

Judicial Deference and Political Power in Fourteenth Amendment and Dormant Commerce Clause Cases

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TABLE OF CONTENTS

I.	INTRODUCTION	222
II.	THE SUPREME COURT’S DIVERGENT LEVELS OF DEFERENCE IN FOURTEENTH AMENDMENT AND DORMANT COMMERCE CLAUSE CASES.....	223
	A. <i>The Passive Approach in Fourteenth Amendment Cases</i>	224
	1. <i>Substantive Due Process</i>	226
	2. <i>Equal Protection</i>	227
	B. <i>The Active Approach in Dormant Commerce Clause Cases</i>	228
	1. <i>Scrutiny of Means-End Fit: Contrast with Substantive Due Process Cases</i>	230
	2. <i>Scrutiny of Non-Facially Discriminatory Laws: Contrast with Equal Protection Cases</i>	233
III.	ASSESSING THE SUPREME COURT’S DIVERGENT APPROACH TO THE FOURTEENTH AMENDMENT AND DORMANT COMMERCE CLAUSE	235
	A. <i>The Supreme Court Has Not Explained Its Current, Divergent Approach to Fourteenth Amendment and Dormant Commerce Clause Cases</i>	236

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	B. <i>There Is No Persuasive Justification for the Supreme Court’s Divergent Approach to Fourteenth Amendment and Dormant Commerce Clause Cases</i>	237
IV.	BECAUSE OF THE PLAINTIFFS’ COMPARATIVE POLITICAL POWER, THE SUPREME COURT SHOULD REVIEW LEGISLATION CHALLENGED UNDER THE FOURTEENTH AMENDMENT MORE ACTIVELY THAN LEGISLATION CHALLENGED UNDER THE DORMANT COMMERCE CLAUSE	242
V.	CONCLUSION	245

I. INTRODUCTION

The United States Supreme Court frequently must decide how much to defer to a state legislature. Examining two lines of cases—challenges to state laws under the Fourteenth Amendment and challenges to state laws under the dormant Commerce Clause—reveals that the Court does not have a coherent approach to deciding how much it ought to defer. In Fourteenth Amendment cases, the Court defers substantially to state legislatures. In dormant Commerce Clause cases, the Court defers little to state legislatures. The Court has not explained why it applies different levels of deference in these two types of cases.

This Article argues that the Supreme Court’s current approach in these two lines of cases is not just unexplained or incoherent, but backwards. Because the Court should aim to ameliorate power differentials, its level of deference to state legislatures should depend on the political power of the plaintiff challenging the law. Typical dormant Commerce Clause plaintiffs have significant power in Congress, whereas Fourteenth Amendment plaintiffs typically seek judicial review of legislation because they have already lost out in the political process at the state level and do not have realistic hope of congressional intervention. Instead of correcting imbalances of political power, the Court’s practice of engaging in active review in cases brought by politically powerful dormant Commerce Clause plaintiffs and passive review in cases brought by typically less powerful Fourteenth Amendment plaintiffs reinforces existing power differentials.

Following this introduction, this Article proceeds in three main parts. First, Part II details the varying levels of deference to state legislatures that the Court applies in Fourteenth Amendment versus dormant Commerce Clause cases. Second, Part III explores potential justifications for the divergence, ultimately arguing that the Court’s current approach is unjustified. Third, Part IV argues that the political power—or lack thereof—of plaintiffs should determine the extent to which the Court defers to the legislature. It further argues that because of the comparative political power of Fourteenth Amendment and dormant Commerce Clause plaintiffs, the Court should

be more passive when reviewing laws that may violate the dormant Commerce Clause and more active when reviewing laws that may violate the Fourteenth Amendment—the opposite of its current approach.

II. THE SUPREME COURT’S DIVERGENT LEVELS OF DEFERENCE IN FOURTEENTH AMENDMENT AND DORMANT COMMERCE CLAUSE CASES

The Supreme Court takes two divergent approaches to Fourteenth Amendment and dormant Commerce Clause cases. The Court takes a passive approach in Fourteenth Amendment cases, deferring substantially to legislatures, and an active approach in dormant Commerce clause cases, deferring little to legislatures.¹

1. Other commenters have noted the Supreme Court tends to engage in more active review in some types of cases than in others, but they have focused on the Rehnquist Court and not earlier examples of this divergence. Furthermore, they have not focused specifically on the divergence between the Court’s approach to the dormant Commerce Clause and its approach to Substantive Due Process and Equal Protection cases. For example, by analyzing the congruence and proportionality test that the Rehnquist Court established in *City of Boerne v. Flores*, 521 U.S. 507 (1997), K.G. Jan Pillai points to the Court’s differing approaches to “state commercial discrimination,” “state discrimination against the disabled,” and the Eighth Amendment to support his argument that the Rehnquist Court’s congruence and proportionality “[t]est is so fundamentally elusive and nonviable that it can only serve as a convenient vehicle for promoting the subjective views and personal philosophies of the five adhering Justices.” K.G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 647–48 (2002). Similarly, Bradley W. Joondeph points out:

A careful examination of the Rehnquist Court’s record in the full range of federalism decisions shows that the five Justices most responsible for the Court’s “federalism offensive”—Rehnquist, O’Connor, Scalia, Kennedy, and Thomas—were largely indifferent to state policy-making autonomy in cases involving preemption and the dormant Commerce Clause. If anything, these Justices actually pushed the law in the opposite direction, increasing the likelihood that state initiatives would be preempted or invalidated on dormant Commerce Clause grounds.

Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 119 (2008). Other commentators who have written about the Court’s treatment of legislative fact-finding have argued the Court is deferential to legislatures in dormant Commerce Clause cases, a thesis this article rejects. See, e.g., Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 15 (2009) (“For example, in contrast to the Dormant Commerce Clause context, where the Supreme Court has often been deferential to state legislative fact-finding, the Court has recently been notably loath to defer to Congress’s fact-finding in cases challenging Congress’s power to act under the Commerce Clause or the Fourteenth Amendment’s Enforcement Clause.” (footnotes omitted)); David Parker, Note, *Policing Procedure Before Substance: Reforming Judicial Review of the Factual Predicates to Legislation*, 99

A. *The Passive Approach in Fourteenth Amendment Cases*

In Fourteenth Amendment cases, the Court has frequently emphasized the importance of judicial restraint. The Court argued that using “the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise” would encroach on legislatures’ power.² Justice Felix Frankfurter, in particular, argued in Fourteenth Amendment cases that judicial power “must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint. [I]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power.”³

Scholars have gone further. Alexander Bickel argued that willingness to invalidate state laws on Fourteenth Amendment grounds was an “assault upon the legal order” that promoted lawlessness.⁴ Bickel even expressed the view that repealing the Due Process Clauses “might have been a solution” to judicial activism because the Due Process Clauses left too much room for judicial policymaking.⁵ Bickel praised Justice Frankfurter⁶ for his tendency

VA. L. REV. 1327, 1332 n.28 (2013) (“In dormant commerce clause cases, the Court generally defers to the legislature, but in commerce clause cases or Fourteenth Amendment Enforcement Clause cases, the Court has discarded Congress’s factual determinations in favor of its own.” (citing Borgmann, *supra*)).

2. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (footnote omitted) (quoting *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 567–68 (1923) (Holmes, J., dissenting)).

3. *Trop v. Dulles*, 356 U.S. 86, 119–20 (1958) (Frankfurter, J., dissenting).

4. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 120–21 (1975).

5. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 22–30 (1970).

6. Justice Frankfurter’s restrained or passive approach in Fourteenth Amendment cases, and Bickel’s praise for it, is worth mentioning because of Frankfurter’s active approach in dormant Commerce Clause cases. *See infra* note 46 and accompanying text. Bickel even pointed out that Frankfurter treated the Commerce Clause differently from other constitutional provisions. *See BICKEL, supra* note 5, at 30 (“Frankfurter set apart, as fittingly exercised by judges, the Commerce Clause jurisdiction, in which judgments denying power to the States are subject to Congressional revision.”).

More broadly, it is worth noting that many of the cases that best exemplify the Court’s divergent approaches to the Fourteenth Amendment and dormant Commerce Clause were decided in the same timeframe and by many of the same justices. For example, the Substantive Due Process cases, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) and *Ferguson*, 372 U.S. 726, were decided in 1955 and 1963; the Equal Protection cases, *Washington v. Davis*, 426 U.S. 229 (1976) and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), were decided in 1976 and 1979; and the dormant Commerce Clause cases, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), were decided in 1959, 1977 and 1978. The participation of many of the same justices in cases passively reviewing legislation challenged under the Fourteenth Amendment and actively reviewing legislation challenged under the dormant Commerce Clause shows these divergent approaches are not just the result of different justices or judicial philosophies prevailing at different times.

to defer to state legislatures, noting that he would “defer[] in two senses; in many instances he deferred judgment, or in rendering judgment he deferred to the political institutions.”⁷

Concerns about judicial overreach have significantly impacted the Court’s review in Fourteenth Amendment cases. The Court has constrained its review of legislative decisions challenged on Fourteenth Amendment grounds in at least two ways. First, as discussed in Section II.A.1, the Court has refused to strike down laws under the Fourteenth Amendment’s Due Process Clause even if there is evidence that the law’s main purpose is to benefit an interest group.⁸ Second, as discussed in Section II.A.2, the Court has refused to invalidate laws under the Fourteenth Amendment’s Equal Protection Clause unless the challenged laws discriminate expressly or intentionally.⁹ Moreover, the Court will not searchingly review the available evidence to uncover discriminatory intent.¹⁰

As to Frankfurter, he joined the majority in actively reviewing and striking down legislation challenged under the dormant Commerce Clause, see *Bibb*, 359 U.S. 529–30; *Dean Milk Co.*, 340 U.S. at 356, while at the same time vehemently opposing active review under the Fourteenth Amendment, see *Trop*, 356 U.S. at 119–20 (Frankfurter, J., dissenting), and joining the Court in refusing to engage in such active review, see *Williamson*, 348 U.S. at 488. Frankfurter was not on the Court when each of the cases discussed in this Article were decided, but he is a notable example, in part because of Bickel’s emphasis on his restrained approach to Fourteenth Amendment cases.

7. BICKEL, *supra* note 5, at 29; see also Louis H. Pollack, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment*, 67 *YALE L.J.* 304, 316–17 (1957) (“When Frankfurter determines that he must address himself to the ultimate substantive issues, he is, of course, guided by canons of judicial restraint as compelling as those that caution him against reaching such issues before they are duly presented. . . . Especially is this true of Justices exercising the Supreme Court’s power, under the Fourteenth Amendment’s due process clause, to veto state action.”).

8. See *Williamson*, 348 U.S. at 487 (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of [a law].”).

9. See *Washington v. Davis*, 426 U.S. at 247–48 (explaining the Court would not declare unconstitutional laws that do facially categorize on the basis of race without evidence of intent to discriminate).

10. See *Feeney*, 442 U.S. at 277–79 (explaining that intent to discriminate means the legislature passed a law because of its recognizable effects on a specific group, not in spite of its recognizable effects on a specific group); see also Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 *HARV. L. REV.* 1, 20–21 (2013) (“The Court emphasized differences between standards that Congress might provide under Title VII and those the Court might impose under the Fifth or Fourteenth Amendments, observing that the disparate impact inquiry ‘involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.’” (quoting *Washington v. Davis*, 426 U.S. at 247)).

1. Substantive Due Process

As to the Court's refusal to strike down certain laws under the Fourteenth Amendment's Due Process Clause, the Court carefully scrutinizes only a narrow class of laws challenged as Substantive Due Process¹¹ violations. When addressing Substantive Due Process claims, the Court applies strict scrutiny to laws that, in its view, impinge on fundamental rights.¹² When the Court determines that a law does not affect fundamental rights, it will not closely scrutinize it, even if there is evidence that the law's purpose is to benefit an interest group rather than achieve a legitimate government end and even if there is evidence that it may harm other groups.¹³ In these cases, the Court will uphold the challenged law as long as there is some permissible end the law might be designed to achieve.¹⁴ This standard is easy to satisfy, as there is almost always a permissible end that a law might achieve.¹⁵

The Court has upheld laws even when, as in *Williamson v. Lee Optical of Oklahoma*, the state did not offer any justification for the law.¹⁶ In that case, the Court held that although the "law may exact a needless, wasteful requirement in many cases. . . it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."¹⁷ The Court also opined that, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."¹⁸ "The day is gone," the *Williamson* Court concluded, "when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."¹⁹ In *Ferguson v. Skrupa*, the Court reiterated this position, saying, "[I]n legislative

11. U.S. CONST. amend. XIV, § 1, cl. 3 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .").

12. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (applying strict scrutiny to a law that interfered with a married couple's right to use contraception); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (applying strict scrutiny to a law that interfered with the right of parents and guardians to direct their children's education).

13. See *Williamson*, 348 U.S. at 487–88.

14. See *id.*

15. See *id.*

16. See generally *id.*

17. *Id.* at 487.

18. *Id.* at 487–88.

19. *Id.* at 488.

bodies have broad scope to experiment with economic problems” and it would not “sit as a ‘superlegislature to weigh the wisdom of legislation.’”²⁰

2. Equal Protection

As to Equal Protection Clause²¹ cases, the Court focuses on laws that explicitly discriminate against members of certain “suspect class[es]”²²—those that explicitly discriminate based on race,²³ national origin,²⁴ gender,²⁵ and sexual orientation.²⁶ The Court carefully scrutinizes laws that explicitly distinguish between people on the basis of suspect classifications, applying either strict or intermediate scrutiny and usually invalidating these laws.²⁷ By contrast, the Court has been reluctant to strike down laws that do not on their face categorize individuals based on suspect classifications. The Court has held that such laws violate the Equal Protection Clause only if the legislature had a discriminatory purpose.²⁸ As the Court said in *Washington v. Davis*, “[s]tanding alone, [disparate impact] does not trigger the rule . . . that racial [or other suspect] classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”²⁹ In *Personnel Administrator v. Feeney*, the Court defined discriminatory intent as “impl[y]ing more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed

20. 372 U.S. 726, 730–31 (1963) (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

21. U.S. CONST. amend XIV, § 1, cl. 4 (“[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.”).

22. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 596 (2008).

23. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 10 (1967).

24. *See, e.g., Oyama v. California*, 332 U.S. 633, 640–41 (1948).

25. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

26. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–05 (2015) (holding that unequal treatment of individuals because of sexual orientation is unconstitutional, at least to the extent that the unequal treatment “interlock[s]” with fundamental rights); *see also United States v. Windsor*, 570 U.S. 744, 774 (2013); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

27. *See Frontiero*, 411 U.S. at 691–92 (Powell, J., concurring) (applying intermediate scrutiny and invalidating a law that distinguishes on the basis of gender); *Loving*, 388 U.S. at 10 (applying strict scrutiny and invalidating a law that distinguishes on the basis of race).

28. *See Washington v. Davis*, 426 U.S. 229, 241 (1976).

29. *Id.* at 242 (citation omitted) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977).

a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”³⁰

The Court has also sharply restricted litigants’ ability to prove discriminatory purpose.³¹ It has explained that assessing “[t]he calculus of effects . . . is a legislative and not a judicial responsibility.”³² As a result, the Court will not invalidate a law with an implicit but foreseeable discriminatory impact,³³ even if there are less discriminatory means that would achieve the same purpose.³⁴ This rule, as scholars such as Reva Siegel have pointed out, makes it easy to avoid liability because as long as legislators do not explicitly state that they are acting from animus, they can enact laws they know will harm certain groups.³⁵

B. *The Active Approach in Dormant Commerce Clause Cases*

The dormant Commerce Clause prohibits states from passing laws that excessively burden interstate commerce.³⁶ State laws can violate the dormant Commerce Clause in two ways. First, a state law can explicitly discriminate against out-of-state commerce.³⁷ The Court almost always invalidates these laws.³⁸ Such laws are equivalent to laws that violate the

30. 442 U.S. 256, 279 (1979).

31. *See id.* at 271–72.

32. *Id.* at 272 (first citing *Dandridge v. Williams*, 397 U.S. 471 (1970); and then citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

33. *See id.* at 271–72; *see also* Siegel, *supra* note 10, at 20.

34. *See Feeney*, 422 U.S. at 288 (Marshall, J., dissenting).

35. *See* Siegel, *supra* note 10, at 20 (“*Feeney* insulated facially neutral action with foreseeable racial disparate impact from constitutional challenge by offering federal judges tools, including the requirement of proving specific intent, that judges could use to make plaintiffs’ burden of proof impossible, for all practical purposes, to discharge.”); *see also* Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & POL. 381, 386 (2000) (“The Court’s current approach makes it virtually impossible for plaintiffs to bring a constitutional challenge to facially neutral governmental acts disproportionately harming classes protected under the Fourteenth Amendment, even where those acts serve no legitimate purpose or are the product of unconscious racism or sexism.”).

36. *See* *Am. Trucking Ass’n, Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005) (quoting *Pike v. Bruce Church, Inc.*, 379 U.S. 137, 142 (1970)); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 565, 574 (1997); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949).

37. *See* *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (“Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination.”).

38. *See id.* at 626–27 (“[W]hatever 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.”); *see also* *Camps Newfound/Owatonna*, 520 U.S. at 565 (“[A law] discriminates on its face against interstate commerce [by] expressly distinguish[ing] between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling

Fourteenth Amendment by explicitly discriminating against people on the basis of a suspect classification.³⁹ As such, there is no real contrast between how the Court treats explicit discrimination in Fourteenth Amendment and dormant Commerce Clause cases.

The focus here is on the second type of violation, state laws that violate the dormant Commerce Clause without expressly discriminating against out-of-state commerce.⁴⁰ A statute that does not expressly discriminate against out-of-state commerce—where the “effects on interstate commerce are only incidental”—violates the dormant Commerce Clause if it fails a judicially created balancing test.⁴¹ The balancing test assesses whether “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁴² If it is, the law fails the balancing test and it is invalid.⁴³

In these dormant Commerce Clause cases, concerns about underenforcement, not judicial overreach, have a significant impact on the Court’s review.

out [entities] that serve mostly in-staters for beneficial tax treatment, and penalizing those [entities] that do a principally interstate business. Such laws are virtually *per se* invalid.”). *But see* *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986) (“The evidence in this case amply supports the District Court’s findings that Maine’s ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, ‘apart from their origin, to treat out-of-state baitfish differently,’ . . .” (citation omitted) (quoting *City of Phila.*, 437 U.S. at 627)).

39. *See supra* note 27 and accompanying text.

40. *See* *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)) (explaining that a statute can violate the dormant Commerce Clause without explicitly discriminating against out-of-state commerce).

41. *Id.*

42. *Id.*

43. *See id.*; *see also* *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994) (“[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it ‘regulates evenhandedly with only “incidental” effects on interstate commerce, or discriminates against interstate commerce.’ . . . 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. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. . . . By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” (citations omitted) (first quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); then quoting *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992); and then quoting *Pike*, 397 U.S. at 142)).

Justices—despite often expressing the concern about invalidating laws based on a “vague” constitutional provision in Fourteenth Amendment cases⁴⁴—have not emphasized this concern in dormant Commerce Clause cases.⁴⁵ Instead, the justices—including, notably, Justice Frankfurter, who expressed particular concern about judicial overreach in Fourteenth Amendment cases⁴⁶—have emphasized the concern that the dormant Commerce Clause would be underenforced without judicial intervention.⁴⁷

The Court’s approach to dormant Commerce Clause cases contrasts in two significant ways with its approach in Fourteenth Amendment cases. First, when determining whether a state law violates the dormant Commerce Clause, the Court has carefully considered evidence of how well the legislature’s means effectuate its purported permissible ends.⁴⁸ The contrast between this approach to the dormant Commerce Clause and the Court’s approach to Substantive Due Process cases is discussed in Section II.B.1. Second, the Court has carefully analyzed a law’s means-end fit even when reviewing laws that do not expressly discriminate.⁴⁹ The contrast between this approach to the dormant Commerce Clause and the Court’s approach to Equal Protection cases is discussed in Section II.B.2.

1. Scrutiny of Means-End Fit: Contrast with Substantive Due Process Cases

*Hunt v. Washington State Apple Advertising Commission*⁵⁰ exemplifies the first contrast. In dormant Commerce Clause cases, unlike in Substantive Due Process cases, the Court will searchingly evaluate the evidence in the

44. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *see also, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486–88 (1955).

45. *See, e.g., City of Phila.*, 437 U.S. at 623; *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 353–54 (1977).

46. For a discussion of Justice Frankfurter’s view of the Fourteenth Amendment and its contrast to his approach to dormant Commerce Clause cases, *see supra* notes 2–7 and accompanying text. Note Bickel pointed out that Frankfurter treated the Commerce Clause differently from other constitutional provisions. *See BICKEL, supra* note 5, at 30 (“Frankfurter set apart, as fittingly exercised by judges, the Commerce Clause jurisdiction, in which judgments denying power to the states are subject to Congressional revision.”).

47. *See City of Phila.*, 437 U.S. at 623 (“Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention ‘because of their local character and their number and diversity.’” (quoting *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 185 (1938))); *see also Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529–30 (1959); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

48. *See Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 677 (1981); *City of Phila.*, 437 U.S. at 626; *Hunt*, 432 U.S. at 350.

49. *See Hunt*, 432 U.S. at 353–54; *Pike*, 397 U.S. at 142.

50. 432 U.S. 333.

record to determine whether a law is well suited to accomplish the legislature's stated goals.⁵¹

In *Hunt*, the Court addressed a law about apple labeling.⁵² The Court acknowledged a state's interest in preventing confusion in the marketing of foodstuffs, but specified three reasons why "the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades."⁵³ The Court explained that, first, the statute "permits the marketing of closed containers of apples under *no* grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades."⁵⁴ Second, "although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples."⁵⁵ The Court noted apple wholesalers, to whom the law was directed, are likely the most knowledgeable about apples and noted that the law "does nothing at all to purify the flow of information at the retail level" where the information may have been more useful.⁵⁶ Third, the Court added that because "Washington grades are in all cases equal or superior to their USDA counterparts, they could only 'deceive' or 'confuse' a consumer to his benefit."⁵⁷ Finally, the Court concluded that "nondiscriminatory alternatives to the outright ban of Washington State grades are readily available."⁵⁸ After this careful evaluation of the evidence, the Court invalidated the law.⁵⁹

51. Compare *id.* at 353, with *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

52. *Hunt*, 432 U.S. at 337. The North Carolina law at issue required closed containers of apples sold in the state to display either the United States Department of Agriculture (USDA) grade or a notice indicating no grade at all. *Id.* The law prohibited displaying state grades. *Id.* Washington State had contradictory labeling requirements and required Washington apples shipped in interstate commerce to display the Washington state grade, which reflected quality standards higher than the USDA standard. *Id.* at 336. Washington apple growers challenged the North Carolina law because its effect was to either prevent Washington apple growers from benefitting from Washington's more stringent grading standards or prevent the sale of Washington apples in North Carolina. *Id.* at 352.

53. *Id.* at 353.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 354.

58. *Id.*

59. *Id.*

Hunt is not the only example of the Court's thorough examination of the record in a dormant Commerce Clause case. In *Kassel v. Consolidated Freightways Corp.*, the Court confronted an Iowa law banning a certain kind of truck—sixty-five foot doubles.⁶⁰ The Iowa legislature put forth a safety rationale for the law, explaining that sixty-five foot doubles were more dangerous than other types of truck.⁶¹ Rather than accepting Iowa's safety rationale, the Court reviewed the record to make its own safety assessments.⁶² Reviewing the record before it, the Court pointed to ways that sixty-five foot doubles were safer than other trucks and disputed the evidence of other trucks' safety advantages.⁶³ After reviewing the evidence, the Court concluded, “[s]tatistical studies supported the view that 65-foot doubles are at least as safe overall as 55-foot singles and 60-foot doubles.”⁶⁴ The Court also determined that the “law substantially burden[ed] interstate commerce.”⁶⁵ As in *Hunt*, after carefully examining the evidence, the Court invalidated the law.⁶⁶

*Bibb v. Navajo Freight Lines, Inc.*⁶⁷ is yet another example. In *Bibb*, the court invalidated an Illinois statute requiring trucks and trailers to use a certain type of mudguard.⁶⁸ Illinois's purported reason for passing the legislation was that curved mudguards were safer than straight mudguards.⁶⁹ Echoing *Kassel*, the Court carefully reviewed evidence of the relative safety of curved and flat mudguards and the burden the Illinois law placed on interstate commerce.⁷⁰ It concluded that the curved mudguards required by Illinois law were not necessarily safer and that the burden on interstate commerce was “rather massive.”⁷¹ The Court invalidated the law.⁷²

The searching analysis the Court undertakes in these cases is precisely the sort of analysis the Court explicitly refused to undertake in Substantive Due Process cases such as *Williamson*, where the Court said it would not use “the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school

60. 450 U.S. 662, 671 (1981).

61. *Id.* at 671–72.

62. *Id.* at 671–73.

63. *See id.* at 672–73.

64. *Id.* at 673.

65. *Id.* at 674.

66. *Id.*

67. 359 U.S. 520 (1959).

68. *Id.* at 529–30.

69. *Id.* at 525. A mudguard is a flap placed behind the wheel of a vehicle to prevent water and mud from being thrown off the wheel. *Id.* at 521 n.1.

70. *Id.* at 525–28.

71. *Id.* at 525, 528.

72. *Id.* at 529–30.

of thought,”⁷³ and *Ferguson*, where it said it would not “sit as a ‘superlegislature to weigh the wisdom of legislation.’”⁷⁴

2. *Scrutiny of Non-Facially Discriminatory Laws: Contrast with Equal Protection Cases*

The second contrast between the Court’s approach to dormant Commerce Clause and Fourteenth Amendment cases is that in dormant Commerce Clause cases the Court is willing to scrutinize laws that do not facially discriminate. The law at issue in *Hunt*, for example, is facially neutral: “All apples sold, offered for sale or shipped into this State in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U.S. grade or standard or the marking ‘unclassified,’ ‘not graded’ or ‘grade not determined.’”⁷⁵ Yet the Court carefully scrutinized, and ultimately invalidated, this law.⁷⁶ The laws at issue in *Bibb*⁷⁷ and *Kassel*⁷⁸ are facially neutral as well, but as in *Hunt*, the Court carefully scrutinized the laws. In Equal Protection cases, the Court does not scrutinize laws that are not discriminatory on their face.⁷⁹ The Court defers to the legislature’s judgment on how to balance the benefits and burdens of a law.⁸⁰ The Court’s careful scrutiny of the facially neutral law in *Hunt*, *Bibb*, and *Kassel* is a significant contrast with its approach to Equal Protection cases such as *Washington v. Davis* and *Feeney*, where the Court said assessing “[t]he calculus of effects” of a law that does not explicitly discriminate is “a legislative and not a judicial responsibility.”⁸¹

73. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

74. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

75. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 339 (1977) (quoting N.C. GEN. STAT. §§ 106-189.1 (1973)).

76. *See id.* at 351–53.

77. *See Bibb*, 359 U.S. at 521–23.

78. *See Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671–72 (1981).

79. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 278–79 (1979) (refusing to carefully scrutinize a law that did not discriminate on its face, even though its discriminatory effects were foreseeable).

80. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.”).

81. *Feeney*, 442 U.S. at 272 (first citing *Dandridge v. Williams*, 397 U.S. 471 (1970); and then citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

There is an interesting wrinkle in the Court's handling of facially neutral statutes in dormant Commerce Clause cases. It is not clear whether the Court requires discriminatory *intent* in dormant Commerce Clause cases, or instead will invalidate laws simply because of their discriminatory *effect* or disparate impact. While this wrinkle warrants a brief discussion, the key point to keep in mind is that there is a contrast with Equal Protection cases either way.

Cases generally indicate that discriminatory effect is sufficient grounds for the court to invalidate a law,⁸² but the Court has not been perfectly clear on this point.⁸³ *Hunt* best demonstrates the ambiguity as to whether discriminatory intent is required. The Court explained, “[d]espite the statute’s facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect.”⁸⁴ But the Court also added:

we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.⁸⁵

The Court's assertion that it did not need to ascribe a protectionist motive to the legislature suggests discriminatory effect is sufficient grounds to invalidate a statute. This statement, however, is arguably dicta because the court also points to compelling evidence of the North Carolina legislature's discriminatory intent.⁸⁶ Subsequent cases do not resolve the ambiguity.⁸⁷

Whichever way this ambiguity is resolved, the Court's handling of dormant Commerce Clause cases differs from its handling of Fourteenth Amendment cases. In Equal Protection cases, the Court has not only required a showing of discriminatory intent but also made it virtually impossible

82. See, e.g., *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (“A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose . . . or discriminatory effect . . .” (citations omitted) (first quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 333 (1977); and then citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))).

83. See, e.g., *id.* at 273 (“We therefore conclude that the Hawaii liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.”).

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

85. *Id.* at 352–53.

86. See *id.* at 352.

87. Compare *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471–72 (1981) (holding that discriminatory intent was necessary to prior decisions striking down statutes as violating the dormant Commerce Clause), with *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670, 675–76 (1981) (holding that discriminatory intent was not necessary for the Court to strike down a statute as violating the dormant Commerce Clause).

for plaintiffs to make such a showing.⁸⁸ In dormant Commerce Clause cases, either the Court does not require discriminatory intent or it willingly searches for discriminatory intent, making it possible for plaintiffs to make a showing of discriminatory intent.⁸⁹ Either way, the cases discussed in this section make clear that the Court defers much less to legislatures in dormant Commerce Clause cases than in Fourteenth Amendment cases.

III. ASSESSING THE SUPREME COURT'S DIVERGENT APPROACH TO THE FOURTEENTH AMENDMENT AND DORMANT COMMERCE CLAUSE⁹⁰

The different levels of deference the Court applies when evaluating legislation challenged under the Fourteenth Amendment, on the one hand, and the dormant Commerce Clause, on the other, raise the question of whether its current, divergent approach is a good one. This section points out that the Court has never explained why it applies one level of deference in Fourteenth Amendment cases and a different level of deference in dormant Commerce Clause cases. It then explains that there is not a principled justification for the Court's current approach.

88. See Siegel, *supra* note 10, at 20; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 (1977).

89. See *Hunt*, 432 U.S. at 352–53.

90. Before moving on, one additional line of cases warrants mention—antitrust state action exemption cases. The question addressed in state action exemption cases is similar to the question addressed in dormant Commerce Clause cases: How much leeway does a state have in making laws that regulate or affect business? See, e.g., *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 391 (1978). The Court's application of this doctrine is more similar to its application of the Fourteenth Amendment: The Court defers to state legislatures. See *id.* at 393. The Court does not evaluate the efficacy of, or motivations behind, the legislation but gives the state leeway to promulgate regulations that would clearly violate the Sherman Act if accomplished through private agreements. See *generally id.* The Court also does not seek to determine if some group—or state—is disadvantaged by the legislation. See *generally id.*; *Parker v. Brown*, 317 U.S. 341 (1943). When considered along with dormant Commerce Clause and Fourteenth Amendment cases, the state action exemption cases offer additional evidence that the Court does not have a systematic view of when it should defer to state legislatures and when it should actively review state legislation. This additional evidence that the Court does not have a systematic approach to deference is all the more reason to see if the Court's current approach can be justified and, if not, suggest a new approach.

A. *The Supreme Court Has Not Explained Its Current, Divergent Approach to Fourteenth Amendment and Dormant Commerce Clause Cases*

The Court has explained why it defers to state legislatures in Fourteenth Amendment cases and separately explained why it defers little to state legislatures in dormant Commerce Clause cases. The Court has not, however, offered an explanation that makes clear why it treats these two types of cases differently.

Addressing its deference to state legislatures in Fourteenth Amendment cases, in *Feeney*, the Court explained, “the Fourteenth Amendment ‘cannot be made a refuge from ill-advised laws.’”⁹¹ It acknowledged that certain laws “may reflect unwise policy” but determined that the threat of unwise policy does not justify the Court’s interference.⁹² Similarly, in *Washington v. Davis*, the Court expressed the desire to give legislatures leeway to serve “ends otherwise within the power of government to pursue.”⁹³ Most emphatically, in *Ferguson*, the Court explained, “courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”⁹⁴

Addressing its lack of deference to state legislatures in dormant Commerce Clause cases, in *City of Philadelphia*, the Court explained, “[a]lthough the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention ‘because of their local character and their number and diversity.’”⁹⁵ According to the Court’s own account, then, the Court is willing to interfere with legislative decisions in dormant Commerce Clause cases because it perceives a risk that Congress will underenforce constitutional provisions.⁹⁶ But the Court hesitates to interfere with legislative decisions in Fourteenth Amendment cases because it recognizes the so-called countermajoritarian difficulty and, as an unelected body, does not want to interfere with the decisions of democratically elected legislatures.⁹⁷

91. 442 U.S. 256, 281 (1979) (quoting *District of Columbia v. Brooke*, 214 U.S. 138, 150 (1909)).

92. *Id.*

93. 426 U.S. 229, 242 (1976).

94. 372 U.S. 726, 730 (1963).

95. 437 U.S. 617, 623 (1978) (quoting *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 185 (1938)).

96. *See id.*; *see also* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 *V.A.L. REV.* 563, 569 (1983) (quoting Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 *YALE L.J.* 219, 220–21 (1957)).

97. *See Ferguson*, 372 U.S. at 730 (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932)). *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

The problem with the Court's explanations for how it handles Fourteenth Amendment and dormant Commerce Clause cases is that both explanations apply to both types of cases. Interference with legislative decisions is just as countermajoritarian in dormant Commerce Clause cases as Fourteenth Amendment cases. The risk of underenforcing constitutional provisions applies to Fourteenth Amendment cases as well as dormant Commerce Clause cases.⁹⁸ The Court has said nothing about why it emphasizes one consideration in one type of case and the other consideration in the other type of case. Consequently, the Court has not satisfactorily explained why it takes an active approach when reviewing laws challenged under the dormant Commerce Clause and a passive approach when reviewing laws challenged under the Fourteenth Amendment.

B. There Is No Persuasive Justification for the Supreme Court's Divergent Approach to Fourteenth Amendment and Dormant Commerce Clause Cases

Having established that the Court has not provided a persuasive justification for its current practice, this section turns to asking whether there is a persuasive justification that the Court has not articulated. This section first briefly addresses two arguments that may seem promising but explains why they are implausible. It then addresses a more plausible argument but explains why this argument is ultimately unpersuasive as well.

The first implausible argument in support of reviewing dormant Commerce Clause cases more aggressively than Fourteenth Amendment cases is prioritizing important issues—arguing that the Court should defer less to legislatures when the issues before it are more important, and that enforcing the dormant Commerce Clause is more important. That argument is unsatisfactory for two reasons.

First, there is not a foolproof mechanism for determining, in general, which issues are most important. The lack of such a mechanism is the key objection to the argument that the Court should defer less when the issues before it are more important. But it is also worth pointing out that, specifically as to the issues raised by the dormant Commerce Clause and Fourteenth Amendment cases discussed here, it seems implausible that any acceptable mechanism would determine that the consumer confusion

98. See *City of Phila.*, 437 U.S. at 623.

over apple labels, at issue in *Hunt*,⁹⁹ is more important than the race-based barriers to employment, at issue in *Washington v. Davis*,¹⁰⁰ or the gender-based barriers, at issue in *Feeney*.¹⁰¹ Second, it is not clear that the importance of an issue would be a good indicator of whether courts should actively review a legislature's decisions about that issue. An issue could be extremely important but best left to the democratic process and ill-suited to active judicial review. For example, setting tax rates to determine how much people and entities should pay is an important issue but also plausibly one better left to the democratic process without active review from judges.

A second—also implausible—argument in support of reviewing dormant Commerce Clause cases more aggressively than Fourteenth Amendment cases is judicial competence—arguing that the Court is better equipped to actively review dormant Commerce Clause cases than Fourteenth Amendment cases. That argument is unsatisfactory because in both types of cases, justices are asked to engage in exactly the same type of analysis: assessing the rationality, or means-end fit, of a law, and assessing whether the legislature had discriminatory intent when passing the law.¹⁰² Because the analysis in dormant Commerce Clause and Fourteenth Amendment cases is effectively identical, judicial competence does not justify actively reviewing a legislature's decisions in dormant Commerce Clause cases but not in Fourteenth Amendment cases.

There is, however, a more plausible argument in support of more active review in dormant Commerce Clause cases than Fourteenth Amendment cases—the stickiness of the Court's decisions. The Court's decisions in Fourteenth Amendment cases are hard to reverse, or sticky.¹⁰³ It might follow that because its decisions in Fourteenth Amendment cases are sticky, the Court should be hesitant to strike down legislation challenged on Fourteenth Amendment grounds.¹⁰⁴ The Court's decisions in dormant Commerce Clause cases are easier to reverse, or less sticky.¹⁰⁵ Congress has significant power to police interstate commerce.¹⁰⁶ As a result of this

99. See 432 U.S. 333, 353–54 (1977).

100. See 426 U.S. 229, 232 (1976).

101. See 442 U.S. 256, 259 (1979).

102. See *id.*; *Hunt*, 432 U.S. at 353–54; *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

103. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (“[For some] cases involving the Federal Constitution, . . . correction through legislative action is practically impossible.”).

104. This is essentially the argument Justice Frankfurter makes against active review in Fourteenth Amendment cases. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 119–20 (1958) (Frankfurter, J., dissenting).

105. See *Levmore*, *supra* note 96, at 569–70.

106. See *id.* at 570.

power, Congress can more easily override the Court's decisions in dormant Commerce Clause cases.¹⁰⁷ It might follow that because its decisions in dormant Commerce Clause cases are not very sticky, the Court should be more willing to engage in active review knowing Congress can always overrule its decisions if they turn out to be "inadequate."¹⁰⁸

Saul Levmore explains this argument:

One might view the federal judiciary then as a surrogate or agency of Congress instructed to protect the national interest by overturning those state actions which an attentive Congress would disapprove. This role requires that judicial decisions not be on inflexible and irreversible constitutional grounds. . . . *That Congress could itself police interstate aggression strengthens, rather than weakens, the case for common-law judicial activism. If, compared to Congress' wishes, the federal courts prove overzealous in protecting free trade, insufficiently deferential to state interests and determinations, or simply inadequate in exploring and interpreting facts, then Congress can step in and use its commerce power to override the courts.*¹⁰⁹

Here, Levmore expresses the view that the Court can engage in active review in dormant Commerce Clause cases because Congress can override the Court if the Court reaches a conclusion that Congress does not approve.¹¹⁰ This statement does not address the contrast between dormant Commerce Clause and Fourteenth Amendment cases; however, it implies Congress's inability to reverse the Court's Fourteenth Amendment decisions means the Court should not engage in active review in those cases.¹¹¹

If there is any argument in favor of the Court's current approach, the stickiness argument is the most persuasive. Still, this argument is ultimately unpersuasive for at least two reasons. First, it contradicts the Court's own reason for active review in dormant Commerce Clause cases. The Court has defended active review in such cases by arguing that Congress will not enforce the dormant Commerce Clause as much as it should, saying "many subjects of potential federal regulation under [the dormant Commerce Clause] power inevitably escape congressional attention."¹¹² If the Court

107. *See id.*

108. *Id.*

109. *Id.* at 569–70 (emphasis added) (footnotes omitted).

110. Bickel also gestures at this argument. *See BICKEL, supra* note 5, at 30 ("Frankfurter set apart, as fittingly exercised by judges, the Commerce Clause jurisdiction, in which judgments denying power to the states are subject to Congressional revision.")

111. In particular, the claim that "[t]his role requires that judicial decisions not be on inflexible and irreversible constitutional grounds" suggests Levmore would not be in favor of active review in Fourteenth Amendment cases because Fourteenth Amendment decisions are inflexible on constitutional grounds. Levmore, *supra* note 96.

112. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

is worried Congress will not pay enough attention to enforcing the dormant Commerce Clause, it should also be worried Congress will not pay enough attention to reversing its dormant Commerce Clause decisions.¹¹³ It is inconsistent for the Court to use concern about Congress's tendency to ignore dormant Commerce Clause issues as a defense of active review and at the same time use Congress's ability to reverse the Court as a defense of active review.

Second, just because an action can be reversed does not mean it is the best course of action to take. The observation that Congress can reverse the Court's dormant Commerce Clause decisions does not resolve whether it is desirable for the Court to engage in active review in dormant Commerce Clause cases in the first place. Nor does it meaningfully resolve whether it is undesirable for the Court to engage in active review in Fourteenth Amendment cases.¹¹⁴

Determining when the Court should engage in active review or passive review requires considering the proper role of the Court in constitutional cases. Considering the proper role of the Court in constitutional cases requires asking, *what is the point of the Constitution?* "It is hardly original or profound to answer this question by observing that the framers chose to create their government in a constitution deliberately made difficult to change as a way of preventing tyranny of the majority, of protecting the rights of the minority from oppression by social majorities."¹¹⁵ "[T]he role of the courts is to make sure that the democratic process remains open and inclusive, and that unfairly excluded minority groups are protected."¹¹⁶

113. Like the Court, Levmore also articulates this worry. *See* Levmore, *supra* note 96 ("Victimized states, producers, and consumers might therefore seek congressional action to check interstate aggression. But what if Congress cannot focus its attention on the myriad local laws and practices that penetrate state borders in one way or another? In such cases, congressional action may eventually overturn an aggressive state law but only after considerable delay. Judicial intervention would restore the benefits of free trade more quickly.").

114. By way of analogy, the fact that you can return a purchase does not necessarily mean you should make that purchase, or the fact that you can stop dating someone does not necessarily mean you should go on a date with that person. It is not that the reversibility of an action is irrelevant to whether that action is wise. You might take into account the return policy when deciding whether to buy something. You might consider whether to go on a second date with someone less carefully than whether to move in with that person, in part because it is much easier to tell someone you are not interested in a third date than to move out of a shared home. But there are considerations beyond the reversibility of an action. A flexible return policy is not itself a reason to buy something you do not need or like—especially instead of something you need and like. The fact that you do not have to keep dating someone is not itself a reason to go on a date with that person—especially if you do not enjoy the person's company or if it will prevent other dating opportunities that interest you more.

115. ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 8 (2014).

116. David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1269.

If the role of the Constitution is to protect minority groups from oppression because a democratic system entails the risk of tyranny of the majority, it follows that in determining how actively to review allegedly unconstitutional legislation, the Court should consider the political power of the plaintiff challenging the law.¹¹⁷ In short, any conflicts that can be resolved fairly through the democratic political process should be resolved through the democratic process; where the democratic process is at risk of treating a group unfairly, the Court should play a greater role by actively reviewing allegedly unconstitutional legislation.¹¹⁸

117. The Court and legal scholars have frequently made this argument. The Court first raised this issue in the famous *United States v. Carolene Products, Co.* footnote four. 304 U.S. 144, 153 n.4 (1938) (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”). The Court then explicitly addressed political powerlessness in *San Antonio Independent School District v. Rodriguez*. See 411 U.S. 1, 28 (1973) (“[T]he traditional indicia of suspectness [includes classes that are] saddled with . . . disabilities, or subjected to . . . a history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness . . .”). Legal scholars have frequently discussed the role of political power—and powerlessness. See, e.g., Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1536, 1542–45 (2015) (noting that “[t]he powerlessness doctrine has been around for a long time” and summarizing scholarly work on political powerlessness).

118. This argument also echoes arguments by philosopher Philip Pettit:
 In order for citizens to control the state in such a way that it is not a dominating force in their lives, it is not enough for them to enjoy collective control over those in power. Such collective control would be consistent with the domination of individuals who fail to go along with the collectively expressed wishes of the group.
 PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 209 (2012). Pettit also argues,

The problem of the sticky divide [between the minority and majority on certain issues] is that there are independently identifiable individuals who, on certain issues, are more or less bound to be on the losing side. It is important that the individuals who are bound to lose are independently identified—say, identified on the basis of creed or colour, race or sexual orientation—not identified just by their disposition to vote a certain way on those issues. Otherwise, we would have to say that just by being unlucky enough to choose minority views on various issues people would be deprived of access to equal influence. Otherwise, indeed, we would have to say that just by being contrarian enough always to choose views that look likely to be in the minority, people would be deprived of access to equal influence. There will be no problem if individuals who are *ex ante* as likely to choose one as another side on given issues happen in general to choose the losing side or aim in general to choose the losing side. The problem is confined to the case where there is *ex ante* reason, associated with their independently

IV. BECAUSE OF THE PLAINTIFFS' COMPARATIVE POLITICAL POWER,
THE SUPREME COURT SHOULD REVIEW LEGISLATION
CHALLENGED UNDER THE FOURTEENTH AMENDMENT
MORE ACTIVELY THAN LEGISLATION CHALLENGED
UNDER THE DORMANT COMMERCE CLAUSE

Playing its proper role and preventing tyranny of the majority means that the Court should work to ameliorate power imbalances.¹¹⁹ Again, this is not a novel idea.¹²⁰ And it is one the Court itself purportedly recognizes.¹²¹ Yet despite recognition that the Court should work to ameliorate power imbalances, its current approach—actively reviewing legislation challenged under the dormant Commerce Clause and passively reviewing legislation challenged under the Fourteenth Amendment—exacerbates power imbalances.

One key difference between dormant Commerce Clause and Fourteenth Amendment plaintiffs is how much political power they have—how likely they are to be able to get Congress to intervene on their behalf. In dormant Commerce Clause cases, plaintiffs seek to vindicate the interests of a state.¹²²

fixed identity, to think that certain individuals will be in the minority on given issues: their identity pre-commits them, as we might say, on those issues.

Id. at 212–13 (footnote omitted). To address this problem, Pettit proposes introducing “a system of individualized contestation that parallels the collective challenge that elections make possible.” *Id.* at 213. This system includes recourse to courts. *Id.* at 216.

119. See, e.g., Strauss, *supra* note 116, at 1268–69 (“That may be why, in the end, *Carolene Products* is not obsolete. Despite all its weaknesses, and there are many, it still gives us a way of thinking about what the courts should do. They should protect political dissenters; they should make sure the democratic process is not blocked; they should protect minorities whose condition resembles that of the clearest example of a discrete and insular minority, African Americans in the Jim Crow South. We might disagree about what those groups are; people undoubtedly do disagree about whether gays and lesbians are such a group. But *Carolene Products* tells us what questions to ask. *Carolene Products* is certainly in eclipse now, but its essential vision is still powerful: the role of the courts is to make sure that the democratic process remains open and inclusive, and that unfairly excluded minority groups are protected. If you have a better idea about what courts should be doing in difficult constitutional cases, let me know.”).

120. See *id.*; see also Stephanopoulos, *supra* note 117, at 1536.

121. See *Rodriguez*, 411 U.S. at 28.

122. For example, the plaintiff in *Hunt* was a “a state agency, the Washington State Apple Advertising Commission, charged with the statutory duty of promoting and protecting the State’s apple industry.” 432 U.S. 333, 336–37 (1977). The agency sued to challenge a North Carolina statute. *Id.* at 336. In *City of Philadelphia*, the plaintiffs were “several cities in other States,” as well as “the operators of private landfills in New Jersey,” and they sued to challenge a New Jersey statute. 437 U.S. 617, 619 (1978). The plaintiffs in dormant Commerce Clause cases are not always states, state agencies, or cities. But even in these cases, states’ interests are represented. Indeed, often the challenges could have been brought by states, even if other entities brought them instead. For example, the plaintiff in *Kassel* was a trucking company. See 450 U.S. 662, 664 (1981). But one of the problems the Court found with the Iowa law was that it intentionally kept trucks traveling interstate routes off Iowa highways, and consequently burdened other states with increased truck traffic. See

Although defining political power can be difficult,¹²³ on any definition of political power, states are politically powerful actors. If any interest group has the ability to get Congress' attention, states do.¹²⁴ States' interests are represented in both houses of Congress, and each state has equal representation in the Senate regardless of population.¹²⁵ Although it probably is true that, as the Court has said, Congress would not act on every such dispute,¹²⁶ Congress is empowered to police interstate commerce, and there is reason to think states would be *more successful* than most other interest groups at getting Congress to address their commercial concerns.¹²⁷

There is also reason to think many Fourteenth Amendment plaintiffs would be *less successful* than other actors—certainly *less successful than states*—at getting Congress to address their concerns. In the Fourteenth Amendment cases at issue here,¹²⁸ individuals or groups who have already lost out in their states' political processes seek to vindicate their interests, alleging harm from legislation passed by their own states' legislatures.¹²⁹

id. at 677. The states that experienced increased truck traffic could have challenged the Iowa law, and the trucking-company-plaintiff's victory benefited these states. *Bibb* is similar to *Kassel* in this regard and serves as another example. See 359 U.S. 520, 521–23 (1959).

123. See Stephanopoulos, *supra* note 117, at 1537 (“One might think that courts and scholars would have settled on the meaning of powerlessness in the decades since *Carolene* and *Rodriguez*. But one would be wrong.”).

124. Under this analysis, subnational divisions of the United States that are not represented in Congress—such as territories, the District of Columbia, and Indian reservations—may require different treatment than states. Although I will not address this issue in detail in this Article, I note that focusing on political power requires considering relevant distinctions between states and other subnational divisions of the government.

125. U.S. CONST. art. I, §§ 1–3.

126. See *City of Phila.*, 437 U.S. at 623.

127. The concerns raised in *Hunt*, for example, deal with interstate shipment of goods, which is precisely the kind of concern that the Commerce Clause empowers Congress to regulate. See 432 U.S. at 336; see also *United States v. Lopez*, 514 U.S. 549, 553 (1995) (explaining that commerce is traffic and intercourse, and that even earlier, and narrower, understandings of the Commerce Clause power permit regulation of interstate trafficking of goods).

128. That is, Substantive Due Process cases that do not implicate fundamental rights and Equal Protection cases where the law being challenged does not facially discriminate.

129. For example, the plaintiffs in *Washington v. Davis* were African American job applicants who were denied employment, allegedly on the basis of race. 426 U.S. 229, 232 (1976). Similarly, the plaintiff in *Feeney* was a female employee who was denied a promotion, allegedly on the basis of gender. 442 U.S. 256, 259 (1979). The plaintiff in *Williamson* was an optician challenging a law that allegedly benefitted the professional interest of ophthalmologists and optometrists over opticians. 348 U.S. 483, 484–85 (1955). The plaintiff in *Ferguson* was an individual challenging a law that made “debt adjusting”

Substantive Due Process plaintiffs may claim another interest group was able to unduly influence their state legislature.¹³⁰ Equal Protection plaintiffs may claim laws harming them passed because they are members of a group that is marginalized in their state’s political process because of “their independently fixed identity.”¹³¹

Certainly not every Fourteenth Amendment case will involve such claims, and, even in those that do, plaintiffs’ claims may not always be true—not every Substantive Due Process case is brought by a plaintiff correctly claiming another group unduly influenced the legislature, and not every Equal Protection case is brought by a member of a group that has been unreasonably excluded from the political process. But the key point is that in some cases these allegations will be true. And when these allegations are true, courts may be the only recourse for groups with little political power.¹³² The same political exclusion that occurred at the state level may occur at the federal level, and, even if it does not, Congress may hesitate to interfere with state laws addressing intrastate issues.¹³³

Of course, after engaging in active review, the Court can always uphold the challenged law. Just as the Court’s current active approach to the dormant Commerce Clause does not mean it has to strike down every law challenged under the dormant Commerce Clause, active review in the Fourteenth Amendment cases discussed here would in no way necessitate striking down every law challenged under the Fourteenth Amendment.¹³⁴ But only by actively reviewing legislation challenged under the Fourteenth Amendment can the Court determine whether a political breakdown has occurred, and intervene if it has.

Therefore, the Court should be more active in Fourteenth Amendment cases because the plaintiffs generally have less political power and more

illegal except as incident to the practice of law, allegedly benefitting lawyers’ professional interests over other groups’ professional interests. 372 U.S. 726, 726–27 (1963).

130. See, e.g., *Ferguson*, 372 U.S. at 726–27.

131. *PETTIT*, *supra* note 118, at 213; see also, e.g., *Washington v. Davis*, 426 U.S. at 232.

132. See, e.g., *CHEMERINSKY*, *supra* note 115, at 10.

133. Under some readings of the Commerce Clause, it is actually precluded from doing so. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (articulating a narrow view of Congress’s Commerce Clause power that would prevent Congress from getting involved in many of the issues raised in Substantive Due Process or Equal Protection cases).

134. See *Maine v. Taylor*, 477 U.S. 131, 147 (1986) (upholding a state law prohibiting importing of baitfish). It is true that when the Court applies strict scrutiny in Substantive Due Process cases, it virtually always invalidates the law under review. See *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (describing conventional strict scrutiny analysis as “scrutiny that is strict in theory, but fatal in fact”). But, even if *Maine v. Taylor* is a rare case of the Court upholding a law that it carefully scrutinized, it shows that active review in no way requires the Court to invalidate a law. See generally 447 U.S. 131.

passive in dormant Commerce Clause cases because the plaintiffs have more political power. Reserving more active judicial review for Fourteenth Amendment cases where plaintiffs may have been unreasonably excluded from the political process is the best approach to judicial review in a democracy.¹³⁵ In cases where both parties have enough political power to demand accountability from state or federal legislatures, the Court should let democracy do its work and passively review laws.¹³⁶ This approach—which, again, the Court at least theoretically recognizes¹³⁷—gives democratically elected legislatures as much leeway as possible while still protecting the rights of groups that cannot count on the democratic process to treat them fairly.¹³⁸

V. CONCLUSION

This Article points out that the Supreme Court takes different approaches to judicial review when examining legislation under the Fourteenth Amendment and the dormant Commerce Clause. The Court takes a passive approach in Fourteenth Amendment cases, deferring substantially to legislatures, and an active approach in dormant Commerce clause cases, deferring very little to legislatures. This Article also argues that, because of the relative political power of typical plaintiffs, the Court should take the opposite

135. As Erwin Chemerinsky articulates:

The primary reason for having a Supreme Court, then, is to enforce the Constitution against the will of the majority. In a democracy, the majority can protect itself through the political process; it is minorities—political, racial, social, economic—that need protection that democracy often cannot and will not provide.

... I believe that the two preeminent purposes of the Court are to protect the rights of minorities who cannot rely on the political process and to uphold the Constitution in the face of any repressive desires of political majorities.

CHEMERINSKY, *supra* note 115, at 9–10.

136. See PETTIT, *supra* note 118, at 212–13. One point about Pettit’s argument deserves special mention. Pettit’s argument suggests the Equal Protection cases discussed in this Article are more in need of active judicial review than the Due Process cases discussed in this Article because the Due Process cases deal with discrimination against certain professional groups and the like, not discrimination against people because of their identities. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486–88 (1955). I agree. While this Article certainly argues there is an appropriate role for active judicial scrutiny of laws that may discriminate against certain professional groups because of the greater political influence of other professional groups, political favoritism or interest group capture on the part of professional groups is a lesser concern than discrimination against individuals who are marginalized in the political process because of their identity.

137. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

138. See, e.g., PETTIT, *supra* note 118, at 209–13.

approach. The Court should review legislation challenged under the dormant Commerce Clause less aggressively because the plaintiffs in those cases can better rely on Congress to protect their interests. The Court should review legislation challenged under the Fourteenth Amendment more aggressively because of the risk that the plaintiffs have been unreasonably excluded from the political process. By engaging in more active review in cases brought by litigants who can rely on the political process to consider their interests and more passive review in cases brought by litigants who all too frequently lack the power to hold legislatures accountable to their interests, the Court's current approach threatens to reinforce power imbalances and weaken democracy.