

# THE IMPACT OF THE CONSTITUTIONAL REVOLUTION OF 1937 ON THE DORMANT COMMERCE CLAUSE—A CASE STUDY IN THE DECLINE OF STATE AUTONOMY

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## I. INTRODUCTION

By any standard, 1937 was a crucial turning point in American constitutional history. In that year, beginning with *West Coast Hotel Co. v. Parrish*<sup>1</sup> and *NLRB v. Jones & Laughlin Steel Corp.*,<sup>2</sup> the Supreme Court turned its back on the *Lochner* era, abandoning the idea that freedom of contract was a concept that deserved special constitutional protection and greatly expanding the power of the federal government over the national economy. Thus, in a very real sense, 1937 was the beginning of the modern era of constitutional jurisprudence.

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1. 300 U.S. 379 (1937).

2. 301 U.S. 1 (1937).

Most commentators characterize the revolution of 1937 as marking the retreat of the Court from significant scrutiny of economic and social regulations.<sup>3</sup> In a certain sense, this characterization is accurate: both *Parrish* and *Jones & Laughlin* clearly reduced judicial oversight of the economic sphere. In Dormant Commerce Clause cases, however, the jurisprudential approach underlying *Parrish* and *Jones & Laughlin* had quite a different impact.

This Article will examine that impact in detail. The Article begins by describing the classical, pre-1937 model of Dormant Commerce Clause jurisprudence, arguing that in large measure the concept of state autonomy drove the pre-1937 case law. The Article then describes the tension between this concept and the post-1937 model of constitutional law. Finally, although not purporting to be an exhaustive survey of post-1937 case law,<sup>4</sup> the Article examines several aspects of post-1937 Dormant Commerce Clause jurisprudence, arguing that the influence of the constitutional revolution has led to the creation of a body of case law that is marked by an undue lack of respect for the authority of state government over economic affairs.

## II. THE CLASSICAL MODEL OF THE DORMANT COMMERCE CLAUSE

For most of American history, debates over the structure of American federalism have focused in substantial measure on the interpretation of the Commerce Clause. In addressing commerce-related issues, the Court necessarily has been forced to deal with the concept of state autonomy, a concept that in general terms is protected by two of the most basic principles under-

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3. See, e.g., Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1952 SUP. CT. REV. 34, 35 (stating that in 1937 the "Court abandon[ed] the cause of economic rights . . . completely").

4. Prominent examples of exhaustive surveys, combined with general theories of Dormant Commerce Clause jurisprudence, include Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395 (1986); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985); and Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

For my own contribution to this literature, see Earl M. Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981).

lying the juxtaposition of state and national power in the federal system. First, States remain free to take any action not prohibited by the Constitution itself.<sup>5</sup> Second, the drafters of the Constitution envisioned a system under which, in Madison's words, "[t]he powers reserved to the several States [would] extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and internal order, improvement, and prosperity of the State."<sup>6</sup> Clearly, like all grants of power to Congress, the very existence of the Commerce Clause modifies this principle to a certain degree. The key question is the extent of this modification.

One of the most important questions is the impact of the Constitution by its terms on the power of the States to regulate matters related to interstate commerce. On its face, the Commerce Clause is simply a grant of power to Congress. From the earliest days of judicial review, the impact of this grant per se on state power has been a matter of considerable dispute. Some Justices initially argued that, in the absence of federal legislation, the Commerce Clause had no impact on state authority.<sup>7</sup> Clearly, this view rested in large measure on a commitment to the principle of state autonomy. Others, by contrast, were committed to the concept of exclusive federal authority. They contended that the States were divested of all power to regulate the matters that the Constitution brought within the scope of congressional control.<sup>8</sup> Those Justices who took this position were plainly less committed to the maintenance of state autonomy; nonetheless, even they were careful to note that large areas of state authority would remain unaffected by their approach. Thus, while expressing sympathy for the doctrine of exclusive federal authority in *Gibbons v. Ogden*,<sup>9</sup> Chief Justice John Marshall also reaffirmed the authority of the States to pass laws regulating the quality of goods produced within their borders, explaining that:

The object of inspection laws, is to improve the quality of the articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon

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5. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

6. THE FEDERALIST No. 45, at 292-93 (James Madison) (New Am. Libr. ed., 1961).

7. See, e.g., *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 143-53 (1837) (opinion of Thompson, J.).

8. See, e.g., *id.* at 153-61 (Story, J., dissenting).

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

the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.<sup>10</sup>

By the middle of the 19th Century, a majority of the Court coalesced around an intermediate position—what might be described as the classical model of Dormant Commerce Clause analysis. Under this model, States generally were forbidden to discriminate against interstate commerce, and in many cases also were denied the authority to regulate directly the interstate movement of goods. In the absence of contrary federal legislation, however, substantial areas of interstate commerce remained subject to state control.

*Cooley v. Board of Wardens*<sup>11</sup> exemplifies one branch of the classical model. *Cooley* was a challenge to a Pennsylvania statute that required ships to engage local pilots when entering or leaving the port of Philadelphia. In 1789, Congress had passed a statute specifically adopting such state regulations as federal law. Because the Pennsylvania statute had not been passed until 1803, however, the Court concluded that the federal law could not be seen as having given its sanction to the specific statute at issue in *Cooley*.<sup>12</sup> Moreover, the Court rejected the theory that Congress could by legislation arm the States with authority to pass measures that would otherwise violate the Dormant Commerce Clause.<sup>13</sup>

Nonetheless, the *Cooley* Court held that the Pennsylvania statute was constitutional. Speaking for the majority, Justice Benjamin R. Curtis conceded that, where matters concerning interstate commerce were “in their nature national, or admit only of one uniform system, or plan of regulation,” Congressional power was exclusive.<sup>14</sup> In the absence of contrary federal regulations, however, Justice Curtis concluded that the States remained free to deal with aspects of interstate commerce that were “likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of

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10. *Id.* at 203.

11. 53 U.S. (12 How.) 299 (1851).

12. *See id.* at 318.

13. *See id.*

14. *Id.* at 319.

the several States should deem applicable.”<sup>15</sup> Fortified by the judgment embodied in the statute of 1789, Justice Curtis had no trouble concluding that the Pennsylvania statute at issue in *Cooley* fell into the latter class. Justice Curtis declared that “the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.”<sup>16</sup>

Clearly, the *Cooley* rule preserved a measure of state autonomy in the regulation of interstate commerce. The majority opinion, however, did not embody the theory that States had an independent, constitutionally-cognizable interest in regulating interstate commerce for their own benefit [hereinafter, the “essentialist theory of state autonomy”]. Instead, Justice Curtis’s argument rested on a vision of the States as agents of the national interest in the proper functioning of interstate commerce. Implicitly, this analysis assumed that the best interests of interstate commerce would not be served if pilotage were left totally unregulated. At the same time, Justice Curtis recognized that Congress might be unable or unwilling to adopt regulations that were appropriately designed to meet the varying needs of different ports. Thus, Justice Curtis effectively allowed the States to operate as a conduit of national authority, subject always, of course, to contrary decisions by Congress.

This functional analysis was an important source of concurrent state power under the classical approach to the Dormant Commerce Clause. In addition, however, the classical model also was influenced strongly by the essentialist theory of state autonomy that underlay Madison’s conception of state-federal relations. The majority opinion in *Baltimore and Ohio Railroad Co. v. Maryland*<sup>17</sup> clearly reflected the importance of the essentialist theory to classical analysis.

*B & O* was a challenge to a provision of a state charter granted to the railroad for the construction of a branch line between Baltimore and Washington, D.C. Under the charter, the railroad was required to pay to the State of Maryland one-fifth of the amount it received from passengers who traveled on the branch line. The

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15. *Id.*

16. *Cooley*, 53 U.S. at 320.

17. 88 U.S. (21 Wall.) 456 (1875).

railroad alleged that enforcement of this provision was inconsistent with the Dormant Commerce Clause.

The Court rejected this challenge. Speaking for the majority, Justice Joseph Bradley observed that, although travel by sea involved the use of an instrumentality provided by nature, railroads and highways were either built by the state or constructed under its auspices.<sup>18</sup> This observation underlay Justice Bradley's assertion of a state's inherent right to tax (and, by implication, regulate) the use of these facilities:

Th[e] unlimited right of the State to charge . . . toll, freight or fare for transportation on its roads, canals and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—a sovereign—discretion, and in its very nature is unrestricted and uncontrolled.<sup>19</sup>

Essentialist arguments were equally prominent in cases that established exceptions to the rule that States could neither directly prevent the entry of goods from outside the State nor discriminate against interstate commerce. The establishment of the quarantine exception to this principle in *Reid v. Colorado*<sup>20</sup> is a classic example. In *Reid*, Colorado required persons desiring to transport cattle from certain areas into the State to obtain certification that the cattle were free from infectious diseases. The Court conceded that the movement of cattle was an aspect of interstate commerce; nonetheless, it held the Colorado statute valid, concluding that under its police power, the State could constitutionally protect its citizens and property from the spread of infectious diseases through interstate commerce.<sup>21</sup>

The essentialist elements of the classical model were even more apparent in *Geer v. Connecticut*.<sup>22</sup> *Geer* was a Dormant Commerce Clause challenge to a Connecticut statute that prohibited the export of certain game birds. The statute clearly discriminated against interstate commerce; nonetheless, the Court rejected the constitutional challenge. Speaking for the majority,<sup>23</sup>

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18. *See id.* at 470.

19. *Id.* at 471.

20. 187 U.S. 137 (1902).

21. *See id.* at 151-52.

22. 161 U.S. 519 (1896).

23. Justices Stephen Field and John Marshall Harlan dissented. *See id.* at 535-42 (Field, J., dissenting); *id.* at 542-44 (Harlan, J., dissenting).

Justice Edward White relied on two related but analytically separable lines of argument, both of which clearly rested on essentialist premises. First, Justice White contended that the people of Connecticut owned the game birds as common property, and that, acting as their agent, the State possessed authority to preserve the birds for their use.<sup>24</sup> Second, Justice White relied on the state government's inherent police power to preserve the food supply of the State.<sup>25</sup>

Taken together, the functional analysis of *Cooley* and the essentialist arguments of cases such as *B & O*, *Reid*, and *Geer* provided substantial protection for state autonomy under the classical model. The revolution of 1937, however, dramatically changed this dynamic. Although the concept of state autonomy has retained some importance in the post-1937 analysis of the problems raised by the Dormant Commerce Clause, its significance has been reduced substantially.

### III. THE CONSTITUTIONAL REVOLUTION OF 1937

Although it did not focus directly on the issue, the constitutional revolution of 1937 had important implications for the development of Dormant Commerce Clause jurisprudence—particularly for the *B & O-Reid-Geer* line of cases. As discussed above, the classical model of Commerce Clause analysis which was embodied in these and similar cases rested on three interrelated premises. First, in general terms, the model reflected a largely essentialist approach to constitutional adjudication, rather than a purely functional analysis. Second, the model saw the most important structural issue in constitutional law as the relationship between state power and federal power. Finally, under the model, States were viewed as having a unique power and responsibility to regulate local affairs. None of these premises emerged entirely unscathed from the revolution of 1937.

First, reflecting the influence of the Legal Realist movement, the post-1937 Court developed a constitutional jurisprudence based primarily on functional principles. This functional analysis did not completely exclude a concern for state autonomy; however, the justification for this concern was entirely different from that which animated the classical model. The most-often cited

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24. See *id.* at 522-34.

25. See *id.* at 534-35.

argument for state autonomy under this analysis is Justice Louis Brandeis's classic formulation in *New State Ice Co. v. Liebmann*.<sup>26</sup>

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>27</sup>

Plainly, the idea that States are "laboratories" does *not* rest on the view that States are by their nature independent societies whose interests and values appropriately may diverge widely—the gravamen of essentialist arguments. Instead, Justice Brandeis apparently saw state autonomy as a vehicle for eventually developing a national consensus on "correct" social and economic policies after "experiments" have been conducted in a number of different venues.

In any event, a concern for state autonomy is only an undercurrent in post-1937 constitutional theory. This jurisprudence does not rest primarily on an analysis of the proper relationship between the state governments and the federal government. Instead, it focuses largely on an assessment of the relationship between the judiciary and the legislature. This shift emerged perhaps most clearly in *NLRB v. Jones & Laughlin Steel Corp.*<sup>28</sup> and its progeny. *Jones & Laughlin* was a challenge to the constitutionality of the application of federal labor laws to a steel manufacturing plant. There is no doubt that under pre-1937 doctrine the Court would have struck down this application of the statute; prior to the modern era, Congress generally had been denied the power to regulate manufacturing activity on the ground that manufacturing had no "direct" impact on interstate commerce.<sup>29</sup> The Court, however, upheld the statute in *Jones & Laughlin*, concluding that Congress constitutionally could regulate any activity that has "a close and substantial relation to interstate commerce."<sup>30</sup> Subsequently, *Wickard v. Filburn*<sup>31</sup> demonstrated that the Court would show great deference to congressional determi-

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26. 285 U.S. 262 (1932).

27. *Id.* at 311 (Brandeis, J., dissenting).

28. 301 U.S. 1 (1937).

29. *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

30. *Jones & Laughlin*, 301 U.S. at 37.

31. 317 U.S. 111 (1942).

nations that particular activities had sufficient impact on interstate commerce to justify federal action. In *Wickard* the Court upheld congressional authority to regulate the amount of wheat that a farmer could grow for home use, determining that Congress could reasonably have concluded that the cumulative effect of home consumption of wheat by many potential consumers could significantly influence the interstate market for wheat, and that the Court should defer to this conclusion.<sup>32</sup> In the wake of *Jones & Laughlin* and *Wickard*, it has become clear that under post-1937 analysis, Congress has authority to regulate virtually all private economic activity.<sup>33</sup>

Decisions such as *Jones & Laughlin* and *Wickard* epitomize modern constitutional jurisprudence. One of the themes of these cases—the importance of deference to legislative judgments—might in theory have operated as a formidable constraint on judicial activism under the Dormant Commerce Clause. Indeed, this theme was a critical element of the analysis of Justice Hugo Black, one of the central figures in the development of post-New Deal jurisprudence.<sup>34</sup> Other elements of the revolution of 1937, however, have tended to increase judicial activism under the Dormant Commerce Clause rubric.

First, the vast expansion of federal power following the New Deal challenged the most basic premises of state autonomy. Judicial deference to congressional decisionmaking in *Jones & Laughlin* and *Wickard* implicitly reflects the view that the United States is a national economy, whose affairs ought to be governed for the benefit of the citizenry as a whole. This view is in considerable tension with the traditional idea that state governments should be allowed to regulate their territory with a view to advancing the unique interests of their own citizenry.

Second, post-1937 analysis does not require judicial deference to legislative judgment in all cases. Under this analysis, legislative decisions generally are preferable to judge-made rules because of the legislature's superior factfinding ability. At the same time,

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32. *See id.* at 127-28.

33. *See, e.g.,* *Perez v. United States*, 402 U.S. 146 (1971) (holding that loansharking affects interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (allowing Congressional regulation to reach a local restaurant that received a substantial portion of its food from out of the State). The standard treatment of *Jones & Laughlin*, *Wickard*, and subsequent cases is described in detail in Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946* (pts. 1 & 2), 59 HARV. L. REV. 645, 883 (1946).

34. *See* *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 357 (1951) (Black, J., dissenting); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 545-64 (1948) (Black, J., dissenting).

however, post-New Deal jurisprudence contemplates the possibility of judicial intervention in cases where the legislative process cannot be trusted to adequately consider all relevant views—a point exemplified by the famous fourth footnote in *United States v. Carolene Products Co.*<sup>35</sup> Taken together with the nationalism inherent in *Jones & Laughlin* and *Wickard*, this justification for judicial intervention has substantially undermined the Court's traditional respect for state autonomy in Dormant Commerce Clause cases. This point emerges clearly in both the highway regulation cases and the cases involving state discrimination against out-of-state interests.

### A. *The Evolution of the Jurisprudence of Highway Regulation*

The gradual shift in the Court's approach to state highway regulation between 1938 and 1977 reflects the declining influence of essentialist analysis. The saga begins with the 1938 decision in *South Carolina State Highway Department v. Barnwell Brothers, Inc.*<sup>36</sup> *Barnwell* was a challenge to a South Carolina statute that limited the weight and width of the trucks allowed on state highways. Eighty-five to ninety percent of the trucks used in interstate commerce failed to satisfy the statutory requirements.<sup>37</sup> Nonetheless, the Court unanimously rejected a constitutional challenge to the statute, holding, inter alia, that the statute was not inconsistent with the strictures of the Dormant Commerce Clause.

Justice Harlan F. Stone's opinion for the Court contained elements of both the classical model and post-1937 jurisprudence. On one hand, Justice Stone drew on the essentialist analysis of *B & O*, asserting that "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways" and stating that "local highways are built, owned, and maintained by the state or its municipal subdivisions [and] [t]he state has a primary and immediate concern in their safe and economical administration."<sup>38</sup> Moreover, Justice Stone reaffirmed the principle that "a state can, if it sees fit, build and maintain its own highways, canals and railroads and . . . in the absence of congressional

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35. 304 U.S. 144, 152-53 n.4 (1938). The classic elaboration of the *Carolene Products* footnote is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-77 (1980).

36. 303 U.S. 177 (1938).

37. *See id.* at 182.

38. *Id.* at 187.

action their regulation is peculiarly within its competence."<sup>39</sup> On the other hand, Justice Stone suggested in a footnote that state regulations that adversely affect outsiders are unconstitutional under the Commerce Clause because the adversely affected interests outside of a State do not participate in the state's internal political process.<sup>40</sup>

*Barnwell* is best viewed as a reaffirmation of the states' authority to adopt nondiscriminatory highway regulations. The erosion of this authority began in *Bibb v. Navajo Freight Lines, Inc.*,<sup>41</sup> in which the Court relied on the Dormant Commerce Clause to strike down an Illinois regulation that required trucks traveling on state highways to use contoured mudguards. Distinguishing *Barnwell*, the Court focused its attention on the fact that at least forty-five other States allowed the use of straight mudguards, and that one State required the use of straight guards.<sup>42</sup> Under these circumstances, the Court held the Illinois regulation invalid because of the conceded expense and disruptive effect of requiring trucks to change mudguards at the Illinois border<sup>43</sup> and the state's failure to demonstrate that contoured mudguards had any advantage over their straight counterparts.<sup>44</sup>

The reasoning of the *Bibb* Court is antithetical to the state-autonomy based analysis of *B & O* and related cases. The essentialist view of state autonomy would have vindicated Illinois's ideosyncratic view of the merits of contoured mudguards. Under the reasoning of *B & O*, the fact that other States may have preferred straight mudguards would have been irrelevant, because only Illinois and the federal government, have the authority to regulate Illinois highways. By contrast, *Bibb* makes perfect sense when viewed against the background of the functional, post-1937 vision of a national economy that should be regulated for national purposes. From this perspective, the key question would be whether the regulation was actually a net benefit to the safe, efficient movement of goods. Given the Court's finding that the Illinois regulation disrupted the free flow of commerce with no evidence of a countervailing safety benefit, the regulation could not be sustained under this view.

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39. *Id.* at 190-92.

40. *See id.* at 185 n.2 (citations omitted).

41. 359 U.S. 520 (1959).

42. *See id.* at 523.

43. *See id.* at 525, 527-28.

44. *See id.* at 525, 529-30.

In any event, the *Bibb* Court carefully limited the scope of its argument. The majority opinion repeatedly emphasized that state highway regulations would rarely be invalidated under the Dormant Commerce Clause, and explicitly limited the import of its analysis to cases where state regulations imposed inconsistent requirements on the interstate transportation of goods.<sup>45</sup> Viewed in the light of subsequent decisions, however, *Bibb* would emerge as a crucial turning point in the Court's treatment of highway regulations.

The erosion of the *Barnwell* principles continued in *Raymond Motor Transportation, Inc. v. Rice*.<sup>46</sup> In *Rice*, the Court considered Wisconsin regulations prohibiting the use of most trucks longer than fifty-five feet in length, even though the States bordering Wisconsin allowed the use of sixty-five foot double trailers on interstate highways. Against this background, a trucking company contended that the Wisconsin regulation ran afoul of the Dormant Commerce Clause. The trucking company demonstrated that the Wisconsin regulation raised its costs by requiring that some cargo be unloaded and reloaded at the Wisconsin border and that other cargo be rerouted around Wisconsin.<sup>47</sup> The trucking company also introduced evidence that supported its contention that sixty-five foot double trailers were no more unsafe than fifty-five foot single trailers when operated on interstate highways.<sup>48</sup> Wisconsin, by contrast, introduced no safety evidence,<sup>49</sup> but instead argued that the length regulation was immune from Dormant Commerce Clause scrutiny under *Barnwell*.<sup>50</sup>

The *Rice* Court unanimously rejected this argument and struck down the regulation. Writing for the Court, Justice Lewis Powell concluded that the *Bibb* analysis was not limited to cases involving irreconcilable state regulations<sup>51</sup> and applied the balancing test that had been first articulated in *Pike v. Bruce Church, Inc.*:<sup>52</sup>

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as fol-

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45. The Court clearly stated, however, that a state's inconsistent regulation would be permitted if it represented a compelling innovation. *See id.* at 529-30.

46. 434 U.S. 429 (1978).

47. *See id.* at 438-39.

48. *See id.* at 436-37.

49. *See id.* at 437-38.

50. *See id.* at 442-43.

51. *See Rice*, 434 U.S. at 443-46 & n.23.

52. 397 U.S. 137, 142 (1970).

lows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>53</sup>

Given the record before the Court, Justice Powell determined that the Wisconsin regulation failed to satisfy this balancing test.<sup>54</sup> He bolstered this conclusion by arguing that exemptions that favored local interests weakened the internal political check,<sup>55</sup> although conceding that this factor was "not decisive."<sup>56</sup> Admittedly, Justice Powell also took care to reemphasize the strong presumption of validity for state highway regulations;<sup>57</sup> however, the theory that States had inherent authority to regulate the highways that they constructed and maintained was mentioned only in a single sentence in a footnote that also discussed the importance of internal political checks.<sup>58</sup>

Despite its reference to the *Bruce Church* test, *Rice* might have been viewed as one of the rare examples of a plaintiff carrying its stringent burden of proof under the rational basis test that is generally applicable to all legislation. Indeed, four of the eight participating Justices joined in a concurring opinion emphasizing the "narrow scope of the decision,"<sup>59</sup> explaining that *Rice* was a case in which "safety interests have not been shown to exist as a matter of law,"<sup>60</sup> and asserting that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce."<sup>61</sup> However, the case was a significant repudiation of the premises underlying the *B & O* essentialist analysis. The *Rice* Court rejected the argument that, simply because the State of Wisconsin constructed and owned the highway system,

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53. *Rice*, 434 U.S. at 441-42 (citations omitted).

54. *See id.* at 444.

55. *See id.* at 446-47.

56. *Id.* at 446.

57. *See id.* at 443-44.

58. *See Rice*, 434 U.S. at 444 n.18.

59. *Id.* at 448 (Blackmun, J., concurring).

60. *Id.* at 450.

61. *Id.* at 449.

the State was free to adopt whatever nondiscriminatory regulations it chose. Instead, the Court required the State to produce at least some evidence that the regulation advanced the state interest in highway safety—an interest that was not peculiar to Wisconsin residents, but rather was shared by the national populace. Moreover, both the majority and concurring opinions emphasized the concept of *legislative* competence in dealing with highway regulation issues. Thus, the case marked a further erosion of the concept of state autonomy in Dormant Commerce Clause jurisprudence.

In *Kassel v. Consolidated Freightways Corp.*,<sup>62</sup> the Court moved even further toward a pure functionalist model. *Kassel* presented the issue that had not been resolved in *Rice*. Like the State of Wisconsin in *Rice*, the State of Iowa in *Kassel* limited the length of trucks allowed on the state's highways, banning the use of single trailers longer than fifty-five feet and double trailers longer than sixty feet. Unlike Wisconsin, however, when faced with a Dormant Commerce Clause challenge, the State of Iowa introduced evidence to support the view that the limitation was a rational safety measure. For three Justices, the existence of such evidence was dispositive; they concluded that so long as the State introduced *any* safety evidence to support a nondiscriminatory highway regulation, that regulation should survive a Dormant Commerce Clause challenge.<sup>63</sup> Six Justices disagreed, however, and the Iowa statute was held unconstitutional.<sup>64</sup>

Justice Powell's plurality opinion extended the analysis which underlay *Rice*. Notwithstanding the evidence introduced by the State, Justice Powell concluded that the federal district court could properly weigh the evidence and could make an independent determination that the longer trucks were no safer than those which the State allowed on its highways.<sup>65</sup> Further, Justice Powell rejected the state's claim that its judgment was entitled to special deference. Focusing on the importance of the internal political check,<sup>66</sup> Justice Powell observed that in *Kassel* the State had granted exemptions for both agricultural vehicles and trucks entering cities which bordered on States that allowed use of the

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62. 450 U.S. 662 (1981).

63. See *id.* at 687-706 (Rehnquist, J., dissenting).

64. See *id.* at 664-79 (Powell, J., plurality opinion); *id.* at 679-87 (Brennan, J., concurring in the result).

65. See *id.* at 669-75 (Powell, J., plurality opinion).

66. See *id.* at 675.

longer vehicles, and argued that these exemptions weakened the internal political check.<sup>67</sup> Finally, citing evidence that suggested that the State simply wished to preserve its highways from the damage caused by increased through traffic,<sup>68</sup> Justice Powell declared that "a State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it."<sup>69</sup>

The latter theme was emphasized by Justice William Brennan, who wrote for himself and Justice Thurgood Marshall. Justice Brennan first noted that, in vetoing a bill that would have eased the length restrictions, the governor of Iowa had stated that the change "would benefit only a few Iowa-based corporations while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens."<sup>70</sup> Justice Brennan also quoted from the testimony of the director of the Iowa Department of Transportation, who conceded that the imposition of the Iowa restriction would raise the total number of traffic fatalities in the nation at large, and stated that "[o]ur primary concern is the citizens of Iowa and our own highway system we operate in this state."<sup>71</sup> Explaining that the existence of the Iowa restrictions had in fact caused trucks to travel more total miles, creating more fatalities and more wear on highways in the nation as a whole, Justice Brennan concluded that:

Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring states in order to decrease the hazards on Iowa highways. . . . Just as a State's attempt to avoid interstate competition in economic goods may damage the prosperity of the Nation as a whole, so Iowa's attempt to deflect interstate truck traffic has been found to make the Nation's highways as a whole more hazardous. This attempt should therefore be subject to "a virtually *per se* rule of invalidity."<sup>72</sup>

This analysis strikes at the core of the essentialist justification for state regulation of interstate commerce. The essentialist justification rests on the view that state governments have a special relationship with and responsibility to their own citizens, and may consider the interest of those citizens paramount in making

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67. See *Kassel*, 450 U.S. at 675-76 (Powell, J., plurality opinion).

68. See *id.* at 677-78.

69. *Id.* at 678 (citation omitted).

70. *Id.* at 685 (Brennan, J., concurring in the judgment).

71. *Id.* at 686.

72. *Kassel*, 450 U.S. at 686 (Brennan, J., concurring in the judgment).

policy determinations. Justice Brennan, by contrast, suggests that state governments are required to consider the interests of *the nation as a whole* in making commerce-related policy judgments, and that when the evidence indicates that the State had elevated its local welfare over that of the nation, the state policy should be rejected. Under this view, the only justification for state regulation would be the presumption that state legislation on matters of local concern in fact advanced the shared national interest in issues such as highway safety—in essence, the functionalist justification of *Cooley*.

Taken together, the Powell and Brennan opinions in *Kassel* reflect the decline in the influence of essentialism in modern Commerce Clause jurisprudence. However, the highway regulation cases do not comprise the only arena in which a battle over essentialism in Dormant Commerce Clause analysis continues; the debate over the proper scope of exceptions to the antidiscrimination principle has been at least equally prominent. In this context, although the results generated by the Court have not been entirely consistent, the decline of essentialism has also been apparent.

## B. *The Modern Discrimination Cases*

### 1. *The Market Participant Cases: Hughes v. Alexandria Scrap Corp. and Reeves, Inc. v. Stake*

The rise of the so-called market participant exception has been one of the most widely-discussed developments in modern Dormant Commerce Clause jurisprudence.<sup>73</sup> The two central cases are *Hughes v. Alexandria Scrap Corp.*<sup>74</sup> and *Reeves, Inc. v. Stake*.<sup>75</sup> In *Alexandria Scrap*, the State of Maryland paid bounties to junkyards that reprocessed abandoned cars found on state highways. To qualify for the bounty, out-of-state junkyards had to file more extensive title documentation than that required of processors located within Maryland. A Virginia processor argued that the statute unconstitutionally discriminated against out-of-state concerns by interfering with the flow of abandoned vehicles

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73. See, e.g., Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097 (1988); Jonathan Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981); Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

74. 426 U.S. 794 (1976)

75. 447 U.S. 429 (1980).

to non-Maryland processors.<sup>76</sup> In *Reeves*, the Commerce Clause challenge was more straightforward. There, the State of South Dakota operated a cement manufacturing plant, and state residents were given first priority in purchasing the plant's products. A Wyoming customer argued that this policy constituted unconstitutional discrimination against out-of-state residents.<sup>77</sup> In each case, a deeply-divided Court refused to strike down the statute at issue. The two majority opinions declared that when a State acts as a market *participant*, rather than a market *regulator*, its actions are immune from Commerce Clause scrutiny.<sup>78</sup> In both cases, the majority relied on essentialist arguments to support its position. Thus, in *Alexandria Scrap*, Justice Powell declared that "[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others."<sup>79</sup> In *Reeves*, Justice Blackmun asserted that "[r]estraint in this area is . . . counseled by considerations of state sovereignty, the role of each state 'as guardian and trustee for its people' . . . and 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise its own independent discretion as to parties with whom he will deal.'"<sup>80</sup>

In responding to these arguments, the dissenters relied in part on purely formal arguments, explaining that the free flow of interstate commerce was inhibited in both cases, and that neither fell into exceptions that had been explicitly established by pre-*Alexandria Scrap* jurisprudence.<sup>81</sup> Underlying their arguments, however, was a rejection of essentialism. For example, arguing that the approach which he had taken in *Alexandria Scrap* should be limited to cases involving the "integral operatio[n] in areas of traditional governmental functions,"<sup>82</sup> Justice Powell contended in *Reeves* that "[i]f . . . the State enters the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization."<sup>83</sup> In essence, Justice Powell's argument

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76. See *Alexandria Scrap*, 426 U.S. at 803.

77. See *Reeves*, 447 U.S. at 443-44.

78. See *Reeves*, 447 U.S. at 436-40; *Alexandria Scrap*, 426 U.S. at 803.

79. *Alexandria Scrap*, 426 U.S. at 810.

80. *Reeves*, 447 U.S. at 438-39 (citations omitted).

81. See *Reeves*, 447 U.S. at 447-54 (Powell, J., dissenting); *Alexandria Scrap*, 426 U.S. at 817-32 (Brennan, J., dissenting).

82. *Reeves*, 447 U.S. at 449 (Powell, J., dissenting) (internal quotation marks omitted).

83. *Id.* at 449-50.

was that a State could not rely on a special relationship with its own citizens to limit the distribution of governmentally-created benefits to those citizens.

Even though the scope of *Alexandria Scrap* and *Reeves* subsequently was limited by the decision in *South-Central Timber Development, Inc. v. Wunnicke*,<sup>84</sup> essentialists scored victories in the market participation cases. The extent of these victories, however, should not be overstated. *Alexandria Scrap* and *Reeves* challenged one of the most widely-shared tenets of the essentialist view of state autonomy—the idea that a state government may limit its largess to those who owe allegiance to that government. Nonetheless, in both cases, the statutes escaped invalidation only by narrow margins. Indeed, in *Reeves*, the statute was upheld only because of the inexplicable support of Justice Thurgood Marshall—a dissenter in *Alexandria Scrap* who normally was one of the most thoroughgoing antiessentialists on the Court. Thus, in a certain sense, *Alexandria Scrap* and *Reeves* actually reflected the weakness of the influence of the concept of state autonomy on contemporary Dormant Commerce Clause jurisprudence. This weakness has emerged more clearly in other discrimination cases.

## 2. *Taxation and Subsidies: West Lynn Creamery, Inc. v. Healy*

*West Lynn Creamery, Inc. v. Healy*<sup>85</sup> provides one of the most dramatic examples of the decline of essentialism in Dormant Commerce Clause jurisprudence. *Healy* was a challenge to a Massachusetts pricing order that imposed a tax on all milk sold to Massachusetts dealers and used the proceeds of the tax to subsidize Massachusetts milk producers. Two-thirds of the milk taxed was produced out-of-state. Under these circumstances, the Court held that the pricing order constituted unconstitutional discrimination against out-of-state milk producers.

As the dissent observed, the two parts of the *Healy* order were in fact no more than ordinary exercises of basic state prerogatives.<sup>86</sup> On one hand, the State had imposed a nondiscriminatory tax on a local transaction—the sale of milk. On the other, it had

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84. 467 U.S. 82, 99 (1984) (holding that a “state may not avail itself of the market-participation doctrine to immunize its downstream regulation of [a] market in which it is not a participant”).

85. 114 S. Ct. 2205 (1994).

86. *See id.* at 2221-23 (Rehnquist, J., dissenting).

chosen to subsidize a local industry without providing a similar benefit to out-of-state producers. Viewed from this perspective, *Healy* was no different than *Alexandria Scrap* and *Reeves*.

The majority's response to this argument reflected the dominance of the functionalist, *Carolene Products*-type approach in modern Dormant Commerce Clause analysis. Speaking for the majority, Justice Stevens appeared to concede that subsidies generally did not violate the Commerce Clause;<sup>87</sup> however, Justice Stevens argued that the *Healy* order was infirm because of the political dynamic created by the linkage between the tax and the subsidy. Citing *Rice*, Justice Stevens focused on the concept of the internal political check, contending that "[n]ondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'"<sup>88</sup> The perceived weakness of the internal political check in *Healy* was central to Justice Stevens's conclusion that the Massachusetts program ran afoul of the Dormant Commerce Clause. Because of the subsidy element of the program in-state dairy farmers, who normally would be expected to oppose the tax, provided its strongest support. Justice Stevens stated that this circumstances undermined the state's defense of its regulation.<sup>89</sup>

Justice Stevens's argument has profound implications. In essence, Justice Stevens suggested that one of the most basic incidents of sovereign authority—the state taxing power—normally are constitutional not because of a theory of inherent power, but rather because the internal political check generally guarantees that the interests of persons outside the State will be adequately considered in the political process. Thus, *Healy* provides another clear example of the decline of essentialist analysis in Dormant Commerce Clause jurisprudence. This decline also has been reflected in other areas of Commerce Clause analysis.

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87. See *Healy*, 114 S. Ct. at 2214 n.15.

88. *Id.* at 2215 (citation omitted).

89. See *id.* at 2215. Justices Scalia and Thomas concurred only in the result, citing *stare decisis* and the advantages of a simple rule which condemned state action under the Dormant Commerce Clause if and only if it facially discriminated against out-of-state interests. See *id.* at 2218-21 (Scalia, J., concurring in the result).

### 3. *The Rejection of State Authority over Wildlife: Hughes v. Oklahoma*

*Hughes v. Oklahoma*<sup>90</sup> also exemplifies the difference in emphasis between classical and modern Dormant Commerce Clause analysis. In *Hughes*, the State of Oklahoma prohibited the export for sale of natural minnows taken from waters within the State. Explicitly overruling *Geer v. Connecticut*,<sup>91</sup> the Court held that the state statute violated the Dormant Commerce Clause.<sup>92</sup> Speaking for the majority, Justice Brennan declared that the concept of state ownership of wildlife was a "19th-century legal fiction"<sup>93</sup> and dismissed *Geer* as a case decided early in "an often controversial evolution of rules to accommodate federal and state interests."<sup>94</sup>

This characterization of *Geer* fundamentally misconstrues the basis of the classical theory which underlay the decision. That theory did *not* reflect an effort to balance state and federal interests; instead, it sought to define spheres of control, leaving state governments free to make their own policy decisions on those matters that were within their sphere. Viewed against this background, Justice Brennan's opinion is a classic example of the jurisprudential changes inherent in the revolution of 1937.

At the same time, however, *Hughes* itself had only a marginal impact on state autonomy. Indeed, the case could have been decided within the classical model simply by redefining ownership of the minnows as resting in the federal government. By contrast, the cases involving the interstate disposal of waste are of far greater practical import.

### 4. *Interstate Waste Disposal: City of Philadelphia v. New Jersey and C & A Carbone, Inc. v. Town of Clarkstown*

As waste disposal problems have mounted in recent years, local governments have faced two basic problems. The first problem is limiting the amount of waste for which they are responsible. The second is devising a method for disposing of whatever waste cannot be avoided. States and municipalities adopting innovative ap-

90. 441 U.S. 322 (1979).

91. 161 U.S. 519 (1896).

92. *See id.* at 326. Chief Justice Burger and then Justice Rehnquist dissented. *See id.* at 339-46 (Rehnquist, J., dissenting).

93. *Hughes*, 441 U.S. at 336.

94. *Id.* at 326 (footnote omitted).

proaches to these problems often have run afoul of the Dormant Commerce Clause.

The seminal case is *City of Philadelphia v. New Jersey*.<sup>95</sup> There, the State of New Jersey prohibited the importation of liquid or solid waste except for certain defined purposes. Finding that the legislation "overtly block[ed] the flow of interstate commerce at a State's border,"<sup>96</sup> the Court concluded that the statute fell within a "virtually *per se* rule of invalidity."<sup>97</sup> Cases such as *Reid* were distinguished as involving items whose "very movement risked contagion."<sup>98</sup> According to the Court, New Jersey considered only the *disposal* of waste to be a problem.<sup>99</sup>

In *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>100</sup> the Court took a similar view of local efforts to prevent the *export* of solid waste. There, a town agreed to allow a private contractor to construct within the town limits a solid waste transfer station to separate recyclable from nonrecyclable items. The contractor was to operate the facility for five years, after which time the facility would be transferred to the town for one dollar. To finance the transfer station, the town guaranteed a minimum waste flow to the station for the five-year period of operation, for which the contractor was allowed to charge a fee in excess of the disposal cost of waste on the open market. To meet the guarantee, the town required that all nonhazardous solid waste be deposited at the transfer station, effectively depriving out-of-state recyclers of the right to bid for the recycling business. Striking down the ordinance under the Dormant Commerce Clause, the majority concluded that it "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility,"<sup>101</sup> and thus was subject to the rigorous scrutiny that had been applied in *New Jersey*.<sup>102</sup>

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95. 437 U.S. 617 (1978).

96. *Id.* at 624.

97. *Id.* at 624.

98. *Id.* at 629.

99. *See id.* Chief Justice Burger and then Justice Rehnquist dissented. *See id.* at 629-33 (Rehnquist, J., dissenting). The Court later would rely on *New Jersey* to strike down other state efforts to limit the inflow of solid waste from other states. *See Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 114 S. Ct. 1345 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992).

100. 114 S. Ct. 1677 (1994).

101. *Carbone*, 114 S. Ct. at 1683 (1994).

102. Chief Justice Rehnquist and Justices Blackmun and Souter dissented. *See id.* at 1692-702 (Souter, J., dissenting). Justice O'Connor concurred in the result only. *See id.* at 1687-92 (O'Connor, J., concurring in the judgment).

Under the essentialist premises of the classical model, the laws in both *New Jersey* and *Carbone* no doubt would have been upheld. *New Jersey* provides the clearest case.<sup>103</sup> As in *Reid*, the dangers against which the State was attempting to protect itself were entirely noncommercial. New Jersey simply was trying to limit the exposure of its citizenry to unhealthy conditions. Indeed, the New Jersey regulatory scheme included specific exceptions covering the importation of waste for commercial uses, for which out-of-state entrepreneurs presumably would compete with New Jersey waste producers.<sup>104</sup>

The *New Jersey* Court dismissed this argument by characterizing the relevant commodity as New Jersey landfill space. According to the Court, the state legislature intended to preserve a local resource—landfill space—for its own residents.<sup>105</sup> This analysis has some superficial appeal; however, it ignores the connection between waste and landfills. From the state's perspective, neither is desirable. When faced with a waste problem, the State must choose between (1) allowing the waste to lie around randomly; (2) providing landfills; or (3) providing some other means of disposal. In short, New Jersey provided for landfills not because they are intrinsically desirable, but because they are the lesser among evils.<sup>106</sup> Thus, the real issue was the waste itself—a commodity against which a State should have the right to protect itself and its citizenry under essentialist theory.

The situation in *Carbone* was only slightly more complex. In effect, the difference between the market price for waste disposal and the price charged at the transfer station was simply a tax charged to local producers of waste to finance a waste treatment facility that was designed to deal with that waste. From this perspective, the requirement that all nonhazardous waste be deposited at the transfer station was nothing more than a device to enforce the tax, with the actual sorting of the waste being a by-product of that enforcement. Thus, the town simply was attempting to provide a local solution for a locally-created problem—a paradigm case for the exercise of state power under essentialist analysis.

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103. Much of the analysis of *New Jersey* is taken from Maltz, *supra* note 4, at 72-74.

104. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 619 n.2 (1978).

105. See *id.* at 626-28.

106. See *id.* at 629-31 (Rehnquist, J., dissenting).

Of course, in part, the decisions in *New Jersey* and *Carbone*—like that in *Healy*—can be seen as reflecting a preference for a formal rule that condemns all discrimination against out-of-state commercial actors.<sup>107</sup> Other factors also were clearly at work, however. The philosophy underlying the waste disposal cases was stated clearly in *New Jersey* itself:

Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.<sup>108</sup>

In evaluating this formulation of the principles underlying Dormant Commerce Clause analysis, it is important to recognize that the problem which produced the New Jersey statute was “shared by all” only in a limited sense. The problem is shared only to the extent that each State must find some means to dispose of its own, locally-produced waste. In theory, each State could be required to resolve this problem within its own borders; that is, there is no reason why Philadelphia’s waste disposal problems necessarily should affect the quality of life in New Jersey, or vice versa.

Thus, *New Jersey* and *Carbone*—like *Kassel*, *Healy*, and *Hughes*—rest on a vision of federalism that requires all States to participate in the solution to problems that many States suffer—even when such participation would place burdens on a State which are disproportionate to the problems faced by the State itself. This vision clearly is antithetical to the essentialist view of state autonomy that animated both the Framers of the Constitution of 1787 and the classical model of Dormant Commerce Clause adjudication, under which state governments are primarily responsible for health and welfare of their own citizenry. It is, however, entirely consistent with the nationalist, functional approach to

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107. See *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2218-21 (Scalia, J., concurring in the result) (arguing for such a formal rule).

108. *New Jersey*, 437 U.S. at 629.

constitutional adjudication that underlay the constitutional revolution of 1937.<sup>109</sup>

#### IV. CONCLUSION

From a certain perspective, the decline of state autonomy in Dormant Commerce Clause jurisprudence might be viewed as a desirable adjustment to the changing reality of the political and social structure of the United States. Whatever the situation was in 1787, the modern nation is not simply a union of relatively small, quasi-independent societies; instead it is, in many respects, a single, unified entity, all of whose parts share common problems and should share common solutions. In such a society, it is possible that the preservation of state autonomy should not be an important consideration in constitutional adjudication.

This argument, however, faces two types of criticisms. First, in purely formal terms, the source of judicial power to make such a determination is unclear. It is one thing to assert that Congress should have authority to reevaluate the appropriate role of state governments in making economic policy decisions; it is quite another for the Court to invoke the Constitution itself as the authority to undermine one of the core values which underlay that document.

Second, the Court's analysis faces practical difficulties. At times, the Court seems to assume that when a problem is of national dimensions, local control of the solutions is inappropriate. The waste disposal cases demonstrate the fallacy in this line of reasoning. Admittedly, in the aggregate, disposal of waste is a problem of national scope. It may be, however, that the best way to deal with the problem is to force each locality to deal with the waste it creates. Such a regime would maximize incentives for each community to reduce its production of waste, thereby also

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109. The Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), may mark a turning point in this vein of Dormant Commerce Clause jurisprudence. In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844-45 (codified at 18 U.S.C. §§ 921-924 (1994))—a law making possession of a firearm in a school zone a federal offense—on the grounds that an offense of this variety simply has no effect on interstate commerce. See *Lopez*, 115 S. Ct. at 1626. The decision marked the first time in almost fifty years that the Court held the passage of a law to exceed Congress's Commerce Clause authority. It would be premature, however, to prepare for the predicted monumental impact of this five-to-four decision. The case did not involve manufacturing, or even business, in any way, and the Court's numerous precedents in these areas may be too solid to overturn—at least in the near future. For a description of *Lopez*, see John P. Frantz, *The Reemergence of the Commerce Clause as a Limit on Federal Power: United States v. Lopez*, 19 HARV. J.L. & PUB. POL'Y 161 (1995).

reducing the overall scope of the problem. In its zeal to minimize the importance of state lines in cases such as *New Jersey* and *Carbone*, the Court substantially reduces this incentive.

In short, even under contemporary economic conditions, Dormant Commerce Clause analyses should give substantial weight to the value of state autonomy. Unfortunately, the Court often has failed to recognize the importance of this consideration. As a result, national uniformity has become almost a fetish and the virtues of local control often have been undervalued.

