Given that such actions can create "confusion and difficulty," courts must be on their guard for such impermissible activity.[240] As a result, the Fourth Circuit should have looked to whether uniformity within the industry was desirous and thus whether an alteration to the current scheme by an individual state would necessitate a finding of unconstitutionality.[241] Under this analysis, the court should have found that, as an industry that involves a very costly and infrequent expenditure, uniformity of ownership opportunities is desirable so as to permit parties to have the benefits of cost as well as the benefits of large providers.[242]

b. To Support Its Conclusion, the Court Constructed Its Own Legitimate Purpose for the Act, Thereby Failing to Conduct an Adequate Analysis

In reviewing the decision of the district court, the Fourth Circuit held for the State of Maryland because "even if [the Morticians Act] was considered to place an incidental burden on commerce, that incidental burden would not be excessive in light of the putative benefits

237. N.H. REV. STAT. ANN. § 325:15 (LexisNexis 2003).

238. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (noting that the Commerce Clause restricts states from regulating "subjects [that] are in their nature national, or admit only of one uniform system, or plan of regulation").

239. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583–84 (1986) (citation and internal quotation marks omitted) (finding impermissible the possibility that "[b]y defining the 'effective price' of liquor differently from other States, New York can . . . force those other States to alter their own regulatory schemes").

240. *S. Pac. Co.*, 325 U.S. at 773–74.

241. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88–89 (1987) (noting that no inconsistent regulation among the states would result from upholding the statute at issue "[s]o long as each State regulates voting rights only in the corporations it has created," but also stating that "[t]his Court's recent Commerce Clause cases . . . have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations").

242. In today's mobile society, the benefits of corporations are profoundly felt, particularly in an industry as sensitive as that of funerary services, as parties can trust the quality associated with a corporate name. *See 2010 Edelman Trust Barometer; Trust in U.S. Business Rebounds Significantly at Home and Around the World*, BIOTECH WK., Feb. 10, 2010, at 3795 ("[T]rust and transparency are as important to corporate reputation as the quality of products and services.").

from the Act's regulation."[243] In so holding, however, the *Hovatter* court failed to complete the inquiry stated under *Pike v. Bruce Church, Inc.*,[244] which is that the permissibility of the extent of the burden depends on "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[245]

In *Exxon Corp. v. Governor of Maryland*,[246] the Court indicated that a regulation does not necessarily discriminate against interstate commerce simply because a burden falls upon *some* interstate companies.[247] Despite the fact that the Act burdens *all* interstate companies, the *Hovatter* court concluded that the Act did not burden interstate commerce—making it clear that the court did not complete the balancing test and weigh the asserted benefits, but rather only addressed the benefits of the Act.[248]

In *CTS Corp. v. Dynamics Corp. of America*,[249] while the Supreme Court looked to the State's interest and the potential negative intrastate effects of shareholder legislation,[250] ultimately, the Court did not address any less invasive alternatives, noting only the legitimacy of the State's concern.[251] Rather than conducting an analysis of the detrimental effects of the legislation, the *Hovatter* court created a broad argument addressing benefits, tailored to accommodate favorable precedent.[252]

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243. Brown v. Hovatter, 561 F.3d 357, 367 (4th Cir. 2009).

244. 397 U.S. 137 (1970).

245. *Id.* at 142.

246. 437 U.S. 117 (1978).

247. *Id.* at 126 ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").

248. *See Hovatter*, 561 F.3d at 367.

249. 481 U.S. 69 (1987).

250. *See id.* at 90–91.

251. *See id.* ("A State has an interest in promoting stable relationships among parties involved in the corporations it charters . . . ."). The *Hovatter* court, drawing from *CTS Corp.* when stating that "a State 'has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing,'" used the case to create a purpose for the Maryland Act. *See Hovatter*, 561 F.3d at 367 (quoting *CTS Corp.*, 481 U.S. at 93). The *Hovatter* court's reliance is misguided, however, as the regulation at issue in *CTS Corp.* reflected the accepted corporate regulatory policy of States prescribing the powers of corporations, whereas the corporate prohibition in the Morticians Act is one of only two in the entire country—a far cry from a well-accepted provision. *See CTS Corp.*, 481 U.S. at 91; Brown v. Hovatter, 516 F. Supp. 2d 547, 551–52 (D. Md. 2007).

252. For support, the *Hovatter* court cited to *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985), and *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166–67 (1973). *Hovatter*, 561 F.3d at 367 (citing this pair of cases when observing that "the Supreme Court has recognized that promoting familiarity between an owner and his business in a licensed and regulated industry is a legitimate local interest").

Had the court conducted a more thorough an analysis, it likely would have determined that the purported local interest in increasing accountability[253] could have easily been served by multiple other options. In keeping with other states that employ less stringent restrictions, the General Assembly could have required, for example, that all corporations desirous of owning a funeral home in Maryland only operate in the mortuary services industry.[254] In the interest of protecting out-of-state businesses and persons, the *Hovatter* court should not have permitted such a weak argument about the benefits to local interests and should have instead ultimately issued a decision protective of out-of-state interests.

V. CONCLUSION

In *Brown v. Hovatter*, the Fourth Circuit narrowly interpreted dormant Commerce Clause jurisprudence in order to reach its conclusion that prohibitions in the Maryland Morticians Act against new corporate ownership of funeral homes were not unconstitutional.[255] In so holding, the *Hovatter* court first failed to properly categorize the provision of funeral services as a service worthy of Commerce Clause protection.[256] The court further erred in its analysis by concluding that the Act did not violate the discrimination test.[257] Finally, the court failed to properly complete the balancing test inquiry, determining that the dormant Commerce Clause does not protect this form of activity.[258] The Fourth Circuit must act soon to protect the diluted interests of out-of-state parties, which, as this case reveals, enjoy little protection from intrastate-commerce-oriented state legislatures.[259]

253. *See supra* note 176 and accompanying text. R

254. *See, e.g.*, 63 PA. STAT. ANN. § 479.8 (West 2010) (permitting a corporate license issued to a licensed funeral director as long as certain conditions, such as that the corporation engage only in the business activity of funeral directing, are met).

255. *See Hovatter*, 561 F.3d at 359–60.

256. *See supra* Part IV.A.

257. *See supra* Part IV.B.

258. *See supra* Part IV.C.

259. *See supra* Part IV.A–C.