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**Discrimination in the Dormant  
Commerce Clause**

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Originally published in SOUTH DAKOTA LAW REVIEW  
49 S. D. L. REV. 844 (2004)

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# DISCRIMINATION IN THE DORMANT COMMERCE CLAUSE

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*The dormant Commerce Clause is one of the few constitutional doctrines effectively utilized by the United States Supreme Court to promote the fundamental economic rights implicit in the Constitution. The Court readily employs the dormant Commerce Clause to strike down state regulations for the sake of promoting the economic rationales underlying the doctrine. Hence, the doctrine has become a potent weapon to invalidate statutes that burden interstate commerce.*

*During the 1970s, the dormant Commerce Clause evolved into a two-tiered model comprised of the “discrimination” tier and the “undue burden” tier.<sup>1</sup> But in the past decade the undue burden tier has fallen into disuse. In fact, in every dormant Commerce Clause decision since 1990, the Court has analyzed the state statute at issue under the discrimination tier of the doctrine.<sup>2</sup>*

*Because of the significance of the discrimination tier in dormant Commerce Clause jurisprudence, the definition of “discrimination” for purposes of the dormant Commerce Clause has become increasingly important. Unfortunately, the definition of discrimination used in the dormant Commerce Clause is broad, vague, and poorly defined. Furthermore, the definition of discrimination under the dormant Commerce Clause is unlike the definition of discrimination used in other constitutional doctrines. This article will explore various definitions of discrimination and how discrimination is found in the dormant Commerce Clause.*

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<sup>†</sup> Juris Doctor received May 2004 from the University of South Dakota School of Law and Bachelor's degree received from Northwestern University.

1. 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, 678-79 (1991). Professor Day stated that “the Court has adopted a two-tier approach” and concisely summarized the model as such:

(1) when a state engages in discriminatory regulatory conduct with respect to interstate commerce, such state laws are subjected to stringent scrutiny approaching per se invalidity; (2) even where the state has a legitimate non-protectionist governmental interest and proceeds in a facially neutral fashion, the Court will employ a “balancing” test and will weigh the putative local benefits of the regulation against the burden it places on interstate commerce.

*Id.* (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978); *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 891 (1988); *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted)). For a more detailed discussion of the two-tiered doctrine see *infra* notes 43-45 and accompanying text.

2. See *South Cent. Bell Telephone Co. v. Alabama*, 526 U.S. 160, 169 (1999); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 297-98 (1997); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 580-81 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201-02 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994); *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 359-60 (1992); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992).

*Throughout the article, there will also be discussions of how discrimination is found in the Equal Protection doctrine to demonstrate how unique the concept of discrimination is within dormant Commerce Clause analysis.*

## I. DORMANT COMMERCE CLAUSE: HISTORY, RATIONALES AND DOCTRINE

### A. ORIGINS OF THE DORMANT COMMERCE CLAUSE

The dormant Commerce Clause arises out of the negative implication of the powers vested in Congress under the Commerce Clause.<sup>3</sup> The Commerce Clause grants Congress the power to “regulate Commerce . . . among the several States . . . .”<sup>4</sup> Thus, “[a]lthough the Clause . . . speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade.”<sup>5</sup> The negative aspect of the Commerce Clause, the dormant Commerce Clause, “directly limits the power of the States to discriminate against interstate commerce.”<sup>6</sup> The doctrine thus prevents states from establishing regulations that discriminate or impose an undue burden on interstate commerce.<sup>7</sup>

### B. HISTORY AND RATIONALES UNDERLYING DORMANT COMMERCE CLAUSE DECISIONS

A primary concern of the Founding Fathers was, in order to prosper, the Nation’s economy needed to be centrally regulated.<sup>8</sup> There was concern that States would act selfishly and would pass tariffs or impose regulations that would not benefit the greater good of the United States.<sup>9</sup> Furthermore, the

3. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 418-20 (1946); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2, at 1029 (3d ed. 2000). “All of the [dormant Commerce Clause] doctrine . . . is thus traceable to the Constitution’s *negative implications*; it is by interpreting ‘these great silences of the Constitution’ that the Supreme Court has limited the scope of what the state might do.” *Id.* (quoting *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949)).

4. U.S. CONST. art. I, § 8, cl. 3.

5. *Taylor*, 477 U.S. at 137 (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980)). For cases supporting this concept see *West Lynn Creamery, Inc.*, 512 U.S. at 192; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

6. *Wyoming v. Oklahoma*, 502 U.S. at 454 (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)); see TRIBE, *supra* note 3, § 6-2, at 1030.

7. *West Lynn Creamery, Inc.*, 512 U.S. at 192 (declaring that “state statutes that clearly discriminate against interstate commerce” violate the dormant Commerce Clause); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (articulating a balancing test for statutes that impose an undue burden on interstate commerce); TRIBE, *supra* note 3, § 6-2, at 1031.

8. THE FEDERALIST NO. 22 (Alexander Hamilton) (arguing that “there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence [than the power to centrally regulate commerce]”); THE FEDERALIST NO. 42 (James Madison).

9. Hamilton, *supra* note 8; Madison, *supra* note 8. In arguing for the inclusion of the Commerce Clause in the U.S. Constitution, Madison stated:

The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience . . . . A very material object of this power was the relief of the States which import and export through

Founding Fathers feared that the States' protectionist measures would lead to retaliation by the burdened States.<sup>10</sup> This system would be highly inefficient and could stymie the development of the economy.<sup>11</sup> Consequently, this worry caused the Founding Fathers to draft the Constitution to prevent States from harming interstate commerce.<sup>12</sup> James Madison wrote that the "Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing, and 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.'" <sup>13</sup> Even in recent years, some Supreme Court opinions indicate that the objective of the dormant Commerce Clause "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."<sup>14</sup>

The Founding Fathers' concerns about the prosperity of the Nation were a primary reason for inclusion of the Commerce Clause in the Constitution.<sup>15</sup> Accordingly, these underlying concerns established the foundation for review of dormant Commerce Clause cases.<sup>16</sup> Based on this foundation, the Court has developed several rationales to support its review of cases under the dormant Commerce Clause doctrine.<sup>17</sup>

A recurring rationale supporting judicial review of dormant Commerce Clause cases is the promotion of national unity.<sup>18</sup> Justice Cardozo emphasized

other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.

*Id.*; see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 441 (M. Farrand ed., Yale University Press 1911) (providing transcripts of the Constitutional Convention in which Madison discussed the necessity of the Commerce Clause to prevent abuses by the States); see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1114-15 (1986). *But cf.* Regan, *supra* note 9 at 1114 n.55 (citing EDMUND W. KITCH, *Regulation and the American Common Market, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* 17 (A. Tarlock ed., 1981) (discussing that Edmund Kitch argued that "in fact there was almost no actual experience of protectionism and retaliation under the Articles of Confederation"))).

10. See generally Madison, *supra* note 8.

11. See generally Hamilton, *supra* note 8; Madison, *supra* note 8.

12. Madison, *supra* note 8.

13. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (M. Farrand ed., Yale University Press 1911) (citations omitted)); see Regan, *supra* note 9, at 1114-15.

14. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing THE FEDERALIST NO. 22, 143-45 (A. Hamilton) (C. Rossiter ed., 1961)); see *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

15. See generally Hamilton, *supra* note 8; Madison, *supra* note 8.

16. See generally Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1206-09 (1986). "[T]he Supreme Court strongly disfavor[s] state discriminations against interstate commerce . . . . The main reasons are adherence to the intentions of the Framers, fear of the economic and political consequences of interstate hostility, and concern about biased local political processes." *Id.* at 1206.

17. See generally *id.*

18. See generally *West Lynn Creamery, Inc.*, 512 U.S. at 193 (acknowledging that tariffs "violate[]

the importance of national unity in constitutional analysis when he stated, “[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”<sup>19</sup>

National unity is oftentimes addressed in the context of the two most identifiable harbingers of division among the States: economic protectionism and isolationism.<sup>20</sup> Regulations that constitute economic protectionism are those that are “designed to benefit in-state economic interests by burdening out-of-state competitors.”<sup>21</sup> Generally, statutes enacted for the purpose of economic protectionism are deemed unconstitutional.<sup>22</sup> The national unity theory also prohibits statutes that encourage state isolationism.<sup>23</sup> Justice Cardozo discussed the evils of isolationism in *Baldwin v. G.A.F. Seelig, Inc.* when he stated in relevant part:

What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation . . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result.<sup>24</sup>

Justice Cardozo’s rationale continues to be cited in modern cases, such as *Chemical Waste Management* where the Court declared, “No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade.”<sup>25</sup>

the principle of the unitary national market”); *Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992) (stating that statutes must not be reviewed only in light of the effect on the state enacting the statute, but also in light of the effect on other states) (citation omitted); *Baldwin*, 294 U.S. at 523, 527.

19. *Baldwin*, 294 U.S. at 523.

20. See *infra* notes 21-22 and accompanying text; *infra* notes 23-25 and accompanying text; Smith, *supra* note 16, at 1208. “[S]tate discriminations arouse hostility in other states . . . [and] tend toward interstate strife and disunity.” *Id.* Cf. Regan, *supra* note 9, at 1112-14.

There are three objections to state protectionism . . . the ‘concept-of-union’ objection, the ‘resentment/retaliation’ objection, and the ‘efficiency’ objection. The concept of union objection is [that] . . . [s]tate protectionism is unacceptable because it is inconsistent with the very idea of political union . . . . [The resentment/retaliation objection is concerned that] [i]f protectionist legislation is permitted at all, it is likely to generate a cycle of escalating animosity and isolation . . . eventually imperiling the political viability of the union itself.

*Id.* The efficiency objection concerns economic inefficiency produced by state protectionism. *Id.* at 1115-16.

21. *Wyoming v. Oklahoma*, 502 U.S. at 454 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

22. *Id.* at 454-55 (citing *New Energy Co.*, 486 U.S. at 273-74). “When a state statute clearly discriminates against interstate commerce, it will be struck down” unless it satisfies strict scrutiny. *Id.* at 454. See *West Lynn Creamery*, 512 U.S. at 192 (citations omitted).

23. See *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339-40 (1992) (stating “[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade”); *Baldwin*, 294 U.S. at 527.

24. *Baldwin*, 294 U.S. at 527.

25. *Chem. Waste Mgmt.*, 504 U.S. at 339-40; see *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (opining that in dormant Commerce Clause cases a statute is invalidated if “a presumably

A second rationale used by the Court in dormant Commerce Clause jurisprudence is the protection of economic liberties.<sup>26</sup> The Supreme Court has a large arsenal of weapons, including the dormant Commerce Clause, that may be employed to protect these rights.<sup>27</sup> Within the long list of constitutional doctrines at the Court's disposal, the dormant Commerce Clause is possibly the most effective tool for protecting economic liberties.<sup>28</sup> Although the dormant Commerce Clause lends itself to protection of economic liberties, the Court does not describe the rationale in explicit terms in its dormant Commerce Clause opinions.<sup>29</sup>

The "economic liberty" rationale is used more openly in other constitutional doctrines; however, few constitutional doctrines are effective at protecting economic liberty interests.<sup>30</sup> It appears that the Court fears protecting economic interests under other doctrines, such as Equal Protection and Substantive Due Process, because protecting economic interests could cause an expansion of the protection afforded to social interests contemplated under these doctrines as well.<sup>31</sup> Conversely, the dormant Commerce Clause does not protect social interests.<sup>32</sup> Therefore, the Court may expand its protection of economic interests under the dormant Commerce Clause without collaterally expanding protection

legitimate goal [is] sought to be achieved by the illegitimate means of isolating the State from the national economy").

26. Richard A. Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAP. L. REV. 1, 20-26 (2003) (discussing the concept of constitutional protection of economic liberties as applied in the dormant Commerce Clause); see Day, *supra* note 1, at 704-05.

27. Epstein, *supra* note 26, at 1 (stating that economic liberties are protected under the "Takings Clause, both Due Process Clauses, the Equal Protection Clause, the Speech and Religion Clauses of the First Amendment, and the Commerce Clause in both its affirmative and (more controversial) dormant manifestations").

28. See generally Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 400 (2003) (discussing that the concept of discrimination under the dormant Commerce Clause is broader than under Article IV Privileges and Immunities); Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 573 (1997) (discussing that the Supreme Court's judicial activism in dormant Commerce Clause cases is a "strike against state power in the federalism balance"); *supra* note 2 and accompanying text (stating that the Court has issued ten dormant Commerce Clause opinions since 1990 and that each of these was decided in the discrimination tier of the doctrine); *infra* note 54 and accompanying text (discussing that, when deciding cases in the discrimination tier, there is only one case in which the Court held that the statute passed the strict scrutiny test).

29. See Day, *supra* note 1, at 704-05 (discussing that dormant Commerce Clause cases concern economic liberties); O'Grady, *supra* note 28, at 584 n.47 (discussing the economic interests that are protected by the dormant Commerce Clause).

30. See *New Hampshire v. Piper*, 470 U.S. 274, 280-81 (1985) (holding that New Hampshire's restrictions requiring bar applicants to be residents of the state were unconstitutional based on the Article IV Privileges and Immunities Clause; the Court implicitly recognized that the economic liberty of seeking employment in a state is a privilege protected by the Clause); *infra* note 121 and accompanying text (citing cases demonstrating that, unlike in dormant Commerce Clause analysis, a showing of purposefulness is required in order to find a statute invalid under the Equal Protection Clause, Substantive Due Process Clause, and Procedural Due Process Clause); *infra* notes 150-54 and accompanying text (discussing that the Court uses a broader definition of discrimination under the dormant Commerce Clause compared to the Equal Protection Clause).

31. See also Day, *supra* note 1, at 706-07 (stating that the fundamental rights doctrine has been tamed through the use of an invidiousness requirement).

32. See generally O'Grady, *supra* note 28, at 572-75 (discussing that the dormant Commerce Clause protects interstate commerce).

of social interests.<sup>33</sup> As a result, the Court may liberally protect economic liberties through expansive judicial review of state regulations affecting interstate commerce.<sup>34</sup>

A third rationale utilized by the Court in dormant Commerce Clause cases concerns the political powerlessness of out-of-state interests.<sup>35</sup> “[T]his approach to judicial review rests on the premises that unaccountable power is to be carefully scrutinized and that legislators are in practice accountable only to those who have the power to vote them out of office.”<sup>36</sup> In the context of the dormant Commerce Clause, an out-of-state party burdened by a discriminatory regulation of another state does not have any political weight to encourage the legislature to change the regulation.<sup>37</sup> Consequently, the Court has used the dormant Commerce Clause to protect politically powerless interests.<sup>38</sup>

Use of the aforesaid rationales establishes a broad base for judicial review within the dormant Commerce Clause.<sup>39</sup> Other constitutional doctrines, such as the Article IV Privileges and Immunities Clause, also use these rationales to justify decisions protecting economic rights.<sup>40</sup> Generally, the protection granted

33. See generally *id.*

34. See *TRIBE, supra* note 3, § 6-6, at 1062-63 (reviewing characteristics of the dormant Commerce Clause doctrine which, together, allow for expansive judicial review).

35. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981); *TRIBE, supra* note 3, § 6-5, at 1054; see *Day, supra* note 1, at 713 (stating the most important rationale underlying dormant Commerce Clause jurisprudence is the “political process rationale”); *Smith, supra* note 16, at 1209 (stating that one of the reasons the Supreme Court disfavors discriminatory state regulations is because of “the concern that such regulations are the product of political processes in which those mainly burdened are inadequately represented”).

36. *TRIBE, supra* note 3, § 6-5, at 1054.

37. See *TRIBE, supra* note 3, § 6-5, at 1054.

38. *Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17. The Court found a Minnesota statute affecting interstate commerce constitutional in part because “[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse.” *Id.* *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18, 447 (1978). The Court found a statute affecting interstate commerce constitutional in part because “where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States’ economic interests, thus insuring that a State’s own political processes will serve as a check against unduly burdensome regulations.” *Id.* at 444 n.18. See also *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 426 (1994) (Souter, J., dissenting) (arguing that the Court’s decision to strike down the statute was wrong, in part because there was not a burden imposed on out-of-state interests who could not use the political process to correct it).

The Court, however, rarely uses the political powerlessness rationale explicitly to justify a dormant Commerce Clause decision. *TRIBE, supra* note 3, § 6-5, at 1057. There are two primary theories concerning why the rationale is rarely used in dormant Commerce Clause decisions. *Id.* at 1054-57. First, the concept of protecting the politically powerless is integrally intertwined with the concept of national unity. See *id.* at 1057. An unrepresentative political process is a “political defect [which] should be seen as underlying the forms of economic discrimination which the Supreme Court has treated as invalidating certain state actions with respect to interstate commerce.” *Id.* Second, the Court somewhat frequently holds that a statute is unconstitutional when in-state, as well as out-of-state interests are burdened. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992); *C & A Carbone*, 511 U.S. at 426 (Souter, J., dissenting). The politically powerless rationale is not applicable in these cases because there is a party affected by the burdensome statute with the ability to wield political power. Compare *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951); with *Day, supra* note 1, at 713 (stating that the political process rationale is the most “important rationale underlying the dormant commerce clause doctrine”).

39. See generally *TRIBE, supra* note 3, § 6-6, at 1059-66.

40. Epstein, *supra* note 26, at 1 (discussing the protection provided for economic liberties under the Takings Clause, the Substantive Due Process Clause, the Procedural Due Process Clause, the Equal

to economic rights is limited in the other doctrines, even when these rationales are utilized.<sup>41</sup> In dormant Commerce Clause decisions, however, the Supreme Court employs these broad rationales to create a forum for activist judicial review.<sup>42</sup>

### C. APPLICATION OF THE DORMANT COMMERCE CLAUSE

The Court developed a two-tiered framework for analyzing dormant Commerce Clause cases: cases are reviewed under either the discrimination tier or the balancing tier, also known as the “undue burden” standard.<sup>43</sup> In the discrimination tier, if a statute discriminates against interstate commerce, it is deemed unconstitutional unless it satisfies strict scrutiny under dormant Commerce Clause analysis.<sup>44</sup> In the balancing tier, if a statute is not discriminatory but has incidental effects on interstate commerce, it will be found valid unless “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>45</sup> Because of the extensive use of the discrimination tier, the Court’s application of the strict scrutiny test in dormant Commerce Clause analysis is important.<sup>46</sup>

The strict scrutiny test in dormant Commerce Clause review is different than strict scrutiny employed in other constitutional doctrines.<sup>47</sup> For example, in *Chemical Waste Management*, the Court stated the dormant Commerce Clause

Protection Clause, the Free Speech Clause, the Freedom of Religion Clause, the Commerce Clause, and the dormant Commerce Clause); see *New Hampshire v. Piper*, 470 U.S. 274, 280-81 (1985) (establishing protection of economic rights under the Article IV Privileges and Immunities Clause).

41. *Infra* notes 150-54 and accompanying text (comparing the restraints on determinations of discrimination in the Equal Protection Clause to the broad definition of discrimination used in the dormant Commerce Clause); *infra* note 121 and accompanying text (discussing the restrictions on the Court in determining that a statute is invalid under the Equal Protection Clause, Substantive Due Process Clause, and Procedural Due Process Clause compared to the activist judicial review under the dormant Commerce Clause doctrine).

42. *Infra* notes 195-98 and accompanying text.

43. *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 99 (1994); Day, *supra* note 1, at 678-79.

44. See *Oregon Waste Sys., Inc.*; 511 U.S. at 99 (stating that “if a restriction on commerce is discriminatory, it is virtually *per se* invalid”); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (declaring that “state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism”); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342-43 (1992) (citations omitted) (opining that “facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives”).

45. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In *Pike*, the Court developed a three-part balancing test to analyze balancing tier cases. *Id.* The test is stated as, “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.*

46. *Supra* note 2 and accompanying text.

47. Compare *Chem. Waste Mgmt., Inc.*, 504 U.S. at 342-43 (citations omitted) (holding that, under dormant Commerce Clause analysis, strict scrutiny examines whether there is “any purported legitimate local purpose and . . . the absence of nondiscriminatory alternatives”); with *Grutter v. Bollinger*, 123 S.Ct. 2325, 2336 (2003) (holding that, under Equal Protection analysis, satisfaction of strict scrutiny requires a finding that a statute protects “a compelling governmental interest” and that such statute is narrowly tailored to promote that governmental interest) and *Reno v. Flores*, 507 U.S. 292, 302 (1993) (holding that under Substantive Due Process analysis, satisfaction of strict scrutiny requires that an “infringement is narrowly tailored to serve a compelling state interest”).

strict scrutiny test as a review of a “legitimate local purpose and of the absence of nondiscriminatory alternatives.”<sup>48</sup> In contrast, the construction of the strict scrutiny test under the Equal Protection and Due Process doctrines is more demanding.<sup>49</sup> Generally, strict scrutiny under both the Equal Protection and Due Process doctrines requires a compelling local interest and use of the least restrictive alternative.<sup>50</sup>

As in other constitutional doctrines, the use of a strict scrutiny standard in dormant Commerce Clause analysis provides the Court another vehicle to find that discriminatory statutes are unconstitutional.<sup>51</sup> The consequences of analyzing a statute in the discrimination tier are severe: statutes virtually never satisfy strict scrutiny.<sup>52</sup> The Court has stated, “[I]f a restriction on commerce is discriminatory, it is virtually *per se* invalid.”<sup>53</sup> In fact, there is only one United States Supreme Court case where a statute was deemed discriminatory, but was found constitutional.<sup>54</sup> Consequently, only when a state regulation is analyzed

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48. *Chem. Waste Mgmt., Inc.*, 504 U.S. at 342-43. In dormant Commerce Clause cases the strict scrutiny test typically uses the standard of “legitimate local interest.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392-94 (1994). See also *Chem. Waste Mgmt., Inc.*, 504 U.S. at 342-43. Cf. *West Lynn Creamery, Inc.*, 512 U.S. at 192 (stating that the strict scrutiny determination concerns whether the statute promotes a “valid factor”). In other constitutional doctrines “legitimate local purpose” is more commonly used for rational basis scrutiny of statutes. See *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001) (citations omitted) (holding that under Equal Protection analysis the rational basis test is whether there “is a rational relationship between the disparity of treatment and some legitimate governmental purpose”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (holding that “[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose”); *Flores*, 507 U.S. at 319 (citations omitted) (holding that the rational basis test in Substantive Due Process cases is whether an action “is rationally connected to a governmental interest”). In dormant Commerce Clause jurisprudence, however, the analysis of a “legitimate” purpose is generally applied as a stricter review than rational basis. See *C & A Carbone*, 511 U.S. at 392-94. In *C & A Carbone*, the Court wrote that the “rigorous scrutiny” applied in dormant Commerce Clause analysis considers whether a state “has no other means to advance a legitimate local interest,” but later discusses that “revenue generation is not a local interest that can justify discrimination against interstate commerce.” *Id.* at 392-94. See also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). Under a rational basis test, revenue generation would be considered a legitimate local interest. See *Lawrence v. Texas*, 123 S.Ct. 2472, 2484 (2003) (O’Connor, J., concurring) (stating that “[l]aws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster”). Therefore, at least in certain cases, the test for a legitimate local interest under dormant Commerce Clause analysis appears to be closer to a compelling interest standard.

49. Compare *supra* notes 47-48 and accompanying text (describing strict scrutiny analysis under the dormant Commerce Clause), with *infra* note 50 and accompanying text (stating the strict scrutiny test under the Equal Protection and Substantive Due Process doctrines).

50. *Grutter*, 123 S.Ct. at 2336 (stating the strict scrutiny analysis under the Equal Protection Clause as review of whether a statute protects “a compelling governmental interest” and that such statute is narrowly tailored to promote that governmental interest); *Flores*, 507 U.S. at 302 (discussing the strict scrutiny test under the Substantive Due Process Clause as an “infringement [that] is narrowly tailored to serve a compelling state interest”).

51. See *TRIBE*, *supra* note 3, § 6-6, at 1062 (discussing the rigorous scrutiny applied to discriminatory statutes under dormant Commerce Clause analysis).

52. See *id.* at 1063 (stating that “review of plainly discriminatory state regulations is nearly always fatal”); *Smith*, *supra* note 16, at 1204 (emphasizing that “discriminatory regulations are almost invariably invalid”); *O’Grady*, *supra* note 28, at 574 (discussing that if a statute is deemed to be discriminatory, the Court will apply strict scrutiny “under a near-fatal rule of ‘virtual per se’ invalidity”).

53. *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994); see *supra* note 48 and accompanying text (discussing the use of strict scrutiny under dormant Commerce Clause analysis).

54. *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986); see *TRIBE*, *supra* note 3, § 6-6, at 1064.

in the balancing tier does it have a realistic chance of survival.<sup>55</sup>

The harsh treatment of statutes analyzed in the discrimination tier is especially profound given the Court's willingness to find discrimination under the dormant Commerce Clause.<sup>56</sup> In recent years the United States Supreme Court has significantly broadened the definition of discrimination for dormant Commerce Clause purposes.<sup>57</sup> Given that discriminatory statutes are "virtually *per se* invalid," the broad definition of discrimination has far-reaching effects: review of state statutes under the dormant Commerce Clause is nearly always fatal to the regulation.<sup>58</sup>

## II. DISCRIMINATION IN THE DORMANT COMMERCE CLAUSE: DEFINITIONS

The first inquiry in dormant Commerce Clause analysis is whether a state statute is discriminatory.<sup>59</sup> Consequently, the definition of "discrimination" employed by the Supreme Court in dormant Commerce Clause cases is of consequence. For purposes of the dormant Commerce Clause, discrimination is often viewed as disparate treatment of in-state and out-of-state interests.<sup>60</sup> Professor Smith refined this definition as follows: "[a] regulation is discriminatory if it imposes greater economic burdens on those outside the state, to the economic advantage of those within."<sup>61</sup> Considering the nature of the Court's dormant Commerce Clause decisions, however, this definition is too narrow.<sup>62</sup> Professor Smith's definition requires that there be out-of-state interests burdened at the expense of in-state interests.<sup>63</sup> But in cases throughout the years the Court has routinely held that a statute violates the dormant Commerce Clause when in-state interests are burdened in addition to out-of-state interests.<sup>64</sup> Furthermore, Professor Smith's definition requires that an economic

55. O'Grady, *supra* note 28, at 574. "A regulation analyzed under the Pike balancing test, on the other hand, has a far better chance of being declared valid" than a regulation analyzed under the discrimination tier. *Id.*

56. See *TRIBE*, *supra* note 3, § 6-6, at 1059. "The Court's operative definition of 'discrimination' is fairly broad." *Id.*

57. See *supra* note 2 (discussing that in dormant Commerce Clause decisions since 1990 the Supreme Court has exclusively analyzed statutes under the discrimination tier of the doctrine).

58. *Oregon Waste Sys., Inc.*, 511 U.S. at 99; see *TRIBE*, *supra* note 3, § 6-6, at 1062. "This expansive notion of discrimination has particular importance because the scrutiny of discriminatory measures is quite strict." *Id.*

59. See *TRIBE*, *supra* note 3, § 6-6, at 1059. "The Court's current approach to state regulation of commerce places great emphasis on the question whether the regulation in question discriminates against interstate or out-of-state commerce." *Id.* Cf. O'Grady, *supra* note 28, at 575 (stating that the preliminary inquiry should be whether a statute is economically protectionist, rather than whether a statute is discriminatory).

60. *Oregon Waste Sys., Inc.*, 511 U.S. at 99. "[D]iscrimination' simply means differential treatment of in- state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* *TRIBE*, *supra* note 3, § 6-6, at 1059-60. "Any disparity in the treatment of in-state and out-of-state interests – whether businesses, users, or products - constitutes discrimination, even if the disparity is slight." *Id.*

61. Smith, *supra* note 16, at 1213.

62. See *infra* notes 64-66 and accompanying text.

63. Smith, *supra* note 16, at 1213.

64. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Fort Gratiot Sanitary*

interest be burdened.<sup>65</sup> In fact, the Court has held that a statute is unconstitutional even when only health and safety interests are burdened.<sup>66</sup>

An alternative definition of discrimination is explicitly used in numerous dormant Commerce Clause cases.<sup>67</sup> In these cases, the issue is phrased as whether a statute regulates “evenhandedly.”<sup>68</sup> Although this definition is considerably broader than Professor Smith’s definition of discrimination, in practice it is generally only used in the context of a balancing tier case.<sup>69</sup>

A third definition of discrimination in dormant Commerce Clause analysis is that a statute is deemed discriminatory when it imposes a “burden on interstate commerce.”<sup>70</sup> Justice Cardozo articulated this standard when he wrote, “[I]t is the established doctrine of this Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.”<sup>71</sup> This definition is broad enough to not require discrimination against out-of-state interests; it only requires that the regulation create a burden on interstate commerce.<sup>72</sup> Considering the generous notion of “commerce” in constitutional doctrines, the definition also encompasses economic, as well as non-economic, burdens.<sup>73</sup> Although this definition of discrimination is frequently utilized by

Landfill, Inc. v. Michigan Dep’t of Natural Res., 504 U.S. 353, 361 (1992); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951). *But see C & A Carbone, Inc.*, 511 U.S. at 411 (Souter, J., dissenting) (basing his dissent, in part, on the idea that in-state and out-of-state interests are treated similarly).

65. *See Smith, supra* note 16, at 1213.

66. *C & A Carbone, Inc.*, 511 U.S. at 393 (stating that the discrimination at issue in this case concerns “health and environmental problems”); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670-71 (1981) (discussing that state health and safety regulations are subject to review under the dormant Commerce Clause); *Smith, supra* note 16, at 1220-21 (analyzing cases where non-economic burdens are created by the subject statute); *TRIBE, supra* note 3, § 6-6, at 1060. “[A] finding of discrimination [does not] necessarily depend on economic analysis.” *Id.*

67. *See infra* note 68.

68. *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994); *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94 (1987) (finding a statute constitutional because it regulated “evenhandedly”); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (setting forth the test used in the balancing tier; the preliminary inquiry is whether a statute regulates evenhandedly).

69. *See CTS Corp.*, 481 U.S. at 94. The Court found the statute at issue was constitutional because it regulated “evenhandedly.” *Id.* The case was decided in the balancing tier. *Id.* In *Pike*, the Court found the statute unconstitutional. 397 U.S. at 146. Although it regulated evenhandedly, it did not pass the test required under the balancing tier. *Id.* at 142-46. *But see Oregon Waste Sys.*, 511 U.S. at 99. The Court discussed whether the statute regulated evenhandedly although the case was decided in the discrimination tier. *Id.*

70. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578 (1997) (discussing that “discriminatory burdens on interstate commerce imposed by regulation or taxation may also violate the Commerce Clause”). *See also Kassel*, 450 U.S. at 670 (stating that non-economic burdens on interstate commerce are sufficient to find a statute unconstitutional).

71. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (citations omitted).

72. *See Kassel*, 450 U.S. at 664 (stating the issue in the case as “whether an Iowa statute . . . unconstitutionally burdens interstate commerce”); *TRIBE, supra* note 3, § 6-6, at 1061. “[A] statute may be deemed to ‘discriminate’ against interstate commerce even if it does not regulate interstate commerce as such.” *Id.*

73. *See Hodel v. Indiana*, 452 U.S. 314, 324 (1981) (citations omitted). “[T]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. The pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce.” *Id.* (citations omitted). *But see United States v. Lopez*, 514 U.S. 549, 561 (1995).

[The] criminal statute [regulating carrying guns] . . . has nothing to do with ‘commerce’ or any

the Court, whether an opinion uses this broad definition often depends on the author of the opinion and the facts of the case.<sup>74</sup>

The use of a broad definition of discrimination is somewhat remarkable considering the narrower definition of discrimination used in other constitutional doctrines.<sup>75</sup> What makes the use of this broad definition of discrimination incredible, however, is the harsh treatment of statutes that are deemed discriminatory.<sup>76</sup> States face a daunting challenge in defending statutes and regulations which impose a burden on interstate commerce: difficulty overcoming an broad definition of discrimination, and harsh treatment of statutes that are deemed discriminatory.<sup>77</sup>

### III. DISCRIMINATION IN THE DORMANT COMMERCE CLAUSE: MODES

Throughout the constitutional doctrines, discrimination is generally found in a statute in one of three ways: the statute discriminates on its face (facial discrimination); the statute discriminates in its effects (discrimination in effect); or, the purpose behind the statute is discriminatory (purposeful discrimination).<sup>78</sup> The Court also uses these three classifications to find discrimination in dormant Commerce Clause cases.<sup>79</sup> Interestingly, the Court utilizes these modes of discrimination differently in dormant Commerce Clause analysis, compared to other constitutional doctrines.<sup>80</sup> The unique use of the modes of discrimination

sort of economic enterprise, however broadly one might define those terms. [The statute is] not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.

*Id.*

74. *E.g.*, *Camps NewFound/Owatonna, Inc.*, 520 U.S. at 578 (stating that “discriminatory burdens on interstate commerce imposed by regulation or taxation may also violate the Commerce Clause”); *West Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994) (opining that statutes are unconstitutional if they are “designed to benefit in-state economic interests by burdening out-of-state competitors”); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)) (stating that the inquiry under the *Pike* test is whether a statute “imposes a burden on interstate commerce”).

75. *See* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring a finding that discrimination may not be found based on the effects of the statute alone in Equal Protection analysis); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (citing *Davis*, 426 U.S. at 242). “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Id.* *Day*, *supra* note 1, at 707 (discussing that in the Equal Protection and Substantive Due Process doctrines, the use of a “purposefulness” requirement has severely curtailed the effectiveness of those doctrines).

76. *See* *TRIBE*, *supra* note 3, § 6-6, at 1062-63; *Smith*, *supra* note 16, at 1204 (stating “discriminatory regulations are almost invariably invalid . . .”).

77. *See* *TRIBE*, *supra* note 3, § 6-6, at 1062-63; *Smith*, *supra* note 16, at 1204.

78. *See generally* *Smith*, *supra* note 16, at 1239-44 (denoting the three types of discrimination).

79. *Amerada Hess Corp. v. Director*, 490 U.S. 66, 75 (1989). “As our precedents show, a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce.” *Id.*

80. *See infra* notes 114-16, 121-22 and accompanying text (comparing how the Court finds discrimination in effect under the dormant Commerce Clause to discrimination in effect under the Equal Protection clause); *infra* notes 150-54 and accompanying text (analyzing the difference in treatment of purposeful discrimination under the dormant Commerce Clause to purposeful discrimination under the Equal Protection Clause).

within the dormant Commerce Clause contributes to the strength of the dormant Commerce Clause as a weapon to be used against statutes and regulations.<sup>81</sup>

In dormant Commerce Clause analysis, the Court sometimes uses discrimination in effect and purposeful discrimination to find that a statute is facially discriminatory.<sup>82</sup> Therefore, this article will first review discrimination in effect and purposeful discrimination, and will conclude by analyzing facial discrimination.<sup>83</sup>

#### A. DISCRIMINATION IN EFFECT

A statute may be deemed discriminatory in dormant Commerce Clause analysis when the effect of the statute is discriminatory.<sup>84</sup> The classic example in dormant Commerce Clause analysis is found in *West Lynn Creamery, Inc. v. Healy*.<sup>85</sup> In this case the Court reviewed a taxation scheme in Massachusetts.<sup>86</sup> The State imposed a pricing order in which every dealer in milk products was required to pay a monthly premium into the Massachusetts Dairy Equalization Fund.<sup>87</sup> This premium applied to all dealers equally, whether they were located in-state or out-of-state, and regardless of where the milk was purchased, sold or distributed.<sup>88</sup> Standing on its own, this statute was not facially discriminatory.<sup>89</sup>

A completely separate statute, however, provided the Massachusetts Dairy Equalization Fund was to be distributed on a monthly basis to every Massachusetts milk dealer.<sup>90</sup> In prior and subsequent decisions, the Court has indicated that subsidies, without more, do not violate the dormant Commerce Clause.<sup>91</sup> Again, standing on its own, this subsidy was not facially discriminatory.<sup>92</sup> The Court found, however, that the two statutes operating together created a scheme that, in *effect*, discriminated against out-of-state

81. See generally Day, *supra* note 1, at 706-08 (discussing the Rehnquist Court's "pacification" of the fundamental rights doctrine and suggesting that the dormant Commerce Clause has not yet been "pacified" in a similar manner).

82. See *infra* notes 179-86 and accompanying text.

83. The author notes that the Supreme Court usually reviews the modes of discrimination in a different order. The author observes that the Court first determines if the statute is facially discriminatory. Then in many cases, if it is facially discriminatory, the Court will not review whether it is discriminatory in effect or in purpose. If the statute is not facially discriminatory, the Court will consider whether the statute is discriminatory in effect, and finally whether it purposefully discriminates. See *Amerada Hess*, 490 U.S. at 75.

84. Smith, *supra* note 16, at 1243-44; see *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994).

85. 512 U.S. 186 (1994).

86. *Id.* at 188.

87. *Id.* at 190.

88. *Id.* at 191.

89. *Id.* at 200. The Court described the taxation scheme as "nondiscriminatory" and "evenhanded." *Id.*

90. *Id.* at 191.

91. *Id.* at 199 n.15. The Court has not directly answered the question whether subsidies violate the dormant Commerce Clause. *Id.* But dicta in a few cases indicates that subsidies, without more, do not violate the dormant Commerce Clause. See *id.*; *Camps NewFound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 583 n.16 (1997).

92. *West Lynn Creamery, Inc.*, 512 U.S. at 199.

commerce.<sup>93</sup> “Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products.”<sup>94</sup> The Court then went on to find that the discriminatory tax did not satisfy strict scrutiny, and deemed the pricing scheme unconstitutional.<sup>95</sup>

In another example of the Court considering the effects of a statute to find it discriminatory, the Court invalidated a city ordinance in *C & A Carbone, Inc. v. Town of Clarkstown*.<sup>96</sup> In *C & A Carbone*, the City enacted an ordinance that required all waste collected within the City to be processed at the local transfer station prior to leaving the town.<sup>97</sup> The statute did not discriminate based on the origin of the waste, or where the waste would ultimately be deposited.<sup>98</sup> It also did not discriminate based on the residence of the waste hauler.<sup>99</sup> Despite the lack of facial discrimination, the Court ruled that the statute was discriminatory in its effects.<sup>100</sup> The Court held that the ordinance directed the waste to the preferred processing facility, instead of allowing waste haulers to choose where to process the waste they collected.<sup>101</sup> “Though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design.”<sup>102</sup> The Court held that this “protectionist effect” constituted “[d]iscrimination against interstate commerce.”<sup>103</sup> Applying the *per se* invalidity standard, the Court determined that the statute was unconstitutional because the local interests were not sufficient to justify the discrimination.<sup>104</sup>

Similarly, in the earlier case *Hunt v. Washington State Apple Advertising Commission*, the Court found that the effect of a statute was discriminatory.<sup>105</sup> The subject of this case was a North Carolina statute that required all closed containers of apples entering the state to display either the USDA grade of the apples, or no grade at all.<sup>106</sup> Washington apple producers requested an exemption from the North Carolina regulations because they already utilized a more stringent grading system.<sup>107</sup> Despite multiple requests, North Carolina refused to grant Washington apple producers an exemption from the labeling

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93. *Id.* at 194.

94. *Id.*

95. *Id.* at 207.

96. 511 U.S. 383, 392-93 (1994).

97. *Id.* at 386.

98. *Id.* at 387-88.

99. *Id.*

100. *Id.* at 394.

101. *Id.* at 391.

102. *Id.* at 394.

103. *Id.* at 392.

104. *Id.* at 392-93.

105. 432 U.S. 333, 350-51 (1977).

106. *Id.* at 337.

107. *Id.* at 338-39. The Washington grading system was utilized in order to protect the reputation of Washington apples as being of high quality. *Id.* at 336. Washington's grading system was, in all respects, equivalent to or more stringent than the USDA grading system. *Id.* at 351.

regulation.<sup>108</sup> Consequently, the Washington State Apple Advertising Commission brought suit declaring that the North Carolina statute was invalid under the dormant Commerce Clause.<sup>109</sup> The Court found that the statute was unconstitutional because it unfairly burdened interstate commerce and that this burden was not outweighed by local interests.<sup>110</sup>

Writing for the Court, Chief Justice Burger engaged in an extended discussion of the discriminatory effects of the North Carolina statute. Chief Justice Burger's opinion listed three ways in which the statute had a discriminatory effect.<sup>111</sup> Despite the finding that there was a discriminatory effect in addition to finding a discriminatory purpose, the Court did not analyze the constitutionality of the statute under the discrimination tier.<sup>112</sup> Instead the Court found the statute unconstitutional under the balancing tier of the doctrine.<sup>113</sup>

### 1. *Comparison to Finding Discrimination in Effect in the Equal Protection Doctrine*

In dormant Commerce Clause jurisprudence, if the Supreme Court finds that the effect of a statute is discriminatory, the statute will be analyzed in the discrimination tier of the doctrine.<sup>114</sup> Analysis of the effect of the statute alone is sufficient to determine whether it is discriminatory.<sup>115</sup> Determinations of discrimination in effect in dormant Commerce Clause jurisprudence varies from findings of discrimination in effect under the Equal Protection doctrine.<sup>116</sup> The 1976 case of *Washington v. Davis* established the standard for determinations of discrimination in effect under the Equal Protection Clause.<sup>117</sup> The subject of *Davis* was a written employment examination utilized by the District of Columbia Police Department.<sup>118</sup> Four times as many African-American police

108. *Id.* at 339.

109. *Id.* Washington complained that the North Carolina regulations increased, to Washington apple producers, the cost of selling apples in North Carolina. *Id.* at 338.

110. *Id.* at 353.

111. *Id.* at 350-52.

112. *Id.* at 352-53.

113. *Id.* See generally *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (articulating the test for the balancing tier of the dormant Commerce Clause doctrine, also known as the undue burden standard).

114. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Amerada Hess Corp. v. Director*, 490 U.S. 66, 75 (1989).

115. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994). But see Smith, *supra* note 16. In his article written prior to the *West Lynn Creamery* decision, Professor Smith suggested that the Court is unlikely to find a statute is discriminatory based solely on the effects of the statute. *Id.* at 1243-44. Smith suggested that the Court will find a statute is discriminatory based on its effects when it also suspects that there is a discriminatory purpose, "but lacks sufficient evidence to characterize it as such." *Id.* at 1249-50.

116. *Infra* notes 121-24 and accompanying text; see Day, *supra* note 1, at 706-07. Professor Day discusses that in the fundamental rights doctrine, the Supreme Court adds an additional burden for the challenger of a statute. *Id.* "[U]nless the state has acted intentionally or purposefully, the state has not violated the liberty interests at issue." *Id.*

117. 426 U.S. 229 (1976).

118. *Id.* at 232-34. The Department used the examination in order to help determine whether police officers were eligible for promotion. *Id.*

officers as Caucasian police officers failed the examination.<sup>119</sup> Despite the greatly disproportionate impact of the examination on African-American applicants compared to Caucasian applicants, the Court held that the examination was not discriminatory.<sup>120</sup> The Court, per Justice White, stated “our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”<sup>121</sup> Furthermore, the Court declared in relevant part:

Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.<sup>122</sup>

In so holding, the Court adopted the rule that *effects alone are not enough* to deem a statute discriminatory under the Equal Protection Clause.<sup>123</sup> Conversely, in dormant Commerce Clause jurisprudence, effects alone are sufficient to deem a statute discriminatory.<sup>124</sup>

The willingness of the Court to find a statute discriminatory in its effects, without more, is doctrinally significant.<sup>125</sup> This, combined with the other factors mentioned throughout this article, demonstrates that discrimination analysis in the dormant Commerce Clause is considerably broader than in other constitutional doctrines.<sup>126</sup> Again, this allows the Court to engage in activist judicial review when considering dormant Commerce Clause cases.<sup>127</sup>

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119. *Id.* at 237. All applicants, regardless of race, had to take the same examination. *Id.* at 234.

120. *Id.* at 246.

121. *Id.* at 239; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (citations omitted) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986) (holding that the negligent deprivation of the protection of prisoners is insufficient to implicate Procedural Due Process, implying that a showing of purposefulness is required).

122. *Davis*, 426 U.S. at 242 (citation omitted).

123. *See generally id.*

124. Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 341-42 (1992) (stating that there is no requirement that the State purposefully discriminate in order to find a statute in violation of the dormant Commerce Clause); Amerada Hess Corp. v. Director, 490 U.S. 66, 75 (1989). “As our precedents show, a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce.” *Id.* Smith, *supra* note 16, at 1249. *But see* Smith, *supra* note 16, at 1249-50 (arguing an alternative proposition that discrimination in effect is subject to strict scrutiny in situations where the Court also suspects the state of purposefully discriminating, but does not have sufficient evidence to find purposeful discrimination).

125. *See generally* Day, *supra* note 1, at 707.

126. *See* TRIBE, *supra* note 3, § 6-6, at 1059, 1062; Day, *supra* note 1, at 707.

127. *See* TRIBE, *supra* note 3, § 6-6, at 1059, 1062.

## B. PURPOSEFUL DISCRIMINATION

The Court will also examine the underlying purpose behind a statute in order to determine if it is discriminatory.<sup>128</sup> To determine whether a statute is enacted with a discriminatory purpose, the Court will consider the motives, objectives and ends of the legislative body.<sup>129</sup> Evidence of the purpose or motive behind enactment of a statute is generally difficult to find.<sup>130</sup> Consequently, this mode of finding discrimination is used less frequently than findings of facial discrimination or discrimination in effect.<sup>131</sup> Irrespective of this difficulty, the Court does periodically find that a state's purpose is discriminatory for dormant Commerce Clause purposes.<sup>132</sup>

In *Kassel v. Consolidated Freightways Corp.*, the Court found that the purpose of the challenged statute was to discriminate against interstate commerce and, ultimately, found the statute unconstitutional.<sup>133</sup> In *Kassel* the Court considered the constitutionality of an Iowa statute enacted to prohibit double-tractor trailers in excess of sixty-five feet in length from using its highways.<sup>134</sup> The statute had several exceptions that primarily benefited Iowans, according to the Court.<sup>135</sup> Iowa's stated purpose of the statute was to increase safety on its highways because double tractor-trailers were not as safe as singles.<sup>136</sup>

In its opinion, the Court relied on three factors in its determination that the statute was enacted with a discriminatory purpose.<sup>137</sup> First, the Court decided that the safety objectives of the statute were "illusory."<sup>138</sup> Second, the Court

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128. *Amerada Hess*, 490 U.S. at 75. "[A] tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Id.* *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003). "[D]iscrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose." *Id.* (citations omitted).

129. O'Grady, *supra* note 28, at 593. "A protectionist measure, however, is one that comes complete with affirmative legislative intent." *Id.* Smith, *supra* note 16, at 1241-42; Mitchell N. Berman, Note, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 23 (2001). "Roughly, a governmental 'purpose' refers to the state of affairs that decision-makers seek to achieve by their action or inaction. Its near-synonyms in constitutional discourse include 'motives,' 'objectives,' 'ends,' and 'aims.'" *Id.* at 23 (citations omitted).

130. Smith, *supra* note 16, at 1242.

131. *See generally id.*

132. *Id.* at 1241-43.

133. 450 U.S. 662, 678-79 (1981).

134. *Id.* at 665.

135. *Id.* at 676.

136. *Id.* at 667. A "double" is a "two-axle tractor pulling a single-axle trailer which, in turn, pulls a single-axle dolly and a second single-axle trailer." *Id.* at 665. A double is typically sixty-five feet in length. *Id.* A "single" is a "three-axle tractor pulling a thirty-foot two-axle trailer." *Id.* A single is typically fifty-five feet in length. *Id.*

137. *Id.* at 671-77.

138. *Id.* at 671. In making this determination the Court considered evidence presented by Consolidated Freightways and determined that the State of Iowa failed to prove that singles were safer than doubles. *Id.* at 671-74. As a result, the Court found that the District Court's findings "that the twin is as safe as the semi" were supported by the evidence. *Id.* at 672. The Court went on to state that "Iowa's law tends to increase the number of accidents, and to shift the incidence of them from Iowa to other States," implying that the safety argument was pretextual and, in fact, Iowa's purpose was discriminatory. *Id.* at 675. *See also* *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 594

opined that the statute disproportionately burdened out-of-state interests.<sup>139</sup> Third, the Court relied on statements made by Iowa's governor indicating he supported the ban on double tractor-trailers because it benefited Iowa-based companies.<sup>140</sup> Based on the above factors, the Court determined that Iowa's purpose in enacting the regulation was not to promote safety on Iowa highways, but rather to force the burden of interstate trucking onto neighboring states.<sup>141</sup> Although the Court found that the statute was enacted with a discriminatory purpose, the Court decided this case in the balancing tier of the dormant Commerce Clause and held that the statute was unconstitutional.<sup>142</sup>

The Supreme Court also found purposeful discrimination when it decided *Bacchus Imports, Ltd. v. Dias*.<sup>143</sup> In this case a Hawaii statute imposed a twenty percent excise tax on wholesale sales of liquor.<sup>144</sup> The statute further provided that sales of two varieties of locally-manufactured liquor were exempt from the tax.<sup>145</sup> Hawaii's stated purpose in enacting the exemptions was to "foster the local industries by encouraging increased consumption of their product."<sup>146</sup>

Authoring the Court's opinion, Justice White stated that "we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry."<sup>147</sup> In addition to finding purposeful

(8th Cir. 2003). The Eighth Circuit determined that there was indirect evidence of the State's discriminatory purpose in proposing Amendment E. *Id.* The Court stated that there were "irregularities in the drafting process" demonstrated by the "impression that the drafters and supporters of Amendment E had no evidence" that Amendment E would accomplish its stated objectives. *Id.* at 594-95.

139. *Kassel*, 450 U.S. at 676. The Court held that disproportionate burdens were demonstrated by the exceptions to the statute that benefited Iowans. *Id.* Furthermore, the existence of the exemptions indicated that the purpose of the statute was not "to ban dangerous trucks, but rather to discourage interstate truck traffic." *Id.* at 677. "Such a disproportionate burden is apparent here. Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use." *Id.* at 676.

140. *Id.* at 677. Iowa's Governor Ray vetoed a 1974 bill that would have permitted 65-foot doubles in the State and later declared:

I find sympathy with those who are doing business in our state and whose enterprises could gain from increased cargo carrying ability by trucks. However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens.

*Id.* See also *South Dakota Farm Bureau*, 340 F.3d at 593-94. The Eighth Circuit determined that the drafters of Amendment E to the South Dakota Constitution "intended to discriminate against out-of-state businesses." *Id.* at 593. The Court demonstrated this intent by stating: "The record contains a substantial amount of such evidence as regards the drafters, the most compelling of which is the 'pro' statement on a 'pro-con' statement compiled by Secretary of State Hazeltine and disseminated to South Dakota voters prior to the referendum." *Id.* at 593-94.

141. *Kassel*, 450 U.S. at 677.

142. *Id.* at 678-79. *But see id.* at 685 (Brennan, J., concurring) (stating that although the Court "recognizes that the State's actual purpose in maintaining the truck-length regulation was 'to limit the use of its highways by deflecting some through traffic,' [it] fails to recognize that this purpose, being protectionist in nature, is impermissible under the Commerce Clause").

143. 468 U.S. 263 (1984).

144. *Id.* at 265.

145. *Id.* Okolehao and pineapple wine, both manufactured in Hawaii, were exempted from the liquor tax. *Id.*

146. *Id.* at 269.

147. *Id.* at 271. The State defended the exemptions stating that the protected liquors did not compete with other products sold by wholesalers. *Id.* at 268. In claiming there was a low level of competition, the State relied on statistics demonstrating the low level of sales of the Hawaiian products.

discrimination, the Court also found that the effects of the statute were discriminatory.<sup>148</sup> Consequently, the Court determined that the exemption violated the dormant Commerce Clause “because it had both the purpose and effect of discriminating in favor of local products.”<sup>149</sup>

### 1. Purposeful Discrimination: Comparison to the Equal Protection Clause

A finding of purposeful discrimination is considerably easier in dormant Commerce Clause analysis than in Equal Protection cases.<sup>150</sup> In Equal Protection cases, the Court will not deem a purposefully discriminatory statute unconstitutional unless the challenger meets “the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.”<sup>151</sup> This burden shifting does not occur within the dormant Commerce Clause doctrine.<sup>152</sup> In fact, at least one author argues that purposefully discriminatory statutes are “per se [sic] invalid.”<sup>153</sup> In dormant Commerce Clause analysis, if purposeful discrimination exists, then the statute will be reviewed under the strict scrutiny standard.<sup>154</sup>

## C. FACIAL DISCRIMINATION

In most constitutional doctrines a statute is deemed to be facially discriminatory if the prohibited discrimination is found on the face of the

*Id.* The Court held that the limited competition between the exempted liquors and other wholesale liquors is not determinative in whether the statute is discriminatory. *Id.* at 269. “[N]either the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present ‘competitive threat’ to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages.” *Id.* The State argued that the limited level of competition, however, indicates that the case should be determined in the balancing tier. *Id.* at 270. The State argued that “taking into account the practical effect and relative burden on commerce” the Court should employ a “more flexible approach” in its analysis. *Id.* The Court held, contrary to the State’s argument, that “examination of the State’s purpose in this case is sufficient to demonstrate the State’s lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce.” *Id.*

148. *Id.* at 271. “[I]t is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory.” *Id.*

149. *Id.* at 273.

150. See *infra* notes 151–54 and accompanying text.

151. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 n.21 (1977).

152. See *Smith*, *supra* note 16, at 1242 (stating “regulations that are discriminatory in purpose are per se invalid”).

153. *Id.*; see also *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 685 (1981) (Brennan, J., concurring) (asserting that because the purpose of the statute, “being protectionist in nature, is impermissible under the Commerce Clause”).

154. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994). “Discrimination against interstate commerce in favor of local business or investment is per se invalid.” *Id.* See also *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596–97 (8th Cir. 2003). “Because we conclude that Amendment E was motivated by a discriminatory purpose, we must strike it down as unconstitutional unless the Defendants can demonstrate that they have no other method by which to advance their legitimate local interests. The Supreme Court has referred to this test as one of the ‘strictest scrutiny.’” *Id.* (citations omitted). But see *Kassel*, 450 U.S. at 678–79 (finding a purposefully discriminatory statute invalid under the balancing tier of the dormant Commerce Clause as opposed to the strict scrutiny applied under the discrimination tier).

statute.<sup>155</sup> While this seems to be a rather straightforward test, its application is somewhat muddled, particularly within the dormant Commerce Clause.<sup>156</sup>

*Chemical Waste Management, Inc. v. Hunt* presents a clear case of facial discrimination.<sup>157</sup> In *Chemical Waste*, the Court reviewed an Alabama statute regulating hazardous waste disposal.<sup>158</sup> The statute imposed a base fee on the disposal of hazardous waste, and an additional fee if the waste was generated outside of Alabama.<sup>159</sup> The Court held that this statute facially discriminated against hazardous waste generated outside of Alabama.<sup>160</sup> The Alabama statute clearly provided that waste generated out-of-state would be subject to higher taxes.<sup>161</sup> Consequently, there was different treatment of out-of-state interests compared to the treatment of in-state interests.<sup>162</sup> *Chemical Waste* demonstrates a clear example of facial discrimination.<sup>163</sup>

The Court will also find a statute facially discriminatory when the statute does not clearly mention out-of-state interests.<sup>164</sup> In *Wyoming v. Oklahoma*, the Court reviewed the constitutionality of a statute that required Oklahoma coal-fired electrical generating plants to use at least ten percent coal that was mined in Oklahoma.<sup>165</sup> Although the statute did not directly treat out-of-state coal interests differently than in-state coal interests, such as through imposing higher taxes on the out-of-state coal, the Court found that the statute discriminated on its face.<sup>166</sup> The statute expressed a preference for Oklahoma coal, thus benefiting the Oklahoma coal industry at the expense of out-of-state coal industries.<sup>167</sup> Therefore, the statute was found to be facially discriminatory.<sup>168</sup>

155. See *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (discussing that the statute at issue was neutral on its face, but held it violated Equal Protection because of a discriminatory purpose); Smith, *supra* note 16, at 1239.

156. See Smith, *supra* note 16, at 1240. Professor Smith argues that facial discrimination can be difficult to identify within the dormant Commerce Clause because of two factors: he suggests that "discrimination on the face is a matter of degree" and because the Supreme Court sometimes imposes a "reciprocity requirement." *Id.* O'Grady, *supra* note 28, at 590-91. "[I]dentifying even express facial discrimination is not as straightforward as one would think." *Id.*

157. 504 U.S. 334 (1992).

158. *Id.* at 338.

159. *Id.* The statute provided that "[f]or waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton." *Id.* at 338-39 (citing ALA. CODE § 22-30B-2(b) (1990 & Supp. 1991)).

160. *Id.* at 342.

161. See *supra* note 159 and accompanying text.

162. See *supra* note 159 and accompanying text; see Smith, *supra* note 16, at 1239 (stating that there is clear facial discrimination when "the very terms of the regulation deal unequally with people inside and outside the state").

163. For another example of clear facial discrimination see *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

164. See *infra* notes 165-67 and accompanying text.

165. 502 U.S. 437, 443 (1992).

166. *Id.* at 455. "[T]he Act, on its face and in practical effect, discriminates against interstate commerce." *Id.*

167. *Id.*

[T]he Act expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States. Such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin.

Facial discrimination is also found in cases where in-state interests are burdened in addition to out-of-state interests.<sup>169</sup> A logical argument is that a statute cannot be considered discriminatory when its burdens fall on both in-state as well as out-of-state interests.<sup>170</sup> Indeed, the general notion of discrimination is that parties are treated differently.<sup>171</sup> Accordingly, in the context of interstate commerce, discrimination is generally found to occur in the disparate treatment of in-state interests versus out-of-state interests.<sup>172</sup> This argument was considered in *Dean Milk Co. v. City of Madison*.<sup>173</sup>

In *Dean Milk*, the Court reviewed the constitutionality of an ordinance that regulated the sale of milk in Madison, Wisconsin.<sup>174</sup> The statute required that milk sold in Madison must be processed at a facility located within five miles of the City.<sup>175</sup> In effect, this prohibited out-of-state milk processors, as well as in-state milk processors that were located more than five miles outside of the City, from selling milk within the City.<sup>176</sup> The Court held that it was “immaterial” that in-state interests were burdened in addition to out-of-state interests.<sup>177</sup> The Court, therefore, held that the statute was discriminatory on its face.<sup>178</sup>

### 1. *Combination of Modes to Find Facial Discrimination*

The Supreme Court has employed numerous tools to create a broad definition of facial discrimination.<sup>179</sup> One of the methods utilized by the

*Id.*

168. *Id.*

169. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (“The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (stating that the Court disagreed with the State when it argued that the regulations “do not discriminate against interstate commerce on their face or in effect because they treat waste from other Michigan counties no differently than waste from other States”). *But see C & A Carbone*, 511 U.S. at 394 (stating that “ordinance may not in explicit terms seek to regulate interstate commerce,” indicating that the Court did not find that the statute was discriminatory on its face).

170. *See C & A Carbone*, 511 U.S. at 391; *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361.

171. *See Smith*, *supra* note 16, at 1239.

172. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). “In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.” *Id.* *Smith*, *supra* note 16, at 1239.

173. 340 U.S. 349 (1951).

174. *Id.* at 350-51.

175. *Id.* at 350.

176. *Id.*

177. *Id.* at 354 n.4; *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 203 (1994). “The idea that a discriminatory tax does not interfere with interstate commerce ‘merely because the burden of the tax was borne by consumers’ in the taxing State [is invalid].” *Id.* (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984)).

178. *Dean Milk Co.*, 512 U.S. at 354. In *Dean Milk*, the Court held that the ordinance “plainly discriminates against interstate commerce.” *Id.* The Court went on to apply something of a balancing analysis in its determination that the statute was unconstitutional. *See id.* at 354-57. The *Pike* test had not been articulated at the time of the *Dean Milk* decision. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

179. *See Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (finding an Oklahoma statute unconstitutional because it discriminated against interstate commerce even though the statute did not directly mention out-of-state interests); *Dean Milk Co.*, 340 U.S. at 354 n.4 (holding that a Wisconsin statute discriminated against interstate commerce although the negative effects of the statute were

Supreme Court is to combine multiple modes of discrimination in order to find facial discrimination. For example, the Court appears to sometimes use the existence of a discriminatory effect or discriminatory purpose to determine that the statute is facially discriminatory.<sup>180</sup> In *West Lynn Creamery*, the Court determined that the “purpose and effect of the pricing order” was discriminatory.<sup>181</sup> But the Court also stated that the “pricing order is *clearly* unconstitutional.”<sup>182</sup> The Court’s language suggests that the combined statutes were facially discriminatory. Additionally, in *C & A Carbone*, the Court indicated that it employed a discriminatory effects analysis plus a purposeful discrimination analysis to find facial discrimination.<sup>183</sup> The Court discussed the language of the statute and asserted it “does not differentiate solid waste on the basis of its geographic origin.”<sup>184</sup> The Court went on to discuss that all solid waste leaving the town must be processed at the favored facility, and it suggested that this was discriminatory on its face.<sup>185</sup> Throughout the opinion, the Court referred to the statute as though it was facially discriminatory, and treated it as though it was facially discriminatory.<sup>186</sup>

## 2. *Theories Why the Court Uses Combinations of Modes of Discrimination*

Using discriminatory effects and purposeful discrimination in order to find facial discrimination creates a very generous notion of facial discrimination.<sup>187</sup> Although it is uncertain why this occurs, there are a few plausible theories. First, the Justices writing for the Court may be attempting to garner additional votes.<sup>188</sup> Justice Scalia has stated several times that he will vote to find a statute unconstitutional as violating the dormant Commerce Clause only if it is facially discriminatory, or if the law is indistinguishable from a law that has previously been held unconstitutional.<sup>189</sup> Consequently, if the Court, through an expanded reading of the dormant Commerce Clause, is able to find that a statute is facially

experienced by both in-state and out-of-state interests); *see generally* TRIBE, *supra* note 3, § 6-6, at 1059. “[T]he Court’s operative definition of ‘discrimination’ is fairly broad.” *Id.*

180. *See infra* notes 181-86 and accompanying text.

181. *West Lynn Creamery*, 512 U.S. at 203.

182. *Id.* at 194 (emphasis added).

183. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

184. *Id.* at 390.

185. *See id.*

186. *See id.* “With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town.” *Id.* at 391. “Discrimination against interstate commerce in favor of local business or investment is *per se* invalid.” *Id.* at 392. *But see id.* at 394. “Though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design.” *Id.*

187. *See generally* TRIBE, *supra* note 3, § 6-6, at 1059.

188. *See Day, supra* note 1, at 695 (quoting *Am. Trucking Ass’n, Inc. v. Scheiner*, 483 U.S. 266, 304 (1987) (Scalia, J. dissenting)) (discussing that Justice Scalia abhors the balancing test of the dormant Commerce Clause and “‘all he would require’ is that the state regulation ‘does not facially discriminate against interstate commerce’”).

189. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 209-10 (1994) (Scalia, J., concurring); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312-13 (1997) (Scalia, J., concurring); *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring); *see also Day, supra* note 1, at 695; O’Grady, *supra* note 28, at 576 n.21.

discriminatory and Justice Scalia agrees, he will vote to subject the statute to strict scrutiny.<sup>190</sup>

A second reason why the Court may be using discriminatory effects and discriminatory purpose to find facial discrimination is to broaden the facial discrimination determination.<sup>191</sup> Both discrimination in effect and purposeful discrimination are targets that could be significantly narrowed through the use of existing constitutional tools.<sup>192</sup> For example, if Chief Justice Rehnquist, Justice Scalia and Justice Thomas determined that the dormant Commerce Clause was too broad, they could effectively narrow the discrimination in the effect and purposeful discrimination modes in two respects: 1) through use of a purposefulness requirement; and, 2) a requirement that upon finding purposeful discrimination, a showing that the statute would not have been passed anyway.<sup>193</sup> But, if the other members of the Court successfully establish a base of case law creating a broad definition of facial discrimination, then discriminatory effect and purposeful discrimination will not be necessary to continue the expansive judicial review within the dormant Commerce Clause.<sup>194</sup>

#### IV. CONCLUSION

The concept of discrimination employed in dormant Commerce Clause jurisprudence is quite broad when compared to the concept of discrimination used in other constitutional doctrines.<sup>195</sup> The Supreme Court readily finds that statutes and regulations are facially discriminatory, discriminatory in effect, and purposefully discriminatory in dormant Commerce Clause cases.<sup>196</sup> In addition to utilization of a broad definition of discrimination, the dormant Commerce

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190. See *supra* note 189. Interestingly, Justice Scalia did join the Court in *C & A Carbone*, when it indicated that purposeful discrimination plus discrimination in effect could be used to find facial discrimination. See *supra* notes 183-86 and accompanying text. In *West Lynn Creamery*, however, Justice Scalia filed a concurring opinion indicating that he found the statute discriminatory on *stare decisis* grounds. See *West Lynn Creamery*, 512 U.S. at 210.

191. See *TRIBE*, *supra* note 3, § 6-6, at 1059. Tribe discussed that, under the discrimination tier of the dormant Commerce Clause, “[i]f a state regulation ‘discriminate[s] against interstate commerce either on its face or in practical effect,’ it will be” subjected to strict scrutiny, and that the “Court’s operative definition of discrimination is fairly broad in this context.” *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

192. See *Day*, *supra* note 1, at 706-07 (citing Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 937, 955 (1990)) (stating that the Burger and Rehnquist Courts effectively reduced judicial review in the fundamental rights doctrine through use of the “purposefulness requirement”); see also *supra* notes 121-23 and accompanying text.

193. See *supra* notes 121-23, 150-52 and accompanying text.

194. See *supra* notes 189-90 and accompanying text.

195. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring a finding that discrimination may not be found based on the effects of the statute alone in Equal Protection analysis); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.” *Id.* (quoting *Davis*, 426 U.S. at 242). “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Id.*

196. See *supra* note 2 and accompanying text (listing the ten dormant Commerce Clause cases decided since 1990); *supra* notes 52-54 and accompanying text (discussing that, with one exception, in every case decided under the discrimination tier of the dormant Commerce Clause, the Court determined the subject regulation was unconstitutional).

Clause doctrine treats harshly those statutes that are deemed discriminatory. In fact, once the Court deems a statute to be discriminatory, the statute is subject to strict scrutiny.<sup>197</sup> The broad notion of discrimination combined with strict scrutiny creates activist judicial review in the dormant Commerce Clause doctrine.<sup>198</sup>

It is interesting that activist judicial review exists in a doctrine that is not based in the text of the Constitution.<sup>199</sup> Despite the absence of an express proscription on interferences with interstate commerce in the Constitution, the Supreme Court is inclined to actively prohibit such burdens on interstate commerce. Hence, it appears the Supreme Court is attempting to promote the rationales underlying dormant Commerce Clause jurisprudence. Other constitutional doctrines are not well designed or as effective at promoting national unity and protecting economic liberties. As such, it appears that the Supreme Court has created an expansive dormant Commerce Clause doctrine so that it may effectively promote these rationales. Through its generous use of the dormant Commerce Clause, the Supreme Court has established a doctrine to protect the economic rights implicit in the Constitution.

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197. *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994) (citations omitted) ("If a restriction on commerce is discriminatory, it is virtually *per se* invalid."); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996).

198. *See also O'Grady, supra* note 28, at 631 (discussing that judicial review under the dormant Commerce Clause is too broad and does not leave enough discretion to state legislatures).

199. *See also Day, supra* note 1, at 694 (quoting *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 254 (1987)) (discussing that Justice Scalia's primary concern with the dormant Commerce Clause is that "it had 'no basis in the Constitution'").