April 2009

Burden of Inaction: How Two States Set Different Paths for One Nonfederal Transborder Highway and Why the Courts Cannot Adequately Solve this Problem in Light of Concerns for Federalism, the Separation of Powers and Matters of Justiciability

Matthew Lincoln Clark
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons

Recommended Citation

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
THE BURDEN OF INACTION:
HOW TWO STATES SET DIFFERENT PATHS FOR
ONE NONFEDERAL TRANSBORDER HIGHWAY AND
WHY THE COURTS CANNOT ADEQUATELY SOLVE
THIS PROBLEM IN LIGHT OF CONCERNS FOR
FEDERALISM, THE SEPARATION OF POWERS AND
MATTERS OF JUSTICIABILITY

I. INTRODUCTION ................................................................. 944
II. A TALE OF TWO STATES ..................................................... 945
   A. West Virginia's Response – Expansion of Route 9 ........... 946
   B. Virginia’s Response – The Controversy and Debates ....... 947
III. THE CONSTITUTIONALITY OF VIRGINIA’S REFUSAL TO EXPAND
     ROUTE 9 ON THE VIRGINIA SIDE OF THE BORDER ........... 949
   A. The Dormant Commerce Clause ..................................... 949
      1. State Laws that Facially Discriminate Against
         Out-of-Staters ..................................................... 951
      2. State Laws that are Protectionist or Discriminatory
         in Purpose or Effect .................................................. 952
      3. Incidental Burdens on Interstate Commerce and
         Pike-Balancing ....................................................... 955
   B. Justiciability and Remedial Obstacles ............................. 958
      1. The Issue of Standing ............................................... 958
         a. Constitutional Standing Requirements ........................ 959
         b. Prudential Standing Requirements ............................. 960
      2. Who is a Proper Plaintiff and What is a
         Viable Remedy? ....................................................... 961
         a. Suit by Private Citizen ........................................ 961
         b. Suit by West Virginia .......................................... 962
         c. The Remedy Preferred: Injunction ............................ 963
      3. Implementation and Enforcement of Injunctive
         Relief ................................................................. 964
         a. Implementing the Injunctive Order ............................ 964
         b. Enforcement ...................................................... 966
      4. Federalism and Separation of Powers Concerns ................ 967
IV. FEDERAL MECHANISMS FOR FINANCING AND
    CONSTRUCTING INTERSTATE ROADS WITH FEDERAL FUNDS .... 969
   A. Authorization Acts ..................................................... 970
   B. Appropriations Measures ............................................. 971
   C. The Highway Trust Fund ............................................... 972

943
I. INTRODUCTION

Driving west along Route 7 from Leesburg, Virginia, you can exit onto Route 9, a state-operated highway meandering from Loudoun County, Virginia toward Charles Town, West Virginia. A drive along Route 9 will take you on a winding, two-lane excursion through the countryside where open spaces and stone walls still dot the landscape and where new homes and vineyards stand as a testament to recent development and growth. As you drive toward the West Virginia border, you will pass through the quaint Town of Hillsboro, which celebrated its 200th anniversary in 2002.2 As you leave the Town of Hillsboro, the terrain becomes hillier and Route 9 becomes even more winding and treacherous. As the journey continues, you will cross from Loudoun County, Virginia, into Jefferson County, West Virginia.

Beneath the façade of the beautiful countryside surrounding Route 9 lies a subtle controversy between the State of West Virginia and the Commonwealth of Virginia that concerns the future of this road. In short, the controversy arises from the fact that West Virginia is expanding Route 9 from two-lanes to four-lanes on its side of the border,3 but Virginia is maintaining Route 9 as a two-lane road on its side of the border.

This Note argues that the Route 9 controversy is one of the strange incidents of federalism that could best be prevented and resolved by federal legislation that better incentivizes cooperation among interstate governments that are developing plans for non-federal, transborder highways and roads.4 This Note discusses whether Virginia’s inaction violates the dormant Commerce Clause of the United States Constitution and argues that it may be possible to bring a cause of action asserting that this inaction is unconstitutional.5 This Note then

---

3 West Virginia has presumably made this decision in order to provide its citizens with better access to the booming economy of northern Virginia. See, e.g., Brian Block, Northern Virginia Regional Economy Spring Forecast Provides Upbeat Outlook on Housing Market, http://blog.brianblock.com/public/item/162348 (Mar. 16, 2007) (indicating that the Northern Virginia economy has “outperformed the national economy on all levels” since 1997 due to the technology boom of 1997-2000 and the increases in government spending from 2000-2005).
4 This proposal is discussed infra in Part IV.
5 See U.S. CONST. art. I, § 8. Despite this theoretical possibility, the author believes that it is highly improbable that the theory would ever find any traction in a court of law. The discussion of pursuing a legal remedy for this controversy in the courts is made, in part, to demonstrate that this interstate, intergovernmental problem cannot likely be solved through judicial process, but rather
goes on to discuss the difficulties that would accompany any attempt to obtain a judicial remedy under this theory. This discussion is provided for the purpose of highlighting the inadequacy of the courts in refereeing this controversy and preventing others like it. This Note then concludes with an examination of existing federal highway funding programs and recommends that the Route 9 issue (and others like it) would be better solved through passage of legislation that appropriately incentivizes interstate cooperation and highway planning among neighboring states, rather than through a judicial remedy sought under the dormant Commerce Clause.

II. A TALE OF TWO STATES

Route 9 has historically served as the primary point of entry or departure between Jefferson County, West Virginia and Loudoun County, Virginia and the Washington, D.C. area. It is the only major east-west corridor providing access to Jefferson County from Loudoun County. Until recently, Route 9 has adequately served the rural populations of Loudoun and Jefferson Counties. However, since 1990, Loudoun County’s dramatic population increase and the resultant congestion along Route 9 has become a serious problem. The growth in neighboring Jefferson County, West Virginia has not been as extensive but it has been significant. This significant growth has been caused, in large part, by increased economic prosperity in the region. It has also placed an increased burden on the existing highway infrastructure, which was originally designed

must likely be solved by voluntary cooperation among state governments, direct intervention by the federal government, or through revision of federal funding legislation. Revising federal funding legislation likely provides the best option because such revision could serve to prevent such a controversy from occurring elsewhere in the future by incentivizing cooperative planning among bordering state governments. This possibility is discussed in greater detail in Part IV, infra.

6 A lengthy discussion of the intricacies of this complex area of law is beyond the scope of this Note.

7 The population of Loudoun County Virginia grew from 86,129 in 1990 to 268,817 in 2006, which is a population growth increase of approximately 212.1%. See U.S. Census Bureau, Population Statistics for Loudoun, County Va., http://www.census.gov/ (enter “Loudoun” under city/town, county, or zip and select “Virginia” for State and press enter, under the “Population Finder” search engine) (last visited Mar. 1, 2009).


9 See, e.g., Stephen S. Fuller, The Northern Virginia Economy: Its Recent Performance and Outlook (2003), http://www.cra-gmu.org/forecastreports/aNorthern%20Virginia%20Economy.pdf (indicating the northern Virginia’s gross domestic product, population, and total employment figures have increased more than the rest of the Virginia).
and constructed to accommodate less traffic.\textsuperscript{10} The economic prosperity in Loudoun County and other parts of the Washington, D.C. metropolitan area\textsuperscript{11} attracts many residents of West Virginia's Eastern Panhandle to the region and accordingly, much of the increased traffic volume along Route 9 can be attributed to people commuting from their homes in West Virginia to their jobs in northern Virginia.\textsuperscript{12} Regardless of whether West Virginians commuting to northern Virginia are truly the source of the increased traffic volumes along Route 9, Route 9's traffic problems are undeniable. In response to these problems, West Virginia and Virginia are responding in two very divergent and conflicting ways.

A. West Virginia's Response – Expansion of Route 9

In 1998, the West Virginia Senate\textsuperscript{13} and the West Virginia House of Delegates\textsuperscript{14} both passed resolutions to upgrade the two-lane Route 9 to four-lanes. Approximately five years after these resolutions passed, the project officially broke ground on April 7, 2003\textsuperscript{15} and United States Senator Robert C. Byrd delivered a speech to commemorate the event.\textsuperscript{16} The financial costs associated with the expansion of Route 9 on the West Virginia side of the border are great. According to the West Virginia Department of Transportation, the expansion of a ten-mile stretch of Route 9 from Martinsburg to Charles Town, West Virginia is estimated to cost $147 million.\textsuperscript{17} The West Virginia Department of Transportation also estimates that the expansion of Route 9 from Charles Town to the Virginia border, which includes the construction of a four-lane bridge

\begin{footnotesize}
\begin{enumerate}
  \item See 2005 Virginia Department of Transportation Daily Traffic Volume Estimates Including Vehicle Classification Estimates, supra note 8, at 9.
  \item See Fuller, supra note 9.
  \item In recent years, various "letters to the editor" and news headlines have served to exemplify the experiences and prevalence of persons commuting from the Panhandle to northern Virginia. See, e.g., Margaret Morton, Rt. 9 Groups Draw Lines Over Transportation Plan, LEESBURG TODAY, Aug. 27, 2007, available at http://leesburg2day.com/articles/2007/08/28/news/loudoun_county/lc15rtnine082707.txt (describing western Loudoun County and West Virginia residents as the major sources of increased traffic volume on Route 9); Bob Harrison, Letter to the Editor, Four Lanes to Disaster, WASH. POST, Aug. 28, 2001, at A14 (describing the experience of West Virginia residents that use Route 9 to get to work).
  \item See S.R. 14, 69TH LEG. (W. Va. 1998).
  \item See H.R. 9, 69TH LEG. (W. Va. 1998).
  \item Id.
\end{enumerate}
\end{footnotesize}
across the Shenandoah River, will cost approximately $153 million.\textsuperscript{18} To help offset the massive construction costs associated with these expansion projects, West Virginia has received federal funds, secured, in part, through the efforts of Senator Byrd.\textsuperscript{19}

Thus, West Virginia was able to secure funding for the expansion of Route 9. However, West Virginia’s power to expand Route 9 is limited to the road on the West Virginia side of the border.\textsuperscript{20} West Virginia clearly has an interest in expanding Route 9 because a total expansion of Route 9 (on the Virginia and West Virginia sides of the border) would better connect the Eastern Panhandle with northern Virginia and would provide commuters and residents with more favorable traffic conditions and access to northern Virginia. Even so, this vision will only be fully realized if Route 9 is expanded on the Virginia side of the border as well. Therein lies the issue at hand.

\textbf{B. Virginia’s Response – The Controversy and Debates}

Whereas West Virginia has a strong interest in making the Eastern Panhandle more accessible for commuters traveling to and from northern Virginia, Virginia’s interest in such an objective is not as strong. This reality is reflected by the fact that Virginia has not sought to expand Route 9 to a four-lane highway on its side of the border. As pointed out above, Virginia’s refusal to act is problematic because under current conditions, the completed four-lane version of Route 9 on the West Virginia side of the border will eventually lead to a winding, two-lane country road on the Virginia side of the border. This would create numerous bottlenecks and other traffic woes that will be detrimental to interstate commerce in the region.

\textsuperscript{18} See id. (describing the project associated with the expansion of Route 9 from Charles Town to the Virginia State line).

\textsuperscript{19} See Senator Robert C. Byrd, Remarks at Groundbreaking for Route Nine: Challenging Days Ahead for America, supra note 15 (stating that $110 million for the project was secured in a 1991 Highway Authorization Bill, $1.04 million was secured through a Transportation Appropriation and Environmental Studies Bill, and that an additional $10 million was secured for the project through an appropriations bill in 2002); see also H. Appropriations Committee, 110th Cong., Division K—Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, at 2527 (Comm. Print 2008), available at http://earmarks.omb.gov/resources/2008_citations/citation_426.pdf (providing a report indicating that under Pub. L. No. 110-161, $8,000,000.00 was earmarked by Senator Byrd to Route 9 in 2008 for “Surface Transportation Priorities”); Lauren Hough, Byrd urges Senate to OK funding, THE JOURNAL, Jul. 21, 2007 (indicating that Senator Byrd has helped to secure “more than $155 million for W.Va. 9 since 1992.”).

\textsuperscript{20} Individual states are not constitutionally permitted to restrict or regulate commerce outside of the state’s territorial boundaries. See Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989). This legal reality indicates, by extension, that a state would be likewise restricted from building a road within the territorial boundaries of a neighboring state without the neighboring state’s consent.
In Virginia, many transportation issues for non-major highways are decided at the local level and every county is required to develop a Countywide Transportation Plan. Under Loudoun County’s current Countywide Transportation Plan, it is stated that “Route 9 will be maintained as a two-lane minor arterial highway in the Rural Policy Area,” and it has no official plans to expand Route 9 to four-lanes. Even so, the high volume of traffic along Route 9 in Virginia has generated concern among Loudoun residents. In fact, some citizens have advocated various options and proposals to deal with the Route 9 traffic problems, ranging from maintaining Route 9 as a two-lane scenic by-way, to expanding Route 9 into a four-lane highway, to building a bypass around the Town of Hillsboro.

Although numerous possibilities and options have been suggested by various organizations and individuals for dealing with the Route 9 traffic congestion problems, Loudoun County has no plans to expand Route 9 to four-lanes. In the meantime, Virginia has responded to the traffic problems along Route 9 by installing a stoplight near the West Virginia border to help control traffic flow.

While there are various reasons why Loudoun County would want to maintain Route 9 as a two-lane road, evidence suggests that some Loudoun

---

21 To facilitate transportation planning at the local level, each Virginia County is required to draw up a Countywide Transportation Plan, which highlights the County’s transportation goals and needs within its jurisdiction. When a County does not wish to expand a highway and thereby does not request state funds for infrastructure improvement, as a practical matter, the Commonwealth’s Department of Transportation will typically give deference to the locality’s preference for maintaining the state of a given road or highway. Despite the policy favoring deference to localities, the Commonwealth’s state government reserves the right to override local preference and construct or expand highway infrastructure in opposition to local preference. See Va. Const. art. VII, §§ 2, 3 (establishing the supremacy of the Virginia General Assembly in terms of setting forth the powers and authority of local governmental entities).

22 See Va. Code Ann. § 15.2-2223 (West 2007) (providing the statutory authority and guidelines for the political subdivisions of Virginia to enact and adopt transportation infrastructure plans).


24 See, e.g., Bill Brubaker, Route 9 Bypass Back on The Table; Hillsboro Residents Oppose Rural Road, WASH. POST, June 10, 2007, at L201 (quoting longtime Hillsboro area resident, Dot Shetterly, as being against the construction of a four-lane highway in the Hillsboro area).


27 See Loudoun County Planning Comm’n, Countywide Transportation Plan, supra note 23.

28 See Michael Laris, Red Light, Green Light: A Tale of 2 States, 1 Road, WASH. POST, Apr. 14, 2002, at T3 (describing Loudoun County’s installation of a stoplight on Route 9, near the West Virginia border) [hereinafter Laris, A Tale of 2 States].
County residents and even some government officials wish to maintain Route 9 as a two-lane road to keep West Virginia commuters out of Loudoun County, or to discourage West Virginian commuters from using Route 9 as a means to access northern Virginia.

III. THE CONSTITUTIONALITY OF VIRGINIA'S REFUSAL TO EXPAND ROUTE 9 ON THE VIRGINIA SIDE OF THE BORDER

The best way to resolve the Route 9 controversy is not through seeking recourse in the courts. It is highly doubtful that it could ever be proven that one State's inaction qualifies as a violation of the dormant Commerce Clause. Even if such a showing could be made, the courts are ill-equipped to provide a suitable remedy and would likely be reluctant to fashion one because of concerns over federalism and the separation of powers. However, if an attempt were made to challenge Virginia's refusal to expand Route 9 on its side of the border in the courts, it would be vital to consider whether Virginia's refusal to expand Route 9 is constitutional and whether the federal courts are capable of providing a remedy that provides redress for a possible constitutional violation. To evaluate these concerns, section A analyzes whether Virginia's refusal to expand Route 9 violates the dormant Commerce Clause; section B analyzes whether the federal courts can remedy any such constitutional violations.

A. The Dormant Commerce Clause

Article 1, Section 8, Clause 3 of the United States Constitution explicitly grants Congress the power to regulate interstate commerce. The United States Supreme Court has held that this "commerce power" granted to Congress is broad, and it is "well-settled" among the federal courts that this power allows Congress to establish and regulate a national system of highways. Although Congress's power to regulate "interstate" commerce is a broad power,

29 See, e.g., Brubaker, supra note 24, at LZO1 (quoting Supervisor James Burton as saying "I don't see why we have to spend a lot of money and destroy our countryside to satisfy West Virginians."); Michael Laris, Virginias Plot Contrasting Paths; W.Va. Highway Runs Head-On Into Loudoun Growth Fears, WASH. POST, Aug. 18, 2001, at Al (quoting Virginia Department of Transportation Official Kamal Suliman as stating that as opposed to West Virginia's interest in facilitating access to Loudoun County for West Virginians, "Loudoun County has a different interest in keeping [West Virginians] out.") [hereinafter Laris, Contrasting Paths].

30 See U.S. CONST. art. I, § 8, cl. 3 (stating that "Congress shall have the Power to... regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

31 See, e.g., Gibbons v. Ogden, 22 U.S. (1 Wheat) 1, 195 (1824) (holding that Congress's power to regulate interstate commerce extends to commercial matters that affect multiple states).

32 See, e.g., Luxton v. N. River Bridge Co., 153 U.S. 525, 529 (1894) (holding that Congress has the power "to authorize the construction of a public highway connecting several states."); Harney v. United States, 306 F.2d 523, 526 (1st Cir. 1962) (holding that "[i]t is now beyond the shadow of doubt that aiding the states in the construction of interstate highways is a lawful function of the United States government.").
the full scope of this power is not always clear because ascertaining the precise limits of whatever may constitute "interstate commerce" is not an easy task. To clarify the scope of Congress's commerce power, the United States Supreme Court held in 1995 that Congress may regulate 1) "the use of the channels of interstate commerce," 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and 3) "those activities having a substantial relation to interstate commerce." Thus, in light of Congress's commerce power, it is clear that Congress has the power to expand Route 9 through specific legislation. Despite this power, it is another question altogether whether Virginia's refusal to expand Route 9 violates the "Dormant Commerce Clause" doctrine.

When explicitly noting that Congress has the power to affirmatively regulate interstate commerce, the United States Supreme Court once famously held that the prohibition against the ability of individual states to regulate interstate commerce when Congress has not already acted on the matter is one of the "great silences of the Constitution." This "great silence" is often referred to as the dormant Commerce Clause. In analyzing a dormant Commerce Clause issue, a reviewing court will consider 1) whether a state law facially discriminates against out-of-staters, 2) whether a state law favors in-state interests at the expense of out-of-state interests, and 3) whether a state law is facially neutral, but places an undue burden on interstate commerce. The following subsec-

---

34 See Luxton, 153 U.S. at 529.
35 As opposed to Congress's Article I power to regulate interstate commerce, the dormant Commerce Clause is sometimes invoked by the federal courts to strike down state regulations or policies that unduly burden or interfere with interstate commerce, even in the absence of Congressional legislation to the contrary. See, e.g., Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573, 575, 585 (1986) (holding that a New York law requiring "every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States" violated the dormant Commerce Clause and was therefore unconstitutional).
37 See Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (holding that a law that distinguished between solid waste originating from outside of the state and solid waste originating from inside of the state was discriminatory on its face and therefore violated the dormant Commerce Clause).
38 See Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 273 (1984) (ruling that a Hawaii law that exempted locally produced liquors from a liquor tax violated the dormant Commerce Clause because it had the impermissible purpose and effect of discriminating against foreign products in favor of local products).
39 See, e.g., Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 678-79 (1981) (reasoning that a facially neutral Iowa law requiring trucks to be a certain length in order to serve the State's asserted purpose of enhancing safety, violated the dormant Commerce Clause because it placed an undue burden on interstate commerce); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.3.1 (3rd ed. 2006) (providing an overview of the dormant Commerce Clause).
tions analyze whether Virginia’s refusal to expand Route 9 would qualify as a violation of the dormant Commerce Clause under any of these categories.

1. State Laws that Facialy Discriminate Against Out-of-Staters

When a state law is facially discriminatory against out-of-staters and their interests, a reviewing court will almost always render the law invalid.\textsuperscript{40} Examples of such facially discriminatory laws include laws that charge out-of-state entities higher fees than those charged to in-state entities to dump solid waste within the state,\textsuperscript{41} laws that allow in-state businesses to receive more favorable protection from tax liability than out-of-state businesses,\textsuperscript{42} and laws that require in-state processing of goods.\textsuperscript{43} A law that is impermissibly discriminatory against out-of-state commerce can take many forms and the cases cited herein merely illustrate circumstances when the Supreme Court determined that a state law was facially discriminatory and therefore unconstitutional. Thus, once a reviewing court determines that a law is facially discriminatory against out-of-state commerce, it will subject the state law to the highest level of scrutiny and will uphold the law only if the discriminatory law serves a "legitimate local purpose" and only if there are no "nondiscriminatory alternatives" available to achieve that purpose.\textsuperscript{44} Because laws that facially discriminate against interstate commerce are subjected to a form of strict scrutiny, a state arguing for such a law must demonstrate that its purpose in enacting the law is one other than "simple economic protectionism. . . ."\textsuperscript{45} A state arguing in favor of a fa-

\textsuperscript{40} See, e.g., Camps Nfld./Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (holding that a Maine law granting charitable organizations that primarily served in-state residents more favorable tax exemptions than those given to charitable organizations that served a clientele consisting primarily of out-of-state residents was a facially discriminatory violation of the dormant Commerce Clause).

\textsuperscript{41} See, e.g., Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93, 114 (1994) (holding that a law charging depositors of solid waste originating from out-of-state to pay a higher fee to deposit the waste at a waste disposal site within the state than depositors of waste that originated from within the State constituted impermissible and invalid discrimination against interstate commerce); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992) (holding that a State law requiring importers of out-of-state trash to pay a fee to deposit waste at a waste site within the state, but not requiring depositors of waste that originated from within the State to pay a fee constituted facially impermissible and unconstitutional discrimination against out-of-state commerce).

\textsuperscript{42} See S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 169-71 (1999) (holding that an Alabama law that allowed Alabama corporations to reduce their tax liability by "reducing the par value of their stock, while [denying] foreign corporations that same ability” was facially discriminatory against out-of-state corporations and was unconstitutional under the dormant Commerce Clause).

\textsuperscript{43} See Dean’s Milk Co. v. Madison, 340 U.S. 349 (1951) (holding that a city ordinance forbidding milk from being sold within a city’s limits that was not processed within five square miles of the city was facially discriminatory against out-of-state commerce and was therefore invalid).

\textsuperscript{44} Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

cially discriminatory law must also be able to demonstrate that the law’s legitimate purpose cannot be achieved by “nondiscriminatory means.”

It is unclear whether the Commonwealth of Virginia’s refusal to expand Route 9 could be challenged under the dormant Commerce Clause. Historically, laws rendered unconstitutional under the dormant Commerce Clause, because they facially discriminated against interstate commerce, involved challenges to laws enacted by a state legislature or municipal lawmaking body. Unlike prior State policies that were invalidated under the dormant Commerce Clause because they were affirmatively enacted, this issue concerns the burdens placed on interstate commerce that arise from one state’s failure to act in cooperation with a neighboring state.

Because the Route 9 situation involves the Commonwealth of Virginia’s refusal to take action, rather than an affirmatively enacted discriminatory law, it is highly unlikely that the Commonwealth of Virginia’s inaction could be challenged under the “facially discriminatory” dormant Commerce Clause doctrines. Therefore, the issue must be analyzed under other dormant Commerce Clause approaches.

2. State Laws that are Protectionist or Discriminatory in Purpose or Effect

Often a state law will fall short of being facially discriminatory against interstate commerce, yet will still run afoul of the dormant Commerce Clause. This can occur if a law is enacted with a protectionist purpose or has produced

46 Id.
47 See, e.g., Camps Nfld./Owatonna, Inc. v. Town of Harrison, 519 U.S. 316 (1997) (involving a challenge to a Maine tax law)
48 See, e.g., Dean’s Milk Co. v. Madison, 340 U.S. 349, 353 (1951) (involving a challenge to a city milk processing ordinance).
49 Unlike prior dormant Commerce Clause cases involving the discriminatory impact of an affirmatively enacted policy, the burden placed on interstate commerce in the case of Route 9 arises from the Commonwealth of Virginia’s inaction. Compare Philadelphia v. New Jersey, 437 U.S. 617 (1982) (involving a New Jersey law affirmatively prohibiting waste originating from outside of the state from being imported into it) with Loudoun County Planning Comm’n, supra note 23 (stating that “Route 9 will be maintained as a two-lane minor arterial highway in the Rural Policy Area” and thereby indicating that the Commonwealth of Virginia will not be taking steps under the current plan to expand Route 9 on Virginia’s side of the border).
50 The burden on interstate commerce will arise from the difficulty that will be incurred in traveling between West Virginia and Virginia as a consequence of having a four-lane highway on one-side of the border that turns into a two-lane road on the other side of the border.
51 See Loudoun County Planning Comm’n, supra note 23.
52 See Buck v. Kuykendall, 267 U.S. 307, 315-16 (1925) (holding that a Washington state law requiring common carriers to receive approval from a state bureaucrat in order to conduct operations on the Washington state highways was unconstitutional because the law was motivated by a protectionist purpose and because it produced a detrimental impact on interstate commerce).
State policies alleged to be motivated by a protectionist purpose or that produce a protectionist effect are not scrutinized under a precise methodology or calculus. Rather, such policies are analyzed individually according to the facts of a given case to find the motivations behind the policy. Although the Supreme Court has invalidated laws because they were possessed with a protectionist purpose or created a discriminatory impact on interstate commerce, the Court has also upheld laws that produce a discriminatory impact on interstate commerce even where adoption of the law was motivated by a protectionist purpose. One leading scholar explains this phenomenon in the Court's dormant Commerce Clause jurisprudence by stating that the Court will tolerate laws that discriminate against one group of "out-of-staters," but will not tolerate laws that discriminatorily inhibit or prevent all out-of-staters from accessing a "particular state market."

In the case of Virginia's refusal to expand Route 9, one could argue that Route 9 is being maintained by Virginia as a "two-lane minor arterial highway" for the protectionist purpose of excluding or inhibiting West Virginians from entering Virginia. Even so, prevailing under this novel theory would require a challenger to argue that the continued existence of Route 9 as a two-lane highway on the Virginia side of the border discriminates against interstate commerce.

See Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 354 (1977) (holding that North Carolina's requirement that apples imported into the state bear a USDA label placed an impermissible burden on interstate commerce when apples exported from Washington state were labeled with a stamp that indicated that the apples were subject to standards that met or exceeded the USDA standards).

See CHEMERINSKY, supra note 39, § 5.3.4.

See, e.g., Hunt, 432 U.S. at 354.

See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472-73 (1981) (holding that Minnesota's requirement that milk be packaged in non-plastic, non-returnable containers was a valid regulation under the dormant Commerce Clause because the burden the regulation placed on interstate commerce was found to be slight and insignificant).

See Exxon Corp. v. Governor of Md., 437 U.S. 117, 140 (1978) (holding that a Maryland law prohibiting producers and refiners of petroleum products from operating retail gas stations within the State did not violate the dormant Commerce Clause, even though the State of Maryland conceded that it adopted the Statute for the purpose of insulating local dealers and retailers from the hardships of competing with out-of-state petroleum producers and refiners).

CHEMERINSKY, supra note 39, § 5.3.4.

Id.

Loudoun County Planning Comm'n, supra note 23.

Although additional evidence would likely need to be gathered in order to demonstrate the existence of a "protectionist" motive on the part of Virginia in maintaining Route 9 as a two-lane highway, any endeavor to do so received a good start when a Loudoun County supervisor stated that he didn't "see why we have to spend a lot of money and destroy our countryside to satisfy West Virginians." See Brubaker, supra note 24, at LZ01; see also Laris, Contrasting Paths, supra note 29 (quoting Virginia Department of Transportation Official Kamal Suliman as stating that as opposed to West Virginia's interest in facilitating access to Loudoun County for West Virginians, "Loudoun County has a different interest in keeping [West Virginians] out.").
commerce by discouraging West Virginians from entering northern Virginia via the only significant east-west corridor connecting the Eastern Panhandle with northern Virginia. Successfully prevailing under this theory would also likely depend on whether a challenger could empirically demonstrate how much interstate commerce is being discriminated against, and whether Virginia's refusal to expand Route 9 could be shown to be motivated by a protectionist purpose (i.e. to keep West Virginians out of Virginia).\(^6\)

In response to these arguments, Virginia would likely argue that the continued existence of Route 9 as a two-lane highway does not prevent West Virginians from entering northern Virginia because travelers can also enter northern Virginia via Route 340.\(^6\) Furthermore, Virginia could also likely overcome any charges that its refusal to expand Route 9 was motivated by a protectionist or discriminatory purpose by arguing that its refusal is based on a lack of resources to complete such a presumably expensive project.\(^6\)

Thus, making a successful challenge under this theory would require convincing a reviewing court that the current state of Route 9 as a two-lane

\(^6\) See id. Accordingly, it may be necessary to obtain more compelling evidence demonstrating a protectionist purpose, such as minutes from the Board of Supervisors or official documentation expressing an official policy goal to achieve such an objective.

\(^6\) See AMERICAN MAP, supra note 1. Route 340 is a north-south highway that originates near Waynesboro, Virginia and continues northward, crossing from Clarke County, Virginia into Jefferson County, West Virginia and extending into Maryland, where it terminates at Route 15 in Maryland. Id. at 112-13. Virginia may be able to argue that the north-south oriented Route 340 provides a suitable alternative to the east-west oriented Route 9 because although Route 340 is a two-lane highway from Charles Town, West Virginia to the Virginia State line, it is a four-lane highway on the Virginia side of the border until it intersects with Route 7 East (and thereby provides indirect east-west access to northern Virginia). See H.B. Elkins, West Virginia U.S. Routes, http://www.millenniumhwy.net/wvroads/wvusroutes.html (last visited Mar. 1, 2009) (providing a brief description of Route 340); On the other hand, although residents of West Virginia's Eastern Panhandle can access northern Virginia by taking Route 340 south to Route 7 east, this alternative arguably does not provide sufficient interstate access between the Eastern Panhandle and northern Virginia because it takes longer to travel between the regions using Route 340 than it would by using a hypothetical four-lane Route 9 and that this inconvenience places an undue burden on interstate commerce. Obviously, additional empirical studies would need to be conducted to mete out how much the existence of Route 9 as a two-lane highway burdens interstate commerce.

\(^6\) In recent years, Virginia has had difficulty in determining how to properly fund highway construction and transportation projects. See Amy Gardner & Tim Craig, Va. Transportation Funding Talks Die, WASH. POST, Sept. 29, 2006, at A01 (discussing the Virginia General Assembly's failure to agree on budgetary funding for roads in northern Virginia and describing the financial crisis facing the Commonwealth with regards to funding highway construction and maintenance in the region at the time). In response to this difficulty, the General Assembly recently passed a budget approving a 35% increase in highway construction expenditures, financed through new revenue and bond programs. See 2007 Va. Acts Ch. 896 originally H.B. No. 3202; see also Office of the Governor Timothy M. Kaine, Governor Kaine Announces Increased Statewide Transportation Funding, http://www.governor.virginia.gov/MediaRelations/NewsReleases/viewRelease.cfm?id=410 (last accessed Feb. 13, 2008) (summarizing the implications of the budgetary funding approved by the General Assembly in H.B. No. 3202 and codified in 2007 Va. Acts Ch. 896).
highway on the Virginia side of the border and Virginia’s refusal to expand Route 9 to four-lanes creates a detrimental impact and discriminatory effect on interstate commerce. A challenger’s ability to demonstrate that Virginia’s refusal to expand Route 9 is motivated by a protectionist purpose would bolster any constitutional challenge brought forth. Making this showing, however, is not necessary to demonstrate a violation of the dormant Commerce Clause because the Supreme Court has previously found that a discriminatory effect, without more, can successfully demonstrate a violation of the dormant Commerce Clause.

Overall, proving that Virginia’s maintenance of Route 9 as a two-lane road amounts to interstate commercial discrimination would ultimately turn on a fact-specific inquiry in the courts. Specifically, this inquiry would turn on whether any empirical data demonstrates the magnitude of any burdens that existing policy places on interstate commerce. This data would likely need to show how many West Virginians are impeded from using Route 9 as a means to enter northern Virginia and also indicate how the burden on interstate commerce would be relieved by expanding Route 9 to four-lanes on the Virginia side of the border.

Even if it could be successfully demonstrated that the continued existence of Route 9 as a two-lane highway on the Virginia side of the border violates the dormant Commerce Clause, it is still questionable whether a reviewing court has the power to remedy this situation. Another question altogether is whether such a remedy (if one exists) should be ordered—after all, ordering such a remedy would essentially require a court to order Virginia to spend its own money and take proactive measures to expand one of its own highways. This scenario obviously raises numerous federalism, separation of powers, and remedial concerns, which will be discussed in detail in Part III.B.4.

3. Incidental Burdens on Interstate Commerce and Pike-Balancing

Any suit alleging that Virginia’s refusal to expand Route 9 to four-lanes on the Virginia side of the border is a violation of the dormant Commerce Clause would most likely be analyzed under Pike-balancing analysis. Pike-balancing analysis is most often applied when a reviewing court is confronted with a law that is facially neutral and not facially discriminatory against interstate commerce, but nevertheless places an incidental burden on interstate commerce. Under Pike-balancing analysis, the reviewing court will weigh the

---

65 See Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (holding that a law that distinguished between waste on the basis of its state of origin was discriminatory on its face and therefore unconstitutional).
68 Id. at 142.
benefits of the state's law against the burdens that those benefits place on interstate commerce. As the Supreme Court in *Pike* famously held:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.\(^6^9\)

Although the "weighing" approach gives a reviewing court the flexibility to determine whether the equities and benefits of a state's law justify the burden placed on interstate commerce, the *Pike*-balancing test has been frequently criticized by some Supreme Court justices as a test that requires the judiciary to make determinations that are better suited for a legislative body.\(^7^0\) Despite these criticisms, the balancing approach is often used to evaluate the constitutionality of laws and provisions that are deemed to place nondiscriminatory burdens on interstate commerce.

In the case of Route 9, *Pike*-balancing analysis would likely be applied because Virginia's refusal to expand its highway can most realistically be categorized as a policy\(^7^1\) that places an indirect, nondiscriminatory, and incidental burden on interstate commerce. Although the two-lane portion of Route 9 on the Virginia side of the border certainly makes it difficult for West Virginians to access northern Virginia, since it is the only major east-west corridor in the region, it also makes it difficult for Virginians and Washingtonians to access the Eastern Panhandle of West Virginia via Route 9, as well. Thus, if the State of West Virginia, or a private citizen, challenged Virginia's refusal to expand Route 9 as a policy that violates the dormant Commerce Clause, and the review-

---

\(^{69}\) Id.

\(^{70}\) See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 619-20 (1997) (Thomas, J., dissenting) (maintaining that the Court's usage of balancing tests allows it to reach different results in different cases that are based on individual and subjective assessments of policies, which have no basis in the Constitution); *Bendix Autolite Corp. v. Midwesco Enters.*, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., dissenting) (arguing that a "balancing" approach is similar to "judging whether a particular line is longer than a particular rock is heavy."); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 691-92 (1981) (Rehnquist, J., dissenting) (arguing that it is improper for the Court to determine whether a State's interest in maintaining a law for the purpose of promoting safety is "outweigh[ed]" by the burden it places on interstate commerce and that it is more proper to determine whether the State's interest in safety is legitimate or a "mere pretext"). For an article arguing that the Court does not engage in "balancing" at all, but rather conducts "purpose" inquiries, see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1105-08 (1986).

\(^{71}\) See Loudoun County Planning Comm'n, *supra* note 23 (stating that "Route 9 will be maintained as a two-lane minor arterial highway in the Rural Policy Area.").
ing court applied a *Pike*-balancing analysis,\textsuperscript{72} the successful claimant would likely have to show that Virginia’s refusal to expand Route 9 places a significant burden on interstate commerce. If this preliminary showing were made, Virginia would likely need to demonstrate that its interest in maintaining Route 9 as a two-lane highway\textsuperscript{73} outweighs any incidental burdens placed on interstate commerce by this policy. Lastly, like in the other areas of dormant Commerce Clause jurisprudence,\textsuperscript{74} it is questionable whether a state’s mere refusal to take action could even be challenged under the dormant Commerce Clause because all previous challenges made under the dormant Commerce Clause doctrine involved challenges to affirmatively enacted legislation.\textsuperscript{75}

Challenging Virginia’s inaction might be possible, however, because a reviewing Court, applying Supreme Court precedent, would be concerned with the impact that Virginia’s conduct places on the continued existence of commercial free trade harmony among the states.\textsuperscript{76} Preserving harmonious interstate commerce appears to be the ultimate objective of the dormant Commerce Clause.\textsuperscript{77} Therefore, when a state intentionally refuses to take action and this inaction places a significant burden on interstate commerce, it may be possible to challenge the inaction as a violation of the dormant Commerce Clause.

Even if Virginia’s inaction was successfully challenged as a violation of the dormant Commerce Clause, there are still issues to consider regarding the power of a reviewing court to issue a remedy, and whether such a remedy would

\begin{itemize}
  \item \textsuperscript{72} See *Pike*, 397 U.S. at 142 (holding that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).
  
  \item \textsuperscript{73} These interests could include anything from safety concerns to preservation of the of the countryside to unavailability of sufficient funds. Regardless of whatever the Commonwealth’s interests in maintaining Route 9 as a two-lane highway may be, if it can be demonstrated that the Route’s continued existence as a two-lane highway places a sufficiently undue burden on interstate commerce and a reviewing court determines that *Pike*-balancing analysis is applicable, the Commonwealth will need to convince the reviewing court that its interests (whatever they may be) outweigh any incidental burden on interstate commerce. See, e.g., Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 678-79 (1981) (holding that Iowa’s truck length requirement was unconstitutional and that its asserted interest in safety was outweighed by the incidental burdens it placed on interstate commerce).
  
  \item \textsuperscript{74} See supra Parts III.A.1, III.A.2.
  
  \item \textsuperscript{75} See supra notes 37-48.
  
  \item \textsuperscript{76} See, e.g., H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-35 (1949) (describing the history of the Commerce Clause’s adoption and the willingness of the states to relinquish their powers of regulation of interstate commerce in order to allow for and promote the existence of harmonious national trade and interstate commerce); Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 523 (1935) (Cardozo, J.) (holding that the Courts must strike down attempts by the States to engage in acts of protectionism because “[t]he Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”).
  
  \item \textsuperscript{77} *Baldwin*, 294 U.S. at 523.
\end{itemize}
be proper, in light of federalism and the separation of powers.\textsuperscript{78} These concerns will be discussed in greater detail in Part III.B.4.

\textbf{B. Justiciability and Remedial Obstacles}

Before Virginia's refusal to expand Route 9 to four-lanes could be reviewed by a court as a violation of the dormant Commerce Clause, it would be necessary for a potential litigant to satisfy threshold standing requirements. If this burden could be met and a court proceeded to review the merits of the case, serious remedial, separation of powers and federalism concerns would nonetheless remain. Part III.B.1 thus proceeds by considering whether a potential litigant could satisfy threshold standing requirements. Part III.B.2 considers who and how a potential litigant could initiate a suit to obtain relief from Virginia's potentially unconstitutional burdening of interstate commerce, as well as the available remedies. Part III.B.3 will discusses problems and issues that could arise from an attempt to implement and enforce a structural injunction as a remedy. Lastly, Part III.B.4 analyzes whether concerns for federalism and the separation of powers values might preclude a reviewing court from ordering a remedy.

\textbf{1. The Issue of Standing}

As mentioned above, before a potential litigant could ever argue that Virginia's refusal to expand Route 9 violates the dormant Commerce Clause, the litigant would need to satisfy standing requirements. The Supreme Court has held that the United States Constitution requires all suits litigated in a federal court to satisfy the standing requirements of "(1) 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, \ldots and (b) 'actual or imminent, not "conjectural" or 'hypothetical,' \ldots [2]) a causal connection between the injury and the conduct complained of—the injury has to be 'fairly \ldots trace[able] to the challenged action of the defendant, and not \ldots th[e] result [of] the independent action of some third party not before the court.' \ldots [and that 3]) it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'\textsuperscript{79} Beyond the constitutional requirements for standing lie various "prudential" court-imposed standing requirements that determine whether it is proper for a court to expend judicial resources in deciding a matter.\textsuperscript{80} Prudential standing requirements bar a plaintiff from bringing suit when 1) the plaintiff is seeking to invoke the rights or inter-


ests of a third party,\textsuperscript{81} or 2) the plaintiff is bringing a generalized grievance,\textsuperscript{82} or 3) the claim is "outside of the zone of interest" that a statutory, or even perhaps a constitutional, right is intended to protect.\textsuperscript{83} A challenge to standing can prevent a case from being decided on the merits. However, allegations satisfying standing requirements will generally be sufficient unless the suit is confronted with a Rule 56(e) motion, at which point the allegations must be supported by "specific facts."\textsuperscript{84}

\subsection*{Constitutional Standing Requirements}

In this case, it should be possible for a potential litigant to satisfy the first constitutionally required standing requirement of "injury in fact."\textsuperscript{85} However, the litigant would likely need to demonstrate how and why the continued existence of Route 9 as a two-lane highway on the Virginia side of the border burdens interstate commerce.\textsuperscript{86} Assuming this showing could be made,\textsuperscript{87} the litigant would then need to demonstrate that the asserted burden on interstate commerce is "fairly traceable" to Virginia's refusal to expand Route 9.\textsuperscript{88} Lastly, the plaintiff would need to satisfy the "redressability" requirement—\textsuperscript{89} that is, the plaintiff must show that a successful result will resolve the harm. In addition to proving "injury in fact," the redressability standing requirement may prove to be the most difficult standing hurdle for a potential litigant to clear. This is be-

\begin{itemize}
  \item \textsuperscript{81} See Tileston v. Ullman, 318 U.S. 44, 46 (1943) (holding that a physician lacked standing to obtain an adjudication upon a matter that affected his patients' rights because the adjudication would not affect any interest that directly implicated or infringed upon the rights or property of the physician, but instead would clarify the rights of his patients).
  \item \textsuperscript{82} See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21 (1974) (holding that "standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."); Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922) (holding that citizens do not have a generalized right to litigate whether a constitutional amendment or statute, if adopted, would be valid).
  \item \textsuperscript{83} See Assoc. of Data Processing Svc. Orgs. v. Camp, 397 U.S. 150, 153-54 (1970) (holding that the courts may consider, as a prudential standing requirement, whether a relevant statute is intended to protect the interest that a plaintiff alleges is not being served as a consequence of a given act, or a failure to act).
  \item \textsuperscript{84} See Lujan, 504 U.S. at 561 (quoting FED. R. CIV. P. 56(e)).
  \item \textsuperscript{85} See id. at 560-61.
  \item \textsuperscript{86} See supra Part III.A.
  \item \textsuperscript{87} As discussed in Part III.A, this could be a very difficult showing for a plaintiff to make. Common sense and practical experience shows that rates of interstate and global commerce increase alongside improvements in trade avenues. Despite this commonsense notion, proving just how much interstate commerce is burdened and impacted by the continued maintenance of Route 9 as a two-lane highway on the Virginia side of the border could prove to be an onerous task indeed.
  \item \textsuperscript{88} See Lujan, 504 U.S. at 560-61.
  \item \textsuperscript{89} See id. at 568.
cause even if a potential litigant successfully demonstrated that Virginia’s failure to extend Route 9 unconstitutionally burdens interstate commerce, it is unclear whether a court would be willing or able to issue an injunction ordering Virginia to expand Route 9 on its side of the border, or to take other remedial action.\textsuperscript{90}

In sum, constitutional standing requirements may prevent a plaintiff from challenging Virginia’s inaction on dormant Commerce Clause grounds. Furthermore, as outlined above, even if the constitutionally mandated standing requirements could be satisfied, it will also be necessary for a potential litigant to satisfy the Supreme Court’s “prudential standing requirements.” Thus, even granting that a provable injury caused by Virginia’s inaction could be established, a reviewing court might still be unable or unwilling to \textit{redress} the harm.

\textbf{b. Prudential Standing Requirements}

The Supreme Court has self-imposed “prudential standing” doctrines on the federal courts for the purpose of ensuring judicial efficiency and for the sake of pragmatism.\textsuperscript{91} These standing requirements are not constitutionally mandated, but if a federal court believes that a case offends a prudential standing requirement, it will decline to assert jurisdiction.

One prudential standing requirement is described as the prohibition against “generalized grievances.” With regard to this standing requirement, the courts generally prohibit plaintiffs from litigating generalized matters that affect everyone, such as challenging a member of Congress’s continued membership in the armed services as an alleged contravention of the Constitution.\textsuperscript{92} The “generalized grievance” prudential standing requirement is grounded in a concern that certain matters are better resolved by the executive and legislative branches of government.\textsuperscript{93} A reviewing court may likewise hold that a challenge to Virginia’s refusal to expand Route 9 qualifies as a generalized grievance and is better resolved by the political branches of government.\textsuperscript{94} However, this may

\textsuperscript{90} These concerns and obstacles are analyzed in greater detail in Part III.B.3. below. \textit{See infra} Part III.B.3.

\textsuperscript{91} \textit{See} Allen v. Wright 468 U.S. 737, 751 (1984) (holding that prudential standing is constituted of “several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”).

\textsuperscript{92} \textit{See} Schlesinger, 418 U.S. at 220.

\textsuperscript{93} Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982) (holding that the prudential standing doctrine can help the courts avoid awkward intrusions into matters that are “most appropriately addressed in the representative branches.”).

\textsuperscript{94} It should be noted that there is some overlap between the “political question doctrine” and the prudential standing requirement prohibiting a litigant from asserting generalized grievances.
not be the case if the litigant can demonstrate that he has suffered particularized harm as a consequence of the continued existence of Route 9 as a two-lane highway.

2. Who is a Proper Plaintiff and What is a Viable Remedy?

Assuming that Virginia's inaction qualifies as an unconstitutional burden on interstate commerce, it would be necessary to determine how a cause of action could be brought and also who or what could bring it. This question is important because a cause of action alleging that Virginia's refusal to expand Route 9 is unconstitutional implicates matters of state sovereign immunity, which protects states from suits that it has not consented to.

a. Suit by Private Citizen

If a private citizen or citizens were to bring a suit seeking redress for Virginia's unconstitutional refusal to expand Route 9, the citizen could file a section 2201 action to obtain declaratory relief clarifying whether Virginia's refusal to expand Route 9 violates the United States Constitution. If a court then determined that Virginia's refusal to expand Route 9 indeed violated the Constitution, the litigant could then file a section 2202 action to obtain redress for the violation. This would likely entail suing a government official of Virginia in his or her official capacity for injunctive relief under *Ex parte Young*.

See, e.g., Baker v. Carr, 369 U.S. 186, 217 (1962) (holding that a nonjusticiable political question can arise when there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department"). The overlap exists in that "both of them depend in part on the alternative means by which a party may adjudicate" the controversy in question. Daniel P. Tokaji, Commentary, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31, 36 (2008), available at http://www.michiganlawreview.org /firstimpressions/vol107/tokaji.pdf (discussing the differences between the political question doctrine and the prudential standing doctrine prohibiting litigants from asserting generalized grievances).

95 U.S. CONST. amend. XI (stating in whole that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

96 See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (holding that as a matter of state sovereignty and in the absence of a valid congressional abrogation of its sovereign immunity, a state may not be sued by individuals without its consent).


98 Id.


100 An example of a government official that might be sued for injunctive relief in this instance might be the Commissioner of the Virginia Department of Transportation. See Va. Department of Transportation, Commissioner of Transportation, http://www.virginiadot.org/about/ekern.asp (last accessed Feb. 13, 2008) (indicating that David S. Ekern is the current Transportation Commissioner of the Virginia Department of Transportation).
Despite sovereign immunity strictures, the Supreme Court permits aggrieved individuals to obtain prospective relief against a state official to stop or prevent the unconstitutional or unlawful enforcement of a federal law. In *Ex parte Young*, the Supreme Court held that it was proper to enjoin the Attorney General of Minnesota from enforcing unconstitutional laws. This holding was significant because it clarified that private citizens can obtain relief from a state's unconstitutional conduct by enjoining a government official from that state, in his or her official capacity, to comply with the United States Constitution. Thus, in the case of a private citizen seeking redress against Virginia for its refusal to expand Route 9, it may be possible for that citizen to enjoin a government official to expand Route 9 and thereby alleviate the burden that Virginia's refusal to expand the road poses. Obtaining such an extraordinary remedy with such dramatic implications and consequences, however, would obviously raise serious questions concerning federalism and the separation of powers.

b. Suit by West Virginia

While it may be possible for a private citizen to bring a suit, it may also be possible for the State of West Virginia itself to seek redress. This is because the United States Constitution vests the United States Supreme Court with original and exclusive jurisdiction over controversies between States and because the Eleventh Amendment gives states sovereign immunity against suits brought

---

101. 209 U.S. 123, 156 (1908) (holding that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected by an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."); see also Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 438 (2004) (holding that a court may enforce a consent decree entered into between a private citizen and a state as part of a settlement agreement with the citizen for the citizen's suit against one of the state's government officials in his or her official capacity and holding further that enforcement of the consent decree does not violate the Eleventh Amendment).

102. See *Ex parte Young*, 209 U.S. at 159; Edelman v. Jordan, 415 U.S. 651, 677 (1974) (limiting the relief available under the *Ex parte Young* doctrine to "prospective injunctive relief").

103. *Id.* at 148.

104. *Id.* at 156.

105. *Id.*

106. See supra note 100 and accompanying text.

107. These questions are discussed in greater detail below in Part III.B.4.

108. See U.S. CONST. art. III, § 2 (granting the United States Supreme Court original jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies between two or more States . . ."); 28 U.S.C. § 1251(a) (2006) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").
by citizens. Accordingly, it may be possible for West Virginia to sue Virginia directly to obtain relief from any constitutional violations that Virginia may be committing by its refusal to expand Route 9. The limitations and procedural requirements imposed on a private citizen would not be present if West Virginia sued Virginia directly.

c. The Remedy Preferred: Injunction

Given the possibility that Virginia's refusal to expand Route 9 could be challenged by a private citizen seeking the enjoinment of a Virginia government official, or by the State of West Virginia suing the Commonwealth of Virginia directly, it is next important to determine the most appropriate remedy. Redress, if available, would likely take the form of an injunction ordering the Commonwealth of Virginia, or a Virginia governmental official to take steps to expand Route 9 to four-lanes on its side of the border because doing so would likely eliminate or reduce the burdens placed on interstate commerce and travel via Virginia's current refusal to expand Route 9.

Although it might be possible for West Virginia to sue Virginia for monetary damages so West Virginia could continue the expansion of Route 9 on

109 See U.S. CONST. amend. XI (stating in whole that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

110 If the State of West Virginia chooses to bring a cause of action against the Commonwealth of Virginia for its refusal to expand Route 9, it would not be the first time that these two states were parties to adverse litigation with one another. See, e.g., Virginia v. West Virginia, 246 U.S. 565, 589 (1918) (involving a suit by Virginia to recover amounts owed by West Virginia for West Virginia's portion of the antebellum debt assumed prior to the division of West Virginia and Virginia and as agreed upon by contract signed between the two sovereigns and as approved by Congress).

111 See, e.g., Ex parte Young, 209 U.S. 123, 156 (1908).

112 Id.

113 See U.S. CONST. art. III, § 2.

114 The Commonwealth of Virginia itself might be ordered to comply with an injunction if the State of West Virginia were a successful litigant.

115 If a private individual or individuals brought suit, a Virginia governmental official, rather than the Commonwealth of Virginia itself, might be ordered to comply with a prospective injunctive order. See Edelman v. Jordan, 415 U.S. 651, 677 (1974).

116 See Loudoun County Planning Comm'n, supra note 23. As an alternative to expanding Route 9 to four lanes on its side of the border, Virginia might be permitted to agree upon some other suitable alternative that sufficiently reduced any incidental burdens placed on interstate commerce, such as the construction of an entirely new highway providing access to the east-west corridor between northern Virginia and the Eastern Panhandle of West Virginia that would connect with Route 9 on the West Virginia side of the border.
the Virginia side of the border, practical realities dictate that this option would not be feasible. Furthermore, private citizens usually cannot sue a state for damages for constitutional violations and usually resort to injunctive relief via the Ex parte Young doctrine.

3. Implementation and Enforcement of Injunctive Relief

As stated, a litigant bringing a cause of action against Virginia for the incidental burden its refusal to expand Route 9 places on interstate commerce, would likely seek injunctive relief. With that said, seeking injunctive relief in this case presents many remedial issues, including, but not limited to, enforcement of the injunction and the precise form of the injunctive relief itself. For example, assume that a litigant successfully argues that Virginia’s refusal to expand Route 9 violates the dormant Commerce Clause. A reviewing court reaching this conclusion will then be confronted with the possibility of ordering injunctive relief that requires Virginia to eliminate the unconstitutionality of its continued inaction. The court would have to order Virginia to expend its own resources to comply with the court order. This strange possibility and the potential difficulties associated with it are considered below.

a. Implementing the Injunctive Order

Although it may seem counterintuitive for a court to order a state to spend its own resources, such orders have previously been issued and enforced. Such extraordinary orders appeared within the context of courts providing redress for constitutional or statutory violations involving school integration,

---

117 Proceeding this way, West Virginia would need to carry out the expansion of Route 9 on the Virginia side of the border in essentially the same way that a private actor would, given that West Virginia obviously has no sovereignty over the Commonwealth of Virginia.

118 For example, West Virginia might be able to build a four-lane highway in Virginia, but this would require West Virginia to purchase property from property owners in the region along Route 9 and receive approval from Virginia for the highway project (in the absence of a Court order). Thus, it is likely that if a remedy is sought and obtained by West Virginia, it will not take the form of monetary damages and would, in all likelihood, take the form of an injunction.

119 See, e.g., Edelman v. Jordan, 415 U.S. 651, 668-70, 94 (1974) (holding that whereas a private citizen may be able to obtain injunctive relief against a state official, it is not likewise permissible for a private citizen to sue a state for monetary damages, which is prohibited by the Eleventh Amendment).

120 209 U.S. 123, 156 (1908).

121 As noted, a potential litigant could be either a private citizen or the State of West Virginia. See supra Part III.B.2.a-b.

122 See supra Part III.B.2.c.

123 See supra Parts III.A.1-3.

124 See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971) (upholding district and circuit court orders requiring the integration of the public schools in a school district,
prisoner civil rights, and public health systems. Furthermore, the U.S. Supreme Court has held that a "court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court." In light of these precedents, it is safe to say that a reviewing federal court possesses the inherent equitable power to order injunctive relief requiring the Commonwealth of Virginia to expand Route 9, or at least to require the Commonwealth to provide a suitable alternative.

If a reviewing court were to order injunctive relief in the case of Route 9, it would likely first order the Commonwealth of Virginia to expand Route 9 and leave the precise implementation of this mandate to the discretion of Virginia. The reviewing court would likely give Virginia a window of time to comply. However, if Virginia failed to comply with the order by the deadline, the court might then order a detailed structural injunction with specific requirements and guidelines, in order to ensure compliance with the court's order. These specific requirements might include highway plans, financial plans, or the appointment of a special receiver to carry out the reviewing court's order. However specific a reviewing court's injunctive order may be, the costs which required, in part, mandatory busing of students in order to properly effectuate racial integration of the schools).

---

125 See, e.g., Benjamin v. Sielaff, 752 F.Supp. 140, 148-49 (S.D.N.Y. 1990) (ordering the New York City Department of Corrections to comply with constitutionally required housing minimums for prisoners and ordering the Department to provide prisoners with specified amounts of compensation for any failures the Department may have complying with the order).


128 Building a new highway parallel to Route 9 and connecting with the expanded Route 9 in West Virginia would likely qualify as a suitable alternative.

129 Dixon, 967 F.Supp. at 537 (noting that the case had been pending for over twenty years and was there before the court because the District of Columbia had failed to comply with the district court's order issued in 1974).

130 See id.

131 Professor Owen M. Fiss is credited with coining the term "structural injunction," which is a form of injunction used by a court to assert control over an improperly or insufficiently functioning social institution, such as an educational or correctional system. See OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 8 (1978).

132 See Dixon, 967 F.Supp. at 555 (ordering a special receiver to "oversee, supervise, and direct all financial, contractual, legal, administrative, and personnel functions of the CMHS, and to restructure the CMHS into an organization that is oriented toward advancing the objectives" outlined in the district court's previous order to comply with statutory requirements after finding that the dire circumstances arising from the District of Columbia's failure to comply with the district court's earlier orders warranted the appointment of the special receiver with such broad powers).

133 Id.
involved in ordering Virginia to expand Route 9134 might present the court with enforcement problems because the costs of implementation might lead Virginia to “drag its feet” with compliance.

b. Enforcement

If a court were to issue an injunction in the Route 9 case, enforcement of the injunction would likely prove to be tricky and difficult. This is because when courts are confronted with the difficult task of ordering a state to meet certain mandates, which thereby require a state to expend its own resources,135 a variety of enforcement difficulties can arise,136 such as the court becoming entwined with a state bureaucracy in order to ensure compliance. Furthermore, to enforce compliance with a court order, the courts will typically levy fines137 or hold non-complying government officials in contempt.138 The use of contempt against individuals as a judicial device for resolving noncompliance with a court order is resorted to only after other options have been used and found to be ineffective.139 Thus, if a reviewing court ordered the Commonwealth of Virginia to

134 For a comparative example illustrating the likely enormous costs that would be associated with expanding Route 9 on Virginia’s side of the border, the West Virginia department of transportation estimates that the expansion of Route 9 along a ten mile stretch of highway from Martinsburg to Charles Town, West Virginia will cost approximately $147 million. See supra note 17.

135 See, e.g., United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir.1966), aff’d, 380 F.2d 385, 390 (5th Cir.) (en banc) (issuing an order elaborately detailing mandates and instructions that a school district was required to follow in order to avoid offending the constitution on equal protection and due process grounds).

136 See, e.g., Benjamin v. Sielaff 752 F.Supp. 140, 142-46 (S.D.N.Y.,1990) (detailing the New York City Department of Corrections’ difficulty in complying with an earlier court order); see also REMEDIES CASES AND MATERIALS 368 (Doug Rendleman ed., West 7th ed. 2006) (1967) (noting that enforcement difficulties can produce responses including claims of a “[d]efendants’ bureaucratic inertia, pleas for more time, and cries of poverty” and can also present “resort to the defense of inability to comply.”).

137 See, e.g., Sielaff, 752 F.Supp. at 148-49 (ordering the New York City Department of Correction to comply with constitutionally required housing minimums for prisoners and ordering the Department to provide prisoners with specified amounts of compensation for any failures the Department may have when complying with the order).


139 For example, when reversing the Second Circuit’s holding in United States v. City of Yonkers in Spallone v. United States, the United States Supreme Court, through Chief Justice Rehnquist, held that

the District Court, in view of the “extraordinary” nature of the imposition of sanctions against the individual councilmembers, should have proceeded with such contempt sanctions first against the city alone in order to secure compliance with the remedial order. Only if that approach failed to produce compli-
expand Route 9 and the Commonwealth failed to comply with the order, the reviewing court would likely issue general fines against the Commonwealth or hold individual Virginia government officials in contempt as a last resort.\footnote{140}

4. Federalism and Separation of Powers Concerns

Although it would be possible for a reviewing court to grant injunctive relief against the Commonwealth of Virginia in this instance,\footnote{141} a reviewing court may be reluctant to do so in light of concerns for federalism and the separation of powers.\footnote{142} Federalism is a concept, thought to be derived from the structure of the United States Constitution itself,\footnote{143} which calls for a division of power between the federal and state governments. The separation of powers is a concept that describes the division and balance of power among and between the three coordinate branches of the federal government.\footnote{144}

In light of federalism concerns, many jurists have long argued that some issues should not be officiated by the federal courts and must be dealt with only by the individual states as an incident of state sovereignty.\footnote{145} Given that Route 9

\footnote{140} 493 U.S. at 280.
\footnote{141}  Id.
\footnote{142}  See supra Part III.B.3.
\footnote{143}  For a scholarly discussion expanding upon the concepts of federalism and separation of powers concerns raised by the usage of broad structural remedies by the federal courts see John Choon Yoo, Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts, 84 CAL. L. REV. 1121 (1996).
\footnote{144}  See Younger v. Harris, 401 U.S. 37, 44-45 (1971) (Black, J.) (stating that the term federalism describes “a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”); see also Patrick M. Gary, The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers, 57 ALA. L. REV. 689, 691 n.13 (quoting LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 154-55 (2004)); Friendly, supra note 78 (discussing the nature of “federalism”).
\footnote{145}  The three branches of the federal government being the legislative, executive and judicial branches of government. See SEPARATION OF POWERS LAW, supra note 78, at 23-33 (discussing the constitutionally designed separation and overlapping of powers amongst the three primary branches of government).

See, e.g., BMW of N. Am. v. Gore, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting) (maintaining that the Supreme Court’s invalidation of a punitive damage award was improper because it constituted “an unjustified incursion into the province of state governments.”); United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting) (stating that “[a]s far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them.”).
is a non-federal highway on both sides of the border, a reviewing court may very well, and should, determine that Route 9's non-federal status renders its disposition purely a state matter. The court should find that Virginia has full authority, as an incident of its sovereignty, to maintain or expand the road's capacity. With regard to separation of powers concerns, the courts will sometimes argue that a matter is nonjusticiable because it should be addressed and resolved by the political branches of government.146

For example, in Lewis v. Casey,147 concerns over the separation of powers and federalism appeared when the United States Supreme Court overturned a broad structural injunction issued by the District of Arizona.148 In Lewis, the Supreme Court held that it was improper for the district court judge to issue a broad injunction requiring the Arizona Department of Corrections to update and improve its law library because the political branches of the federal government and the states, rather than the federal judiciary, should develop the precise policies and means necessary to avoid future offenses to the law.149

Thus, in light of the principles of federalism and the separation of powers, a reviewing court may determine that it would not be proper to order Virginia to expand Route 9. Furthermore, this matter should be resolved by Congress or by the individual states. It is unfortunate that Route 9 will likely exist as a four-lane highway on one side of the border and as a two-lane country road on the other for the foreseeable future, but perhaps this result should be accepted as one of the peculiar consequences of federalism.150

---

146 See Missouri v. Jenkins, 515 U.S. 70, 131-32 (1995) (Thomas, J., dissenting) (asserting that "[f]ederal courts do not possess the capabilities of state and local governments in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution."); Nixon v. United States, 506 U.S. 224, 228 (1993) (holding that "[a] controversy is nonjusticiable—i.e., involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .' (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)); see also J. Harvey Wilkinson, III, Of Guns, Abortions and the Unraveling Rule of Law, 95 VA. L. Rev. __ (2009) (forthcoming), available at http://papers.ssrn.com/sol3 /papers.cfm?abstract_id=1265118 (arguing that some matters are best resolved by the political branches of government and that the courts are ill-suited for determining certain complex policy matters).

147 518 U.S. at 349-50.

148 Id.

149 Id.

150 In other words, the Route 9 phenomenon (and others like it) can arise when a non-federal interstate highway is maintained by one state on one side of the border and by another state on the other side of the border and when each state has contrasting policy interests and goals for the future of the highway on its own side of the border.
IV. FEDERAL MECHANISMS FOR FINANCING AND CONSTRUCTING INTERSTATE ROADS WITH FEDERAL FUNDS

In light of the foregoing, it is clear that although it may be possible to resolve the Route 9 controversy through judicial redress, it is also clear that any litigant attempting this will be plagued with uncertainty and will be faced with the onerous tasks of 1) proving that Virginia's inaction is unconstitutional and 2) overcoming numerous remedial obstacles. Given the obstacles inherent in any attempt to resolve the Route 9 controversy through judicial redress, it is important to alternatively analyze how the controversy could be resolved through the political process. Accordingly, this Part will analyze the relevant federal highway statutes and will seek to determine whether the Route 9 controversy could be resolved by an act of Congress or through existing statutory mechanisms.

To begin, it is undisputed that the "Commerce Clause" of the United States Constitution gives Congress the power to regulate interstate commerce among the States. This grant of power is typically referred to as Congress's "Commerce Power," and from it the courts have uniformly held that Congress has the power to establish and regulate a national system of highways, and to financially assist states with the construction and maintenance of state highways.

Congress began its most significant foray into the establishment of a modern interstate highway system when it enacted the Interstate Highway Act of 1956, which was subsequently signed into law by President Eisenhower. Under this Act, Congress authorized "the building of a forty-one-thousand-mile system of expressways," which laid the foundation for the interstate highway system that exists today. Since 1956, an elaborate series of congressional legis-

---

151 See supra Part III.A (discussing the constitutionality of Virginia's refusal to expand Route 9 on its side of the border).
152 See supra Part III.B (discussing the remedial difficulties that would confront a litigant able to successfully demonstrate that Virginia's refusal to expand Route 9 is unconstitutional).
153 See U.S. CONST. art. I, § 8, cl. 3 (stating that "Congress shall have the Power to... regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
154 See, e.g., California v. Cent. Pac. R. Co., 127 U.S. 1, 39-40 (1888) (holding that the commerce power grants Congress the power to construct or authorize the construction of a national system of highways and that this power is "essential to the complete control and regulation of interstate commerce.").
155 See Harney v. United States, 306 F.2d 523, 526 (1st Cir. 1962) (holding that "it is now beyond the shadow of doubt that aiding the states in the construction of interstate highways is a lawful function of the United States government.").
lation has addressed the distribution of federal funds for highway projects. A summary and description of the primary methods of distributing federal highway funds is provided to illustrate how the Route 9 issue could be solved through reforming the existing highway funding laws.

A. Authorization Acts

Highway projects financed with federal funds under the Federal-Aid Highway Program primarily receive funding through authorization acts passed by Congress. These acts finance a variety of programs, but most often guide how funds should be distributed by providing "ceilings," or maximum amounts of federal money available for highways and other transportation programs. They can also set spending minimums for various programs. These authorization acts typically allocate certain levels of funds for a limited duration, and special legislation can be passed to extend their durations for varying periods of time. Many of these acts are not formally codified, but many

\[\text{Vol. 111}\]
provisions relating to fund distribution under the Federal Aid Highway Program are codified in Title 23 of the United States Code. For example, one of the most significant and recent highway authorization acts is the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (herein "SAFETEA-LU"). The SAFETEA-LU provides $244.1 billion for highway infrastructure construction, improvement, and maintenance and will sunset in 2010 unless it is reauthorized by Congress.

B. Appropriations Measures

The second major way Congress funds highway construction projects is through congressional appropriations measures. Whereas authorization acts "establish, continue, or modify agencies or programs . . . [a]ppropriations measures provide new budget authority for the program, activity, or agency previously authorized" by an authorization act. In other words, appropriation measures bolster or buffer a program that already has baseline funding through an authorization act, such as the SAFETEA-LU. Congress finances many transportation projects in this way.


168 See Federal Highway Administration, supra note 162, at 2 (providing an overview of the budgetary implications of the SAFETEA-LU).

169 See id.

170 Under current law, Congress directs that an appropriation of funds under SAFETEA-LU is not to infringe upon the State’s sovereign power “to determine which projects shall be federally financed.” 23 U.S.C.A. § 145 (2009).


C. The Highway Trust Fund

In 1956, the same year that Congress passed the Federal-Aid Highway Act,\textsuperscript{174} it also passed the Highway Revenue Act,\textsuperscript{175} which established the Highway Trust Fund.\textsuperscript{176} The Highway Trust Fund was established for the purpose of directing tax revenues from specific sources to go toward the construction of a federal highway system.\textsuperscript{177} The Highway Trust Fund is funded by taxes levied on the sale of gasoline,\textsuperscript{178} specialized fuels, tires, trailers, trucks, and heavy vehicles.\textsuperscript{179} The fuel taxes are typically paid by the refiners or importers, and the tire taxes are typically paid for by the tire manufacturers.\textsuperscript{180} Under this scheme, some states inevitably pay more into the Highway Trust Fund than others. Consequently, a state can receive less federal funding for its highways than the state pays into the Highway Trust Fund. Likewise, another state can receive more federal funding from the Highway Trust Fund than it has contributed.\textsuperscript{181} States contributing more to the Highway Trust Fund than they receive are often referred to as “donor” states and states receiving more from the Highway Trust Fund than they contribute are often referred to as “donee” states.\textsuperscript{182} To rectify the problem of disproportionality and to enhance the equitability of distribution under the Highway Trust Fund, Congress established a minimum guaranteed contribution return rate\textsuperscript{183} with the passage of the now-expired Transportation

\textsuperscript{174} Passage of this act resulted in commencement of the Interstate Highway System. See Federal-Aid Highway Act of 1956, 70 Stat. 374 (1956).

\textsuperscript{175} See 70 Stat. 390 (1956).


\textsuperscript{178} See Dempsey, supra note 176, at 314.

\textsuperscript{179} See Federal Highway Administration, supra note 177, at 6 (providing a table of federal highway user taxes and distribution rates under the Highway Trust Fund as of 1998); see also Stephen McDonald, Note, Why VEETC Is Not Enough: Protecting the National Highway Transportation Infrastructure, 30 WM. & MARY ENVTL. L. & POL’Y REV. 731, 739-40 (2006).

\textsuperscript{180} Federal Highway Administration, the Highway Trust Fund, http://www.fhwa.dot.gov/reports/financingfederalaid/fund.htm#82a (last visited Feb. 28, 2009).

\textsuperscript{181} For an in-depth discussion of the problems associated with this phenomenon, see Kirk, supra note 159; see also Liam A. McCann, Note, Tea-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America’s Dependence on the Automobile, 23 WM. & MARY ENVTL. L. & POL’Y REV. 857, 862-63 (1999).

\textsuperscript{182} See Kirk supra note 159, at 2. For a scholarly observation and discussion of the apparent inequity of Highway Trust Fund contribution and distribution ratios, see McCann, supra note 181, at 863 (citing Robert Jay Dilger, TEA-21: Transportation Policy, Pork Barrel Politics, and American Federalism, 28 PUBLIUS 49, 56 (1998)).

Equity Act for the 21st Century (TEA-21).\textsuperscript{184} A state’s minimum guaranteed return is based on a calculation that factors in the state’s contributions and other various considerations.\textsuperscript{185}

In addition to the controversy surrounding the ratios between state contributions and returns, at least one study has suggested that the fund is grossly under-funded and would be better served by increasing gasoline taxes.\textsuperscript{186} Over the years, the functional purpose and distribution of funds under the Highway Trust Fund has varied, and the Fund has experienced some modification.\textsuperscript{187} However, it still provides a mechanism by which Congress raises funds for the construction and maintenance of highways and thereby distributes these funds to the states.\textsuperscript{188}

When the Highway Trust Fund was first established under the Highway Revenue Act of 1956\textsuperscript{189} it was set to sunset in 1972,\textsuperscript{190} but its lifespan has been extended by various legislative enactments and was most recently extended to last until 2011 by SAFETEA-LU.\textsuperscript{191}

\section*{D. The Distribution of Federal Funds to the States}

Although existing federal law provides various means by which transportation projects can be financed with federal funds, under the existing scheme, states seeking these federal funds must often match the federal funds with pro-
portions of state and local funds. Because the current statutory scheme makes
distribution of federal funds for highway construction projects contingent on a
state's ability to match the award, the reality of the situation is that a state will
only request federal funding for a project it is willing to spend its own funds on.
While requiring states to match awards of federal funds with state and local
funds for highway construction projects is an institutional norm and normally
unproblematic, this requirement presents issues when a state road crosses state
lines and when the neighboring states have different visions for the future of the
road. This is exactly the sort of problem confronting the future of Route 9. Be-
cause Virginia has made no affirmative plans to expand Route 9 and because
Loudoun County's Countywide Transportation Plan plans to maintain Route 9
"as a two-lane minor arterial highway in the Rural Policy Area," it can be
assumed that Virginia and Loudoun County have determined, for the time being,

192 See McCann, supra note 181, at 859 (citing Talk of the Nation (NPR radio broadcast, June
10, 1998) (transcript on file with the William and Mary Environmental Law and Policy Review)
(quoting United States Representative Jim Obershaw (D-MN) as stating that in 1982 Congress
began providing States with 80% of Federal funds for construction of certain highway programs
that were not under the Interstate Highway program and requiring the States to match this alloca-
tion with 20% of funds from the State and local sources)); see also Clinton R. Snow, Comment,
Meeting Texas Infrastructure Needs in the Face of a Burgeoning Population and Declining Tax
Revenues: The Trans-Texas Corridor, 8 TEx. TECH. ADMIN. L. J. 195, 219 n.192 (stating that
under the Federal Aid Highway Act the federal government bears a specified percentage of the
cost of a highway construction project subject to the provisions of the Act which has been ap-
proved by the Secretary of Transportation, the percentage, generally, being 90% in the case of
projects affecting highways on the Interstate System, 80% in the case of projects affecting other
highways in the National Highway System, and 100% with respect to certain specified construc-
tion projects, which are generally safety-related).

193 Under existing legislation, federal funding will typically be available to finance 80% of the
costs of a project entitled to receive federal funding. See 23 U.S.C. § 120(b) (2006). Some pro-
jects can qualify for more than 80% federal funding, such as highways built on federal or Indian
lands, however, a highway project's maximum funding from federal sources will almost always
be 95%. See 23 U.S.C. § 120(a)(1) (stating that the "Federal share payable on any project in any
State shall not exceed 95 percent of the total cost of such project."). Thus states receiving federal
funding for a highway project will typically need to match the federal funding available with
anywhere from 5-20% of the project cost. On the other hand, certain federal funds apportioned or
appropriated to a state can sometimes be used by the states as part of the state's federal-fund
matching. See, e.g., 23 U.S.C. § 120(j)(1)(A) (stating that states may receive credit toward the
non-federal matching share by contributing federal funds awarded to the state under the federal
emergency relief highway program, as codified in 23 U.S.C. § 125). Thus, there is some flexibil-
ity in acquiring and designating federal funding to be used for a highway project. For a description
of federal/state matching share requirements under SAFETEA-LU, see Federal Highway Admini-
stration, Draft RTP Federal Share and Matching Requirements under SAFETEA-LU 12/21/05,
Mar. 1, 2009).

194 See, e.g., Arthur E. Bauer, Government Reorganization and the Federal System, 8 PUBLIUS
59, 60 (1978) (noting that since the inception of the Federal-Aid Highway Program, the federal
government "has required the states to participate financially, through matching formulas in the
cost of construction and to be responsible for maintaining the system.").

195 Loudoun County Planning Comm'n, supra note 23.
that an expansion of Route 9 is not in the Commonwealth's best interest. Thus, although the expansion of Route 9 could conceivably be financed with 80-95% federal funds, Virginia would still need to finance 5-20% of the project with its own funds. It is therefore unlikely that Virginia will voluntarily expand Route 9 until it determines that doing so is in the Commonwealth's best interest to do so.

In order to prevent situations similar to the Route 9 controversy from developing in the future, statutory highway finance reform might be made to develop a statutory scheme that promotes, encourages, and fosters increased cooperation between states that are confronted with differing needs and interests (e.g., Route 9). Such a scheme could make additional federal funds available under an authorization act when two or more States jointly approve an interstate project. Interstate cooperation in jointly approved projects could be further incentivized if such proposed legislation made additional funds available that could not otherwise be obtained by one state acting unilaterally. Regardless of the precise parameters involved in such reform, it is clear that fostering interstate cooperation could be accomplished by providing financial incentives that are not available under current law.

Thus, the current controversy between the State of West Virginia and the Commonwealth of Virginia concerning the future of Route 9 will not likely be resolved under existing legislation. The current state of Route 9 will likely remain stagnant, until either Virginia decides that expanding Route 9 is in its own best interest, or until a new statutory scheme is adopted that would provide Virginia and West Virginia with incentives to jointly agree to a solution that best satisfies the needs and interests of each.

V. CONCLUSION

"Our Federalism," which calls for a division of power between the state and federal governments, is essential to limiting the powers of each. Federalism is one of the hallmarks of the American Republic and remains a truly great innovation of the founding fathers. However, its many benefits do not come without consequences. This is because federalism can produce scenarios, such as the Route 9 controversy, whereby the interests of two neighboring states can diverge and the action (or inaction) of one places incidental burdens on the other. Such burdens can disrupt interstate commercial harmony. As the foregoing discussion demonstrates, Congress is capable of directly rectifying the Route 9 controversy (and others like it). However, Congress cannot be relied upon to come to the rescue in every instance. Congress cannot individually police the countless other situations similar to Route 9 that likely arise throughout the na-

197 Id.
tion and therefore, it is essential that policies be enacted which serve to incentivize interstate cooperation and thereby prevent such situations from occurring in the future.

Under the current federal funding system, states must request federal funds as individual states and there appears to be little legislation that incentivizes interstate cooperation between two or more states. Instead of requiring states to request funds as individual states (by requiring them to match the distribution of federal funds with local proportional contributions), Congress may be able to increase interstate cooperation by incentivizing interstate cooperation with regard to interstate highway projects. Congress could do this by making certain funds available only to those states that agree to cooperate. This new legislation could encourage neighboring states to jointly plan non-federal interstate highways and would thereby likely decrease instances of states developing opposing visions.

Furthermore, it remains to be determined whether Virginia’s refusal to expand Route 9 violates the dormant Commerce Clause. As discussed above, it may be possible to argue that Virginia’s inaction is unconstitutional by demonstrating that the burdens arising from the continued existence of Route 9 as a two-lane highway on the Virginia side of the border produces a constitutionally impermissible burden on interstate commerce and that this burden arises from the state’s inaction. Even if this burden of proof could be conclusively demonstrated through economic studies and other empirical evidence, it is unclear whether a reviewing court would be willing to grant an injunction to provide relief in light of the inherent difficulties associated with the implementation and enforcement of an injunction, as well as concerns for federalism and the separation of powers.

---

199 Although the federal highway laws encourage the states to develop joint highway transportation plans and, in some cases, to “coordinate” with other states, there is little that sufficiently incentivizes interstate cooperation. See, e.g., 23 U.S.C.A. § 134(f) (2009) (directing the Secretary of Transportation to encourage state governors to take responsibility for transportation planning in transportation areas and granting states the consent of congress to enter into compacts for the purpose of developing joint plans in interstate areas); 23 U.S.C.A. § 135(e)(3) (“each State shall consider, at a minimum . . . (3) coordination of transportation plans . . . with related planning activities being carried out outside of metropolitan planning areas and between States.”).

200 In all likelihood, Virginia’s inaction would be found to be perfectly constitutional.

201 See discussion supra Part III.

202 See Loudoun County Planning Comm’n, supra note 23.

203 See discussion supra Parts III.B.2-3.

204 See discussion supra Part III.B.4.
Regardless of whether the Route 9 controversy is ultimately resolved through Congressional action, statutory reform, judicial decree, or through the natural pressures of growth in the region, the controversy illustrates deficiencies in existing federal legislation and perhaps even in the system of federalism itself. Thus, although successfully obtaining a judicial remedy might alleviate any burdens on interstate commerce that arise from Virginia’s refusal to expand Route 9, the remedy would not likely provide a resolution for other situations similar to the Route 9 controversy. Accordingly, Congress should move to adopt new legislation that promotes and incentivizes increased interstate cooperation and better inter-regional highway planning among and between the states.

Matthew Lincoln Clark*

* J.D. candidate May 2009, West Virginia University College of Law; B.A., James Madison University. The author would like to thank his parents Ron and Theresa and Alessandra Rosseto Cardoso da Silva for their love and support. The author would also like to thank Associate Dean Caprice L. Roberts, Professor Gerald G. Ashdown and Patrick W. Reilly, Esq. for their thoughtful comments and suggestions. All errata are the author’s own.