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PUTTING THE DORMANCY DOCTRINE OUT OF ITS MISERY

*Richard D. Friedman**

Justice Antonin Scalia has put on the academic table the question of whether the doctrine of the dormant commerce clause should be abandoned. That is a significant contribution, for this is an issue that should be debated thoroughly. But Justice Scalia's campaign against the doctrine has been notably ambivalent. On the one hand, he argues that the doctrine lacks justification in constitutional text, history, and theory.¹ On the other hand, assertedly feeling the pressure of *stare decisis*,² he has gone along with, and even led, applications of the doctrine, although within narrow limits.³

In this essay, I argue that Justice Scalia's instincts are correct: the dormancy doctrine ought to be abandoned, though not necessarily for the reasons he suggests. The doctrine is the result of an historical anomaly. It has long outlived its usefulness, and *stare decisis* is an insufficient prop to keep it standing. I believe the doctrine requires the courts to make political and economic judgments that could be made better—certainly more efficiently and legitimately, and perhaps more wisely as well—by other branches of government. From the comfort of the academic sidelines that Justice Scalia has left, I suggest

* My thanks to Charlie Bieneman and David Goodhard for very able research assistance on this piece, and to David Katz, Larry Kramer, Mark Tushnet, and Elliot Weiss for helpful comments on an earlier draft.

¹ See *Tyler Pipe Indus. v. Washington*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (“[T]he Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well.”).

² “It is astonishing that we should be expanding our own beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.” *Id.* But cf. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1689 (1991) (in Scalia's view, “[i]f a judge has correctly construed the document's original intent, this opinion is worth respect; if not, then not (unless the judge's error has become too deeply entrenched in practice—repeated too often, relied upon too extensively—to correct without substantial disruptions).”); Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991). Professor Strauss argues that it is not necessarily a paradox that Scalia appears to be “deeply respectful of tradition” while not “a great fan of *stare decisis*”: “Precedent overlaps tradition; it is not subsumed by it. Some precedents may be said to be part of a tradition. But not all are.” *Id.* at 1705, 1699, 1706.

³ See *Healy v. Beer Inst., Inc.*, 109 S. Ct. 2491, 2503-04 (1989) (concurring in part); *Goldberg v. Sweet*, 488 U.S. 252, 272 (1989) (concurring in judgment); *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897-98 (1988) (concurring in judgment); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) (for a unanimous Court).

that he, and the Court, go further than merely complaining about the doctrine of the dormant commerce clause; they should do away with it.⁴

To prevent any confusion, I will assert right off that I recognize as essential to our national economy that there be some federal authority ready and able to invalidate state laws that unacceptably interfere with interstate commerce. Indeed, the need to prevent provincial state legislation was one of the principal reasons for the creation of our Constitution.⁵ The need for a supervising authority is as necessary now as it was in 1787—and as it will increasingly be for the European Community in the 1990s. My argument is simply that this authority should not be judicial. I do not question *whether* the authority should exist; I only question *who* should exercise it. Congress itself can perform only a small part of the job. Most of the burden, therefore, must be borne by one or more administrative agencies. To some extent, Congress and the administrative agencies already perform the oversight function, but with judicial review under the commerce clause as a backup. Removing this backup, thereby shifting the function entirely to the political branches (with judicial review only to prevent arbitrary action violating due process), would not necessarily result in the invalidation of fewer state laws. Any agency might well perform the primary oversight function more aggressively than the courts, because the agency would not confront the factors that appropriately inhibit the courts from unduly interfering with political decisions.

Professor Tushnet suggests that Justice Scalia's "textual and historical attack on the doctrine [of the dormant commerce clause] is substantially less powerful than he believes it to be."⁶ I agree with

⁴ I thus go further than does Professor Eule, who argues that the dormancy doctrine should be eliminated except to the extent necessary to take up what he perceives as the slack left by an unduly narrow view of the term "citizens" in the privileges and immunities clause of article IV, section 2 of the Constitution. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 428 (1982). Under one clause or the other, then, he would protect out-of-state corporate interests against discriminatory state laws. By contrast, I would eliminate the dormancy doctrine altogether, without expanding the scope of the privileges and immunities clause beyond a narrow prohibition—the bounds of which I will not attempt to define here—of certain types of discrimination against individuals.

⁵ G. GUNTHER, CONSTITUTIONAL LAW 99 (11th ed. 1985); see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 404-05 (2d ed. 1988).

⁶ Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1719 (1991). It is important to note that where constitutional interpretation is concerned, Scalia has endorsed the doctrine of "originalism," which approves of the use of the Constitution's "legislative history" when adjudging its meaning. See Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864-65 (1989). In contrast, as Nicholas Zeppos points out, where statutory interpretation is concerned, "Scalia has urged an abandonment of

this assertion, but, as I contend in Part I of this essay, the textual and early historical arguments in favor of the doctrine are shaky at best. These arguments are far from compelling, either in the sense that they are completely persuasive or that they preclude current debate about the appropriateness of the doctrine. In Part II, I set forth the reasons of constitutional policy and theory why the doctrine ought to be discarded.

I. TEXT AND HISTORY

Neither text nor history resolves the question of whether the dormant commerce clause doctrine should persist. Even if the text or early history of the commerce clause clearly indicated that the framers did *not* intend for the clause to have a dormant aspect, or at least not one resembling the current doctrine, that would not be sufficient evidence to discard the doctrine, if it made sense; the encrustation of well over a century of precedent has given the doctrine the legitimacy it needs and may have lacked when the clause was written.⁷ Similarly, demonstrating that the doctrine reflects the framers' intent does not suffice to uphold the doctrine if it is not sensible, unless the showing of intent is so compelling that a departure would amount to a breach of faith.

The significance of text and history with respect to the current appropriateness of the doctrine is not limited to questions of legitimacy. If the doctrine were engrained into our constitutional system from the outset, this might suggest that it is integral to our notion of federalism. To dispel this suggestion, those who advocate abandoning the doctrine still need not carry the burden of proof regarding the original understanding of the clause; it is enough if the framers of the Constitution and others in the early years of the Constitution were unclear as to whether the doctrine existed, or at least were not firmly committed to it.⁸ In other words, the advocates of discarding the dormant commerce clause need not, and in fact cannot, score a knockout

the Court's traditional use of legislative history to interpret statutes." Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1598 (1991); see also *id.* at 1619-20.

⁷ Cf. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2116 (1990) (Scalia, J.) (declining to reconsider the prevailing in-state service rule: "[F]or our purposes, its validation is its pedigree, as the phrase 'traditional notions of fair play and substantial justice' makes clear." (emphasis in original)). But see Strauss, *supra* note 2 (arguing that longevity of precedent is not sufficient basis to justify its continuance); Burt, *supra* note 2 (same).

⁸ Ideally, though, a theory in favor of discarding the doctrine should posit factors that explain how it grew and thrived for so long, but that no longer justify it. In Part II, I offer some speculations on this theory.

blow on the textual and historical issues; a draw will suffice. But I believe we can do better.

As Justice Scalia notes, the language of the commerce clause is naturally read as merely a grant of power to Congress. If that is all the clause was intended to do, the historical issue is at an end. In Albert Abel's exhaustive study of the early history of the clause, one can draw a glimmering of evidence from the Constitution's earliest days supporting this restrained linguistic reading of the clause.⁹

The natural reading of the clause, however, is not the only plausible one. By implication, a grant of power can also be exclusive, as some of the powers in article I, section 8 appear to be. Indeed, Abel concludes that "[o]n the whole" the evidence provides stronger support for the view that the grant of power was understood to be exclusive within the limited field that was, at that time, deemed commerce.¹⁰

Abel does not express great confidence in this conclusion; he says that the issue of the clause's effect on the states was neither "clearly posed [nor] unequivocally settled."¹¹ But even assuming his conclusion is correct—and I have no reason to suspect it is not—it provides limited comfort for a supporter of the modern doctrine of the dormant commerce clause. Abel's conclusion does suggest that some state laws would be invalid under the unexercised commerce power. But his conclusion appears, at least at first glance, to do so on terms that are unacceptable today. The original understanding as hypothesized by Abel leaves no room for *valid* state regulation of commerce. And it is of course essential to our notion of federalism that the states be able to regulate some aspects of commerce—at least of what today we deem to be commerce.

Thus, one seeking to find support for the modern dormancy doctrine in the early constitutional history cannot be satisfied merely by reading into the clause the qualification that the grant of power is exclusive. The interpolation must be doubly complex: in some areas the grant to Congress must be deemed exclusive, and in other areas concurrent (and of course some areas, now perhaps vanishingly small, are unreached by the grant at all). I am not willing to go as far as Justice Scalia and say that such a multifaceted reading of unfaceted language is illegitimate.¹² In *Federalist* No. 32, Hamilton argues rea-

⁹ See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 489-90 (1941).

¹⁰ *Id.* at 493-94; see *id.* at 491-93.

¹¹ *Id.* at 481.

¹² In his dissent in *Tyler Pipe*, Justice Scalia wrote that the doctrine that some regulations of commerce require exclusive legislation by Congress and some do not "has the misfortune of

sonably that some federal powers must be construed as exclusive, even in the absence of explicit language, because a concurrent state power would unacceptably obstruct the federal power.¹³ If this argument is accepted, then it is plausible to argue further that the determination of obstructiveness should be made case by case, application by application, rather than in gross, clause by clause. Indeed, this argument seems to lead to something similar to the doctrine enunciated in *Coolley v. Board of Wardens*.¹⁴

Even if such a construction of the text is plausible, however, it is certainly not compelled by the constitutional language. Nor could one plausibly argue that this construction was generally accepted and understood—much less articulated—by those who drafted, debated, and ratified the Constitution. Nevertheless, those supporting modern dormancy doctrine could maintain, with some force, that contemporaries of the Constitution did regard the clause as being disaggregated, rather than as a monolithic whole. Abel persuasively demonstrates that the framers regarded the clause as being an affirmative grant of regulatory power with respect only to foreign commerce, which was their primary concern.¹⁵ The framers, as well as the ratifiers, paid only “incidental and minor regard” to commerce between the states;¹⁶ they believed that the power to regulate that commerce was to be supervisory only, restraining state-created preferences and discriminations.¹⁷

A supporter of modern dormancy doctrine might argue that this history reveals the requisite structure, designating one area of exclusive Congressional power as well as one of concurrent powers: the heart of the clause’s grant (covering foreign commerce) was exclusive, if Abel’s hedged conclusion is correct, while on a matter of peripheral concern (interstate commerce), the power was concurrent, in that Congress was authorized to nullify state legislation. Even if the precise boundaries between the exclusive and concurrent areas have

finding no conceivable basis in the text of the Commerce Clause, which treats ‘Commerce . . . among the several States’ as a unitary subject.” *Tyler Pipe Indus. v. Washington*, 483 U.S. 232, 265 (1987).

¹³ THE FEDERALIST No. 32, at 80-83 (A. Hamilton) (R. Fairfield ed. 1981), *quoted in* Abel, *supra* note 9, at 489.

¹⁴ 53 U.S. (12 How.) 299, 319 (1851) (“Whatever subjects of this power [to regulate commerce] 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.”); *see also* *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279-80 (1873).

¹⁵ Abel, *supra* note 9, at 465, 469.

¹⁶ *Id.* at 465; *see id.* at 470-71, 472.

¹⁷ *Id.* at 469-72, 475.

changed over two centuries, the argument runs, this does not negate the structural point.

I do not believe this argument succeeds. For one thing, the area of potentially exclusive federal power, as originally conceived, was very narrow. It was not only limited to the international context, but even within that context

three large classes of subjects—fiscal regulation as to imports and exports, navigation, “mercantile” enterprises—are the only ones that there is any evidence for believing were thought of by any one as embraced within “commerce” or affected by the grant of power to regulate it. . . . Peripheral matters—the routes and channels of internal communication, internal police regulations determinative of whether and on what conditions articles of commerce might move between state and state, the establishment of a trustworthy medium of exchange—might be ever so intimately connected with commerce, but they were not commerce, and Congress had no power over them under, or by implication from, the commerce clause.¹⁸

Thus, if the framers and others at the time of the Constitution regarded the exclusive nature of the commerce clause as not only tolerable, but hardly worthy of comment, it was probably because the grant of active power to Congress, and the corresponding withdrawal of power from the states, was so limited.

Furthermore, according to Abel, the area of exclusive federal power was also the exclusive area of *active* federal power. Interstate matters, the area of supposed concurrence, involved overlapping powers in one sense only; although the states and Congress could both regulate aspects of what we would now consider interstate commerce, Congress’ legislation was limited to controlling unsuitable state laws.

Thus, the structure of the commerce clause according to Abel’s account of the original understanding simply does not square with the present structure of the clause. Under the original structure, as viewed by Abel, Congress was given a “mild, modest little power,”¹⁹ limited to active regulation of certain areas of foreign commerce and the negation of some state regulations of interstate commerce. The states could not act in the areas of active federal regulation at all. But because the framers did not “think of the arteries of commerce, the highways and the inland streams, harbors, bridges, and the like, as within the ambit of congressional power under the commerce clause,”²⁰ the clause did not limit state power in these areas at all. In

¹⁸ *Id.* at 465, 481.

¹⁹ *Id.* at 481.

²⁰ *Id.* at 478.

the current structure, by contrast, active federal power is far more encompassing, but the mere fact that an area is within the scope of that power does not mean that it is removed from the state's realm.

Today, we depend on the "fine large substitute" that the courts have created to replace the original limited grant of active federal power.²¹ In addition, we depend on there being a significant overlap in the areas that the states and Congress, respectively, can regulate actively; we cannot tolerate an expansive but exclusive federal power, one that precludes state action absent federal action, any more than we can be satisfied by severely limited federal power. Plainly, then, we cannot—or at any rate will not—live today with the original conception of the commerce clause described by Abel. The judicially crafted federal power of today suits our needs far better and is at least a plausible reading of the text, if not the history, of the clause. A fortiori, even assuming contrary to its most natural reading that the clause was understood to effect a partial exclusion of state power (which is by no means certain), there is no need to view the clause that way today if doing so obstructs our constitutional needs. And there is certainly no need to expand such an exclusion beyond its original bounds.

This is not simply a matter of "sauce for the goose, sauce for the gander." That is, I am not arguing (though the argument may have some validity) that, if we can expand the federal power beyond recognition from its original shape, we might as well feel free also to disregard poorly articulated and uncertain limitations on state power. I am arguing, however, that the structure of the commerce clause as originally conceived provides no significant support for the vastly different structure of the clause as it stands today. If the original structure removed power from the states, it did so because the active grant of power to Congress was exclusive; in 1787, there was nothing comparable to the current system, in which some areas that can be reached by active federal regulation are also subject to state regulation while others are not.

This argument does not suggest that the framers ignored the problem of state laws obstructing the national economy. Their solution, though, was not to write into the Constitution an invalidation of such obstructions; rather it was to authorize Congress to remove them. That is the reason why the framers decided to give Congress power over interstate commerce.

The history of state regulation in early post-Constitutional years

²¹ *Id.* at 480, 481.

confirms that nothing close to the modern conception of the dormant commerce clause was in the air. As Abel summarized this period,

The decades before *Gibbons v. Ogden*²² were a time neither of legislative inaction nor of constitutional confusion. . . . There was throughout a vigorous proliferation of action by the state governments—establishment of highways, of canals, of navigable watercourses, of telegraph systems and railroads, control of harbors and coastal rivers, of vessels and vehicles, of conditions of the highway, of equipment and weight loads of vehicle. . . . [These actions] peculiarly and in some cases expressly impinged on interstate intercourse.²³

Yet the question of whether such laws were valid under the commerce clause was not presented to the Supreme Court before *Gibbons* because, “almost without exception, Marshall’s contemporaries in the infancy of the republic did not regard the questions involved as presenting commerce clause issues.”²⁴ On the few occasions when lower courts were presented with the argument that the commerce clause of its own force invalidated state laws regulating what we now think of as interstate commerce, the courts rejected the argument almost out of hand.²⁵

Chancellor Kent’s opinion in one of those cases, *Livingston v. Van Ingen*,²⁶ is particularly interesting. In that case, the New York Court for the Correction of Errors sustained the same steamboat monopoly that was later invalidated in *Gibbons*. Because the case, unlike *Gibbons*, involved carriage wholly in New York waters, it was easy for Kent to say that the subject matter was beyond the scope of federal power. But Kent went further, and rejected in principle a dormant commerce clause argument:

The states are under no other restrictions than those expressly specified in the constitution, and such regulations as the national government may, by treaty, and by laws, from time to time, prescribe. Subject to these restrictions, I contend, that the states are at liberty to make their own commercial regulations. . . . Whenever the case shall arise of an exercise of power by congress which shall be directly repugnant and destructive to the use and enjoyment of the appellants’ grant, it would fall under the cognizance of the federal courts, and they would, of course, take care that the laws of the union are duly supported. . . . But when there is no

²² 22 U.S. (9 Wheat.) 1 (1824).

²³ Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Facilities*, 25 N.C.L. REV. 121, 170-71 (1947).

²⁴ *Id.* at 171.

²⁵ *Id.* at 167-70.

²⁶ 9 Johns. 507 (N.Y. 1812).

existing regulation which interferes with the grant, nor any pretence of a constitutional interdict, it would be most extraordinary for us to adjudge it void, on the mere contingency of a collision with some future exercise of congressional power. Such a doctrine is a monstrous heresy.²⁷

Kent's reliance on Congress squares with the anticipation of the framers: Congress would remove obstructions to interstate commerce, and the courts would get involved only by giving force, under the supremacy clause, to the acts of Congress. But Congress, as Chief Justice Marshall and other members of the Supreme Court no doubt realized, was not up to the job. Thus, the courts began to take up the slack. Because they were unfamiliar with the modern administrative state, it probably never occurred to them that another alternative was possible.

II. THEORY AND POLICY

In this Part, I contend that, as a matter of constitutional theory and policy, the power to decide which state laws impermissibly obstruct interstate commerce should not be exercised by the courts. First, the determination of which laws impede interstate commerce is an exercise of national political policy, and little more.²⁸ To say that the matter is one of policy does not necessarily mean that the courts should not get involved—courts make policy judgments all the time—but it does suggest that, in the absence of countervailing reasons, the political branches are capable of making such a determination, and legitimately should do so, without judicial involvement. Second, no such countervailing considerations are presented here: there is no need for the courts to perform this policy function, and over the long run this function will be performed far better by the political branches.

State laws are held invalid under the dormancy doctrine either because they burden interstate commerce excessively or because they discriminate improperly.²⁹ That the "excessive burden" branch of the doctrine is merely a matter of national political policy is apparent on its face. This part of the doctrine calls for a balancing of the "burden imposed on [interstate] commerce" and the "putative local benefits."³⁰ If the state law accomplishes some local benefit—and it al-

²⁷ *Id.* at 578.

²⁸ "Political policy" is used here in an all-encompassing sense to include economic and social, as well as strictly political, policies.

²⁹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

³⁰ *Id.*

most always will—the outcome of the balance depends on what policy values one attaches to the benefits and burdens. Do the benefits to interstate commerce of permitting sixty-five-foot double trailers outweigh the inconvenience of riding alongside or behind such trailers?³¹ That depends on how substantial those benefits are, what value we place on them, and on how much of a nuisance we find it to have an enormous truck for a neighbor on the highway.

It is therefore not surprising that, more than a half a century ago, the Supreme Court declared that nondiscriminatory state laws should not be invalidated simply because of the burdens they impose on interstate commerce.³² Since then, however, at least in its rhetoric, the Court has ignored this earlier position.³³

It is less readily apparent that the determination of whether a state law impermissibly discriminates against interstate commerce is a matter of policy choice. But I believe this point can be demonstrated. Let us put aside the frequently difficult questions of whether the law does discriminate, either in purpose or effect, and even the broader question of what we mean by discrimination. My point is that, even if a law clearly discriminates, and this discrimination was clearly intentional, there may still be various reasons why, as a matter of national policy, such a law should not be disturbed.

Undoubtedly, a state may promote its own commerce without promoting that of its neighbors. If a state decides to enter the market as a participant, it may decide with whom it will deal, as may a private market actor.³⁴ These principles, I believe, are part of a broader theory—that it may be sound national economic policy for the states or their subdivisions to act in certain respects as commercial, competitive units.

A related principle appears to be at play here: at times, it may be sound policy to avoid free rider problems and to say that the citizens

³¹ Cf. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (plurality opinion); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978).

³² This Court has often sustained the exercise of [a state's regulatory] power although it has burdened or impeded interstate commerce. . . . In each of [the cases cited] regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 189 (1938).

³³ In *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1174-82 (1986), my colleague Don Regan has argued that in movement-of-goods cases the Court has, language notwithstanding, invalidated state laws only for discriminatory purpose.

³⁴ *Reeves, Inc. v. Stake*, 447 U.S. 429, 435-36, 440 (1980).

of the state who pay the cost of an investment, perhaps in the form of taxes, may reap the rewards. Such a policy may not only be fairest to the state's citizens, but it may also encourage the state to make the investment in the first place. I believe this is the reason why states are permitted to give tuition preferences to their own citizens.³⁵ Perhaps this argument could be extended to some cases in which the investment, although not closely related to the activity in question, significantly improves the economic infrastructure of the state.

Moreover, even if a state law appears to be purely protectionist—even if it simply favors the state's own citizens and is not based at all on efforts to channel an investment by the state—there may be good reason to allow it. Discrimination in favor of an infant industry, for example, may be beneficial in the long run, and not only to citizens of the legislating state.³⁶

Obviously, discrimination carries detriments from the national point of view that most often outweigh the local benefits. Thus, I do not mean to suggest that in any particular case discriminatory laws ought to prevail. Rather, I mean that discriminatory laws may have valid policy considerations in their favor, and that in a particular case a national policymaker *might* conclude that they should prevail. Furthermore, if the responsible national policymaker reaches such a conclusion, there is no superseding reason why the nation's constitutional well-being requires any other result. Just as the antitrust laws, while making free competition the general national economic policy, do not mandate a rule of laissez-faire, the commerce clause, while reflecting a general policy in favor of free trade, should not mandate free trade constitutionally. The commerce clause does not enact Adam Smith's *Wealth of Nations* any more than the fourteenth amendment enacts Herbert Spencer's *Social Statics*.

The crucial question remains: if, as I have argued, a weighing of

³⁵ See, e.g., *Johns v. Redeker*, 406 F.2d 878 (8th Cir. 1969), *cert. denied sub nom. Twist v. Redeker*, 396 U.S. 853 (1969). In *Johns*, the Eighth Circuit noted:

A substantial portion of the funds needed to operate the Regents' schools are provided by legislative appropriation of funds raised by taxation of Iowa residents and property. Nonresidents and their families generally make no similar contributions to the support of the school. A reasonable additional tuition charge against non-resident students which tends to make the tuition charged more nearly approximate the cost per pupil of the operation of the school does not constitute an unreasonable and arbitrary classification violative of equal protection.

Id. at 883.

³⁶ In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272-73 (1984), the Supreme Court refused to recognize a doctrinal distinction between thriving and struggling industries. That does not mean that there is no basis in policy for such a distinction. See *Regan*, *supra* note 33, at 1140 ("the possibility of genuine infant industry cases and the like . . . suggest[s] . . . that perhaps Congress ought to be able to authorize protectionist state laws").

competing policy considerations determines whether a burdensome or discriminatory state law should be invalidated, should the courts be doing the weighing?

One reason for courts to enter a policy fray is that constitutional values are at stake. But that is not so with respect to the dormant commerce clause. In particular, commerce clause questions do not involve individual or minority rights of the type that might require judicial protection of the politically powerless.³⁷ Indeed, even under the current system, the courts, when they uphold a challenge under the dormancy doctrine, do not guarantee the prevailing challenger against nullification of the victory by the national political branches. As the Supreme Court held in *Prudential Insurance Co. v. Benjamin*,³⁸ Congress may authorize state laws that would otherwise violate the dormancy doctrine.³⁹

Benjamin explicitly recognizes that, even when a state law is discriminatory, the question of whether it should be allowed to stand is a policy matter on which the Court will defer to the expressed findings of Congress. And this is clearly correct as a matter of constitutional policy. Certainly, the question of whether a state law impermissibly interferes with interstate commerce should be decided by a decisionmaker with a national source of authority to ensure, to the extent possible, that the viewpoint of the decision reflects the national interest. Congress and the agencies it has created, no less than the courts (and perhaps more than some lower courts), have national constituencies. They have the same policy agenda in this area as the courts do—balancing the benefits of the state law against the imposition on interstate commerce. Unlike the courts, however, Congress and the agencies are the proper authorities for deciding policy questions when no constitutional matter is at stake.

Given the *Benjamin* doctrine, the issue really is whether the courts should make a presumptive decision—a decision pending ac-

³⁷ A law that interferes with interstate commerce in a questionable manner might, of course, violate some other constitutional provision, such as the privileges and immunities clause or the equal protection clause of the fourteenth amendment. If it does, though, it can be invalidated on that ground without reaching the commerce clause. Cf. *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part). For present purposes, therefore, we may assume that any state law under examination has passed muster with respect to other constitutional provisions.

³⁸ 328 U.S. 408, 423-24 (1946).

³⁹ See also *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980) (dictum).

Congress, of course, has power to regulate the flow of interstate commerce in ways that the States, acting independently, may not. And Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.

tion by the political branches—concerning the validity of state laws. In other words, should the courts alter the inertia of the political system?⁴⁰ Courts, of course, make presumptive decisions of policy, subject to alteration by the legislature, all the time; that is the common law. But because political inertia often means that the presumptive decision, at least for a while, will be the final decision, courts must always consider whether they have good and legally sufficient reason to alter the status quo on a matter that is within the political realm.

Until late in the nineteenth century the courts probably had good reason to do so. Monitoring state laws requires a large amount of decisionmaking with respect to individual cases. A national legislature can set general policy, but it is not fit to perform most of the spadework. The task requires numerous participants, preferably dispersed throughout the nation. For the first century under the Constitution, there was no substantial federal bureaucracy, and during most of that time probably no serious thought of creating one: the first great agency, the Interstate Commerce Commission, was created in 1887. The natural tendency, therefore, was to rely on federal judges to do the work that more properly ought to be performed by political officers.⁴¹ Perhaps this accounts for the doctrine's evolution. And the doctrine may have continued to thrive because of judicial and political inertia—judges are frequently reluctant to discard old doctrine, and legislators are hesitant to revise decisions that appear to have already been made elsewhere.

Now, however, there need not be a vacuum for the courts to fill. If the courts were to step out of the arena, Congress could easily delegate the authority to decide, absent action by Congress itself, on the

⁴⁰ Cf. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-67 (1982).

⁴¹ Note that in 1792, pursuant to the Invalid Pensions Act, Congress assigned circuit judges administrative functions with respect to pension claims: judges were to determine whether a potential pensioner was indeed an invalid as a result of service in the military, and if so, what should be the amount of his pension. These recommendations were then passed on to the Secretary of War, who could choose to ignore or accept the judges' recommendations. Marcus & Tier, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 529. Many of the circuit judges refused to hear any pension cases, however, because they believed the Act was invalid in providing that decisions of article III judges could be overruled by the Secretary of the War. *Id.* at 529-33; see *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (denying Attorney General's ex officio mandamus motion seeking to compel circuit court for District of Pennsylvania to act on Hayburn's pension petition). This role of the circuit courts was eliminated entirely by subsequent passage of the 1793 Invalid Pensions Act, Marcus & Tier, *supra*, at 539 n.83, and in November 1794, the House, to enable Congress to determine claims itself, established a Committee of Claims with jurisdiction over all money claims against the United States, including pension claims, Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 643-44 (1985).

continued validity of state laws. In fact, Congress already does this to some extent, because many agencies are authorized to preempt state laws within their domain. If the courts were to step out of the dormancy business—or if Congress were to boot them out⁴²—Congress would simply have to fashion a greater delegation of authority, to one agency or to a combination of them.

Would it be preferable for an agency, rather than the courts, to make the presumptive decisions? I think the answer is clearly affirmative.

First, agencies, unlike courts, are subject to political control, and thus can more properly and comfortably exercise political judgment. A court is acting somewhat presumptuously if it says that national policy demands—or does not demand—free travel for sixty-five-foot double trailers; on the other hand, an agency doing the same thing would be doing its job. Agencies might, indeed, feel free to be more aggressive than courts in invalidating state laws. Because courts are properly hesitant to decide matters of political policy, they tend to be reticent when a case does not fit neatly into doctrinal terms.

Thus, in *Commonwealth Edison Co. v. Montana*,⁴³ the Supreme Court refused to strike down a very steep, but formally nondiscriminatory, severance tax on coal, even though it was apparent that the brunt of the tax would be borne out of state.⁴⁴ Certainly Montana is allowed to impose some severance tax on coal, but no doctrine could determine what an appropriate level is; hence, the Court stepped out of the picture altogether. I doubt that an agency untrammelled by the need to decide cases with a doctrinal venire would be so deferential.

Courts' need for doctrinal guideposts might also explain the at-

⁴² Consider a statute such as this:

No state law shall be deemed invalid as against the Commerce Clause of the Constitution. Nothing herein shall prevent any state law from being deemed invalid against the Supremacy Clause of the Constitution by reason of other parts of the Constitution or of laws made in pursuance of any part of the Constitution.

Under *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), such a law might be upheld: it represents a wholesale judgment by Congress that it prefers the national political processes, rather than the courts, to determine whether state laws impermissibly interfere with interstate commerce. Under one theory—sharply attacked by Justice Scalia in his dissent in *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part)—the dormancy doctrine enforces the presumed will of Congress. *Leisy v. Hardin*, 135 U.S. 100, 109-10 (1890) (dictum) (“[S]o long as Congress does not pass any law to regulate [interstate commerce], or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.”); see *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 289 n.23 (1987). At least under that theory, a statute of this kind ought to be upheld, because the statute negates any presumption of congressional intent to leave the commerce unregulated.

⁴³ 453 U.S. 609 (1981).

⁴⁴ *Id.* at 618-29.

traction of the theory, which Justice Scalia has endorsed,⁴⁵ that discriminatory purpose is the sole, or principal, test in determining the validity of a state law under the dormancy doctrine. The determination of whether a state law has a discriminatory purpose, difficult as that may be, is at least a far more manageable standard than one that asks the court to weigh burdens and benefits. But in terms of what best serves national policy, a purpose test aims in the wrong direction. If the purpose of a state law and the impact of the law on interstate commerce diverge, it is the impact on commerce that should be determinative. A state law intended to discriminate against interstate commerce but ineffectual in achieving that end will not do much harm,⁴⁶ while an innocent but obstructive law should not stand. An agency would be more likely than a court to focus on obstructive effects.

Furthermore, agencies have far better procedures and resources than courts for determining whether a state law intolerably interferes with interstate commerce. Agencies can, at least ideally, muster the expertise they need to understand technical problems. They can seek out information in efficient ways; they need not rely on experts provided by parties in interest or on formal procedures better designed to determine whether the blue car or the orange car entered the intersection first than to determine whether a complex state regulation unduly interferes with the national economy. They can—and do—act prospectively if that seems most satisfactory, setting out regulations and guidelines as to what types of laws in a particular area will be preempted and what types will not.⁴⁷ Alternatively, agencies can mimic

⁴⁵ *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring in part and concurring in judgment) ("If [Regan, *supra* note 33] is not correct, he ought to be.").

⁴⁶ This stands in contrast to, say, racial or sexual discrimination, in which improper motivation of a law in itself may do harm, by creating feelings of inadequacy or reinforcing stereotypes. No such harm is created by a law that improperly aims at interstate commerce.

⁴⁷ For example, in 1976 the Federal Home Loan Bank Board feared that some states would forbid "due on sale" clauses from home mortgages and that such laws would undermine financial institutions' stability, raise interest rates, and impede the market for homes. Accordingly, the Board promulgated regulations preempting state laws forbidding such clauses. 41 Fed. Reg. 6283, 6285 (1976); see *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 159 (1982) (upholding the preemption); see also *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 880 (D.C. Cir. 1983) ("Believing that these state restrictions have the effect of discouraging national banks from offering ARMs [adjustable rate mortgages], the Comptroller [of the Currency] determined that his regulations should override inconsistent state law." (citing *Adjustable Rate Mortgages*, 46 Fed. Reg. 18,932 (1981))); *City of Boston v. Harris*, 619 F.2d 87, 89 (1st Cir. 1980) (upholding HUD regulations that preempted all local rent control laws as applied to federally subsidized insured projects; HUD regarded such laws as "a significant factor in causing owners of FHA projects, especially subsidized projects, to default on their mortgage payments" (quoting 40 Fed. Reg. 8189 (1975))); cf. *Exec. Order No. 12612*, 3 C.F.R. 252, 255 (1987), reprinted in 5 U.S.C. § 601 at 478-79 (1988) ("Federal-

a court if that seems most appropriate, deciding a particular case in an adversarial proceeding. Also like a court, they can act immediately to provide interim relief whenever necessary.

In short, almost anything a court can do in this area an agency can do, probably better, and the agency can do much more besides. The reason is simple: an agency may act like a court, but it is not required to do so. The judiciary has all the disadvantages of a bureaucracy—it *is* a bureaucracy of sorts—but with none of the flexibility.

Only one potentially significant drawback is apparent: an agency might be more subject to state-oriented political pressures, especially from the governor and the Congressional delegation, than a court would be. This is not so clear, however; lower court judges may be subject to bias in favor of their home states.⁴⁸ If localized political pressure really is a problem, the agency might be immunized to a large degree by making the agency independent, protecting the tenure of its heads. But I do not believe this is necessary. The vast majority of the agency's decisions would not involve questions so crucial to a state that its political apparatus would gear up to full lobbying power. In addition, as with most administrative action, judicial review to protect against arbitrariness—but not to balance policy benefits and burdens—would be available.

Moreover, our political system generates many decisions with differential local impacts—the location of defense plants, the amounts of farm subsidies and savings and loan bailouts and indeed the allocation of the entire federal budget, and on and on. The decisions in any particular case are sometimes subject to localized political pressure, but a fair dispersion of political power guarantees against lopsided results overall. We would not consider attempting to guarantee fairness on a case-by-case basis by referring any of these matters to the judiciary; it is mysterious why the question of whether a state law intolerably interferes with the national economy should be treated differently.

Perhaps, though, it might appear that I have misstated the choice as one between an agency and the courts: both can only make presumptive determinations, an agency until Congress decides otherwise

ism", § 4(b)) (instructing executive branch to preempt state law by rule-making "only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law").

⁴⁸ Moreover, if the system I propose is subject to political pressure, so is the current one, because the courts' decisions, whether for or against the state law, may be overridden by the political branches. As discussed below, the courts' decisions under the dormancy doctrine may affect political inertia—and so the set of political pressures on each side of the issue.

and the courts until Congress or a properly authorized agency decides otherwise. Thus, the argument that I have made based on *Benjamin*⁴⁹—that the dormancy doctrine offers no strong protection because the political processes can reverse the courts' decision—may be turned around: a decision by the courts cannot do irreparable harm because it is subject to political reversal. But it would be a mistake to underestimate the importance of political inertia. If the courts invalidate a state law, then the inertia shifts: now the state, rather than those opposing its laws, must gain political relief. If the courts reject a challenge to a state law, inertia is also affected, albeit less obviously: once the courts consider and reject a claim that a state law interferes impermissibly with commerce, the political branches are less likely to focus attention on the claim than if the claim had not been in court at all. We do not allow the courts even to shift political inertia by creating a presumptive budget or schedule of farm price supports. There is no apparent reason why we should allow them to create a presumptive federal commerce policy.

Perhaps the discussion in this essay seems to reflect an idealized view of the political processes (as some judicial opinions reflect an idealized view of judicial process⁵⁰). I do not believe so; the discussion has taken into account the fact that the political processes are far messier than we would like. These are, however, the processes to which we commit most of the great questions of our national life. Those same processes are the best we have to determine, initially as well as ultimately, whether a state law intolerably intrudes on the national economy.

This suggests two simple questions. If we were to redraft the commerce clause, would we delegate to the judiciary the initial responsibility of deciding which laws intolerably obstruct interstate commerce? And if not, is there any reason other than sheer inertia why we should not start all over again?

⁴⁹ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

⁵⁰ Strauss, *Comment: Legal Process, and Judges in the Real World*, 12 *CARDOZO L. REV.* 1653 (1991).