2002

Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination against Interstate Commerce

Julian Cyril Zebot

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1720

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce

Julian Cyril Zebot*

“Let sleeping dogs lie.”
—Proverb

“Even a dog distinguishes between being stumbled over and being kicked.”
—Oliver Wendell Holmes

As a legal doctrine, the dormant Commerce Clause has often proven to be a difficult specimen. In applying the doctrine, the Supreme Court has labeled it a “quagmire,” “not predictable,” “hopelessly confused,” and “not always... easy to follow.” Yet the Court is responsible for the esoteric nature of the “dormant” or “negative” Commerce Clause, as the Court has denied it the time and attention routinely given to other constitutional provisions. While this appears to be changing, the

* J.D. Candidate 2003, University of Minnesota Law School; B.A. 2000, Grinnell College. The Author would like to thank Mehmet Konar-Steenberg for suggesting the topic of this Note, and Alexis Pfeiffer, Christy Szitta, Kathryn Olson, and Frank Piskolich for their editorial assistance.

7. As one commentator has noted, the categorical treatment of cases under the doctrine seemingly stifled its development. See Michael E. Smith, State Discriminations Against Interstate Commerce, 74 CAL. L. REV. 1203,
dormant Commerce Clause remains the least glamorous of the commonly litigated constitutional provisions. The source of its unwelcome status is debatable.9 Regardless of its origins, the confusion surrounding the dormant Commerce Clause has had the deleterious effect of discouraging close public and judicial scrutiny of the doctrine.10

This collective failure to take notice has served to compound the doctrinal awkwardness of which many complain. Perhaps uniquely, the lack of attention has contributed to the dormant Commerce Clause's development independent of other constitutional provisions.11 Nowhere is this more evident than in the discussion surrounding whether a particular state's statutory provision discriminates in its purpose against interstate commerce. Unlike discriminatory purpose analysis within the realm of individual rights, the courts applying the dormant Commerce Clause have taken various unprincipled

1203 (1986). As a result, between 1941 and 1976, approximately ten cases were found to involve violations of the dormant Commerce Clause. Id.
8. Between 1976 and 1986, the dormant Commerce Clause was found to have been violated in at least ten cases. Id. In the words of another commentator, "the mid-1970s brought a resurgence of invalidations under the clause." John J. Dinan, The Rehnquist Court's Federalism Decisions in Perspective, 15 J.L. & POL. 127, 182 (1999).
9. There are a few obvious explanations for this. First, as mentioned supra, this is quite possibly the result of the staid nature of the doctrine prior to the 1970s. See Smith, supra note 7, at 1203. Second, as several commentators have suggested, the Court's scattered approach may serve the purpose of maintaining judicial discretion "to prevent what appear to be instances of intolerable local or state interference with interstate markets." Michael A. Lawrence, Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework, 21 HARV. J.L. & PUB. POL'Y 395, 397-98 (1998) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 440 (2d ed. 1988)). Finally, as some have suggested, the courts could just be unsure as to whether the negative aspect of the Clause should be judicially enforced, or left to Congress. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 863-64 (2d ed. 1998) [hereinafter CONSTITUTIONAL LAW].
10. In addition, the seemingly insignificant subject matter of the statutes struck down enables the doctrine to keep a low public profile. See Daniel A. Farber, State Regulation and the Dormant Commerce Clause, 3 CONST. COMMENT. 395, 413 (1986).
11. One commentator has noted that the dormant Commerce Clause has developed differently from the Equal Protection Clause, even though "the dormant commerce clause serves a function much like that of the equal protection clause." Id. at 403. While "[a] business can establish a prima facie claim under the commerce clause by showing either discriminatory intent, a disparate impact, or a substantial burden . . . a disparate impact on the minority is not enough" to state such a case under the Equal Protection Clause. Id. at 403-04.
approaches to determining whether a statute is the product of a discriminatory purpose.\textsuperscript{12}

This is not an idle concern, especially within the context of waste management. As policies designed to encourage recycling and landfill conservation have been implemented in response to our nation’s growing waste crisis,\textsuperscript{13} waste haulers, landfill owners, and other parties with an economic interest in the prosperity of landfilling have sought, often successfully, to invalidate such regulation under the dormant Commerce Clause.\textsuperscript{14} While plaintiffs challenging local waste management policies and decisionmaking under the dormant Commerce Clause often assert a variety of theories of liability,\textsuperscript{15} they regularly allege purposive discrimination because of the contentious nature of po-

\textsuperscript{12} Compare, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (considering whether improper motive was a “but for” cause of the discriminatory action), with McNeilus Truck & Mfg., Inc. v. Ohio, 226 F.3d 429, 443-44 (6th Cir. 2000) (failing to consider whether improper motive was a “but for” cause of the discriminatory statute).

\textsuperscript{13} As of 1997, the United States was producing 200 million tons of household waste per year, an amount that was expected to grow to about 216 million tons by 2000. James E. Breitenbucher, Note, \textit{Yakety Yak, Take Your Garbage Back: Do States Have Any Protection From Becoming The Dumping Grounds For Out-of-State Municipal Solid Waste?}, 52 WASH. U. J. URB. & CONTEMP. L. 225, 225 (1997). In addition, the nation also produces an astonishing 275 million tons of hazardous waste per year. Erin A. Walter, Note, \textit{The Supreme Court Goes Dormant When Desperate Times Call for Desperate Measures: Looking to the European Union for a Lesson in Environmental Protection}, 65 FORDHAM L. REV. 1161, 1161 (1996). In response to such dire numbers, and the real environmental problems, such as groundwater contamination, that accompany them, many communities and states have adopted ordinances designed to increase the costs of landfilling and encourage local recycling. \textit{See} Breitenbucher, \textit{supra}, at 227-28.

\textsuperscript{14} See Breitenbucher, \textit{supra} note 13 at 228. (“The waste management associations have been largely successful in challenging recycling laws . . . by arguing that the laws violate the dormant Commerce Clause.”); see also Walter, \textit{supra} note 13, at 1164 (“These constitutionally mandated principles of free trade and market unity have been a silent but deadly foe for state environmental protection measures.”) (citation omitted).

\textsuperscript{15} See, e.g., Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 334 (4th Cir. 2001) (stating that the plaintiffs argued that the statute discriminated against interstate commerce in both purpose and effect); E. Ky. Res. v. Fiscal Ct. of Magoffin County, 127 F.3d 532, 540 (6th Cir. 1997) (noting that plaintiff argued that the challenged statute was facially, purposefully, and effectually discriminatory); SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995) (examining theories of both discriminatory purpose and effect); Randy’s Sanitation, Inc. v. Wright County, 65 F. Supp. 2d 1017, 1021, 1029 (D. Minn. 1999) (explaining that the plaintiff argued that the challenged statute was both facially discriminatory and excessively burdensome and that challenged permit decision was both purposefully and effectually discriminatory).
itical debate on waste issues. Where a particular policy or decision is unobjectionable under the other theories, the method by which the courts determine the presence of discriminatory purpose decides the balance to be struck between federal and state power on such issues. To the extent that the courts' indiscriminate approach in finding discriminatory purpose increases the potential for unwarranted and unpredictable judicial interference, it chills state and local creativity in crafting environmentally friendly waste management policies and undermines the dormant Commerce Clause as a doctrine.

In light of these concerns, this Note argues that the current approach to analyzing discriminatory purpose in a state action is dysfunctional. Case law reveals the possibility for the doctrine's abuse and provides ample opportunity for its indictment. Part I uses the Court's decision in Mt. Healthy to describe the approach used to establish discriminatory purpose dominant in other constitutional settings. Part II provides a brief overview of dormant Commerce Clause jurisprudence and how it has addressed the issue of ascertaining discriminatory purpose. Part III outlines the problems of the courts' current approach. Part IV evaluates Mt. Healthy as a possible alternative approach, analyzing its implications for both waste management policy and the dormant Commerce Clause as a whole. This Note concludes that application of the Mt. Healthy standard to analysis under the dormant Commerce Clause would produce consistent, coherent judicial decisions that would uphold a tenable balance between local waste management policymaking and federal supremacy in regulating interstate commerce.

16. Given the wide range of views on waste management matters, there are almost always some policymakers who advocate a "not in my backyard" ("NIMBY") position, tainting the political process and making a discriminatory purpose argument possible for aggrieved parties. See, e.g., Waste Mgmt., 252 F.3d at 336-37 (providing examples of remarks made by the governor and legislative sponsor evincing discriminatory intent); SDDS, 47 F.3d at 268 (finding statements made in an election pamphlet to provide "ample evidence of a discriminatory purpose").

17. One can easily imagine a waste management policy that would result in neither a discriminatory effect nor an excessive burden on interstate commerce. See infra text accompanying notes 140-41.

18. In such a context, the courts' decision on discriminatory purpose is determinative of the boundaries between legitimate and illegitimate policymaking. See infra notes 163-67 and accompanying text.

19. See infra notes 163-67 and accompanying text.
I. Mt. Healthy: The Dominant Approach to Ascertaining Discriminatory Purpose

The standard method of ascertaining discriminatory purpose in constitutional contexts other than the dormant Commerce Clause is found in the Supreme Court's decisions in Mt. Healthy City School District Board of Education v. Doyle20 and Texas v. Lesage.21

Decided by the Court on the same day as Village of Arlington Heights v. Metropolitan Housing Development Corp.,22 Mt. Healthy's new, and at the time controversial, approach to determining whether an action was unconstitutional by reason of discriminatory intent arose in the context of an alleged First Amendment violation.23 The plaintiff, a teacher, sued the board of education for failing to give him tenure, claiming that this decision was in response to his public disclosure of an internal memorandum concerning the school's uniform policy.24 To support his claim, the plaintiff introduced a letter he received from the board that indicated that its decision not to offer tenure was, in part, made on the basis of the disclosure incident.25 The letter, however, also noted that the plaintiff had engaged in other questionable, if not inappropriate, actions, including using "obscene gestures to correct students."26 The board also produced evidence that the plaintiff had been previously disciplined for an altercation involving another teacher.27

On the basis of this record, the district court held that the plaintiff's tenure was denied in retaliation for exercising his right to free speech under the First and Fourteenth Amendments.28 In so holding, the district court made two essential findings. First, it found that the plaintiff's conduct in publicizing the internal memo was expressive and therefore constitutionally protected.29 Second, it determined that the plaintiff's

22. 429 U.S. 252, 270 (1977) (holding that plaintiffs in equal protection cases must make an initial showing that discriminatory purpose was a "motivating factor" in the state actor's decision).
23. Mt. Healthy, 429 U.S. at 276.
24. See id. at 281-83.
25. Id. at 282-83.
26. Id. at 283 n.1.
27. Id. at 281.
28. Id. at 276.
29. Id. at 283.
constitutionally protected speech played a "substantial part" in the board's decision not to tenure plaintiff. Consequently, the district court concluded, and the Sixth Circuit affirmed, that the plaintiff was entitled to reinstatement with back pay.

In a decision with momentous consequences, the Supreme Court vacated the decision and remanded, finding that the district court and the Sixth Circuit had been incautious in determining whether the board had actually retaliated against the plaintiff in violation of his First Amendment rights. The problem with the lower court's analysis was that "it would require reinstatement in cases where a dramatic and abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred." The district court's "substantial part" rule, by itself, would produce the absurd result of "plac[ing] an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." The Court found this to be "commanding undesirable consequences not necessary to the assurance of those [constitutional] rights."

To correct this result, the Court found that the lower courts should have gone beyond their finding—that the constitutionally protected conduct was a "substantial fact or part" in the decision not to rehire—to determine whether that conduct was also the cause-in-fact of the tenure decision. The Court placed the burden of this additional showing on the defendant, essentially requiring the board of education to disprove that it acted

30. Id.
31. Id.
32. See id. at 285-86. To prove a First Amendment retaliation claim, a plaintiff must prove that the adverse action taken was the result of an improper motive to retaliate against the exercise of constitutionally protected speech. See id.
33. See id. at 285.
34. Id.
35. Id. at 287. The "substantial part" rule is not necessary to the assurance of First Amendment rights because those rights are only violated when retaliatory motive is the real, "but for" cause of the adverse action. See id. But see Sheldon Nahmod, Mt. Healthy and Causation-in-Fact: The Court Still Doesn't Get It!, 51 MERCER L. REV. 603, 605 (2000) (arguing that there has been a constitutional violation in such cases despite the Court's approach in Mt. Healthy).
36. Mt. Healthy, 429 U.S. at 287.
out of discriminatory animus. As a result, the Court remanded the case to the lower courts to determine whether the defendant had carried its burden by proving that it would have reached the same decision even in the absence of the protected conduct.

While subsequent Supreme Court decisions have applied the standard implemented in Mt. Healthy, no recent decision has gone further in extending it than Texas v. Lesage. In that case the plaintiff, a rejected candidate for a state university doctoral program, sued the state alleging violation of his Fourteenth Amendment rights under 42 U.S.C. § 1983. The plaintiff based his claim on the university's use of racial criteria in the admissions process, contending that he had been discriminated against as a white applicant. In rebuttal, the university argued that the plaintiff had been rejected not because he was white, but because his credentials were inferior compared to those of the other candidates admitted into the program.

In reversing the court of appeals' denial of summary judgment to the university, the Supreme Court took issue with the Fifth Circuit's analysis of what constitutes a redressable injury under § 1983. Specifically, it rejected the Fifth Circuit's refusal to consider whether the university would have admitted the plaintiff under a race-neutral admissions policy as inconsistent with Mt. Healthy. As the Court stated, "The underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive." The Court also rejected the sugges-

37. See id.
38. Id. On remand, the district court found that the defendant had met its burden by showing that it would have terminated the plaintiff regardless of his protected conduct. See Doyle v. Mt. Healthy City Sch. Dist. Bd. of Educ., 670 F.2d 59, 61 (6th Cir. 1982).
41. Id. at 19.
42. Id.
43. See id. at 19-20 (stating that "students ultimately admitted to the program ha[dl] credentials that the committee considered superior to Plaintiff's") (citation omitted).
44. See id. at 20.
45. Id. (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).
46. Id. at 21.
tion that the *Mt. Healthy* standard was limited solely to the context of First Amendment retaliation cases: "Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial." Accordingly, the Court held that the Fifth Circuit should have determined whether the university could have conclusively established that it would not have admitted the plaintiff under a race-neutral policy. If, on remand, the court found that such was the case, the Supreme Court held that summary judgment should be granted for the university on the plaintiff's § 1983 claim.

*Mt. Healthy* and *Lesage* both stand for the principle that where an improper motive must be proved, and several different motives are present, the improper motive must be found to be the "but for" cause of the adverse action taken. In different terms, such a causal test allows courts to distinguish, like Holmes's dog, between cases in which the plaintiff's class has been "stumbled over" by the state actor and cases in which the state actor has "kicked" it. Without the *Mt. Healthy* test, the courts are blind to whether an adverse action was actually caused by an improper motive.

The courts' widespread application of *Mt. Healthy* and *Lesage* is supportive of the test's efficacy. Having applied the *Mt. Healthy* approach in the context of First Amendment, Equal Protection, and § 1983 claims, the Supreme Court has shown a willingness to treat cases involving an allegation of in-

---

47. Id.
48. Id. at 22.
49. Id.
50. See id. at 21 (finding no "cognizable injury" when an adverse governmental decision would have been made regardless of the presence of an improper motive); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (establishing a burden-shifting standard, where defendant has the burden of showing the action taken would have been made even in the absence of the protected conduct).
51. See supra note 2 and accompanying text.
52. Cf. Catherine G. O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 599 (1997) ("[S]tate legislation will be 'protectionist' under the definition of protectionism offered here if the record indicates that it was substantially motivated by the need to protect resident economic interests . . . ").
53. See *Lesage*, 528 U.S. at 19; *Mt. Healthy*, 429 U.S. at 287.
tentional discrimination to the same searching analysis. After all, as the Court suggested in Lesage, the distinction between such cases is "immaterial." As Part II will note, however, in spite of Mt. Healthy's successful application in other constitutional settings, the courts have never given serious consideration to using it as part of the discriminatory purpose analysis under the dormant Commerce Clause.

II. THE DORMANT COMMERCE CLAUSE: HISTORY AND RECENT DEVELOPMENTS

A. FRAMERS' INTENT AND JUDICIAL UNDERSTANDING

"The Congress shall have the power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ..."57

While the Commerce Clause clearly grants the federal government, specifically Congress, the power to regulate interstate commerce, the converse proposition, that the states have no or limited authority to do so, has always been somewhat more controversial. Lacking a firm textual foundation, the current understanding of the Clause is rooted within the intent of the Framers as divined by the courts.60

While this understanding is often debated among scholars, it does derive some support from the writings of the

---

54. Cf. Lesage, 528 U.S. at 21 (finding the distinction between First Amendment and Equal Protection cases to be "immaterial").

55. Id.

56. No court has explicitly considered the possibility of "mixed motives" in deciding a case. See infra note 117 and accompanying text. But see Randy's Sanitation, Inc. v. Wright County, 65 F. Supp. 2d 1017, 1029 (D. Minn. 1999) (stating that in order to prevail on summary judgment the plaintiff must prove that the county would not have made the same decision in the absence of a discriminatory motive).

57. U.S. CONST. art. I, § 8, cl. 3.

58. Id.

59. See Dinan, supra note 8, at 181-83 (discussing the federalism critique of the dormant Commerce Clause); infra notes 144-47 and accompanying text.

60. See Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (stating that the courts have interpreted the Commerce Clause in line with the Framers' "central concern" of economic balkanization among the states).

Framers themselves. In an 1829 letter to a friend, James Madison wrote that the Commerce Clause was "intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged." Certainly, given the spectacular failure of the Articles of Confederation to prevent economic trade wars and retaliation among the states, there is strong evidence to indicate that the Framers intended such a provision be read into the Commerce Clause.

This scholarly debate is moot for all practical purposes, however. Regardless of whether the Framers themselves intended a dormant Commerce Clause, the courts charged with interpreting the Constitution have found one implied within lack of textual support); Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425, 428 (1982) (suggesting that the Privileges and Immunities Clause is the better clause to protect out-of-state economic interests); Martin H. Redish & Shane V. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 571 ("[T]he simple fact is that there is no dormant commerce clause to be found within the text or textual structure of the Constitution.").

62. Lincoln L. Davies, Note, If You Give the Court a Commerce Clause: An Environmental Justice Critique of Supreme Court Interstate Waste Jurisprudence, 11 FORDHAM ENVTL. L.J. 207, 246-47 (1999) (quoting Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14, 15 (1867)); see also W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994) (discussing Madison's quote). Davies, however, notes that this statement has not been without controversy, as Madison's use of the term "General Government" has been debated. See Davies, supra, at 247. If "General Government" is taken to mean the judiciary, the statement would seem to provide an historical foundation for the dormant Commerce Clause. See id. If, however, the term was simply used in reference to the legislature, no such support for the dormant Commerce Clause can be derived. See id. As a result, both supporters and detractors of the Clause have used Madison's statement to support their contentions. See id. One commentator has noted that Madison, more so than any other Framer, was concerned with state regulation of both foreign and interstate commerce. Smith, supra note 7, at 1207.

63. Under the Articles of Confederation, states discriminated against interstate commerce as a matter of course, inhibiting national economic development. See CHARLES W. MEISTER, THE FOUNDING FATHERS 7-8 (1987). The most common form of such discrimination was the taxation of goods passing through a state in interstate commerce. See id.

64. Indeed, in Hughes, Justice Brennan wrote, "The few simple words of the Commerce Clause... reflected... the [Framers'] conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." 441 U.S. at 325-26.
the Clause.\textsuperscript{65} In \textit{Baldwin v. G.A.F. Seelig, Inc.}, Justice Cardozo, reiterating Judge Hand before him, stated, "We are reminded . . . that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'\textsuperscript{66} In perhaps the most eloquent restatement of the judicial understanding of the Framers' intent, Justice Jackson wrote in \textit{H.P. Hood & Sons v. Du Mond},

> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. "... each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." This came "to threaten at once the peace and safety of the Union."\textsuperscript{67}

Consequently, courts have seen it as their duty under the Commerce Clause to advance the "solidarity and prosperity of this Nation" by checking local regulations that interfere with interstate commerce.\textsuperscript{68}

\textbf{B. DOCTRINAL DEVELOPMENT}

Although there is widespread agreement among the courts that a dormant Commerce Clause exists, there has been a startling lack of consensus as to how to implement this judicial understanding of the Framers' intent.\textsuperscript{69} In part, this is because judicial understanding has shifted over time and with the development of the national economy.\textsuperscript{70}

\textsuperscript{65} This is not to suggest that there is no dissension within the ranks of the Judiciary. Certainly, many judges have applied the same types of critiques made by scholarly detractors of the dormant Commerce Clause. See Dinan, \textit{supra} note 8, at 181-85 (discussing the Supreme Court's recent concern with the dormant Commerce Clause's origins); \textit{infra} notes 144-47 and accompanying text.


\textsuperscript{67} 336 U.S. 525, 533 (1949) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 259-60 (1833)).

\textsuperscript{68} See, e.g., id. at 535.

\textsuperscript{69} See Lawrence, \textit{supra} note 9, at 397 ("It seems that the only thing consistently predictable about the [Court's interpretation of the dormant Commerce Clause] is its continued unpredictability." (quoting Eule, \textit{supra} note 61, at 479)).

\textsuperscript{70} See \textit{id.} at 409-10 (contending that the demise of the "local-national"
Initially, the Supreme Court, in *Gibbons v. Ogden*,71 suggested that the Commerce Clause be interpreted as "a grant of the whole" power to Congress to regulate interstate commerce, "leav[ing] no residuum" to the states.72 This "dual federalism" vision of the balance between federal and state power in regulating commerce, however, eroded in the face of the realization that the domain of purely intrastate commerce was rapidly dwindling, and, thus, the delicate balance of state and federal power was being upset.73

As courts began to accept the fact that the states had some authority to regulate interstate commerce, a new dormant Commerce Clause doctrine emerged. Instead of prohibiting all state regulation, the courts held that the Clause proscribes only exercises of state power that discriminate against, or excessively burden, interstate commerce.74

Nonetheless, for most of the past century courts confused

subject distinction within dormant Commerce Clause jurisprudence was due to the growing difficulty of distinguishing between local and national economic interests).

71. 22 U.S. (9 Wheat.) 1 (1824).

72. Id. at 198; see also Justin Shoemake, Note, The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause, 48 DUKE L.J. 891, 911 (1999) (reading *Gibbons* to suggest "a complete prohibition on state regulation of interstate commerce"). Although *Gibbons* was the first case to involve discussion of the dormant aspect of the Commerce Clause, it did not actually decide the issue of whether the Clause prohibited state regulation of commerce because the statute at issue was preempted by federal law. See Lawrence, *supra* note 9, at 408-09.

73. See Shoemake, *supra* note 72, at 911 ("The Court... soon recognized that denting the states any power to legislate in the area [of interstate commerce] could upset the delicate balance between the states and the national government."). Under the "dual federalism" view of the Constitution, a power provided to the federal government was not thought to be available to the states, and vice versa. Davies, *supra* note 62, at 251-52.

74. See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (citing to numerous cases standing for the same proposition); see also Shoemake, *supra* note 72, at 911. It should also be noted that the prohibitions imposed by this conceptualization of the dormant Commerce Clause are not final. If Congress wishes, it may grant a state permission to discriminate against interstate commerce. See *In re Rahrer*, 140 U.S. 545, 562-65 (1891) ("The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge."); see also CONSTITUTIONAL LAW, *supra* note 9, at 863 ("Less robust is [the] suggestion that Congress cannot authorize states to regulate non-local commerce... By the twentieth century, it became accepted doctrine that Congress could authorize state regulation of interstate commerce.").
this distinction in application, treating cases categorically.\textsuperscript{75} Such categories included those relating to the importation of harmful goods,\textsuperscript{76} the exportation of natural resources,\textsuperscript{77} and others.\textsuperscript{78} This lumping together of like cases served to create the illusion of separate doctrines; in actuality, this fiction was not far from the truth, as each category developed its own unique approach to determining whether state regulation discriminated against or burdened interstate commerce.\textsuperscript{79}

Over the last several decades, this approach to the dormant Commerce Clause has largely collapsed.\textsuperscript{80} In its place, a new, more uniform jurisprudence has taken shape, resulting in a two-tiered analytical framework.\textsuperscript{81} This framework has been described as reflecting a "pervasive dichotomy between state regulations that discriminate against interstate commerce and those that do not."\textsuperscript{82}

The first tier consists of cases in which the statute directly discriminates against interstate commerce,\textsuperscript{83} a category de-

\textsuperscript{75} See Smith, supra note 7, at 1203.
\textsuperscript{78} Smith, supra note 7, at 1203 (explaining that "there were special doctrines relating to the importation of harmful goods, the exportation of natural resources"); see also CONSTITUTIONAL LAW, supra note 9, at 867-68 (discussing the categories of laws typically invalidated under the dormant Commerce Clause).
\textsuperscript{79} See Smith, supra note 7, at 1203.
\textsuperscript{80} See id.; see also Hughes, 441 U.S. at 335 (recognizing a unitary framework for dormant Commerce Clause analysis); City of Philadelphia, 437 U.S. at 624 (describing the evolution of dormant Commerce Clause analysis).
\textsuperscript{82} Smith, supra note 7, at 1204. But see C & A Carbone, 511 U.S. at 402 (O'Connor, J., concurring) (stating that "there is no clear line separating these categories").
\textsuperscript{83} C & A Carbone, 511 U.S. at 402 (O'Connor, J., concurring). A statute discriminates against interstate commerce if it benefits in-state economic interests by burdening out-of-state competitors. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192 (1994). Intentional discrimination can be either facial—obvious from the face of the statute—or purposive—obvious from the purpose or intent of the statute. Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992). Facially discriminatory measures are ones with which the dormant Commerce Clause was clearly intended to deal; measures which are not facially discriminatory, by their very nature, are less likely to spur the interstate protectionism and trade wars that the Framers feared and sought to avert through the Commerce Clause (since their protectionist motivation is
scribed as being “virtually per se” invalid. A statute is per se invalid if it discriminates against interstate commerce on its face, in its purpose, or in its effect. Due to the presumption of invalidity, statutes within this category are subjected to strict judicial scrutiny. If the state can present a legitimate public purpose that cannot be accomplished through non-discriminatory means, the statute may still be saved from being found unconstitutional. It is rare, however, for a discriminatory measure to survive strict scrutiny.

If, on the other hand, a statutory provision does not discriminate and only imposes a slight, indirect burden on interstate commerce, it falls into the second tier of cases. This category of cases is subjected to the less rigorous balancing test adopted under the Supreme Court’s decision in Pike v. Bruce Church, Inc. Under the Pike balancing test, a court examines the state’s interest in the regulation and determines whether the burden the regulation places on interstate commerce clearly exceeds the benefits derived from the interest. Only not as obvious). Cf. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949) (arguing that overt state protectionism led to the adoption of the Commerce Clause). Although admittedly there is some blurring between these two types, this Note is concerned only with the latter form of discrimination against interstate commerce.

84. Waste Mgmt., 252 F.3d at 333.
86. See id. at 454.
87. See C & A Carbone, 511 U.S. at 402 (O'Connor, J., concurring); see also Shoemake, supra note 72, at 912.
88. Shoemake, supra note 72, at 912; see also O'Grady, supra note 52, at 574 (“As the standard’s name suggests, a discriminatory regulation will almost never survive review under the virtual per se invalid standard of scrutiny.”). In fact, only one law has been upheld upon such review. Lisa Heinzerling, The Commercial Constitution, 1995 SUP. CT. REV. 217, 217 (citing Maine v. Taylor, 477 U.S. 131 (1986)).
89. 397 U.S. 137, 146 (1970) (holding that the cost of requiring an in-state packing plant for locally harvested cantaloupes was excessive in relation to the requirement’s legitimate benefits).
90. See id. at 142 (“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.”) (citing Huron Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)); see also Shoemake, supra note 72, at 912. As the Pike balancing test shows, a finding of discriminatory purpose is important even when the challenged provision burdens interstate economic interests. Without a discriminatory purpose, a statute producing such a burden would fall into the category of cases in which the Pike balancing test is applied. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-73 (1981) (finding in the absence of a discriminatory pur-
where the burden on commerce clearly exceeds the benefits is
the regulation found to violate the dormant Commerce Clause.\(^9\)

C. THE CONFUSION SURROUNDING DISCRIMINATORY PURPOSE

While an analytical framework has emerged from the
miasma surrounding the dormant Commerce Clause, the same
cannot be said for analysis under the second, or discriminatory
purpose, prong of the discrimination inquiry. In part, this may
be the result of the perceived similarities between the process
of uncovering a discriminatory purpose and the process by
which a statute is determined to be facially discriminatory.\(^9\)
There is some degree of truth to this perception. In practice,
there is little to distinguish between cases deemed “facially dis-

\(^9\)

\(^1\)
SDDS, Inc. v. South Dakota.\footnote{95} SDDS involved a challenge not to a legislative enactment but to a statute passed by referendum.\footnote{96} The statute required the legislature to grant permission for large landfills only upon an additional finding that the facility was environmentally safe and in the public interest.\footnote{97} The plaintiff, who sought to construct a large solid waste disposal facility, challenged the enacted referendum as discriminating in purpose against interstate commerce.\footnote{98}

In evaluating the plaintiff's claim, the court focused on an election information pamphlet and the existing administrative permit procedure for such facilities, eschewing a standardized inquiry into the voters' motives.\footnote{99} Statements excerpted from the state-issued campaign literature that "exhorted voters to vote against the 'out-of-state dump' because 'South Dakota is not the nation's dumping grounds' [were found to be] ample evidence of a discriminatory purpose to trigger strict scrutiny."\footnote{100} Discounting the state's argument that additional approval by the legislature was necessary for larger waste disposal facilities, which as the court recognized, generally pose greater environmental risks, the court found that dual approval was a relatively ineffective means of achieving such environmental protection.\footnote{101} Nevertheless, the court gave serious consideration to the state's purported rationale for the referendum only after deciding that strict scrutiny review was required.\footnote{102} Accordingly, the court struck down the statute as a discriminatory restraint on interstate commerce.\footnote{103}

\footnote{95} 47 F.3d at 268-70.
\footnote{96} Id. at 266 (citing to the challenged statutory provision, S.D. CODIFIED LAWS §§ 34A-6-53 to 56 (Michie 1992)).
\footnote{97} Id. at 265-66. Previously, solid waste disposal facilities needed only to gain approval through South Dakota's administrative permit procedure. Id. at 265. At the time, the procedure was to issue a one-year initial permit if the facility was found to be environmentally safe and in the public interest. Id. After the initial permit expired, the Department of Water and Natural Resources would review the safety of the facility and, on the basis of that determination, decide whether to issue a five-year renewal of the permit. Id.
\footnote{98} See id. at 264-65.
\footnote{99} See id. at 268-69.
\footnote{100} Id. at 268. The Attorney General for South Dakota drafted the pamphlet at issue. See id. at 266. The court also relied on the trial court judge's finding that the initiative "was purposely drafted to insure that, except for [Plaintiff], the Initiated Measure would not apply to existing or foreseeable future landfills that dispose of South Dakota waste." Id. at 268.
\footnote{101} See id. at 269.
\footnote{102} See id. at 271.
\footnote{103} Id. at 272. The court also found that the statute had a discriminatory
Another example of such ad hoc analysis is found in the Sixth Circuit's decision in *Eastern Kentucky Resources v. Fiscal Court of Magoffin County*.104 Eastern Kentucky involved a dormant Commerce Clause challenge to Kentucky's waste management program.105 The legislatively enacted statute was designed to "reduce the amount [sic] of solid waste disposal facilities in the Commonwealth, and to encourage a regional approach to solid waste management."106 At the heart of its provisions, the statute ceded the state's authority over developing waste management strategies to local planning areas, requiring all landfill developments to be in accordance with locally developed waste disposal plans.107

Having had its plans for a new landfill to accept both local as well as out-of-state waste rejected by Magoffin County, the plaintiff sought to invalidate the local-control statute as a discriminatory restraint upon interstate commerce.108 While the court had little trouble finding the statute to be neutral on its face with respect to interstate commerce, it struggled to articulate a means of ascertaining whether the statute had been enacted with a discriminatory purpose. As the court recognized, "Where discrimination is not patent on the face of a statute, the party challenging its constitutionality has a more difficult task."109 In deciding whether the plaintiff made such a showing, the court first considered the strength of the circumstantial evidence, examining the statute's stated purpose, legislative history, and the effectiveness of the statute in carrying out its

---

104. 127 F.3d 532 (6th Cir. 1997).
105. Id. at 534-38 (citing to the challenged statutory provisions, KY. REV. STAT. ANN. §§ 224.40-315, 224.43-345 (Michie 1995)).
106. See id. at 535. This legislation was the product of an "extraordinary session" convened by then-Governor Wallace Wilkinson to consider the Commonwealth's waste disposal practices. Id. at 534. At the time the session was held in 1991, the Commonwealth was under a declared state of environmental emergency resulting from the "deplorable effects . . . of its then-current waste disposal program." Id. at 534-35.
107. Id. at 535.
108. Id. at 539. The plaintiff, offering numerous inducements to secure the county's cooperation, was initially successful in negotiating a contract with the county for construction of the landfill. See id. at 533. This approval was later retracted when the county identified "irregularities in the plan's preparation and submission." Id. at 538-39.
109. Id. at 542 (quoting C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 423 n.12 (1994) (Souter, J., dissenting)).
purported non-discriminatory purpose. Notably, the court did not directly examine the state's purported rationale for the statute. Since, however, the court found the evidence presented by plaintiff unconvincing, the court held that the plaintiff failed to carry its burden with respect to proving a discriminatory legislative purpose.

Even where the courts have adopted explicit standards to guide their inquiry into the state's motives in cases of facially neutral decisionmaking, they have failed to countenance the possibility of legitimate non-discriminatory intentions with respect to the challenged policy or decision. The superficiality of such incomplete inquiries is highlighted by the courts' recognition of the "mixed motive" problem in other areas of constitutional law. Judicial silence on this matter within the context of the dormant Commerce Clause is certainly not the result of attorneys failing to raise the issue before the courts; in fact, defense attorneys routinely argue that allegedly discriminatory statutes were enacted out of purer motives than discriminatory animus. Nor is it the fault of academicians—scholars have long made note of the presence of conflicting motivations in the passage of many regulations that affect interstate commerce.

110. See id. In conducting this inquiry, the court found the factors discussed in SDDS, Inc. v. South Dakota to be particularly apt. See id. (citing SDDS, Inc. v. South Dakota, 47 F.3d 263, 268-69 (8th Cir. 1995)).

111. See id.

112. See id. at 543. Interestingly, the court came close to recognizing that more than a showing of circumstantial evidence indicating discriminatory purpose is required for the plaintiff to meet its burden. See id. In dicta, it commented that even if the circumstantial evidence had been sufficient to raise an inference of discriminatory purpose, there was no "evidence to show that the [inflammatory rhetoric] impacted the legislature... or how the [rhetoric] led to the passage of... the challenged provisions." Id. In essence, the court hinted that the plaintiff, in proving its case, must show a causal link.

113. See, e.g., McNeilus Truck & Mfg., Inc. v. Ohio I. Montgomery, 226 F.3d 429, 444 (6th Cir. 2000) (dismissing the possibility of a legitimate motive for the challenged statute).


115. See Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 340 (4th Cir. 2001) (indicating that the state argued the statute was enacted for "neutral reasons"); SDDS, 47 F.3d at 271 (stating that the state argued that its motive was environmental protection).

116. See O'Grady, supra note 52, at 599 ("In enacting a piece of legislation [burdening interstate commerce], a legislature may be responding to a number of underlying motivations or incentives. A legislature, for example, may be motivated, solely or in part, by legitimate safety or environmental concerns.")
Nonetheless, even when pursuing a more formal inquiry into intent the courts have never explicitly considered the possibility of "mixed motives" being present in the legislative process and have rarely given much weight to such contentions.\textsuperscript{117}

Two cases are illustrative of this phenomenon. In *McNeilus Truck and Manufacturing, Inc. v. Ohio ex rel. Montgomery*, the plaintiff, an out-of-state vehicle re-manufacturer that did business in Ohio, challenged an Ohio statute requiring re-manufacturers to be located within twenty miles of their customers or have a binding service agreement with a dealer within the vicinity as a condition of licensing.\textsuperscript{118} Alleging a host of constitutional claims, the plaintiff claimed that the statute discriminated against interstate commerce, specifically out-of-state vehicle re-manufacturers.\textsuperscript{119}

While the Sixth Circuit found the statute neutral on its face, it decided that the statute was both discriminatory in its effect and in its purpose and struck it down.\textsuperscript{120} Although resting its decision primarily on the finding of discriminatory effect, the court also found the statute to have a discriminatory purpose according to the standard set out in *Pete's Brewing Co. v. Whitehead*.\textsuperscript{121} Accordingly, the court found "several letters

(footnotes omitted); see also Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, The Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 440 (1992) ("Invalidation of these state measures has occurred even though, in most of these jurisdictions, the legislative motive is not economic protectionism. The primary motive is to protect quality of life and the environment. Any impact on interstate commerce is, in most cases, truly incidental.").

\textsuperscript{117} See *McNeilus*, 226 F.3d at 444 (failing to recognize the possibility of "mixed motives"). But see *E. Ky. Res. v. Fiscal Ct. of Magoffin County*, 127 F.3d 532, 543 (6th Cir. 1997) (suggesting in dicta that the court should inquire into whether the discriminatory purpose actually affected passage of the statute); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017, 1029 (D. Minn. 1999) ("In order to prevail, Randy's must prove that the County's decisionmakers were motivated by a desire to stifle interstate commerce, and that the same decision would not have been made absent this wrongful motivation.").

\textsuperscript{118} 226 F.3d 429, 434-37 (6th Cir. 2000) (citing to the challenged statutory provisions, OHIO REV. CODE ANN. §§ 4517.02(e), 4517.12(A), 4517.12(C) (Anderson 1999)). Prior to filing suit, the plaintiff had attempted to enter into a servicing agreement with Ohio dealerships without success. *See id.* at 436. In fact, one dealer returned McNeilus's letter with the simple response, "Go to Hell." *Id.*

\textsuperscript{119} See *id.* at 437.

\textsuperscript{120} See *id.* at 443.

\textsuperscript{121} See *id.* (citing 19 F. Supp. 2d 1004 (W.D. Mo. 1998) (striking down a labeling law that was lobbied for by local producers instead of consumers)).
by in-state dealers” to legislators and the dealers’ admission that consumers had not complained about servicing arrangements with out-of-state dealers to be sufficient evidence of discriminatory purpose.\textsuperscript{122} Such a finding was made in spite of the court’s recognition that “[t]here are no doubt some legitimate state interests served by this statute” and that consumer protection was a possible motive in its passage.\textsuperscript{123}

Finally, in \textit{Waste Management Holdings, Inc. v. Gilmore}, the plaintiffs, several landfill operators and transporters of municipal solid waste, successfully challenged Virginia statutory provisions regulating the transportation and disposal of municipal solid waste as violating the dormant Commerce Clause.\textsuperscript{124} The provisions capped the amount of municipal solid waste that landfills could accept and restricted the use of barges and trucks to transport such waste.\textsuperscript{125} Apparently inspired by the closure of Fresh Kills landfill in New York and the plaintiffs’ plans to significantly increase their importation of New York waste into Virginia, the statute was enacted in April 1999.\textsuperscript{126} Facing the statute’s chilling effect on their plans, the plaintiffs filed suit, alleging a violation of the dormant Commerce Clause.\textsuperscript{127}

In its analysis, the Fourth Circuit denied summary judgment to the plaintiffs on the discriminatory effects of the statute, finding that there was a genuine issue of material fact.\textsuperscript{128}

\footnotesize
\begin{itemize}
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id. at 444.
\item \textsuperscript{125} See id at 323. The first provision capped the amount of waste that any Virginia landfill could accept. \textit{Id.} The second provision prohibited the stacking of waste containers more than two containers high on any ship, barge, or other vessel. \textit{Id.} The third provision prohibited the commercial transport of solid waste on Virginia’s navigable waterways. \textit{Id.} The fourth provision prohibited landfill operators from accepting waste from a vehicle with four or more axles without certification that the waste is free of certain substances. \textit{Id.} at 323-24. The fifth provision required that owners of such vehicles make certain financial assurances. \textit{Id.} at 324.
\item \textsuperscript{126} See id. at 323, 327. In July 1998, having learned of Fresh Kills landfill’s impending closure, Virginia State Senator Bill Bolling, the statute’s sponsor, wrote to Virginia Attorney General Mark Earley: “I am concerned that the pressure for additional importation will increase even more in the next few years. If it is legally possible to do so, I would like to introduce legislation . . . that would place restrictions on such importations.” \textit{Id.} at 326-27.
\item \textsuperscript{127} Id. at 324.
\item \textsuperscript{128} Id. at 335.
\end{itemize}
However, the court did find that the statute was passed with a discriminatory purpose.\(^{129}\) Applying the four part standard for finding discriminatory intent from *Sylvia Development Corp. v. Calvert County*,\(^ {130}\) the court rested its finding on the historical background and the sequence of events leading up to the statute's enactment.\(^ {131}\) The court focused specifically on statements evincing discriminatory intent made by the statute's sponsor as well as the governor.\(^ {132}\) Faced with such strong evidence, the court did not even consider the state's proffered justifications for the statute until its strict scrutiny analysis.\(^ {133}\) In applying that analysis, the court found that the plaintiffs were entitled to summary judgment in their favor on all but the barge provision, which raised a genuine issue of material fact with respect to whether it was the least discriminatory alternative.\(^ {134}\)

The casualness with which courts determine discriminatory motive is undoubtedly in part the result of cases such as *SDDS* and *Waste Management*, which drip with discriminatory animus.\(^ {135}\) In such cases, the preferred analysis differs little from the cursory examination typically applied in facially discriminatory cases.\(^ {136}\) Cases such as these blur the analytical lines, but more importantly distract courts from considering other legitimate motives behind the challenged statute in less clear-cut cases.\(^ {137}\) As *Eastern Kentucky* aptly noted in dicta, it

\(^{129}\) *Id.* at 336.

\(^{130}\) 48 F.3d 810, 819 (4th Cir. 1995). The four factors that *Sylvia* held to be probative of whether a state was motivated by discriminatory intent are as follows: 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; 3) the specific sequence of events leading up to the particular decision being challenged; and 4) contemporary statements made by decisionmakers on the record. *Id.*


\(^{132}\) See *id.* at 337-40. Senator Bolling and Governor Gilmore, throughout the period leading up to the statute's passage, issued many statements indicating their hostility towards out-of-state waste, including a letter from Gilmore to New York City Mayor Rudolph Giuliani stating, "Let me assure you that the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds." *Id.* at 337.

\(^{133}\) See *id.* at 340-41.

\(^{134}\) See *id.* at 344-45.

\(^{135}\) See supra notes 99-100, 12933and accompanying text.

\(^{136}\) See supra notes 92-94 and accompanying text.

is not enough to note a discriminatory motive behind the legislation—one must also find that that motive led to the passage of the statute.\textsuperscript{138} By assuming that discriminatory intent can be proven solely by reference to part of the legislative record or by some other similarly simplistic method of inquiry, the courts have foregone the necessary second part of the analysis, determining whether an adequate causal link exists between discriminatory intent and actual passage of the legislation.\textsuperscript{139}

III. THE SLEEPING DOG: THE CURRENT APPROACH AND ITS FAILINGS

While dormant Commerce Clause cases decided solely on grounds of discriminatory purpose are “relatively rare,”\textsuperscript{140} there is, nonetheless, reason to be concerned with the path taken by the courts with respect to this subset of cases. To better understand the threat of the courts’ current approach to analyzing discriminatory purpose, consider the following hypothetical: A state legislature, facing a serious waste disposal crisis within its borders, considers restrictive legislation aimed at encouraging recycling and other landfill alternatives. During the course of legislative debate on the bill, several legislators argue in favor of it, citing a desire to decrease the importation of out-of-state waste, which has increased dramatically in recent years. Ultimately, the legislation is enacted into law. The law itself is neutral on its face and regulates in-state and out-of-state waste evenhandedly.

Assuming a dormant Commerce Clause challenge to the statute, the court would likely attach significance to statements made by the legislators as evidence of discriminatory purpose.\textsuperscript{141} In contrast, if the courts’ current jurisprudence is any guide, little attention would be given to the legitimate purpose for which the legislation was actually approved.\textsuperscript{142} If considered at all, such evidence would be relegated to the perfunctory

\textsuperscript{138} See E. Ky. Res. v. Fiscal Ct. of Magoffin County, 127 F.3d 532, 542-43 (6th Cir. 1997).

\textsuperscript{139} One commentator, however, takes issue with the contention that no constitutional violation exists in the absence of the secondary, causal, showing. See Nahmod, supra note 35, at 605 (arguing that “there is a First Amendment violation in this situation”). Instead, he argues, the secondary showing should only impact the damages allowed. See id.

\textsuperscript{140} Lawrence, supra note 9, at 419.

\textsuperscript{141} See supra notes 100, 110, 122, 132 and accompanying text.

\textsuperscript{142} See supra notes 102, 111, 123, 133 and accompanying text.
inquiry made into governmental purpose after strict scrutiny has already been decided upon.\textsuperscript{143} Thus, the courts' approach could easily lead to, and indeed would seem to encourage, judicial invalidation of the statute under the dormant Commerce Clause. Assuming such a result, the courts' approach then raises several concerns for both the doctrine as well as for waste management policymaking.

First, the unprincipled approach taken by the courts raises common federalism objections to the dormant Commerce Clause as a whole. In general, the federalism critique has centered around the dubious origins of the doctrine.\textsuperscript{144} Such concerns have only been magnified by the courts' expansion of the doctrine over the last several decades. As Justice Scalia remarked in his concurring opinion in \textit{Tyler Pipe Industries v. Washington State Department of Revenue},

\begin{quote}
\textit{To the extent that we have gone beyond guarding against rank discrimination against citizens of other states... the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.} \textsuperscript{145}
\end{quote}

Other justices have echoed such concerns. For instance, Justice Thomas, in \textit{Camps Newfound/Owatonna v. Harrison},\textsuperscript{146} criticized the dormant Commerce Clause as "[having] no basis in the text of the Constitution, [making] little sense, and [having] proved virtually unworkable in application."\textsuperscript{147}

As a practical matter, this common set of misgivings about the dormant Commerce Clause has raised concern among many commentators and jurists about the doctrine's impact on state

\begin{footnotes}
\item[143] See supra notes 102, 111, 123, 133 and accompanying text.
\item[144] See, e.g., McGinley, supra note 116, at 409 ("By recognizing a constitutional principle which is not found in the text of the charter, but is said to flow from the document's negative inferences, the Court may be seen as significantly altering a federal system delicately balanced by the framers."); Redish & Nugent, supra note 61, at 573 ("[N]ot only is there no textual basis to support recognition of such a concept, but also that the dormant commerce clause actually contradicts, and therefore directly undermines, the Constitution's carefully established textual structure for allocating power between federal and state sovereigns."); see also supra notes 59-62 and accompanying text.
\item[146] 520 U.S. 565 (1997).
\item[147] Id. at 610 (Thomas, J., dissenting).
\end{footnotes}
sovereignty.\textsuperscript{148} Compounded by the fact that the dormant Commerce Clause, according to one commentator, "has proved to be one of the most prolific sources of invalidation of state laws,"\textsuperscript{149} the doctrine's uncertain constitutional standing and frequent use have contributed to a desire to rein in the Clause.\textsuperscript{150} In effect, according to this view, doctrinal uncertainty counsels even more strongly in favor of judicial deference to state legislation.\textsuperscript{151}

Viewed in this context, the courts' discriminatory purpose jurisprudence is clearly subject to indictment under the principles of federalism. Where, as in the hypothetical, the courts' approach allows for a discriminatory purpose to be found when another more legitimate purpose motivated passage of the statute, the current jurisprudence is a direct affront to state sovereignty, for it fails to respect legitimate state policymaking.\textsuperscript{152} Since the case law does nothing to ensure that a legitimate statute will be upheld against a dormant Commerce Clause challenge, it threatens to inflame federalism sensibilities more moderate than those of Justices Scalia and Thomas.\textsuperscript{153} As the courts take greater notice of such arguments in this more federalism-conscious jurisprudential era,\textsuperscript{154} the dormant Commerce Clause, as a whole, will be rendered more vulnerable to the larger criticisms made by those who oppose the

\textsuperscript{148} See, e.g., Dinan, supra note 8, at 181-85 (noting that a growing number of Supreme Court justices are disturbed by the federalism implications of dormant Commerce Clause cases); Heinzerling, supra note 88, at 276 (describing application of the Clause as "a Lochner-style incursion on [state] legislative autonomy"); Lawrence, supra note 9, at 398-99 (arguing that current doctrinal uncertainty with respect to the Clause infringes upon basic state sovereignty); McGinley, supra note 116, at 440 (suggesting that the dormant Commerce Clause's "impact on federalism . . . principles is significant indeed").

\textsuperscript{149} Dinan, supra note 8, at 181.

\textsuperscript{150} See id. at 183-85 (stating that Scalia and other federalist jurists believe that the doctrine should be substantially limited or eliminated altogether); see also supra note 144 and accompanying text.

\textsuperscript{151} See Dinan, supra note 8, at 183; see also supra note 144 and accompanying text.

\textsuperscript{152} See Dinan, supra note 8, at 183 (commenting that Scalia believes any additional requirements to be an undue burden on state policymaking).

\textsuperscript{153} See Lawrence, supra note 9, at 398 (stating that the doctrine's uncertainty as to what violates the dormant Commerce Clause "disturb[s] in a basic sense [state] sovereignty"); see also supra notes 144, 148 and accompanying text.

\textsuperscript{154} See Dinan, supra note 8, at 181 ("The distinctive aspect of the Rehnquist Court's approach to Dorman Commerce Clause cases is that several justices have begun to call attention to the federalism implications of these cases . . . ").
Besides diminishing state sovereignty, the courts' current approach threatens the doctrine's overall legitimacy as an instrument of controlling protectionist impulses. While some commentators see the dormant Commerce Clause as a mere redundancy, made irrelevant by federal preemption, the Clause undoubtedly possesses some degree of utility as a check on economic protectionism. After all, it was the federal courts, not Congress or the administrative agencies, that prevented bitter interstate disputes in *Waste Management* and other similar cases from escalating into greater conflicts. The doctrine's continued efficacy in this regard, however, depends on its ability to effectuate the Framers' intent. Just like a rule that has deserted its rationale over the course of many subsequent applications, a doctrine that abandons its purpose is destined to be disregarded—after all, *stare decisis* cannot be relied upon to preserve a vestige forever.

If the dormant Commerce Clause is to avoid such a fate, it must stay reasonably true to its judicially ascribed purpose. As discussed in Part II, the courts created the doctrine out of their understanding of the Framers' desire to prevent economic protectionism of the type that doomed the Articles of Confederation. The specter of this protectionism today can generally be found in two different settings: where a statute either intentionally discriminates against or disparately affects out-of-state interests. Thus, the dormant Commerce Clause only has le-

---

155. *See* Farber, *supra* note 10, at 407 (“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.”); *see also* Redish & Nugent, *supra* note 61, at 594-99 (finding congressional oversight of state enacted protectionist legislation to be preferable to judicial oversight under the dormant Commerce Clause).

156. *See* O'Grady, *supra* note 52, at 576 (contending that the Clause is useful in guarding against economically protectionist measures). *But see* Farber, *supra* note 10, at 411 (arguing that “vigorous judicial review is probably not needed to keep states from blockading the national economy”).

157. *See supra* notes 124-34 and accompanying text.

158. *See* Farber, *supra* note 10, at 411 (noting that *stare decisis* has been no hindrance to the Supreme Court in “overruling outmoded cases” within the Commerce Clause).

159. *See supra* notes 65-68 and accompanying text.

160. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (stating the dormant Commerce Clause's rationale as being the prohibition of "state or municipal laws whose object is local economic protectionism" and "laws that impose commercial barriers . . . against an article of commerce
According to this view of the Clause's purpose, the courts' confused approach to determining discriminatory purpose allows for the illegitimate application of the dormant Commerce Clause. Again, the hypothetical described above provides an example of a situation in which the courts' approach could leave the overall doctrine subject to attack. To the extent that their discriminatory purpose jurisprudence allows for the invalidation of statutes that discriminate neither intentionally nor in effect, the courts have rendered the doctrine illegitimate in its application.

Even under a more circumscribed view of the dormant Commerce Clause's underlying purpose, the courts' approach is plainly illegitimate. Having rejected the free trade rationale for the dormant Commerce Clause, several commentators have suggested that the doctrine's only concern should be with statutes that intentionally discriminate against out-of-state interests. Such a position shows even less tolerance for judicial overreaching of the kind in which the courts have engaged with respect to finding discriminatory purpose. Regardless of how one conceives of the doctrine and its proper limits, one reaches the same conclusion—the courts' recklessness threatens the overall legitimacy of the dormant Commerce Clause.

This betrayal of purpose is needlessly harmful. Taken together with the federalism concerns, the courts' illegitimate
application of the clause provides those who would dismantle it with powerful arguments that some day could prove convincing enough to curtail or seriously cripple the doctrine's utility.

Beyond the problems created for the overall doctrine, the courts' failure to ensure that a causal link exists between discriminatory purpose and enactment threatens a more serious consequence—bad policymaking. Specifically, it threatens to unnecessarily restrict the states' police power to regulate matters affecting the public health, safety, and welfare.\textsuperscript{165} By allowing courts to overreach in finding a discriminatory purpose, the current jurisprudence encourages invalidation of otherwise valid state environmental and land use statutes.\textsuperscript{166} The hypothetical provides an example of such a situation: A dormant Commerce Clause challenge to the hypothetical statute would invalidate legislative efforts to fashion a responsive solution to the state's waste crisis. As Chief Justice Rehnquist has noted, the current approach to the dormant Commerce Clause "cranks the dormant Commerce Clause ratchet against the States ... and by doing so ties the hands of the States in addressing the vexing national problem of . . . waste disposal."\textsuperscript{167}

Not only does the uncertainty surrounding the courts' standard for finding discriminatory purpose allow for case-by-case invalidation of legitimately enacted local environmental policies, but it also chills legislation in such areas.\textsuperscript{168} In the

\textsuperscript{165} See Davies, supra note 62, at 278-79 ("When Congress is relying on state sovereignty, and the Supreme Court is eroding that autonomy, a double whammy . . . ensues: less state autonomy and less environmental protection overall."); Lawrence, supra note 9, at 398 ("Under the current doctrine, lawmakers and others at the state level are left with far too little idea of which state laws will . . . withstand judicial scrutiny. This . . . hinders States' efforts to regulate matters within their own borders . . . ."); see also Earl M. Maltz, The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy, 19 HARV. J.L. & PUB. POL'Y 121, 145 (1995) ("Dormant Commerce Clause analyses should give substantial weight to the value of state autonomy. Unfortunately, the Court often has failed to recognize the importance of this consideration. As a result, national uniformity has become almost a fetish and the virtues of local control often have been undervalued.").

\textsuperscript{166} See supra note 152 and accompanying text.

\textsuperscript{167} Or. Waste Sys. v. Dept. of Envtl. Quality, 511 U.S. 93, 109 (1994) (Rehnquist, C.J., dissenting); see also Dinan, supra note 8, at 183-85 (noting the Supreme Court's recent federalism critique of the dormant Commerce Clause).

\textsuperscript{168} See Lawrence, supra note 9, at 398-99; see also Farber, supra note 10 at 414 ("Because the outcomes of the cases are so unpredictable, the doctrine may well have a chilling effect on legitimate state regulation.").
words of one commentator, "A state that is uncertain about the limits of its authority in regulating activity that might affect interstate commerce may be hesitant to enact novel and possibly visionary laws out of fear that they will be struck down in court." 169 As always, fear of litigation in an unsettled area of the law is a powerful deterrent to legislative experimentation. 170

Thus, the courts' approach to ascertaining whether a statute discriminates in purpose against interstate commerce poses a number of threats. It threatens immediate state efforts to regulate the local environment and land use, while rendering the dormant Commerce Clause as a whole more vulnerable to future criticism. When closely examined, the courts' approach is exposed as a method devoid of any internal consistency, sense, or policy concern.

IV. AWAKENING THE DOG: APPLYING THE MT. HEALTHY STANDARD TO THE DORMANT COMMERCE CLAUSE

*Mt. Healthy* takes a markedly different approach to determining discriminatory purpose. 171 Instead of focusing solely on the presence of an invidious purpose, the Court held that purpose must be the causal factor for the action complained of by the plaintiff. 172

While the *Mt. Healthy* standard suggests a possible alternative to the current confusion, it is necessary to ask whether such a doctrine would be feasible within the context of the dormant Commerce Clause, and if so, whether it successfully addresses the criticism of the current approach discussed in Part III. In meeting these concerns, the *Mt. Healthy* standard does in fact provide a superior alternative to the current approach to ascertaining whether a statute discriminates in its purpose against interstate commerce.

A. APPLICATION OF THE MT. HEALTHY STANDARD TO THE DORMANT COMMERCE CLAUSE

As a practical matter, there appear to be no significant im-

---

169. See Lawrence, *supra* note 9, at 398-99.
170. See *id*.
172. See *id*.
AWAKENING A SLEEPING DOG

pediments to the application of the *Mt. Healthy* standard to the dormant Commerce Clause. First, there is no principled distinction between the different constitutional settings arguing against the further extension of the approach. In *Mt. Healthy*, the Court emphasized that the secondary causal inquiry into discriminatory intent was necessary so as not to command "undesirable consequences not necessary to the assurance of [constitutional] rights." This rationale is equally applicable within the context of the dormant Commerce Clause. In that setting, the requirement of a causal inquiry would ensure that no statute was invalidated which was not in fact motivated by a discriminatory purpose. Since invalidations of non-discriminatory statutes are undesirable and serve no purpose with respect to the dormant Commerce Clause, the same rationale justifies the extension of the *Mt. Healthy* standard.

Even if no principled distinction exists between the dormant Commerce Clause and other settings in which the *Mt. Healthy* standard has been applied, detractors still might argue that the standard would be difficult to implement within the context of the dormant Commerce Clause because of the inscrutability of legislative intent. This argument, however, does not go far enough. First, the difficulty of ascertaining motive is not unique to the dormant Commerce Clause; the same critiques have been made of Equal Protection Clause cases and others employing the *Mt. Healthy* standard. Yet, as one commentator notes, the "problems of proof... have not proved insurmountable" in those settings. Second, with the possible exception of public referenda, legislative intent is easier to

173. *See* Farber, *supra* note 10, at 403 ("[T]he dormant commerce clause serves a function much like that of the equal protection clause."). But see Metro Life Ins. Co. v. Ward, 470 U.S. 869, 876 n.6 (1985) ("The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests."). This distinction, however, does not counsel against application of *Mt. Healthy*. In both contexts, the trier must still find that a discriminatory purpose motivated the state action.

174. 429 U.S. at 287.

175. *See* Farber, *supra* note 10, at 405 (stating a common objection that [f]ew states [would] be foolish enough to adopt facially discriminatory statutes.").

176. *See id.* at 404-05.

177. *Id.* at 405.

178. As SDDS, Inc. v. South Dakota indicates, there is usually only a sparse record from which to infer the intent of the electorate in approving referenda. 47 F.3d 263, 266 (8th Cir. 1995) (focusing on state-issued campaign
ascertain than the intent of non-institutional actors. This is for the simple reason that legislative actors at least leave a record to assist the judicial fact-finder in determining motive.\textsuperscript{179} Finally, if doubts persist, the \textit{Mt. Healthy} approach places the burden of disproving a discriminatory motivation on the defendant.\textsuperscript{180} Such an approach gives the plaintiff the benefit of any doubt concerning legislative motivation and eliminates any serious concern about the practical application of the \textit{Mt. Healthy} standard to the dormant Commerce Clause.


Having addressed the practical concerns about applying the \textit{Mt. Healthy} standard to the dormant Commerce Clause, it is necessary to examine whether this alternative is any more successful in addressing the criticism leveled against the courts' current approach.

The hypothetical described in Part III illustrates the advantages of the \textit{Mt. Healthy} approach in comparison to the current tack taken by the courts. Under both approaches, the initial step of analysis under the dormant Commerce Clause would be very similar, if not the same: The plaintiff would carry the initial burden of proving that the intent to discriminate against out-of-state waste was a "substantial" or "motivating" factor in the legislature's passage of the statute.\textsuperscript{181} In meeting this burden, the plaintiff, like the plaintiff in \textit{Waste Management}, could provide evidence of the statements made evincing such intent and the sequence of events leading up to

\textsuperscript{179} That being said, the traditional caveat concerning the difficulties of ascertaining collective intent from often individualized accounts of legislative history should be noted. See Holder v. Hall, 512 U.S. 874, 932 n.28, 933 (1994) (Thomas, J., concurring) (stating that legislative history consists of "a series of partisan statements about purposes and objectives collected by congressional staffers and packaged into a committee report" and should only be consulted as an interpretive device "when the text of a statute is "inescapably ambiguous" (quoting Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring)).

\textsuperscript{180} 429 U.S. at 287.

\textsuperscript{181} \textit{Compare id.} (requiring the plaintiff to show discriminatory intent was a "substantial" or "motivating" factor), with \textit{Waste Mgmt. Holdings, Inc. v. Gilmore}, 252 F.3d 316, 336 (4th Cir. 2001) (requiring the plaintiff to show that the decisionmaking body was motivated by discriminatory intent).
Assuming the sufficiency of such a showing, the two approaches would then diverge. Under the current approach, no further inquiry would be required; discriminatory purpose would be proven conclusively, and the court would proceed under the presumption of per se invalidity. If the Mt. Healthy approach were applied, however, the burden would then shift to the defendant state to prove that it would have enacted the statute regardless of an economic protectionist motive. Here, the state could present evidence of its waste disposal crisis, its strong and legitimate desire to encourage recycling, and its evenhanded regulation of in-state and out-of-state interests. Assuming, again, the sufficiency of such a showing, the Mt. Healthy approach would uphold the statute as a legitimate exercise of state regulatory power.

The additional step taken by the Mt. Healthy approach allows it to address the doctrinal and policymaking concerns raised by the courts’ current approach. First, it immunizes the dormant Commerce Clause doctrine to a certain extent from its harshest criticism. While it would not eliminate the non-textual basis for the doctrine, it would diminish the federalism argument that the doctrine undervalues state sovereignty. No such argument is possible where the state is allowed to affirmatively prove that its policy was in fact motivated by legitimate policy concerns. Compared to the current approach, which does not examine such evidence until the statute’s invalidity has been already presumed, the Mt. Healthy approach accords legitimate state policymaking the respect it deserves.

Second, as illustrated by the hypothetical, the Mt. Healthy standard also possesses an advantage over the current standardless approach because it addresses the concurrent issue of legitimacy. While the current approach only evaluates the substantiality of a discriminatory purpose, the alternative takes the second step of ensuring that that purpose was in fact what motivated the statute’s passage. By doing so, the application of Mt. Healthy invalidates only those statutes that are truly discriminatory in purpose. Thus, unlike the courts’ current approach, it uses the doctrine in a manner true to its legitimate

182. See 252 F.3d at 336.
183. See id. at 341 (concluding that the decisionmaking body was motivated by discriminatory purpose and applying strict scrutiny analysis).
184. See 429 U.S. at 287.
185. See supra notes 102, 111, 123, 133 and accompanying text.
purpose of proscribing discrimination against interstate commerce

Finally, and perhaps most importantly, extension of the Mt. Healthy standard to the dormant Commerce Clause answers the practical policymaking concerns raised by the current approach. As the hypothetical demonstrates, the less rigorous current approach, by undervaluing legitimate local policymaking, is more likely to transfer actual regulatory power from the states to the federal courts. This is less likely to be the case with the Mt. Healthy approach, as it is more deferential to local prerogatives.

Additionally, through its standardized application, the Mt. Healthy standard is less likely to discourage state regulation in areas touching upon interstate commerce. Decreasing the constitutional uncertainty surrounding policymaking in areas of waste management and land use will allow for the creative legislation those areas desperately demand.186 Thus, the Mt. Healthy standard satisfactorily addresses concerns with the current approach and presents itself as a legitimate alternative.

CONCLUSION: "DON'T LET A SLEEPING DOG LIE"

The courts have taken a woefully dysfunctional approach to the discriminatory purpose prong of the current dormant Commerce Clause analysis. The most recent cases demonstrate a scattershot approach to determining the presence of a discriminatory purpose, one made particularly dangerous by the courts' lack of concern for whether such purpose actually motivated the challenged state action.

Moreover, this is not harmless error. The courts' failure to recognize the distinction between discriminatory and nondiscriminatory motives raises the possibility of judicial invalidation of legitimate state legislation. Furthermore, the courts' lack of concern for such a possibility renders it subject to attacks on federalist and legitimacy grounds, while threatening to chill state environmental and waste management policymaking. These are telltale signs of a doctrine in need of change.

While the court's current approach poses serious problems for the doctrine as well as the states burdened by the courts'

186. See Redish & Nugent, supra note 61, at 598 (arguing that state legislative experimentation would increase if judicial invalidation of such legislation decreased).
potential overreaching, these concerns would be satisfactorily addressed if courts were to adopt the approach embraced in other constitutional settings, as typified by the *Mt. Healthy* and *Lesage* cases. By also inquiring into whether the discriminatory purpose was the "but for" cause of the statute's passage, the *Mt. Healthy* approach would cure the complained-of defects in the courts' current approach. It would minimize criticism of the doctrine's overall legitimacy by restricting invalidation to those situations in which a statute can truly be said to have had a discriminatory purpose, according legitimate state legislation the respect it deserves. Without this necessary second part of the analysis, the courts have done worse than Holmes's dog: They have rendered themselves incapable of detecting whether interstate commerce was "kicked," or merely "stumbled over."