The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination

David Day, University of South Dakota School of Law

Available at: https://works.bepress.com/david_day/3/
I. INTRODUCTION

During the “mature” years of the Rehnquist Court, the dormant Commerce Clause doctrine was a seemingly “well-settled” standard of judicial review. Although challenges had been raised to the propriety of judicial review under the auspices of the dormant Commerce Clause doctrine, the United States Supreme Court had developed a comprehensive “two-tier” interpretative model. Under this system, as long as the challenger had demonstrated some form of burden on interstate commerce, the challenger’s attack on the state regulation would receive one of two levels of heightened scrutiny. On one hand, if the state had utilized a discriminatory regulation, then the level of scrutiny was “virtually per se.” A discriminatory regulation, in other words, would almost inevitably be struck down.

On the other hand, even if the Court found that the regulation was not discriminatory, the Court applied a heightened level of judicial review commonly referred to as the “undue burden” standard. In this form of “intermediate scrutiny,” the Court had struck down apparently neutral regulations which, largely in effect, created an “unreasonable burden” on interstate commerce. Here, the Court would scrutinize the allegedly nondiscriminatory goals of the state as possible pretexts and would carefully examine the state’s choice of means.

† Professor of Law, The University of South Dakota Law School. I want to thank Jennifer Van Ann, Esq., Stephanie Amiote, Esq., Michael Horn, Esq., Sharon Red Deer, Esq., John Kelley, Esq., Michelle Carter, Esq., Bruce Broll, Esq., Deena Townley, and Jennifer Zupp, Esq., for research assistance. I appreciate the reading of early drafts by John Simko, Esq., and Frank Brost, Esq. The University of South Dakota Law School Foundation contributed summer research support to this project. I am solely responsible, of course, for any remaining errors or interpretations.


In the two-tiered model, the most important issue in any case is whether the particular state regulatory scheme constitutes "discrimination." In determining whether the state regulatory scheme is discriminatory, the Court has recognized three types of discrimination. First, a state regulation can be facially discriminatory. Second, a facially-neutral regulation may be discriminatory in purpose. Third, a state regulation may be discriminatory in effect even if it would be facially neutral and there is no showing of discriminatory purpose.

While the Court has found that any one of these types of discrimination will trigger the rigorous scrutiny of the discrimination tier, there is a significant advantage to a facial discrimination theory: it is far easier to prove than discriminatory purpose or discriminatory effect.

The caselaw and the commentators on the Rehnquist Court also recognized that three distinct, but sometimes overlapping, rationales supported the two-tier doctrine. Under one rationale, the heightened judicial review was based upon the need to enforce national economic solidarity or to avoid "economic Balkinization." A second rationale for the dormant Commerce Clause doctrine was based on the need to protect nonresidents involved in interstate commerce because, as non-voters, they would not have the ability to vote on or otherwise protect themselves in the political process. Moreover, in some decisions, a third rationale had emerged: the judicial protection of persons involved in interstate commerce was justified because they were asserting a form of economic "liberty." The decisions of the mature Rehnquist Court would
reflect all three rationales. Indeed, as the Court's application of the doctrine became more expansive, the mature Rehnquist Court looked more frequently to the broader and more protective rationales.

During the mature years of the Rehnquist Court, the Court decided thirteen major dormant Commerce Clause cases. Of the thirteen, the Court decided in favor of the challengers (and against the State) in ten of the cases. Merely on a quantitative level, this is a significantly non-deferential record of judicial review. As discussed below, the qualitative aspects of the Court's record indicate a remarkable pattern of judicial activism.  

I have focused here on the decisions of the mature Rehnquist Court: 1992-2005. The selection of any cut-off point has elements of arbitrariness (or apparent arbitrariness). To some extent, the selection of dates here parallels Professor Merrill's analysis of what he called "The Second Rehnquist Court." I have selected a different starting date because I think the "mature Rehnquist Court" existed when Justice Thomas replaced Justice Marshall. At that point, Chief Justice Rehnquist finally had a relatively solid bloc of five votes: Rehnquist, O'Connor, Scalia, Kennedy and Thomas. As explained below, this bloc of five did not hold together in the dormant Commerce Clause cases, but I believe it was the potentially controlling group for the duration of the Rehnquist Court.

During this time, the primary criticism of the dormant Commerce Clause doctrine had been led by Associate Justice Antonin Scalia. Others have developed more expansive analysis of Justice Scalia's theories, but it is sufficient, for present purposes, to say that Justice Scalia expressed skepticism about any form of heightened review under the dormant Commerce Clause doctrine. Justice Scalia's critique of the doctrine was blunt: "I would therefore abandon the 'balancing' approach to negative Commerce Clause cases... and leave essentially legislative judgments to the Congress." Recognizing that one resembles a substantive due process analysis. See generally Bruce F. Broll, The Economic Liberty Rationale in the Dormant Commerce Clause, 49 S.D. L. REV. 824, 841-43 (2004).


16. See Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 ST. LOUIS U. L. J. 569, 570 (2003). Professor Merrill chose October 1994 as the starting date for the Second Rehnquist Court. Id. Merrill's analysis recognized that the dormant Commerce Clause decisions were an exception from the constitutional federalism theme of the Rehnquist Court. See id. at 571. I make no claim here to reconciling the dormant Commerce Clause decisions with other doctrinal themes of the Rehnquist Court. My focus here is on how the mature Rehnquist Court addressed dormant Commerce Clause issues and why the Court acted as it did. There will be some overlap with Professor Merrill's "strategic actor" theory since I believe the mature Rehnquist Court has tried to avoid confronting Justice Scalia's critique of the two-tiered doctrine.

17. See, e.g., RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 135 (1997); Day, supra note 13, at 693.


hundred seventy years worth of precedent was at stake, Justice Scalia eventually
determined that his reformist criticism would be primarily directed at the
nondiscrimination tier of the dormant Commerce Clause doctrine.\textsuperscript{20} Specifically, Justice Scalia indicated that he would use the doctrine to strike
down "discriminatory" state regulations but that he would not support the
heightened scrutiny under the undue burden standard.\textsuperscript{21} Justice Scalia has
stated: "In my view, a state statute is invalid under the Commerce Clause if, and
only if, it accords discriminatory treatment to interstate commerce in a respect
not required to achieve a lawful state purpose."\textsuperscript{22} Except for Justice Thomas,
Justice Scalia seemed unable to secure support for his position from other
members of the Court (and in fact the Court reaffirmed its well-settled, two-
tiered doctrine). A review of the decisions in the mature Rehnquist Court,
however, will suggest that Justice Scalia's critique may have had some
influence, albeit in an indirect manner, on the development of the doctrine.\textsuperscript{23}

This article will review the Rehnquist Court's major dormant Commerce
Clause decisions from 1992 to 2005. Almost every term saw at least one
decision regarding a state regulatory scheme. For present purposes, it should be
noted that no decision explicitly relied upon the nondiscrimination tier
standard.\textsuperscript{24} The Court was aggressive in determining that state regulatory
schemes were discriminatory and thereby subject to the rigorous scrutiny of the
upper tier of the doctrine. By having a broad notion of discrimination, the Court
was able to avoid the apparently troublesome balancing called for by the undue
burden standard. When the Court upheld a state regulatory scheme, the Court
deployed to apply either the discrimination tier or the lower tier.\textsuperscript{25} Thus, in this
fashion, the mature Rehnquist Court also avoided any need to re-examine the
soundness of the undue burden standard.

\textsuperscript{20.} See \textsc{Brisbin}, supra note 17, at 137.
in part and in judgment); \textsc{Brisbin}, \textit{supra} note 17, at 137.
\textsuperscript{22.} \textit{Bendix}, 486 U.S. at 898 (Scalia, J., concurring).
\textsuperscript{23.} Justice Scalia maintained his position throughout the end of the Rehnquist Court. In \textit{General
Motors Corp. v. Tracy}, 519 U.S. 278, 300 (1997), for example, he reiterated his rejection of the "undue
burden" tier of the doctrine. See infra Part II.I.1. For purposes of this article, Justice Scalia's critique is
considered as a constant, and the article examines how the Court may have responded to his critique.
See \textit{generally Tribe}, supra note 2, at 1033.

Although it arose in the context of a case concerning the dormant foreign Commerce Clause, Justice
Scalia repeated his criticism of the doctrine's lower tier: "Japan Line, like Complete Auto and Pike,
ultimately asks courts to make policy judgments - essentially, whether nondiscriminatory state
regulations of various sorts are worth their effects upon interstate or foreign commerce." \textit{Itel}, 507 U.S.
at 80 (Scalia, J., concurring). For Justice Scalia, the courts are not to make "policy" judgments. Hence,
the courts should defer to the judgments of the politically-accountable decision makers. See \textsc{Sara
Sachse, Comment, United We Stand – But For How Long? Justice Scalia and New Developments of the
Dormant Commerce Clause, 43 ST. LOUIS U. L.J. 695 (1999)}.

\textsuperscript{24.} See \textit{Tribe}, supra note 2, at 1059. As noted above, the \textit{Michigan Public Service Commission}
decision was implicitly resolved under the nondiscrimination tier, but the Court was not explicit. See \textit{generally Am.
\textsuperscript{25.} See \textit{Tracy}, 519 U.S. at 281-82.
A. AN IRONIC PRELUDE TO THE MATURE REHNQUIST COURT’S DOCTRINE

In its 1990 decision in American Trucking Associations, Inc. v. Smith,26 the Court did not actually address a dormant Commerce Clause issue. In Smith, the Court faced the claim that the State of Arkansas should be retroactively liable, under the 1987 Scheiner27 decision, for the application of its highway utilization tax. The Scheiner Court had declared the Arkansas tax unconstitutional under the dormant Commerce Clause doctrine.28 In a plurality opinion by Justice O’Connor, the Smith Court subsequently held that Arkansas would not be retroactively liable.29 The plurality specifically declined to address any dormant Commerce Clause issues.30 Nonetheless, for doctrinal purposes, Justice Scalia’s Smith concurrence established an important theme for the rest of the Rehnquist Court.

Although Justice Scalia concurred in the Smith decision, he bluntly rejected the plurality’s analysis.31 Justice Scalia declared that judicial review under the dormant Commerce Clause was “beyond the judicial role itself.”32 He rejected any role for the “balancing” analysis on the lower tier of the doctrine.33 As such, Justice Scalia staked out an aggressive critique of the well-settled doctrine. Although in 1990 he seemed to speak only for himself,34 Justice Scalia’s Smith concurrence alerted the Court that he would require attention in future dormant Commerce Clause cases – especially any addressed on the lower tier. The Smith concurrence thus foreshadowed the doctrinal dynamics of the dormant Commerce Clause doctrine during the mature years of the Rehnquist Court. A decade dominated by decision-making based on the “discrimination tier” had, therefore, an ironic prelude.

B. THE SCALIAN CRITIQUE OF THE DORMANT COMMERCE CLAUSE DOCTRINE

With his concurrence in the Smith decision, Justice Scalia fully explained his jurisprudential attack on the established dormant Commerce Clause analysis. While the articulation of Justice Scalia’s critique certainly suffered from some inconsistencies,35 his position was certainly clear enough, at least in broad terms.

Using textual and historical analytical techniques, Justice Scalia rejected the two-tiered model. Specifically, Justice Scalia rejected any judicial review conducted with “balancing techniques” – such as the undue burden standard – and this led to his refusal to follow the precedent on the lower tier of the dormant Commerce Clause.36 He would, according to his Bendix Autolite concurrence,37

28. Id. at 292-97.
29. See Smith, 496 U.S. at 183.
30. Id. at 183 n.1.
31. Id. at 201 (Scalia, J., concurring).
32. Id. at 202.
33. Id. at 203.
34. See Day, supra note 13, at 703.
35. See Tushnet, supra note 18, at 1718.
36. Perhaps as a rhetorical device, Justice Scalia occasionally suggested that all dormant
vote to strike down discriminatory state regulations – but only discriminatory regulations. Thus, while Justice Scalia would use the discrimination tier of the doctrine, he would not apply the undue burden tier. Significantly, it also appeared as of the beginning of the decade that his concept of “discrimination” was not as expansive as that used by other Justices.

The balance of this article is a review of the Court’s interpretation of the concept of “discrimination” on the upper tier of the doctrine. In the concluding section, I shall return to the Scalian critique of the dormant Commerce Clause doctrine and how it may have influenced the development of the doctrine during the decade.

II. THE DORMANT COMMERCE CLAUSE DOCTRINE DECISIONS OF THE MATURE REHNQUIST COURT

A. WYOMING V. OKLAHOMA

The decade’s initial dormant Commerce Clause decision, Wyoming v. Oklahoma, was not doctrinally significant or even a difficult application of the two-tier model. For present purposes, however, Wyoming is best understood, within the two-tiered system, as a discrimination tier case. As such, it was a precursor to the Rehnquist Court’s later decisions.

Wyoming was a major coal-producing state and imposed a severance tax on those who extracted coal. Wyoming provided almost all of the coal used by four Oklahoma electric utility companies including the Grand River Dam Authority (GRDA), which was a state agency. For its part, the Oklahoma legislature, in an effort to encourage the use of Oklahoma coal by utilities, initially passed a resolution that encouraged Oklahoma utilities to use at least ten percent of Oklahoma-mined coal. Because the Oklahoma utilities ignored the resolution, the Oklahoma legislature then passed a statute mandating that Oklahoma utilities use at least ten percent Oklahoma-mined coal. Since they had to comply with the Oklahoma domestic coal statute, the Oklahoma utilities purchased less of Wyoming’s coal. Accordingly, Wyoming’s coal severance tax revenues fell.

Commerce Clause analysis was illegitimate. See Smith, 496 U.S. at 202. As a general matter, however, his critique was aimed at the lower tier.


38. Wyoming v. Oklahoma, 502 U.S. 437 (1992). The Wyoming decision involved several issues apart from the basic dormant Commerce Clause. See generally Note, Wyoming v. Oklahoma: Misguided Exercise of Discretion, 26 AKRON L. REV. 341 (1992). It has, for example, a discussion of the “market participant exception” to the dormant Commerce Clause doctrine. Id. at 459. This argument was properly rejected in the Wyoming decision, but the market participant exception subdoctrine is beyond the scope of this article. See DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 253 (Found. Press 2004).


40. Id. at 444.

41. Id. at 443-44.

42. Id. at 444.

43. Id. at 445-46.
Based on the lost severance tax revenue, Wyoming sued Oklahoma for violation of the dormant Commerce Clause. As the first issue, the Court addressed which tier of the dormant Commerce Clause doctrine was applicable. In its analysis, the Court found that the Act discriminated both on its face and in "practical effect."\(^4\) The facial discrimination, according to the Court, was that Oklahoma's coal usage statute expressly reserved a segment of the Oklahoma coal market for Oklahoma-mined coal.\(^5\) In addition, the Court found that Oklahoma's coal usage statute discriminated in effect because the express reservation necessarily excluded coal mined in other states.\(^6\) By withdrawing a set percentage of the Oklahoma market from other states, the Court found that there was necessarily an impact on interstate commerce.

Having found discrimination in Oklahoma's regulatory scheme, the Court then applied the discrimination tier standard. Under this strict scrutiny, the Court rejected all of Oklahoma's proffered justifications, concluding that none of them were compelling.\(^7\) With respect to an asserted interest in protecting the stability of the coal supply, which came from a single source via a single rail line, the Court suggested that the means chosen by Oklahoma were overly broad.\(^8\) Therefore, since Oklahoma could not satisfy the strict scrutiny review, the Court upheld Wyoming's claim.

1. The Dissents

The main Wyoming dissent was written by Justice Scalia and was joined by Chief Justice Rehnquist and Justice Thomas. The Scalia dissent suggested that Wyoming could not satisfy the elements of the *Lujan* standard and, therefore, lacked standing.\(^9\) Justice Scalia's dissent did not explicitly address the dormant Commerce Clause issues.

There was also a dissent by Justice Thomas, joined by the Chief Justice and Justice Scalia which argued that the Court should not have exercised original jurisdiction.\(^10\) Thus, neither dissent reached the merits of the dormant Commerce Clause claim.

2. Conclusion

In sum, the first major case of the era was a relatively straightforward discrimination tier decision. The Court found facial discrimination, and this placed the case in the doctrine's upper tier. The challenger, Wyoming, prevailed.

---

44. *Id.* at 456.
45. *Id.* at 455 ("The Act expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal.").
46. *Id.* The Court rejected Oklahoma's argument that the ten-percent reservation was an "insignificant" burden. *Id.* at 455-56. The Court would revisit this issue in the *Oregon Waste Management* decision below.
47. *Id.* at 456-59.
48. *Id.* at 456-57.
when Oklahoma then failed to satisfy the strict scrutiny standard.

In the *Wyoming* decision, the Court adhered to well-settled doctrine. As a matter of dormant Commerce Clause doctrine, the conclusion that the Oklahoma law was discriminatory was a relatively easy determination because the discrimination appeared on the face of the Oklahoma regulatory program. The more innovative doctrinal dimension was that the determination of facial discrimination was bolstered by the Court’s consideration of the program’s effect. To this extent, the Court signaled an expansive concept of facial discrimination: *facial discrimination by effect*. This expansive analysis of the facial discrimination concept would be repeated several times during the Rehnquist Court era.

**B. CHEMICAL WASTE MANAGEMENT, INC. v. HUNT**

The second major decision of the mature Rehnquist Court regarding the dormant Commerce Clause doctrine was one of several garbage cases decided by the Court. In *Chemical Waste Management, Inc. v. Hunt* the Alabama Legislature had enacted Alabama code provisions which included a cap on the amount of hazardous waste that could be disposed of in any one year in any landfill in Alabama. The amount of hazardous waste disposed of during the first year under the Act became the permanent annual ceiling. In addition to the ceiling, the Alabama Act also imposed a base fee of $25.60 per ton on all hazardous waste. In addition, a surcharge of $72.00 per ton was imposed on all hazardous waste generated outside of Alabama. The surcharge did not apply, however, to waste generated in Alabama.

Chemical Waste Management, Inc., a Delaware corporation, operated one of the oldest commercial hazardous waste disposal facilities in the nation, located in Emelle, Alabama. The Emelle facility handled substances which were toxic, ignitable, corrosive, and extremely dangerous to human health. Over the course of the late 1980s, the rate of hazardous waste shipped to the Emelle facility increased each year, increasing from 341,000 tons in 1985 to 788,000 tons in 1989. Over ninety percent of the hazardous waste at the Emelle facility was shipped to it from states other than Alabama. Under these circumstances, theAlabama surcharge impacted the Emelle facility directly: Ninety percent of the waste processed would be subject to the $72.00 a ton surcharge.

Relying on a dormant Commerce Clause theory, Chemical Waste Management filed suit in state court. Although it upheld the base fee and the cap

---

51. Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992), rev’g, 584 So. 2d 1367 (Ala. 1991). The Alabama Supreme Court analyzed the case on the nondiscrimination tier and upheld the regulatory scheme. *Id.* at 1376-78. The *Hunt* decision represents an example of the United States Supreme Court’s pattern in this decade: treating a case which the lower courts saw as an undue burden tier issue as a discrimination-tier case. The *Hunt* decision is the first example of this pattern.
53. *Id.* at 338.
54. *Id.* at 337.
55. *Id.* at 338.
56. *Id.*
57. *Id.* at 338-39.
on the amount of waste, the state trial court found that the surcharge was unconstitutional under the dormant Commerce Clause.58 On appeal, the Alabama Supreme Court found that all the provisions were constitutional, including the out-of-state surcharge.59 In the Chemical Waste Management decision, the United States Supreme Court reversed the Alabama Supreme Court regarding the out-of-state waste surcharge.60 The Court, per Justice White, relied on the narrowest doctrinal rationale and found that the Alabama surcharge threatened the national economy. “No State,” wrote Justice White, “may attempt to isolate itself from a problem common to the several states by raising barriers to the free flow of interstate trade.”61

The Court found that the surcharge facially discriminated against interstate commerce.62 Consistent with its reasoning in the Wyoming decision, the Court considered the effect of the regulatory scheme as part of its analysis: “The Act overall has plainly discouraged the full operation of petitioner’s Emelle facility.”63 The Court again determined, as in Wyoming, that part of the facial discrimination analysis was an examination of a statute’s effect.

Having found that the Alabama Act discriminated, the Court subjected Alabama’s regulatory scheme to strict scrutiny.64 Under this rigorous scrutiny, the state had the burden of justifying the surcharge. The Court found that, although Alabama may have had a legitimate health and public safety argument or concern, Alabama had not presented sufficient evidence to demonstrate that out-of-state hazardous waste was any more dangerous than in-state waste that was disposed of at the landfill.65

Regarding the means prong of strict scrutiny, the Court rejected Alabama’s argument that it was using the least restrictive alternative.66 The Court noted that a generally applicable additional surcharge on all hazardous waste – whether in-state or out-of-state – would be a less drastic nondiscriminatory alternative.67 Under the circumstances, Alabama failed both prongs of the strict scrutiny test, and the Court accordingly held that the surcharge was unconstitutional.

1. Chief Justice Rehnquist’s Dissent

The lone dissenter in Chemical Waste Management was Chief Justice Rehnquist. He rejected the Court’s use of the strict scrutiny standard.68 He further argued that Alabama’s use of a tax as a means for discouraging the consumption of scarce commodities was a less drastic alternative than various

58. Id. at 339.
59. Id.
60. Id.
61. Id. at 339-40.
62. Id. at 342.
63. Id.
64. Id. at 342-45.
65. Id. at 343-44.
66. Id. at 344-45 (“Less discriminatory alternatives, however, are available.”).
67. Id. at 345.
68. Id. at 350 (Rehnquist, C.J., dissenting).
other regulatory alternatives available to the State. While hedging on the question of whether this particular tax would be the least restrictive alternative, the Chief Justice’s dissent characterized Alabama’s choice of means as, at least, not the most drastic.

As even a casual review would indicate, the Chief Justice’s dissent should be understood in terms of some of his prior dissents. Particularly in Philadelphia v. New Jersey, the Chief Justice had argued that garbage was not commerce for purposes of any dormant Commerce Clause analysis. Justice Rehnquist had lost on this issue in the Philadelphia case, and there was no sign that his dissent there had subsequently garnered the majority of the Court. Chief Justice Rehnquist made an attempt to “water down” the strict scrutiny of the discrimination tier, but his analysis was rebuffed by the other Justices.

2. Conclusion

The Chemical Waste Management decision confirmed the basic two-tiered doctrine, and it was also another “easy” decision for the Court. It was a facial discrimination decision, bolstered by consideration of the effect. Because the facial discrimination appeared in the text of the Alabama law, even Justice Scalia joined the majority. No analysis of the state’s purpose was necessary. Moreover, under the circumstances, no balancing under the undue burden standard was undertaken. The Court, therefore, avoided any need to address the issues raised by Justice Scalia’s critique of the doctrine’s nondiscrimination tier.

C. FORT GRATIOT SANITARY LANDFILL, INC. V. MICHIGAN DEPARTMENT OF NATURAL RESOURCES

The next decision during the 1990s was the Fort Gratiot decision. The second of the trilogy of garbage cases, the Fort Gratiot decision, like the other garbage cases, arose from the national problem of solid waste disposal.

In 1978, the State of Michigan enacted its Solid Waste Management Act (SWMA). The SWMA required every county within the state to “estimate the amount of solid waste” it would generate for the next twenty years. Each county was also required to “adopt a plan providing for” waste disposal at a facility that complied with state health standards. This case arose from the

69. Id. at 349.
71. See generally id. at 629-33.
73. Ft. Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res., 504 U.S. 353 (1992), rev’g, Bill Kettlewell Excavating, Inc. v. Mich. Dep’t of Natural Res., 931 F.2d 413 (6th Cir. 1991). The Sixth Circuit had upheld the State’s regulatory scheme by applying the nondiscrimination-tier standard. See id. at 416-18. The Supreme Court’s reversal was based on the application of the discrimination tier. As such, the Fort Gratiot decision is part of the decade’s pattern where the Court avoids the undue burden standard by characterizing state regulations as discriminatory.
74. Fort Gratiot, 504 U.S. at 355.
75. Id.
76. Id.
overall state plan and the particular actions of the County Planning Committee.

The Fort Gratiot Sanitary Landfill (Ft. Gratiot Landfill) operated a landfill as a solid waste disposal facility in St. Clare County, Michigan. In 1987, it obtained a permit to operate its landfill. Approximately one year after the Ft. Gratiot Landfill obtained its permit, Michigan amended the SWMA to prohibit acceptance of solid waste generated outside any given county without the explicit authorization from that county's Solid Waste Planning Committee (Committee). In an attempt to comply with the procedural requirements of the SWMA amendments, the Ft. Gratiot Landfill submitted an application to the county Committee seeking authorization to accept up to 1750 tons of out-of-state waste at the sanitary landfill. The Committee denied the application; as a consequence, the Ft. Gratiot Landfill was prohibited from receiving any solid waste that did not originate in St. Clare County, including the prospective 1750 tons of out-of-state waste.

Under the circumstances, the Ft. Gratiot Landfill sued the County and the State, alleging that the statute and its implementation by the Committee violated the dormant Commerce Clause doctrine. The District Court denied Ft. Gratiot's motion for summary judgment on the theory that the SWMA did "not discriminate against interstate commerce on its face," and that it was applied evenhandedly. Initially, the District Court found there was no discriminatory effect because each county was given discretion to accept out-of-state waste by approval from the Committee. In this regard, the District Court seemed to accept a theory that providing local discretion was the equivalent of evenhandedness. In addition, the District Court found that, under the undue burden standard, the SWMA scheme survived.

Although the Sixth Circuit Court of Appeals affirmed the District Court, the United States Supreme Court reversed. The Court held that SWMA violated the dormant Commerce Clause rights of the Ft. Gratiot Landfill. The Court determined that SWMA was "protection from competition from out-of-state waste producers." The Court found that the economic protectionism was accomplished by delegating decision-making to each county and allowing each county "to isolate itself from the national economy." This type of protectionism, according to the majority, constituted discrimination.

Having found that the Michigan regulatory scheme was discriminatory, the

77. Id. at 356.
78. Id. at 356-57.
79. Id. at 357.
80. Id.
81. Id.
82. Id. at 357-58.
83. Id. at 358.
84. Id.
86. See Fort Gratiot, 504 U.S. at 358.
87. Id. at 361.
88. Id.
Court then rejected the State’s argument that SWMA was a comprehensive health and safety regulation. The Court concluded that the State had the burden of proof and that the State did not satisfactorily meet its burden of showing the health and safety concerns could not be achieved through less drastic and nondiscriminatory alternatives. In particular, the Court noted that the State had the alternative of limiting the amount of garbage accepted rather than just targeting out-of-state waste. The Court also concluded that the State was unable to show that out-of-state waste posed some specific health hazard different from the State’s own waste.

The State also argued that SWMA was not discriminatory because other counties besides St. Clare County had in fact authorized acceptance of out-of-state waste. The Court rejected this bottom line argument since the effect of SWMA, as implemented by the County Board, was to exclude out-of-state waste from St. Clare County. The Court concluded that the SWMA regulations “unambiguously discriminate against interstate commerce.”

In some respects, this case presented the Court with an important threshold issue. Could the state regulation be characterized as discriminatory even when, on its face, it could be considered facially neutral? By determining that the Board’s practices under SWMA created discrimination in effect, the Fort Gratiot decision relied on a more expansive notion of discrimination.

The Court, in Fort Gratiot, applied traditional analysis with respect to the discrimination tier. The state regulatory scheme can be analyzed on the discrimination tier not only when the scheme is facially discriminator, but also when it is discriminatory in purpose or discriminatory in effect. Careful camouflage of discrimination with clever statutory language will not prevent the Court from recognizing economic protectionism.

1. Chief Justice Rehnquist’s Dissent

The Chief Justice’s dissent initially argued that Michigan was not engaged in economic protectionism. The dissent asserted, as a factual matter, that the statute operates to economically disadvantage the State of Michigan because, by limiting volumes of waste, the State is increasing the disposal cost per unit for Michigan consumers. The dissent’s analysis of the facts, however, did not affect the majority’s interpretation of the doctrine. The Chief Justice’s dissent was particularly concerned, as a matter of policy, that states would now become

89. Id. at 364.
90. Id. at 366.
91. Id. at 367.
92. Id.
93. Id. at 362. This was apparently an effort to place the case on the undue burden tier.
94. Id. at 363. The exclusionary practices of the St. Clare County Board created the injury to Ft. Gratiot’s interstate commerce interests.
95. Id. at 367.
96. See supra notes 86-95 and accompanying text.
97. Fort Gratiot, 504 U.S. at 361-63.
98. Id. at 370 (Rehnquist, C.J., dissenting).
“the waste repositories” for other larger and more populous states.\textsuperscript{99} This policy argument also fell short.

As a doctrinal matter, the dissent accepted the State’s position that SWMA was a “facially-neutral regulation.” The Chief Justice then argued that the SWMA was directed at legitimate health and safety concerns.\textsuperscript{100} In essence, the dissent contested the majority’s finding of economic protectionism and its decision to analyze the case on the discrimination tier. The dissent would have analyzed the case on the nondiscrimination tier, where the means testing of the undue burden standard was not so rigorous. The majority’s rejection of the dissent’s call for the use of the undue burden standard foreshadowed the pattern of the decade: Cases were decided on the discrimination tier, and any undue burden analysis was avoided.

2. Conclusion

\textit{Fort Gratiot} was, in one sense, a more difficult case than \textit{Chemical Waste}. The decision that the Michigan statutory scheme was discriminatory turned, in large measure, on the Court’s assessment of the State’s purpose and the effects of SWMA rather than solely on a simple reading of the statute’s text.\textsuperscript{101} Purpose and effect theories of discrimination require a more activist judicial review than facial discrimination. In \textit{Fort Gratiot}, the Court was willing to be, in the context of the dormant Commerce Clause, sufficiently activist to find discrimination.

The \textit{Fort Gratiot} decision, in another sense, was not a particularly difficult one. Even the dissent recognized that the purpose of SWMA was to limit the amounts of solid waste from out-of-state that might come into Michigan’s landfills.\textsuperscript{102} Although \textit{Fort Gratiot} involved a somewhat more sophisticated state regulatory scheme than the \textit{Chemical Waste} case, the Court applied the national economic unity rationale. While the particular statutory mechanism chosen here involved the conferral of so-called discretion on the counties, the Court saw through the discretionary facade and recognized the Board’s action as economic protectionism.\textsuperscript{103}

Consistent with the decisional themes outlined in this article, the \textit{Fort Gratiot} Court declined to analyze this case with the undue burden standard.\textsuperscript{104} Arguably, the Court might have viewed this as an evenhanded regulation with only an incidental effect on interstate commerce, like the Rehnquist dissent urged. Under the lower tier, the State might have prevailed. Through an expansive concept of discrimination, however, the Court avoided the balancing involved in the undue burden analysis and placed this case on the discrimination tier.\textsuperscript{105} Placement on the discrimination tier, and the consequential use of the

\textsuperscript{99} \textit{Id.} at 373.
\textsuperscript{100} \textit{Id.} at 368.
\textsuperscript{101} In that regard, for example, \textit{Fort Gratiot} is a more difficult case than \textit{Oregon Waste System} discussed below. \textit{See infra} Part II.D.
\textsuperscript{102} \textit{Fort Gratiot}, 504 U.S. at 370 (Rehnquist, C.J., dissenting).
\textsuperscript{103} \textit{Id.} at 363 (majority opinion).
\textsuperscript{104} \textit{Id.} at 361-63.
\textsuperscript{105} \textit{Id.} at 363. \textit{See O'Grady}, supra note 2, at 572 n.4.
strict scrutiny standard, doomed the Michigan program.\textsuperscript{106} Thus, in addition to its use of an expansive theory of facial discrimination, the \textit{Fort Gratiot} decision is significant because the Court’s reluctance to consider the undue burden tier foreshadowed its approach to subsequent decisions during this decade.

\textbf{D. \textit{OREGON WASTE SYSTEMS, INC. V. ENVIRONMENTAL QUALITY COMMISSION OF OREGON}}

Two years after the \textit{Fort Gratiot} and \textit{Chemical Waste} decisions, the Court faced yet another “garbage case.” In \textit{Oregon Waste Systems},\textsuperscript{107} the State of Oregon had established a wide range of fees on landfill operators. At issue in \textit{Oregon Waste Systems} was the surcharge that was imposed on every person who disposed of \textit{waste generated out-of-state} at a regional disposal site in Oregon.\textsuperscript{108} In 1989, the Oregon Environmental Quality Commission set the out-of-state surcharge at $2.25 per ton.\textsuperscript{109} Oregon argued that the $2.25 amount was based on the costs to the state of Oregon, and its political subdivisions, in disposing of solid waste generated out-of-state.\textsuperscript{110} At the same time, the Environmental Quality Commission also imposed a fee on waste generated in-state; this fee was only eighty-five cents per ton.\textsuperscript{111} Oregon Waste Systems, which ran disposal sites that accepted out-of-state waste, challenged the higher out-of-state surcharge and the enabling state statutes as a violation of the dormant Commerce Clause.\textsuperscript{112}

The lower Oregon courts upheld the statutes and the surcharge.\textsuperscript{113} In particular, the Oregon Supreme Court reasoned that the surcharge was in essence a “compensatory tax” because its calculation had a nexus to the actual cost incurred by the state and local government with respect to out-of-state waste.\textsuperscript{114} The United States Supreme Court, in the \textit{Oregon Waste Systems} decision, reversed.\textsuperscript{115}

In an opinion by Justice Thomas, the Court formulated the issue as whether the out-of-state surcharge violated the dormant Commerce Clause doctrine when the State had not demonstrated that the higher fee for out-of-state waste disposal was proportional to the services rendered to the out-of-state waste.\textsuperscript{116} The threshold issue was whether the surcharge was a “discriminatory” regulation, or

\textsuperscript{106} Id. at 367. The \textit{Fort Gratiot} decision, in that regard, re-emphasizes the theme that, once a state regulatory scheme is placed on a discrimination tier, it is highly unlikely that the State will satisfy the level of judicial review.


\textsuperscript{108} \textit{Or. Waste Sys., Inc.}, 511 U.S. at 95-96.

\textsuperscript{109} Id. at 96.

\textsuperscript{110} Id. at 100.

\textsuperscript{111} Id. at 96.

\textsuperscript{112} Id. at 97.

\textsuperscript{113} Id.

\textsuperscript{114} Id. at 100.

\textsuperscript{115} Id. at 108.

\textsuperscript{116} Id. at 95.
whether it was an evenhanded regulation that might be analyzed under the undue burden standard.117

The State argued that the surcharge was not discriminatory because it had a “compensatory” purpose.118 The Court’s response was that the purpose or justification for the particular state regulation has no bearing on whether it is “discriminatory.”119 For the initial purposes of deciding which doctrinal tier was applicable, the Court also rejected the argument that the presence of discrimination was measured by the quantity of the discrimination.120 Put simply, even a little bit of discrimination was enough. Under this reasoning, the Court concluded that the surcharge was discriminatory.

The Court also concluded that the surcharge was facially discriminatory. The Oregon Waste majority apparently saw this as an “easy” case. This conclusion derived from a simple reading of the statutes. No purpose or effect analysis was needed.

Having decided that the surcharge was discriminatory, the Court used what it called the “strictest scrutiny” standard.121 The burden of persuasion was on the State, and the State failed its burden.122

The State’s main argument was that the higher surcharge on out-of-state waste was a compensatory tax.123 The Court rejected this because Oregon had not shown that the out-of-state fees, with the surcharge, were substantially equivalent to what the in-state waste disposal would pay.124 The Court also noted that in-state shippers of out-of-state waste, such as the challenger Oregon Waste Systems, would be charged the out-of-state surcharge even though, as an Oregon resident, it paid Oregon income taxes.125 The Court found, therefore, that Oregon’s compensatory tax was both over- and under-inclusive.

Finally, the Court rejected the State’s argument that Oregon had a legitimate interest in spreading the cost of in-state waste disposal to all of its citizens. The Court reasoned that, in fact, Oregon was actually giving its in-state waste disposers an economic advantage over out-of-state waste disposers.126 This, according to the Court, constituted “resource protectionism” violative of the dormant Commerce Clause because a state may not afford its own residents a preferred right of access over consumers in another state.127

117. Id. at 99.
118. Id. at 100.
119. Id. The Court here found that the “facial discrimination” appeared in the text of the statute. “In making that geographic distinction, the surcharge patently discriminates against interstate commerce.” Id.
120. Id. at 100 n.4.
121. Id. at 101 (“the strictest scrutiny”).
122. Id. The Court obviously suggested to other states how a compensatory tax might be justified. The Court initially noted two arguments that the State did not make: that the disposal of out-of-state waste was more expensive than the disposal of in-state waste, and that the State had distinctive health or safety concerns with out-of-state waste compared to in-state waste. Id.
123. Id. at 102.
124. Id. at 103.
125. Id. at 105.
126. Id. at 107.
127. Id. at 108.
1. Chief Justice Rehnquist’s Dissent

The dissent by Chief Justice Rehnquist argued that the State had satisfied its burden to demonstrate that the surcharge was justified as a compensatory tax. The dissent’s more creative argument, though, was its quantitative analysis of the surcharge. Chief Justice Rehnquist argued that the $2.25 surcharge was a reasonable burden on interstate commerce because, on average, it amounted to only an additional charge of fourteen cents per week for solid waste producers (i.e., homeowners) who were out-of-state. The Chief Justice reasoned that fourteen cents per week should be considered an incidental effect on interstate commerce because it would not actually deter any waste disposal from out-of-state within Oregon. The Chief Justice reasoned that, if the fourteen cents per week added cost was only incidental, then the Court should not apply the strict standard of the discrimination tier.

The dissent’s creative reasoning regarding what constitutes an incidental burden was firmly rejected by the majority. Even a little discrimination was enough to invoke the higher tier. As noted above, the majority concluded a burden of only fourteen cents per week constituted discrimination which, under the two-tiered doctrine, called forth the strict scrutiny standard.

2. Conclusion

In summary, Oregon Waste Systems seemed to be an easy case. It was easy for the mature Rehnquist Court to find that the discrimination tier was applicable because the Oregon surcharge system facially imposed differential treatment on out-of-state solid waste. There was no reason to consider the state’s purpose or the effect of the surcharge on interstate commerce. Moreover, Oregon’s attempts to justify its facial discrimination seemed weak. Even the creative efforts of the Chief Justice in dissent did not deter the majority from finding this particular fee system to be discriminatory.

Ultimately, Oregon’s argument floundered because there was no reason to differentiate between solid waste generated in-state and solid waste generated out-of-state. The only reason to make that distinction would be state protectionism. Under the two-tiered doctrine, moreover, state protectionism must be subjected to strict scrutiny on the discrimination tier.

The Oregon Waste decision, therefore, seems quite consistent with many of the rest of the Rehnquist Court’s decisions. First, the Court decided the Oregon Waste case on the discrimination tier. Second, the Court rather easily found the Oregon statutory scheme to be facial discriminatory. Third, the Court declined an opportunity, as urged by the Chief Justice’s dissent, to pursue an undue

128. Id. at 115-16 (Rehnquist, C.J., dissenting).
129. Id. at 109 n.4.
130. Id. at 115. The dissent argued that a quantitatively small burden should be considered an incidental burden. Although it is outside the scope of this article, it should be noted here that, in dormant Commerce Clause doctrine, “incidental” means “nonpurposeful.” See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
131. Or. Waste Sys., Inc., 511 U.S. at 100 n.4 (majority opinion). See TRIBE, supra note 2, at 1060.
burden analysis on the nondiscrimination tier. This complementary pattern had been established by the middle of the 1990s.132

With the expansive doctrines of discrimination and facial discrimination, the Court subsequently addressed more complex state regulations of interstate commerce. Not all state regulations were as transparently discriminatory as Oregon's.

E. C & A CARBONE, INC. V. TOWN OF CLARKSTON, NEW YORK

One of these relatively more sophisticated state environmental regulations involved yet another garbage decision. The decision in C & A Carbone, Inc. v. Town of Clarkston133 involved the disposal of solid waste, but the regulatory scheme was less transparent regarding discrimination than the schemes tested in the Alabama and Oregon decisions. In its approach to the solid-waste disposal problem, the Town of Clarkston, New York (Town) used arguably more creativity than some of the earlier government entities in its efforts to address solid landfill problems and to encourage recycling.

In Carbone, the Town contracted with a private company to have the private company build and operate a "transfer station" for the sorting of solid waste into recyclable and non-recyclable segments.134 The agreement was that, after the private company operated the transfer station for five years, the Town would purchase the transfer station for only $1.00.135 In order to induce the private development of the transfer station, the Town guaranteed that it would provide a minimum solid waste flow of 120,000 tons per year during the five years of the contract. This would be accomplished by requiring, in a "flow-control" ordinance, all garbage haulers to use the transfer station.136 As a further inducement to the private contractor, the Town promised to make up any operational deficits of the transfer station if the tonnage did not meet the 120,000 tons per year.137 As a third incentive, the private contractor was also authorized to charge the waste haulers a "tipping fee" of $81.00 per ton.138 This $81.00 per ton tipping fee was approximately $11.00 per ton higher than the tipping fees charged in the private market, including that of other waste disposal or transfer stations out-of-state.139 Through the combination of a guaranteed waste flow, the 120,000 ton minimum, and the mandated higher-than-market tipping fee, the

132. The cases also reveal the Court's reliance on an expansive notion of discrimination. See infra Part III.
134. Carbone, 511 U.S. at 387.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id. at 424 (Souter, J., dissenting) (identifying the greater-than-market amount as $11.00 per ton).
Town sought to make the operation of the transfer station profitable for the private company. Ultimately, given the future $1.00 purchase price, the entire scheme would be a “good deal” for the Town, or at least one that avoided local tax increases.

The C & A Carbone Company (Carbone) was a long-time participant in the solid waste recycling and disposal business. Carbone, a New York company, was picking up waste in the Town and shipping the waste out of state (e.g., Indiana) to sites with lower fees without utilizing the transfer station or paying the Town’s tipping fee.\textsuperscript{140} Under the circumstances, the Town sued Carbone, seeking an injunction.\textsuperscript{141} In its defense, Carbone alleged that the ordinance scheme violated the dormant Commerce Clause.\textsuperscript{142} An injunction was eventually issued against Carbone by the state trial court, and this was affirmed on appeal when the New York Court of Appeals found that the ordinance did not discriminate on its face and survived the balancing of the undue burden standard.\textsuperscript{143} The United States Supreme Court reversed the state courts.\textsuperscript{144}

The Supreme Court characterized the issue as whether the Town’s regulatory scheme – requiring that all waste generated in, or brought into, the municipality be processed at its transfer station and charging a greater-than-market tipping fee – would be considered discriminatory under the dormant Commerce Clause doctrine.\textsuperscript{145} The Court, in an opinion by Justice Kennedy, found that the flow-control ordinance was discriminatory against interstate commerce.\textsuperscript{146}

Regarding the doctrine’s threshold issue of discrimination, the Town sought to argue the case on the undue burden standard rather than the discrimination tier. The Town’s principal argument was that the flow-control ordinance applied to both in-state and out-of-state waste haulers who picked up waste within the municipality and, therefore, was not discriminatory.\textsuperscript{147} Such “even handedness,” according to the Town, constituted nondiscrimination.

The United States Supreme Court rejected the Town’s argument. The Court decided that so-called facial evenhandedness is not the only criterion for nondiscrimination, and that there must be an examination of the ordinance’s “design and effect.”\textsuperscript{148} The Court found that the regulatory scheme barred the import of processing services for solid waste from other states, and that this effect was the discrimination.\textsuperscript{149} The Court suggested that this flow-control scheme actually “hoarded” the waste, and the demand to get rid of it, for the

\begin{itemize}
\item \textsuperscript{140} Id. at 387-88 (majority opinion).
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 388-89.
\item \textsuperscript{144} Id. at 389. The Town’s creativity, however, was considered by the Court’s majority as little more than a pretext for discrimination.
\item \textsuperscript{145} Id. at 392.
\item \textsuperscript{146} Id. at 391.
\item \textsuperscript{147} Id. at 390.
\item \textsuperscript{148} Id. at 392.
\item \textsuperscript{149} Id.
\end{itemize}
benefit of the Town's own processing facility. Therefore, the flow-control ordinance was the "means" to meet the guarantee of 120,000 tons per year. By eliminating competition, the Town burdened competition in interstate commerce.

In sum, the Court found protectionism through the control of the flow of waste-processing services and the favoritism toward the Town's own operator of the transfer station, and this constituted discrimination against interstate commerce. The Court found that the ordinance was discriminatory because it had a protectionist purpose and protectionist effect.

Since the ordinance was discriminatory, the Carbone Court subjected the flow-control ordinance to strict scrutiny. The Town advanced three interests as "compelling." First, the Town argued that conserving landfill space is a compelling state interest. The Court rejected this as a compelling interest. Moreover, on the means prong of strict scrutiny, the Court identified nondiscriminatorial alternatives that the Town could have imposed, such as uniform safety regulations for all waste, in-state or out-of-state, that would be less drastic alternatives to protect landfill space.

Second, the Town argued that a compelling reason for the ordinance was that it served to steer solid waste away from disposal sights that might be more harmful to the environment. This also failed. The Court reasoned that since some of these disposal sights were outside the Town and the state of New York, the Court considered this as an attempt to impose the Town's police power beyond its jurisdictional limits. Instead of a compelling interest, therefore, the Town's argument here was treated as evidence of discriminatory, extraterritorial purpose.

Third, the Town also argued that its need to provide a financial incentive for the private operator to build and operate the transfer station was a compelling state interest. The Court rejected this argument because it was merely an "economic" interest.

1. Justice O'Connor's Concurrence

Justice O'Connor concurred only in the judgment. She did not agree that the flow-control ordinance was discriminatory; instead, she would have applied the nondiscrimination tier's undue burden standard. Under this standard, she concluded that the Town's ordinance was an "excessive" burden on interstate

---

150. Id.
151. Id. ("The flow control ordinance at issue here squelches competition in the waste-processing service altogether.").
152. Id. at 392-93.
153. Id.
154. Id. at 393.
155. Id.
156. See id. at 393-94.
157. Id.
158. Id. at 401 (O'Connor, J., concurring).
159. Id.
commerce and, therefore, unconstitutional.\textsuperscript{160}

Justice O'Connor's opinion is the only explicit application of the undue burden standard found in any dormant Commerce Clause decision from the mature Rehnquist Court. This unique status confirms the Court's apparent reluctance to use the undue burden standard. As a general matter, Justice O'Connor's opinion is modestly expansive but easily compatible with the doctrine's lower-tier law. Moreover, her concurrence demonstrates that a number of the decisions, like \textit{Carbone}, could have fit the analysis of the nondiscrimination tier.

\textbf{2. Justice Souter's Dissent}

The dissent, by Justice Souter, argued that the flow-control ordinance should be distinguished from other local garbage regulation measures. The dissent argued that the exclusions created by the flow-control ordinance scheme bestowed no benefit on a class of local private actors, and that the ordinance was a direct means for the local government to satisfy its traditional governmental responsibility for solid-waste disposal.\textsuperscript{161} The dissent also took issue with the fact that Carbone was not an out-of-state resident or business.\textsuperscript{162} According to the dissent, since Carbone lived in the state and would have access to the political process, Carbone should not have heightened judicial scrutiny to assist its position.\textsuperscript{163}

In this regard, the dissent forced consideration of the rationale underlying the majority's analysis. In general, Justice Souter's dissent avoided use of the "well-settled" two-tiered doctrine, probably because this was a relatively easy case of discrimination. Justice Souter struggled to find the right doctrinal theory to defeat the \textit{Carbone} Court's conclusions about discrimination.

\textbf{3. Conclusion}

In the third generation of the garbage cases, the mature Rehnquist Court confronted a more sophisticated regulatory scheme than presented in the earlier cases. While the earlier cases had been discriminatory based on a simple reading of the text, the flow-control scheme here was arguably facially neutral between in-state and out-of-state commerce: both in-state and out-of-state garbage disposal were required to use the transfer station for waste processing and required to pay the higher-than-market fee for disposal.\textsuperscript{164} The Court, however, still found discrimination. The \textit{Carbone} Court decided that, even if the flow-control ordinance was facially neutral, the purpose and effect of the flow-control ordinance was to discriminate against interstate commerce in the waste

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id. at 410} (Souter, J., dissenting).
\textsuperscript{162} \textit{Id. at 427.}
\textsuperscript{163} \textit{See id. at 428}. While only out-of-staters may bring an Article IV privileges and immunities claim, in-staters may bring a claim against their own state under the dormant Commerce Clause doctrine.
\textsuperscript{164} \textit{See id. at 390} (majority opinion).
processing industry.\textsuperscript{165}

While the Court's methodology was expansive, its reasoning was, at one level, a narrow version of the national economic unity rationale. The Court determined that the ordinance was a local protectionist measure which, especially if repeated by other towns, would balkanize the marketplace with respect to solid waste disposal.\textsuperscript{166} For present purposes, the Court's use of the national economic unity rationale must be viewed as a bit of a stretch.\textsuperscript{167} But, in that regard, Carbone would presage subsequent decisions.

The Carbone majority, moreover, suggested that its rationale also relied on a form of protected economic liberty. The Carbone Court thus used an expansive rationale. The precedential consequences of this expansive "substantive rights" rationale would be noticed in subsequent decisions.

Finally, the Carbone decision is notable because its reasoning eschewed consideration of the political process rationale. As Justice Souter's dissent argued, Carbone was an in-state resident and not an "outsider" to the political process. In the absence of a political process rationale, the majority may have been compelled to use a "domino theory" of economic effect to find potential harm to the national economy in conjunction with the economic liberty reasoning.

In sum, Carbone confirmed the emerging trends of the Rehnquist Court. Carbone was another expansive decision regarding the discrimination tier: it was discrimination \textit{in purpose} and \textit{in effect}.\textsuperscript{168} Despite the clear invitation by the O'Connor concurrence, the Court also avoided any reliance of the nondiscrimination tier. Through an expansive concept of discrimination, the Court avoided any explicit balancing in the undue burden standard. As a consequence of its expansive concept of discrimination, the mature Rehnquist Court again evaded the hard issues in the nondiscrimination tier and in Justice Scalia's critique.

F. \textsc{West Lynn Creamery, Inc. v. Massachusetts Dairy Equalization Fund}

In the same term as the Carbone decision, the Court confronted another regulatory scheme that appeared to reflect a State's more sophisticated appreciation of the limits imposed by the dormant Commerce Clause doctrine. Indeed, the regulatory scheme in \textsc{West Lynn Creamery Inc. v. Massachusetts Dairy Equalization Fund}
Dairy Equalization Fund\textsuperscript{169} seemed carefully designed to evade the strictures of the doctrine. Ultimately, however, all of the strategizing could not withstand the Court's scrutiny.

The West Lynn Creamery case originated in 1992, when the Massachusetts Department of Food and Agriculture declared an "emergency" because of concerns that the prices paid to Massachusetts dairy farmers were so low that it threatened to force many of the state's farmers out of business.\textsuperscript{170} In response to this "emergency," the Commissioner enacted a "pricing order" that required every milk "dealer" in Massachusetts to make a monthly premium payment into the "Massachusetts Dairy Equalization Fund."\textsuperscript{171} In essence, this was a tax levied on sellers or dealers of milk products, and it applied to milk products produced in-state and out-of-state. From this Fund, dairy producers in Massachusetts received a subsidy — a share equal to the producer's "proportionate contribution to the State's total production of raw milk."\textsuperscript{172} Although the tax portion of the regulatory scheme was arguably evenhanded, the subsidy part of the program applied only to in-state producers.\textsuperscript{173}

The challengers in the case were West Lynn Creamery and LaCont's. They had paid nearly $200,000 in the first two months of the pricing order.\textsuperscript{174} They subsequently refused to make any further payments, and license revocation proceedings were instituted against them.\textsuperscript{175} The challengers brought an action in state court challenging the pricing order.\textsuperscript{176}

After the lower court ruled for the State, the Massachusetts Supreme Court affirmed on the grounds that the statutory scheme was nondiscriminatory, only incidentally burdening interstate commerce.\textsuperscript{177} Applying its version of the undue burden standard analysis, the Massachusetts Supreme Court upheld the pricing order regulatory scheme.\textsuperscript{178} The United States Supreme Court, however, found that the pricing order scheme was discriminatory.\textsuperscript{179}

The West Lynn Creamery Court's analysis, in an opinion by Justice Stevens, first focused on the presence of discrimination. The opinion is heavily laced with historical analysis. In particular, the Court analogized the

\begin{itemize}
\item \textsuperscript{170} Id. at 243-44. As discussed in the text, the United States Supreme Court considered the dealer tax together with the subsidy to in-state producers, and it concluded that the regulatory scheme as a whole was discriminatory. See generally George P. Patterson, Note, Does the Commerce Clause Value Public Goods?: West Lynn Creamery v. Healy, 44 Cath. U. L. Rev. 977 (1995).
\item \textsuperscript{171} Id. at 190-91.
\item \textsuperscript{172} Id. at 191.
\item \textsuperscript{173} Id. at 194. The out-of-state producers would have to pay the tax through their dealers, but they would not be the recipients of any share of the subsidy.
\item \textsuperscript{174} Id. at 191.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id. at 191-92.
\item \textsuperscript{178} Id. at 192.
\item \textsuperscript{179} Id. at 194-96.
\end{itemize}
Massachusetts pricing order to the protective "tariffs" and customs duties which had existed during the Articles of Confederation.\textsuperscript{180}

In its analysis of the discrimination issue, the Court also recognized that the tax aspect of the pricing order was arguably evenhanded between in-state and out-of-state producers. The Court, however, decided that the two parts of the regulatory scheme had to be examined together.\textsuperscript{181} When considered together, the Court concluded that the effort to raise revenue and then to provide subsidy benefits only to in-state producers was economic protectionism.\textsuperscript{182} The Court therefore concluded that the effect of the pricing order would cause locally-produced milk to constitute a larger share of the retail market; consequently, that milk with an out-of-state origin would constitute a smaller share of the market.\textsuperscript{183}

One of Massachusetts's arguments was that a "subsidy" was simply not subject to dormant Commerce Clause analysis. In a footnote, the Court seemed to accept that to be true, for purposes of the \textit{West Lynn Creamery} decision.\textsuperscript{184} Massachusetts then argued that if subsidies were exempt from dormant Commerce Clause analysis, and if the tax was evenhanded, then neither part of the pricing order violated the dormant Commerce Clause.

Rejecting the State's argument, the Court applied a holistic analysis. The Court refused to separate the tax aspect from the subsidy aspect, reasoning that it was the entire program, as a whole, that burdened interstate commerce and violated the challengers' rights.\textsuperscript{185} The Court observed that an ingenious attempt at discrimination violated the dormant Commerce Clause doctrine as much as direct discrimination.\textsuperscript{186}

While the majority's rationale has several dimensions, the majority appeared to rely heavily on the political process rationale for the dormant Commerce Clause doctrine.\textsuperscript{187} The Court focused on the fact that the out-of-state producers and dealers who had to pay the tax did not have access to the political processes within Massachusetts. According to the majority, the in-state producers who received the subsidy would not have any incentive to protect the

\textsuperscript{180} Id. at 193.

\textsuperscript{181} Id. at 201 ("It is the entire program – not just the contributions to the fund or the distributions from that fund – that simultaneously burdens interstate commerce and discriminates in favor of local producers."). The out-of-state producers were burdened when their purchasers had to pay the tax, but they did not receive any of the subsidy benefits.

\textsuperscript{182} Id. at 199-200. See Louis Michael Seidman, \textit{Our Unsettled Constitution} 138 (2001).

\textsuperscript{183} See \textit{W. Lynn Creamery}, 512 U.S. at 199.

\textsuperscript{184} Id. at 199 n.15.

\textsuperscript{185} Id. at 201. See also Walter Hellerstein and Dan T. Coenen, \textit{Commerce Clause Constraints on State Business Development Incentives}, 81 CORNELL L. REV. 789, 836-38 (1996).

\textsuperscript{186} See \textit{W. Lynn Creamery}, 512 U.S. at 201. Massachusetts also argued that the dormant Commerce Clause doctrine should not apply to a so-called "emergency" faced by the state. The State essentially argued that, because of the emergency, the program should not be considered discriminatory. The Court rejected this position, reasoning that the dormant Commerce Clause doctrine makes no distinction between states which discriminate to enhance in-state entities which are "thriving" as compared to states which discriminate to save "troubled" industries. See id. at 205.

\textsuperscript{187} Id. at 200-01. Under the political process rationale, the Court utilizes heightened judicial review because the political processes will no longer appropriately protect the interstate commerce interest. From this, the majority seemed to find a breakdown in the political process: the dairy farmers who should have resisted the tax "were in fact its primary supporters." Id. at 201.
out-of-state producers.\textsuperscript{188}

In \textit{West Lynn Creamery}, the Court reaffirmed the rigorous nature of the judicial review under the dormant Commerce Clause doctrine. The \textit{West Lynn Creamery} facts required the Court to review the pricing order \textit{as a whole} as compared to looking at the component parts of the regulatory scheme.\textsuperscript{189} The Court also relied upon the "effect" of the pricing order.\textsuperscript{190} The holistic textual interpretation, combined with the effects analysis, led the Court to find that this regulatory scheme was discriminatory.

The \textit{West Lynn Creamery} decision, in sum, fits with the general theme of the mature Rehnquist Court. Despite the State’s arguments for judicial review on the lower tier, the Court placed this case on the discrimination tier. The Court also used a holistic analysis of the regulatory scheme, and this resulted in an expansive notion of discrimination. The Court used evidence of the scheme’s effect to conclude that the scheme was facially discriminatory. Accordingly, the Court avoided any consideration of the nondiscrimination tier, even though that had been the part of the doctrine applied by the state courts.

1. Justice Scalia’s Concurrence

The \textit{West Lynn Creamery} majority decided to view the pricing order as a whole and to consider the effects of the pricing order. The decision to place this regulatory scheme on the discrimination tier drew an opinion from Justice Scalia where he concurred only in the judgment. Consistent with his earlier concurring and dissenting opinions, Justice Scalia did not join the Court’s expansive discrimination analysis. He determined the existence of discrimination on narrower grounds, and he issued a strong reiteration of his theories.\textsuperscript{191}

In his narrower theory of discrimination, Justice Scalia found that the discriminatory feature of the Massachusetts regulatory scheme was the fact that the tax revenues went into a special fund earmarked only for in-state milk producers.\textsuperscript{192} According to Justice Scalia, the problem with the Massachusetts tax/subsidy scheme was that the normal political processes were truncated by virtue of the specially-designated fund.\textsuperscript{193} His reasoning, however, did not rely on a political process rationale. Justice Scalia argued that the scheme was unconstitutional because of the existing precedent concerning discrimination.\textsuperscript{194} Justice Scalia’s concurrence was, in effect, a cautionary warning to the Court’s majority that he would carefully scrutinize any conclusions about discrimination.

\begin{itemize}
\item \textsuperscript{188} Id. at 200. \textit{See also} TRIBE, \textit{supra} note 2, at 1051.
\item \textsuperscript{189} \textit{W. Lynn Creamery}, 512 U.S. at 201.
\item \textsuperscript{190} Id. at 196 n.12.
\item \textsuperscript{191} Id. at 209 (Scalia, J., concurring).
\item \textsuperscript{192} Id. at 211.
\item \textsuperscript{193} Id. at 211-12.
\item \textsuperscript{194} Id. Justice Scalia also argued that the State should be able to subsidize its local industries without regard to the dormant Commerce Clause doctrine as long as the funds used for the subsidies come from the State’s general revenue fund. \textit{See} BRISBIN, \textit{supra} note 17, at 139.
\end{itemize}
2. Chief Justice Rehnquist’s Dissent

The *West Lynn Creamery* majority drew a dissent from Chief Justice Rehnquist, who was joined by Justice Blackman. The Chief Justice’s dissent basically subscribed to the State’s argument that the two parts of the pricing order should be analyzed separately. The dissent also accepted the State’s argument that subsidies were immune from dormant Commerce Clause analysis. The dissent reasoned that since neither part of the regulatory scheme would violate the dormant Commerce Clause, the combination of the two was not constitutionally flawed. The Chief Justice’s dissent also recognized the majority’s reliance on the broader political process rationale. The Chief Justice rejected this broader rationale.

The essential problem with the dissent’s position is that it simply fails to recognize that Massachusetts was transparently engaged in economic protectionism. The difference between the economic protectionism of Massachusetts and that of some other states is that Massachusetts was simply a little more sophisticated about it. They were able to provide some degree of facial neutrality to their program by ingenious drafting. Under the Court’s holistic analysis of discrimination, however, this ingenuity was ultimately unavailing.

3. Conclusion

Again, as in all earlier discrimination cases, the *West Lynn Creamery* Court employed a broad notion of discrimination. *West Lynn Creamery’s* approach – the holistic analysis – demonstrated the Court’s expansive concept of discrimination. This decision, however, seems to be the closest of all the cases regarding discrimination. Not only did the Court have to employ “effects” analysis to find discrimination, but the majority’s analysis was also energized by historical analogy.

The *West Lynn Creamery* decision also demonstrated the mature Rehnquist Court’s expansive notion of facial discrimination. *West Lynn Creamery* was a relatively more difficult case in which to find facial discrimination even under the Court’s expanding concept of discrimination. The Court had to consider the

---

196. *Id.* at 214.
197. *Id.* at 214-15.
198. *Id.* at 215. The Chief Justice wryly observed that “analysis of interest group participation in the political process may serve many useful purposes, but serving as the basis for interpreting the dormant Commerce Clause is not one of them.” *Id.*
199. It would seem quite clear that Massachusetts was responding to some of Justice Scalia’s earlier opinions in its attempt to secure the lowest possible level of judicial review for its program.
200. Of course, it should be recognized that Chief Justice Rehnquist basically saw nothing constitutionally wrong with economic protectionism. At that level, all that can be said is that the Chief Justice simply disagreed with the basic premise of the doctrine. The dissent’s reasoning seemingly would give states credit for being *sophisticated* violators of dormant Commerce Clause values.
201. See TRIBE, supra note 2, at 1112 (stating that *West Lynn Creamery* is “a particularly far-reaching application of the nondiscrimination principle.”). One can easily imagine that a “pure” subsidy case will now surface and go before the Supreme Court, forcing a test of the validity of the subsidy footnote in *West Lynn Creamery*. See *W. Lynn Creamery*, 512 U.S. at 199 n.15 (majority opinion).
two statutes together in a holistic analysis in order to find facial discrimination. The Court’s analysis of facial discrimination – by text and by effect – expanded beyond the earlier decisions of the Rehnquist Court.

Since the Court’s approach found “discrimination” and “facial discrimination,” it thereby avoided the balancing of the undue burden analysis. Thus, *West Lynn Creamery* also fit within the pattern of avoiding the nondiscrimination tier, even though the state courts below had employed the undue burden standard. The interpretation patterns of the mature Rehnquist Court were again confirmed.202

**G. Fulton Corp. v. Faulkner**

After the series of decisions during the 1994 term, the mature Rehnquist Court was relatively silent on the dormant Commerce Clause doctrine until 1996. The unanimous decision in *Fulton Corp. v. Faulkner*203 concerned the application of dormant Commerce Clause doctrine to a state tax scheme.

The *Faulkner* case arose from a tax by the State of North Carolina. North Carolina had a state corporate income tax, but it was not applicable to corporations unless they did business in North Carolina.204 In lieu of the applicability of the state corporate income tax, the state adopted a state “intangibles” tax which was levied on the fair market value of corporate stock owned by North Carolina residents where the nonresident corporation had a “business, commercial or taxable situs” in North Carolina.205 The Fulton Corporation (Fulton) was a North Carolina company that owned stock in other corporations doing business in interstate commerce. In 1990, Fulton owned shares in six corporations, five of which did no business in North Carolina and were not subject to a state corporate income tax.206 Thus, under the North Carolina scheme, the stock of these five corporations was subject to the intangibles tax on one hundred percent of its value.

Fulton also owned stock in Foodlines, Inc., which did forty-six percent of its business in North Carolina.207 Although the forty-six percent of Foodlines business would be subject to the corporate income tax, Fulton was subjected to the intangibles tax on fifty-four percent of the value of the Foodlines stock.208

In 1990, Fulton paid $10,884 in intangibles tax, and then it challenged the intangibles tax scheme as violating the dormant Commerce Clause.209

---

202. See *W. Lynn Creamery*, 512 U.S. at 209-10 (Scalia, J., concurring). Not surprisingly, this provoked a cautionary opinion from Justice Scalia. *Id.*

203. Fulton Corp. v. Faulkner, 516 U.S. 325, 327 (1996). As in other cases where the challenged state regulatory scheme involved taxation, one issue involved whether the “intangibles” tax scheme might be considered a valid “compensatory” tax. See *id.* at 333-34. For present purposes, *Faulkner* is considered here for its relationship to the general dormant Commerce Clause doctrine and not to the so-called “compensatory tax” doctrine.

204. *Id.* at 328.

205. *See id.* at 327.

206. *Id.* at 328.

207. *Id.*

208. *Id.* The fifty-four percent represented the percentage of Foodlines’ business done outside North Carolina. *Id.*

209. *Id.* at 329.
Procedurally, the state trial court ruled in favor of the State, but this was reversed by the North Carolina Court of Appeals, which held that the taxable percentage deduction in the intangibles tax violated the dormant Commerce Clause. The Supreme Court of North Carolina reversed, holding that the intangibles tax was a "compensatory" tax not subject to dormant Commerce Clause scrutiny. The United States Supreme Court, in a unanimous opinion by Justice Souter, reversed the North Carolina court.

The structure of the intangibles tax was significant. The intangibles tax only applied to that part of stock ownership which was not subject to the state corporate income tax. The intangibles tax on the value of corporate stock owned by North Carolina residents was, therefore, inversely proportional to the corporation's exposure to the state's income tax.

For purposes of this article, it is significant that the Court found that the intangibles tax scheme was facially discriminatory because, by its very terms, it taxed stock only to the degree that the issuing corporation participated in interstate commerce. Thus, even though this was not facial discrimination in the sense of Oregon Waste, the Court understood this tax scheme to be facially discriminatory. Although not as broad as West Lynn Creamery, the Faulkner Court's textual analysis was an expansive interpretation of the facial discrimination subdoctrine.

In determining that the taxing scheme was facially discriminatory, the Court also considered the effect of the scheme. The Court reasoned that the intangibles tax applied only to the value of corporate stock to the extent that the corporate stock was involved in interstate commerce – commerce outside of North Carolina. This taxation scheme thus had the effect of favoring "domestic corporations over their foreign competitors" regarding the state's efforts to raise capital among North Carolina residents. In a further consideration of the impact of the scheme, the Court also found that the intangibles tax had the effect of discouraging "domestic corporations from plying their trades in interstate commerce." Thus, in two ways, the intangibles tax had an effect which discriminated against interstate commerce.

1. Chief Justice Rehnquist's Concurrence

The Court's analysis of the compensatory tax doctrine in the Faulkner decision brought forth a short concurring opinion by Chief Justice Rehnquist. He mainly disagreed with the stringency of the Court's application of the
compensatory tax doctrine. As noted above, the Chief Justice had not joined a number of earlier decisions during the decade where discrimination was found. The Rehnquist concurrence in *Faulkner* was notable, therefore, for the fact that it represents an agreement that this taxing scheme should be considered discriminatory.219

More generally, it may be doctrinally important that no other Justice joined the concurrence, and no one dissented. In particular, Justice Scalia’s agreement with the majority’s analysis would seem to confirm that the concept of facial discrimination was controlling even though it was broader than some of the earlier facial discrimination decisions.

2. Conclusion

The main argument by North Carolina in *Faulkner* was that this tax was a “compensatory tax.”220 The State used the compensatory tax argument in its efforts to avoid the discrimination tier. Because the Court considered the effects of the tax scheme, this was not successful.221 Therefore, *Faulkner* fits with other decisions as a facial discrimination by effects decision.

More generally, the *Faulkner* decision is also quite consistent with the patterns and themes of the dormant Commerce Clause doctrine in the mature Rehnquist Court. In *Faulkner*, the Court only used the discrimination tier analysis. Moreover, the Court did not consider the undue burden standard. The *Faulkner* decision, therefore, was consistent with the Court’s emerging preference to avoid the “balancing” of the nondiscrimination tier by using broad theories of discrimination to place the state regulatory scheme under the heightened scrutiny of the discrimination tier.

H. CAMPS NEWFOUND/OWATONNA, INC. V. TOWN OF HARRISON, MAINE

Although decisions like *Faulkner* appear to have been relatively easy for the Court to find discrimination, the mature Rehnquist Court dramatically splintered in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*222 regarding

---

219. See id.

220. Id. at 333 (majority opinion).

221. Id. at 333 n.3. In *Faulkner*, North Carolina failed to substantiate its “compensatory” tax argument. Id. The Court determined that North Carolina did not even identify the intrastate tax for which it sought to compensate with this tax on interstate commerce. Id. at 332. The Court relied upon *Oregon Waste Systems* to indicate that the compensatory tax argument would not carry the day in the face of a discriminatory taxing scheme. The Court also found that North Carolina did not satisfy the “rough approximation” requirement. Id. Finally, the Court found that the intangibles tax failed the third prong of the compensatory tax analysis: the compensatory taxes did not fall on substantially equivalent events. Id.

In *Faulkner*, the Court put the burden on the state to demonstrate each of the elements of a compensatory tax defense. Id. The placement of the burden of persuasion on the state in the discrimination tier is quite consistent with the discrimination tier’s use of the strict scrutiny standard. As such, the Court’s analysis in *Faulkner* is firmly in the discrimination tier.

222. See *Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564, 564 (1997), rev’g, 655 A.2d 876 (Me. 1995). The Maine Supreme Court claimed to apply a “flexible standard” in upholding the property tax scheme. See *Camps*, 655 A.2d at 878-79. While the undue burden standard was not explicitly referenced, the Maine Supreme Court’s analysis is parallel to the interest balancing of the undue burden standard. On the whole, I consider the decision to be another example of the United States
the discrimination issue. Even though the State’s property tax scheme at issue in 
*Camps* was arguably facially discriminatory, it was one of the “closest” 
decisions in the doctrine’s development.\(^{223}\)

The *Camps* case involved Maine’s property tax scheme.\(^{224}\) Maine, like 
most states, provided an exemption from the real estate property tax for “benevolent and charitable institutions” incorporated in the state.\(^{225}\) Maine denied the exemption, however, to those charitable institutions which primarily served out-of-state persons.\(^{226}\)

*Camps*, a Christian Science faith camp for children, was a nonprofit 
corporation operating in Maine.\(^{227}\) Over ninety-five percent of the children 
attending the faith camp were not residents of Maine.\(^{228}\) Although *Camps* 
would have otherwise qualified for the charitable institution exemption, *Camps* 
did not receive it because the campers were primarily from out-of-state.\(^{229}\) Under the circumstances, *Camps* challenged the application of the real property 
tax scheme.

The state trial court ruled in favor of *Camps*, but the Maine Supreme Court 
held in favor of the State.\(^{230}\) The Maine Supreme Court reasoned that the 
property tax scheme regulated evenhandedly, with only incidental effects on 
interstate commerce.\(^{231}\) In other words, the Maine Supreme Court thought this 
matter should be handled under the undue burden standard of the 
nondiscrimination tier.\(^{232}\) The United States Supreme Court reversed, finding 
that the tax scheme was discriminatory.

Before the Supreme Court, the Town advanced several arguments that 
might be grouped under the heading of “exceptions.” One of the main exception 
arguments was that a real estate tax is simply not subject to dormant Commerce 
Clause analysis because a real estate tax is applicable only to in-state property.\(^{233}\) The Court held that a real estate tax, like any other tax, may 
implicate the dormant Commerce Clause.\(^{234}\)

Having determined that the dormant Commerce Clause applied, the 
threshold issue in *Camps* was whether the state taxing scheme was 
discriminatory, or whether it would be analyzed under the undue burden tier.\(^{235}\)

\(^{223}\) Supreme Court’s avoidance of the undue burden standard by using a broad concept of discrimination.

\(^{224}\) *Camps*, 520 U.S. at 568. The use of an expansive dormant Commerce Clause theory of 
discrimination would be balanced in *Camps* by the traditional deference to local property tax 
determinations. *See id.* at 608 (Scalia, J., dissenting).

\(^{225}\) *Camps*, 520 U.S. at 568 (majority opinion).

\(^{226}\) *Id.*

\(^{227}\) *Id.* at 567.

\(^{228}\) *Id.*

\(^{229}\) *Id.* at 568 n.3, 569.

\(^{230}\) *Id.* at 570.

\(^{231}\) *Id.*

\(^{232}\) *Id.* at 570-71.

\(^{233}\) *Id.* at 572.

\(^{234}\) *Id.* at 574. The Court declined to adopt other exception arguments. The Town was attempting 
to create a doctrinal exception much like the “market participation” exception in *Reeves v. Stake*, 447 
U.S. 429, 441 (1980).

\(^{235}\) *See Camps*, 520 U.S. at 575. The Town made a number of arguments, including a far-reaching
The Court’s decision about the applicable tier was determined largely by its reading of the text of the statute. Since the Maine statute expressly distinguished between entities serving interstate commerce and intrastate commerce, Camps was a relatively easy case in which to find facial discrimination.

Even so, one doctrinally significant feature of Camps was noteworthy. Although many of the challengers to state regulatory schemes are actually out-of-staters, in this instance the Camps organization was an in-state resident. The fact that the Camps organization was a resident of Maine and could thereby avail itself of Maine’s political processes did not, by itself, preclude it from being able to raise the dormant Commerce Clause challenge. While the other decisions in the decade were also expansive, the expansiveness of the Camps decision was based on the majority’s willingness to go beyond the national economic unity and political process rationales. Camps depends, at least in part, on acceptance of the economic liberty rationale.

The majority’s determination of facial discrimination was bolstered, as in Faulkner, by the consideration of the effect of the property tax exemption scheme. The Court concluded that “[a]s a practical matter, the statute encourages affected entities to limit their out-of-state clientele, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market.” As in other discrimination tier decisions of the 1990s, the Camps Court relied upon the discriminatory effect of the regulatory scheme to determine that the regulation was facially discriminatory.

1. Justice Scalia’s Dissent

The main dissent in Camps was by Justice Scalia. His dissent relied on two basic arguments: (1) no dormant Commerce Clause analysis should be applied at all because this is merely “a subsidy;” and (2) if dormant Commerce Clause analysis would be applied, then only the undue burden standard was applicable. The dissent first analogized the property tax exemption to a subsidy. Relying upon the notion that subsidies, such as public welfare assistance, would not be subject to dormant Commerce Clause analysis, the dissent argued that the Court was mistaken in even applying the dormant Commerce Clause at all.

Second, the Scalia dissent argued that the property tax exemption —
properly understood – should only be analyzed under the undue burden standard, not the discrimination tier.\textsuperscript{243} The dissent’s reasoning focused on what it saw as the “narrow” nature of the property tax exemption. Although the majority saw the taxing scheme as involving a broad nonprofit organization exemption which was then restricted by the provision eliminating the exemption for entities serving out-of-staters, Justice Scalia argued that the exemption needed to be read together with the limitation on the exemption.\textsuperscript{244} When viewed as a narrow exemption, the Scalia dissent saw that the exemption was being applied for its legitimate purpose in an evenhanded fashion.

The \textit{Camps} majority explicitly rejected both of the dissent’s arguments.\textsuperscript{245} In light of Justice Scalia’s earlier pronouncements, moreover, his \textit{Camps} dissent has some curious aspects. To the extent that his \textit{Camps} dissent would appear to argue that the appropriate analysis should be under the undue burden standard, this is exactly what Justice Scalia had criticized in the past.\textsuperscript{246}

2. Justice Thomas’s Dissent

There also was a dissent by Justice Thomas, joined in part by Justice Scalia and Chief Justice Rehnquist. Justice Thomas accepted the Town’s argument that a tax on real estate did not implicate the dormant Commerce Clause doctrine because real estate does not “move” in interstate commerce.\textsuperscript{247} More significantly, Justice Thomas also pursued a wide-ranging critique of use of the dormant Commerce Clause doctrine, especially the undue burden tier.\textsuperscript{248} In this regard, Justice Thomas seemed to mirror Justice Scalia’s general critique of the dormant Commerce Clause doctrine.

3. Conclusion

With its application of the dormant Commerce Clause doctrine to state property taxes, the \textit{Camps} decision is one of the most expansive of the decisions of the mature Rehnquist Court. As such, \textit{Camps} would confirm that the two-tier doctrine seemed to be solidly entrenched. Moreover, the \textit{Camps} decision demonstrates the emerging consensus in the mature Rehnquist Court to apply the discrimination tier broadly and, particularly, to use the facial discrimination theory expansively.

\textsuperscript{243} \textit{Id.} at 602-08.
\textsuperscript{244} \textit{Id.} at 598-601.
\textsuperscript{245} \textit{Id.} at 587 n.21 (majority opinion).
\textsuperscript{246} \textit{See supra} notes 17-23 and accompanying text.
\textsuperscript{247} \textit{See Camps}, 520 U.S. at 609 (Thomas, J., dissenting).
\textsuperscript{248} \textit{Id.} at 610-21. Thomas’s dissent in \textit{Camps} is close enough to Justice Scalia’s critique that it would appear that Justice Scalia may have finally gained an adherent to his views on the Court. \textit{See} Sachse, \textit{supra} note 23, at 696. Justice Thomas, in essence, criticized the general existence of the dormant Commerce Clause doctrine. Justice Scalia’s own dissent in \textit{Camps} did not go as far as Justice Thomas, but Justice Scalia joined the \textit{Camps} dissent by Justice Thomas. In contrast, Justice Ginsburg, while joining the Scalia dissent, did not join Justice Thomas’s dissent. This would seem to indicate that Justice Ginsburg would not be willing to jettison the dormant Commerce Clause doctrine altogether.
I. General Motors Corp. v. Tracy

The mature Rehnquist Court’s decision in General Motors Corp. v. Tracy was one of the three decisions where the state prevailed. The Court’s methodology was, however, complex, and it avoided the two-tiered doctrine by using an ad hoc, factually-intensive analysis. By being an exception to the rule, the Tracy decision actually confirmed some of the trends indicated above.

In Ohio, the state heavily regulated certain natural gas utilities known as Local Distribution Companies (LDC’s), but certain producers and independent marketers of natural gas (the independent marketers) were not regulated to the same degree. LDC’s were exempt from the Ohio general sales and use tax scheme, but the independent marketers did not enjoy this exemption.

GMC had taken advantage of the deregulation in the natural gas industry and, as a large consumer of natural gas, had purchased its gas from independent marketers outside of Ohio. The Ohio taxing authorities applied the state use tax to GMC’s purchases of gas from independent marketers, and GMC contested the tax. Ultimately, GMC challenged the exemption of the LDC’s as violating the dormant Commerce Clause (and the equal protection clause).

The lower courts, including the Ohio Supreme Court, held that the tax regime did not violate the dormant Commerce Clause and also that GMC lacked standing to bring the suit. The Rehnquist Court reversed the lower courts on the issue of standing.

Having resolved the standing issue in favor of GMC, the Court turned to the question of whether Ohio’s taxing scheme violated the dormant Commerce Clause doctrine. Since the exemption only applied to the LDC’s, all of which were in-state entities, GMC argued that the “effect” of this regulatory scheme was discriminatory. GMC argued, moreover, that the taxing scheme was facially discriminatory. GMC’s argument was undoubtedly bolstered by the Court’s recent decisions in West Lynn Creamery and Faulkner. In Tracy,
the state had essentially a two-part regulatory scheme: a generally applicable sales and use tax with an exemption that applied only to in-state sellers of natural gas (the LDC’s). Despite GMC’s arguments analogizing to West Lynn Creamery, the Court found that there was no discrimination and, hence, no violation of the dormant Commerce Clause.\textsuperscript{260}

The key to understanding the Tracy Court’s analysis is the threshold comparison of the LDC’s with the independent marketers.\textsuperscript{261} Contrary to GMC’s analysis that this comparison indicated discrimination, the Court concluded that non-LDC “gas marketers did not serve the Ohio LDC’s core market of small, cap tire users, typified by residential consumers who want and need the bundled product.”\textsuperscript{262} In other words, the independent marketers were not part of the same market as the LDC’s.\textsuperscript{263} Hence, according to the Tracy majority, the fact that the LDC’s received an exemption from the taxation scheme did not have an impact on the markets served by the independent marketers.\textsuperscript{264} The Court concluded that the LDC’s and independent marketers were not similarly situated for purposes of the dormant Commerce Clause doctrine.\textsuperscript{265} Hence, since the dormant Commerce Clause doctrine would not serve to protect competition in a national market, the Court decided the Ohio regulatory scheme was not discriminatory.\textsuperscript{266}

Apart from the reasoning that the LDC’s and independent marketers were not similarly situated, the most notable feature of the decision is what the Court did not say. Under the well-settled doctrine, even if the Court found there was no discrimination, the Court should have proceeded to a second-tier analysis. There, under the undue burden test, the Court should have compared the putative local benefits of the tax exemption with the burden on interstate commerce and considered the State’s alternatives.\textsuperscript{267} The Tracy Court, however, never addressed the nondiscrimination standard. Having concluded that there was no commonality of market between the LDC’s and the independent sellers,\textsuperscript{268} the

\begin{thebibliography}{9}
\bibitem{259} Fulton Corp. v. Faulkner, 516 U.S. 325 (1996).
\bibitem{260} Tracy, 519 U.S. at 311-12. The Court eventually also rejected an equal protection claim on the grounds that it would apply only a rational basis standard and that the State easily satisfied that low level of judicial scrutiny. See id.
\bibitem{261} Id. at 298-300.
\bibitem{262} Id. at 301.
\bibitem{263} Id. at 301-02. At one point, the Court differentiated between the two markets served. See id. at 303. The Court defended this distinction along three lines. First, the Court sought to proceed cautiously for health and safety reasons so as not to disrupt the delivery to the captive or small consumer market of products bundled together with natural gas. Second, the Court noted that it lacked the expertise to disrupt the current system and to adequately assess the outcome, should it strike down the taxing scheme under the dormant Commerce Clause. Third, the Court noted that Congress was better situated to address the issue because it had the institutional capacity and resources to investigate the interaction between the captive and noncaptive markets more thoroughly than could the judiciary. Id. at 304.
\bibitem{264} Id.
\bibitem{265} Id. at 310.
\bibitem{266} Id.
\bibitem{268} Tracy, 519 U.S. at 310. By traditional standards, this particular state regulatory scheme failed even the undue burden standard. That it would fail a discrimination-tier analysis is also quite likely. Importantly, the quality of the evidence shown by the state – whether it had a compelling interest – is not tested at all in the Court’s analysis.
\end{thebibliography}
Court declined to apply any dormant Commerce Clause analysis at all. In *Tracy*, the mature Rehnquist Court seemed quite determined to avoid having to address an undue burden standard analysis.

1. *Justice Scalia’s Concurrence*

Justice Scalia concurred in *Tracy*. He returned to his basic critique of the modern dormant Commerce Clause doctrine. Justice Scalia commented:

I join the Court’s opinion, which thoroughly explains why the Ohio tax scheme at issue in this case does not facially discriminate against interstate commerce. I write separately to note my continuing adherence to the view that the so-called “negative” Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain. Justice Scalia warned that, had the Court applied the standards from the nondiscrimination tier, he would have “dissented” from such analysis.

Justice Scalia’s concurrence, however, left much unsaid. As Justice Stevens’s dissent demonstrated, the Ohio tax exemption scheme would be considered facially discriminatory by normal dormant Commerce Clause standards. It is only through the “differential market analysis” of the majority that the Court avoided the discrimination tier. Reading Justice Scalia’s concurrence in this context, it appears that Justice Scalia’s concurrence is really directed at Justice Stevens’s dissent.

2. *Justice Stevens’s Dissent*

In dissent, Justice Stevens characterized the Ohio tax scheme as a “tax exemption that discriminates against interstate commerce.” As such, consistent with the other discrimination-tier decisions (a number of which he had authored), Justice Stevens would apply the heightened scrutiny of the discrimination tier.

Justice Stevens’s dissent agreed with the Court’s factual premise, stating that “[a]lthough the physical composition of the gas sold in the two markets is identical, I agree with what I understand the Court to be assuming, namely, that as a matter of economics ‘bundled gas’ and ‘unbundled gas’ should be viewed as different products.” Justice Stevens was not persuaded, however, by the majority’s creation of two different, independent markets. His analysis noted that it was “not uncommon for a firm with a monopolistic position in one market also to sell a second product in a competitive market.” He further emphasized that simply because the “LDC is heavily regulated in the ‘bundled gas’ market,” this should not justify granting a special preference in another market.

269. Id. at 312 (Scalia, J., concurring).
270. See id. at 314-15 (Stevens, J., dissenting).
271. Id. at 315.
272. Id. at 314.
273. Id.
274. Id.
Stevens further argued that:

[I]t may well be true that without a discriminatory tax advantage in the competitive market, the LDC’s would lose business to interstate competitors and therefore be forced to increase the rates charged to small local consumers. This circumstance may require the states to find new, and nondiscriminatory, methods for accommodating the needs of small consumers for regular and reasonably priced natural gas service.\footnote{Id. at 314-15.}

Justice Stevens’s dissent viewed the Ohio tax scheme as a “discriminatory tax advantage.”\footnote{Id. at 314.} As such, he would have applied the standard of the discrimination tier, and the fact that the states might very well have nondiscriminatory alternatives meant that Ohio’s scheme failed strict scrutiny.\footnote{Id.}

In sum, Justice Stevens’s dissent seemed to be more consistent with the two-tiered system than any of the other opinions in Tracy.\footnote{See W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994). Justice Stevens’s close adherence to the two-tiered system in Tracy may have been what provoked Justice Scalia’s concurrence. It is important to remember that Justice Scalia’s concurrence here, and his general critique, are basically a refutation and criticism of the two-tiered system. See generally COENEN, supra note 38, at 281 n.81; TRIBE, supra note 2, at 1056-59.}

3. Conclusion

The Tracy decision was the first dormant Commerce Clause decision of the mature Rehnquist Court where the challengers lost. Even so, it was the exception which proved the rule. The Tracy decision was consistent with the emerging themes of the mature Rehnquist Court: the Court would address dormant Commerce Clause questions on the discrimination tier but would not address them with the undue burden standard. With that “rule” in mind, it is clear that, in an earlier era, Tracy very likely would have been treated as a nondiscrimination-tier case. The Court’s reluctance to address the undue burden type case would appear to be the motivation for developing the “definitional” approach in Tracy.\footnote{See Exxon Corp v. Governor of Md., 437 U.S. 117, 126 (1978). See generally COENEN, supra note 38, at 287-314. I would not go that far – especially without more explicit discussion from the Court.}

Under the circumstances, the Tracy decision, therefore, is best understood as an ad hoc response to a nondiscrimination-tier case.\footnote{The reasoning in the Tracy decision has many parallels to Reeves v. Stake, 447 U.S. 429 (1980). Reeves, it will be remembered, is a leading “market participant exception” decision. In Reeves, the Court upheld a facially-discriminatory regulatory system by the state of South Dakota regarding the distribution of cement from a state-owned cement plant. Id. at 441.}

With that in mind, however, Tracy fits well into the general theme of the mature Rehnquist Court: the Court would use the discrimination tier, or no tier at all.
J. South Central Bell Telephone Co. v. Alabama

The next dormant Commerce Clause decision was the Court's 1999 decision in South Central Bell. It demonstrated a continued allegiance to the two-tiered doctrine and, as noted in this article, the mature Rehnquist Court's preference for deciding dormant Commerce Clause cases only on the discrimination tier.

In South Central Bell, Alabama had a "franchise tax" for all corporations. For both domestic and foreign corporations, the calculation of the amount of the franchise tax was based on a corporation's capital. At this level, the Alabama franchise tax seemed arguably evenhanded. There were, however, statutory differences in how the amount of the tax was calculated. Alabama corporations were taxed based on the "par value" of their stock. Foreign corporations, however, paid tax based on the "actual amount of capital employed in Alabama." Alabama corporations were allowed to set their stock's own par value. Thus, by setting par value low, the Alabama corporation could minimize the amount of franchise tax that it had to pay.

However, the calculation of the tax for non-Alabama corporations was quite different. For non-Alabama corporations, because the calculation of the tax was based on the value of the actual amount of capital it employed in Alabama, a non-Alabama corporation was taxed on the actual market value of its assets in Alabama. Thus, while Alabama corporations could artificially limit and minimize their franchise tax exposure, an out-of-state corporation could not. As a result of this leeway, the Court observed that "the average domestic corporation pays only one-fifth the franchise tax it would pay if it were treated as a foreign corporation."

The challenge to the Alabama taxing scheme was undertaken by several different corporations. After the Alabama Supreme Court rejected the dormant Commerce Clause and equal protection claims of the earlier suit, South Central Bell pressed forward to a trial on the merits. The state trial court had dismissed South Central Bell's claims, and the State's theory was affirmed by the Alabama Supreme Court. South Central Bell took the case to the United

---

283. Id. at 162.
284. See id.
285. Id.
286. Id.
287. Id. at 169.
288. Id.
289. Id.
290. Id.
291. Id. at 163-65. The first suit was actually filed by the Reynolds Metals Company. South Central Bell filed an action alleging violation of the dormant Commerce Clause doctrine. South Central Bell's case was stayed pending the review of an earlier challenge at the Alabama Supreme Court.
292. Id. at 164.
293. Id.
States Supreme Court, which reversed.  

With respect to the dormant Commerce Clause challenge, Alabama’s primary line of defense in the lower courts was that the provisions of the franchise tax scheme were a “compensatory” tax. One interesting feature of the South Central Bell decision is that, at the Supreme Court, Alabama’s defense shifted. Instead of relying on the compensatory tax defense, Alabama adopted a position consistent with Justice Scalia’s general doctrinal critique, arguing that the Court should abandon the dormant Commerce Clause jurisprudence altogether.

The Court did not treat the abandonment argument very kindly. The Court summarily rejected the argument as having been improperly raised too late for appropriate consideration. Only Justice Thomas, in a concurrence, indicated any agreement with it.

Regarding the merits of the dormant Commerce Clause claim, the Court first addressed the nature of the regulation issue. The Alabama statute, on one level, was arguably evenhanded: the franchise tax applied to both in-state and out-of-state corporations. The “discrimination” did not appear until one read further in the text of the statute. The unanimous Court concluded that the “[Alabama franchise] tax therefore facially discriminates against interstate commerce . . . .”

With this analysis, the Court necessarily indicated that the review of the regulatory scheme must include a review of the whole statute. As in Camps or West Lynn Creamery, the entire regulatory scheme must be considered. Moreover, as in West Lynn Creamery, the Court’s use of a facial discrimination theory was expansive. In determining facial discrimination, the Court also relied upon its analysis that the Alabama franchise tax scheme was discriminatory in effect. The Court relied on the trial court record, concluding

294. Id. at 171. The Court, in a unanimous decision by Justice Breyer, rejected Alabama’s res judicata or claim-preclusion theory. Id. at 165. The Court then proceeded directly to the dormant Commerce Clause issue. Id. at 169.
295. Id. at 169-70.
296. Id. at 170-71. See also Charlotte Crane, Should the Court Abandon its Appellate Jurisdiction Over States? Should it Abandon its Negative Commerce Clause Jurisprudence?, 4 PREVIEW 203, 204-05 (1998).
297. See S. Cent. Bell, 526 U.S. at 170-71.
298. Id. (Thomas, J., concurring).
299. Id. at 162 (majority opinion).
300. See id. at 169. In many ways, the South Central Bell decision reflected the growing expansiveness of the discrimination-tier analysis, after decisions such as C & A Carbone and West Lynn Creamery.
301. Id.
302. Id. at 169-70.
305. S. Cent. Bell, 526 U.S. at 162. The Court employed an arguably broader analysis in West Lynn Creamery when it reviewed an entirely different statute to determine facial discrimination. See supra notes 181-86 and accompanying text.
306. S. Cent. Bell, 526 U.S. at 169.
that "[t]his discrimination is borne out in practice, as the record, undisputed here, shows that the average domestic corporation pays only one-fifth the franchise tax it would pay if it were treated as a foreign corporation." The Court's conclusions about the discriminatory effect of the regulatory scheme were used to bolster the determination that Alabama's franchise tax scheme was facially discriminatory.

1. Justice Thomas's Concurrence

There were two concurrences. Justice Thomas, in a one-paragraph concurrence, argued that this was not an appropriate case to take up the State's invitation to examine the dormant Commerce Clause doctrine. The clear implication of Justice Thomas's concurrence, however, when read together with his earlier dissent in 

2. Justice O'Connor's Concurrence

The second concurrence was by Justice O'Connor. She also submitted a one-paragraph concurrence. It was clearly a response to Justice Thomas's concurrence when she said: "I further note, however, that the State does nothing that would persuade me to reconsider or abandon our well-established body of negative Commerce Clause jurisprudence." Justice O'Connor thus signaled the continuing doctrinal struggle on the Court regarding Justice Scalia's critique of the dormant Commerce Clause doctrine.

3. Conclusion

As applied in the South Central Bell decision, the dormant Commerce Clause doctrine seemed remarkably stable. First, the two-tiered nature of the dormant Commerce Clause doctrine remained "well-established." Second, the South Central Bell decision also was consistent with another major theme of the mature Rehnquist Court - the Court's broad concept of discrimination and its expansive methodology for determining facial discrimination. The South Central Bell decision's determination of facial discrimination against interstate commerce was made by reading the regulatory statute in its entirety. Moreover, evidence of discriminatory effect was considered as part of the determination of facial discrimination. The Court's treatment of the evidence

307. Id.
308. Id. at 171 (Thomas, J., concurring).
310. Id. at 171 (O'Connor, J., concurring) (emphasis added).
311. Id. ("our well-established body of negative Commerce Clause jurisprudence").
312. The Court has remained remarkably faithful to the modern dormant Commerce Clause doctrine and has exhibited consistency in the expansive use of the discrimination tier.
313. See S. Cent. Bell, 526 U.S. at 169 (majority opinion). In South Central Bell, the Court did not have to search for a discriminatory purpose because it relied on a facial discrimination theory. Id.
314. See id. at 169. The significance of the trial record is seen in the Court's reliance on the evidence of discriminatory effect. Id.
of discriminatory effect was consistent with a facial discrimination-by-effect theory.\footnote{315}{See id. at 169. ("This discrimination is borne out in practice . . .") (emphasis added).}

The \textit{South Central Bell} decision also fits the third theme: the mature Rehnquist Court avoided any balancing under the nondiscrimination tier. While the facts of \textit{South Central Bell} were certainly less transparent than many decisions, the Court protected interstate commerce against discrimination by (1) defining discrimination broadly, and (2) by using a facial discrimination-by-effect theory.

In sum, the "holistic" approach to facial discrimination in \textit{South Central Bell} was an expansive and activist level of judicial review. Under these circumstances, it is somewhat surprising that Justice Scalia did not submit a concurrence on the discriminatory-effect theory.

**K. \textsc{Pharmaceutical Research and Manufacturers of America v. Walsh}**

After the \textit{South Central Bell} decision, there was a hiatus of several years regarding the dormant Commerce Clause doctrine. Then, in 2003, the mature Rehnquist Court decided \textit{Pharmaceutical Research and Manufacturers of America v. Walsh}.\footnote{316}{538 U.S. 644 (2003). In this Term, the Court also decided \textit{Hillside Dairy v. Lyons}, 539 U.S. 59 (2003). The \textit{Hillside Dairy} Court held only that California's milk pricing and pooling regulations were not exempt from dormant Commerce Clause scrutiny because of any congressional action. \textit{Id.} at 66-67. The decision did not mark any alteration of the doctrinal principles developed during the mature Rehnquist Court, and it will not be discussed further. While \textit{Hillside Dairy} contained a doctrinally-significant holding regarding the Privileges or Immunities doctrine under Article IV, § 2, it did not address the substantive issues of the dormant Commerce Clause. See Peter Felmly, Comment, \textit{Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism}, \textit{55 Me. L. Rev.} 467, 499 (2003).} The \textit{Pharmaceutical Research} decision was basically a dispute between the State of Maine and the nation's major drug manufacturers.\footnote{317}{\textit{Pharm. Research}, 538 U.S. at 649-50.} In response to increasing Medicaid expenditures for prescription drugs, Congress had enacted a cost-saving measure that required drug manufacturers to pay rebates to states for their Medicaid purchases.\footnote{318}{\textit{Id.} at 649.} Various states subsequently enacted "supplemental rebate programs" to achieve additional cost savings.\footnote{319}{\textit{Id.} at 650.}

The rebate program in Maine (Maine Rx Program) was one of these state programs.\footnote{320}{\textit{Id.} at 650.} Under the program, Maine would attempt to negotiate rebates with drug manufacturers. If a company would not enter into a rebate agreement, its Medicaid sales would be subjected to a "prior authorization" procedure that required state agency approval to qualify a doctor's prescription for reimbursement.\footnote{321}{\textit{Id.} at 649-50.} This was a rather obvious threat to the non-cooperating drug manufacturer.

The Association of Drug Manufacturers challenged the program, making two basic claims: (1) that the Maine Rx Program was preempted by the Federal
Medicaid Act; and (2) that, if not preempted, the Maine Rx Program violated the dormant Commerce Clause.\footnote{322} The Court's analysis in \textit{Pharmaceutical Research} essentially focused on the preemption issue, and the Court rejected the drug manufacturers' Supremacy Clause argument.\footnote{323}

The challengers' dormant Commerce Clause claim relied, as a threshold, on the fact that all drug manufacturers subject to the Maine Rx Program were out-of-state businesses. The drug manufacturers claimed that the effects of the rebate agreements would harm interstate commerce, whether the manufacturer complied voluntarily or as a result of "coercion."\footnote{324} The drug manufacturers advanced both "extraterritorial" and "protectionist" theories of discrimination.\footnote{325}

The Court, per Justice Stevens's plurality opinion, addressed the dormant Commerce Clause arguments somewhat summarily. The Court, in fact, spent only four paragraphs analyzing these dormant Commerce Clause arguments.\footnote{326} As to the extraterritoriality argument, the Court agreed with the lower courts that the Maine Rx Program simply did not "regulate the price of any out-of-state transaction, either by its expressed terms or by its inevitable effect."\footnote{327} The Court then concluded that an extraterritorial argument was not applicable in this case.

As to the drug manufacturers' protectionist discrimination claim, the drug manufacturers relied on the fact that all drug manufacturers were out-of-state manufacturers and, thereby, the Maine Rx fund would be created entirely from rebates paid by out-of-state businesses. Given that the fund would be used to subsidize sales by local pharmacists to in-state consumers, the drug manufacturers argued that this was close to the \textit{West Lynn Creamery} situation.\footnote{328} The Court rejected this argument:

Unlike the situation in \textit{West Lynn}, however, the Maine Rx Program will not impose a disparate burden on any competitors. A manufacturer could not avoid its rebate obligation by opening production facilities in Maine and would receive no benefit from the rebates even if it did so; the payments to the local pharmacists provide no special benefit to competitors of rebate-paying manufacturers.\footnote{329}

The plurality reasoned that, since there was no demonstration that in-state drug manufacturers (of which there were none) would receive a benefit or advantage, there could be no showing of protectionism or of discrimination.\footnote{330} The Court therefore rejected the drug manufacturers' dormant Commerce Clause claim.

\footnote{322} \textit{Id.} at 650.
\footnote{323} \textit{Id.} at 668.
\footnote{324} \textit{Id.} at 669.
\footnote{325} \textit{Id.}
\footnote{326} Given the considerable success of dormant Commerce Clause claims in the mature Rehnquist Court, this seemed surprising. \textit{See} Felmy, \textit{supra} note 316, at 499 ("perfunctory discussion").
\footnote{327} \textit{Pharm. Research}, 538 U.S. at 669 (quoting Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d. 66, 81 (1st Cir. 2001)).
\footnote{328} \textit{Id.} at 670.
\footnote{329} \textit{Id.}
\footnote{330} \textit{Id.} The Court did not address the advantage afforded to in-state consumers by the rebate program.
1. The Concurring Opinions

There were several concurrences. Justice Breyer’s concurrence focused on the preemption claim and relied upon procedural grounds. Justice Scalia concurred only in the judgment. His reasoning was that “[t]he Maine statute under challenge is neither facially discriminatory against interstate commerce nor [as the Court explains] similar to other state action that we have hitherto found invalid on negative Commerce Clause grounds . . . .” Thus, sounding his constant critique, Justice Scalia rejected any dormant Commerce Clause challenge.

Justice Thomas also concurred only in the judgment. Citing to his dissent in the *Camps* decision, he also rejected the dormant Commerce Clause challenge. Justice Thomas, of course, had previously suggested that the whole dormant Commerce Clause doctrine be abandoned.

2. Justice O’Connor’s Opinion

Justice O’Connor, for the Chief Justice and Justice Kennedy, concurred in part and dissented in part. She dissented on procedural grounds regarding the preemption issue, and she did not address the dormant Commerce Clause issues. While Justice Thomas’s extreme views on the dormant Commerce Clause doctrine had prompted Justice O’Connor to respond in *South Central Bell*, she did not respond in *Pharmaceutical Research*.

3. Conclusion

The *Pharmaceutical Research* decision was very brief and not very revealing. Justice Stevens’s rejection of the dormant Commerce Clause claim relied on the type of definitional analysis that Justice Stevens had criticized in the *Tracy* decision. The case did not involve an argument under the *Pike* decision, and the Court stayed away from any such analysis, even in the alternative. In part, this was a function of the way the drug manufacturers presented the case, without making an undue burden or nondiscrimination tier argument.

As such, *Pharmaceutical Research* is a decision that is somewhat aberrational from the general pattern of results in the mature Rehnquist Court. The State, after all, won. It does fit, however, the pattern of avoidance of the undue burden standard. The *Pharmaceutical Research* decision is best understood as a preemption decision – and should probably carry very little precedential weight as far as dormant Commerce Clause doctrine is concerned.

331. *Id.* at 670–74 (Breyer, J., concurring in part and concurring in the judgment).
332. *Id.* at 674 (Scalia, J., concurring).
333. *Id.* at 683 (Thomas, J., concurring).
334. *Id.* at 684 (O’Connor, J., concurring in part and dissenting in part).
335. See supra notes 271–78 and accompanying text.
In the last year of the mature Rehnquist Court – indeed of the Rehnquist Court altogether – the Court decided two dormant Commerce Clause decisions. In *Granholm v. Heald*, the challengers prevailed over the states of Michigan and New York and their arguments regarding the impact of the Twenty-first Amendment on dormant Commerce Clause doctrine. The *Granholm* decision, moreover, would fit into the basic patterns of the mature Rehnquist Court’s dormant Commerce Clause jurisprudence.

The *Granholm* case involved substantial changes in the American wine industry. First, the number of wineries, especially small wineries, had expanded dramatically. By 2005, there were over 3,000 wineries in the United States. Second, the wholesale market for wine had greatly consolidated in the past decades. The number of licensed wholesalers had dropped from 1600 to only 600. "The increasing winery-to-wholesaler ratio was economically problematic for small wineries" because they did not produce enough wine, or have sufficient consumer demand for their new wines, to make it economically attractive for the wholesalers to carry their wines. A third factor was the national phenomenon of e-commerce. Under the disappearance of the wholesalers, many small wineries started to rely on direct shipping to consumers to reach new markets, and e-commerce was a major vehicle.

The consequences of direct shipping, however, bypassed the three-tiered regulatory system that most states had regarding the sale or importation of wine. The three-tier systems required separate licenses for producers, wholesalers, and retailers. The small wineries simply could not be successful under the three-tiered system and needed direct sales to thrive. The states, however, sought to control direct sales, in the name of preventing underage alcohol consumption and controlling taxation of alcoholic beverages.

The states engaged in a variety of regulatory schemes. Overall the Court eventually concluded that the “current patchwork of laws... is essentially the product of an ongoing low-level trade war.” In the Michigan regulatory scheme, Michigan permitted in-state wineries to sell to in-state consumers, but Michigan had a complete ban on out-of-state wineries shipping directly to Michigan consumers. The New York regulatory scheme was somewhat more obscure, but it had the same effect. New York allowed direct sales by out-of-

337. *Granholm*, 544 U.S. at 467 (internal citations omitted).
338. *Id.*
339. *Id.*
340. *Id.* at 468.
341. See *id.* at 466.
342. *Id.* at 489-92.
343. *Id.* at 473. Some states had "reciprocity laws" which allowed direct shipment from wineries outside the state to consumers as long as the state of origin provided similar nondiscriminatory treatment to wines from the reciprocal state. *Id.*
344. *Id.* at 469.
state wineries as long as the winery established a “physical presence” in New York.\textsuperscript{345}

The most highly visible aspect of the \textit{Granholm} decision was the extended discussion of the Twenty-first Amendment. The states essentially argued that the Twenty-first Amendment permitted discrimination against interstate commerce with respect to the sale and importation of alcoholic beverages. In a 5-4 decision, the Court decided that while the Twenty-first Amendment had conferred extensive authority to the states, it did not give the states authority to discriminate.\textsuperscript{346}

For present purposes, the Court’s analysis of the discrimination issue, however, fits well within the patterns of the mature Rehnquist Court and the themes of this article. The Court decided that both the Michigan and New York laws constituted facial discrimination.\textsuperscript{347} In reaching this conclusion, the Court looked not only at the text of the two state regulatory schemes, but also at the effects that the regulatory schemes had on the out-of-state producers.\textsuperscript{348} The Court concluded that the regulatory schemes raised the costs for out-of-state producers and also raised the costs for in-state consumers who would then be inclined to buy in-state wines.\textsuperscript{349} The Court followed the pattern of other cases such as \textit{Camps} and \textit{South Central Bell} in relying upon the evidence of discriminatory effect to help reach the determination that there was facial discrimination.\textsuperscript{350} The \textit{Granholm} decision involved both an expansive notion of discrimination in effect and also an expansive theory of facial discrimination.

The majority also relied on the national economic unity rationale – and only on that rationale.\textsuperscript{351} The Twenty-first Amendment appeared to undercut any efforts to rely upon the political process rationale. The Amendment, after all, was the product of the political process.

The Court’s analysis also avoided any consideration of the nondiscrimination tier. Although the State of New York expressly argued that the \textit{Pike} standard should apply and had success in the lower courts on that argument,\textsuperscript{352} the Court completely ignored any analysis under the undue burden standard. The Court explicitly applied what it considered to be the discrimination-tier standard.\textsuperscript{353}

\textsuperscript{345} Id. at 474. In New York, therefore, it was possible for an out-of-state winery to sell to New York consumers (the second largest market in the United States) but to do so was economically infeasible for most small wineries. Id. at 475.

\textsuperscript{346} Id. at 484-85. The textual and historical analysis of the Twenty-First Amendment issue is beyond the scope of this article. For present purposes, I can only say that I consider it a very close question. As Justice Stevens indicated in his dissent, the Framers and the American public in the 1930s that adopted the Twenty-First Amendment probably understood the context and need for the Twenty-First Amendment differently than would the modern public, or at least the Court’s majority. See id. at 494 (Stevens, J., dissenting).

\textsuperscript{347} Id. at 469 (Michigan) and 475-76 (New York) (majority opinion).

\textsuperscript{348} Id. at 468-69 (Michigan) and 474-75 (New York).

\textsuperscript{349} Id. at 474 (Michigan) and 475 (New York).

\textsuperscript{350} See Day, Expanded Concept, supra note 336.

\textsuperscript{351} Granholm, 544 U.S. at 472. There was no apparent reliance on the individual liberty rationale.

\textsuperscript{352} Swedenberg v. Kelly, 358 F.3d 223, 239 (2d Cir. 2004).

\textsuperscript{353} See Granholm, 544 U.S. at 489. The standard the Court used was from the \textit{New Energy} decision. New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988). This was a curious choice of the
1. The Dissenting Opinions

There were no concurrences. It was surprising that there was not a concurring opinion from Justice Scalia, but the Court did find facial discrimination that even Scalia could support.

The main dissent was by Justice Thomas. At the first level, therefore, it is important to note that Justices Scalia and Thomas were on opposite sides in this case. The explanation appears to be that Justice Scalia found the state regulatory schemes to be facially discriminatory. In contrast, Justice Thomas suggested in his dissent that, even if a state regulation were discriminatory, such discrimination is authorized by the Twenty-first Amendment. In this regard, Justice Thomas’s dissent in Granholm demonstrates the differences between Justices Scalia and Thomas. While Justice Scalia will strike down facially discriminatory state laws, Justice Thomas has repeatedly suggested he would not use the dormant Commerce Clause doctrine even in the case of facial discrimination.

2. Conclusion

When all of the historical arguments about the Twenty-first Amendment are set aside, the Granholm decision fits well within the patterns of the mature Rehnquist Court. It is decided as a discrimination case, and the challengers won. The Court used not only the discrimination tier, but it used a facial discrimination analysis based on an expansive theory—the exceptions. The Court also used facial discrimination based upon a record showing discriminatory effects. In both these ways—an expanded concept of facial discrimination and using discriminatory effects evidence to establish facial discrimination—the Court secured Justice Scalia’s vote and avoided his critique.

The patterns of the mature Rehnquist Court were also evident in the Court’s refusal to consider the matter under the undue burden standard of the nondiscrimination tier. Although the states had argued for that, the Court ignored this argument altogether. At this point in time, that was certainly not surprising, but it indicated that the Court’s willingness to find discrimination was motivated by its desire to avoid using any type of undue burden analysis and being subjected to the Scalian critique.

discrimination standard until one realizes it was a discrimination-tier standard decision written by Justice Scalia. By citing to and using the New Energy version of the discrimination-tier standard, the Court may have secured, or at least solidified, Justice Scalia’s vote for the slim majority. See Day, Expanded Concept, supra note 336.

354. See Granholm, 544 U.S. at 497-527 (Thomas, J., dissenting). The dissent by Justice Thomas was longer than the Court’s opinion.

355. Id. at 514.

M. AMERICAN TRUCKING ASSOCIATIONS, INC. V. MICHIGAN PUBLIC SERVICE COMMISSION

The final dormant Commerce Clause decision of the mature Rehnquist Court had an ironic dimension. The case of American Trucking Associations, Inc. v. Michigan Public Service Commission\(^3\)\(^5\)\(^7\) was brought by the American Trucking Associations, Inc., a trade association that had also been the main challenger in the 1990 Smith decision.\(^3\)\(^5\)\(^8\) In Smith, of course, Justice Scalia outlined his rejection of the nondiscrimination tier and his limitation of dormant Commerce Clause scrutiny to only cases involving facial discrimination.\(^3\)\(^5\)\(^9\) Fifteen years later, in the Michigan Public Service Commission decision, the Court's approach to the dormant Commerce Clause doctrine reflected great reluctance to confront Justice Scalia's attack on the nondiscrimination tier – even as it applied an analysis that, in a pre-Scalian era, would have been called the undue burden standard.

In Michigan Public Service Commission, the State of Michigan imposed a "flat $100 annual fee" on all "trucks engaged in intrastate commercial hauling."\(^3\)\(^6\)\(^5\) The fee applied as long as the truck did any intrastate hauling. The trucking trade association and USF Holland, Inc., a trucking company, challenged the fee because it applied to some of their trucks which engaged in both interstate and intrastate commerce.\(^3\)\(^6\)\(^1\) The challengers claimed that, because the fee was flat, it discriminated in effect against interstate commerce in violation of the dormant Commerce Clause doctrine.\(^3\)\(^6\)\(^2\) The Michigan state courts, on several theories, ruled for the State.\(^3\)\(^6\)\(^3\) In one of the few victories for a state during the mature Rehnquist Court, the Court affirmed.\(^3\)\(^6\)\(^4\)

In a relatively brief opinion by Justice Breyer, the Court began its analysis by acknowledging the national economic unity theory of the dormant Commerce Clause doctrine.\(^3\)\(^6\)\(^5\) The Court then explicitly acknowledged the two tiers of the modern doctrine.\(^3\)\(^6\)\(^6\) Here the remarkable feature, compared to the Tracy or Pharmaceutical Research decisions, was the explicit citation to the Pike decision.\(^3\)\(^6\)\(^7\) Because this was a tax case, the Court also referenced its state tax precedent.\(^3\)\(^6\)\(^8\)

The Court then concluded that "[a]pplying these principles and precedents, we find nothing in [the flat fee] that offends the Commerce Clause."\(^3\)\(^6\)\(^9\) The

\(^{357}\) 545 U.S. 429 (2005).
\(^{358}\) See supra Part I.A.
\(^{361}\) Id. at 2422.
\(^{362}\) Id.
\(^{363}\) Id.
\(^{364}\) Id. at 2426. See also Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
\(^{366}\) Id. at 2423.
\(^{367}\) Id.
\(^{368}\) Id. at 2426. See also Complete Auto Transit, Inc., 430 U.S. at 279.
Court held that the flat fee did "not facially discriminate against interstate or out-of-state activities or enterprises." The Court relied here on the fact that the flat fee applied evenhandedly. The Court concluded that "such a neutral, locally focused fee or tax" did not discriminate against interstate commerce.

The Court also rejected the challenger's discrimination-in-effect argument. According to the Court, the "record, moreover, shows no special circumstance suggesting that Michigan's fee operates in practice as anything other than an unobjectionable exercise of the State's police power." Regarding discriminatory effect, the Court later reiterated that "[w]e lack convincing evidence showing that the tax deters, or for that matter discriminates against, interstate activities." The Court ruled out any opportunity to show facial discrimination by effect – because it concluded that there was no showing of discriminatory effect.

Justice Breyer's analysis in *Michigan Public Service Commission* has striking parallels to Justice Breyer's analysis in *South Central Bell*. In *South Central Bell*, the Court found facial discrimination in part because of discriminatory effects. Here, in the absence of discriminatory effects evidence and with an arguably "evenhanded" regulation, the Court did not find facial discrimination.

1. **Justice Scalia's Concurrence in the Judgment**

Justice Scalia, citing to his *West Lynn Creamery* concurrence, concurred only in the judgment. Repeating his standing critique of the dormant Commerce Clause doctrine, he rejected the nondiscrimination tier of the modern two-tiered doctrine.

2. **Justice Thomas's Concurrence in the Judgment**

Justice Thomas provided a separate concurrence in the judgment. Citing to his *Camps* dissent, Justice Thomas presumably meant to convey an even broader rejection of the modern doctrine than the Scalian position.

3. **Conclusion**

With the final decision of the mature Rehnquist Court, the effect of Justice Scalia's critique would seem to be clear. The *Michigan Public Service Commission* decision, with its "evenhanded" regulation, was an obvious
candidate for the application of the undue burden standard from the nondiscrimination tier. The Court, however, declined the simpler way and engaged in a somewhat convoluted precedential analysis.

This approach, of course, did not fool Justices Scalia and Thomas, but its import was clear. As a means to evade the Scalian critique, the mature Rehnquist Court would avoid applying the nondiscrimination tier’s undue burden standard. While the state’s victory in *Michigan Public Service Commission* was an unusual outcome, the analysis fit quite closely with the undue burden avoidance theme of the decisions of the mature Rehnquist Court.

### III. SOME DOCTRINAL OBSERVATIONS AT THE END OF THE REHNQUIST ERA

During the final part of the Rehnquist Court, the Supreme Court was significantly active regarding the dormant Commerce Clause doctrine. Although the basic doctrine did not change, the mature Rehnquist Court addressed one or more cases during most terms. There were thirteen major decisions which, compared to other doctrines such as procedural due process, is a quantitative dimension that might be fairly characterized as an active doctrinal area. There are also several qualitative observations that can be made about this level of activity.

First, the Court continued to adhere, both substantively and rhetorically, to the well-settled doctrine. The Court maintained a two-tier doctrinal structure where the initial issue was the determination whether or not the State’s regulatory program was discriminatory.

A second, and perhaps more significant, observation is that the Court avoided using the undue burden standard of the nondiscrimination tier. Given the large number of decisions, this seems remarkable. Of course, it may just be a coincidence, but the Court avoided using the undue burden analysis. This observation, in turn, raises certain questions regarding the Court’s methodology and rationale.

#### A. THE METHODOLOGY OF THE EXPANDED DISCRIMINATION TIER

There appear to be at least two answers as to how the Court could avoid the use of the lower-tier analysis. The Court’s means to the avoidance were: (1) a broadened concept of discrimination; and (2) within the broader discrimination concept, an expanded concept of facial discrimination. There is, of course, a synergistic interaction between these concepts.

The broadening of the discrimination concept means that the doctrine’s upper tier will be utilized more often. Since the upper tier utilizes a strict scrutiny standard, the broader reach of the discrimination tier is “bad news” for the States. Under a strict scrutiny test, the State will rarely win – even when they pursue legitimate ends in a non-pretextual manner.

The broadening of the reach of the discrimination tier was accomplished by the Court’s use of evidence of “purpose” and “effect” to determine discrimination. The expansiveness is particularly attributable, in cases like
Carbone and West Lynn Creamery, to the Court’s use of a regulatory program’s effect to determine that it was discriminatory. In a number of cases, the Court found discriminatory purpose as well as discriminatory effect, and the coexistence of these factors is undoubtedly supportive. Yet, the Court’s consideration of effect is constitutionally significant. If discriminatory effect would be enough, the mature Rehnquist Court was essentially rejecting the purposefulness model it has employed in other doctrinal areas.  

The broadening of the discrimination tier was accompanied by the Court’s willingness to ascribe to a more expansive notion of facial discrimination. As noted above, this expanded concept of facial discrimination derives from the Court’s adoption of a holistic technique when reviewing state regulatory programs. The Court demonstrated that it would not read the burdensome state regulation in isolation. Instead, the Court read the regulatory provision together with the rest of the State’s program. As in South Central Bell, the Court read the whole statute. Even more expansively, the Court will find facial discrimination, as in West Lynn Creamery, by reading other statutes and considering the other statutory provisions together with the regulatory statute.  

This expansive interpretation of facial discrimination is sometimes supported by the Court’s willingness to consider the effects of the regulation. Again, West Lynn Creamery, South Central Bell, and Granholm are examples. The consequence is that the Court considers discriminatory effects as both a form of discrimination and also as evidence of facial discrimination. 

In summary, the mature Rehnquist Court’s decisions made it easier for a challenger to characterize the case in the discrimination tier. Moreover, the Court’s decisions permitted a challenger in a discrimination-tier case to have its case characterized as facial discrimination. Both of these doctrinal developments had the consequence of giving the challenger a high level of scrutiny. In effect, the Court created a new discrimination tier.

B. THE REASONS FOR THE EXPANDED DISCRIMINATION TIER

In addition to these observations regarding “how” the Court avoided the undue burden tier for so many years, there is also the question why? Any observations here are necessarily more speculative, but the historical and precedential evidence seems to merit at least some tentative conclusions.

It appears that, although the dormant Commerce Clause area was a quantitatively active field for the Court, the doctrine was remarkably stable. The two-tiered doctrine of the 1970s decisions remained a two-tiered doctrine at the close of the Rehnquist Court. The Supreme Court did not overrule the basic doctrinal structure. There was no announced change in the doctrine’s governing
standard, like a *Casey* decision in the abortion doctrine, or a *Smith* decision in Free Exercise doctrine. At the end of the Rehnquist Court, the two tiers of scrutiny - the discrimination tier and the undue burden tier - were still the articulated doctrinal standards.

Yet, as this article has demonstrated, there was a third significant doctrinal development. Although both tiers of the doctrine remain doctrinally intact, the nondiscrimination tier has apparently fallen into disuse. The mature Rehnquist Court declined to apply the lower tier standard even when the case appeared to rest on nondiscriminatory state regulations. Instead, the Court has resolved cases on the discrimination tier, or outside the two tiers altogether, as in *Tracy*.

The disuse of the undue burden standard to resolve cases of state regulation of interstate commerce presents the question why the mature Rehnquist Court would essentially abandon this part of the doctrine. This article has suggested that the relative stability of the dormant Commerce Clause doctrine may be attributable to the Court's avoidance of the use of the nondiscrimination tier. Thus, the two-tiered doctrine continued to exist precisely because the second tier was not used.

Moreover, by not using the second tier's intermediate scrutiny, the mature Rehnquist Court avoided confronting the critique of the dormant Commerce Clause doctrine announced by Justice Scalia. Perhaps, under these circumstances, Justice Scalia has achieved indirectly a part of the goal denied to him more directly in the 1980s.

Justice Scalia's sense of doctrinal satisfaction may be only temporary. Such expansiveness in determining discrimination is a form of judicial activism. It is activist in the same manner that review under the undue burden standard is activist. Thus, for the same reasons Justice Scalia has attacked the second tier standard, it can be anticipated that he will eventually attack the expansive notion.

---

388. *See* Amer. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n, 125 S.Ct. 2419; Day, *supra* note 6, at 49 n.22. Some confirmation of the Court's pattern of avoidance is found in the Court's reversal of every lower court decision relying on the undue burden standard to uphold a state regulatory scheme, as discussed *supra* regarding *Chemical Waste, Fort Gratiot, Carbone, West Lynn Creamery, and Camps*. This quantitative pattern is reinforced by a qualitative analysis of the Court's use of an expansive and malleable concept of discrimination to place all these cases on the discrimination tier, even though the lower court had considered the case to be a nondiscriminatory-tier case. *See generally* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 93-95 (2005-06).
389. As noted above, the Court's avoidance of the doctrine's nondiscrimination tier is demonstrated by its pattern of converting undue burden cases into discrimination cases with broadened concepts of discrimination and facial discrimination. The Court's avoidance of the balancing found in the undue burden standard is further demonstrated by its pattern of denying certiorari. My research indicates that, during the 1990s, the Court denied certiorari to sixteen cases which the lower courts had decided using the undue burden standard. I do not mean to suggest that these sixteen were wrongly decided. The point here is that the Court had ample opportunity to examine the undue burden standard - five decisions which were converted into discrimination-tier cases and the sixteen cases where certiorari was denied. For completeness, I would note that my research indicates that certiorari was denied in ten cases where the lower courts decided using the discrimination tier. Given that the Court did take the discrimination-tier cases discussed in the text, I do not see the type of "avoidance" of discrimination-tier cases as compared to the nondiscrimination-tier cases.
of discrimination. Whether he will advance a formalistic critique or a purposefulness alternative remains to be seen.

C. THE CONSEQUENCES OF THE EXPANDED DISCRIMINATION CONCEPT

The use of an expansive doctrinal concept of discrimination will have consequences for legitimate state regulatory efforts. One thing the states must learn from these doctrinal developments is that "facial neutrality is not enough." When drafting its regulatory efforts, therefore, a state must not assume that the use of neutral terminology will result in review in the lower tier. Apparently, to avoid the exacting scrutiny of the discrimination tier, a state must consider – anticipate – the "effect" of its regulatory scheme on interstate commerce and, presumably, draft around such problematic effects. In light of the Court's holistic analysis of discrimination and its broad concept of facial discrimination, this will be no small undertaking.

In general, the decisions of the mature Rehnquist Court indicate that the dormant Commerce Clause doctrine is outwardly stable and significantly activist. At the same time, there are suggestions that the dormant Commerce Clause doctrine is internally dynamic and, perhaps, ripe for doctrinally significant changes. Justice Scalia's critique of the judicial activism inherent in the two-tiered doctrine has not gained a majority, but it may have contributed to the apparent abandonment of the second tier. Ironically, the Court's majority may have abandoned the lower tier's explicit balancing by engaging in an implicit balancing of an expanded concept of discrimination.

IV. CONCLUSION

At the end of the century, the dormant Commerce Clause doctrine remained remarkably well-settled. It was a two-tiered doctrine where discriminatory state regulations of interstate commerce were treated with a nearly fatal level of judicial scrutiny, and even nondiscriminatory regulations were scrutinized to determine whether they placed an undue burden on interstate commerce.

Another remarkable feature of the end of the Rehnquist Court was that, although the doctrine had two tiers, the Court had chosen to decide cases only on the discrimination tier. The nondiscrimination tier had fallen into rather obvious non-use.

In order to decide all cases as matters of the discrimination tier, the mature Rehnquist Court employed two techniques. First, the Court adopted an expansive concept of discrimination. Discrimination could be found: (1) facially; (2) in purpose; or (3) by effect. Second, the Court adopted a broader theory of facial discrimination. The expanded theory of facial discrimination served the broader discrimination concept, and it also permitted the Court to

391. See Day, supra note 13, at 707-10.
392. See supra Part III.A.
393. See Sachse, supra note 23, at 708.
decide the existence of discrimination without regard to the factual complexities arguably present in the record.

Ultimately the Court needed a rationale for the discrimination tier beyond the rationales of national economic unity and the protection of the political process. During the mature Rehnquist Court, the economic liberty rationale filled this doctrinal necessity in some cases.\textsuperscript{394}

Finally, these decisions demonstrate that there was an "attraction-avoidance" aspect to the mature Rehnquist Court's dormant Commerce Clause jurisprudence. As powerful as the expanded rationale for the discrimination concept may have been, this doctrinal attraction worked in conjunction with a doctrinal avoidance factor. During the later Rehnquist Court, the nondiscrimination tier almost disappeared. By deciding almost all cases as a matter of discrimination, the mature Rehnquist Court's majority avoided confronting the theories of Justices Scalia and Thomas that the undue burden standard was doctrinally illegitimate. Justices Scalia and Thomas apparently exerted, given the Court's avoidance posture, a significant influence on the course of the mature Rehnquist Court's development of the modern dormant Commerce Clause doctrine.

\textsuperscript{394} See Carbone, 511 U.S. at 392; Broll, supra note 14, at 841-43. Although historical analogies played a minor role in the expansion of the new discrimination tier, a significant doctrinal force was the expansion of the Court's rationale. In several decisions, the Court adopted a rationale based on a quasi-substantive due process theory that the right to participate in interstate commerce was \textit{fundamental} in nature. Thus, the dormant Commerce Clause interest deserved heightened judicial scrutiny. In a classic doctrinal shift, this expansive rationale led to an expanded concept of discrimination. This, in turn, expanded the scope of the discrimination tier so that the Court could decide almost all cases under the discrimination tier. The expanded discrimination tier, of course, virtually assured that every State regulatory scheme would be defeated and, accordingly, that the economic interests participating in interstate commerce would be free from state regulation.