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State Regulation and the Dormant Commerce Clause.

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STATE REGULATION AND THE DORMANT COMMERCE CLAUSE

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The commerce clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] Although it speaks only of congressional power, the clause has been interpreted to empower the federal courts to enjoin state laws that interfere unduly with interstate commerce.[2]

Since the Marshall Court, the Supreme Court has continually modified its definition of the judicial role in overseeing state regulation.[3] The Court's current view of the so-called "dormant" commerce clause, in a nutshell, is as follows.[4] State regulations having a discriminatory effect on interstate commerce are subject to stringent judicial scrutiny even if the discrimination was inadvertent.[5] On the other hand, regulations that burden interstate commerce without discriminating against it are subject to a less rigorous balancing test:[6] a state law that burdens local and interstate commerce equally will be upheld if the law's local benefits outweigh the burden

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1. U.S. CONST., art. I, § 8, cl. 3. This article will not discuss judicial review in the contexts of commerce with foreign nations or Indian tribes.

2. *See* G. GUNTHER, CONSTITUTIONAL LAW 232 (11th ed. 1985); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 266 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 319-21 (1978).

3. For historical reviews, see NOWAK, ROTUNDA, & YOUNG, *supra* note 2, at 268-74; T.R. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 142-79 (1956); L. TRIBE, *supra* note 2, at 321-26; Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 2-19 (1940).

4. For more extended discussions of current doctrine, see NOWAK, ROTUNDA, & YOUNG, *supra* note 2, at 275-89; L. TRIBE, *supra* note 2, at 326-44.

5. *See, e.g.*, Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980). References to "direct" versus "indirect" regulation and to "protectionism" are also still to be found in these cases. *See* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 106 S. Ct. 2080 (1986).

6. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440-42 (1978).

on commerce.[7]

This doctrine is said to serve two purposes: preventing discrimination against outsiders who are not represented in the state's political process, and furthering the national interest in free trade among the states.[8] In the last decade, the Court has become increasingly aggressive in its pursuit of these goals.[9]

This article will argue for a sharply reduced judicial role in reviewing state regulations[10] under the dormant commerce clause.[11] The first part will examine some of the flaws in the Court's current approach. The second part will then present two proposals for redefining the judicial role. One proposal is that courts invalidate only laws that intentionally discriminate against interstate commerce. The other is that when Congress has given a federal agency the power to preempt state legislation, the dormant commerce clause should be considered inoperative. These are far from being the first scholarly proposals to limit the Court's role in this area,[12] but so far none of the proposals has made headway. The third part of the article will consider the reasons why current doctrine has been so impervious of change.

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7. Traces of earlier doctrines still appear in the cases from time to time. *See* NOWAK, ROTUNDA, & YOUNG, *supra* note 2, at 286.

8. Another rationale sometimes used is that the Court is implementing what it believes to be the unexpressed will of Congress. That is, congressional silence is assumed to demonstrate an intention to place restrictions on the states. *See* Dowling, *supra* note 3, at 18-20. The obvious flaw in this concept is that congressional silence, in the end, means only that Congress has not decided to legislate. Interpreting what Congress means when it has spoken is often difficult enough; to determine what Congress means when it has said nothing at all is impossible. *See generally* Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U.L. REV. 737 (1984).

9. *See* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 426, 437, 474, 482 (1982).

10. The article will not, however, directly address two related areas: review of state tax statutes under the dormant commerce clause, and review of state funding programs and other proprietary activities. *See* NOWAK, ROTUNDA & YOUNG, *supra* note 2, at 288, 307-95. The state taxation cases may be consistent with much of the article's thesis. *See* Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978); Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426 (1977). The proprietary activity cases limit judicial review even more sharply than the proposals made in this article regarding state regulation.

11. In criticizing the Court's current approach, this Article builds on the work of several earlier scholars. *See* Anson & Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980); Eule, *supra* note 9; Kitch, *Regulation and the American Common Market*, in A. TARLOCK, REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9 (1981); Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125. On the Court itself, Justice Rehnquist has forcefully dissented from several of the Court's decisions. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 687 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

12. See the sources cited in the previous note.

THE COURT'S CURRENT APPROACH

In understanding the Supreme Court's current approach,[13] it is useful to distinguish among three types of cases. The first type involves intentional discrimination against interstate commerce.[14] *City of Philadelphia v. New Jersey*[15] illustrates the Court's approach to such statutes. New Jersey faced a serious shortage of landfill space. To conserve existing space as long as possible, the legislature prohibited the importation of waste from other states for disposal in New Jersey. The Supreme Court found this legislation unconstitutional on its face. "[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[16] Thus, intentional discrimination against interstate commerce is generally prohibited.[17]

Even when discrimination is unintentional, state laws are subject to substantial scrutiny, as illustrated by *Hunt v. Washington State Apple Advertising Commission*.[18] Federal law provided a system of grades to be used in labeling apples. North Carolina prohibited the use of any other grades on labels. The suit was brought by Washington apple growers, who contended that the Washington grading system was superior and that the ban on use of these grades impaired the marketability of their apples. The law did not on its face discriminate against interstate commerce. The discriminatory effect on Washington apples was enough, however, to subject the law to heightened scrutiny. Given this discriminatory effect, the state had the burden to "justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory

13. For a review of the recent cases demonstrating what the author calls the Court's "strict approach" to state regulation, see Schwartz, *Commerce, the States, and the Burger Court*, 74 NW. U.L. REV. 409, 438 (1979). *See also* Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473, 484 (1978) (referring to the Court's "searching review"; compare with the discussion on pp. 493-95 of the Court's "interventionism").

14. For a discussion of the discrimination cases, see Blumstein, *supra* note 13, at 503-06.

15. 437 U.S. 617 (1978).

16. *Id.* at 626-27.

17. There is a minor exception for state quarantine laws. *See id.* at 628-29. Also, the Court has not entirely decided whether a facial discrimination is "by itself . . . a fatal defect," or whether it merely "invokes the strictest scrutiny," Hughes v. Oklahoma, 441 U.S. 322, 337 (1979), but the practical difference seems slight. Maine v. Taylor, 106 S. Ct. 2440 (1986), upheld a facially discriminatory law after applying strict scrutiny, but might well be considered to fit within the "quarantine" exception.

18. 432 U.S. 333 (1977).

alternatives adequate to preserve the local interests at stake."[19] The state was unable to carry this burden.

Even a statute with neither a discriminatory purpose nor a discriminatory effect may be unconstitutional. The leading case on commerce clause review of non-discriminatory statutes is *Pike v. Bruce Church, Inc.*[20] *Pike* involved an Arizona statute governing cantaloupe packing. A state official claimed that enforcement of this law required that the cantaloupes be packed inside the state, which would have required the company to build an expensive new packing shed.[21] The Court began its constitutional analysis[22] with a synthesis of the previous case law:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.[23]

The state requirement under consideration in *Pike* did not survive this balancing test. Since *Pike*, the balancing test has been applied to a variety of subjects ranging from state corporation laws to highway safety regulations.[24]

The *Pike* test is to some extent rigged against the state. A state law may create benefits as well as burdens for outsiders. The burdens are weighed against the state, but any beneficial effect on interstate commerce is not weighed.[25] *Pike*, in other words, establishes a judicial cost-benefit analysis in which all of the costs of a state law are counted, but only some of the benefits.

The Court's current approach has been subjected to strong

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19. *Id.* at 353.

20. 397 U.S. 137 (1970).

21. Arguably, this requirement should be considered discriminatory, as it distinguishes between packing firms on the basis of their location.

22. According to the lower court, this administrative order was unauthorized by state law. *See Pike*, 397 U.S. at 62, app. The Supreme Court deemed it unnecessary to defer resolution of the constitutional issue while this issue of state law was resolved. *See id.* at 140.

23. 397 U.S. at 142 (citations omitted).

24. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624 (1982); *Kassel*, 450 U.S. at 662; Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982); Procter & Gamble Co. v. City of Chicago, 509 F.2d 69, *cert. denied*, 421 U.S. 978 (1975).

25. *See MITE*, 457 U.S. at 644 (state has no legitimate interest in protecting nonresidents).

scholarly criticism.[26] To begin with, results in dormant commerce clause cases are notoriously unpredictable.[27] This is particularly true of the *Pike* test, which requires an ad hoc balancing based on the trial record in each case.[28] For example, even after a Wisconsin truck regulation was struck down, no one could be sure of the validity of a similar Iowa regulation until the Court ruled, since the records in the two cases differed.[29]

The more fundamental flaw in the current approach is that it places the Court in the position of evaluating economic policy. Under *Pike*, as Professor Kitch has observed,

> The question, in other words, is not whether the regulation or tax is or is not on interstate commerce. The question is whether, all things considered—including the national interest—the tax or regulation of commerce, interstate or not, is good or bad. This approach, of course, has a close kinship with the now discredited substantive due process of cases like *Lochner v. New York*, 198 U.S. 45 (1905). The Court abandoned substantive due process in the 1930s, but the method has lived on in Commerce Clause matters. . . .[30]

In one recent case, for example, the Court heavily stressed the virtues of the unregulated free market in allocating resources to their best use. The Court may be right, but many people share Justice Holmes's skepticism about assertions that the Constitution embodies particular economic theories.[31] In a decision particularly reminiscent of *Lochner*, the Sixth Circuit concluded that state regulation of prices was especially suspect under *Pike* because it intruded so deeply into the free market.[32] Thus, in many ways, *Pike* is a throwback to the now discredited era when courts sat as super-legislatures to determine the wisdom of economic regulations.[33] Indeed, Justices Black and Douglas argued cogently against a predecessor of the *Pike* test on just this ground.[34]

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26. *See* Eule, *supra* note 9; Tushnet, *supra* note 11.

27. *See* Eule, *supra* note 9, at 479; Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 566, 608 (1983); Maltz, *supra* note 11, at 85-86. For a judicial complaint about the doctrinal confusion, see Baltimore Gas and Electric Co. v. Heintz, 760 F.2d 1408, 1420, 1421 n.9 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 141 (1986).

28. *See* Maltz, *supra* note 11, at 85-86.

29. *See Kassel*, 450 U.S. 662 (1981); *Rice*, 434 U.S. at 447-48; *The Supreme Court: 1980 Term*, 95 HARV. L. REV. 91, 93, 100 (1981).

30. Kitch, *supra* note 11, at 29-30.

31. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

32. *Rhodes*, 679 F.2d at 665 ("state's interest in righting a bargaining imbalance . . . is not sufficient under the commerce clause to permit direct interference with pricing where it burdens interstate commerce").

33. *See* Tushnet, *supra* note 11, at 141-42 (*Pike* balancing indistinguishable from substantive due process).

34. Southern Pacific Co. v. Arizona, 325 U.S. 761, 784, 795 (1945). An even earlier opinion, joined by Justices Black, Frankfurter, and Douglas, eloquently explains why this form of policymaking should be left to Congress. McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 183-89 (1940).

The Court's current willingness[35] to strike down state statutes under the commerce clause is contrary to other trends over the past fifteen years. Even in non-constitutional areas, the Court has attempted to narrow the policymaking role of the federal courts.[36] Moreover, outside of the commerce clause area, the Court has been increasingly anxious to prevent the federal judiciary from impairing the role of the states in the federal system.[37] The Court's willingness to allow vigorous judicial supervision of state regulation in commerce clause cases seems inconsistent with its proclaimed attachment to what Justice Black called "Our Federalism."[38]

In short, the judicial role under the dormant commerce clause seems ripe for reconsideration.

REFORMULATING THE JUDICIAL ROLE

It is one thing to show that current law is imperfect, and quite another to demonstrate the existence of a superior alternative. Two possible reforms will be discussed in this section. One goes to the substance of the standard governing state regulation. The other would not change the applicable standard, but instead would limit the class of cases heard by courts.[39]

Adoption of an Intent Standard

Establishing the proper standard for judicial review under the dormant commerce clause requires first that the purposes of judicial review be determined. A various times, the Supreme Court has relied on two quite different justifications for judicial review under the commerce clause. One justification relates to the political process;[40] the other relates to substantive constitutional values.[41]

The process rationale is based on the lack of representation for non-residents in the political process.[42] At least since *Carolene*

35. For documentation that the Court is increasing its activism under the dormant commerce clause, see Eule, *supra* note 9, at 426, 437, 482.

36. One noteworthy expression of the Court's philosophy is found in TVA v. Hill, 437 U.S. 153 (1978).

37. *See* Southern Motor Carriers Rate Conf. v. United States, 105 S. Ct. 1721 (1985); Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); Wainwright v. Sykes, 433 U.S. 72 (1977).

38. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

39. The two proposals are independent. They have separate justifications, and either one could be adopted without the other.

40. *See, e.g., Rice*, 434 U.S. at 444 n.18, 447.

41. *See* Eule, *supra* note 9, at 441.

42. Professor Tribe has highlighted the importance of the process rationale in the dormant commerce clause cases. *See* L. TRIBE, *supra* note 2, at 326-27.

Products[43] it has been a commonplace that judicial review is most defensible when it compensates for a defect in the political process.[44] The paradigm is judicial protection of minority groups under the equal protection clause. Like racial minorities during much of our history, out-of-state residents lack political representation and thus the democratic process may fail fully to safeguard their interests.[45]

This process rationale does provide some justification for reviewing at least some state legislation.[46] In particular, it may justify review of state legislation that discriminates against interstate commerce. But it falls well short of justifying the extent of judicial review allowed under current doctrine. In particular, lack of political representation hardly justifies the *Pike* test. Under *Pike*, completely non-discriminatory legislation that burdens non-residents is subject to judicial review. Since the burden on non-residents is the same as that on residents, however, the state's political process seems to offer adequate protection.[47]

Therefore, any justification for the Court's current approach must rely on substance rather than process. The Court has often referred to the important constitutional value of free trade.[48] On close examination, however, this value does not justify expansive judicial review. Admittedly, concern about discriminatory state trade barriers was important in motivating the adoption of the Constitution in general and the commerce clause in particular.[49] But no evidence exists that the clause was intended of its own force to institute free trade, or that the courts were authorized to supervise state legislation.[50] Indeed, two strong arguments can be made against

43. United States v. Carolene Products Co., 304 U.S. 144 (1938).

44. *See* J. ELY, DEMOCRACY AND DISTRUST (1980); Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982); Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89 (1984).

45. *See* Helvering v. Gerhardt, 304 U.S. 405, 412 (1938); Dowling, *supra* note 3, at 15.

46. For a detailed discussion of the process rationale, see Sunstein, *Naked Preferences*, 84 COLUM. L. REV. 1689, 1705-10 (1984); Tushnet, *supra* note 11, at 130-41.

47. After all, no one would seriously argue for judicial review of all legislation imposing any burden on members of racial minorities, even when that legislation had no disparate impact and imposed precisely the same burdens on the majority group. As Dean Ely points out, in such cases we rely on "virtual representation" to protect the interests of those lacking direct political input. J. ELY, *supra* note 44, at 82-88.

48. *See Hunt*, 432 U.S. at 350; Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808 (1976); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533-35 (1949). For recent scholarly attempts at a substance-based theory of the commerce clause, see Levmore, *supra* note 27 (courts should police exploitation of monopoly power by states); Maltz, *supra* note 11, at 64-65 (courts should uphold "free location" principle).

49. *See* Eule, *supra* note 9, at 430-31. For a review of the historical materials, see Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432 (1941).

50. *See* Anson & Schenkhan, *supra* note 11, at 78-79; Eule, *supra* note 9, at 430-31.

finding a judicially enforceable value of "free trade" in the clause.

First, to paraphrase Justice Stevens, "there is only one commerce clause."[51] It is well settled that Congress may not only erect trade barriers of its own, but may also freely authorize the states to do so.[52] If the clause embodied a constitutional preference for free trade, then allowing Congress to use the commerce power to restrict trade would be as perverse as using the first amendment as a basis for censorship. The breadth of congressional power long recognized by the Court seems to be in tension with the view that the clause established free trade as a substantive constitutional goal.

Second, even finding a free-trade value in the clause would not in itself justify a judicial role in enforcing that value. Various portions of article I seem directed at achieving a wide variety of goals, from national security to technological progress. Yet no one thinks these clauses create any warrant for a judge-made body of law directed at these goals. Thus, justifying current doctrine requires an explanation of why a grant of power to Congress has the effect of authorizing judicial review of state legislation, when Congress has not acted. One traditional justification is that Congress simply cannot keep up with the myriad of relatively insignificant state barriers to free trade.[53] Even if the dubious factual premise of this argument is granted,[54] its logic is flawed. The limitations of the other branches do not necessarily imply a correlative judicial power to fill the need.[55] The Constitution places several express limitations on forms of state economic regulation that the framers found undesir-

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51. *Cf.* Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause.") The Court has made it clear that there is no two-tiered definition of commerce. "Interstate commerce" means the same thing under the dormant commerce clause as it does when considering the scope of congressional power. *See* Hughes v. Oklahoma, 441 U.S. at 326 n.2; *Philadelphia*, 437 U.S. at 621-23.

52. *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 339-40 (1982); Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652-53 (1981).

53. *See* Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 222 (1957); Dowling, *supra* note 3, at 24-25.

54. In reality, the factual premise is probably incorrect. *See infra* text accompanying notes 100 to 104.

55. For example, experience has shown that it is difficult for Congress to keep up with the myriad ways in which individuals seek to avoid the payment of taxes. Yet there is no "dormant taxation clause" under which courts create their own rules of tax law. Similarly, Congress has done less than a perfect job in executing its enforcement powers under the Civil War amendments. By analogy to the dormant commerce clause, the Court could have created its own body of civil rights laws governing private individuals, subject to congressional override. Yet there is no "dormant civil rights power." Rather than attempting to draw authority from these grants of power to Congress, the Court has been content to enforce the limitations expressly placed by the Constitution on state action.

able.[56] Rather than place such a limitation on state incursions into free trade, the framers simply made free trade one of the many aspects of "general welfare" entrusted to Congress.[57]

The process approach has recently received strong support from the Supreme Court in another federalism-related context. In *National League of Cities v. Usery*,[58] the Court had taken upon itself the duty of protecting a substantive value (state sovereignty) without any express textual basis. In *Garcia v. San Antonio Metropolitan Transit Authority*,[59] the Court overruled *National League of Cities*. As the *Garcia* Court explained, judicial intervention is proper only when the federal legislative process is inadequate to protect the interests of the states. The Court found no such flaw in the legislative process behind the extension of the federal minimum wage to state employees.[60] If process theory is to determine the extent of judicial protection of the states, it seems equally applicable when determining judicial limitations on state powers. The teaching of *Garcia* is that, absent a textual limitation, protection for federalism-related values is to be found in the political process, with judicial intervention only when that process has broken down. By the same reasoning, the dormant commerce clause should be limited to its process rationale.[61]

Under this interpretation, the dormant commerce clause serves a function much like that of the equal protection clause. Both protect politically disenfranchised groups. Yet the scope of protection under the two existing doctrines is quite different.[62] Under current law, interstate businesses receive far more protection from state legislation than do racial minorities. A business can establish a prima facie claim under the commerce clause by showing either discriminatory intent, a disparate impact, or a substantial burden. But a

56. The ban on state tariffs (art. I, § 10, cl. 2) is especially relevant. It would have been easy enough to add a ban on state laws burdening commerce.

57. *See* Eule, *supra* note 9, at 434-35.

58. 426 U.S. 833 (1976).

59. 105 S. Ct. 1005 (1985). For approving commentary on *Garcia*, see Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMM. 341 (1985). For a sharply critical view of the Court's opinion, see Van Alystyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

60. The Court's confidence in the responsiveness of Congress to the interests of the states has proved correct. Congress promptly amended the statute to ameliorate the impact on the states. *See Fair Labor Standards Amendments of 1985*, Pub. L. No. 99-150, 99 Stat. 787 (1985).

61. It is noteworthy that all references to undesirable state legislation prior to the adoption of the Constitution referred to intentional discrimination against nonresidents. *See* Eule, *supra* note 9, at 430-31.

62. *See* Blumstein, *supra* note 13, at 521-24.

law imposing a substantial burden on a racial minority is not considered suspect; even a disparate impact on the minority is not enough. Instead, minority groups must prove discriminatory intent.[63]

Is this radical difference in doctrine justifiable? Since judicial action under the commerce clause is subject to congressional override, it is less undemocratic than judicial action under the equal protection clause. Arguably, therefore, a more freewheeling form of review is appropriate under the commerce clause.

While in isolation this argument may sound strong, powerful arguments can be made that review under the commerce clause is much *less* needed than protection of minorities. Typically, government actions that burden interstate commerce also adversely affect many state residents.[64] For example, if outside firms are barred from entering a state market, consumers lose the benefit of the competition and pay higher prices.[65] These consumers may not be as well organized politically as local business lobbies,[66] but they are not completely lacking in political power. Furthermore, multistate firms may often be important in a state's domestic economy, giving them the opportunity to exert pressure on the government. Finally, even if they lack votes, interstate businesses have the other vital ingredient of political influence: money.

Thus, while the harm done to the democratic process by judicial review under the commerce clause is perhaps less, the justification for judicial review is also weaker. On balance, it is hard to see any justification for providing substantially greater judicial protection to interstate businesses than to racial minorities.

Of course, this discussion assumes the correctness of the intent standard for equal protection claims, which certainly is open to substantial dispute.[67] But much of the criticism of the intent test in equal protection cases is motivated by concerns of little relevance to dormant commerce clause cases. Like affirmative action, support for the disparate-impact test is usually based on a perception of deep-rooted, systematic discrimination. Because of the long history of systematic racial and gender discrimination by government, and the private prejudices that remain today, government neutrality

63. *See* City of Mobile v. Bolden, 446 U.S. 55, 62-63 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

64. *See* Anson & Schenkkan, *supra* note 11, at 82; Maltz, *supra* note 11, at 56.

65. For further discussion of this point, see text accompanying notes 107 to 110, *infra*.

66. See Tushnet, *supra* note 11, at 133, for a discussion of why consumers are arguably less likely to organize effectively than businesses.

67. *See* Bennett, *Reflections on the Role of Motivation Under the Equal Protection Clause*, 79 NW. U.L. REV. 1009 (1985), Sherry, *supra* note 43, at 118-19.

may doom some groups to continued inferiority. Therefore, it may not be enough to eliminate ill-motivated legislation; instead, perhaps even heedless government injury to oppressed minorities must be eliminated. However valid these arguments may be with respect to blacks or women, they are surely misplaced when applied to major interstate businesses. A desire to improve the lot of ghetto residents may lead to a rejection of the intent test in equal protection cases, but surely multinational corporations are entitled to no such special protection.

The argument commonly made against an intent standard is that adopting this standard would eviscerate the commerce clause. Few states, it is said, will be foolish enough to adopt facially discriminatory statutes.[68] In reality, however, a surprising number of states have adopted such statutes. *Philadelphia v. New Jersey*, discussed earlier,[69] is only one of the cases of this genre that have reached the Supreme Court.[70] Moreover, although problems of proof are considerable, they have not proved insurmountable in equal protection cases. To be subject to judicial scrutiny, racial discrimination need not be evident on the face of the statute. The Court has described the other types of evidence of intent that may be adduced in equal protection cases, and the same rules could be applied in the commerce clause context.[71]

The contrast between equal protection law and commerce clause law is illustrated by two cases. In one, *Dean Milk v. City of Madison*,[72] Madison passed a law forbidding the sale of milk imported from more than twenty-five miles away, and requiring pasteurization plants to be located within five miles of town.[73] Obviously, the burden fell on Wisconsin farmers outside the Madison area as much as on out-of-state farmers. Yet the Court struck down the law as facially discriminatory. In contrast, *Personnel Administrator v. Feeney*[74] involved a Massachusetts law giving

68. Few statutes "artlessly disclose . . . an avowed purpose to discriminate against interstate goods," though some do, and dormant commerce clause doctrine would have little impact were it confined to a ban on avowedly purposeful discrimination. The Court, however, has developed a fairly elaborate structure for analyzing disparate effects that might violate the commerce clause.

Tushnet, *supra* note 11, at 133.

69. *See supra* text accompanying notes 15 to 17.

70. *See, e.g.*, Northwest Bancorp v. Board of Governors, 105 S. Ct. 2545 (1985); Sporhase v. Nebraska, 458 U.S. 941 (1982); Lewis, 447 U.S. 27 (1980); Hughes v. Oklahoma, 441 U.S. 322 (1979).

71. *See* Hunter v. Underwood, 105 S. Ct. 1916 (1985); Castaneda v. Partida, 430 U.S. 482 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

72. 340 U.S. 349 (1951).

73. *Id.* at 352.

74. 442 U.S. 256 (1979).

an employment preference to veterans, who were, with few exceptions, men. Just as the Wisconsin law excluded many in-state farmers and all out-of-state farmers, the Massachusetts law excluded many men and virtually all women. But in *Feeney* the Court found no reason to subject the law to heightened scrutiny as a form of gender discrimination. After all, there was no demonstrated intent to discriminate against women, and the impact on a large group of men provided a political check on the legislature.

In *Dean*, the existence of discrimination was considered so serious as to create almost a per se finding of invalidity, while in *Feeney* there was not even enough discrimination to subject the legislation to serious judicial scrutiny. Under the approach suggested in this section, *Dean* would be decided differently. In the absence of a finding of intent to exclude non-residents from the market, the mere existence of an exclusionary effect would be irrelevant.

Another important case that would be decided differently is *MITE Corp. v. Edgar*.[75] *MITE* involved an Illinois statute directed at protecting local shareholders against takeovers. Applying the *Pike* test, the Court struck down the legislation. On the negative side, the Court found a substantial barrier to free competition:

> The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.[76]

On the benefit side, the Court found that Illinois had "no legitimate interest in protecting nonresident shareholders," and in any event the Court was "unconvinced that the Illinois Act substantially enhances the shareholders' position."[77] In short, the Court thought that additional regulation of the tender markets was a bad idea. What purported to be enforcement of a federalism concept was in reality a policy decision in favor of laissez faire.

Under the approach proposed in this section, the question of how much the securities markets should be regulated would be left to Congress and the states. Within the confines of federal statutory preemption, the states would be free to make their own policy decisions about securities regulation, so long as they did not intentionally discriminate against non-residents.

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75. 457 U.S. 624 (1982).

76. *Id.* at 643.

77. *Id.* at 644. In particular, the Court believed that the Illinois statute increased the risk that tender offers would fail, an outcome that it (but apparently not the Illinois legislature) viewed as undesirable. *Id.* at 645.

"Preempting" the Dormant Commerce Clause

Quite apart from the question of what standard should be used in judging state laws, is the question of what tribunal should apply the standard. In many instances, the federal courts are not the only possible national tribunal. Given the breadth of federal regulatory power over the national economy, federal administrative agencies often have jurisdiction over the industries involved in dormant commerce clause cases. They may pass substantive regulations inconsistent with state law, thereby preempting state law. Or, if they choose, they may simply adopt regulations stating that state laws are preempted. In adopting such regulations, they perform a role much like that of courts in dormant commerce clause cases: they decide whether a state law unduly infringes on national policies. Like the court, the agency speaks for the national interest as against parochial local interests. But for several reasons, the agency may be a superior decisionmaker.

The first reason is expertise.[78] A federal judge knows less about railroads and interstate trucking than the ICC, less about the security industry than the SEC, less about solid waste disposal than the EPA.[79] Determining the ultimate economic effects of a law is often a delicate undertaking requiring expert knowledge.[80] Not only are the agency's members more likely to know about an industry than is a judge, but the agency's staff contains a variety of experts, whose training in fields like economics is likely to be much more rigorous than that of the judge's law clerks (typically one or two years out of law school).

The agency also has a superior ability to gather information. Unlike the judge, the agency can finance new investigations to increase its data base. Its procedures will also typically require notice and comment, allowing all affected factions an opportunity to present information. Asking permission to file an amicus brief is hardly an equivalent opportunity to be heard.[81]

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78. On the complexity of the factual issues courts must decide under the *Pike* test, see Maltz, *supra* note 11, at 85-87.

79. [T]he balancing inquiry calls for a relatively detailed examination of the particular industries involved. The Court must understand how cantaloupes, apples, and milk are marketed, and it must learn how the regulation in question affects the industry. These tasks are far removed from the ordinary business of the Supreme Court, and may place burdens on the judicial system that are not worth the benefits.

Tushnet, *supra* note 11, at 156.

80. *See* Anson and Schenkhan, *supra* note 11, at 82 ("[o]nly sophisticated economic analysis can properly identify the true size and distribution of the burdens and benefits.").

81. Readers will recognize the foregoing as the classic New Deal justifications for the very existence of administrative agencies. While this traditional view has been subject to attack, there seems little reason to think that shifting policymaking to courts would be an improvement.

There are more fundamental reasons for preferring an administrative tribunal. Compared with the federal judiciary, agencies are relatively accountable to the political process. Therefore, review of state legislation by agencies tends to be more democratic than review by federal courts.[82] Moreover, the agency has the advantage of an express legislative mandate. After all, it is to the agency, rather than to the federal court, that Congress has delegated the power to make policy over an industry or business practice. The agency, then, has a much better claim than the court to determine what is national policy and whether state law conflicts with that policy. As the Supreme Court explained in *Chevron, U.S.A. v. NRDC*:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[83]

Two recent cases strongly support the argument that agencies rather than courts should decide when state laws conflict with national economic policy. The first is *City of Milwaukee v. Illinois [Milwaukee II]*.[84] In *Milwaukee I*,[85] the Court had held that interstate water pollution is subject to federal common law. The federal courts would determine when one state's pollution unduly affected another, just as under *Pike* they decide when one state's regulations unduly affect another's economy. In *Milwaukee II*, however, the Court repudiated any such role for the federal judiciary because intervening legislation had given federal agency jurisdiction over the problem. As the Court explained:

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82. Anson and Schenkkan argue that Congress is the most appropriate decisionmaker, and that therefore the dormant commerce clause should be wholly abandoned. *See* Anson & Schenkkan, *supra* note 11, at 84. This argument, considered as an original matter, has some merit, but it seems too late in the day to argue for complete abandonment of the dormant commerce clause. Although the Court has arguably usurped congressional power in this area, Congress's long acquiescence must be considered a ratification, at least to the extent of authorizing the Court to play some role in supervising state legislation. *See generally*, United States v. Midwest Oil Co., 236 U.S. 459 (1915). Given the Court's many doctrinal changes over the years, however, Congress cannot be considered to have ratified any particular judicial approach, such as the *Pike* test.

83. Chevron U.S.A. v. NRDC, Inc., 104 S. Ct. 2778, 2793 (1984).

84. 451 U.S. 304 (1981).

85. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.[86]

Precisely the same argument applies when a federal court is asked to use the dormant commerce clause to eliminate a state regulation in favor of a federal policy of laissez faire. When Congress has created an administrative agency with jurisdiction, such judicial policymaking becomes superfluous.

In another recent case, the Court acknowledged that judges should be less willing to find that a state law conflicts with national policy when a federal agency has jurisdiction over the issue. In *Hillsborough County v. Automated Medical Laboratories, Inc.*,[87] the Court was asked to hold a local regulation of blood banks invalid under the supremacy clause. In rejecting this preemption argument, the Court relied heavily on the FDA's decision not to preempt state law through its regulations:

> Finally, the FDA possesses the authority to promulgate regulations pre-empting local legislation that imperils the supply of plasma and can do so with relative ease. Moreover, the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements. Thus, since the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma.[88]

In short, the agency's refusal to preempt created a strong presumption that the ordinance did not conflict with national policy. At least an equally strong presumption of consistency with national policy should apply when the claim is made under the dormant commerce clause.

Essentially, the argument is quite simple. The Constitution gives Congress, not the courts, the role of making policy for the interstate economy. When Congress has delegated its policymaking role to an administrative agency, that agency should be trusted to decide whether a state law is inconsistent with the national interest. For a federal court to make that decision is an unnecessary intrusion on the policymaking authority of the democratic branches. As the Court said in *Milwaukee II*:

> When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state

86. *Milwaukee II*, 451 U.S. at 312-13 (citations omitted).
87. 105 S. Ct. 2371 (1985).
88. *Id.* at 2379 (citations omitted).

> law," the Court has found it necessary, in a "few and restricted" instances, to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. We have always recognized that federal common law is "subject to the paramount authority of Congress." . . . Federal common law is a "necessary expedient," and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.[89]

Everything in this passage applied with equal force to the dormant commerce clause, regardless of whether one characterizes it as an instance of federal common law[90] or merely an analogous exercise of judicial power.

Adopting this argument would change the results in some cases. For example, in *Bibb v. Navajo Freight Lines*,[91] the Court struck down as an undue burden on commerce an Illinois law requiring the use of a certain kind of mudguard on trucks. Under the approach suggested in this section, the Illinois statute would be upheld, since the ICC had expressly decided not to preempt state safety standards.[92] If indeed the Illinois statute unduly burdened commerce, the proper remedy was a petition to the ICC, followed by judicial review of the agency's decision.

Whether allowing Illinois to regulate mudguards was desirable or an undue burden on commerce was a question of transportation policy no different from countless other policy issues decided by the ICC. No reason exists for transferring this particular issue of transportation policy to the federal courts for de novo decision.[93]

OVERCOMING DOCTRINAL INERTIA

To date, scholarly criticisms of dormant commerce clause doctrine have been ignored by the Court. Quite apart from the theoret-

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89. *Milwaukee II*, 451 U.S. at 313-14 (footnotes and citations omitted). As Judge Posner has said, "one might think that once Congress had spoken the 'dormant' commerce clause would fall out and the only judicial function would be to enforce the congressional enactment." Dynamics Corp. v. CTS Corp., 794 F.2d 250, 263 (7th Cir. 1986).

90. *See* Levmore, *supra* note 27, at 569-73; Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 56 (1985); Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14-17 (1974). As Merrill aptly observes, "[s]ince necessity is the foundation of preemptive lawmaking, the disappearance of necessity eliminates the foundation for the rule." Merrill, *supra*, at 58.

91. 359 U.S. 520 (1959).

92. *See id.* at 524 n.5.

93. Similarly, the state law in *Southern Pacific*, 325 U.S. 761 (1945), would be upheld, since the ICC apparently had the power to issue a preemptive regulation. *Id.* at 764-65. If indeed the ICC had jurisdiction, the Court should have left the issue to the Commission. Justice Douglas unsuccessfully urged this argument in dissent, *id.* at 795.

ical merits of these criticisms, some important forces work against doctrinal change in these areas. It is important to address these forces directly.

The first force working in favor of existing doctrine is stare decisis. The Court has, after all, reiterated its current doctrines in a number of opinions. That in itself is some reason for retaining the doctrines. Yet the argument from precedent is weaker than it may appear. Over time, the Court has repeatedly changed its approach to the dormant commerce clause, sometimes quite dramatically.[94] There is little reason to treat the most recent formulation as more permanent than its predecessors.[95] As the Court itself has said, the development of commerce clause doctrine has been an "evolutionary process," and the Court has felt free to overrule outmoded cases.[96] It also should not be forgotten that earlier versions of the current test were forcefully opposed by some of the leading Justices of recent times, including Black, Douglas, and Frankfurter.[97]

Reconsideration is especially appropriate in an area in which the Court has always given practical considerations as much weight as legal theory.[98] Perhaps a correct theoretical analysis is good for all time, but practical considerations can be expected to change over the years.

These practical considerations are probably crucial to changing the judicial approach to the dormant commerce clause. Even if current doctrine is weak as a matter of legal theory, it still might be worth retaining if it served an important practical function.[99] The Court has often proclaimed the importance of the dormant commerce clause in maintaining the national economy. If indeed current doctrine were important to the health of the economy, conceptual purity might have to give way to practical necessity.

In reality, however, vigorous judicial review is probably not needed to keep states from blockading the national economy. Other powerful safeguards exist. Historically, state legislation has been judicially reviewed under the commerce clause on the basis that Congress cannot be expected to trouble itself with minor matters. This argument has lost whatever validity it may once have had, as Congress has shown itself willing and able to preempt burdensome

94. *See* NOWAK, ROTUNDA, & YOUNG, *supra* note 2, at 268-75.

95. For a discussion of the relevant factors in reconsidering precedent, see Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMM. 123 (1985).

96. *See* Hughes v. Oklahoma, 441 U.S. at 326.

97. *See supra* note 34.

98. *See* Dowling, *supra* note 3, at 13.

99. *See Supreme Court, 1980 Term*, *supra* note 29, at 101-02.

state legislation.[100]

Although Congress formerly met only for short sessions, and therefore may have had time only for the most pressing matters of national concern, clearly that is no longer true.[101] In particular, burdens on commerce that are important enough to justify action by the Court are also likely to be important enough to prompt congressional action.[102] For instance, after the Court's repeated bouts with the issue of truck length on interstate highways, Congress acted to settle the issue.[103]

Since Congress can correct judicial mistakes, what is ultimately at stake under the dormant commerce clause is the burden of inertia. Should the states or interstate businesses have the burden of getting congressional action? In allocating this burden, it is useful to consider which party is more likely to get judicial mistakes corrected. The very reason for giving the power to regulate interstate commerce to Congress, rather than to state legislatures, is that Congress is more responsive to the national interest and less responsive to parochial interests. If so, those claiming to represent the national interest should be better able to secure congressional action than their opponents.[104] Hence, the burden of overcoming congressional inertia should be on them.

Two other safeguards against improper state legislation exist. First, as we have seen, administrative agencies have the power to backstop Congress within the scope of their regulatory authority.[105] As the Court pointed out in *Hillsborough*, fewer practical impediments exist to agency supervision of state legislation than those hampering Congress. Agencies have more flexible agendas than

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100. *See* Eule, *supra* note 9, at 435-37.

101. As one author recently observed, "[t]oday Congress interests itself in everything from the training of medical technicians and the housing of cats and dogs held for medical experiments, to disclosure of consumer credit terms, local law enforcement records, local possession of firearms by convicted felons, and health hazards from asbestos insulation in public schools." Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93, 108 (1985) (footnote omitted).

102. *See* Eule, *supra* note 9, at 428.

103. *See Kassel*, 450 U.S. 662 (1981); *Rice*, 434 U.S. 429 (1978); *Surface Transportation Assistance Act of 1982*, Pub. L. No. 97-424, 96 Stat. 2097 (1982); *Department of Transportation and Related Agencies Appropriations Act, 1983*, Pub. L. No. 97-369, 96 Stat. 1965 (1982). Professor Gunther queries whether "this evidence of congressional willingness to deal with the problem of state burdens on interstate commerce in the highway area indicate that Congress is fully able to protect its own prerogatives and the interests of interstate commerce *without* the active assistance of the courts?" G. GUNTHER, *supra* note 2, at 245 n.2 (emphasis in original).

104. If interests favoring restraints on free trade had the political clout to get national legislation, presumably they would have done so rather than seek duplicative state legislation.

105. *See* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984); Fidelity Federal Sav. & Loan Assn'n v. de la Cuesta, 458 U.S. 141 (1982). For general discussion, see *supra* text accompanying notes 78 to 93.

Congress and are surely able to address even "minor" matters.[106] More important, agencies, unlike courts, have practical expertise in their particular regulatory areas.

Second, the market exacts its own inexorable penalties for needlessly burdensome regulations.[107] For example, in *Pike*, Arizona imposed an apparently senseless and expensive requirement that its farmers build packing sheds inside the state. A state that makes a practice of doing such things will soon find that multistate firms like the plaintiff in *Pike*[108] are making their investments elsewhere. Those farmers remaining in the state will suffer a competitive disadvantage compared with farmers in neighboring states. Similarly, laws that protect in-state firms from competition in local markets have the effect of raising prices, so the ultimate burden is borne by local consumers.[109] These consumers may not be able to organize as effectively as business lobbies, but they should not be dismissed as a political force. Indeed, Professor Kitch has suggested that these market sanctions are so powerful that state interference with commerce can only be evanescent.[110] This is perhaps an overstatement, but market forces at least offer a strong reinforcement to congressional and administrative oversight of state regulations.

The final factor working against change in the dormant commerce clause is that relatively little may seem to be at stake. The state laws struck down by the Court typically deal with rather insignificant matters, rather than major issues of public policy. Even if the Court has erred, it may seem that there are more important battles to be fought. After all, when the Court does go too far in a

106. Eule, *supra* note 9, at 435, speaks of the "obvious role" of the administrative agencies in safeguarding the national economy against ill-advised state regulations.

107. If Arizona burdens its cantaloupe producers with pointless marketing rules, as in *Pike*, Arizona's cantaloupes will become less competitive in the national market. If Illinois foolishly legislates to shield inefficient corporate management, as it allegedly did in *MITE*, its economy will suffer as businesses associated with other states gain a competitive edge. *See* Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913 (1982). Levmore, *supra* note 27, at 572-73, suggests that state regulation can injure the national economy only when the state has monopoly power in some market. *See also* Maloney, McCormick, & Tollison, *Economic Regulation, Competitive Governments, and Specialized Resources*, 27 J.L. & ECON. 329 (1984). Such cases are likely to be quite rare.

108. The Bruce Church firm had "for many years been engaged in the business of growing, harvesting, processing, and packing fruits and vegetables at numerous locations in Arizona and California." The farm involved in the case consisted of 6400 acres, and the company had spent more than $3,000,000 developing the land. *Pike*, 397 U.S. at 139.

109. *See* NOWAK, ROTUNDA, & YOUNG, *supra* note 2, at 281 n.7.

110. *See* Kitch, *supra* note 11. Professor Kitch argues, based on a reexamination of the historical evidence, that in fact trade barriers were not a major problem prior to the ratification of the Constitution. *Id.* at 11-19.

commerce clause case, the states can always ask Congress to overrule the decision.

The practical effects of current doctrine may be more profound, however, than individual cases suggest. Because the outcomes of the cases are so unpredictable, the doctrine may well have a chilling effect on legitimate state regulation. The practical significance of the dormant commerce clause may be increasing. The Court's activity in the area has certainly been increasing.[111] As the national government becomes more tangled in budgetary problems, the states may resume more of their historic roles as policymakers and laboratories for social experimentation. These efforts may well come into question under the dormant commerce clause. Finally, if no good purpose is served by current commerce clause doctrine, the Court's time is being seriously wasted.

In summary, the Court's current approach to the dormant commerce clause is badly in need of reform. The disparate impact and undue burden phases of current doctrine give the federal courts an undesirable policymaking role. Under current doctrine, courts are asked to decide whether laissez-faire is better national policy than state regulation. Such policy determinations are better left with more democratic institutions.

This article suggests two limitations on the judicial role in dormant commerce clause cases. First, the Court should only intervene when an intent to discriminate against interstate commerce can be proved. As in equal protection law, disparate impacts or undue burdens should not be enough in themselves to trigger judicial review. Second, when administrative agencies have the authority to preempt state rules, federal courts should not become involved in determining whether state rules violate national interests. That determination should be left to the agency or to Congress.

Obviously, the dormant commerce clause does not implicate the fundamental social policies involved in abortion or free speech. Nevertheless, if the Court's current doctrine is too broad, the error is not trivial. Even in relatively unimportant areas, there is something to be said for allowing the people of a state to determine their laws through the democratic process. These values of federalism and democratic self-rule are impaired when a federal court imposes its own view of desirable social policy on the states.

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111. *See supra* note 35.