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JUSTICE SCALIA AND THE ELUSIVE IDEA OF DISCRIMINATION AGAINST INTERSTATE COMMERCE

RICHARD B. COLLINS*

[T]he Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent non-textual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.

Scalia, J., in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*.¹

Justice Scalia's views are bracing. No one would accuse him of excessive caution in his approach to Court precedents with which he differs.² Nor does he lightly concur in opinions of his colleagues; since joining the Court, he has issued more solo opinions than even Justice Stevens.³

This article examines the views of Justice Scalia and the Rehnquist Court on what Chief Justice Marshall tagged as Congress's "power to regulate commerce in its dormant state,"⁴ under which the Court defends the American common market. Justice Scalia has advocated cutting back this doctrine so that it would forbid only discrimination against interstate commerce. At the same time, other members of the Court have employed a broadened definition of forbidden discrimination. Justice Scalia has countered by arguing that discrimination should be facial to be fatal.

I shall argue here that the Court's loosened definition of discrimination is unfortunate and ought to be resisted, as several members of the Court have done. But trying to accomplish this by confining discrimination to "facial" won't work; Justice Scalia's own opinions give this away. A more promising path is to recognize the difference between state laws

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1. 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

2. See *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3064, 3065, 3067 (1989) (Scalia, J., concurring) ("Justice O'Connor's assertion . . . cannot be taken seriously"; "the most stingy possible holding"; "the least responsible" course of action); *Mistretta v. United States*, 488 U.S. 361, —, 109 S. Ct. 647, 683 (1989) (Scalia, J., dissenting) ("the creation of a new branch altogether, a sort of junior-varsity Congress . . . will be disastrous"); *Morrison v. Olson*, 487 U.S. 654, 712 (1988) (Scalia, J., dissenting) (Court's judgment "ad hoc, standardless"); *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (Title VII has "been converted into a powerful engine of racism and sexism").

3. My count through the 1988 Term is Justice Scalia - 52, Justice Stevens - 35. The quoted language from *Tyler Pipe* is from a solo opinion. Justice Scalia concurred and dissented based on precedent in the first part of his opinion, joined by Chief Justice Rehnquist. 483 U.S. at 254. The quoted language is from the second part, in which no other justice joined.

4. *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829).

that discriminate against interstate commerce without regard to the laws of any other state and those that burden commerce only when other states' laws are taken into account. To clarify the distinction, I shall label these concepts respectively independent and dependent discrimination.

The independent discrimination concept identifies protectionist state laws that are presumptively invalid. Discrimination so defined is thus a practical concept producing a workable rule capable of predictable application by state officials and lower courts. In contrast, dependent discrimination does not identify presumptively invalid state laws. The validity of burdens on interstate commerce arising only when the laws of two or more states are considered turns on factors other than discrimination. The principal factors involved are effects on commerce in transit through the state and the state's justification. Thus, when the Court labels such state laws "discriminatory," it achieves almost nothing analytically, but rather, causes confusion. Clarity of analysis is improved by confining the concept of discrimination against interstate commerce to independent discrimination and categorizing other cases according to the actual criteria upon which the Court bases its decisions.

If the Court's definition of discrimination were limited to independent discrimination, Justice Scalia's view could be reformulated. Should the Court entirely confine the dormant commerce power doctrine to independent discrimination, for the reasons that Justice Scalia asserts in favor of his facial discrimination standard? That is, should the Court sustain all state laws that do not discriminate independently of the laws of other states? If this were done, the Court would abandon its efforts to police multiple taxation of interstate commerce and its efforts to protect commerce in transit through a state.

Neither history nor policy justifies abandoning judicial protection of commerce in transit. This was the problem most clearly within the intent of the framers, so that Justice Scalia's concern about original intent ought to accord it priority rather than abandon it. On the other hand, the Court's present policing of multiple taxation includes both commerce in transit and state import-export commerce. When multiple taxation solely involves a state's import-export commerce, common market concerns are not so strongly implicated. The Court could sustain such laws without serious damage to our national market.

I. JUSTICE SCALIA'S THEORY REVEALED

Justice Scalia has unfolded his commerce clause theory in stages, like a serialized story. Chapter one was his 1987 concurring opinion in *CTS v. Dynamics Corp. of America*.⁵ While voting with the Court to overrule

5. 481 U.S. 69 (1987), reversing 794 F.2d 250 (7th Cir. 1986). The preface to chapter one was Professor Scalia's remark to a symposium on federalism that the dormant commerce power doctrine is not "a good idea." Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 21 (1982).

Judge Posner and sustain Indiana's anti-takeover statute, Justice Scalia announced that he disagreed with the Court's traditional commerce clause theory and endorsed a more limited doctrine that would confine invalidity to discrimination against interstate commerce or "an impermissible risk of inconsistent regulation by different States."⁶

His view further unfolded two months later when the Court announced its decisions in *Tyler Pipe* and *American Trucking Associations v. Scheiner*.⁷ Both rulings invalidated state taxes by concluding that they discriminated against interstate commerce. The peroration of Justice Scalia's blistering dissent in *Tyler* is quoted at the head of this article. He argued from original intent and policy against any dormant commerce power doctrine. He also wrote a specific dissent in *American Trucking* that invoked his *Tyler* opinion.⁸

For the next year, Justice Scalia sheathed his sword. He quietly concurred in Chief Justice Rehnquist's opinion for a unanimous Court sustaining an application of Louisiana's use tax.⁹ This was a routine case of a kind that we'll see no more under the Court's reduced appellate jurisdiction.¹⁰ But the opinion was based on the Court's precedents to which Scalia objects. Later in the same term, Justice Scalia wrote for a unanimous Court to overturn Ohio's discriminatory tax on ethanol imported from Indiana.¹¹ His disagreements with the Court's precedents were reserved in an innocuous footnote, and the opinion itself was on his terms: Ohio's law "on its face . . . violate[s] the cardinal requirement of nondiscrimination."¹²

6. 481 U.S. at 95 (Scalia, J., concurring in part and concurring in the judgment). In fact, the quoted words were the essence of the Court's traditional theory in context; Scalia's disagreement was more with the Court's articulation than with its doctrine. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Court struck down Illinois' anti-takeover statute based on risk of conflicting regulations of different states. The *CTS* opinion distinguished *MITE* because the Indiana statute was confined to Indiana-chartered corporations. The effect of both decisions is to allocate exclusive jurisdiction to regulate corporate takeovers to the state of incorporation, thus preventing conflicting state regulation.

Before *CTS*, Justice Scalia had joined the Court's unanimous rejection of an import-export clause challenge to a state property tax. *R. J. Reynolds Tobacco Co. v. Durham Co.*, 479 U.S. 130 (1986). While *R. J. Reynolds* involved some of the same concepts as the commerce clause doctrines Scalia questions, the import-export clause is a more specific constitutional text with a distinct history.

7. 483 U.S. 266 (1987).

8. *Id.* at 303. See also *American Trucking Ass'ns v. Smith*, 58 U.S.L.W. 4704, 4713 (1990) (Scalia, J., concurring in the judgment).

9. *D. H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988).

10. See Pub. L. 100-352, 102 Stat. 662 (1988), applying to cases that became subject to appeal on or after September 25, 1988. Before this statute became effective, dormant commerce power challenges that lost in state courts were within the Court's appellate jurisdiction, and cases challenging state taxes were kept out of the lower federal courts by the statutes limiting federal district court jurisdiction over state tax attacks. Hence, some entirely unremarkable affirmances such as *D. H. Holmes* got full-dress opinions. Under the newly reduced appellate jurisdiction, these cases will be denied review on certiorari. See generally Boskey & Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 109 S. Ct. 412 (1988).

11. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

12. *New Energy Co.*, 486 U.S. at 274. On broader theory, see *id.* at 273 n.2.

Justice Scalia reentered the lists in *Bendix Autolite Corp. v. Midwesco Enterprises*.¹³ The Court overturned an Ohio statute that denied statute of limitations defenses to foreign corporations that had not consented to the general jurisdiction of Ohio's courts. The Court refused to base its decision on discrimination against interstate commerce, and Justice Scalia concurred in the judgment based on discrimination.¹⁴

In *Goldberg v. Sweet*,¹⁵ the Court sustained Illinois' tax on interstate telephone calls charged to an Illinois service address. All justices voted to sustain, but three concurred separately.¹⁶ Justice Scalia squarely asserted that only facial discrimination against interstate commerce ought to invalidate a state law.¹⁷

*Amerada Hess Shipping Corp. v. Director, Division of Taxation of New Jersey*¹⁸ was another routine affirmance of a state tax. Justice Blackmun's opinion relied on traditional criteria, and Justice Scalia concurred separately, based on his facial discrimination standard.¹⁹

*Healy v. Beer Institute, Inc.*²⁰ overturned a Connecticut statute regulating wholesale beer prices. The outcome seemed controlled by recent precedents, although Justices Scalia and Kennedy were new votes.²¹ Justice

13. 486 U.S. 888 (1988). The case began as a contract action in federal district court based on diversity jurisdiction. The lower federal courts struck down the state law at issue, so the case was also within the Court's former appellate jurisdiction. See *supra* note 10 and accompanying text.

14. *Bendix Autolite*, 486 U.S. at 890, 895 (Scalia, J., concurring in the judgment). Chief Justice Rehnquist's dissent concluded, "I see no discrimination against interstate commerce here." *Id.* at 900.

15. 488 U.S. 252, 109 S. Ct. 582 (1989).

16. *Id.* at ____, 109 S. Ct. at 585 (Justices Stevens, O'Connor and Scalia).

17. *Id.* at ____, 109 S. Ct. at 594 (Scalia, J., concurring in the judgment).

18. 109 S. Ct. 1617 (1989). *Amerada* was a product of the jurisdictional rules since changed. See *supra* note 10 and accompanying text.

19. *Amerada Hess*, 109 S. Ct. at 1625 (Scalia, J., concurring in the judgment). Justice Scalia added his agreement with the Court's conclusion that the taxpayer had a sufficient connection to the state to satisfy the due process clause. *Id.* The Court bases its standard for a taxpayer's connection to a taxing jurisdiction on both the commerce and due process clauses. See *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165-66 (1983). Justice Scalia confined his concurrence on this point to the due process clause.

In *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989), the Court unanimously rejected a commerce clause challenge to a state regulation of natural gas pipelines. Justice Scalia joined the Court's opinion that was based on traditional criteria, but the case was chiefly about preemption rather than the dormant commerce power.

20. 109 S. Ct. 2491 (1989) (*Healy II*).

21. See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983) (*Healy I*); both followed, 109 S. Ct. at 2499-2501. Because the *Healy* cases involved regulatory laws rather than taxes, there was federal district court jurisdiction, invoked by the beer barons. The lower federal courts struck down the state laws, so the cases were again within the Court's former appellate jurisdiction. See *supra* note 10 and accompanying text.

Part of the dispute in *Healy*, *Brown-Forman*, and other liquor cases was about the reach of the twenty-first amendment, which expressly authorizes states to prohibit importation of intoxicants. In *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), the Court had unanimously sustained a less burdensome state regulation of liquor prices, relying on the twenty-first amendment, but its opinion was strongly hedged. The *Brown-Forman* opinion distinguished *Seagram*, then *Healy II* overruled it. 109 S. Ct. at 2502.

The appointments of Justices Scalia and Kennedy have not affected the Court's division on the twenty-first amendment issue. In *Brown-Forman*, the Burger Court rejected twenty-first amendment

Kennedy joined Justice Blackmun's majority opinion, and Justice Scalia concurred based on his standard of facial discrimination against interstate commerce.²² However, discrimination was not so evident to the three dissenters.²³

As this review suggests, how much a discrimination-only standard would change the dormant commerce power doctrine depends very much on one's definition of discrimination. Scholars have argued in favor of various discrimination standards that would increase or reduce invalidation of state laws.²⁴ If the justices follow conceptually different definitions, the discrimination standard could become so vague that it simply conceals what the Court is doing.

II. THEME AND VARIATION ON DISCRIMINATION

A. *Tariffs as Discrimination*

When thinking about legal barriers to intersovereign trade, it is natural to focus on tariffs as the most prominent device in the traditional arsenal of governmental parochialism. Reasoning by induction, we can generalize from tariffs and similar methods like embargoes and quotas to conclude that discrimination against intersovereign trade is a categorical evil that suppresses free trade. Applying the commerce clause to interstate trade, the Supreme Court reached this conclusion long ago,²⁵ and it has often relied on discrimination as a standard to identify presumptively invalid state laws.

To be useful, a general legal standard should be sufficiently defined for reasonably consistent application. For discrimination against interstate commerce, the question is what legal devices are so tariff-like that they should fall under the same condemnation. However, the idea of dis-

immunity by a 6-3 vote. Chief Justice Burger and Justice Powell were in the majority. See also *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (same). In *Healy II*, the Rehnquist Court rejected the same argument by the same vote, with Justices Scalia and Kennedy in the majority.

22. 109 S. Ct. at 2503 (Scalia, J., concurring in part and concurring in the judgment).

23. 109 S. Ct. at 2504 (Rehnquist, C.J., joined by Stevens and O'Connor, JJ., dissenting).

24. See Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395 (1986); Hellerstein, *Constitutional Limitations on State Tax Exportation*, 1982 AM. B. FOUND. RES. J. 1; Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985); Smith, *State Discrimination Against Interstate Commerce*, 74 CALIF. L. REV. 1203 (1986).

25. See *Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 151-53 (1869) (dictum); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 138-140 (1869) (dictum). Both the Court and scholars regularly invoke the tariff model. See, e.g., *Baldwin v. G. A. F. Seelig, Inc.* 294 U.S. 511, 521-22 (1935); Regan, *supra* note 24, at 1095.

The Treaty of Rome governing the European Economic Communities achieves the same generalization by forbidding tariffs and "all charges having equivalent effect" and quotas "and all measures having equivalent effect." Treaty of Mar. 25, 1957, arts. 9, 30, published in 1 Common Mkt. Rep. (CCH) ¶¶ 201, 321.

crimination has acquired great rhetorical force from its deployment in civil rights battles, and interstate commerce cases are not immune from this development. Lawyers attacking state commercial laws and justices explaining invalidations are tempted to claim the high ground of discrimination. This has intensified disagreements over how the concept should be defined in commerce clause cases. In the Rehnquist Court, the debate matches Justice Scalia, seeking to limit the dormant commerce power doctrine to facial discrimination, against other justices who explicitly reject that view and apply a very broad definition.

B. Independent or Dependent Discrimination

Tariffs make transboundary trade more expensive than trade within the enacting state. If we define discrimination by generalizing from this effect alone, any state law causing such differential expense would be condemned as equivalent to a tariff. But this would go much too far. A firm operating in two states incurs many costs simply from the existence of separate legal systems. Two bureaucracies must be paid instead of one, the firm must hire separately licensed persons to do certain things, and it must obey disparate rules that add costs, such as safety and labeling standards for goods. Many of these costs inhere in a federal system and can't be eliminated without abolishing it.

How can we generalize from tariffs in a more limited way, consistent with both a federal system and a common market? Another feature of tariffs is that they make transboundary commerce more expensive regardless of what any other government does. A tariff disadvantages interstate commerce whether or not any other state imposes one. In contrast, many other laws disadvantage interstate commerce only if we take into account the laws of two or more states. An annual property tax applied to an interstate railroad car disadvantages interstate commerce only if imposed by more states than one. A state law requiring railroad cars to have a particular kind of safety coupler disadvantages interstate commerce only when another state in which the car travels requires a different, incompatible coupler.

From the point of view of an interstate firm or a national economist, either kind of discrimination can be very costly, and there is no general reason to condemn one more than the other. But from the perspective of the federal system, the two are very different. Except for a few special circumstances such as quarantines, independently discriminatory laws serve only to protect local interests from their direct competitors in other states—the policy known as protectionism.²⁶ Indeed, that is usually why

26. This definition must be altered when applied to state laws that discriminate against commerce in transit through a state and in favor of import-export commerce of that state. Such laws are independently discriminatory, and to some extent they benefit locals over their outside competitors, but that is not the principal effect or usual purpose. Such laws are rare in the United States, and the discussion in the text assumes the usual definition, discrimination between interstate and intrastate commerce. However, commerce in transit is very important to commerce clause jurisprudence. See *infra* notes 120-26 and accompanying text.

the enacting state adopts them.²⁷ Protectionism is not essential or even important to state autonomy; a federal system can flourish without it.

State laws that have discriminatory effects on interstate commerce only in conjunction with the laws of other states often carry out essential functions of state government. Compare a tariff on milk imports with a tax on milk sales. The tariff raises some revenue, but the only effect of its tariff form is to protect local milk producers. The tax on milk sales has no distinct effect on interstate commerce unless another state can and does tax some of the same sales. In that event, local commerce is favored in the same way as under tariffs; the law is protectionist to that extent. But the sales tax is primarily a revenue measure, and modern government is heavily reliant on either this tax or others presenting the same issue.

The same contrast can be seen for regulatory laws. A quota on milk imports protects local milk producers. Regulating the way milk should be transported is not a uniquely interstate burden unless another state imposes different, conflicting regulations. In that event, interstate commerce is specially burdened according to the degree of conflict. State government again has important interests in promoting health, safety, the environment, and other worthy ends.

In sum, prohibiting independent discrimination against interstate commerce (except for quarantines and the like) bars only protectionism. But limiting dependent discrimination directly invades essential state interests.

C. *The Court's Discrimination Concept(s)*

In reviewing state regulatory laws, the Supreme Court has consistently conceived of discrimination against interstate commerce as what I have called independent discrimination. When burdens on commerce arise from conflicting or cumulative regulations of two or more states, the Court labels the state laws at issue as "nondiscriminatory."²⁸ It may nevertheless strike them down as "undue burdens," but not on the basis of discrimination.²⁹

27. Protectionist purpose is usually present at enactment. In the unusual case where it is not, continued enforcement is intentional, in the relevant sense, after discrimination becomes apparent. See, e.g., *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1970) (striking down accidental discrimination).

28. See *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959). This rule works both ways: a state cannot justify independent discrimination by reference to the laws of other states. See *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Cf. *Austin v. New Hampshire*, 420 U.S. 656, 665-66 (1975) (analogous ruling under interstate privileges and immunities clause).

29. *Bibb*, 359 U.S. at 529 (striking down Illinois' requirement of peculiar mudflaps for trucks). See also *Edgar v. MITE Corp.*, 427 U.S. 624 (1982).

The Court has struck down a few state laws as "undue burdens" on interstate transportation or communication even though they do not impose any extra burden (actual or potential) on interstate activities of the subject of regulation. E.g., *Cleveland, C., C. & S. Ry. v. Illinois*, 177 U.S. 514 (1900) (voiding state law requiring all passenger trains to stop for passengers at all county seats). The famous decision in *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945), might be so characterized. In those instances, a state "discriminated" by selecting as the subject of regulation a mode of transportation or communication in which commerce in transit heavily predominated. See *infra* notes 121-23 and accompanying text.

This is a precise rule because independent discrimination is usually easy to identify; indeed, it is often facial, as Justice Scalia would have it.³⁰ When it is, the Court imposes "a virtually *per se* rule of invalidity."³¹

The Court is much less exact in its review of state taxes. It has sometimes defined discrimination to mean what I have described as independent discrimination and has classified burdens on interstate commerce that arise solely from cumulative taxes of two states as nondiscriminatory.³² But on other occasions, it has branded cumulative or multiple taxation as discrimination.³³ In the latter instances, it has relied on what I have called dependent discrimination but without differentiating it from independent discrimination. Recent disagreements within the Court are part of the muddled pattern for tax cases.

Concluding that a tax is not independently discriminatory does not automatically sustain it. The Court has struck down many multiple tax burdens but has based invalidity on more flexible criteria than discrimination.³⁴

Justice Scalia argues for a limit to facial discrimination, but his opinions suggest a concern about independent discrimination. While arguing for a facial limit, he has favorably cited decisions that struck down nonfacial (but independent) discrimination.³⁵ His dissents have been targeted at the multiple taxation doctrine, which involves only dependent discrimination.³⁶

30. But not always; some nonfacial statutes are independently discriminatory. Certain state-imposed devices inherently burden outsiders in relation to their local competitors, so that the economic effect is the same as facial discrimination. The best known are those employed in the "drummer" cases, in which state or local governments imposed special requirements on sales agents. See, e.g., *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

When state laws draw lines based on product differences or selling methods that happen to favor local interests, the Court sustains them whenever the state advances any plausible, nonprotectionist basis for the distinction. See, e.g., *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (sustaining "Green River ordinance" forbidding door-to-door selling because it furthered residential privacy, safety, and quiet, despite resulting advantages to local retailers). But in a few instances, regulations based on product differences appear to have no other purpose than to erect tariff-like barriers, and the Court strikes them down. E.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (striking down North Carolina labeling law burdening apples imported from certain states). The same rule applies to tax cases. E.g., *Bacchus Imports, Inc. v. Dias*, 468 U.S. 263 (1984) (striking down liquor tax because of exemptions for products made locally); *Dayton Power & Light Co. v. Lindley*, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979) (striking down tax on low-sulfur coal burdening imports).

31. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

32. See, e.g., *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), sustaining a state tax over Justice Powell's dissent, which expressly argued that unfair apportionment that resulted in multiple taxation should constitute forbidden discrimination. Compare *id.* at 278-80 with *id.* at 283, 288-97 (Powell, J., dissenting). See also *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 501-03 (1947), discussed *infra* at notes 72-73 and accompanying text.

33. See, e.g., *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 439 (1939) (invalidating as discriminatory state gross income tax that did not discriminate unless risk of cumulative burdens imposed by other states was considered). See also *infra* notes 54-68 and accompanying text.

34. See *infra* notes 43-49 and accompanying text.

35. See, e.g., *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-76 (1988) (citing *Bacchus*, 468 U.S. 263, and *Hunt*, 432 U.S. 333); *supra* note 30.

36. In his *Tyler* dissent, Justice Scalia explicitly recognized that multiple taxation can be called "discrimination" only by considering cumulative effects of the laws of two or more states. 483 U.S. 232, 258 (1987). See *id.* at 254 n.1 (tax can be called "*facially* discriminatory" only by examining taxes of other states).

Moreover, there is a circularity problem. If discrimination is defined to include dependent discrimination, then multiple taxation is facially discriminatory, as some justices have argued.³⁷

One of Justice Scalia's purposes is to achieve standards that reduce case-by-case judicial discretion.³⁸ Superficially, that purpose would be better served by a facial standard, but it would be too easy for state drafters to avoid.³⁹ Moreover, confining the discrimination principle to independent discrimination would focus the doctrine in a predictable way, so judicial discretion can be confined.

The Court's disagreements and uncertainties about discrimination encourage litigants to keep pressing the concept. Their cause is aided by multifarious uses of the word discrimination outside of commerce clause jurisprudence. Four recent cases, two about taxes and two involving regulatory laws, reflect the Court's uncertainty about discrimination against interstate commerce.

III. COMMERCE DISCRIMINATION IN THE REHNQUIST COURT

A. *The Tyler Hype*

Justice Scalia delivered his vehement challenge to commerce clause doctrine in *Tyler Pipe*. In addition to the language quoted at the head of this article, his opinion accused the Court of implicitly overruling "a rather lengthy list of prior decisions."⁴⁰ From this, one would think that the case involved a sharp departure from precedent. Yet the holding in the case was conservative with respect to precedent, which was followed as closely as possible.⁴¹

The Court based its *Tyler* decision on discrimination against interstate commerce although, with Justice Scalia, I would classify it as a case about nondiscriminatory multiple burdens on interstate commerce. Or, according to the terms adopted in this article, the case was about dependent discrimination. If that was what the Court meant, my disagreement is with its undifferentiated definition of discrimination.

37. See *American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 290 (1987), discussed *infra* at notes 69-84 and accompanying text. Scholars who argue for a standard of intentional discrimination or intentional protectionism face a similar problem. While dependent discrimination need not be intended, it often is, particularly in the tax field, and in any case, it is intentional to continue enforcement after discriminatory/protectionist effects are revealed.

38. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 895 (1988) (Scalia, J., concurring in the judgment).

39. See *supra* note 30.

40. 483 U.S. at 255.

41. The Court did expressly overrule *General Motors v. Washington*, 377 U.S. 436 (1964), "to the extent . . . inconsistent" and approve the theory of one of the dissents in that case. 483 U.S. at 248. But that was a narrow and technical overruling. See *infra* notes 54-68 and accompanying text. The Court also unanimously rejected a broader attack on Washington's business taxes. 483 U.S. at 248-51.

Washington imposed a gross income tax on all business activities "in the State."⁴² Two of the specified classes of business activities were manufacturing and wholesaling, both assessed at the same rate on the same tax base, the price of goods sold. Local manufacturers who sold at wholesale within the state and paid tax on sales received a full credit against the tax on manufacturing. Thus, the tax on manufacturing considered alone facially discriminated against interstate commerce because the tax was imposed on exported goods but not on goods sold locally. But if manufacturing and wholesaling were considered together, any business operating in the state paid the same tax, and interstate commerce was burdened only to the extent that another state taxed the same transactions. From that perspective, the case was about nondiscriminatory multiple burdens. Because the scheme was one tax applied to several kinds of business activities, it was more realistic to view the case this way. No discrimination arose based on Washington's taxes alone; one had to take into account the actual or hypothetical taxes of other states to find multiple taxes.

To see where this problem fit into preexisting law, we need to look briefly at the general law on nondiscriminatory multiple taxation of interstate commerce. The Court has attempted to limit all multiple taxation, but in a general and flexible manner. It has applied two limiting concepts. One is exclusive allocation: when the basis for a state tax is associated with but one state, such as taxes on realty, the Court allocates exclusive taxing jurisdiction to that state. The Court upholds taxes by the state and strikes taxation of the same event by other states, thus reducing multiple taxation.⁴³

The alternative concept is apportionment. When more than one state has jurisdiction over an interstate activity, the Court requires these states to share taxing jurisdiction. A state can satisfy this requirement by granting a credit against taxes paid to other states.⁴⁴ Or the state can limit its

42. For the facts of the case, see 483 U.S. at 234-40.

43. See *Commonwealth Edison v. Montana*, 453 U.S. 609, 617 (1981) (sustaining state coal severance tax because "the severance can occur in no other state . . . no other state can tax the severance"); *Freeman v. Hewitt*, 329 U.S. 249, 271-72, 278 (1946) (Rutledge, J., concurring).

The text says "reducing" multiple taxation to recognize that this method is inexact. Taxable events do not neatly separate into economically distinct categories; some multiple taxation occurs because states' definitions of taxable events overlap. The facts of *Tyler* illustrate the problem; manufacturing and wholesaling are distinct events in many contexts but not when a manufacturer sells new goods.

The Court's opinions do not describe the concept as allocation of jurisdiction, in commerce clause cases nor in related due process cases about "minimum contacts." See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). The term is used by the leading treatise on state taxation of interstate commerce. 1 J. HELLERSTEIN, *STATE TAXATION* 328-30, 328 n.95 (1983).

44. See *Goldberg v. Sweet*, 488 U.S. 252, —, 109 S. Ct. 582, 590 (1989) (combination of fractional and credit apportionment); *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988) (credit provision is method of apportionment). Cf. *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 360-61 (1944) (Rutledge, J., concurring and dissenting) (credits are remedy distinct from apportionment). The credit method can cause interstate conflicts about which state's tax is primary and thus need not grant a credit. *Id.* The credit remedy is most commonly associated with sales taxes. See *infra* notes 46-49 and accompanying text.

taxes to a fraction of the tax that it applies to the same kind of activity entirely within it, a fraction based on the proportion of the taxed event occurring within the state. Annual property taxes on instrumentalities of interstate transportation are often apportioned according to miles traveled in each state. Net income taxes on interstate firms are apportioned based on measures of the firm's business activity in the state. If apportionment is reasonably accurate, multiple taxation is minimized.⁴⁵

Taxes on interstate sales straddle these concepts. Some sales, such as ordinary retail transactions, are sufficiently local to one state to confine formal taxing jurisdiction to it.⁴⁶ Many other sales are taxable in both the seller's and the buyer's jurisdictions. For practical reasons, states have traditionally taxed interstate sales based on some concept of place of sale.⁴⁷ This amounts to a form of apportionment that resembles exclusive allocation.⁴⁸ The Court has sustained the practice, rather than requiring apportionment of taxes on every sale between the seller's and

45. See *Freeman v. Hewit*, 329 U.S. 249, 271-72, 278 (1946) (Rutledge, J., concurring); Hellerstein, *Federal Limitations on State Taxation of Interstate Commerce*, 2 COURTS AND FREE MARKETS 451, 451-53 (1982). Like allocation, this method is inexact because each state can choose its own definition of taxable events and its own apportionment formulae. States are likely to select events and formulae favorable to them, and this causes some multiple taxation. See *Goldberg v. Sweet*, 488 U.S. 252, —, 109 S. Ct. 582, 588-91 (1989); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278-80 (1978). The *Moorman* Court concluded that more exact suppression of multiple taxation would too greatly invade state autonomy.

46. Cf. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) (striking down attempt by buyers' state to collect use tax on sales from mail order/common carrier seller in another state). The text says "formal taxing jurisdiction" because the Court sustains use taxes imposed on buyers who bring goods into a state for use there. But the use taxes that have been sustained credit sales taxes paid to another state, so that multiple taxation is not involved. See Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986).

47. See Nowak & Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. DAVIS L. REV. 273, 277 (1987). For a recent variation, see *Goldberg v. Sweet*, 488 U.S. 252 (1989), where the Court sustained Illinois' tax on interstate telephone calls billed to an Illinois service address. The billing provision was a method of apportionment akin to place of sale.

Departing from place of sale would require a state to distinguish local sales subject to its exclusive jurisdiction from interstate sales subject to the jurisdiction of two or more states. This would be complex and difficult, and no state attempts it on any general basis. However, parties can arrange the place of sale by agreement and have an incentive to do so for big ticket items. Thus some legal warfare arises from state efforts to counter place of sale arrangements that are contrary to a state's interest.

48. See *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 564 (1975) (gross receipts tax on local sales "apportioned exactly to the activities taxed, all of which are intrastate.") This is not exclusive allocation because for many wholesale transactions, both states have jurisdiction to tax, and in theory a state could choose a different apportionment formula than place of sale.

Sales and other turnover taxes are a particular concern in common market theory. The conflict arising from taxing systems that emphasize taxation of production ("origin principle") and systems that emphasize taxation of consumption ("destination principle") is considered a significant barrier to transboundary trade. See generally *FISCAL HARMONIZATION IN COMMON MARKETS* (C. Shoup ed. 1967). The European Common Market has eliminated most of this barrier by adoption of its harmonized system of value-added taxes. See A. EASSON, *TAX LAW AND POLICY IN THE EEC* 70-150 (1980). However, that was plainly a policy decision beyond the competence of courts. The U.S. Supreme Court allows each state to have whatever system of turnover taxes it chooses subject to the apportionment requirement.

buyer's states. This rule applies as well to gross income taxes when measured by gross sales.⁴⁹

Considered separately, Washington's tax on manufacturing was a "local" tax, imposed on an activity occurring entirely within the state and thus taxable only there. Its wholesaling tax was a typical sales tax, which, applied to interstate sales, was apportioned by the place of sale (to sales "in the State"). The credit tied the two together for the class of manufacturer-wholesalers. This class was not local because it included out-of-state manufacturers who sold at wholesale in Washington. The tax was obviously malapportioned. Conceptually, half the interstate activities were in Washington, but the tax was imposed on all of the same activities, external sales by local manufacturers and local sales by outside manufacturers.

The Court could have sustained the scheme, as Justice Scalia wished; the fundamental common market concern with commerce in transit⁵⁰ was not present, and merchants' ability to arrange the place of sale reduced the practical burden on interstate commerce. But the Court's prior decisions were strongly against that course.⁵¹

On the other side, some scholars have argued that the Court ought to require states to apportion interstate sales taxes like net income taxes, based on the taxpayer's overall business activities in the state; that is, to require that every transaction be apportioned between buyers' and sellers' states.⁵² Instead, the *Tyler* Court gave the state the most flexibility and changed its own precedents as little as possible. It held that a state can cure the problem by granting credits against its tax to interstate taxpayers who have paid a tax on the same transaction to another state.⁵³ This allowed Washington to continue its taxing system, and even to collect the same tax whenever a taxpayer could not qualify for the credit, a much less intrusive remedy than requiring apportionment of each transaction.

I have described what the *Tyler* Court did, but I have not described the Court's rationale. In its prior decision in *Armco Inc. v. Hardesty*,

49. See, e.g., *Standard Pressed Steel*, 419 U.S. 560. Another boundary between apportionment and allocation is the Court's concept of a unitary, multistate activity. Interstate firms have activities so distinct (such as the income of a subsidiary firm in a different business) that the Court treats them as separate for taxation purposes. If such activities occur in only one state, exclusive taxing jurisdiction is allocated to that state. The issue arises when a state tries to include in its apportionment base activities outside that state that the firm claims are separate. See *F. W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982); *Asarco, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982). For a space-age example, see *Communications Satellite Corp. v. Franchise Tax Bd.*, 156 Cal. App. 3d 726, 203 Cal. Rptr. 779 (1984), *appeal dismissed*, 469 U.S. 1201 (1985).

50. See *infra* notes 120-26 and accompanying text.

51. See *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), discussed *infra* notes 54-68 and accompanying text; 1 J. HELLERSTEIN, *supra* note 43, at 111-26.

52. See Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 171-88 (1988) (authorities cited at 175 n.206). Justice Brennan advocated this view in *General Motors v. Washington*, 377 U.S. 436, 451 (1964) (Brennan, J., dissenting). But no other justice joined him, and he has not pursued the point.

53. 483 U.S. at 246, 249. The state could also choose apportionment of every transaction, but this is unlikely. See *supra* note 47.

the Court classified a similar tax as unlawful discrimination against interstate commerce.⁵⁴ West Virginia had arranged its scheme the opposite way, crediting manufacturing tax payments by local manufacturers against its wholesaling tax. Thus, the wholesaling tax considered alone facially discriminated against interstate commerce because it was paid by outside manufacturers who sold in West Virginia, but it was not paid by their local competitors. The state argued that the two taxes should be considered together, but the Court disagreed.

The state also argued that the taxpayer should be required to prove that it had actually paid higher combined taxes than its local competitors, and Justice Rehnquist's dissent agreed.⁵⁵ In retrospect, Justice Rehnquist's position was not so different from the Court's because the credit remedy approved in *Tyler* amounted to almost the same thing. The Court required the state to cure its tax code on its face, while Justice Rehnquist's *Armco* dissent would have imposed the same cure as applied.⁵⁶

The *Armco* Court decided that risk of, not actual, multiple taxation was sufficient and overturned the tax. In doing so, it relied on *Container Corp. of America v. Franchise Tax Board*,⁵⁷ which had upheld an apportioned state tax on corporate net income applied to a multinational corporation. The principal issue was whether the tax was invalid because it involved foreign commerce.⁵⁸ The company also attacked the state's method of apportionment, and the Court dutifully reviewed the issue and sustained the apportionment formula—a routine decision strongly supported by precedent. In doing so, its opinion organized relevant precedents into tests, one of which was tagged as a requirement of “internal consistency.”⁵⁹ This test asks whether, if all states impose the same apportionment formula, there would be any multiple taxation of the firm's income. The test is a logical way to examine a formula's facial validity, although it determines an issue that is usually so easy that it may be overly formalistic to define it as a “test.” Indeed, no actual state attempt at apportionment has failed this test.⁶⁰

54. 467 U.S. 638, 639 (1984). For the facts of *Armco*, see 467 U.S. at 634-41.

55. *Id.* at 644; *id.* at 646 (Rehnquist, J., dissenting). This appears to have been the view of the issue taken in *General Motors v. Washington*, 377 U.S. 436 (1964), which was overruled *pro tanto* by *Tyler*, although the *General Motors* opinion was vague. See *supra* note 41.

56. See *supra* notes 52-53 and accompanying text. The *Armco* opinion did not suggest the credit remedy; it did not address the remedy question.

Justice Scalia's *Tyler* dissent seems to be much more basic than Justice Rehnquist's *Armco* dissent. Justice Scalia apparently would sustain the tax even if a taxpayer like *Armco* could prove that it had paid a higher combined tax. 483 U.S. at 258-59. Because Chief Justice Rehnquist joined in this view, he may have widened his disagreement with the majority.

57. 463 U.S. 159 (1983).

58. *Id.* at 184-97 (rejecting foreign commerce power argument by 5-3 vote). The special problem in applying the apportionment requirement to multinational transactions or taxpayers is that the United States has no power over foreign taxing authorities, so there is no way to require reciprocal apportionment by other jurisdictions. Some domestic taxes have been struck down for this reason. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

59. *Container Corp.*, 463 U.S. at 169.

60. See *Container Corp.* 463 U.S. 159; *Exxon v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); *Mobil Oil v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Moorman Mfg. Co. v. Bair*,

The *Container Corp.* opinion also discussed discrimination against interstate commerce. "Aside from forbidding the obvious types of discrimination against interstate or foreign commerce, [the anti-discrimination] principle might have been construed to require that a state apportionment formula not . . . produce double taxation."⁶¹ But the Court then pointed out that this definition of discrimination had been rejected in a prior decision.⁶²

The *Armco* opinion relied on *Container Corp.* twice. First, it borrowed the internal consistency test to decide if there were a risk of multiple taxation.⁶³ This use of the test was even more formalistic than in *Container Corp.*; once the Court reasoned that potential multiple taxation was invalid, it was quite obvious (and uncontested by the state) that such risk existed. There was no need of a formal test to answer the question, and by adopting one, the opinion gave the impression that the test had determined something important. Stated as an issue of apportionment of the tax on manufacturer-wholesalers, the state had not attempted apportionment, so malapportionment was obvious.

Second, the *Armco* Court said: "A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce."⁶⁴ In support, the opinion miscited the passage from *Container Corp.* quoted above, which stated that unfair apportionment "might have been construed" as forbidden discrimination but had not been.⁶⁵

Then came *Tyler*, so similar to *Armco* that the dominant question was whether the two cases could be distinguished. The majority concluded, correctly, that they could not be.⁶⁶ Justice Stevens' opinion fully quoted the passages from the *Armco* opinion discussed above, applying the internal consistency test and characterizing malapportionment as discrimination.⁶⁷ As in *Armco*, the internal consistency test had nothing to do with the contested issues, which had been determined before the opinion addressed the definition of discrimination in the *Armco* quote.

The holdings in both *Armco* and *Tyler* were consistent with the weight of precedent, and Justice Scalia's contrary accusation was mistaken. The

437 U.S. 267 (1978). States lose apportionment cases when they don't attempt to apportion, and a court later decides that apportionment should be required, or when an apportionment formula as applied produces grossly disproportionate results. See *Container Corp.*, 463 U.S. at 168-69.

61. *Container Corp.*, 463 U.S. at 170.

62. *Id.* at 171 (citing *Moorman Mfg. Co.*, 437 U.S. 267). See *supra* note 32. On the other hand, some prior cases had defined discrimination this way, to include dependent discrimination. See *supra* note 33.

63. 467 U.S. at 644.

64. *Id.*

65. *Id.* (citing *Container Corp.*, 463 U.S. at 170-71). Justice Powell wrote for the Court in *Armco*. Whether innocent or otherwise, his statement about discrimination revived the point he had lost in *Moorman*. See *supra* note 32. But as previously mentioned, the Court had at other times defined discrimination as it did in *Armco*. See *supra* note 33.

66. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). In his dissent, Justice Scalia tried to argue that *Armco* involved facial discrimination, but *Tyler* did not. *Id.* at 256-59. This was plainly wrong (either both involved facial discrimination, or neither did, depending on one's definition) and undermined his challenge to the majority's expansion of the discrimination concept.

67. *Id.* at 247 (quoting *Armco*, 467 U.S. at 644).

Court had a long-standing commitment to police multiple taxation, whether or not defined as discrimination. On whether the standard ought to be actual multiple taxation or the risk of it, there were decisions both ways. But the dominant rule was that risk of multiple taxation was sufficient.⁶⁸ The deployment of the broad concept of dependent discrimination with the internal consistency test was new, but it probably did not affect the outcome of either case.

B. *The American Trucking Detour*

After ambiguous opinions in *Armco* and *Tyler*, the Court unmistakably relied on the dependent discrimination concept in *American Trucking*. The decision was issued in tandem with *Tyler*, and Justice Stevens wrote for the Court in both.

The truckers attacked Pennsylvania's annual "flat" taxes on trucks using state highways. The taxes were imposed in the same dollar amount on every truck of a certain size, whether the truck used state highways for one day per year or for 365 $\frac{1}{4}$.⁶⁹ This form of taxation is plainly nondiscriminatory if one considers only Pennsylvania's taxes. Extra burdens on interstate commerce arise when other states impose like taxes, so that interstate trucks pay two or more taxes, while local trucks pay only one. According to the Court's dominant taxonomy, this was a nondiscriminatory multiple burden case.

In the last century, the Court had concluded that multiple taxation of interstate railroads and ships was invalid under the commerce clause.⁷⁰ After some uncertainty about remedy, the Court settled on apportionment of taxing jurisdiction among states visited, each taxing at a percentage of its rates on local transportation according to some measure such as miles traveled in the state.⁷¹

As highway travel became commercially important, states argued that the apportionment rule should not apply to highway taxes because the states own, build, and maintain roads, and they should be able to tax users to pay for them. The Court agreed and recognized an exception

68. See Hellerstein, *supra* note 52, at 165-70.

69. See *American Trucking*, 483 U.S. at 273-75.

70. See *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873) (railroads); *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 299 (1855) (ships). The *Hays* opinion did not rely on any specific provision of the Constitution, but the decision has been interpreted to rest on the commerce clause. See *Morgan v. Parham*, 83 U.S. (16 Wall.) 471 (1873).

Neither of these opinions, nor others of that period, described multiple taxation as "discrimination." Moreover, the dissent in the *State Freight Tax* case expressly argued that the tax was good because there was no discrimination between intrastate and interstate commerce. 82 U.S. (15 Wall.) at 282.

71. The Court at first favored allocation of exclusive taxing jurisdiction to the home state, the theory underlying *Hays* and *State Freight Tax*. See also *State Tax on Gross Receipts*, 82 U.S. (15 Wall.) 284 (1873), sustaining a state tax based on the allocation concept. Compare Justice Miller's dissent, *id.* at 297, arguing for apportionment. Later, the Court changed to apportionment for transportation cases, the modern rule. See 1 J. HELLERSTEIN, *supra* note 43, at 128-36, 632-54. The Court might sustain an unapportioned tax that granted a credit for taxes paid to other states. See *supra* note 44 and accompanying text.

to apportionment when a state can show that its tax reasonably relates to highway use.⁷² Under this pay-for-use standard, the Court sustained many unapportioned state highway taxes, including the most recent precedents on point in *American Trucking*.⁷³

Justice Stevens' majority opinion invoked discrimination to lower the precedential barrier. He applied the broader dependent discrimination definition stated carelessly in *Armco*, taking in all multiple burdens. Justice Stevens relied on the truckers' showing that trucks registered in Pennsylvania averaged five times the in-state mileage of trucks registered elsewhere.⁷⁴ Thus the average tax per mile paid by trucks registered in other jurisdictions was five times greater. Dramatic as this statistic seemed, discrimination nevertheless depended on other states' taxes. Assuming similar usage, the statistic showed that trucks registered outside Pennsylvania and using its roads averaged five times more miles in other states than did locally-registered trucks. If the other states did not tax, all trucks paid the same tax.

Under the dependent discrimination standard, Pennsylvania's taxes were facially discriminatory, although the characterization was contrary to the dominant concept, as well as to the Court's specific precedents.⁷⁵ Justice Stevens went on to apply the internal consistency test, relying on *Armco*. Again the test did not determine a contested issue because Pennsylvania had not attempted apportionment. But this time the opinion implied that violation of the test was a substantial reason for invalidity.⁷⁶

72. See *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915). The Court relied on earlier decisions sustaining charges for use of public wharves. See, e.g., *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1883). Cf. *Guy v. Baltimore*, 100 U.S. 434 (1880) (wharfage charges that discriminated—indeed—against interstate commerce violated commerce clause).

73. See *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co. v. Board of RR Comm'rs*, 332 U.S. 495 (1947). Justice Scalia's opinion in *Tyler* claimed that the internal consistency rule as applied in *Tyler* overruled these decisions. 483 U.S. at 254-55. Justice O'Connor's dissent in *American Trucking* said the majority in that case had overruled the same decisions. 483 U.S. at 298 (O'Connor, J., dissenting). The Court's *American Trucking* opinion essentially agreed. See *id.* at 292-97. However, the "overruling" may have been only a change in legal theory, not in the outcome of the case. See *infra* note 78 and accompanying text.

74. *American Trucking*, 483 U.S. at 276, 282, 286. This statistic was not the optimum way to show burden on interstate commerce; the truckers would have been better off focusing on the effect on commerce in transit through the state. See *infra* notes 120-26 and accompanying text. But the truckers' legal strategy relied heavily on the idea of personal discrimination against nonresidents of the state, rather than discrimination against interstate commerce. This is a common source of confusion in dormant commerce power cases. See Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 110-16 (1988).

75. *American Trucking*, 483 U.S. at 280-82. In *Aero Mayflower*, the Court had unanimously decided that flat highway taxes do not discriminate against interstate commerce. 332 U.S. at 501-03 (quoted in *American Trucking*, 483 U.S. at 293). The opinion was by Justice Rutledge, who wrote more clearly about the commerce clause than most members of the Court. See *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 349 (1944) (Rutledge, J., concurring). Justice Frankfurter dissented in *Capitol Greyhound*, but he did not rest his argument on discrimination. 339 U.S. at 548, 556-57 (Frankfurter, J., dissenting).

76. *American Trucking*, 483 U.S. at 282-86. Only Justices O'Connor and Powell saw *Tyler* and *American Trucking* as different enough to justify different votes; both dissented in *American Trucking*, and Justice O'Connor concurred in *Tyler*. See *Tyler*, 483 U.S. at 253 (O'Connor, J., concurring); *American Trucking*, 483 U.S. at 298 (O'Connor, J., dissenting). In the latter opinion, Justice O'Connor acknowledged that the truckers' claim had force as an issue of first impression; she relied principally on *stare decisis*.

American Trucking's result was not necessarily wrong. The opinion also concluded that "Pennsylvania's flat taxes do not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads,"⁷⁷ and this conclusion was supported by the truckers' statistical showing that the average truck registered outside the state paid five times more tax per mile. This would justify the decision according to traditional criteria, including the policy of protecting commerce in transit, and distinguish the precedents that the dissenters accused the Court of overruling.⁷⁸ But the Court stated this conclusion in rejecting the argument that payment for use justified discrimination. The Court's invocation of discrimination and its reliance on the misleading test of internal consistency raise doubts about the scope of the decision. The near-admission that leading precedents were overruled implies a major change.⁷⁹ To no one's surprise, the trucking industry has pressed its case in other states, so we shall learn more about the subject in due course.⁸⁰

The broad definition of forbidden discrimination against interstate commerce stated in the majority opinions in *Armco*, *Tyler*, and *American Trucking* is unfortunate. The Court can't strike down all multiple and conflict burdens (dependent discrimination) on interstate commerce. What is feasible for many taxes is not feasible for regulations, which cannot be apportioned. Even in the tax field, the pay-for-use idea and the complex differences among state tax systems compel the Court to sustain many multiple burdens. In selecting apportionment formulae, states can choose variants most favorable to their own situations, which cause some multiple taxation.⁸¹ A healthy federal system should allow broad variations among state laws, including many duplicative regulations.

For these reasons, deciding when a multiple or conflict burden on interstate commerce should be sustained or invalidated must depend on more flexible factors than discrimination. To decide based on discrimination masks the issues and undermines the usefully precise independent discrimination standard, which isolates protectionism. To the extent that it was actually a basis for decision, the internal consistency test suffers from the same defect. Rigorously applied, that test might greatly alter commerce clause doctrine, invalidating many more state laws.⁸²

77. 483 U.S. at 290.

78. See *supra* note 40. On commerce in transit, see *infra* notes 120-26 and accompanying text.

Whether *American Trucking* fully overruled leading precedents or changed only the governing theory is uncertain. According to the traditional test, an unapportioned state tax had to be justified by its relation to highway use, and this caused some taxes to be sustained and others to be struck down. For a complete catalog to that date, see *Capitol Greyhound*, 339 U.S. at 561 (Frankfurter, J., dissenting). Today's great preponderance of federal highway money could justify a shift in the traditional balance.

79. See *supra* note 73.

80. See Hellerstein, *supra* note 52, at 153 n.86. As this article goes to press, the Court has just announced its decisions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (1990), and *American Trucking Ass'ns v. Smith*, 58 U.S.L.W. 4704 (1990). The principal issue in both is whether there is a federal right to a tax refund when a state tax has been held invalid under the commerce clause. See Collins, *supra* note 74, at 114 n.416.

81. See *supra* note 45.

82. See Hellerstein, *supra* note 52, at 148-63.

The latest appearance of both the broader definition of discrimination and the internal consistency test was in *Goldberg v. Sweet*.⁸³ Here, as in the opinion of its birth, the Court used the internal consistency test to review validity of an actual state attempt at apportionment, and the tax readily passed the test. But Justice O'Connor had become so leery of the internal consistency test and the *American Trucking* definition of discrimination that she specially concurred to avoid joining an opinion that relied on them.⁸⁴ She is right; they have caused more obscurity than enlightenment.

The vice is not the internal consistency test but the broad concept of discrimination to which it is attached. The narrower definition, confined to independent discrimination, precisely identifies state protectionism. Multiple and conflict burdens do not coincide with protectionism and traditionally have been invalidated more selectively, based on other criteria, such as impact on commerce in transit. In tax cases, the key decision is whether a particular tax ought to be subject to apportionment or allocation. The dependent discrimination standard hides that decision under a highly-charged idea. The same standard cannot be applied to unapportionable regulations; to do so widens the already artificial gap between the Court's tax and regulation opinions.

C. *The Bendix Boiler*

In 1974, Bendix hired Midwesco, an Illinois company, to deliver and install a boiler system in Bendix's Ohio factory.⁸⁵ Bendix sued for breach of contract in 1980, and Midwesco pleaded Ohio's four-year statute of limitations. Bendix invoked Ohio's rule tolling the statute for foreign corporations that had not consented to the general jurisdiction of the Ohio courts. The Supreme Court overturned the state rule under the commerce clause.

The Court's decision adhered to precedent. The Court has struck down other state statutes that penalized foreign corporations for not registering in the state by denying them the right to sue in state courts as plaintiffs, or by tolling statutes of limitations defenses, as Ohio did in *Bendix*.⁸⁶

83. 488 U.S. 232, ___, 109 S. Ct. 582, 588-91 (1989). A footnote in the Court's subsequent opinion in *Amerada Hess* alluded to the test without naming it. *Amerada Hess Shipping Corp. v. Director, Div. of Taxation*, 109 S. Ct. 1617, 1622 n.8.

84. *Goldberg*, 488 U.S. at ___, 109 S. Ct. at 593-94 (O'Connor, J., concurring). As noted previously, Justice O'Connor concurred in *Tyler* but dissented in *American Trucking*. See *supra* note 76.

85. *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888 (1988). For the facts of the case, see 486 U.S. at 889-91.

86. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974) (striking down statute barring suit by unregistered foreign corporation); *Dahncke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921) (same); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914) (same). Cf. *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (state law similar to the one in *Bendix* did not deny equal protection; commerce clause challenge remanded). Two lower courts have reached the same result as *Bendix*. See *McKinley v. Combustion Eng'g*, 575 F. Supp. 942 (D. Idaho 1983); *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983), *cert. denied*, 469 U.S. 1123 (1985) (same state statute as in *G.D. Searle*, 455 U.S. 404).

Because the only parties disadvantaged by such laws are foreign corporations, it is tempting to see this as a problem of discrimination against nonresidents, as Justice Scalia did.⁸⁷

But the Court, in its precedents, had not analyzed the problem that way, and Justice Kennedy's opinion in *Bendix* expressly declined Justice Scalia's strong urging to do so.⁸⁸ State discrimination against nonresidents is not generally proscribed by the commerce clause. The usual discrimination concept applies to interstate commerce, not out-of-state residency, and the goal is a national common market, not a personal right of nondiscrimination for nonresident merchants.⁸⁹ Moreover, rules requiring foreign corporations to register largely match requirements that the state imposes on its own corporations, so it is not obvious why the rules should be condemned as discriminatory.

The problem is better viewed as one of cumulative or multiple burdens, rather than discrimination, or in our adopted terminology, dependent rather than independent discrimination. If only one state requires registration and consent to be sued, all corporations are treated alike.⁹⁰ But when more states than one require it, interstate commerce bears a higher regulatory burden than does local commerce.

Unlike tax burdens, regulatory laws can't be ameliorated by apportionment. The courts must either sustain or strike them whole. For foreign corporations, the Court has evolved the rule that states can require interstate firms to register and consent to general state jurisdiction only when they do substantial and continuous local business.⁹¹ This requires more than the minimum contacts that sustain local jurisdiction under the due process clause; a foreign corporation that cannot be required to register can nevertheless be held liable for a tort. Midwesco's local activity of installing the boiler was ample basis for tort or contract liability—it would also sustain local or apportioned tax liability—even though not sufficient to require general registration. This is a practical accommodation between the states' legitimate interest in controlling businesses having a substantial local situs and the national common market interest in not burdening businesses located outside that buy or sell goods in the state. There is reason to believe that the Court's protection of foreign corporations has aided the special success of Delaware's corporation laws.

87. See *Bendix Autolite*, 486 U.S. at 898 (Scalia, J., concurring in the judgment).

88. *Id.* at 891.

89. That this is so can be seen more readily by considering the foreign commerce clause. States may not discriminate against foreign commerce, but to base that rule on personal rights of foreign merchants is absurd.

90. One might dispute this by pointing out that local registration and consent to suit would more greatly burden firms located at a great distance from the state, but the relevant question is the extra burden beyond that of defending long-arm cases, and that is minor. See *infra* text accompanying notes 91-92.

91. See *Eli Lilly & Co. v. Sav-On Drugs*, 366 U.S. 276 (1961) (sustaining, by 5-4 vote, registration requirement applied to foreign corporation with local sales office in state); *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) (sustaining registration requirement applied to foreign corporation with local customhouse broker). Cf. *Silver v. Woolf*, 694 F.2d 8, 11-12, 13-14 (2d Cir. 1982) (sustaining requirement that interstate debt collection firm be licensed locally).

Unfortunately, both the majority and concurring opinions in *Bendix* were vague and uncertain about what was at stake. The majority dwelt on the particular burden of requiring foreign corporations to consent to the general jurisdiction of Ohio's courts, in terms of the possibility that suit would be brought in Ohio on claims otherwise not cognizable there.⁹² Justice Scalia effectively picked that rationale apart by pointing out that the due process clause bars suits lacking minimum contacts with the state.⁹³ Neither opinion addressed the issue in terms of the multiple burden on interstate firms, of registering and consenting to jurisdiction in every state where they sell or buy even one widget.

The particular burden imposed by Ohio was not very great, and the state did have the legitimate interest of aiding its citizens in serving process on foreign corporations. However, as the Court's opinion suggested, Ohio could have solved the service problem with a statute confined to that aim, and Ohio had no legitimate reason to subject Midwesco to the general jurisdiction of its courts.⁹⁴ Although the burden was light, the statute had no justification and was struck down, not because it alone was so harmful to interstate commerce, but because such laws in every state would be.

D. The Healy Maneuver

In *Healy* the Court overturned Connecticut's statute setting maximum manufacturers' prices for beer. The state required each brewer to post prices and affirm that the prices were no higher than those for the same beers in any bordering state.⁹⁵ The Court struck the statute on two alternative grounds. First, based on precedent, it held that the statute improperly attempted to regulate transactions in other states.⁹⁶ Second, the statute discriminated against interstate commerce because it facially burdened only interstate sellers.⁹⁷ Justice Scalia concurred in the latter ground. The discrimination theory was a departure from prior cases, which had not characterized statutes of this kind as discriminatory.⁹⁸ The majority may have done this to garner Justice Scalia's vote.

In terms of the statute's facial application to brewers, discrimination was debatable. While the statute's pricing requirement was imposed only on certain interstate firms, an intrastate brewer would be forced to meet the required price or be undersold. Moreover, the required price would be set in the first instance by interstate firms; local competitors would be forced to go along after the fact. Local firms might benefit to the

92. 486 U.S. 894.

93. *Id.* at 895.

94. *Id.* at 894-95. See also *G. D. Searle*, 455 U.S. at 413-14 (suggesting that requirement of agent for service without more would be valid).

95. *Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2493 (1989) (*Healy II*).

96. *Id.* at 2499-2501.

97. *Id.* at 2501-02.

98. See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935).

extent that the statute caused their interstate competitors to withdraw entirely from the Connecticut market. But the statute would as likely harm as help local firms, which are smaller and less able to cope with price ceilings. Thus it is hard to see how the statute favored local brewers, despite its facial application only to interstate companies. If this amounts to "facial discrimination," so also do many port regulations, and the holding of *Cooley v. Board of Port Wardens*⁹⁹ was wrong.

Moreover, Connecticut could avoid this "facial discrimination" in a way unrelated to economic realities. Suppose the state set maximum wholesale prices for all in-state sales by directing its beer bureaucrats to base prices on their surveys of prices in bordering states. The system would be less precise and more expensive to operate, but its results would be much like those of the actual regulation. Yet there would be no "facial discrimination" of the sort mentioned by the Court.¹⁰⁰

Nevertheless, *Healy* arguably was within the traditional concept of independent discrimination. The local interests that Connecticut claimed to want to favor were not brewers but retailers and consumers. To the extent that the statute successfully lowered Connecticut prices, it would force an interstate brewer to set a uniform price between lower market prices elsewhere and higher prices in Connecticut.¹⁰¹ Beer retailers and consumers in states where market prices had been lower would pay higher prices because of Connecticut's regulation. Connecticut consumers and retailers would benefit at the expense of competing consumers and retailers in other states.

Whether or not such discrimination in favor of local consumers and retailers can be called facial, it was independent of the impositions of any other state; this was not a case about multiple or conflict burdens. As the Court pointed out, other states also fixed beer prices, making the burden on interstate commerce much more serious.¹⁰² But Connecticut's statute alone was protectionist. In the Court's leading decision in this area, Justice Cardozo had likened a state price regulation to customs

99. 53 U.S. (12 How.) 299 (1851) (sustaining city's port regulations).

100. This illustrates the problem of line-drawing here. If the state set maximum beer prices that "are fair and equitable," the result again might be similar to that of Connecticut's scheme. But the connection to market advantages in other states would be hidden. Unless a challenger could show reliance on prices outside the state, this regulation ought to be sustained.

101. In practice, such a statute might have no effect because there is no price differential to alter; this might result from deals among state regulators. Or its effect might be to cause some beer manufacturers not to sell in Connecticut. The effect would be partly a function of the enacting state's relative size. Regulations of New York and California have much more effect on smaller states than vice versa, and their regulators have greater clout in making deals. A large state's price regulation would probably succeed in capturing market advantages from its smaller neighbors, while a small state's regulation would more likely cause a seller to withdraw from its market. Either result is protectionism.

Because Connecticut is smaller than two of its three neighbors, its regulation would probably not have been very successful in lowering local prices unless its regulators reached deals with those of New York and Massachusetts. But the Court must apply the same rule to New York, Texas, and California, where the effect would be to appropriate smaller state advantages.

102. *Healy*, 109 S. Ct. at 2501.

duties,¹⁰³ invoking an analogy derived from independent discrimination.

Moreover, the Court's traditional theory for this kind of case—that Connecticut was attempting to regulate transactions in other states—is too crude. Many state laws have collateral effects on their neighbors, and most of them are not suspect on that account alone. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids."¹⁰⁴

Connecticut's theory was that the actual brewers, all of them out-of-state companies, were charging above-market prices in Connecticut, causing Connecticut residents near a border to buy out-of-state. Thus, the state argued, the only effect of the statute would be to lower Connecticut prices to the market prices already prevailing in border states, and those prices would not change. This "market failure" idea was actually endorsed by the *Healy* dissenters.¹⁰⁵

But this was tooth fairy economics. There was no evidence in the case that the beer industry was monopolized or otherwise able to conspire about prices. And even if it were, there was no conceivable reason why that would lead to price discrimination defined by a state boundary. By far the most likely reason for higher beer prices in Connecticut was higher state-imposed costs. And the Court's opinion suggested an explanation: Connecticut forbade price and volume discounts, specials, and the like, while its neighbors allowed them.¹⁰⁶ Modern American retailers operate in a world of more or less perpetual "discounts" and "sales," and a state that opts out of that system may cause its prices to rise in relation to those members of the consuming public who pursue every "discount." Thus, to the extent it was effective, the Connecticut law would have foisted some of Connecticut's regulatory costs onto consumers and retailers in other states.

Healy also raises a question about state liquor monopolies. In many states, some kinds of alcoholic beverages are sold only by the state. And the Supreme Court has held that commerce clause limits on state protectionism do not apply to the state as a market participant, that is, states as buyers and sellers are free to discriminate against interstate commerce.¹⁰⁷ Monopoly liquor states can claim that they can have the kind of price fixing that *Healy* denied Connecticut because they are market participants rather than regulators.

103. *Baldwin v. G. A. F. Seelig Co.*, 294 U.S. 511, 521 (1935).

104. *Healy*, 109 S. Ct. at 2505 (Rehnquist, C. J., dissenting) (quoting *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)).

105. *Id.*

106. *Id.* at 2500-01. Connecticut and Massachusetts also mandated sale in reusable containers on which a deposit was paid, while New York and Rhode Island did not, and this may have added to differential regulatory costs. See *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312, 1319 (D. Conn. 1982) (*Healy I*). However, no party to either *Healy I* or *Healy II* attempted to show any relevance of this scheme. If a recycling state regulated to deter consumer importation of throw-away containers, the state would have an argument for validity under the Court's quarantine cases. See *Maine v. Taylor*, 477 U.S. 131 (1986).

107. *E.g., Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

This situation can be distinguished from the Court's precedents. In prior cases, the state was participating in a market from which it did not exclude others, while liquor monopolies bar private sellers in the state. In other words, a liquor monopoly involves the state as both market participant and regulator. When the state is but one actor in a private market, its parochial buying and selling amount to subsidies to local interests, and the essence of the market participant rule is to exempt protectionist subsidies from the dormant commerce power doctrine. Most of the policy reasons that support the market participant exception are confined to subsidies.¹⁰⁸ But when a large state's liquor monopoly pegs its purchase prices to those in another state, there is no subsidy, and the regulatory cost is much more successfully exported onto outsiders than in the case of subsidies.

On the other hand, an important reason for the market participant exception is the difficulty of identifying when a state as buyer or seller has favored local interests, and that difficulty is little different when a state is a monopolist. Thus the Court is likely to decide that a state as buyer is free to dicker for any price it chooses, and it can consider prices charged elsewhere in deciding on its purchases. But if a monopoly state imposes a formal rule that requires price equivalence with neighboring states, the Court would likely strike it down.¹⁰⁹

IV. JUSTICE SCALIA ON COMMON MARKET POLICY AND ORIGINAL INTENT

Justice Scalia argued in *Tyler* that the entire dormant commerce power doctrine is mistaken because it is contrary to the intent of the framers.¹¹⁰ He also opined that the doctrine lacked any coherent theory and had been carried out poorly,¹¹¹ and his *Bendix* opinion parodied the Court's leading balancing test.¹¹² His later opinions asserted that the doctrine ought to be confined to facial discrimination against interstate commerce.¹¹³ Presumably, he continues to rely on his *Tyler* arguments as reasons for the Court to confine review to facial discrimination, or as I have suggested, to independent discrimination.

In any broad sense, it is hard to know what Justice Scalia means by lack of coherent theory. Before our nation's independence, Europeans had attempted primitive common market arrangements, and these efforts were favorably mentioned by the framers.¹¹⁴ Canada and Australia to

108. See Collins, *supra* note 74, at 98-105.

109. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (invalidating state rule regulating resale of timber bought from the state).

110. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 263-64 (1987).

111. *Id.* at 259-65.

112. *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 895-98 (Scalia, J., concurring in the judgment).

113. See *supra* notes 15-23 and accompanying text.

114. See *The Federalist* No. 42 p. 284 (J. Madison) (J. Cooke ed. 1961) (Switzerland, Germany, the Netherlands).

some extent copied our system, including judicial involvement; the three nations have followed similar paths.¹¹⁵ The European Economic Community has adopted like methods of economic integration, again including judicial supervision.¹¹⁶ There is abundant literature about federal common markets, theoretical and practical.¹¹⁷

Justice Scalia's claim that the Court has poorly carried out a common market policy has force to the extent that it is based on some of the Court's opinions. American constitutional and political arrangements distort articulation. In many legal fields, the Court's opinions exaggerate its deference to states' rights, and dormant commerce clause cases are no exception.¹¹⁸ Indeed, the Court's strained reliance on an expanded concept of discrimination plausibly may be explained as an effort to invoke an accepted ideological counterweight to states' rights. Moreover, this is part time work for the Court; it is not surprising that its opinions are less careful than those of the European Court of Justice. Nevertheless, what the Court does is much better than what it says; its product compares favorably with that of other systems.¹¹⁹

A. Policy Consequences of Justice Scalia's Position

Rather than extensively discuss broad policy issues, I shall comment on whether Justice Scalia's reasons should lead the Court to confine the dormant commerce power doctrine to independent discrimination. If the Court did that, it would abandon three overlapping lines of precedent. It would withdraw its broad limits on multiple taxation and regulation, it would no longer strike down state regulatory laws that burden commerce based on risk of conflict with laws of other states, and it would no longer strike down laws that particularly burden commerce in transit through the enacting state.¹²⁰

The most important consequence would be for commerce in transit through states, the principal beneficiary of all the standards to be forgone.

115. See R. JOHNSTON, *THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES* ch. VI (1969); V. MACKINNON, *COMPARATIVE FEDERALISM* (1964).

116. See Schermers, *The Role of the European Court of Justice in the Free Movement of Goods*, 1 CTS. & FREE MARKETS 222 (1980); Wägenbaur, *Elimination of Discriminatory State Taxation in Intra-Community Trade: The Contribution of the European Court of Justice*, 2 CTS. & FREE MARKETS 480 (1981).

117. See, e.g., *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (M. Capelletti et al. eds. 1986); *COURTS AND FREE MARKETS* (T. Sandalow & E. Stein eds. 1980); R. JOHNSTON, *supra* note 115; V. MACKINNON, *supra* note 115; *FEDERALISM AND THE CANADIAN ECONOMIC UNION* (M. Trebilcock, J. Prichard, T. Courchene & J. Whalley eds. 1983); *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE* (E. Stein & T. Nicholson eds. 1960); A. SMITH, *WEALTH OF NATIONS* (1776).

118. See, e.g., *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978). The Court held invalid a state law regulating truck size in an opinion that stated, "In no field has [the Court's] deference to state regulations been greater than that of highway safety regulation." *Id.* at 443. Because the Court is particularly concerned with conflict burdens on commerce in transit, this statement is inaccurate. See *infra* notes 120-26 and accompanying text.

119. See, e.g., R. JOHNSTON, *supra* note 115, ch. VII.

120. See *supra* notes 26-39 and accompanying text.

State burdens on commerce in transit rarely discriminate independently; burdens usually depend on actions of other states. Risk of regulatory conflict is invoked mostly to strike down laws that burden interstate transportation and communication passing through the enacting state.¹²¹ The multiple burdens doctrine is not targeted solely at commerce in transit, but it has important applications to interstate transportation and communication. One of the Court's *per se* rules, which states seldom challenge, bars any ad valorem taxation of goods in transit through a state.¹²²

Withdrawing all judicial protection from commerce in transit would be unfortunate. This is the most ancient and best established common market problem. Commerce in transit has the least protection from local politics because so few local interests benefit from it. An import or export transaction involves a local party as buyer or seller, and these commercial interests can often persuade legislatures to limit multiple taxation or other burdens. But commerce in transit lacks political support and will be made to pay much more than its way. One subtle form of favoritism imposes transportation burdens but exempts some import and export transactions from them.¹²³

This analysis corresponds with a common sense view of legitimate state interests. States have an obviously more weighty and worthy interest in regulating and taxing their import and export commerce than they have in imposing on goods passing through. From an economic point of view, costs imposed on commerce in transit are much more successfully imposed on persons outside the state than are costs imposed on import-export commerce.

These problems are not so acute as they once were. Congress is less inhibited about undertaking regulation and might fill a void left by the Court.¹²⁴ And technology has reduced the ability of states to exploit their geography. But it is hard to see the attraction of encouraging more

121. This does not mean that such laws exclusively burden commerce in transit; most laws that burden commerce in transit also burden import-export and local commerce in some measure as well. The Court's principal concern is with laws that substantially burden commerce in transit. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (striking down train length law that principally burdened trains traversing the state). But see *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981), and *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978) (striking down laws that made special exceptions for state import-export commerce).

122. See *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Minnesota v. Blasius*, 290 U.S. 1 (1933). See also *Goldberg v. Sweet*, 488 U.S. 252, —, 109 S. Ct. 582, 589 (1989) (dictum) (states may not tax telephone calls in transit). Cf. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868) (similar holding regarding passengers, including those in transit, but not relying on commerce clause).

123. See *Kassel*, 450 U.S. at 676-77; *Raymond Motor Transp.*, 434 U.S. at 446-47. As previously noted, discrimination against commerce in transit and in favor of import-export commerce is a form of independent discrimination, but states usually burden commerce in transit without any form of independent discrimination. See *supra* note 26.

124. Congress is less inhibited legally as well as politically; former judicial limits on congressional regulatory power have been withdrawn. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 148-59 (3d ed. 1986). In the tax field, Congress has in fact imposed its own limits. See, e.g., 15 U.S.C. §§ 381-84, 391 (1982); 49 U.S.C. §§ 1513, 11503-11503a (1982).

federal regulatory legislation, and technological changes are already recognized by the Court.¹²⁵

When the Court's multiple burdens doctrine is applied to purely import-export commerce, the need for judicial supervision is considerably reduced. The Court might reasonably conclude that local political restraint and technological change are sufficient common market protections. From this policy perspective, the *Tyler* decision, which involved only import-export commerce, can be questioned despite its pedigree in precedent. But the *American Trucking* decision heavily involved commerce in transit.¹²⁶ Despite its apparent clash with precedent, it had stronger backing in common market policy.

Multiple taxation has another serious economic consequence that involves other policy issues. Industry can avoid multiple sales and other turnover taxes by vertical integration. The fewer times a good is bought or sold from raw material to ultimate user, the fewer chances for turnover taxes. Thus, multiple taxation is an inducement for vertical integration. Whether this effect ought to bear on the dormant commerce power doctrine is a complex question, but it is at least relevant to a full policy debate on the Court's multiple burdens doctrine.

B. Original Intent

Justice Scalia's reliance on the framers is consistent with his other opinions, where he invokes original intent more often than other justices do.¹²⁷ However, the particular original intent claim in *Tyler* was supported by a shallow and selective review of the issue. Part of the opinion scorched the wooden version of the "exclusive commerce power" theory attributed to Marshall's opinion and Webster's argument in *Gibbons*.¹²⁸ Many a constitutional law teacher has had fun with that, but it is surely

125. See, e.g., *Michelin Tire Corp. v. Wages*, Tax Comm'r, 423 U.S. 276, 288 (1976).

126. This is the most important conclusion to be derived from the truckers' statistical showing that locally-registered trucks paid the tax at only one-fifth the rate per mile of trucks registered elsewhere. See *supra* note 74 and accompanying text. Local registration will strongly correlate with trucks that either travel only within the state, or engage in the state's import-export commerce, as opposed to trucks that merely pass through the state. Of course, the showing would have been more directly pertinent if it had directly compared commerce in transit with other truck commerce.

127. In addition to *Tyler*, see *Stanford v. Kentucky*, 109 S. Ct. 2969, 2974 (1989); *South Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, —, 109 S. Ct. 706, 737 (1989) (Scalia, J., concurring in the judgment); *Mistretta v. United States*, 488 U.S. 361, —, 109 S. Ct. 647, 682-83 (1989) (Scalia, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 864 (1988) (Scalia, J., dissenting); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816-18 (1987) (Scalia, J., concurring in the judgment).

Justice Scalia discussed "Originalism versus Nonoriginalism" with students at the University of Kentucky College of Law on September 15, 1988. He acknowledged problems with rigid positions either way and advocated reliance on original intent as a moderating influence on judicial review.

128. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 261 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824)).

a straw. That so subtle a mind as Marshall's meant the argument in its mechanical form is most unlikely.¹²⁹

Justice Scalia's second straw was Justice Field's silly argument that the dormant commerce power doctrine should be implied from congressional silence.¹³⁰ Scalia also abused the views of Chief Justice Taney and Justice Frankfurter. He selectively cited Taney's opinion in *The License Cases*,¹³¹ without acknowledging that Taney qualified that view elsewhere in the same opinion and in his later decisions.¹³² He quoted Frankfurter the scholar, who indeed questioned the doctrine, but took no note of Frankfurter the justice, who altered his views and became an ardent defender of it.¹³³

It is reasonably clear that the framers in Philadelphia intended that the commerce clause restrain interstate economic conflicts.¹³⁴ In Madison's words, the interstate clause was "intended as a negative and preventive provision against injustice among the States themselves."¹³⁵

129. Marshall's probable premise was that the power to impose regulations on more than one state is exclusively federal, and he thought that concept might be developed into judicial protection against interstate economic warfare. He surely foresaw many of the difficulties of working it out. That much is implied by his retreat to the preemption holding in the case—a holding that is nevertheless hard to understand absent a national common market policy. See Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Pre-emption*, 2 CTS. & FREE MARKETS 523, 538-45 (1982).

130. See *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 508 (1888) (Field, J., concurring); *Tyler*, 483 U.S. at 262 (the "least plausible theoretical justification of all").

131. 46 U.S. (5 How.) 504, 579 (1847).

132. *Tyler*, 483 U.S. at 261. At the passage cited, Taney was answering the exclusive commerce power argument in absolute form, as he clearly said. His opinion suggested support for limits on state power over goods in transit, *The License Cases*, 46 U.S. (5 How.) at 575-76, and for limits on extraterritorial effects of state laws, *id.* at 585. For a discussion of Taney's later decisions, see Collins, *supra* note 74, at 49-50.

133. See *Tyler*, 483 U.S. at 264 (citing F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937)); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 548 (1950) (Frankfurter, J., dissenting); *Freeman v. Hewit*, 329 U.S. 249 (1946) (Frankfurter, J.) (striking down state tax on interstate sales).

134. See 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION* 308 (1937) (Sherman); *id.* at 547-48 (Madison's Preface to Debates in the Convention); *THE FEDERALIST* No. 7, at 39-41 (A. Hamilton); No. 11, at 71-72 (A. Hamilton); No. 22, at 137 (A. Hamilton); No. 42, at 283-84 (J. Madison) (J. Cooke ed. 1961).

Justice Miller was the principal architect of the dormant commerce power doctrine during the post-Civil War period, and his opinions relied on original intent. See *Cook v. Pennsylvania*, 97 U.S. 566, 574 (1878); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 134-36 (1869).

135. Letter from James Madison to J. Cabell (Feb. 13, 1829), reprinted in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* at 14-15 (J. B. Lippincott & Co., Philadelphia 1865). See also Letter from James Madison to Professor Davis, reprinted in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 251-54, stating that "it could not be the intention of those who framed the Constitution to substitute for a power in Congress to impose a protective tariff, a power merely to permit the states individually to do it." *Id.* at 251 (emphasis in original).

In Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941), Professor Abel extensively reviewed the original history of the commerce clause and concluded that the history as a whole corresponded with Madison's quoted views. *Id.* at 480-81. Justice Scalia cited Abel in his opinion but failed to acknowledge his conclusion. *Tyler*, 483 U.S. at 261. Abel's work appeared during the post-1937 debate about the scope of Congress's affirmative power to regulate interstate commerce. His chief point was that the original history contemplated a small scope for the latter power, as Madison had said. For a satire on the debate about original intent of Congress's interstate power, see Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235, 240-43 (1989).

There are considerable leaps from this evidence to the Court's dormant commerce power doctrine. One way the connection might be severed is by the argument that the evidence of intent is confined to Philadelphia insiders, especially Madison;¹³⁶ there is almost no evidence from the ratification reports. This proposition has its best application to settle conflicts between popular understanding and insider deals. But there is no evidence of a popular understanding in 1787 and 1788 that the Constitution would leave the states free to exploit their neighbors with tariffs and taxes on commerce in transit, nor of an insider deal.

A second problem in connecting original intent to the dormant commerce power doctrine is lack of any evidence that the framers contemplated judicial enforcement. On the original record, enforcement by Congress alone would have been at least as plausible. But there is again no evidence the other way; we simply do not know how the framers thought the commerce clause "negative . . . against injustice among the States" would be enforced. Legislative enforcement would have been more familiar to them, but this is not conclusive against the courts. The issue is wrapped up in the general controversy over the proper role of the federal judiciary.

If there is to be a dormant commerce power doctrine, there are many issues about its scope, and it is here that Justice Scalia has staked his concrete challenge to the Court's doctrine. However, from the standpoint of original intent, Justice Scalia's formulation has the emphasis backward. Facial or independent discrimination mostly addresses states' burdens imposed on their imports and exports, like the paradigms of tariffs, quotas, and embargoes. Yet the original sources show that the framers' main concern was with taxation of commerce in transit; there was very little discussion of burdens on imports or exports of the enacting state.¹³⁷ Thus Scalia's position would have the Court recede from addressing the problem that was foremost in the framers' minds. This is a good lesson in the slipperiness of any rigid theory of original intent jurisprudence.

V. CONCLUSION

In *American Trucking*, the Supreme Court relied on a broad concept of forbidden discrimination against interstate commerce that had evolved accidentally in *Armco* and *Tyler*. All were tax cases. In cases about

136. Justice Scalia has opposed use of legislative history for interpreting statutes. See *Sable Comm. of Calif., Inc. v. F.C.C.*, 109 S. Ct. 2829, 2840 (1989) (Scalia, J., concurring); *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2724 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment); *Blanchard v. Bergeron*, 489 U.S. 87, ___, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring in part and concurring in the judgment); *United States v. Taylor*, 487 U.S. 326, 344 (Scalia, J., concurring in part). Cf. *United States v. Stuart*, 489 U.S. 353, ___, 109 S. Ct. 1183, 1193 (1989) (Scalia, J., concurring in the judgment) (similar opinion regarding treaties). However, this derives from reaction to modern evidence that some legislative history is manipulated and from his strong views about separation of powers. Scalia imposes no like standard on legislative history of the Constitution; he frequently cites Madison in his original intent opinions.

137. See *supra* note 134. Virtually all of the specific examples in the sources cited concerned commerce in transit. The same is true of sources discussed in Abel, *supra* note 135.

regulatory laws, the Court has consistently limited the concept to discrimination without reference to the laws of other states, what I have called independent discrimination. In tax case opinions, the Court had strayed to a broader meaning only occasionally. The broader definition includes state laws that burden interstate commerce only in conjunction with the laws of other states, what I have called dependent discrimination. In regulation cases, the Court has also recognized that independent discrimination coincides with protectionism and has made it presumptively invalid. If the same presumption is mindlessly extended to dependent discrimination, many more state laws will fall.

Even if the Court does not intend to extend the definition, the broader definition will confuse state officials, taxpayers, and the lower courts. The confusion is compounded by the appearance in the same opinions of the internal consistency test. This test evaluates whether a state tax law is facially designed to avoid the risk of multiple taxation of interstate commerce. That apportionment or allocation ought to be required by the commerce clause is a necessary predicate to the test's application. Determining this predicate is submerged under the rhetorical force of the discrimination idea. Decisions since *American Trucking* have not borne out the portent; the *Bendix* decision deliberately adhered to the traditional definition of independent discrimination in cases about regulatory laws. But uncertainty has not been allayed.

In *Healy*, the Court again applied the concept of discrimination to a category of cases not previously identified with the concept. But this time, the extension was reasonably consistent with traditional doctrine because the state statute at issue did discriminate independently of the laws of other states.

Justice Scalia analyzed some of these points better than other members of the Court, deciding that *Healy* involved discrimination, while *Tyler* and *American Trucking* did not. But his illumination of the discrimination issue was marred by entanglement with his attacks on the Court's multiple burden doctrine. His opinion featured a poorly reasoned original intent claim, and it failed to acknowledge that the great weight of precedent was against his position. While there is a principled way to achieve part of what he wishes, his attack was too crudely formulated to find it. And his *Bendix* opinion described a multiple burden case as discrimination when the Court did not.

The Court as a whole continues to have a good intuitive sense of what it is doing in dormant commerce power cases, but a much less commendable ability to explain itself. When combined with disagreements among the justices, this is a recipe for confusion. The doctrine would become clearer if the Court distinguished the concept of independent discrimination from multiple and conflict burdens that depend on enactments by two or more states and differentiated between laws that impose only on a state's import or export commerce and those that also burden commerce in transit through the state.

