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"Drawn from Local Knowledge... and Conformed to Local Wants": Zoning and Incremental Reform of Dormant Commerce Clause Doctrine

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“Drawn from Local Knowledge . . . And Conformed to Local Wants”: Zoning and Incremental Reform of Dormant Commerce Clause Doctrine

John M. Baker & Mehmet K. Konar-Steenberg***

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I. INTRODUCTION

As the importance of substantive due process and the takings clause has declined in land use cases, the dormant Commerce Clause has increasingly played a role in litigation over land use regulation.¹ With the proliferation of measures by local governments to preserve the local

1. For examples of land use cases with dormant Commerce Clause implications, see *Gallenthin Realty Dev., Inc. v. BP Products of N. Am., Inc.*, 163 F. App'x. 146 (3d Cir. 2006); *Cuyahoga Falls & Hudson Ry. v. Vill. of Silver Lake*, 122 F. App'x. (6th Cir. 2005); *Salvador v. Adirondack Park Agency*, No. 01-7539, 35 F. App'x. 7 (2d Cir. 2002); *Ga. Manufactured Hous. Ass'n v. Spalding County*, 148 F.3d 1304 (11th Cir. 1998); *Tex. Manufactured Hous. Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996); *Blue Circle Cement, Inc. v. Bd. of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994); *Wal-Mart Stores, Inc. v. City of Turlock*, No. 1:04-CV-05278 OWW DLB, 2006 WL 1875446 (E.D. Cal. July 3, 2006); *Nichols Media Group, LLC v. Town of Babylon*, 365 F. Supp. 2d 295 (E.D.N.Y. 2005); *BFI Waste Sys. of N. Am. v. DeKalb County*, 303 F. Supp. 2d 1335 (N.D. Ga. 2004); *Jemal's Fairfield Farms, LLC v. Prince George's County*, 319 F. Supp. 2d. 618 (D. Md. 2004); *Superior FCR Landfill, Inc. v. Wright County*, No. COV/98-1911 (JRT/FLN), 2002 WL 511460 (D. Minn. Mar. 31, 2002); *City of New Rochelle v. Town of Mamaronek*, 111 F. Supp. 2d 353 (S.D.N.Y. 2000); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999); *Omnipoint Commc'ns, Inc. v. Penn Forest Twp.*, 42 F. Supp. 2d 493 (M.D. Pa. 1999); *Smart SMR of N.Y., Inc. v. Zoning Comm'n.*, 995 F. Supp. 2d 52 (D. Conn. 1998); *Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton*, 997 F. Supp. 340 (E.D.N.Y. 1998); *Colo. Manufactured Hous. Ass'n v. City of Salida*, 977 F. Supp. 1080 (D. Colo. 1997); *Colo. Manufactured Hous. Ass'n v. Board of County Commissioners*, 946 F. Supp. 1539 (D. Colo. 1996); *Tex. Manufactured Hous. Ass'n v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996); *N.H. Motor Transp. Ass'n v. Town of Plaistow*, 836 F. Supp. 59 (D. N.H. 1993); *Coronadans Organized for Retail Enhancement v. City of Coronado*, No. D040293, 2003 WL 21363665 (Cal. Ct. App. Jun. 13, 2003); *N & N Sanitation v. City of Coralville*, No. 01-1211, 2002 WL 31640695 (Iowa Ct. App. Nov. 25, 2002).

character of their communities in the face of sprawling retail development,² the trickle of land use cases in which the dormant Commerce Clause plays a significant role seems likely to turn into a flood akin to the surge of dormant Commerce Clause garbage cases in the 1990s.³ As these cases begin to percolate up through the system, it seems likely that the Supreme Court will soon be confronted with demands to clarify how its dormant Commerce Clause doctrine applies in zoning cases.

When it does so, it will also have to confront a doctrine that for decades has been harshly criticized by many legal commentators and a few Justices for its theoretical incoherency and unpredictable (some would say *ad hoc*) outcomes. In particular, the Court's confused approach in the branch of dormant Commerce Clause doctrine analyzing state laws thought to have "discriminatory effects" (as distinct from laws motivated by discriminatory intent) has drawn much of the critical fire. But despite this persistent criticism from within and without, the Court has not yet budged from this aspect of its doctrine.

This article argues that the time for such a reappraisal is long overdue, and that the coming wave of dormant Commerce Clause zoning cases provides a unique opportunity to establish a beachhead for further reforms of dormant Commerce Clause doctrine. Accordingly, this article seeks to provide a principled argument that application of the discriminatory effects branch of the dormant Commerce Clause doctrine is unjustified in zoning cases. Part II begins the discussion with an examination of the basic framework of dormant Commerce Clause doctrine and illustrates how the "discriminatory effects" prong of that framework has resulted in considerable doctrinal ambiguity.⁴ We also

2. See generally Justin Shoemaker, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891 (1999) (examining growth control measures at state and local levels, focusing on local efforts to keep Wal-Marts out of Vermont); Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907 (2005) (examining popular ordinances which limit the amount of square feet stores may occupy in an effort to target big-box stores).

3. See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 505 (2d Cir. 1995) (stating that federal docket "clogged with—of all things—garbage").

4. This article addresses the question whether discriminatory effects should ever be a *sufficient* basis for invalidating zoning laws under the dormant Commerce Clause, and not the quite interesting (but very different question) whether a discriminatory effect is a *necessary* part of any dormant Commerce Clause claim. The latter question was addressed by the recent federal district court ruling in *Wal-Mart Stores Inc. v. City of Turlock*, 2006 WL 1875446 at *24–25. There, the court found that "in no Commerce Clause case cited or disclosed by research has a statute or regulation been invalidated solely because of the legislators' alleged discriminatory motives." *Id.* at 25. Cf. Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1245 (1986) ("[I]n practice, the Court has never upheld a regulation identified as discriminatory in purpose during the current era.").

identify the special problems that the effects analysis poses for zoning. Part III then summarizes reform proposals to date, most of which are focused on the effects analysis. The argument builds on these earlier efforts in an attempt to show that enforcement of the discriminatory effects prong of the dormant Commerce Clause doctrine is of limited value in advancing the goals of the dormant Commerce Clause doctrine, and reinvigorates “classic”⁵ Supreme Court doctrine recognizing the value of preserving local regulation of local concerns. Part IV then seeks to identify such policy considerations in the Supreme Court’s discussions in various contexts of zoning and concludes that local zoning decisions represent a class of state regulation which, in light of their national importance and inherently local nature, ought not to be subject to the discriminatory effects prong of the Court’s dormant Commerce Clause doctrine.

II. THE PROBLEM OF DISCRIMINATORY EFFECTS

This section presents an overview of the framework used by the Court in dormant Commerce Clause cases. Although the framework appears rigorous, it often gives way to an ad hoc “case-by-case” analysis, thus suggesting that the framework too often becomes a formality that no longer accurately depicts the current meaning of the doctrine. In our view, this problem is due largely to the conceptual difficulties inherent in the Court’s insistence on a “discriminatory effects” category, which has been aptly described as “a fundamental perplexity in dormant Commerce Clause jurisprudence.”⁶ As we explain, both the ambiguities in the analysis and the ad hoc approach to resolving actual cases pose specific problems for zoning.

A. *The Basic Dormant Commerce Clause Framework*

The Supreme Court has long interpreted the Commerce Clause’s express grant of authority to Congress to regulate interstate commerce as having an implicit “negative” or “dormant” aspect limiting state power to act in ways impacting interstate commerce.⁷ Because the

5. FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WHITE* 13 (U.N.C. Press 1937), quoted in BORRIS BITTKER, *BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE* at §6.03 (1999). Then-Solicitor General Robert H. Jackson repeated this characterization in an article published in 1940. Robert H. Jackson, *The Supreme Court and Interstate Barriers*, 207 ANNALS AM. ACAD. POL. & SOC. SCI. 70 (1940), available at <http://www.robertjackson.org/Man/theman2-5>.

6. Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 581 (1997).

7. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996). See generally Shoemaker, *supra* note 2, at 910–13 (discussing the background and development of this interpretation).

“principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce,”⁸ there is a threshold (and often outcome-determinative) issue in such cases: whether the state action in question “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.”⁹ State action with only incidental burdens on interstate commerce “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁰ This more deferential standard is commonly known as the “*Pike* balancing test,” after *Pike v. Bruce Church, Inc.*, although the application of the balancing test in that case was hardly novel.¹¹ In contrast, if the state action is found to be discriminatory, then it is subject to a virtual per se rule of invalidity.¹² The oft-quoted formulation of the discrimination portion of its dormant Commerce Clause framework provides that a finding of economic discrimination under the dormant Commerce Clause “may be made on the basis of either discriminatory purpose, or discriminatory effect.”¹³

8. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987).

9. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Okla.*, 441 U.S. 322, 336 (1979)).

10. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

11. *Id.*

12. See *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (“[T]he commerce clause presumes a national market free from local legislation that discriminates in favor of local interests.”). The only case in which the Supreme Court has not invalidated such a statute is *Maine v. Taylor*, 477 U.S. 143 (1986), which upheld Maine’s ban on the import of baitfish because Maine had no other way to prevent the spread of parasites and the adulteration of its native fish species.

13. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citations omitted). The Supreme Court has spoken inconsistently about whether a disparate effect is the legal equivalent of purposeful discrimination. A phrase first used by Justice Marshall in 1986, and now used in the Supreme Court’s most recent dormant Commerce Clause decision in 2005, treats effect as an alternative to proving discrimination. *Granholm v. Heald*, 544 U.S. 460 (2005). In *Brown-Foreman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573, 579 (1986), the Supreme Court held that “[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.” The continued viability of the effects branch was called into question in 1994, when (in a decision written by Justice Thomas, who personally does not support much about the dormant Commerce Clause) the Supreme Court held, “As we use the term here, ‘discrimination’ simply means differential treatment of in state and out of state economic interests that benefits the former and burdens the latter.” *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994). However, those hopes were dashed when, most recently in 2005, the Supreme Court again quoted Justice Marshall’s articulation of the test. *Granholm v. Heald*, 544 U.S. 460 (2005).

B. *The Blurring Effect of "Discriminatory Effects"*

Although seemingly tidy¹⁴ on its face, this basic framework has generated two closely related interpretive problems, both stemming from the inclusion of discriminatory effects in the basic dormant Commerce Clause framework. First, it is unclear where discrimination leaves off and incidental burdens begin. Second, and closely related, the Court's language in a series of dormant Commerce Clause cases has led some lower courts (incorrectly, in our view) to equate "discriminatory effects" with "disparate impacts" and thus to dispense with analysis of discriminatory intent and purpose altogether.

1. Discriminatory Effects and Incidental Burdens

The Supreme Court itself has been forced to caution that "there is no clear line" separating the categories identified in its dormant Commerce Clause taxonomy, a troubling feature of an analysis in which the categories determine whether strict scrutiny (and near-certain invalidation) will apply.¹⁵ As an introduction to this problem, consider a pair of cases with similar facts and dissimilar outcomes: *Hunt v. Washington State Apple Advertising Commission*¹⁶ and *Minnesota v. Clover Leaf Creamery Co.*¹⁷

In *Hunt*, the Court found that a North Carolina consumer protection law forbidding the use of any apple grading system other than the USDA system harmed Washington apple growers (who used Washington state's grading system) and benefited North Carolina's apple growers.¹⁸ In *Clover Leaf*, the Court found that a Minnesota environmental law that banned the sale of milk in plastic containers harmed foreign plastic producers and benefited the domestic paper

14. See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1414 (1994) ("Although this three-part scheme has the appearance of tidiness, in practice it involves difficult line-drawing.").

15. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986), cited in Farber & Hudec, *supra* note 14, at 1414 n.47. The Court's reminder that "the critical consideration is the overall effect of the statute on both local and interstate activity" does little to clarify the situation. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. at 410-11 (1994) (citing *Brown-Forman Distillers Corp.*, 476 U.S. at 579).

16. 432 U.S. 333 (1977). This comparison owes much to the Third Circuit's analysis in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 401 n.18 (3d Cir. 1987). As is discussed in greater detail below, the Third Circuit has since backed away from the ultimate conclusions of its analysis in *Oberly* because it felt it was required to do so by subsequent Supreme Court case law. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) (emphasizing the Court's analysis in *Carbone*).

17. 449 U.S. 456 (1981). Nevertheless, the Court's analysis of these cases remains perceptive.

18. *Hunt*, 432 U.S. at 350-54.

industry.¹⁹ Thus, in the words of one commentator, both statutes “are facially neutral, both have asserted innocent purposes, and both have protectionist effects.”²⁰ But only the statute in *Hunt* was found to have a discriminatory effect; the one in *Clover Leaf* was upheld because its burden on interstate commerce was deemed to be only incidental.²¹

A common explanation for the different outcomes in these cases is that in *Hunt* there was at least some evidence of discriminatory purpose, while in *Clover Leaf* the Court accepted Minnesota’s innocent environmental justification for its embargo on plastic milk jugs.²² Even here, though, there is a schizophrenic quality to the Court’s analysis. In *Hunt* itself, the Court noted the evidence of protectionist statements in the record but then concluded that it was unnecessary “to ascribe an economic protection motive to the North Carolina legislature to resolve this case.”²³ Just four years later, however, the *Clover Leaf* court characterized *Hunt* as having been decided on exactly that evidence of purposeful discrimination.²⁴

This analytical zigzag thus makes it difficult to know whether to classify *Hunt* as a case involving discriminatory effect (as *Hunt* declares itself to be) or a case involving discriminatory purpose (as *Clover Leaf* describes it). For, if in fact *Hunt* is to be read as *Clover Leaf* describes it, then what are we to make of the *Hunt* Court’s assertion that it is unnecessary to ascribe an economic protection motivation to the legislature’s action in order to invalidate the statute? We will return to this question in our discussion of disparate impact below. For now, however, it is enough to note that these two decisions, when read together, suggest that the difference between discriminatory effect and incidental burdens is whether there is evidence of discriminatory purpose; needless to say, this suggestion hardly serves to crystallize the distinctions between these three categories, and more recent case law doesn’t help matters much.

Against an already confusing background, the notion of “discriminatory effects” emerges as a particularly confounding aspect of the Court’s basic dormant Commerce Clause framework, because it can so easily be made to mean different things to different people. It may be used to describe effects on interstate commerce that evince or belie a

19. *Clover Leaf*, 449 U.S. at 473.

20. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1241 (1986).

21. *Clover Leaf*, 449 U.S. at 473–74.

22. Regan, *supra* note 20, at 1241; *Oberly*, 822 F.2d 388, 401 n.18.

23. *Hunt*, 432 U.S. at 352–53.

24. *Clover Leaf*, 449 U.S. at 741 n.15.

discriminatory purpose. It may mean effects on interstate commerce that are indistinguishable from traditional devices of economic protection, like embargoes and tariffs. Or it may mean disparate impacts—that is, disproportionate impact on interstate commerce regardless of intent. This chameleon-like character may owe to the fact that the notion of *discriminatory effects* would appear to have one foot on the branch of dormant Commerce Clause analysis involving strict scrutiny and almost per se invalidation, and another on the branch of the doctrine involving the much more deferential *Pike* balancing test, resulting in a generalized confusion about how to choose the correct branch in cases where some effect on interstate commerce is alleged.²⁵ Consider: If one effect of a law is to burden interstate commerce, what should be the Court's next question? *Pike* suggests the question should be whether those burdens are incidental when compared to the law's putative local benefits. But those decisions indicating that strict scrutiny applies to laws with discriminatory purpose *or effect* suggest that strict scrutiny should be the next question. Only one can be true.

The modern poster child for this analytical confusion is the Court's 1994 decision in *C & A Carbone, Inc. v. Town of Clarkstown*.²⁶ The case involved a so-called "flow control" ordinance which required all waste processed or handled within Clarkstown, New York, to be processed at the town's solid waste transfer station.²⁷ The transfer station was built as the result of a consent decree with the New York state environmental agency that required Clarkstown to close its landfill and use the site to build a facility to separate recyclable and nonrecyclable materials.²⁸ A local builder agreed to construct the facility and operate it for five years, after which the facility was to be sold to the town for one dollar.²⁹ During the five years, the town guaranteed a minimum amount of waste flow through the facility to make the facility profitable for the builder.³⁰ To accomplish this, Clarkstown adopted an ordinance routing solid waste to the transfer station.³¹ The plaintiff, Carbone, was a solid waste processor which received and processed waste in much the same manner as the transfer station—separating out recyclable materials and disposing of the

25. Farber & Hudec, *supra* note 14, at 1414 (1994).

26. 511 U.S. 383 (1994), cited in Farber & Hudec, *supra* note 14, at 1414 n.47.

27. *Carbone*, 511 U.S. at 386.

28. *Id.* at 386–87.

29. *Id.* at 387.

30. *Id.*

31. *Id.*

nonrecyclable portion.³² Under the ordinance, Carbone was permitted to continue its business, but it was required to bring the nonrecyclable portion of its waste stream to the town's transfer station so that the town could then dispose of it (charging a fee to do so).³³ After police discovered that Carbone was bypassing the transfer station and hauling its nonrecyclable waste to out-of-state disposal facilities, the town sought an injunction against Carbone.³⁴

The Court's analysis of these facts resulted in what has been described as "a particularly fractured and incoherent opinion."³⁵ Five Justices voted to strike down the ordinance under the discrimination prong of the dormant Commerce Clause analysis, without specifying whether the statute's defect was discriminatory intent or effect;³⁶ three voted to uphold it under *Pike*;³⁷ and one—predictably, perhaps, Justice O'Connor—split the analytical difference by voting to invalidate the ordinance under *Pike*.³⁸ Thus, nearly all analytical permutations are represented in this single case.

Writing for the majority, Justice Kennedy insisted that the Court's decision rests "upon well-settled principles of our Commerce Clause jurisprudence."³⁹ There are nevertheless some odd features to the opinion. For one, the treatment of *Pike* is confusing. The majority found that the Clarkstown ordinance discriminated against interstate commerce (without explicitly specifying whether this discrimination is purposeful or in effect), and that the Court therefore "need not resort to the *Pike* test," i.e., balancing incidental burdens on interstate commerce against the law's putative local benefits.⁴⁰ Yet elsewhere in the opinion, Kennedy attempted to recast *Pike* from a self-described incidental burdens/balancing case⁴¹ into a facial discrimination case, much in the same way that *Clover Leaf* recast *Hunt* from a self-declared discriminatory effects case into a discriminatory purpose case. Kennedy wrote that Clarkstown's "flow control ordinance is just one

32. *Id.* at 387–88.

33. *Id.* at 388.

34. *Id.*

35. Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 442 (1998).

36. *Carbone*, 511 U.S. at 385–400.

37. *Id.* at 410–30.

38. *Id.* at 401–410, cited in Farber & Hudec, *supra* note 14, at 1414 n.47.

39. *Id.* at 386.

40. *Id.* at 390 (citing *Pike*, 397 U.S. at 142).

41. *Pike*, 397 U.S. at 145–46 (assuming that the state's asserted interest is legitimate but insufficient to justify the burden on interstate commerce, "an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved").

more instance of local processing requirements that we long have held invalid,” and then provided a string cite of such cases that included, oddly, *Pike*.⁴² Kennedy further stated, “The essential vice in laws of this sort”—that is, laws like the one at issue in *Carbone* as well as in *Pike*—“is that they bar the import of the processing service,” suggesting that it was this similarity to a facially protectionist embargo which represented the real problem in both cases.⁴³

Interestingly, Justice O'Connor shared Justice Kennedy's revisionist view of *Pike* as a case in which Arizona's actions “facially discriminated against interstate commerce.”⁴⁴ However, she departed from the majority because she did not find Kennedy's conclusion that the Clarkstown ordinance discriminated against interstate commerce as self-evident as he suggested.⁴⁵ This points out another odd facet of *Carbone*: The plaintiff was a *local* firm which processed local *and* out-of-state waste.⁴⁶ Thus, O'Connor noted, unlike the laws struck down in the cases cited by Kennedy (including *Pike*), the Clarkstown ordinance “does not give more favorable treatment to local interests as a group as compared to out-of-state or out-of-town economic interests.”⁴⁷ Because Clarkstown's garbage monopoly came at the expense of both local and foreign competitors, O'Connor concluded that the ordinance “‘discriminates’ evenhandedly” against all commercial waste processors—local and foreign—except for the operator of the town's transfer station.⁴⁸ In O'Connor's view, the ordinance was invalid not because it discriminated against interstate commerce, but because under the *Pike* balancing test the town's purpose of assuring the transfer station's financial viability could be accomplished in ways that “would have a less dramatic impact on the flow of goods,” such as imposing taxes or issuing bonds.⁴⁹

Completing the assortment of views was a dissent authored by Justice Souter and joined by Chief Justice Rehnquist and Justice Blackmun that would have taken O'Connor's point one step further—not only did the

42. *Carbone*, 511 U.S. at 391–92.

43. *Id.* at 392. Professor Regan has argued that in deciding *Pike*, Justice Stewart announced his famous balancing test and then ignored it in favor of analogizing to some of the same local processing cases cited by Kennedy while noting the “virtually per se illegal” nature of this mode of regulation. Regan, *supra* note 20, at 1215–16. Though conceptually attractive, that characterization of what *Pike* actually says may be too strong. See discussion *supra* note 41.

44. *Carbone*, 511 U.S. at 403.

45. *Id.* at 403–05.

46. *Id.* at 387–89, 404.

47. *Id.* at 404.

48. *Id.* at 404, quoted in O'Grady, *supra* note 6, at 605.

49. *Carbone*, 511 U.S. at 405–06.

statute not discriminate, it was valid under the *Pike* balancing test.⁵⁰ Souter emphasized evidence in the record which he argued showed that the ordinance's burden fell exclusively on Clarkstown residents, who faced higher disposal costs, and on the absence of protectionist benefits for local processors:

Here, we can confidently say that the only business lost as a result of this ordinance is business lost in Clarkstown, as customers who had used Carbone's facility drive away in response to any higher fees . . . ; but business lost in Clarkstown as a result of a Clarkstown ordinance is not a burden that offends the Constitution.⁵¹

Accordingly, Souter and the other dissenters would have upheld the ordinance not only because it did not in their view discriminate against interstate commerce, but because it did not significantly burden *interstate* commerce under the *Pike* balancing test.⁵²

Given the absence of clear guidance from the top, it is not surprising that lower courts have had to improvise their own understandings of the basic dormant Commerce Clause framework. For example, in *Stephen DeVito, Jr., Trucking v. Rhode Island Waste Management Corp.*, the district court offered the following hazy summary of the doctrine:

[A] regulation that "on its face or in practical effect" restricts the interstate but not the intrastate movement of goods or imposes heavier burdens on interstate commerce than those imposed on intrastate commerce is more likely to be held discriminatory than a regulation that affects interstate commerce only indirectly and in a manner and to a degree that is not appreciably different from the way it affects intrastate commerce.⁵³

Elsewhere, Judge Frank Easterbrook of the Seventh Circuit, in especially elaborate dicta, wrestled with the dual references to effects in the Supreme Court's framework and would apparently resolve the problem by classifying the magnitude of the effect and asking whether that effect is like an embargo. In *National Paint and Coatings v. City of Chicago*, paint manufacturers brought a range of challenges to the city's ban on the sale of products like spray paint and jumbo-sized markers that are misused for graffiti.⁵⁴ On the question of the plaintiffs' dormant Commerce Clause challenge, Judge Easterbrook found that they had failed to present necessary evidence to prove their case, but that did not prevent Judge Easterbrook from first engaging in a thorough

50. *Id.* at 410.

51. *Id.* at 427–28.

52. *Id.* at 430.

53. *Stephen DeVito, Jr., Trucking v. R.I. Waste Mgmt. Corp.*, 770 F. Supp. 775 (D.R.I. 1991).

54. *Nat'l Paint and Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1126 (7th Cir. 1995).

exogenesis of the meaning of each branch of the doctrine.⁵⁵ Under his interpretation of the framework, *Pike* applies “when the discriminatory effect is weak.”⁵⁶ However, “when the effect is powerful, acting as an embargo on interstate commerce without hindering intrastate sales, the Court treats it as equivalent to a statute discriminating in terms.”⁵⁷ Thus, in his view the parties should have litigated about whether the facially neutral ban on items such as spray paint caused customers to replace those items with products more apt to be supplied from Illinois.⁵⁸ Since the plaintiff made no attempt to prove that the law created any such preference, the Seventh Circuit did not need to decide whether the effect was “weak” enough to trigger the *Pike* test or “powerful” enough to require strict scrutiny (if it also had an embargo-like effect).⁵⁹

As this discussion suggests, the categories that the Court calls “discriminatory effects” and “incidental burdens” are hardly self-defining. Moreover, the confusion is compounded by another ambiguity: whether “discriminatory effect” encompasses “disparate impact.”

2. Discriminatory Effects and Disparate Impacts

As noted above, a particular problem introduced by the Court’s insertion of “discriminatory effects” into its dormant Commerce Clause jurisprudence is that phrase’s seeming acceptance of the “disparate impact” type of economic discrimination claim that the Court has rejected in the Fourteenth Amendment racial discrimination context.⁶⁰ When rejecting an invitation to treat the Fourteenth Amendment’s prohibition of race discrimination as forbidding employment testing with a racially disparate impact, the Court warned that:

[A] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of

55. *Id.* at 1132.

56. *Id.* at 1131.

57. *Id.*

58. *Id.* at 1332.

59. *Id.*

60. *Compare* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact”) with *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Board*, 138 F. Supp. 2d 593, 605 n.6 (M.D. Pa. 2001) (“either discriminatory purpose or effects triggers heightened scrutiny”), *aff’d in part, rev’d on other grounds*, 298 F.3d 201 (3d Cir. 2002).

tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.⁶¹

But in several dormant Commerce Clause cases, the Supreme Court seems to have given many lower courts the impression that a discriminatory effect alone, without evidence of discriminatory intent, may be sufficient to trigger strict scrutiny.⁶² Unfortunately, it is not at all clear that such a disparate impact theory actually exists at the Supreme Court level, for as commentators have observed, most of the key decisions thought to authorize such an approach involved facial discrimination rather than disparate impact.⁶³

The Court's decision in *City of Philadelphia v. New Jersey* illustrates this phenomenon.⁶⁴ There, the Supreme Court struck down a New Jersey law which barred landfills in the state from receiving waste originating from outside of the state.⁶⁵ The stated purpose of the statute was to protect New Jersey's environment and public health from the disposal risks associated with rapidly increasing volumes of waste flowing into the state's landfills from outside of the state, and in its brief the state denied that the statute was motivated by economic protectionism, noting that New Jersey landfill operators were among the plaintiffs.⁶⁶ The plaintiffs countered that New Jersey's stated environmental goals cloaked a covert economic purpose: "to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents."⁶⁷ The Court's reaction to this dispute about the relevance of motivation to the dormant Commerce Clause discrimination analysis is worth quoting at length:

This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. *Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends.* Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be

61. *Washington*, 426 U.S. at 248.

62. *See, e.g., City of Phila. v. New Jersey*, 437 U.S. 617, 626 (1978); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Cloverland-Green Springs Dairies*, 138 F. Supp. 2d at 605 n.6.

63. *See generally* Regan, *supra* note 20, at 1268–85.

64. 437 U.S. 617 (1978).

65. *City of Phila.*, 437 U.S. at 618–19.

66. *Id.* at 625.

67. *Id.* at 625–26.

assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.⁶⁸

This "legislative means" language has been quoted by some lower courts for the proposition that a disparate impact on interstate commerce—regardless of legislative intent—is enough to trigger strict scrutiny.⁶⁹ And yet with a little reflection we know that this is not what the *New Jersey* Court meant, because of what that court told us in the last sentence of the excerpt above: the statute was invalidated because it was *facially discriminatory*—specifically, New Jersey's ban on the importation of foreign waste amounted to "an embargo on the export of landfill space," and there is little question that embargoes are a kind of patently protectionist device that is strongly disfavored under dormant Commerce Clause doctrine.⁷⁰

Given this context, the Court's discussion in these cases of "legislative means and ends" takes on a completely different meaning than that ascribed to it by disparate impact proponents: The Court is *not* saying that intent is suddenly irrelevant in all situations. It is simply pointing out that legitimate ends (or "intentions"), like environmental protection, do not justify patently improper means, like embargoes,

68. *Id.* at 626–27 (emphasis added).

69. A good example is *Gulch Gaming Inc. v. State of South Dakota*, 781 F. Supp. 621 (D.S.D. 1991). There, the court quoted *New Jersey* while striking down South Dakota laws requiring certain gambling businesses to have a majority of in-state owners. The state argued that such a restriction was important for regulatory purposes because it preserved unfettered jurisdiction over persons holding gambling licenses, provided for immediate access to data held by licensees of the state, facilitated daily oversight of such operations, and avoided difficulties in the collection of taxes. *Id.* at 627. Crucially, the court fully credited the state's "contention that it enacted the statutory provision at issue with the intent to protect the health and welfare of its citizens and to retain tight regulatory control" over an industry which the court recognized was "illegal in many states and restricted in scope and geographical location." *Id.* at 628. In other words, the court did not find any discriminatory purpose in these requirements. Nevertheless, the court found them to be discriminatory in their effect and struck them down because other less discriminatory means for achieving these regulatory objectives existed. *Id.* at 629. See also *Nutritional Support Services, L.P. v. Miller*, 830 F. Supp. 625, 628–29 (N.D. Ga. 1993) ("The State apparently believes that its lack of a protectionist motivation should be dispositive, as it argues that the regulation 'is not the type of protectionist legislation the Commerce Clause has been held to prohibit.' . . . The Supreme Court, however, has noted that a state's purpose in establishing a rule is irrelevant to the Commerce Clause issue as 'the evil of protectionism can reside in legislative means as well as legislative ends.'" (quoting *New Jersey*, 437 U.S. at 626).

70. Regan, *supra* note 20, at 1270.

tariffs, and other traditional and facially discriminatory tools of economic protectionism. A follow-up case, *Hughes v. Oklahoma*,⁷¹ followed a similar pattern and made exactly the same point. There the Court struck down an Oklahoma law that forbade the export of minnows caught in the state—another instance of a state pursuing an arguably legitimate end (preservation of domestic wildlife stock) by means of a facially improper embargo.⁷² Quoting *New Jersey*, the Court stated, “Such facial discrimination by itself may be a fatal defect, regardless of the State’s purpose, because ‘the evil of protectionism can reside in legislative means as well as legislative ends.’”⁷³ Similarly, the *Clover Leaf* court characterized *New Jersey* as involving “a state law purporting to promote environmental purposes [that was] in reality ‘simple economic protectionism’”⁷⁴ as evinced by its “discriminatory effect.”⁷⁵ It also seems likely that this is what was really going on in *Hunt*, where the Court noted that despite protestations of innocent intent, North Carolina’s bar on apples graded under any system other than the USDA system had at least the potential to operate much like “an embargo against those Washington apples . . . as Washington dealers withhold them from the North Carolina market.”⁷⁶

Nevertheless, the ease with which this language changes meaning when stripped of this essential context has resulted in judicial whiplash in at least one circuit court. Initially, the Third Circuit took the position that discriminatory effect alone could *never* sustain a dormant Commerce Clause claim, as it explained in *Norfolk Southern Corp. v. Oberly*.⁷⁷ That case involved a challenge by coal shippers to a Delaware statute banning facilities for the transfer of bulk products from Delaware’s coastal zone and raised both interstate and international commerce issues.⁷⁸ The *Oberly* court “acknowledge[d] having some difficulty” harmonizing discriminatory effect and incidental burden cases, but concluded that the key in most of the Supreme Court’s major cases on the issue was whether the record contained any evidence of a protectionist purpose.⁷⁹ Based on this analysis, the court declared, “[U]ntil we receive further guidance from

71. 441 U.S. 322 (1979).

72. *Id.* at 336–38.

73. *Id.* at 337.

74. *Clover Leaf*, 449 U.S. at 471.

75. *Id.* at 471 n.15.

76. *Hunt*, 432 U.S. at 352.

77. 822 F.2d 388, 402 (3d Cir. 1987).

78. *Id.* at 391.

79. *Id.* at 400.

the Supreme Court, we believe the 'discriminatory effect' cases are best regarded as cases of purposeful discrimination."⁸⁰ Arguably, this position goes further than the Supreme Court intended, for it would seem to conflict with cases like *New Jersey* in that even a clearly protectionist device such as an embargo might be acceptable under *Oberly* so long as it was deployed for nonprotectionist purposes.

In any event, less than a decade later, the Third Circuit recanted, though without much conviction. In a flow control case called *Harvey & Harvey v. County of Chester*, the court noted that although it had previously "expressed some doubt" about whether effects alone could trigger strict scrutiny, recent Supreme Court decisions such as *Carbone* had "clarified that either purpose or effect will trigger strict scrutiny analysis."⁸¹ What makes this conclusion puzzling is that, as we have already seen, it is hard to conclude that *Carbone* clarified much of anything in this area. Even stranger, the *Harvey* court concluded that "where the showing of effect is weak, demonstrating discriminatory purpose buttresses the case," thus seeming to exalt discriminatory effects over discriminatory intent (whereas one would have thought that evidence of the latter would be sufficient in itself to establish a claim).

At a minimum, the Third Circuit's experience at the mercy of the shape-shifting effects prong illustrates how ambiguities in the Court's presentation and resolution of dormant Commerce Clause cases can have significant and sometimes unexpected implications for lower courts trying to implement that doctrine. As we explain below, these problems are likely to become especially acute as applied to zoning.

C. *The Four Special Problems of Applying Discriminatory Effects to Zoning*

Invalidating zoning decisions and ordinances if they have a discriminatory effect on interstate commerce can lead to a number of unintended consequences. In this section, we identify four: (1) upsetting the "average reciprocity of advantage" at the core of zoning; (2) propagation of very speculative claims; (3) exacerbation of economic and geographic inequalities; and (4) distorting the land use decision-making process.

1. Upsetting the Reciprocity of Advantage

Many ordinary zoning regulations are *supposed to* have a negative effect on commerce that is interstate in nature, particularly when those

80. *Id.* at 400.

81. *Harvey & Harvey v. County of Chester*, 68 F.3d 788, 798 (3d Cir. 1995).

regulations are viewed in isolation. To pick a simple, common example, the zoning law that requires you and your neighbors to limit the use of your homestead to residential use has a negative effect on your ability to replace it with an all-night drive-in restaurant. Your home does little to increase the amount of interstate commerce, but a drive-in restaurant might, particularly if it developed a regional reputation for fine dining. In that respect, the residential zoning classification has a negative effect on interstate commerce, despite how easy it is to justify that effect. However, the legal effect of concluding that a law discriminates against interstate commerce is that it is subject to scrutiny so strict that, as the Supreme Court recognizes, it has only spared a state law once.⁸² Thus, the effect on interstate commerce of forcing you to keep residential property residential could arguably fail a standard dormant Commerce Clause analysis.

Of course, this just doesn't seem right. One reason is that most people recognize the validity of the "average reciprocity of advantage" of which Justice Holmes spoke in the original regulatory takings case, *Pennsylvania Coal Co. v. Mahon*.⁸³ While one zoning regulation might burden your property, you and your property may also benefit from zoning in other respects, as a consequence of the government's ability to burden *others'* use of property through zoning.⁸⁴ Under the theory of reciprocity, the burden of losing authority to convert your homestead for use as a drive-in restaurant is counterbalanced by the benefit of knowing that your neighbors cannot do so either. Just as homeowners benefit because a drive-in cannot relocate next door, a drive-in properly located in a commercial district benefits because a brick-making plant cannot relocate next door, and a brick-making plant properly located in an industrial district benefits because it is free from the nuisance suits that might be filed if homes were located next door.

However, the standard dormant Commerce Clause analysis leaves little room for the logic of reciprocity. That is because the reciprocity justification is based not upon empirical proof of the actual effect of the

82. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (describing such laws as "per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest").

83. 260 U.S. 393, 414 (1922).

84. *Id.* at 415; *see also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) ("While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.") (emphasis in original).

actual decision that is being challenged, or on the absence of other alternatives, but instead turns upon a general, unverified feeling that things may even out in the long run.⁸⁵ In contrast, a standard dormant Commerce Clause analysis (on the discrimination branch) would focus on the particular application of it that is being challenged—for example, the denial of the building permit for the drive-in restaurant in a residential area or the denial of a request to rezone the site from residential to commercial. Once the plaintiff establishes that the denial or the ordinance provision discriminates against interstate commerce, the game would be all but over.⁸⁶

Such considerations prompted one federal judge to refuse to allow an effects-based dormant Commerce Clause challenge to a zoning decision. In *Randy's Sanitation, Inc. v. Wright County*,⁸⁷ a refuse hauler tried and failed to obtain a conditional use permit to use part of his property for a solid waste transfer station, and then tried and failed to secure a rezoning to allow the same use. While allowing the case to proceed to trial on a discriminatory intent theory, Judge Paul Magnuson refused to allow the plaintiff to attack zoning decisions through an effects-based theory. His justification was based not only on the "particular importance" of zoning "to state and local governments," but also upon the excessive reach of an effects-based claim in the zoning context:

Zoning is a matter of particular importance to state and local governments. See *Night Clubs, Inc. v. City of Ft. Smith*, 163 F.3d 475, 479 (8th Cir. 1998). As a result, federal courts have traditionally been somewhat hesitant to interfere in the zoning process. That concern is particularly present here. Randy's asks this Court, on the basis of two zoning decisions, to declare that those decisions had the "effect of discriminating against interstate commerce." *Those decisions may have had such an effect, but no more so than would any commonplace zoning decision preventing a distributor from building a distribution warehouse in a residential zone.* In short, the County's actions cannot be deemed wrongful in this regard without a consideration of motive—a factor which must be determined at trial.⁸⁸

85. The benefits need not precisely equal the burdens for every particular property owner to survive analysis under the "reciprocity of advantage" analysis. See, e.g., *Penn. Central Transp. Co.*, 438 U.S. at 133–34 ("Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account.").

86. See discussion, *supra* note 12.

87. *Randy's Sanitation Inc. v. Wright County*, 65 F. Supp. 2d 1017, 1029 (D. Minn. 1999). The authors served as defense counsel for Wright County in this matter.

88. *Id.* (emphasis added).

While Judge Magnuson's analysis was wise, his refusal to allow an effects-based dormant Commerce Clause challenge to zoning decisions did not exactly catch on, even within the same federal district. Two years later, in *Superior FCR Landfill Inc. v. Wright County*,⁸⁹ his colleague, Judge John Tunheim, presided over a trial in another dormant Commerce Clause suit against the same county—this one filed by a landfill company whose plans to expand the landfill into a 40-acre agricultural parcel were derailed by zoning amendments that reclassified waste disposal from a conditional use (in an agricultural zone) to an unpermitted use. Judge Tunheim submitted to the jury the question of whether the denial of the rezoning for the landfill discriminated against interstate commerce “in effect.”⁹⁰ The jury found for the plaintiff on that question (and on the question of intentional discrimination), and Judge Tunheim refused to set aside the verdict on posttrial motions.⁹¹

2. Propagating Speculative Claims

When judging the effects of a law challenged under the dormant Commerce Clause requires excessive speculation, the U.S. Supreme Court has sometimes declined the challenge.⁹² The *Superior FCR Landfill* case was atypical, for reasons that made it relatively easier for the trier of fact to reliably foresee the impact of the zoning decision on interstate commerce. Most denials of land-use approval for commercial uses keep a new business from getting off the ground. In those settings, the trier of fact would be forced to do little more than guess about whether the impact of the denial would truly be interstate in character; there is no customer base of an existing operation to analyze and track. The need to build a case upon so much guesswork should discourage courts from embarking down that path. In *Superior*, however, the rezoning amendments (and later denial of a rezoning petition) hastened the demise of an existing landfill business, because it ultimately would need the expansion space to remain in business. That business had an easily documented market. The trier of fact could thus consider

89. *Superior FCR Landfill, Inc. v. Wright County*, No. COV/98-1911 (JRT/FLN), 2002 WL 511460 (D. Minn. Mar. 31, 2002). The authors served as defense counsel for Wright County in this matter as well.

90. *Id.* at *4–5.

91. *Id.*

92. See *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 525 (1989) (“To strike down the KCC’s production regulation as *per se* unconstitutional on the basis of such indirect and speculative effects on interstate commerce ‘would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the . . . Commerce Clause of the Constitution.’”) (quoting *Panhandle E. Pipe Line Co. v. Michigan Public Serv. Comm’n*, 341 U.S. 329, 337 (1951)).

whether the landfill's actual market already extended across state lines, and take that into consideration when evaluating the impact of decisions that could bring those customer relationships to an end.

Even where an existing business is involved, however, finding the lost out-of-state customers is only the beginning of what is likely to be a particularly speculative analysis. To see how speculative such an analysis becomes, consider the jury's task in a zoning dispute like *Superior*. As the *Superior* case showed, zoning decisions usually involve choices between varying commercial uses. In that case, by preventing the landfill expansion, Wright County enabled the expansion area to remain as farmland, producing grain that was an article of commerce. Assuming that one could establish that that grain was an article of interstate commerce,⁹³ a proper effects-based analysis would require the trier of fact to value and then subtract the interstate commerce resulting from the status quo (preserving productive farmland) from the interstate commerce that would result from approval (turning farmland into more landfill space) in order to determine whether the rezoning amendments that preserved the agricultural use had a negative rather than a positive impact on interstate commerce. The margin for error in these kinds of necessarily speculative calculations is likely to be large, to put it mildly.

The calculus is further complicated by another feature of zoning—its frequent *benefit* to interstate commerce. In calculating the net effect of zoning decisions on the total amount of interstate commerce, a court would often be mistaken to assume that zoning restrictions always hinder interstate commerce (and never foster it). Consider, for example, San Francisco's formula business ordinance, which prohibits new chain stores and restaurants in two areas (the Hayes Valley District and North Beach), regulates them more restrictively as conditional uses in other areas, but exempts other areas (such as Union Square and Fisherman's Wharf).⁹⁴ Ordinances of that kind predictably make it more difficult for national chains like Anne Klein, Chili's, and The Limited to displace homegrown shops in eclectic areas. If successful, however, the prohibitions and restrictions in that ordinance will increase interstate

93. Cf. *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat produced for own intrastate consumption affects interstate commerce).

94. See SAN FRANCISCO PLANNING CODE § 703.3 (Added by Ord. 62-04, File No. 031501, App. April 9, 2004); Charlie Goodyear, *Supervisor Moves to Restrict Chain Stores*, S.F. CHRON., July 7, 2005, at B1. It has more recently been amended to extend its protections to other areas of the city, such as a nine blocks along Divisadero Street east of the Panhandle and six blocks east of the corner of Haight Street and Ashbury Street. See Ord. 173-05, File No. 050254, App. July 29, 2005.

commerce by enabling certain areas to maintain their distinctive charm. When communities are charming and unique, people should be more interested in traveling across state lines to visit them for an experience they cannot find at home.⁹⁵ Conversely, when communities are homogenous, citizens have fewer reasons to cross state lines for an experience that will be little different than what can be found closer to home. Thus, an accurate assessment of the impact of such an ordinance on interstate commerce would require measurement of these countervailing forces. As a result, the level of speculation involved in a proper analysis magnifies, because it becomes necessary to evaluate not only what the Chili's claims it would have lured across state lines had its permit been approved, but to subtract from that the forms of interstate commerce that are actually preserved as a result of the denial.

3. Exacerbating Inequalities

Justice Jackson's widely quoted homage to the dormant Commerce Clause doctrine's value of protecting the right of "every farmer and every craftsman" to have "free access to every market"⁹⁶ has an important egalitarian component to it. For that reason it is important to ask whether allowing effects-based challenges to zoning furthers equality. In at least two important respects it does not.

First, effects-based analysis will tend to favor larger businesses over smaller ones and compound existing competitive advantages. Imagine that a community without a hardware store, located twenty miles from a state border, receives two applications to rezone two nearby pieces of land in an area set aside for future residential subdivisions. One application is from Home Depot (for a store 100,000 square feet in size) and the other is from Joe and Jill's Hometown Hardware (for a store 10,000 square feet in size). Finding that either facility would be inconsistent with the comprehensive guide plan, the city council denies both applications. Although both uses were denied for the same

95. Though there are few if any studies of the number of tourists who cross state lines in search of unique retail areas and restaurants, some insight can be gained from studies of the economic effect of historic preservation. According to "Historic Preservation at Work in the Texas Economy" (a report prepared by a statewide preservation partnership based on the study *Economic Impacts of Historic Preservation in Texas*, conducted by the Center for Urban Policy Research at Rutgers University, Texas Perspectives, and the LBJ School of Public Affairs at the University of Texas at Austin), travelers visiting historic sites "spend \$29 more per day than non-heritage travelers and those dollars are more likely to come from out of state." CTR. FOR URBAN POLICY RESEARCH AT RUTGERS UNIV. ET AL., *HISTORIC PRESERVATION AT WORK FOR THE TEXAS ECONOMY* 11 (1999), <http://www.thc.state.tx.us/publications/reports/EconImpact.pdf>. See also Rachelle Garbarine, *A New Report Tells Just How Preservation Pays*, N.Y. TIMES, Aug. 3, 1997, § 9, at 7.

96. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532 (1949).

reasons, at the same time, in the same community, Home Depot would be in a better position than Hometown Hardware to claim that the city's preference for residential use over commercial use has an effect on interstate commerce. That is because Home Depot could more plausibly show that it would have become a destination for customers from around the region, including those coming from across the state border.⁹⁷ Moreover, under one reading of *Hunt*, laws are vulnerable to a discriminatory effects challenge if they level the playing field by reducing a competitive advantage that larger national businesses have over smaller local businesses.⁹⁸ If that were the test for whether a zoning ordinance was unconstitutional, those businesses that already have a competitive advantage—nearly always larger businesses—would have a relatively greater ability to overturn an adverse land-use decision.

Second, permitting effects-based challenges to zoning is likely to create geographic disparities, burdening those communities in proximity to state borders to a greater degree. Denying a rezoning application needed to locate a Home Depot store in a border community such as Texarkana would likely have a greater effect on interstate commerce than denial of approval needed for an equally large store in Austin, located hundreds of miles from the nearest state border. As a result, the zoning authority of Austin would be relatively greater under the U.S. Constitution than the zoning authority of Texarkana. There is nothing in the Supreme Court's dormant Commerce Clause jurisprudence suggesting that it intended to create a new kind of discrimination. Instead, the Supreme Court's rhetoric repeatedly invokes notions of "evenhandedness" and equality.⁹⁹

4. Distorting the Land Use Decision-Making Process

Allowing an effects-based challenge to zoning would often place local officials between a rock and a hard place, under which the legality of their decisions may turn on information that they do not have (and

97. As Timothy Idoni, Mayor of New Rochelle, New York, stated upon the opening of a Home Depot and a Price Club discount retailer in 1996, "These two stores will bring customers to New Rochelle from a wide geographic area." Mary McAleer Vizard, *New Rochelle Hopes Home Depot Sparks a Revival*, N.Y. TIMES, Oct. 20, 1996, §9, at 9. This compounds an existing advantage that large businesses have over smaller businesses in litigation arising from the denial of zoning approval. Home Depot could put together a more intimidating damages theory than could Hometown Hardware, because the greater the potential stream of revenue foreclosed by the denial of approval, the higher an award could be imposed against the city for denying the permit.

98. See Denning and Lary, *supra* note 2, at 940–43.

99. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (balancing test applies to laws which regulate "even-handedly" and have incidental burden on interstate commerce).

cannot seek out without creating an even greater risk of liability). Few, if any applications, for zoning approval for a business indicate the size of the likely market of customers. Companies understandably consider such information proprietary, and in any event, volunteering it rarely would improve the chances of approval. As a result, cities interested in avoiding effects-based dormant Commerce Clause liability would need to affirmatively request geographically specific information from their applicants in order to intelligently evaluate whether denial would adversely affect interstate commerce. However, to ask for this kind of geographically specific information would constitute evidence that the city officials were *interested* in whether the customer base resided in other states, which ironically, could then serve as the basis for an inference of an *intention* to discriminate against those customers (and, by inference, against a business that would attract them).¹⁰⁰ Thus the risk of dormant Commerce Clause liability discourages zoning officials from learning as much as possible about a zoning applicant and chills the process generally.

In summary, there are special problems that arise in zoning cases when courts endeavor to decide whether a particular decision or regulation has a discriminatory effect on interstate commerce. First, many ordinary zoning laws have as their purpose to restrict commerce from certain areas, for reasons that are undisputedly legitimate (but that may not survive strict scrutiny). Because most zoning disputes arise from the denial of permission to commence a new property use, evaluation of the impact of that decision requires a particularly high degree of guesswork. The guesswork is compounded when a zoning ordinance or denial has a mixed impact on different kinds of interstate commerce, chilling one kind while encouraging another; in those settings, the impact on interstate commerce is incredibly difficult to measure and compare. If that weren't enough, allowing effects-based challenges to zoning decisions would create new inequalities, by favoring the largest market participants over smaller ones, and

100. “[D]iscrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose.” *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003) (striking down South Dakota constitutional amendment forbidding most corporate farming). Borrowing from the U.S. Supreme Court’s view of what can shed light on whether a land-use decision was motivated by racial discrimination, the Eighth Circuit and the Fourth Circuit have identified statements by lawmakers and the sequence of event leading up to the particular decision being challenged as sources of direct or indirect evidence of whether an action was motivated by an intention to discriminate against interstate commerce. *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004); *Waste Mgmt. Holdings Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977)).

disfavoring border communities over those located the greatest distances from state lines.

D. Summary

As this discussion suggests, current dormant Commerce Clause doctrine offers the worst of both worlds: in the lower courts, very much (the validity of state regulation) is made to depend on very little (the amorphous distinctions between discriminatory purpose, discriminatory effect, and incidental burdens as well as the vexing issue of disparate impacts). Meanwhile, the Supreme Court continues to compile a record of essentially ad hoc decisions in this area that does little to assist the lower courts in deciding actual cases.¹⁰¹ This combination of risks and ambiguities is not without consequence. As several commentators have pointed out, legitimate state regulation may be chilled by the uncertainties inherent in the Court's current approach, a very real concern in an area of regulation as dependent on planning as zoning.¹⁰²

All of these problems taken together suggest the need for reform of the Court's current doctrine, and there have been several proposals made to do just that.

III. TEMPERING DISCRIMINATORY EFFECTS

Part II presented the problems created by dormant Commerce Clause discriminatory effects analysis generally as well as in the specific context of zoning decisions, suggesting the acute need for reform. In this part, we examine several reform proposals that have been offered over the last twenty years but have failed to gain traction at the Court. Drawing inspiration and caution from these earlier efforts, we then turn to the task of crafting our own, more modest reform proposal.

101. BITTKER, *supra* note 5, §6.06[A]:

The Supreme Court has employed [a] case-by-case process of passing on the constitutionality of state measures charged with the taint of economic protectionism in a wide variety of contexts, without finding it necessary to revise the *Pike* definition or its related 'virtually per se' principle, though it has occasionally refined or augmented its approach in minor respects.

102. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 414 (1986) ("Because the outcomes of the cases are so unpredictable, the doctrine may well have a chilling effect on legitimate state regulation."); Lawrence, *supra* note 35 at 398 ("Under the current doctrine, lawmakers and others at the state level are left with far too little idea of which state laws will . . . withstand judicial scrutiny. This . . . hinders States' efforts to regulate matters within their own borders . . .").

*A. Selected Modern Reform Proposals:
Too Much, Too Soon*

Given the quantity of comment on the subject, it would appear that hardly anyone is really satisfied with the Court's post-*Pike* dormant Commerce Clause doctrine. In this section, we examine several reform suggestions that have been made over the years. Although none of these proposals has been adopted by the Court—and there are important reasons for that which we shall explore—each offers some important lessons for more the modest reform framework that we will soon construct.

1. Farber (1986) and Regan (1986): Focusing on Intent

In 1986, Professor Farber¹⁰³ and Professor Regan¹⁰⁴ independently concluded that the proper cure for the dormant Commerce Clause doctrine's malaise was to adopt a purely intent-based framework of the sort the Third Circuit posited the following year in *Oberly*.¹⁰⁵

Farber argued that such an analysis was compelled by what he viewed as the central function of the dormant Commerce Clause doctrine: protecting the rights of out-of-state persons negatively impacted by in-state political choices over which they have no control, based on a representation reinforcement theory of the dormant Commerce Clause drawn from *United States v. Carolene Products*.¹⁰⁶ Taking aim at *Pike*, Farber noted that in situations where there was no discrimination—that is, in-state and out-of-state actors were equally burdened by a measure—there was no justification for a court to step in, as in-state political processes ought to be responsive to an issue that burdened in-state residents to the same extent as out-of-state residents.¹⁰⁷ In Farber's view, this "process" justification for dormant Commerce Clause doctrine was far more persuasive than a competing economic justification which saw in the dormant Commerce Clause a

103. Farber, *supra* note 102.

104. Regan, *supra* note 20.

105. See *supra* Part II.B.2.

106. Farber, *supra* note 102, at 400–03. Farber's argument for a process-based justification for dormant Commerce Clause doctrine goes like this: First, he points to *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), as the revival of the process-based reasoning associated with *Carolene Products*, noting that the *Garcia* Court concluded that "judicial intervention [in federalism issues] is proper only when the federal legislative process is inadequate to protect the interests of the states." Farber, *supra* note 102, at 403. From this, Farber reasoned that "[i]f process theory is to determine the extent of judicial protection of the states, it seems equally applicable when determining judicial limitations on state powers." *Id.*

107. Farber, *supra* note 102, at 401.

guarantee of a laissez-faire economic system.¹⁰⁸ As for the question of discrimination and disparate impact, Farber expressed his concerns that it would be anomalous to, in effect, treat economic discrimination more seriously than racial discrimination under the Constitution by permitting such claims in dormant Commerce Clause cases but not in Fourteenth Amendment cases.¹⁰⁹

Unlike Farber, Regan rejected the *Carolene Products* process justification for dormant Commerce Clause analysis¹¹⁰ and gravitated instead toward what he describes as structural¹¹¹ goals of promoting federal political unity and, to a significantly lesser extent, avoiding market distortions that lead to economic inefficiencies.¹¹² Regan teaches philosophy in addition to law, and his thesis is exhaustive. But greatly simplified, Regan basically argued that the dormant Commerce Clause doctrine should be most concerned about measures like embargoes, tariffs, and quotas because of their tendency to undermine the federal political union and because they generally result in economic inefficiencies without offsetting benefits, while unintentionally discriminatory state regulation ought to be tolerated because it would be unlikely to offend political unity and because associated market inefficiencies were speculative and might be offset by other gains (like environmental protection).¹¹³ Accordingly, Regan's framework would treat discriminatory effect as evidence of discriminatory intent, but would not permit a claim based solely on disparate impact (let alone incidental burdens) on interstate commerce.¹¹⁴

2. O'Grady (1997): Distinguishing Protectionism and Discrimination

Nearly a decade after Farber's and Regan's work, Professor O'Grady suggested a revised dormant Commerce Clause framework based on her observation that there are relevant distinctions between protectionism and discrimination. In this respect, her work is very reminiscent of Regan's, as both are most concerned about thwarting embargoes and other traditional tools of economic protectionism and less concerned with preventing inadvertent discrimination against interstate commerce. However, O'Grady argues that her model departs from Regan's in that

108. Farber, *supra* note 102, at 401-02.

109. Farber, *supra* note 102, at 403-05. Cf. Regan, *supra* note 20, at 1146.

110. Regan, *supra* note 20, at 1160-67.

111. *Id.* at 1111.

112. *Id.* at 1112-25.

113. *Id.* at 1112-28.

114. *Id.* at 1144-46.

she would not “accept the discrimination inquiry as an appropriate proxy for protectionism,” as she claims Regan does.¹¹⁵

Instead, O’Grady would deploy a “protectionist-first” test, asking first and foremost whether the statute in question is protectionist—that is, “whether the state enacted the statute because it intended to isolate itself and/or protect a segment of its industry from competition on the interstate market.”¹¹⁶ Only if this inquiry returns a negative response would O’Grady’s model ask about discrimination, and only then using a kind of discrimination/*Pike* hybrid balancing analysis.¹¹⁷

O’Grady’s protectionism-first approach differs from the Court’s current discrimination-first approach review in that it does not in the first instance require analysis of whether out-of-state economic interests are burdened in a way that benefits in-state ones; instead, it turns largely on intent: “It is sufficient simply to ask whether the decisionmakers sought purposefully to protect a segment of their own and, in so doing, impacted or disrupted the national market.”¹¹⁸ O’Grady also argues that the magnitude of impact—a factor ordinarily associated with *Pike* but not with discrimination—is important to her protectionism-first review,¹¹⁹ not as a balancing factor but rather as potential evidence of protectionist intent.¹²⁰

Intriguingly, O’Grady would not dispose of the discrimination inquiry altogether but would instead temper it through the application of a *Pike*-like balancing process.¹²¹ Part of her reason for keeping discrimination around appears to be pragmatic: Although O’Grady finds process justifications for dormant Commerce Clause doctrine far less persuasive than the functionalist/political justification identified by Regan and fundamental to her protectionist-first approach,¹²² she nevertheless would retain discrimination analysis in her model because doing so “respects the Court’s long-held concern with” process-based justifications.¹²³ Additionally, O’Grady argues that discrimination analysis may be useful in netting protectionist measures concealed by pretextual explanations of statutory purpose.¹²⁴

115. O’Grady, *supra* note 6, at 576 n.20.

116. *Id.* at 580.

117. *Id.* at 630.

118. *Id.* at 589–91.

119. *Id.* at 600–01.

120. *Id.* at 601–02.

121. *Id.* at 630–31.

122. *Id.* at 624–27.

123. *Id.* at 630.

124. *Id.* at 600–30.

3. Lawrence (1998): A Unitary Framework

A more recent and ambitious proposal by Professor Lawrence would discard the current framework altogether in favor of what he calls a "Unitary Framework" that seeks to consolidate "the Court's array of dormant-commerce-clause pronouncements and leading scholarly commentary on the subject under one roof."¹²⁵ Lawrence details his framework in an elaborate flowchart,¹²⁶ which he summarizes as involving two essential questions: "(1) whether the state . . . regulation [has] a legitimate purpose and, if so, (2) whether [that] purpose is so outweighed by the burdens imposed . . . on interstate commerce . . . that it must be struck down."¹²⁷ Lawrence's placement of the legitimate state purpose inquiry first in his flowchart reflects his belief that the Court should presume valid those state laws which have as their object nondiscriminatory purposes, such as providing "for the health, safety, or welfare of its citizens."¹²⁸

4. Observations

In his 1986 article, Professor Farber identified five earlier reform proposals which had failed to make "headway"¹²⁹ and pointedly observed that "[t]o date, scholarly criticisms of dormant commerce clause doctrine have been ignored by the Court."¹³⁰ Farber identified *stare decisis* as a major inhibitor of reform proposals to that point,¹³¹ and little has changed in the ensuing twenty years. The Supreme Court has issued major dormant Commerce Clause opinions like *Carbone* in which it could have clarified the meaning of its effects analysis; it has even cited to pieces of various reformers' proposals. But there has been no significant clarification or development of the doctrine in that time. To the contrary, since *Pike*, the Supreme Court has basically fallen back on

[A] case-by-case process of passing on the constitutionality of state measures charged with the taint of economic protectionism in a wide variety of contexts, without finding it necessary to revise the *Pike* definition or its related "virtually per se" principle, though it has occasionally refined or augmented its approach in minor respects.¹³²

125. Lawrence, *supra* note 35, at 400.

126. *Id.* at 415-16.

127. *Id.* at 400.

128. *Id.* at 417-18.

129. Farber, *supra* note 102, at 396 n.11.

130. *Id.* at 410.

131. *Id.* at 411.

132. BITTKER, *supra* note 5, §6.06[A].

Given this track record, the prospects for proposal that would fundamentally rewrite dormant Commerce Clause doctrine—as all of these authors propose in one way or another—seem bleak.¹³³ Nonetheless, the accumulated scholarship in this area offers many valuable components which ought to be salvaged. There is value in the basic notion that that doctrinal reform should be driven by doctrinal purpose, and more importantly in the identification of distinct political and economic justifications that are not necessarily of equal weight. Additionally, these scholars' collective identification of the effects prong as the primary doctrinal offender suggests that reform efforts should be focused in that area first. Extending the metaphor for a moment, it would seem that the Court's resistance to implementing these various broad proposals suggests the need to find some kind of narrower lens through which to achieve that focus.

B. Synthesizing a General Argument to Temper the Effects Prong

The following discussion is intended to lay the conceptual groundwork for a more modest reform proposal by establishing several propositions that, when lined up in the proper order, compel the conclusion that the discriminatory effects component of dormant Commerce Clause doctrine ought to be subordinated in some circumstances to other, more significant policy values. The argument's pieces, in order, are:

(1) Dormant Commerce Clause doctrine is best justified on two grounds: political and economic.

(2) While the political justifications of dormant Commerce Clause doctrine are hard to dispute, the economic ones are unsupported by the historical record and smack of already discredited judicial management of the national economy. As such, any portion of the dormant Commerce Clause analysis that depends on the economic justification alone is suspect and, at a minimum, ought to be weighed against other policy values.

(3) Effects analysis is relevant only to the economic justifications for dormant Commerce Clause doctrine.

(4) Therefore, application of effects analysis should give way when other compelling policy interests so demand.

Let us proceed with the arguments.

133. As mentioned earlier, Farber himself identified stare decisis as a major inhibitor of reform proposals to that point. See Farber, *supra* note 102, at 411.

1. Political and Economic Justifications for Dormant Commerce Clause Doctrine

Justice Wiley Rutledge once described the problem of interstate commercial rivalry as the “proximate cause of our national existence,” referring to the fact that the Philadelphia constitutional convention came about as a result of the failure of the Articles of Confederation to check commercial rivalries among the states.¹³⁴ Though not all commentators share this historical view,¹³⁵ there is no doubt that state economic protectionism was and is the main impetus for the Court’s development of the dormant Commerce Clause doctrine, and there is a consensus among most commentators that the doctrine rests on two specific kinds of objections to state economic protectionism, one political and one economic.¹³⁶

First, state economic protectionism is contrary to the political principles of our federal system because it reflects a kind of hostility toward other states that is likely to result in resentment and retaliation.¹³⁷ This concern is captured in a letter James Madison wrote to George Washington prior to the 1787 convention arguing that in addition to the need for a positive grant of power to the national government to regulate interstate trade, there was need for a negative on the power of states to do so, without which the states would “continue . . . to harass each other with rival and spiteful measures”¹³⁸ It is also reflected in Justice Brennan’s explanation that the Commerce Clause reflects:

a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.¹³⁹

Similarly, Justice Kennedy has opined that “[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite

134. See generally BITTKER, *supra* note 5, §1.01.

135. *Id.* at §1.01 n.2 (summarizing “conflicting views of the nature and extent of the pre-1787 commercial ‘warfare’ among the states”).

136. See generally Regan, *supra* note 20, at 1112–16; Lawrence, *supra* note 35, at 411 (citing GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 293–94 (3d ed. 1996)).

137. Regan, *supra* note 20, at 1112–16. Professor Regan actually separates hostility and retaliation into separate policy objections, but because both relate to undermining the federal political union we combine the concepts here for ease of reference.

138. Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 627 (1999).

139. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

those jealousies and retaliatory measures the Constitution was designed to prevent.”¹⁴⁰

Second, state economic protectionism is disfavored because it is sometimes economically inefficient, in that it sometimes diverts business away from presumptively low-cost producers without any colorable justification in terms of “benefit that deserves approval from the point of view of the nation as a whole.”¹⁴¹ This concern with maintaining market efficiency is often tied to Justice Jackson’s observations that the Commerce Clause (and the Court’s interpretation of it) produced an economic system in which “every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation” and “every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.”¹⁴²

140. *C & A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (emphasis added). The Court’s sometimes expansive explanations of the purposes of dormant Commerce Clause doctrine result in two additional possible purposes. First, it might be argued that *New Jersey* created a third objection to state economic protectionism: that states should not be allowed to escape the burdens of social problems afflicting the nation as a whole by erecting economic barriers. However, this is really little more than an aspect of the political justification. Second, in *Dennis v. Higgins*, 498 U.S. 439 (1991), the Court found that claims for violation of the dormant Commerce Clause doctrine could be asserted under 42 U.S.C. § 1983, noting that the doctrine secures individual “rights” to engage in interstate commerce and therefore satisfies § 1983’s “rights, privileges, or immunities secured by the Constitution and laws” language. Again, if one reflects upon the purpose of securing this individual right (and upon its defeasibility by Congress) one returns to the essential structural/political purpose of the doctrine.

An additional political justification is the process concern highlighted by Farber, *supra* note 102, at 400–01, in which dormant Commerce Clause review is justified as a counterbalance for defects in representative government that mean that local officials are unlikely to be responsive to external concerns. This more suspicious view of local officials and their interests and motives is reflected in Justice Blackmun’s partial dissent in *Exxon v. Maryland*, 437 U.S. 117 (1978), where he wrote that “one of the basic assumptions of the Commerce Clause is that local political systems will tend to be unresponsive to problems not felt by local constituents; instead, local political units are expected to act in their constituents’ interests.” *Id.* at 151 (Blackmun, J., dissenting in part). Notably, Justice Blackmun’s dissent was not joined by any member of the Court. He did not explicitly derive this statement from any previous decision of the Court (although *Carolene Products* may have been in mind), and no subsequent opinion of any Justice has quoted it, even in dissent. Even if his “assumption” were correct, however, it still relates solely to local officials’ motivations and incentives, and therefore cannot be used to justify effects-based liability, which is important only in those circumstances in which an intention to discriminate against interstate commerce is not present. In sum, while there are numerous critiques of process approaches generally (see articles collected in Regan, *supra* note 20, at 1161 n.126), for our purposes it is enough to note that this concern does not upset our argument against the application of discriminatory effects.

141. Regan, *supra* note 20, at 1112–18.

142. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538–39 (1949), quoted in BITTKER, *supra* note 5, §1.03; see also Farber, *supra* note 102, at 399. Farber cites Justice Jackson’s reasoning in the *Hood* case, source of the “every farmer and every craftsman” quote as an example of this economics-based rationale. We note, however, that despite that case’s expansive

2. Relative Weakness of Economic Justifications

The political justifications for dormant Commerce Clause doctrine significantly outweigh the economic justifications in two respects. First, the historical record contradicts arguments by some modern commentators that the framers sought through the Commerce Clause to institutionalize laissez-faire economic policy. As Regan notes, the framers' concerns with pure economic efficiency were quite secondary to their concerns with preserving the federal political union:

The people who wrote our Constitution were by no means thoroughgoing free traders. . . . The framers did have some efficiency-related objection to interstate protectionism. They argued that eliminating preferential state regulation of trade would encourage agriculture and industry. But that is a much narrower claim than is suggested by modern apostles of efficiency, who operate with a strong presumption in favor of total economic laissez-faire. The framers would have recognized many good reasons for state economic regulation, and they would have recognized that states must be the primary judges of what are good reasons.¹⁴³

Second, there is the backdrop of the *Lochner* era and the Court's eventual rejection of the notion that the Constitution embodies a laissez-faire economic theory. The Court's attempts to connect dormant Commerce Clause doctrine with free-market, laissez-faire principles have been sharply criticized as a throwback to this era,¹⁴⁴ and a relatively recent example illustrates the problems with this approach. In *West Lynn Creamery, Inc., v. Healy*, Justice Stevens explained that a protective tariff represents the "paradigmatic example of a law discriminating against interstate commerce" because "it violates the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when

language, historical evidence suggests that Justice Jackson—a New Deal luminary—was more concerned about avoiding the *political* impacts of protectionism than the *economic* impacts of market regulation. Compare Robert H. Jackson, Solicitor General of the United States, Address at the National Conference on Interstate Trade Barriers: Trade Barriers—A Threat to National Unity, (April 6, 1939), available at <http://www.roberthjackson.org/Man/theman2-5>:

Our forefathers believed that exclusive control by Congress of commerce among the several States made certain that such trade would not be obstructed by State barriers. But today we witness a growing tendency to erect what are, in substance, State tariff walls. State laws which make the marketing of goods more difficult or expensive have been steadily increasing in both number and variety. Between neighboring States discrimination and retaliation, rivalries and reprisals have flared up.

Robert H. Jackson, *supra* note 5 (The Commerce Clause "forms the warp into which theoreticians have woven strange designs of laissez faire. . .").

143. Regan, *supra* note 20, at 1124 (internal citations omitted).

144. Farber, *supra* note 102, at 399.

the same goods could be produced at lower cost in other States.”¹⁴⁵ Though there is general agreement that the Commerce Clause embodies the “principle of a unitary national market,” it is not at all clear that this principle requires judicial invalidation of state laws simply because they (in the words of the Court) “neutraliz[e] the advantage possessed by lower cost out-of-state producers.”¹⁴⁶ Strictly applied, this approach leaves little room for the state law that, despite this effect on interstate commerce, advances other policy considerations valuable to the nation as a whole.¹⁴⁷ In this light we see that favoring unfettered market function becomes a choice of economic policy, one that is not mandated by the Commerce Clause now any more than it was by substantive due process in the *Lochner* era.¹⁴⁸

Another way to think about this objection is to consider the implications for congressional regulation of the economy. As Professor Farber observes, a free-market-based theory of the Commerce Clause would seem to prove too much, in the sense that it would not only

145. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

146. *Id.* at 194. Justice Scalia, who hardly seems a likely opponent of free market economics, made the point forcefully in his dissent:

The purpose of the negative Commerce Clause, we have often said, is to create a national market. It does not follow from that, however, and we have never held, that every state law which obstructs a national market violates the Commerce Clause. Yet that is what the Court says today. It seems to have canvassed the entire corpus of negative-Commerce-Clause opinions, culled out every free-market snippet of reasoning, and melded them into the sweeping principle that the Constitution is violated by any state law or regulation that “artificially encourage[s] in-state production even when the same goods could be produced at lower cost in other States.”

Id. at 207–08 (Scalia, J., dissenting).

147. *Id.* at 209 (Scalia, J., dissenting)

The Court’s guiding principle also appears to call into question many garden-variety state laws heretofore permissible under the negative Commerce Clause. A state law, for example, which requires, contrary to the industry practice, the use of recyclable packaging materials, favors local nonexporting producers, who do not have to establish an additional, separate packaging operation for in-state sales. If the Court’s analysis is to be believed, such a law would be unconstitutional without regard to whether disruption of the “national market” is the real purpose of the restriction, and without the need to ‘balance’ the importance of the state interests thereby pursued, see [*Pike*]. These results would greatly extend the negative Commerce Clause beyond its current scope.

148. Curiously, Justice Stevens seemed to have taken a contrary view of these issues in his decision in *Exxon*. There, the Maryland legislature prohibited producers or refiners of petroleum from operating gas stations in Maryland. Writing for the majority, Justice Stevens rejected arguments that the law would push some refiners out of the retail market entirely, deprive consumers of special services they enjoyed because of the participation of those refiners in the market, and generally alter the market structure—efficiency concerns which seemed logically to follow from the adoption of the statute. Justice Stevens rejected all the arguments, noting that they were “to the wisdom of the statute, not to its burden on interstate commerce.” 437 U.S. at 127–28, quoted in Regan, *supra* note 20, at 1237.

justify restricting state regulation that impacts interstate commerce, but federal regulation as well.¹⁴⁹ Of course, the Court has gone in exactly the opposite direction, finding Congress's power to regulate commerce to be "plenary" and explicitly noting that dormant Commerce Clause doctrine does not "limit the authority of *Congress* [as opposed to the states] to regulate commerce among the several states as it sees fit."¹⁵⁰ Accordingly, the Court has stated, "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."¹⁵¹ Such a dichotomy makes no sense if promoting free-market economics is the purpose of the Commerce Clause, but it makes perfect sense if the purpose of that clause (and associated case law) is to promote the functioning of the federal union. Indeed, circling back to the historical argument, it should be observed that the framers themselves wanted to permit a protectionist foreign trade policy.

3. Effects Analysis Is Consistent Only with Economic Justifications

Professor Regan's analysis of how these policy concerns interact with discriminatory intent and effect under is illuminating because it reveals that state and local laws with discriminatory effects (but not intent) offend only the economic justifications for dormant Commerce Clause doctrine. As noted above, Regan first argues that intentionally discriminatory, "classical instruments of protectionism"—the tariff, the embargo, and the quota—run afoul of both political and economic objections. A state enacting one of these measures plainly manifests hostility toward its neighbors and risks provoking similar measures in retaliation, undermining our political union.¹⁵² These measures are also inefficient because they distort the market by favoring firms based on

149. Farber, *supra* note 102, at 402 (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339–40 (1982); *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652–53 (1981)).

150. *W. & S. Life*, 451 U.S. at 652 (emphasis in original).

151. *Id.* For a radically different perspective on this issue, see Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 156 (2005):

The Court's willingness to allow Congress to overrule the Dormant Commerce Clause's limitation on state authority is fundamentally inconsistent with the Court's declared view that Congress may not authorize the states to violate the Constitution. That is bad enough, but, even worse, the Court has failed to provide a cogent explanation for this anomalous exception.

152. Regan, *supra* note 20, at 1113–14.

their geographic location instead of other market advantages, without promoting any other national interest that might justify such a distortion.¹⁵³

Regan also sets forth what he regards as a contra-example: an Oregon statute banning the sale of pull-top beverage cans and imposing a refundable-deposit scheme.¹⁵⁴ The law, which Oregon justified on environmental grounds, had the effect of raising transportation costs because returnable glass bottles are heavier than disposable metal cans; as a result, the law tended to favor Oregon beverage bottlers over out-of-state bottlers because the former were closer to the consumer and therefore incurred less additional transportation cost.¹⁵⁵ The measure was upheld by an Oregon court—correctly in Regan’s view—because it did not trigger either of the principal policy objections to protectionism. Regarding federal political union concerns, Regan makes an insightful argument: “Protectionist effect, considered in itself, is also perfectly consistent with the concept of union.”¹⁵⁶ This is because a measure like Oregon’s, which arguably has a protectionist effect but not a protectionist intent, cannot reasonably be construed by other states as a hostile act justifying resentment or retaliation.¹⁵⁷

Thus it turns out that, to the extent that dormant Commerce Clause doctrine is concerned about unintentionally discriminatory effect, such a concern must relate solely to economic considerations and not political ones.

4. Subordinating Effects Analysis: The Persistent Lessons of *Cooley v. Board of Wardens*

To summarize the argument thus far, the dormant Commerce Clause is justified on two kinds of grounds: political and economic. Though the political justifications are hard to refute, the economic ones (as we have seen) are unsupported by the historical record and smack of already discredited judicial management of the national economy. As such, any portion of the dormant Commerce Clause analysis that depends on the economic justification alone is suspect and, at a minimum, ought to be weighed against other policy values before it is

153. Regan, *supra* note 20, at 1118.

154. Regan, *supra* note 20, at 1102–04 (discussing *Am. Can Co. v. Or. Liquor Control Comm’n*, 517 P.2d 691 (Or. Ct. App. 1973)).

155. Regan, *supra* note 20, at 1102–04.

156. Regan, *supra* note 20, at 1127.

157. Regan, *supra* note 20, at 1133. Regan also persuasively rejects the argument that such measures run counter to federal union because they fragment the common market that is a key aspect of that union. Regan, *supra* note 20, at 1128.

used to invalidate otherwise legitimate state and local laws. As it turns out, discriminatory effects analysis falls into this category, thus justifying making the application of that doctrine conditional and not automatic in every case. The next question is, how do we judge whether a given policy interest ought to justify setting aside the discriminatory effects analysis?

We begin crafting our answer with an examination of the Court's 1852 decision in *Cooley v. Board of Wardens*.¹⁵⁸ There, the Supreme Court considered a challenge to a Pennsylvania law that required ships of 75 tons or more, other than certain coal ships, leaving the port of Philadelphia to hire local pilots or to pay a fine used to support "Distressed and Decayed Pilots."¹⁵⁹ Reflecting its awareness of the problem of pretextual laws concealing intentional discrimination against commerce, the *Cooley* Court noted that it did not find the law "to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one."¹⁶⁰ The Court then upheld the law based on the notion that while some matters required uniform national regulatory rules, others which depend largely on local conditions—in this instance, "the circumstances of the ports within their limits"—are for that reason best left to local regulators.¹⁶¹ In the words of the Court, "the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."¹⁶²

The *Cooley* national/local test was eventually superseded by another dormant Commerce Clause test known as the direct/indirect burdens test,¹⁶³ which in turn was later supplanted by the discrimination/incidental burdens formulation in *Pike*. Nevertheless, the reasoning at the core of *Cooley* has never really gone away. In 1936, then-professor Felix Frankfurter described *Cooley* as "classic doctrine."¹⁶⁴ Shortly thereafter, the Court itself "again breathed the spirit of *Cooley*"¹⁶⁵ when it upheld a South Carolina law regulating the width and length of trucks

158. 53 U.S. 299 (1851).

159. *Id.* at 299, 311–12.

160. *Id.* at 312.

161. *Id.* at 320.

162. *Id.*

163. BITTKER, *supra* note 5, §6.04 (citing *Smith v. Alabama*, 124 U.S. 465, 482 (1888)).

164. FRANKFURTER, *supra* note 5, at 56.

165. BITTKER, *supra* note 5, §6.04.

used in interstate commerce on state highways, noting that the building and maintenance of highways “is peculiarly within [a state’s] competence, even though interstate commerce is affected.”¹⁶⁶

Since then, the Court has continued to invoke this aspect of *Cooley*, not as a decisive dormant Commerce Clause criterion, but as a kind of background principle fortifying its decisions to uphold local laws regulating local concerns and to invalidate local laws affecting national subjects.¹⁶⁷ For example, in 1978, the Court cited *Cooley* when it rejected a dormant Commerce Clause challenge to a Washington law requiring oil tankers that did not meet the state’s design requirements to be accompanied by a tug-escort when traversing Puget Sound.¹⁶⁸ The Court found the law to be similar to the local pilotage requirement in *Cooley* and as such it was “not the type of regulation that demands a uniform national rule.”¹⁶⁹ Revisiting related laws in 2000 after congressional action in response to the *Exxon Valdez* disaster, the Supreme Court again cited *Cooley*, this time to support its decision to strike down aspects of those laws on federal preemption grounds.¹⁷⁰ And in perhaps the paradigmatic modern affirmation of *Cooley*’s continued vitality, a 2003 decision by the Second Circuit cited the case in noting that the Internet was destined to be governed by the principle of national uniformity, rather than local experimentation.¹⁷¹ Thus, as Professor Tribe has summarized:

[T]he enduring legacy of *Cooley* has been this basic theme: The validity of state action affecting interstate commerce must be judged in light of the desirability of permitting diverse responses to local needs and the undesirability of permitting local interference with such uniformity as the unimpeded flow of interstate commerce may require.¹⁷²

That basic theme is helpful in moving us toward an answer to our question, but it is probably not enough by itself. Given *Cooley*’s semi-retired (or perhaps emeritus) status in dormant Commerce Clause jurisprudence, it seems appropriate to demand something additional beyond simply reviving *Cooley*’s national/local test. Therefore, we think an appropriately stringent way of framing our proposed rule is as

166. S.C. State Highway Dep’t v. Barnwell Bros., 303 U.S. 177, 187–88 (1938).

167. See BITTKER, *supra* note 7, §6.03, and cases cited therein.

168. Ray v. Atl. Richfield Co., 435 U.S. 188 (1978), discussed in BITTKER, *supra* note 5, §6.03.

169. Ray, 435 U.S. at 179–80.

170. United States v. Locke, 529 U.S. 89, 99–100 (2000).

171. Am. Booksellers Found. v. Dean, 342 F.3d 96, 104 (2d Cir. 2003).

172. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 407 (2d ed. 1988).

follows: Dormant Commerce Clause discriminatory effects analysis should not be applied to state and local regulations (1) of uniquely local matters and (2) serving values of national significance.¹⁷³

Discovering such values in the seemingly pedestrian activity called zoning is the focus of Part IV.

IV. ZONING AND THE DORMANT COMMERCE CLAUSE: RECONTEXTUALIZING THE NATIONAL VALUE OF LOCAL CONTROL

Part III presented a general argument for subordinating dormant Commerce Clause effects analysis when competing national policy values so require. In this part, we flesh out that general argument with a specific example: zoning. As this part demonstrates, the Supreme Court has long recognized both the uniquely local considerations inherent to zoning and the important values that local control of zoning serves. Together, these values justify setting aside discriminatory effects analysis of zoning decisions under our incremental reform approach.

A. *Zoning's Local Character*

The role that local interests appropriately play in the zoning process is apparent from the Supreme Court's landmark decisions concerning the constitutionality of zoning. In *City of Euclid v. Ambler Realty Co.*, when first upholding the constitutionality of zoning, at least in the abstract, the Supreme Court justified Euclid's exclusion of industrial, commercial, and high-density housing uses from a low-density residential area uses in part because they "deprive[d] children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities."¹⁷⁴

173. Cf. Regan, *supra* note 20, at 1192 (dormant Commerce Clause economic considerations should not trump state laws which advance policies that are "fundamentally related to the existence and viability of federal union"). Regan's purposes are a bit different than ours: He advocates dispensing with the disparate impact theory of the dormant Commerce Clause entirely, in favor of an analysis in which discriminatory intent is always required. In Regan's view, effects might be evidence of intent, but effects alone are never enough to invalidate state action. This view has much to recommend it from a normative perspective, especially when the constitutional treatment of economic discrimination is compared to the constitutional treatment of racial discrimination. But we are not committed to making that extensive an argument in this article. It is also possible that Professor Regan might disagree about whether the local interests that drive zoning decisions meet his definition of national interests. See Regan, *supra* note 20, at 1192 ("Genuine national interests for dormant commerce clause purposes are those interests, and only those, that, like the interest in preventing state protectionism, are fundamentally related to the existence and political viability of federal union.").

174. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

In *Berman v. Parker*, the Supreme Court's next major decision involving the constitutionality of planning—when upholding urban renewal as a public purpose under the takings clause—a unanimous Supreme Court recognized that “it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”¹⁷⁵

Twenty years later, the author of *Berman*, Justice Douglas, elaborated in the Equal Protection case of *Village of Belle Terre v. Boraas* that the power of local governments to regulate land use “is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”¹⁷⁶ Even the dissenting justice in *Village of Belle Terre*, Justice Thurgood Marshall, recognized that zoning “may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.”¹⁷⁷

These values identified by the Supreme Court resonate with the *Cooley*-esque notion that local officials are best positioned to decide peculiarly local questions. In technical terms, consider that the predominant purpose of most zoning decisions is to arbitrate between *alternative* uses of property, each of which can be presumed to be economically viable in some respect.¹⁷⁸ Unless a local government is engaging in a regulatory taking of property without just compensation (which would already be unconstitutional under the Fifth and Fourteenth Amendments), every denial of a rezoning application, conditional use permit application, PUD application, reguiding application, or the like, will leave in place at least one economically viable use for that site.¹⁷⁹ Deciding which use among many possible uses is the “best” use in a given community is of necessity a question of

175. *Berman v. Parker*, 348 U.S. 26, 31 (1954).

176. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

177. *Boraas*, 416 U.S. at 13 (Marshall, J., dissenting on other grounds). See also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (“The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.”) and *City of Memphis v. Greene*, 451 U.S. 100, 127 (1981) (“The residential interest in comparative tranquility is also unquestionably legitimate.”).

178. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. REV. 36, 50–63 (1964).

179. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992) (a taking occurs in “the extraordinary circumstance when no productive or economically beneficial use of land is permitted”).

local needs and values. It is certainly not one calling for (or even susceptible to) uniform national regulation.

B. Zoning's National Importance

One measure of the importance of zoning to our national life is the Supreme Court's acceptance of otherwise constitutionally suspect conduct (such as content-based discrimination otherwise violative of the First Amendment) when it is embodied in a zoning regulation requiring particular activity to be conducted in particular areas. For example, in the First Amendment case of *Young v. American Mini-Theatres*, the Supreme Court affirmed the constitutionality of Detroit's Anti Skid Row Ordinance, even with its siting requirements that applied to theatres based on the content of the movies shown there, because "the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures."¹⁸⁰ Because the Court's majority was willing to uphold an ordinance that singled out speech based on the communicative impact of its content, without subjecting it to strict scrutiny, Justice Stewart wrote in his dissent that the ruling was a "drastic departure from established principles of First Amendment law."¹⁸¹ Concurring in *Young* (and providing a decisive vote), Justice Powell rejected the theatres' invitation to "mechanically apply the doctrines developed in other contexts," emphasizing that it was a case "presenting an example of innovative land-use regulation."¹⁸² He found it "undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'"¹⁸³

The special deference given to zoning decisions is also reflected in the federal appellate courts' decisions warning that federal courts should not become boards of zoning appeals through the manner in which they apply the U.S. Constitution to land use decisions.¹⁸⁴ As Justice Alito

180. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71–72 (1976) (plurality opinion).

181. *Id.* at 84 (Stewart, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

182. *Id.* at 73, 76 (Powell, J., concurring).

183. *Id.* at 80 (quoting *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

184. See, e.g., *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 286 (3d Cir. 2004) (noting that alleged misconduct of zoning officials, stemming from an adverse ruling, did not "rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.'"); *Tri County Ind., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (stating that "our circuit requires the plaintiff to show 'grave unfairness' by State (or District) officials."); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) ("Something more

recognized before his elevation to the Supreme Court, “every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority.”¹⁸⁵ Judge Richard Posner made a similar observation, when he wrote for the Seventh Circuit that “[i]f the plaintiffs can get us to review the merits of the Board of Trustees’ decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude.”¹⁸⁶ Federal appellate courts’ concern about transforming federal courts into boards of zoning appeals transcends the meaning of any particular constitutional amendment or section that the property owner invokes.¹⁸⁷

C. Summary

As these cases make clear, the Supreme Court has recognized the value of local zoning in our national life, and it has further recognized that value derives from zoning’s intensely local orientation. Ironically, under the Court’s current dormant Commerce Clause framework, it is precisely that local orientation which can so easily be transformed into a dormant Commerce Clause vulnerability under the discriminatory effects prong of that analysis.

Under our approach, however, the Supreme Court’s long-standing recognition of the national importance of local control of zoning is re-contextualized into the primary justification for silencing discriminatory effects analysis. The result is that although intentionally discriminatory zoning actions still would be subject to strict scrutiny, otherwise legitimate zoning regulations would be preserved against dormant Commerce Clause discriminatory effects attack, an outcome consistent with the

is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case . . .”); *Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (en banc) (“[T]he outside limit upon a state’s exercise of its police power in zoning decisions is that they must have a rational basis.”); *Creative Env’ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) (noting that claim against planning board did not rise to the “level of a due process violation”).

185. *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) (quoting *Estabrook*, 680 F.2d at 833) (emphasis added).

186. *Coniston Corp.*, 844 F.2d at 467.

187. See, e.g., the Equal Protection Clause case of *Vill. of Belle Terre*, 416 U.S. at 13 (Marshall, J., dissenting) (“Our role is not and should not be to sit as a zoning board of appeals.”); and the Substantive Due Process case of *Estabrook*, 680 F.2d at 833 (“[T]he conventional planning dispute at least when not tainted with fundamental procedural irregularity, racial animus, or the like, which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution.”).

Cooley principle and the dominant political purposes of dormant Commerce Clause doctrine.

V. CONCLUSION

Zoning “draw[s] from local knowledge . . . and conforms to local wants.”¹⁸⁸ That is its value, and that is its vulnerability. This article has argued for preservation of the former and attenuation of the latter, through an incremental¹⁸⁹ reform of the dormant Commerce Clause doctrine. We call not for a complete overhaul (not yet, anyway), but rather an adjustment that would preserve the Court’s authority to rein in intentional discrimination (whether overt or pretextual) while giving appropriate breathing room to a class of regulation whose value to the nation as a whole is exactly the local orientation that makes it susceptible to dormant Commerce Clause challenges.

188. *Cooley v. Bd. of Wardens*, 53 U.S. 299, 320 (1852).

189. Our conclusion that an effects-based dormant Commerce Clause theory should be unavailable in land-use cases is most directly aimed at an effects-based concept of discrimination. That is in part because lower courts have tended to summarily reject on the merits *Pike*-based challenges to land-use ordinances and regulations, prior to trials, perhaps out of deference to local decision-making, *see, e.g.*, *Nichols Media Group LLC v. Town of Babylon*, 365 F. Supp. 2d 295, 315 (E.D.N.Y. 2005) (noting that a local ordinance is invalidated under the *Pike* balancing test where the burden on interstate commerce “clearly exceeds” the local benefit), and we are mindful of the experience of prior reformers who attempted to achieve too much reform too soon. However, there is no strong doctrinal reason why the “land use decision exception” we propose should not extend to *Pike*-based claims. The reasons why such an exception is needed generally apply to *Pike*-based claims as well. *Pike* does not incorporate the logic of the average reciprocity of advantage. A judge applying *Pike* may attempt not only to engage in undue speculation about effects, but also about putative local benefits, thus compounding the problems noted above. Moreover, so long as *Pike* involves a balancing of effects on interstate commerce against something else, there will be the chance that Home Depot’s rights may be greater than those of its smaller competitors, and that the constitutional rights of a Home Depot in Texarkana may be greater than those of a Home Depot in Austin.