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**The Dowling Thesis Revisited: Professor
Dowling and Justice Scalia**

by

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THE DOWLING THESIS¹ REVISITED: PROFESSOR DOWLING AND JUSTICE SCALIA

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I. INTRODUCTION

The status of the dormant Commerce Clause doctrine has been the topic of litigation and controversy for over one hundred and eighty years. Inquiries into the dormant Commerce Clause's textual existence, or lack thereof, its historical background, along with its policy goals have been highly scrutinized. Article I, Section 8, of the United States Constitution bestows an affirmative power to Congress, which states in pertinent part: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." ² In reviewing the language of Article I, Section 8, nowhere in the text does the dormant Commerce Clause doctrine have any explicit reference or origin. ³ However, through the negative Constitutional implications of the dormant Commerce Clause, a doctrine has evolved that, in application, limits the amount of state interference with that of interstate commerce. ⁴ The United States Supreme Court has therefore "advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." ⁵

1. Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940) (initiating the evolutionary process that crafted the balancing test, which is now referred to as the *Pike* test, or Undue Burden standard; the *Pike* test is the current test which the United State Supreme Court applies to questions regarding non-discriminatory state regulation that places an undue burden on out-of-state economic interests, and is also known as the non-discrimination tier of the dormant Commerce Clause). See David S. Day, *Revisiting Pike: The Origins of the Non-Discrimination Tier of the Dormant Commerce Clause Doctrine*, 27 HAMLINE L. REV. 46 (2004) (detailing and reevaluating the undue burden standard handed down in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

2. U.S. CONST. art. I, § 8, cl. 3.

3. *Id.*; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2, at 1029 (3d ed. 2000); see John B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 561-62 (1936) (questioning why the Framers of the Constitution did not expressly prohibit discriminatory state action).

4. TRIBE, *supra* note 3, at 1030 n.8 (citing *New York v. United States*, 505 U.S. 144, 171 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 359 (1992); *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992); *Dennis v. Higgins*, 498 U.S. 439, 446 (1991)). See generally MARK V. TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 228-29 n.98 (Princeton University Press 2003) ("The idea of preemption in the Constitution remained an important part of constitutional law in the guise of the dormant commerce clause [I]t is said that that doctrine has two branches, one barring states from enacting statutes that discriminate . . . and the other barring unacceptably high burdens on interstate commerce.").

5. *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949) (reversing the decision of the Court of Appeals of New York in its denial of a license to operate a milk plant, which violated the dormant Commerce Clause).

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given

This Note will begin with an overview of Professor Noel T. Dowling's famous *Virginia Law Review* article that has helped shape dormant Commerce Clause jurisprudence. Throughout the review of Mr. Dowling's work, four theories that have, at one time or another, been recognized in the United States Supreme Court will be addressed. In addition, an outline of each theory and its accompanying case law will be discussed. Following the synopsis of the Court's four theories is Mr. Dowling's prediction of what is to come in the future with regard to the state of the dormant Commerce Clause. Although Mr. Dowling's forecast of the dormant Commerce Clause was asserted over sixty years ago, his thesis will be applied to the current Court's interpretation of the dormant Commerce Clause. In support of Professor Dowling's proposition, five additional assertions stemming from his article will accompany the analysis section of this review, which will assert "that in the absence of affirmative consent a Congressional negative will be presumed in the courts against state action which in its effect upon interstate commerce constitutes an unreasonable interference with national interests"⁶ Lastly, this Note will review Justice Scalia's formalistic approach and its legal realist counterpart, and address an alternative argument supporting the dormant Commerce Clause – the political process.

II. PRIOR DORMANT COMMERCE CLAUSE JURISPRUDENCE: FOUR THEORIES

Throughout dormant Commerce Clause jurisprudence, four theories have served as the bases for the United States Supreme Court's doctrine.⁷ Detailed below are the four theories which Professor Dowling recognized in shaping the dormant Commerce Clause.⁸ Along with the four theories is the accompanying case law.⁹

A. PROHIBITION ON ALL STATE REGULATION OR TAXATION

The first theory handed down in the course of dormant Commerce Clause jurisprudence, which has had an effect on a state's power, asserted "[t]hat the clause impliedly prohibits all state regulation or taxation of interstate

to these great silences of the Constitution.

Id. at 534-35.

6. Dowling, *supra* note 1, at 20. A dormant Commerce Clause doctrine following such constructs would free the several states from constitutional disability,

but at the same time would not give them license to take such action as they see fit irrespective of its effect upon interstate commerce With respect to such commerce, the question whether the states may act upon it would depend upon the will of Congress expressed in such form as it may choose. State action falling short of such interference would prevail unless and until superseded or otherwise nullified by Congressional action.

Id. See also *id.* at n.30 (reaching the same result with alternative arguments).

7. *Id.* at 2-3. In the course of implementing one of the four theories, the Court has employed the doctrine through majority opinions, or utilized any of the particular theories to advance separate opinions through concurrences and dissents. *Id.*

8. *Id.*

9. *Id.* at 2-8.

commerce”¹⁰ This first theory was launched in two seminal United States Supreme Court cases, which were *Gibbons v. Ogden*¹¹ and *Brown v. Maryland*.¹²

In *Gibbons v. Ogden*, the New York Legislature granted the entire state’s navigation rights exclusively to Robert R. Livingston and Robert Fulton.¹³ Aaron Ogden obtained Mr. Livingston and Mr. Fulton’s exclusive navigation rights by assignment and, thereafter, sought to enjoin Thomas Gibbons from operating a competing navigation service.¹⁴ Mr. Gibbons’ service operated between New York City, New York, and Elizabethtown, New Jersey.¹⁵ In asserting his right to engage in commerce, Mr. Gibbons contended that the Federal Licensing Act and the Commerce Clause protected the right to participate in the “coasting trade.”¹⁶

The New York State courts upheld the state law in favor of Mr. Ogden.¹⁷ Further, Mr. Ogden’s monopoly in the “coasting trade” was held to be constitutional and, in so holding, the court granted the injunction against Mr. Gibbons.¹⁸ However, the United States Supreme Court reversed, declaring, per Chief Justice Marshall, that “[t]he power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.”¹⁹ The issue that the Court was faced with was determining whether a state regulation could withstand constitutional muster.²⁰ As Professor Dowling observed, “the narrow holding was that the Act of Congress prevailed over the inconsistent regulation of the New York statute.”²¹

Three years after *Gibbons*, the United States Supreme Court was faced with the case of *Brown v. Maryland*, which dealt with another form of state sponsored control – taxation.²² In *Brown v. Maryland*, the State Legislature of Maryland promulgated a statute that imposed a fifty dollar tax on foreign (out of state) goods.²³ Again, like the lower courts in *Gibbons*, the Maryland state courts

10. *Id.*

11. 22 U.S. (9 Wheat.) 1 (1824).

12. 25 U.S. (12 Wheat.) 419 (1827). The effect of the aforementioned cases should be recognized by every legal scholar and lawyer challenging or defending the dormant Commerce Clause.

13. 22 U.S. (9 Wheat.) at 1-2.

14. *Id.* at 2.

15. *Id.*

16. *Id.* at 1 (arguing that the Commerce Clause protects the rights of those “carrying on the coasting trade”).

17. *Id.* at 2-3. “[T]he Chancellor perpetuated the injunction, being of the opinion, that the said acts were not repugnant to the constitution and the laws of the United States, and were valid.” *Id.* at 3.

18. *Id.*

19. *Id.*

20. See generally *id.* at 1-3.

21. Dowling, *supra* note 1, at 4. See also *id.* at 3-4 (recognizing, however, that the Court did not need to “decide whether the power of the states was surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power, for the reason that the power had been exercised, and the regulations which Congress deemed it proper to make were in full operation”).

22. 25 U.S. (12 Wheat.) 419, 419-20 (1827).

23. *Id.* The piece of legislation passed in 1821 by the Maryland Legislature was entitled, ““An act supplementary to the act laying duties on licenses to retailers of dry goods, and for other purposes.”” *Id.*

upheld the state taxation law and, therefore, entered a judgment against the defendants for failing to pay the state tax.²⁴

The United States Supreme Court reversed, holding that through “the constitution of the United States, the power of taxation by the States is restrained, by express words”²⁵ As such, the Court denied the power to tax in two ways:

[F]irst, because the power exerted by the law in question is that of regulating commerce with foreign nations, and among the several States, which the Court has determined to be exclusively vested in Congress. Secondly, because it was that of laying an impost, or duty on imports, without the consent of Congress [sic].²⁶

Moreover, as to state taxation, the Court applied the doctrine that had been established in *McCulloch v. Maryland*.²⁷ In *McCulloch v. Maryland*, the State of Maryland imposed a state tax on a federally created bank for the sole purpose of retaliating against the federal government.²⁸ Although the States have the

at 419. The portion of the Act in question provided in relevant part:

That all importers of foreign articles, or commodities, of dry goods, wares, or merchandises, by bail or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c. and other persons selling the same by whole sale, bale, or package, hogshead, barrel, or tierce, shall, be fore they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act, to which this is a supplement.

Id. at 419-20. The original Act prescribed a one-hundred dollar fine and a forfeiture of the license tax. *Id.* at 420.

24. *Id.* at 420. “[A] judgment was rendered upon the demurrer against [Brown], in the City Court, which was affirmed in the Court of Appeals, and the case was brought, by writ of error, to this Court.” *Id.*

25. *Id.* at 430. In making reference to the Federalist Papers, Chief Justice Marshall explained:

One of the avowed objects for conferring the power of regulating commerce upon Congress, was that of raising a revenue for the support of the national government. It was foreseen, that the prosperity of commerce would best be promoted by uniform regulations contained in the laws and treaties of the Union; and it was also foreseen, that an impost was that species of taxation best suited to the genius and habits of the American people. But if the power now in question may be exercised by one State, it may be exercised of all; and the principal source from which the revenues of the Union were to be derived, will be dried up, or diverted to local purposes. In short, it was insisted, that all the evils for which the constitution was intended to provide an effectual remedy, would be entailed upon the country, by confirming the validity of such State laws as the act now in question.

Id. at 434-36; see The Federalist No. 11, 12 (Alexander Hamilton).

26. *Brown*, 25 U.S. (12 Wheat.) at 433.

27. 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall, again, declared the opinion of the Court when he opined:

[T]he constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand [i.e., by a state government], is hostile to, and incompatible with these powers to create and to preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

Id. at 426.

28. *Id.* at 318-22. The Maryland Legislative Act stated in relevant part:

[T]he president, cashier, each of the directors and officers of every institution established, or to be established as aforesaid, offending against the provisions aforesaid, shall forfeit a sum of \$500 for each and every offence [sic], and every person having any agency in circulating any

inherent power to impose taxes, the Court held that Maryland's efforts to thwart or impede federal exercises of power were improper.²⁹

[Here] the doctrine, . . . that there is a 'total failure' of power in the states to tax the operations of a federal instrumentality[,] was brought over and declared to be 'entirely applicable' to state taxation of foreign and interstate commerce. And as late as 1887 *Robbins v. Shelby County* was saying that a state cannot tax interstate commerce at all.³⁰

Additionally, as put forth by Chief Justice Marshall, "the power to tax involves the power to destroy."³¹ Thus, under the Court's rationale in *Brown v. Maryland*, the Court has fully committed itself to the first theory – "the [commerce] clause impliedly prohibits *all* state regulation or taxation of interstate commerce."³²

B. NOTHING PROHIBITED UNDER THE CLAUSE

Professor Dowling's second theory entertained with regard to the effect the commerce clause has had on state power is "[t]hat the clause prohibits nothing, the states being free to regulate and tax as they see fit unless and until they are stopped by Congressional action"³³ Of particular importance to the second Dowling theory are the decisions handed down in *The License Cases*.³⁴ *Thurlow v. Massachusetts*, *Fletcher v. Rhode Island*, and *Pierce et al. v. New Hampshire* are commonly referred to as *The License Cases*.³⁵ Each case represented a challenge upon state law which required liquor distributors in possession of less than a prescribed amount of liquor to obtain liquor licenses from their respective states before being considered a retailer.³⁶ At the state level the defendants were indicted and convicted for selling liquor without a license.³⁷ The United States Supreme Court affirmed each state's opinion.³⁸ Chief Justice Taney, in an opinion written in consideration of all the cases, declared in relevant part:

[A] State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the

note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not exceeding \$100 every penalty aforesaid, to be recovered by indictment, or action of debt, in the county court of the county where the offence [sic] shall be committed, one-half to the informer, and the other half to the use of the state.

Id. at 321-22.

29. *Id.* at 326-27.

30. Dowling, *supra* note 1, at 4.

31. *McCulloch*, 17 U.S. (4 Wheat.) at 431.

32. Dowling, *supra* note 1, at 2 (emphasis added).

33. *Id.* at 2.

34. 46 U.S. (5 How.) 504 (1847).

35. *Id.* Interestingly, at that point in time, Chief Justice Taney was the presiding Justice of the United States Supreme Court; Chief Justice Taney was Chief Justice Marshall's successor. TRIBE, *supra* note 3, at 1045. Chief Justice Taney carried with him a different view of what powers the Commerce Clause possessed. *Id.*

36. *The License Cases*, 46 U.S. (5How.) at 505.

37. *Id.*

38. *Id.* at 633.

passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself.³⁹

Accordingly, “the Commerce Clause [has] left states free to regulate interstate commerce as they pleased so long as their actions did not conflict with validly enacted federal legislation.”⁴⁰

The theory asserted in Chief Justice Taney’s opinion did not win the majority of the votes within the Court. However, there was conformity as to the conclusion his opinion led to.⁴¹ “In general, this view would remove the commerce clause from judicial consideration.”⁴² Moreover, according to Dowling, “[t]here would be nothing for the Court to do on the subject of the validity of a state law, assuming of course that it violated no other provision in the Constitution and collided with no national action.”⁴³ In application, this view would only permit negative implications inherent in the dormant Commerce Clause to occur when Congress employed its power to preempt a state law that was in conflict with an exercise of its own lawful authority.⁴⁴

39. *Id.* at 577 (Taney, C.J., concurring). Chief Justice Taney continued in his opinion to grant absolute power to the several States until and unless an Act of Congress explicitly prohibits a State from enacting a particular piece of legislation. In further support of his proposition Chief Justice Taney expounded:

[I]n my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such evidently I think was the construction which the constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States.

Id. at 579.

40. TRIBE, *supra* note 3, at 1045 (commenting on the different views held within the Court concerning the Commerce Clause and, further, how Chief Justice Taney’s anti-Madisonian perspective has still been recognized as viable); *The License Cases*, 46 U.S. (5 How.) at 573 (Taney, C.J., concurring). Also, to provide additional clarity, the Court did not issue a joint opinion; rather, six Justices wrote separately. *Id.* at 505. For purposes of this article, Chief Justice Taney’s opinion will be the only opinion dealt with. *Id.* at 573.

41. See *The License Cases*, 46 U.S. (5 How.) at 573. “The Justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments.” *Id.*

42. Dowling, *supra* note 1, at 4; see, e.g., *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). “Weighing the governmental interest of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, and ‘ill suited to the judicial function . . .’” *Id.* (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring)). Justice Scalia “would therefore . . . leave essentially legislative judgments to the Congress.” *Id.*

43. Dowling, *supra* note 1, at 4.

44. TRIBE, *supra* note 3, at 1045. Dowling noted, moreover, that the “presence of an Act of

C. SOME PROHIBITION OF STATE REGULATION UNDER THE CLAUSE

The third Dowling theory brought to bear is “[t]hat the clause prohibits some, but not all, state regulation and taxation – that is, sometimes it prohibits and sometimes it does not”⁴⁵ In reviewing the proposed theories an obvious observation arises in that the third view is a composite of the first and second theories.⁴⁶ Consequently, in *Cooley v. Board of Wardens of Port of Philadelphia*,⁴⁷ the United States Supreme Court arrived at its first definite stance when analyzing issues arising under the commerce clause.⁴⁸

The case of *Cooley* stemmed from the implementation of pilotage fees.⁴⁹ The Pennsylvania State Legislature enacted a statute that required vessels departing or arriving at the Port of Philadelphia to “receive a pilot.”⁵⁰ If the vessel refused to take on a pilot, the vessel would be responsible for paying half of the mandated pilotage fee.⁵¹ The Pennsylvania Pilotage Act was challenged in the United States Supreme Court on the grounds that it violated the dormant Commerce Clause.⁵² As to the state pilotage law, the challenge was unsuccessful in the Pennsylvania state court system.⁵³

Upon review, the United States Supreme Court affirmed the Pennsylvania Supreme Court and prior trial court decisions.⁵⁴ The Court, per Justice Curtis, declared that the “act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states”⁵⁵ Additionally, and perhaps more importantly, the Court struck down a congressional statute, which purportedly permitted states to enact this form of legislation.⁵⁶ However, the Court opined that regulations of such a

Congress might give rise, as it did in *Gibbons v. Ogden*, to questions concerning its interpretation and the reconciliation of state laws with it, but that would be a statutory inquiry.” Dowling, *supra* note 1, at 4.

45. Dowling, *supra* note 1, at 2-3.

46. *Id.* at 4.

47. 53 U.S. (12 How.) 299 (1851).

48. Dowling, *supra* note 1, at 4. “The third view, a compromise between the two earlier views, represents the first definite position taken by the Court on the commerce clause” *Id.*

49. *Cooley*, 53 U.S. (12 How.) at 311.

50. *Id.* The statute promulgated in the Pennsylvania State Legislature stated in pertinent part: “That every ship or vessel arriving from or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot” *Id.*

51. *Id.* “And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to the warden aforesaid, a sum equal to the half-pilotage of such ship or vessel” *Id.*

52. *Id.* at 301.

53. *Id.* at 300. The Pennsylvania Supreme Court held in favor of the pilotage, affirming the judgment of the lower court. *Id.*

54. *Id.* at 327.

55. *Id.* at 319 (asserting, further, that “[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress”).

56. *Id.* “[T]he nature of this subject is . . . local and not national” *Id.*

nature were more of a “local” character, rather than a “national” concern.⁵⁷

Thus, under the *Cooley* theory, the Court could now assert that a “state may or may not regulate interstate commerce depending upon whether the ‘subjects of this power’ are ‘local’ or ‘national.’”⁵⁸ If the subjects of this power were local, then the states were free to regulate until Congress acted otherwise.⁵⁹ If the subjects of this power were national, then Congress could step in and regulate.⁶⁰ Here, and of seminal importance, a balancing test was born in which the Court could consistently adopt and apply to inquiries involving the dormant Commerce Clause.⁶¹

On the face of the opinion the principal inquiry centered on the need for uniformity of regulation, the determination of which involved (the Court did not enlarge upon the point) at least some weighing of the advancement of local interests as against interference with national interests. And at this stage there was distinctly a job for the courts to do.⁶²

D. THE CLAUSE PROHIBITS NOTHING EXCEPT FOR CONGRESSIONAL IMPEDIMENTS THAT ARISE

The fourth and final Dowling theory contained elements of both the second and third theories, which is “[t]hat though the clause itself prohibits nothing an impediment may arise from the express or implied will of Congress.”⁶³ The fourth concept was announced in the 1890 case of *Leisy v. Hardin*.⁶⁴ In *Leisy*, a cause of action was filed for replevin of several barrels and cases of beer, which were seized from the owners.⁶⁵ The Supreme Court of Iowa held in favor of the state, proclaiming that the statute in question was a valid exercise of the State’s

57. *Id.* at 319-20. The regulation in question “is local in character and object, an essential exercise of one branch of the police power of the state, to aid, and not to regulate commerce.” *Id.* at 306 (citing *City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837) and *The Passenger Cases*, 48 U.S. (7 How.) 283, 402 (1849)). Professor Tribe, in addressing the *Cooley* decision, stated eloquently: The *Cooley* doctrine held that states are free to regulate those aspects of interstate and foreign commerce so *local* in character as to demand diverse treatment, while Congress alone may regulate those aspects of interstate and foreign commerce so *national* in character that a single, uniform rule is necessary. TRIBE, *supra* note 3, at 1048 (emphasis in original).

58. Dowling, *supra* note 1, at 5; see *Cooley*, 53 U.S. (12 How.) at 319.

59. *Cooley*, 53 U.S. (12 How.) at 319. “[I]t is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.” *Id.*

60. *Id.* Justice Curtis stated further that “[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.” *Id.*

61. *Id.* The Court, per Justice Curtis, is evidently weighing all of the circumstances when declaring, in relevant part:

Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Id.

62. Dowling, *supra* note 1, at 5. See *infra* Section IV. B. and accompanying notes.

63. Dowling, *supra* note 1, at 3.

64. 135 U.S. 100 (1890).

65. *Id.* at 100.

police power to regulate the production and sale of intoxicating liquor.⁶⁶

As a result of the Iowa state courts' findings, the United States Supreme Court examined the Iowa statute proscribing the production and sale of intoxicating liquors.⁶⁷ In doing so, the Court considered the "original packages" doctrine, which views the article of trade as a part of the constant stream of commerce if the article was delivered and sold in its "original package[ing]."⁶⁸ Henceforth, the Court ruled that the Iowa statute was unconstitutional, declaring that, "in the absence of congressional permission to do so, the state had no power to interfere by seizure" with the flow of imported commerce from an out-of-state or foreign importer.⁶⁹

The eminence of the dormant Commerce Clause at this point in time has taken on a share of both the second theory in that "the clause itself prohibits nothing," and the third theory in that "the clause prohibits some, but not all, state regulation and taxation."⁷⁰ However the doctrine is examined under the fourth

66. *Id.* at 104 (asserting that the "decision in this cause is in favor of the validity of said statutes of the state or Iowa").

67. *Id.* at 104-05. The Iowa statute's language prohibited in relevant part:

'No person shall manufacture or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof, or any person acting under his authority, or by his permission, to sell the same within this state, contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided.'

Id. (citing section 1523 of chapter 6 of title 11 of the Code of Iowa of 1873).

68. *Id.* at 110, 122; *see also* *Kidd v. Pearson*, 128 U.S. 1, 8 (1888).

69. *Leisy*, 135 U.S. at 124-25. Pointedly, the United States Congress quickly passed the Wilson Act in response to the unpopular opinion disseminated in *Leisy v. Hardin*. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW § 3.02, at 188-89 (4th ed. 2002). The Wilson Act permitted the several states to police the production and sale of intoxicating liquors. *Id.* Moreover, the Wilson Act was upheld as constitutional in the subsequent case of *Wilkerson v. Rahrer*, 140 U.S. 545 (1891). In *Wilkerson*, Chief Justice Fuller, announcing the opinion of the Court, declared the applicable language:

The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered to them by the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government

.....

The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the state constitution and the terms of the law, (within whose mischief all intoxicating liquors came,) that the State did not intend imported liquors to be included. We do not mean that the intention is to be imputed of violating any constitutional rule, but that the state law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged in valid [sic] from an external cause . . . [Congress] imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

Id. at 554, 564. The Court's opinion pronounced that when Congress passed the Wilson Act, Congress did not employ "terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part." *Id.* at 564.

70. Dowling, *supra* note 1, at 2-3.

view, the Court has entered into a “balancing” inquiry vis-à-vis national and local interests.⁷¹ The balancing inquiry entered into still possessed a flavor stemming from *Cooley*, but coming to a different result: “if the subject were held ‘national,’ a congressional negative would be presumed rather than a constitutional prohibition applied.”⁷² Under this view Congress retained the power to control both local and national interests.⁷³ “The significant and salutary effect was to take constitutional rigidity out of the commerce clause problem and substitute the flexible and adaptable will of Congress.”⁷⁴

III. DOWLING’S FUTURE PREDICTION

“It is, that in the absence of affirmative consent a Congressional negative will be presumed in the courts against state action which in its effect upon interstate commerce constitutes an unreasonable interference with national interests, the presumption being rebuttable at the pleasure of Congress.”⁷⁵ In realizing the strength of the above proposition, Dowling suggests that the application of the dormant Commerce Clause would, therefore, permit the states to conduct their business and “free the states from any constitutional disability[,]” but would still place on the states some restraint with regard to their effect on interstate commerce.⁷⁶ In support a “realist” approach, five of Professor Dowling’s primary rationales will be discussed.⁷⁷

A. CONGRESSIONAL CONSENT AND PRECEDENT

In plain language, to depart from the doctrine and its progeny would fly in the face of precedent.⁷⁸ Dowling observed that “[t]he congressional consent

71. *See id.* at 5.

72. *Id.* at 6. The melding between the third and fourth theories also resembles a similar type of inquiry that was found in *Cooley*, but with a different result. *Id.*; see Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381, 392 (1995) (stating that Professor Dowling “questioned the *Cooley* vision of the justification for judicial intervention in dormant Commerce Clause cases”). *Cf.* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 428 (1982). Professor Eule argued:

Our needs today differ significantly from those of the 1940’s when the Court embraced Professor Dowling’s suggestion that its proper role, in the absence of congressional action, was to balance national and local interests in scrutinizing state commercial enactments. Congress, the implied beneficiary of the Court’s protection under that standard, no longer needs such assistance.

Id.

73. Dowling, *supra* note 1, at 6.

74. *Id.*

75. *Id.* at 20.

76. *Id.*

77. *Id.* at 20-26.

78. *E.g.*, *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality of Oregon*, 511 U.S. 93 (1994); *New York v. United States*, 505 U.S. 144 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Res.*, 504 U.S. 353 (1992); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *Dennis v. Higgins*, 498 U.S. 439 (1991); *Healy v. Beer*

aspect of the doctrine would entail no sharp break with the past, and its adoption would constitute the acceptance of some of the best efforts of the Court.”⁷⁹ Moreover, the rationale of congressional consent and the strength of precedent are, unsurprisingly, supportable propositions in today’s Court.⁸⁰

B. CONSISTENTLY EMPLOYED RUBRIC

Throughout the Court’s application of the language, “unreasonable interference with national interests,” it has consistently taken a firm position with how the dormant Commerce Clause doctrine is utilized.⁸¹ In application, the Court is balancing national and local interests and, consequently, arriving at a conclusion as to which interest prevails.⁸² Although not covered extensively, the Court entered into the balancing test as early as *Cooley*.⁸³

In addition, Justice Stone addressed the importance of the balancing model in his dissent found in *Di Santo v. Pennsylvania*.⁸⁴ As such, Justice Stone would

Inst., Inc., 491 U.S. 324 (1989); *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493 (1989); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Honda Motor Co. v. Coons*, 469 U.S. 1123 (1985); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375 (1983); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333 (1977); *Great Atl. & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976); *Allenburg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Cooley v. The Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

79. Dowling, *supra* note 1, at 20. “Indeed, except for explicitness and generalization, it is the position to which the Court itself had come by a process of trial and error over nearly a [sic] hundred years.” *Id.* See *Leisy v. Hardin*, 135 U.S. 100, 109 (1890); *Welton v. Missouri*, 91 U.S. 275 (1875) (striking down a license tax imposed per state law, which was found to discriminate against interstate commerce). In *Welton*, the Court further noted that Congressional inaction with regard to interstate commerce, “when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled.” *Id.* at 282; see also *In re State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 328 (1868); *Brown v. Maryland*, 25 Wheat. 419 (1827).

80. See *Virginia v. Maryland*, 124 S.Ct. 598 (2003); *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); *Cuyler v. Adams*, 449 U.S. 433 (1981); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275 (1959); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *People of State of Cal. v. Zook*, 336 U.S. 725 (1949); *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945). For more of an illustrative list of precedent, see *supra* note 78.

81. Dowling, *supra* note 1, at 21. “The substantive standard embodied in the doctrine, ‘unreasonable interference with national interests,’ would commit the Court to no new or untried principle.” *Id.*

82. *Id.* In balancing and determining whether local or national interests should prevail, the Court is making a “policy” judgment. *Id.* The balancing approach finally became the cornerstone of the Court’s opinion in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768-71 (1945), in which Chief Justice Stone wrote for the majority of the Court. See, e.g., *Northwest Cent. Pipeline*, 489 U.S. at 493; *Bacchus Imps.*, 468 U.S. at 263; *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440-48 (1978); *Pike*, 397 U.S. at 142 (1970).

83. Dowling, *supra* note 1, at 20-22. “*Cooley v. The Board* comprehended a certain balancing of state and national interests, though the Court did not go into the subject in detail.” *Id.* at 22.

84. 273 U.S. 34, 44 (1927) (contending that a determination of whether a state regulation is

not apply the “mechanical” and “uncertain” terms of “direct” or “indirect” in determining the degree of interference with national interests.⁸⁵

But it seems clear that those *interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.*⁸⁶

Moreover, Justice Stone’s renowned dissent took on a more realistic approach, rather than a formalistic stance.⁸⁷ The purpose of the commerce clause was to prevent discrimination and to promote free, unrestricted trade between the several States.⁸⁸ Conversely, precluding *all* state regulation was not the purpose of the dormant Commerce Clause doctrine.⁸⁹ State “regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the state by the decisions of this court.”⁹⁰

C. FLEXIBILITY, PRESERVATION AND AMPLIFICATION

Flexibility would derive from the Court’s ability to provide accommodating decisions in which both national and local interests are afforded some weight.⁹¹ But, as an initial matter, “[t]he trial courts would operate out on the front line, where the impact of state action on interstate commerce is first felt, and they

prohibited under the Commerce Clause must first be balanced with all relevant considerations, not a mere categorization or finding of an indirect or direct interference with national interests). In *Di Santo v. Pennsylvania*, Giovanni di Santo was found guilty of violating a state law prohibiting the sale of steamship transportation orders. *Id.* at 35. The United States Supreme Court ultimately held that the state regulation prohibiting the sale was interfering with interstate commerce and, therefore, unconstitutional. *Id.* at 36-37.

85. *Id.* at 44 (Stone, J., dissenting). “[T]he traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and *too remote from actualities*, to be of value.” *Id.* (emphasis added). Here, Justice Stone is implicitly disavowing a formalistic approach as to dormant Commerce Clause inquiries. *See id.* *See also* Dowling, *supra* note 1, at 22.

86. *Di Santo*, 273 U.S. at 44 (emphasis added); *see* Twyman, *surpa* note 72, at 390-91 (noting that Justice Stone developed the reasonableness approach, which effectively eradicated the “direct-indirect” test). *See generally* South Carolina State Highway Dep’t v. Barnwell Bros., 303 U.S. 177, 190 (1938). In *Barnwell Bros.*, Justice Stone declared that “the judicial function, under the commerce clause . . . as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.” *Id.*

87. Dowling, *supra* note 1, at 22. Justice Stone’s dissent in *Di Santo* “appears to be well calculated to produce a ‘realistic’ judgment” in determining whether a particular state action “constitutes an unreasonable interference with national interests.” *Id.*

88. *See Di Santo*, 273 U.S. at 43-44 (Stone, J., dissenting).

89. *Di Santo*, 273 U.S. at 43-44 (emphasis added). “As this court has many times decided, the purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.” *Id.*

90. *Id.* at 44; *see also Barnwell Bros.*, 303 U.S. at 177.

91. Dowling, *supra* note 1, at 23.

could appraise at close range the conflicting state and national interests.”⁹² And, while the trial court weighs all of the relevant factors, the issues of any particular case involving interstate commerce and state regulatory efforts may be refined in order to facilitate Congress in their pursuit to implement corrective action if dissatisfaction arises from a court case.⁹³

Preservation of the power vested in Congress will also be effectuated.⁹⁴ If a state law was deemed as overreaching but survived within the court system, Congress could intervene to remedy a state law interfering with national interests.⁹⁵ On the contrary, Congress may also wield its power to obviate a result arising in court and, as a consequence, bestow congressional consent upon the state law.⁹⁶ Amplification of Congress’ power would take effect through congressional consent.⁹⁷ However, “no longer would congressional consent be thought of as somehow dependent upon the nature of the subject matter involved.”⁹⁸

D. AN AGREEABLE CONGRESS

Congress would agree to adopt the aforementioned form of the doctrine. An agreeable Congress is supported with two showings of affirmative and negative evidence.⁹⁹ “Affirmatively, Congress has acted upon the basis of the doctrine’s soundness.”¹⁰⁰ “Negatively, Congress has never . . . repudiated or seriously questioned its underlying idea.”¹⁰¹ Congress, over a span of many years, has not employed its constitutional power to alter or abolish rules that have been judicially established; instead, Congress “has accommodated its legislation as have the States, to these rules as an established feature of our constitutional system.”¹⁰² Subsequent to the holding of *Leisy v. Hardin*, “Congress has become accustomed to the doctrine,” and has pointed out that “the states shall be free” when engaging in interstate transactions.¹⁰³

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* “In no event could the courts forestall or impede Congressional action.” *Id.* “If the state law complained of were sustained in the courts, Congress could step in and occupy the field if in its judgment the state action went too far.” *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (citing *James Clark Distilling Co. v. W. Maryland Ry. Co.*, 242 U.S. 311, 332 (1917) (stating that “the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest”)).

99. *Id.* at 25.

100. *Id.*

101. *Id.*

102. *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 441 (1939); see Dowling, *supra* note 1, at n.37 (referring also to *Leisy v. Hardin* in which the Court struck down a state law, but directed Congress to remove the impediment on interstate commerce, which was accomplished only after Congress gave credence to the Court’s ruling).

103. Dowling, *supra* note 1, at 25-26.

E. COMMON GROUND FOR THE COURT'S DIVERSIFIED VIEWS

Through the rubric and application of the dormant Commerce Clause doctrine, the United States Supreme Court can rest with satisfactory conclusions, irrespective of the Court's composition.¹⁰⁴ Therefore, in practice, the Court will have to accept the fact that, under the doctrine, impediments upon state action stem from the command of Congress, not from prohibitions implied in the Constitution.¹⁰⁵

All members of the Court are agreed, it may of course be assumed, in desiring that the states have the fullest governmental freedom consistent with national interest. In a sense the differences in the Court are largely of a procedural nature – as to the methods for determining whether any challenged state action interferes too much with those interests – and to some extent they are verbal – as to the theories of the effect of the commerce clause and the bases for determining that effect.¹⁰⁶

IV. THE DOWLING EFFECT: EVOLVING NATURE OF THE DORMANT COMMERCE CLAUSE

Professor Dowling's article successfully put into motion the dormant Commerce Clause doctrine which the United States Supreme Court employs today.¹⁰⁷ Dowling's influential *Virginia Law Review* article took on the flavor of well known dissenting opinions of the Justices of the Supreme Court during the era leading up to the New Deal, such as Justices Stone, Holmes, and Brandeis.¹⁰⁸ Although the three Justices wrote or joined the dissent, the Justices' opinion effectively changed the nature of the modern doctrine.¹⁰⁹ In

104. *Id.* at 26. "The doctrine would afford a common ground on which the divergent views in the Court could be brought together." *Id.* "No bothersome concession should be required of any one, and the ultimate aims of each might be secured." *Id.*

105. *Id.*; see, e.g., *Ky. Whip & Collar Co. v. Illinois Cent. R.R. Co.*, 299 U.S. 334 (1937) (sustaining the Ashurst-Sumners Act in the second convict-made goods case); *Whitfield v. Ohio*, 297 U.S. 431 (1936) (ruling that congressional consent was valid and, accordingly, upholding the Hawes-Cooper Act in the first convict-goods case); *Leisy v. Hardin*, 135 U.S. 100 (1890) (opining that the Wilson Act, which permitted the states to control the distribution of intoxicating liquors, was a valid exercise of Congressional power).

106. Dowling, *supra* note 1, at 26.

107. For an extensive United States Supreme Court case list see *supra* note 78, excluding, however, the cases of *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927), *Leisy*, 135 U.S. 100 (1890), and *Cooley v. The Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851), because of Professor Dowling's later publication date of 1940.

108. See *Di Santo*, 273 U.S. 34, 37-45 (1927) (Stone, Holmes, Brandeis, JJ., dissenting) (pronouncing that a balancing approach must be utilized when determining whether a state regulation unduly interferes with interstate commerce).

109. *Id.* See, e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 181 (1995) (citing Justice Stone's dissenting opinion handed down in *Di Santo*); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, n.4 (1974) (referring to the rationale disseminated in the *Di Santo* dissent); *People v. Thompson*, 313 U.S. 109 (1941). The Court, per Justice Stone, declared in *Thompson* that it has recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce

effect, the dormant Commerce Clause doctrine has been utilized in a manner in which decisions are handed down in a realistic fashion, rather than in a result driven method.¹¹⁰ However, throughout the doctrine's tenure and its goal in seeking realistic application by means of balancing all considerations, the dormant Commerce Clause doctrine has been criticized by legal formalists.¹¹¹ Justice Scalia is the foremost such critic today.¹¹² This Note will now address Justice Scalia's critique and compare it to Professor Dowling's theories.

A. JUSTICE SCALIA: FORMALISM AT ITS FINEST

Justice Scalia's disagreement with courts taking on a balancing approach, with any matter in front of a judge or panel of judges, was confirmed in his *University of Chicago Law Review* article.¹¹³ Justice Scalia declared in relevant part:

I frankly do not know why we treat some of these questions as matters of fact and others as matters of law—though I imagine that their relative importance to our liberties has much to do with it. My point here, however, is not that we should undertake a massive recategorization, and leave a lot more of these questions to juries, but simply that we should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where “law,” properly speaking, has any further application. And to reiterate

Id. at 113; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 253 (1938) (writing for the Court, Justice Stone again issues another dormant Commerce Clause opinion).

110. See *Di Santo*, 273 U.S. at 43-44; Dowling, *supra* note 1, at 22. “Mr. Justice Stone[’s] . . . approach in [*Di Santo*] appears to be well calculated to produce a ‘realistic’ judgment whether any given state action constitutes an unreasonable interference with national interests.” *Id.* See generally *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-98 & n.6 (8th Cir. 2003) (weighing the proffered evidence in order to find that the State of South Dakota’s Amendment E Referendum failed the “well-settled” tiers of the dormant Commerce Clause).

111. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989); see, e.g., *American Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167 (1990) (Scalia, J., concurring); *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep’t of Treasury*, 490 U.S. 66 (1989) (Scalia, J., concurring); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (Scalia, J., concurring); *Am. Trucking Ass’n v. Scheiner*, 483 U.S. 266 (1987) (Scalia, J., dissenting); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (Scalia, J., concurring). See David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Potential Unsettling of the “Well-Settled Principles”*, 22 U. TOL. L. REV. 675 (1991); Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717 (1991). But see *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493 (1989). Justice Scalia joined, without separate opinion, the unanimous majority in which the Court applied the balancing test stemming from the *Pike* decision. *Id.*

112. See, e.g., *Oklahoma Tax Comm’n*, 514 U.S. at 200 (Scalia, J., concurring); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 207 (1994) (Scalia, J., concurring); *Tyler Pipe Indus., Inc. v. Washington State Dep’t. of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part); *supra* note 111. See Sara Sachse, Comment, *United We Stand – But For How Long? Justice Scalia and New Developments of the Dormant Commerce Clause*, 43 ST. LOUIS U. L.J. 695, 703-05 (1999) (addressing Justice Scalia’s theories and, in sum, his abhorrence of the dormant Commerce Clause).

113. Scalia, *supra* note 111, at 1182.

the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.¹¹⁴

Consequently, in the context of the dormant Commerce Clause, Justice Scalia would do away with the balancing approach adopted in *Pike v. Bruce Church, Inc.*¹¹⁵ Despite, however, Justice Scalia's disdain for the dormant Commerce Clause doctrine, he has produced only one opinion for the Court on the subject.¹¹⁶ In *New Energy Company of Indiana v. Limbach*, Justice Scalia wrote the unanimous decision for the Court.¹¹⁷

In *New Energy*, the challenger claimed that the Ohio tax credit was unconstitutional under the dormant Commerce Clause due to its reciprocity provision.¹¹⁸ The Ohio state court system denied the challenger's sought after injunctive relief and, subsequently, entered a judgment in favor of the state.¹¹⁹ The Ohio Supreme Court held that the tax credit and reciprocity provision was not unreasonably burdensome or a form of economic protectionism.¹²⁰

Justice Scalia, writing for the unanimous United States Supreme Court, held that the reciprocity provision was, however, a violation of the dormant Commerce Clause.¹²¹ In so ruling, Justice Scalia avoided using any language pertaining to "balancing" or "tiers."¹²² Rather, Justice Scalia put into operation his own version of what the dormant Commerce Clause doctrine should be when he declared that Ohio's provision was facially discriminatory.¹²³ Thus, according to Justice Scalia, the reciprocity provision "explicitly deprive[d]" certain other products from beneficial tax treatment due to the products

114. *Id.*

115. 397 U.S. 137 (1970); David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier* (forthcoming 2004) (manuscript at 5, copy on file with South Dakota Law Review) (arguing that Justice Scalia would specifically reject "any judicial review conducted with 'balancing techniques' – such as the undue burden standard"); Day, *supra* note 111, at 703-04. See, e.g., *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988) (writing for the majority and applying the "explicitness theory," for the only time, Justice Scalia chastised the courts for the use of a balancing model in dormant Commerce Clause inquiries).

116. *New Energy*, 486 U.S. at 280 (declaring, ironically, for the unanimous Court that the Ohio tax credit was a form of facial discrimination, so therefore the Court held for the challenger). See Day, *supra* note 111, at 692, 697-99. "In light of Justice Scalia's stated objective of completely abolishing the entire balancing tier, however, any erosion of scrutiny on the upper tier would be significant." *Id.* at 698.

117. 486 U.S. at 269.

118. *Id.* at 273.

119. *Id.*

120. *Id.*

121. *Id.* at 280.

122. See *id.*

123. *Id.* at 274. The "'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy*, 486 U.S. at 273-74 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-73 (1984); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 532-33 (1949); *Guy v. Baltimore*, 100 U.S. (10 Otto) 434, 443 (1880)). "Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down." *Id.* at 274 (citations omitted). State statutes are not struck down when the "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* (citation omitted).

originating from other states.¹²⁴

Notably, the *New Energy* holding was an easy one for the Court to arrive at, and, for Justice Scalia, the case was an opportunity to exhibit his “explicitness standard.”¹²⁵ Moreover, the *New Energy* opinion demonstrated that Justice Scalia was not only skeptical of the Court’s balancing test under the *Pike* decision, but that he was also leery of the *per se* tier (discrimination tier) of the dormant Commerce Clause.¹²⁶

Justice Scalia’s skepticism derives from a legal formalism approach.¹²⁷ To define “formalism” would be, in Justice Scalia’s own words, “to suggest that when an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding.”¹²⁸ To avoid judicial fact finding, Justice Scalia suggests that judges adhere to “the plain meaning of a text” in order for those judges to “develop general rules”¹²⁹

Therefore, under Justice Scalia’s jurisprudence, the dormant Commerce Clause fails in two respects.¹³⁰ First, to state in simplistic terms, the courts have been applying a balancing test in order to determine whether interstate commerce has been unreasonably interfered with due to a state’s regulatory scheme, which is in complete contravention with Justice Scalia’s anti-balancing approach.¹³¹ Second, again in simplistic terms, the dormant Commerce Clause does not exist textually, which would prohibit any judicial body from examining the “plain meaning” or “text” of the clause – and, probably to Justice Scalia’s satisfaction.¹³² As a prediction, if Justice Scalia were to obtain only four other Justices on the Supreme Court that sought general principle decisions, thus avoiding any form of balancing, then courts would thereby be required to hand down uniform, general outcomes.¹³³

124. *Id.* “The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination.” *Id.*

125. Day, *supra* note 111, at 698-99.

126. *Id.* at 698. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (Scalia, J., dissenting); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (Scalia, J., concurring); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Scalia, J., concurring); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (Scalia, J., dissenting). See generally Tushnet, *supra* note 111, at 1724-27. “Justice Scalia said that he could not ‘confidently assess’ the correctness of the Court’s balancing.” *Id.* at 1725 (citation omitted).

127. See generally Scalia, *supra* note 111, at 1182-83; Day, *supra* note 111, at 703-04; Tushnet, *supra* note 111, at 1731.

128. Scalia, *supra* note 111, at 1180-81.

129. *Id.* at 1184 (discussing the Court’s recent decision to apply the totality of the circumstances test in the case of *Michigan v. Chesternut*, 486 U.S. 567 (1988), in order to determine whether a seizure took place).

130. *Id.* at 1185 (contending that “without clear congressional command, the acknowledgement of causes of action that do not readily lend themselves” to broad, general principles, such as the dormant Commerce Clause, should not be recognized within the judiciary).

131. *Id.*

132. See generally *id.*

133. *Cf.* Day, *supra* note 115 (manuscript at 61). “By deciding almost all cases as a matter of discrimination, the Court’s majority avoided confronting the theories of Justice Scalia and Thomas that

B. FORMALISTIC ANALYSIS?: GET REAL(ISTIC)!

Justice Scalia's formalistic approach within the judiciary conjures up several challenges.¹³⁴ Initially, where formalistic standards are less valuable, the formalistic perspective is significantly weakened.¹³⁵ As a secondary observation, "in some areas, including the dormant commerce clause, there are institutional alternatives" that demonstrate that Justice Scalia's judicial formalism is less prevalent in seeking uniform, general principles.¹³⁶ For example, in *Raymond Motor Transportation, Inc. v. Rice*,¹³⁷ the United States Supreme Court employed a balancing test twice and, in doing so, focused primarily on the facts underlying the regulation at issue.¹³⁸ Although confusion may arise in lower courts as to how the application of such a balancing doctrine should operate, "the price of eliminating the Court's ability to give the right answer" will be greatly hampered.¹³⁹

Furthermore, Justice Scalia's formalism supports the observation that, even though some of his colleagues have signed on to his opinions, "no one else appears to be committed to formalism as a general approach to constitutional law."¹⁴⁰ Requiring judges to adopt a formalistic approach and abandon discretion, such as the one proffered through Justice Scalia's writings, will consequently result in judges migrating their discretionary powers elsewhere, i.e., Article IV Privileges and Immunities Clause, Substantive Due Process, Takings Clause of the 5th Amendment, Privileges or Immunities Clause of the 14th Amendment, or Equal Protection.¹⁴¹

The proposition that a "[balancing] doctrine would provide flexibility in the adjustment and accommodation of national and state interests, at the same time preserving the judicial and amplifying the legislative function" is still viable in the current Court's dormant Commerce Clause doctrine, without regard to continuous admonishments heard from Justice Scalia.¹⁴² Thus, the Court has

the 'undue burden' standard was doctrinally illegitimate." *Id.*

134. See Day, *supra* note 111, at 703-04; Dowling, *supra* note 1, at 22; Tushnet, *supra* note 111, at 1731. See generally GRANT GILMORE, *THE AGES OF AMERICAN LAW* 108 (Yale University Press ed. 1977) ("The vice of the formalistic approach to law . . . is that it leads to a disastrous overstatement of the necessary limits of law.")

135. Tushnet, *supra* note 111, at 1734. "[A]s [Justice Scalia] also recognizes, there is no reason to believe that uniformity is equally valuable in every area covered by the formalist paradigm." *Id.* (citing Scalia, *supra* note 111, at 1179).

136. *Id.*

137. 434 U.S. 429 (1978).

138. Tushnet, *supra* note 111, at 1734-35 n.81 (recognizing that fact specific inquiries utilized in balancing tests achieve appropriate resolutions in the realm of the dormant Commerce Clause).

139. *Id.* at 1734-35.

140. *Id.* at 1741.

141. *Id.* at 1732 (citing *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (illustrating that the Court will utilize another constitutional doctrine when constrained or barred from subjecting the case to the Commerce Clause)).

142. Dowling, *supra* note 1, at 23. See, e.g., *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

applied its “well-settled’ constitutional principles”¹⁴³ derived from the balancing test proposed in Professor Dowling’s law review article,¹⁴⁴ opined in Justice Stone’s dissent,¹⁴⁵ ruled for in *Pike*,¹⁴⁶ and supported in a long line of subsequent precedent¹⁴⁷ – all of which have renounced legal formalism.

C. IF ALL ELSE FAILS: POLITICAL PROCESS

If all else fails to rebut the arguments in support of legal formalism, assuming an overthrow of the “well-settled constitutional principles” takes place, the political process rationale still underlies the dormant Commerce Clause.¹⁴⁸ “By omitting to discuss the political process rationale, Justice Scalia is not forced to contend with it. But, like a doctrinal Freddy Krueger, the political process rationale will not just go away because Justice Scalia ignores it.”¹⁴⁹ Thus, under the political process rationale, judicial review protects out-of-state participants of interstate commerce from being discriminated against by overprotective states.¹⁵⁰

V. CONCLUSION

Professor Dowling was correct in 1940 when he presented his thesis concerning the state of dormant Commerce Clause jurisprudence, and he is correct today. The Court, in weighing all the factors and considerations, must

143. *Bendix Autolite*, 486 U.S. at 889.

144. Dowling, *supra* note 1, at 20.

145. *Di Santo v. Pennsylvania*, 273 U.S. 34, 43-45 (1927) (Stone, J., dissenting).

146. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

147. *Northwest Cent. Pipeline*, 489 U.S. at 493; *Bendix Autolite*, 486 U.S. at 888; *CTS Corp.*, 481 U.S. at 69; *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Honda Motor Co. v. Coons*, 469 U.S. 1122 (1985); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375 (1983); *Edgar v. MITE Corp.*, 457 U.S. 624 (1981); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333 (1977); *Great Atl. & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976); *Allenburg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

148. Day, *supra* note 111, at 713 (announcing that Justice Scalia’s opinion in *Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part), failed to rebut the political process rationale, which helps substantiate and support the dormant Commerce Clause).

149. *Id. Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 215 (1994) (Rehnquist, C.J., dissenting) (“Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.”).

150. Day, *supra* note 111, at 713; see *American Trucking Ass’n, Inc. v. Scheiner*, 483 U.S. 266, 281 (1987). “The political process rationale justifies judicial review under the dormant commerce clause doctrine, even in the absence of a textual referent, on the grounds that, to use Professor Farber’s phrase, it ‘compensates for a defect in the political process.’” Day, *supra* note 111, at 713 (quoting Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395, 401 (1986)). See generally *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Res.*, 504 U.S. 353, 370 (1992) (declaring that economic barriers placed against out-of-state participants of commerce is violative of the dormant Commerce Clause due to the lack of political power); *New Hampshire v. Piper*, 470 U.S. 274, 274 (1985) (opining that discrimination against out-of-staters violates Article IV, Privileges and Immunities Clause, which safeguards the nation’s economic unity, the nation’s economic liberty, and the political powerlessness’ right to participate in commerce).

presume a “Congressional negative” in opposition to state action that unreasonably interferes with interstate commerce. As a result, the courts will be effectuating Congressional policy. The very notion of generating Congressional policy through the nation’s many courts is the purpose of the dormant Commerce Clause, because in doing so Congress holds a rebuttable presumption to override any negative implication deriving from court decisions. Regardless of the manner in which the United States Supreme Court addresses the dormant Commerce Clause in the future, the Court must give deference to all of the surrounding considerations and avoid the arrival at a general principle of law applicable to all constitutional questions. And, finally, we must adhere to the words of Justice Stone when he eloquently declared:

“Great as is the practical wisdom exhibited in all the provisions of the Constitution, and important as were the character and influence of those who secured its adoption, it will, I believe, be the judgment of history that the Commerce Clause and the wise interpretation of it, perhaps more than any other contributing element, have united to bind the several states into a nation.”¹⁵¹

Justice Stone captured what the Court should always strive to achieve with the dormant Commerce Clause doctrine: national economic unity, protection of the politically powerless, and economic liberty.

151. Dowling, *supra* note 1, at 28 (quoting Justice Stone, *Fifty Years’ Work of the Supreme Court*, 14 A.B.A.J. 428 (1928)).