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ECONOMIC UNION AS A CONSTITUTIONAL VALUE

RICHARD B. COLLINS*

Professor Collins presents an in-depth defense of the dormant commerce power doctrine. He maintains that the text of the commerce clause, the original intent behind it, and a century of congressional acquiescence to broad judicial enforcement of the dormant commerce power lend sufficient legitimacy to the doctrine to support its continued existence. After examining the textual and historical bases for the doctrine, Professor Collins concludes that the primary purpose behind the commerce clause is the promotion of economic integration and interstate harmony. Based upon his discussion of the doctrine's origins and development, he contends that critics of the doctrine who would inject personal rights jurisprudence into dormant commerce power analysis are misguided. The doctrine aims at protecting economic union, not personal rights. Given this purpose, political process and legislative motivation theories do not present compelling cases for doctrinal change or abolition. Until challengers can show that the Court's promotion of economic integration does not achieve net political and economic gains, the doctrine should be employed to achieve those ends.

INTRODUCTION

Since early in the nineteenth century, the Supreme Court has promoted economic union by invalidating state laws that were hostile to a national common market. The Court's principal instrument to carry out this policy has been the commerce clause. The Court has defined the reach of the commerce clause expansively and has broadly read acts of Congress passed under it, leading to the preemption of state laws. Absent any congressional action, the Court has construed Congress's "power to regulate commerce in its dormant state" as an important limit on state regulation. Other judicial policies that promoted economic union include expansive interpretation of the federal admiralty power, development of a federal common law under Swift v. Tyson, recognition

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1 U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have power . . . [to] regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes . . . ").
5 43 U.S. (6 Pet.) 1 (1842), overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938); see D. Currie, supra note 4, at 158-61.

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of corporate citizenship in diversity cases,\textsuperscript{6} creation of a constitutional right to travel or migrate interstate,\textsuperscript{7} and aggressive enforcement of the contracts clause and of the fourteenth amendment in economic cases.\textsuperscript{8} These decisions, combined with enforcement of more explicit provisions of articles I,\textsuperscript{9} III,\textsuperscript{10} and IV,\textsuperscript{11} moved the nation toward economic integration.

Many of these judicial doctrines were not inexorably commanded by constitutional text and history and have generated great controversy.\textsuperscript{12} The vision directing the Court is the belief that economic union is a central purpose of the Constitution, and that the judiciary has broad power to carry out that purpose. Critics, particularly academics, concentrate their attacks on the latter proposition because it has weaker support in constitutional text and history.

Constitutional controversy over economic union is not active in the political arena. Today's political debates over federalism are about judicial enforcement of individual rights and appropriate exercise of congressional powers.\textsuperscript{13} But academic criticism continues unabated on one front: the dormant commerce power doctrine and its expansive influence on the interpretation of federal commercial statutes. Claims that this doctrine is illegitimate, mistaken, or misapplied, entirely or in important part, bloom again each law review season.\textsuperscript{14}


\textsuperscript{9} See U.S. Const. art. I, §§ 8-10.

\textsuperscript{10} See id. art. III, §§ 1-2.

\textsuperscript{11} See id. art. IV, §§ 1-2.

\textsuperscript{12} The Court itself has rescinded the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and no longer aggressively reviews economic regulations under the fourteenth amendment. J. Nowak, R. Rotunda & J. Young, supra note 7, § 11.4, § 11.8, at 378.

\textsuperscript{13} One exception to political acceptance of constitutional principles governing economic union is the Reagan Administration's assault on the Supreme Court's preemption doctrine. The Administration has limited the circumstances under which executive agencies may construe federal statutes and regulations to preempt state law. See Exec. Order No. 12,612, § 4, 52 Fed. Reg. 41,685 (1987); Working Group on Federalism, The Domestic Policy Council, The Status of Federalism in America 3, 9, 37-42 (1986). However, both of these policy statements are about preemption in the abstract, without regard to context, commercial or otherwise. In actual commercial cases, the Administration has addressed both preemption and the dormant commerce power doctrine according to traditional criteria. See, e.g., Brief for the Securities and Exchange Commission and the United States as Amici Curiae at 8-10, CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637 (1987) (No. 86-71).

\textsuperscript{14} Professor Thayer was the first prominent academic to argue that the doctrine is entirely unjustified. See 2 J. Thayer, Cases on Constitutional Law 2090-91 (1895). His view continues
Contrary to the assertions of its critics, the dormant commerce power doctrine has a reasonable, though not conclusive, basis in constitutional history. Economic union was unquestionably a principal aim of the framers.Originally, the issues were the Constitution's allocation of authority to carry out that purpose and judicial competence to achieve it. Now that the dormant commerce power doctrine has been applied for more than a century, an additional concern, frequently neglected in scholarly discourse, is the value of continuity in the legal order. When a rule has been so long observed, we should demand good reasons from those who would discard it.

Modern constitutional law's preoccupation with individual rights has created confusion in discussions of the dormant commerce power doctrine. Personal rights thinking has infiltrated academic analysis, and it occasionally appears in the Court's opinions. Two features of dormant commerce power cases encourage this rights-based perspective: most enforcement actions are brought by merchants seeking personal advantage, and the Court's opinions deploy that elusive talisman of modern constitutional law, discrimination.

Academic revisions of the dormant commerce power doctrine follow two lines of argument. One advocates recasting the doctrine from a method of promoting economic union into an instrument for safeguarding the personal rights of nonresident merchants under the political process theory of judicial review. The other seeks to engraft on to the

to have adherents. See, e.g., D. Currie, supra note 4, at 342 ("In doctrinal terms the Court's efforts in this field can be described only as a disaster."); Anson & Schenkan, Federalism, the Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71, 78-80 (1980) (arguing that Court's doctrine rests on "questionable" constitutional foundations); Kitch, Regulation and the American Common Market, in Regulation, Federalism and Interstate Commerce 9 (A. Tarlock ed. 1981) [hereinafter Kitch, Regulation] (calling Court's doctrine illegitimate and inefficient); Kitch, Regulation and the American Common Market, 6 Harv. J.L. & Pub. Pol'y 119, 123 (1982) (calling dormant commerce power doctrine "an idea of absolutely no merit"); see also Tyler Pipe Indus. v. Washington Dep't of Revenue, 107 S. Ct. 2810, 2829 (1987) (Scalia, J., concurring in part and dissenting in part) ("[T]he Court for over a century has engaged in an enterprise that it has been unable to justify . . . that it was almost certainly not intended to undertake, and that it has not undertaken very well.").

15 See notes 69-84 and accompanying text infra.
16 See text accompanying notes 25-52, 105-10 infra.
17 See notes 205, 287-89, 394-75 and accompanying text infra.
doctrine the special legislative motivation standard of modern suspect classification law under the equal protection clause.19

These theories erroneously entangle the doctrine in constitutional debates about judicial enforcement of personal rights. They also expose the doctrine to criticism based on original intent. It is elementary to show that the framers had no personal rights focus when writing the commerce clause, and that in neither 1787 nor 1791 did they have in mind important federal involvement in the subject of individual rights against state governments.20 Those who wrote the fourteenth amendment intended federal intrusions, but they plainly did not think they were rewriting the commerce clause.

Personal rights theories are wrong. The framers’ concern with economic union arose from conflicts among the states and problems of foreign trade, not from disputes between the states and individual merchants.21 Many enumerated federal powers were intended to ameliorate interstate conflicts, particularly those in which stronger states beset weaker. Although the Court’s dormant commerce power opinions do not acknowledge this origin as frankly as they should, the Court’s doctrine is, in fact, based on resolving commercial conflicts between states. Many of the Court’s controversial rules, particularly those striking down state transportation regulations and those sustaining certain state laws that appear highly parochial, make sense when we recognize that the doctrine is grounded in intergovernmental rights rather than in personal rights.22 The doctrine’s use of the concept of discrimination does not mean personal discrimination against outsiders; it is an instrumental device to identify protectionist actions by state governments that are hostile to other states.23 Although merchants often sue to enforce the doctrine, they do so as surrogates for their own states, acting in effect as private attorneys general.24

My principal aims in this Article are to show the basis of the dormant commerce power doctrine in interstate conflicts, the order that the interstate perspective brings to the Court’s decisions, and the confusion and distortion caused by constitutional theories based on personal rights. Part I states a brief history of the dormant commerce power doctrine.

19 See Farber, supra note 18, at 400-06; Regan, supra note 18, at 1143-60. A third influence of fourteenth amendment law has surfaced in attempts to distinguish between facial discrimination against interstate or foreign commerce and discriminatory effect. This has produced minor doctrinal confusion. See text accompanying notes 214-20 infra.

20 See notes 69-84 and accompanying text infra.

21 See id.

22 See text accompanying notes 221-46, 270-300 infra.

23 See text accompanying notes 189-203 infra.

24 See notes 108, 415-16 and accompanying text infra.
Part II explains in some detail my view of current doctrine to show its theoretical basis in promoting a national common market and protecting states against interference by other states. Part III criticizes alternative academic theories based on personal rights concepts: legislative motivation theories borrowed from the fourteenth amendment and the political process theory of Chief Justice Stone and Dean Ely. The Article concludes by discussing the doctrine's efficiency and appraising the case for doctrinal change.

I

HISTORY

A. Evolution of the Dormant Commerce Power Doctrine

Between 1824 and 1873, the Supreme Court incrementally assumed authority to enforce implicit commerce clause limits on state law. The earliest lawsuits seeking to limit state regulations were based on the argument that the federal commerce power is exclusive of state power over the same subject. This concept was raised at the Constitutional Convention, but it was not explained and may have meant different things from speaker to speaker. When the argument reached the courts, Kent pronounced it "a monstrous heresy," but Marshall said it had "great force."

In the formative years of constitutional judicial review, the Court repeatedly faced arguments that one or another power granted to the national government was implicitly exclusive of state power. In a tautological sense, the argument was correct. No state can exercise the powers given to Congress as such; no state can legislate coercively over other states. This meaning may account for some historical statements that federal powers are exclusive. But litigants contended that exclusive

26 See Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 434 (1941).
30 See, e.g., Tucker, 1 Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia app. at 179-81 (St. G. Tucker ed. 1803). Tucker's treatise was cited by counsel for
congressional powers implicitly removed internal state authority over the same subjects. The Court sensibly rejected all of these claims in broad or absolute form.  

In a few important instances, however, the Court sustained the argument that state actions sometimes must yield to unexercised federal powers. These were in areas in which state action had serious effects on the federal government itself, on its relations with foreign nations, or on other states. In *Gibbons v. Ogden*, the Court struck down New York's steamboat monopoly on federal preemption grounds, but noted that there was "force" in the exclusive commerce power argument. The invalid monopoly imposed substantial extraterritorial burdens on New Jersey, a smaller and weaker state.

The exclusive commerce power theory was more difficult to apply to state tax laws. The federal taxing power was recognized as plainly concurrent with retained state power. A more specific obstacle was Hamilton's Number 32 of *The Federalist*, in which he said that there are no implied constitutional limits on state taxing powers. As a limit on state tax laws, the dormant commerce power doctrine had to enter by the side

Gibbons. See *Gibbons*, 22 U.S. (9 Wheat.) at 179. Since Tucker was a Jeffersonian, it is unlikely that he favored a strongly nationalist interpretation of the Constitution.

The tautological meaning resembles the Virginia Plan at the Convention, allowing Congress "to legislate in all cases . . . to which the states are separately incompetent." 2 The Records of the Federal Convention of 1787, at 21 (M. Farrand ed. 1911) [hereinafter Records of the Federal Convention].


33 See Japan Line v. County of Los Angeles, 441 U.S. 434, 444-51 (1979) (foreign commerce); Zschernig v. Miller, 389 U.S. 429, 436-41 (1968) (foreign affairs); Southern Pac. Co. v. Jensen, 244 U.S. 205, 214-17 (1917) (admiralty). The Court has spoken ambiguously in the area of immigration and naturalization; because there has been federal legislation since the first Congress, the issue is probably moot. See Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 269, 275 (1817) (power of naturalization is exclusively in Congress).


36 Id. at 209.

37 Webster, counsel for the defendant-appellant, argued that New York's monopoly created interstate hostility and led to New Jersey's retaliatory laws. See id. at 4-5; 17. But see Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 250-51 (1829) (no extraterritorial impact of legislation authorizing construction of a dam across a navigable creek).

38 See *Gibbons*, 22 U.S. (9 Wheat.) at 199 (dictum) ("The power of taxation is indispensable to [the states'] existence, and . . . is capable of residing in, and being exercised by, different authorities at the same time.").

ECONOMIC UNION

The dormant commerce power doctrine remained in doubt during the Taney years. On three occasions, Chief Justice Taney forcefully argued that only explicit acts of Congress should limit state regulation or taxation of interstate or foreign commerce. However, two of these opinions were dissents, and all three responded to the argument that the federal commerce power was broadly exclusive of any state authority over the same subjects.

When the argument shifted to more limited, implicit restraints on states, Chief Justice Taney went along. He silently joined the majority opinion in Cooley v. Board of Wardens, which is now a basic precedent for the dormant commerce clause doctrine. He also joined the Court's surprising holding in Hays v. Pacific Mail S.S. Co., voiding California's property tax as applied to visiting ships on the ground that the state had no jurisdiction to tax them.

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40 See notes 45-46 and accompanying text infra.
41 See Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 579-80 (1852) (Taney, C.J., dissenting); The Passenger Cases, 48 U.S. (7 How.) 283, 466 (1849) (Taney, C.J., dissenting); The License Cases, 46 U.S. (5 How.) 504, 573, 578-86 (1847) (Taney, C.J.). Wheeling was a preemption case, but Taney's dissent identified the influence of the exclusive commerce power theory on the majority's statutory interpretation. See Wheeling, 54 U.S. (13 How.) at 584-85; see also Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 428-30 (1827) (in which Taney was counsel for state).
42 Taney's opinion in the License Cases is the crown jewel in many arguments that the dormant commerce power doctrine is wrong. See, e.g., D. Currie, supra note 4, at 225-26, 278, 454. Such commentators typically read too much into the opinion. Taney stated that "the mere grant of power to the general government cannot . . . be construed to be an absolute prohibition to the exercise of any power over the same subject by the States." 46 U.S. (5 How.) at 579 (emphasis added). But his opinion supported some limits on state power to regulate interstate commerce by stating that state taxes on goods in interstate transit would be invalid. Id. at 575-76. He also suggested that extraterritorial effects might justify invalidating a state law. See id. at 585.
43 53 U.S. (12 How.) 299 (1851).
44 Cooley sustained Philadelphia's pilotage regulation as a permissible local regulation, but the Court's opinion is known for its dictum stating that the federal commerce power was exclusive over subjects of legislation that demanded uniform national regulation. See id. at 319. Only Justice Daniel disagreed with the dictum. See id. at 325-26 (Daniel, J., concurring).
45 58 U.S. (17 How.) 596 (1855).
46 The commerce clause was urged by counsel, see 15 L. Ed. at 254, but the Court did not refer to any provision of the Constitution as a basis for its holding. Later opinions recognized the commerce clause as the proper basis for Hays. See Japan Line v. County of Los Angeles, 441 U.S. 434, 441-44 (1979); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1873).
Only Justice Daniel dissented in Hays. He was the only member of the Court who consistently opposed any implicit commerce clause limits on state laws. See J. Frank, Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860, at 190-99 (1964).
Another surprising feature of Hays was the failure of the Court to say anything about the fact that the state was attempting to tax a foreign corporation within its borders, despite Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 524 (1839), in which the Court had said that states...
In *Almy v. California*, Chief Justice Taney wrote for the Court to overturn a state tax on exports of precious metals to other states based upon the import-export clause. In *Woodruff v. Parham*, the Chase Court reinterpreted *Almy* to rest on the dormant commerce power and articulated the basic doctrine that the Court follows today. Although Justice Miller’s opinion in *Woodruff* upheld a state tax, its reasoning led to active and frequent invalidation of state laws under the dormant commerce power. Since then, debate within the Court has been over the doctrine’s definition and scope, not its existence.

Dormant commerce power policy has influenced strongly the interpretation of federal commercial statutes. Preemption decisions are often based on the same criteria that the Court employs to apply the dormant power. Of course, free trade preemption is formally older than the dormant commerce power doctrine. In modern times, the relationship be-

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48 Id. at 173-75. Justice Daniel was no longer on the Court, and there were no dissenters.
49 75 U.S. (8 Wall.) 123 (1869).
50 See id. at 137-48.
51 See, e.g., Asher v. Texas, 128 U.S. 129 (1888); Leloup v. Port of Mobile, 127 U.S. 640 (1888); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); Guy v. City of Baltimore, 100 U.S. 434 (1880); Welton v. Missouri, 91 U.S. 275 (1876); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1873); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873); see also D. Currie, supra note 4, at 335-42, 405-16, 449-50. The Court equivocated once after *Woodruff*. In Osborne v. City of Mobile, 83 U.S. (16 Wall.) 479 (1873), it sustained a municipal license tax on express companies that was higher in amount for interstate firms than for those operating within Alabama. The opinion cryptically said that “no objection to the license tax was taken at the bar on the ground of discrimination.” Id. at 482. But see *Leloup*, 127 U.S. at 647 (stating that later decisions made ordinance in *Osborne* “repugnant to the power conferred upon Congress to regulate commerce among the several States”).
52 Since 1873, the doctrine’s strongest opponent on the Court was Justice Black. He advocated restricting the doctrine to cases of “discrimination,” although it is unclear what he meant by that. See, e.g., Morgan v. Virginia, 328 U.S. 373, 387 (1946) (Black, J., concurring) (although precedent commands invalidation of state law that imposes “undue burden” on commerce, this role is properly left to Congress); McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 184 (1940) (Black, J., dissenting, joined by Frankfurter & Douglas, J.J.) (Court’s role in policing state legislation is limited to laws that discriminate against interstate commerce). Justices Frankfurter and Douglas at first agreed with Black but later became supportive of the doctrine. Compare Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959) (Douglas, J.) (“[S]tate regulations that run afoul of the policy of free trade reflected in the commerce clause must . . . bow.”) and Freeman v. Hewitt, 329 U.S. 249 (1946) (Frankfurter, J.) (invalidating tax on interstate sales of securities as direct burden on interstate commerce) with *McCarroll*, 309 U.S. at 183 (Black, J., dissenting, joined by Frankfurter & Douglas, J.J.) (joining dissent that favored limited role for Court in dormant commerce power enforcement). Chief Justice Rehnquist favors restricting the doctrine. See note 495 and accompanying text infra. Justice Scalia has questioned the historical grounds for the doctrine, its application, and its expansion. See Tyler Pipe Indus. v. Washington Dep’t of Revenue, 107 S. Ct. 2810, 2826-29 (1987) (Scalia, J., concurring in part and dissenting in part).
53 See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186-222 (1824); see also Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878); Sinnott v. Davenport, 63 U.S. (22 How.) 227,
tween the two judicial doctrines has been widely recognized.\textsuperscript{54}

\textbf{B. Original Intent}

\textit{I. Constitutional Text}

The dormant commerce power doctrine has no direct support in the text of the Constitution. The words of the commerce clause grant regulatory power to Congress and do not explicitly limit the states when Congress has not acted; nor do the words suggest that the Supreme Court was intended to enforce the clause directly. Specific provisions forbid state duties on foreign imports and exports\textsuperscript{55} and on shipping,\textsuperscript{56} and state discriminations against citizens of other states,\textsuperscript{57} implying the deliberate absence of other limits.\textsuperscript{58} The simplest view is to stop right there and conclude that the clause imposes no implicit limits on the states, as Justice Daniel maintained.\textsuperscript{59} Those whose great concern is to limit federal judicial power to that explicitly granted find the argument just as compelling today.\textsuperscript{60}

However, the negative inference drawn from the import-export clause raises a puzzling problem. The Supreme Court has held that the explicit limits of the clause apply only to foreign trade, not to interstate commerce.\textsuperscript{61} Assuming this is right, it is odd that the framers would directly forbid state tariffs on foreign goods, but allow them on interstate shipments absent an act of Congress to the contrary. A possible explanation is that foreign duties were a more important subject in 1787 than


\textsuperscript{55} See U.S. Const. art. I, § 10, cl. 2.

\textsuperscript{56} See id. cl. 3.

\textsuperscript{57} See id. art IV, § 2, cl. 1 (privileges and immunities clause).

\textsuperscript{58} See The License Cases, 46 U.S. (5 How.) 504, 578-86 (1847); The Federalist No. 32, at 199 (A. Hamilton) (J. Cooke ed. 1961).

\textsuperscript{59} See note 46 supra.

\textsuperscript{60} See, e.g., Graglia, The Supreme Court and the American Common Market, in Regulation, Federalism and Interstate Commerce 68 (A. Tarlock ed. 1981).

\textsuperscript{61} See Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 130-36 (1869). The analysis in Woodruff was debatable. One of Justice Miller's arguments rested on the broad reading of the import-export clause known as the "original package doctrine," which the Court has since renounced. See Michelin Tire Corp. v. Wages, 423 U.S. 276, 301 (1976). For the view that Woodruff was wrong in its reading of history, see 1 W. Crosskey, Politics and the Constitution in the History of the United States 315-23 (1953). However, Justice Miller's argument that a basic purpose of the import-export clause, and a benchmark for review of state laws alleged to infringe the clause, was to secure federal tariff revenues against erosion by state laws has not been successfully refuted. See Woodruff, 75 U.S. (8 Wall.) at 132-33. This purpose has no relation to interstate barriers.
interstate tariffs. And, perhaps, interstate rivalries were assumed to be unimportant. However, this reasoning is inconsistent with much of the contemporaneous argument about the need for a new Constitution, argument that stressed interstate commercial rivalry. That the burden of congressional inertia should favor the states in interstate but not foreign trade is not irrational but is at least curious.

Two lesser textual problems arise from the framers’ failure to anticipate the dominance of corporations in commercial organization and the shift from water to land transportation. The privileges and immunities clause guards aspects of economic union for sole proprietors and partners; it was not designed for corporations. The admiralty power, the import-export clause, and the duty-of-tonnage clause protect water transport but not land.

2. Constitutional History

Few constitutional theorists rest on text alone. Even those who strongly advocate close adherence to original intent of the framers recognize the need for further inquiry beyond bare text. When constitutional history is considered, the case for the dormant commerce power doctrine and its preemption companion improves.

Most historians believe that commercial issues galvanized the call for the Convention and were an important incentive for ratification.
When commercial issues were debated at the Convention, there was great concern about foreign commerce. In particular, the framers wanted a stronger national union to compete more effectively with the British. The framers believed that British trade domination was made possible by interstate squabbling and the lack of adequate central authority to require states to honor their obligations and agreements. Accordingly, they granted power to regulate foreign commerce to the federal government.

Interstate rivalry was the Convention's greatest concern. Small states feared the power of large, and the South feared commercial domination by the North and federal interference with slavery. The Great Compromise on the structure of Congress mainly settled the former issue, and other compromises suppressed the question of slavery in return for unqualified federal power over interstate and foreign commerce. The provisions in the Articles of Confederation concerning commercial harmony among the states were carried forward and strengthened in article IV. Their enforcement was assured by articles III and VI.

Many writings at the time of the Convention condemned commercial exploitation of one state by another with respect to foreign trade. Some discussed exploitation of weak states by stronger ones. Others decried exploitation of favorable geography to tax goods passing through ports on the way to or from less favored states. It can be argued that the import-export and tonnage duty clauses were intended as complete

87 (1978).


71 See M. Jensen, The New Nation 287-89 (1950); C. Nettles, supra note 70, at 90-92; A. Nevins, supra note 70, at 642-44; Abel, supra note 26, at 466.


73 Compare U.S. Const. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”) with Articles of Confederation art. IV (“[T]he people of each State shall have free ingress and egress to and from any State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions, and restrictions, as inhabitants thereof respectively.”).


75 See Abel, supra note 26, at 448-51, 449 nn. 69-70.

76 See Cook v. Pennsylvania, 97 U.S. 566, 574 (1878); Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 134-36 (1869); M. Farrand, supra note 63, at 29-30; The Federalist No. 7, at 39-41 (A. Hamilton) (J. Cooke ed. 1961); Abel, supra note 26, at 448-49. As explained in Part II, this type of interference in trade is a paradigm problem addressed by the Court's allocation of jurisdiction and uniformity principles.
responses to these questions.77 This interpretation, however, requires a very broad reading to account for state exactions besides duties and excises.78 Also, that reading would not reach state impositions on goods moving between two states and passing through a third—a problem that grew in importance as interior states were admitted. A federal common market must allow states some, but not unlimited, jurisdiction over goods in transit through their territory;79 this requires an elaboration beyond the obvious scope of any textual source.

In contrast to foreign trade and commerce in transit, commerce clause limits on protectionism in interstate trade are less well supported in the Convention record. There was no specific condemnation of state tariffs against goods from other states.80 The antiprotectionism norm must rest instead on inferences drawn from general remarks at the Convention and in The Federalist about interstate rivalry and economic union.81 It can also be supported by interpreting the import-export and tonnage duty clauses to establish a constitutional policy against state protectionism that is implicit in the commerce clause as well. This argument is countered by the negative implication raised by the import-export and tonnage duty clauses, but that inference is far from conclusive.82

Perhaps the most explicit historical support for the dormant commerce power was Madison’s recollection many years later of the purpose of the interstate commerce power.

I made no reference to the “power to regulate commerce among the several States.” I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it, which, however just, might give birth to spe-

77 See text accompanying notes 55-60 supra.
79 See Prichard & Benedickson, Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade, in Federalism and the Canadian Economic Union 6-7 (1983); text accompanying notes 270-72 infra.
80 See Abel, supra note 26, at 450 & n.78.
81 See M. Farrand, supra note 63, at 29-30, 97, 99; A. Nevins, supra note 70, at 556-61; C. Rossiter, supra note 72, at 47; D. Smith, supra note 72, at 16-17; C. Warren, supra note 74, at 5-6, 85, 166-71; The Federalist No. 6, at 30-36 (A. Hamilton) (J. Cooke ed. 1961); The Federalist No. 7, at 39-41 (A. Hamilton) (J. Cooke ed. 1961); see also The Federalist No. 11, at 71-72 (A. Hamilton) (J. Cooke ed. 1961) (“An unrestrained intercourse between States themselves will advance the trade of each. . . . The veins of commerce in every part will be replenished, and will acquire additional motion and vigour from a free circulation of the commodities of every part.”).
82 See notes 55-68 and accompanying text supra. In Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 438 (1827), Marshall expressly relied on negative implication (expressio unius est exclusio alterius) to construe the import-export clause. But his construction of the commerce clause ignored this maxim’s possible application. See id. at 445-49. This was not owing to any laxity on the part of Taney and Johnson, counsel for Maryland. See id. at 430-31.
cious though unsound objections. Being in the same terms with the
power over foreign commerce, the same extent, if taken literally, would
belong to it. Yet it is very certain that it grew out of the abuse of the
power by the importing States in taxing the non-importing, and was
intended as a negative and preventive provision against injustice
among the States themselves, rather than as a power to be used for the
positive purposes of the General Government, in which alone, how-
ever, the remedial power could be lodged. 83

Madison’s statement that the commerce power was “intended as a
negative” is direct support for the substance of a dormant commerce
power doctrine, although it does not advert to judicial stewardship. Of
course, very little in constitutional history directly supports judicial re-
view. Madison’s remark that, as a proponent of the Constitution, he had
deliberately kept quiet about the meaning of the interstate commerce
power to facilitate adoption and ratification is intriguing. It raises a
special difficulty in ascertaining the original intent of the interstate part
of the commerce clause. But at the least, Madison’s recollection, and state-
ments in the Convention record, show some expectation that the clause
would serve as a “preventive provision against injustice among the States
themselves.” 84

It must nevertheless be conceded that the case in favor of the dor-
mant commerce power doctrine rests on inconclusive inferences about
the Constitution. An initial examination of the question based on text
and recorded history could reject the Court’s role in policing interstate
commerce and limit federal authority to Congress, as Justice Daniel had
wished to do. 85

However, most early interpretations favored implicit limits on state
power. The first Supreme Court vote to invalidate a state law based on
the commerce clause alone was that of Justice Johnson, Jefferson’s most
Republican appointment, in Gibbons v. Ogden. 86 The rest of the Court

83 Letter from James Madison to J. Cabell (Feb. 13, 1829), reprinted in 4 Letters and Other
Writings of James Madison at 14-15 (J.B. Lippincott & Co., Philadelphia 1865) [hereinafter
Letters]. Madison restated this view in more detail three years later. See Letter from James
Madison to Prof. Davis (1832), reprinted in 4 Letters, supra, at 251-54. In the second letter,
he discussed the problem of interior states and noted that their condition “is of itself sufficient
proof that it could not be the intention of those who framed the Constitution to substitute for a
power in Congress to impose a protective tariff, a power merely to permit the states individu-
ally to do it.” Id. at 251.

84 Letter from James Madison to J. Cabell (Feb. 13, 1829), reprinted in 4 Letters, supra
note 83, at 15; see also Abel, supra note 26, at 469 & n.167, 475 (characterizing Madison’s
statement as expressing idea that clause is shield, not sword, to guard against state-created
discriminations and preferences).

85 See notes 46 supra and 89 infra.

86 22 U.S. (9 Wheat.) 1, 222 (1824) (Johnson, J., concurring); see Morgan, Mr. Justice
Johnson and the Constitution, 57 Harv. L. Rev. 328, 328-29 (1944).
agreed with Marshall's opinion that the idea had merit, and the exclusive commerce power theory rather clearly influenced the Court's preemption holding. Story and other theorists endorsed it. When Taney wrote a clear opinion rejecting the exclusive commerce power argument, only Justice Daniel agreed. Taney retreated in later cases, and only Daniel, in the Court's entire history, consistently rejected the doctrine.

Justice Curtis, author of *Cooley v. Board of Wardens*, was one of the ablest members of the 1850s Court. Justice Miller, who developed the doctrine's practical application, has been lionized as the Court's leading constitutional theorist during the post-Civil War era. Finally, Justices Stone, Brandeis, and Cardozo shaped modern articulations. It takes a good deal of hubris to dismiss the doctrine in the face of this history.

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87 See Gibbons, 22 U.S. (9 Wheat.) at 209.
89 See note 41 and accompanying text supra. As stated above, Taney rejected the exclusive commerce clause theory but recognized aspects of what we now view as the dormant commerce power doctrine. Justice Daniel refused to join Taney's opinion in The License Cases, 46 U.S. (5 How.) 504 (1847), because of these qualifications; he would unequivocally have backed state freedom from implied federal restraint. See id. at 611-18 (Daniel, J.).
93 See C. Fairman, Mr. Justice Miller and the Supreme Court 1862-1890, at 309-16 (1939); Gillette, Samuel Miller, in 2 The Justices of the United States Supreme Court 1789-1969, at 1011, 1021-23 (1969).
3. Can the Framers Be Trusted?

According to Professor Edmund Kitch, the original history of the commerce clause is insufficient support for the dormant commerce power doctrine because the framers' statements about interstate economic exploitation and retaliation under the Confederation were greatly exaggerated or even false. Professor Kitch argues that the Confederation was an economic success and the Constitution was not needed for commercial prosperity.95

There are several answers to Professor Kitch's thesis. He rests most of his case on four similar history articles published in the 1950s that described the tariff laws of four of the most important commercial states during the Confederation.96 The author of all four, William F. Zornow, claimed that state tariff laws usually exempted imports in their original packages that were bound for other states.97 Thus, concludes Professor Kitch, the framers' complaints about exploitation of commerce in transit through these states were false.98 Zornow also claimed generally that contemporaneous accusations of commercial hostility among the states were overblown.99

While the claim that the framers exaggerated commercial difficulties under the Confederation is probably true,100 Professor Kitch's conclusion from Zornow's history that there were no major commercial problems among the states is unjustified. Zornow examined only tariff laws, and he is essentially correct about them.101 But formal tariffs are not the only way in which a state can exploit its geographic position to tax goods in transit through its ports, rivers, or highways, or engage in protectionism. In Brown v. Maryland,102 for example, the use of other taxes to burden commerce in transshipped goods was an explicit concern of the Court despite the formal tariff exemption.103

This is not a conclusive answer to Professor Kitch's argument. He

[95] See Kitch, Regulation, supra note 14, at 15-19. The argument is made to seem stronger by emphasizing The Federalist rather than the records at Philadelphia or the ratifying conventions; it is easier to denigrate the former as propaganda.
[97] See id. at 18.
[98] See id. at 19.
[99] See id.
[100] See, e.g., A. Nevins, supra note 70, at 602-05.
[101] The report of Brown v. Maryland shows that Maryland's tariff law of 1783 had the same structure as the tariff laws of the four states that Zornow examined. See 25 U.S. (12 Wheat.) 419, 422-23 (1827) (argument of Mr. Meredith).
[103] See id. at 449; see also Michelin Tire Corp. v. Wages, 423 U.S. 276, 283-86 (1976).
rightly points out that the framers' complaints of interstate exploitation have few verifications in historical records. It remains possible that Madison and others were mendacious regarding this subject. On the other hand, the framers' concerns may have been more anticipatory than curative. When the Constitution was written, the Confederation had existed for only four peacetime years. To conclude from this tiny slice of time that the American states would achieve a better level of economic harmony by political bargaining than by central authority is extremely speculative.

The most important answer to Professor Kitch is that his proposal, like the many other academic calls for judicial abolition of the dormant commerce power doctrine, would be a radical policy shift. It should be justified more carefully and extensively than Professor Kitch has done.104

C. Implied Consent of Congress

Justice Field coined the theory that the dormant commerce power doctrine is based on the implied will of Congress that commerce "shall be free."105 As an a priori justification, this argument borders on the absurd. The framers did not erect the complex labyrinth of the federal legislative process to see it disregarded when Congress is silent.106

Congressional acquiescence to a settled judicial doctrine is another matter. The Court has repeatedly made it clear that Congress may limit or overrule the dormant commerce power doctrine in its discretion. That Congress has chosen to exercise this power only to override a few aberrant judicial mistakes implies at least congressional complacency.107

104 See text accompanying notes 494-500 infra.
107 See, e.g., Bowman, 125 U.S. 465 and Leisy v. Hardin, 135 U.S. 100 (1890), which invalidated nondiscriminatory liquor prohibition laws applied to imported intoxicants. These are strong candidates for the Court's silliest misapplications of the doctrine. Chief Justice Fuller's dreadful opinion in Leisy seems to have been influenced by substantive due process arguments and by the original package doctrine under the import-export clause. Congress promptly overrode these decisions by passing the Wilson Act, ch. 728, 26 Stat. 313 (1890). The Court unanimously sustained the statutory override. In re Rahrer, 140 U.S. 545 (1891); see also Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). The ambiguities of the twenty-first amendment are a continuing legacy of Leisy. See Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 334 (1964) (Black, J., dissenting).

In another misapplication, the Court defied economic logic by holding that "[i]ssuing a policy of insurance is not a transaction of commerce. . . . Such contracts are not inter-state transactions, though the parties be domiciled in different States.” Paul v. Virginia, 75 U.S. (8
Furthermore, that states have so seldom sought Congress's assistance against the Court strongly suggests that the doctrine is not altogether unpopular in state capitals either. The essential beneficiaries of the interstate branch of the doctrine are other states, particularly smaller ones lacking geographic advantages. When states are unhappy with the Court's decisions, they make themselves heard. Why has there not been at least one bill to abolish the doctrine?

Congress's actions in response to judicial restrictions on state tax laws strongly support implied ratification. Since 1959, Congress has studied judicial doctrine on state taxing power extensively and has enacted statutes more restrictive of state taxing power than the Court's decisions.

Most modern constitutional debates about judicial review center on the antimajoritarian objection. Because Congress can overrule the Court, the dormant commerce power doctrine does not infringe on ma-


108 See text accompanying notes 170-71, 270-72 infra. States occasionally sue directly to enforce the doctrine. See, e.g., Maryland v. Louisiana, 451 U.S. 725 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Pennsylvania v. West Virginia, 262 U.S. 553 (1923). In some but not all of these cases, the Court has allowed states to invoke the Court's original jurisdiction. See, e.g., Maryland, 451 U.S. at 735-45. But see id. at 760-71 (Rehnquist, J., dissenting). In other cases, states take the side of parties seeking to enforce the doctrine. See, e.g., Brief of the State of North Carolina, Amicus Curiae, in Support of Appellants, American Trucking Ass'ns v. Scheiner, 107 S. Ct. 2829 (1987) (No. 86-357).


110 See note 275 infra.
Majority rule. Rather, the doctrine raises only federalism concerns. Since state autonomy is the only competing constitutional value at issue, and the states have not sought to abolish the doctrine, the case for continuing the Court's power to promote interstate commercial harmony is strong.

II

THE COURT'S DOCTRINE AND THE PROMOTION OF INTERSTATE HARMONY

A common market requires reasonable mobility of goods and people across interior borders. Many American institutions serve this purpose without constitutional controversy. We no longer question a national currency and monetary system or national regulation of banking. No one advocates separate state-run postal systems or copyright, patent, or bankruptcy laws. The propriety of national investment in interstate transportation ceased to be disputed over a century ago. We also have a national system of weights and measures. But each of these institutions is based on affirmative undertakings by Congress, carrying out its enumerated powers.

States have seldom seriously impeded personal migration across their borders. Until recently, we were a labor-short nation, and states wanted to attract immigrants, not keep them out. There have been a few major lawsuits challenging discrimination against nonresident workers or burdens on the right to migrate interstate. These have been based on the explicit terms of the interstate privileges and immunities clause, the commerce clause, the equal protection clause, and the nontextual right to travel. None of these constitutional provisions prohibits state occupational licensing laws, which are an impediment to the migration of skilled labor. However, such laws must be nondiscriminatory, and states have worked out some reciprocity agreements.

Interstate mobility of goods and transportation, by contrast, has often been seriously obstructed by state taxes and regulations. Under

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111 See Prichard & Benedickson, supra note 79, at 7.
113 See, e.g., Edwards v. California, 314 U.S. 160 (1941) (invalidating law prohibiting transport of indigent people into state).
the dormant commerce power doctrine, the Court has attempted to limit state barriers to economic integration without unduly restricting state autonomy.

A. An Overview of the Court’s Formal Tests and Their Deficiencies

Supreme Court doctrine postulates that the commerce clause established a national interest in interstate and foreign trade free of excessive state interference, which the courts have authority to defend. The national interest is said to be impaired to the degree that state laws “burden” interstate or foreign commerce, that is, restrict market allocations of resources across state borders or in other states.117

Some state laws promote rather than burden commerce, such as those defining basic property rights of ownership and alienability. Many other laws are commerce-neutral except as part of a state’s package of laws competing against other states. But most taxes and commercial regulations displace or restrict market allocation118 and thus “burden” commerce. Because very few markets are entirely intrastate, almost any burden on commerce affects border-crossing trade. If burden alone were sufficient to invalidate, few state taxes or regulations would survive.119 Nor is the magnitude of burden the governing standard. This is a relevant factor, but the “nature of [the] burden is, constitutionally, more significant than its extent.”120

To determine which burdens are invalid, the Court applies formal and summary rules declared in two of its opinions, Complete Auto Transit, Inc. v. Brady121 and Pike v. Bruce Church, Inc.122 Under both

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119 See Exxon, 437 U.S. at 128-29.
121 430 U.S. 274, 279 (1977) (stating that a state tax does not offend commerce clause if it “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State”).
122 397 U.S. 137 (1970)

Where the statute regulates evenhandedly 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Id. at 142 (citation omitted). Subsidies also burden interstate and foreign commerce, but re-
cases, state laws that discriminate against interstate or foreign commerce are presumed invalid. Nondiscriminatory tax statutes must pass requirements of nexus, apportionment, and relation to state services, while nondiscriminatory regulation is evaluated under the Pike balancing test, which contraposes the national free trade interest and state autonomy.

For several reasons discussed fully below, these tests draw artificial distinctions and do not adequately explain the Court's doctrine. Describing the national interest as free trade is misleading because it implies that the doctrine's essential purpose is economic efficiency rather than interstate commercial harmony. The Court's opinions tell us that the nature of burdens on commerce is more important than their magnitude, but they do not systematically explain what kinds of burdens are bad. The Court's antidiscrimination rule is usefully precise, but the Court does not carefully guard it against the confusing influence of personal discrimination doctrines under the fourteenth amendment and other constitutional provisions. Opinions occasionally mention protectionism, but they do not adequately relate it to the antidiscrimination rule. The Court at times relies on local political restraint and on market corrections as reasons to sustain state laws, but it does not explain when and how these ideas are deployed.

Two important concepts are implicit in the cases but are not identi-
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fied by the Court. One is the distinction between a state's burdens on its import and export commerce (interstate and foreign), and its burdens on commerce in transit through its territory and on transactions outside its borders. The second is the concept of allocating jurisdiction among interested states; this single principle governs review of all the state laws that the Court classifies as "nondiscriminatory." The Court obscures the allocation principle by compartmentalizing the cases under its apparently separate nexus, apportionment, services, and balancing tests.

This Section analyzes each of these shortcomings in the Court's explanations. I do not advocate amending the doctrine. With rare exceptions, the Court's results are right. However, the Court's jurisprudence in this important area ought to be properly articulated in order to improve predictability of doctrine for future decision making.

I. The National Interest

Some of the controversy about the dormant commerce power doctrine can be traced to lack of articulation of competing constitutional values. Obviously, state autonomy is the fundamental value favoring validity of state taxes and regulations. Local lawmaking is preferred on grounds of efficiency, participatory democracy, and diffusion of power. These are broadly accepted postulates of the federal system; debates are about their weight in context, not over their stature as basic constitutional precepts.

National values underlying the dormant commerce power doctrine are not so well defined. Supreme Court opinions deprecate burdens on interstate and foreign commerce and praise free trade. These vague terms have led many to assume that economic efficiency is the essential national value arrayed against state autonomy. According to this understanding, the doctrine presumes that private market allocation of goods is the most efficient mechanism, and states must be restrained from excessively interfering in national and international markets. This in turn generates charges that the doctrine promotes laissez faire as a substantive constitutional value, for which there is no basis in the Constitution and its history.

This is essentially wrong. Economic efficiency is an important interest defining the doctrine's boundaries because the efficiency of local lawmaking is arrayed against that of a national market in determining which

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131 See text accompanying notes 143-48 infra.
132 See text accompanying notes 247-53 infra.
134 See, e.g., R. Posner, Economic Analysis of Law 602-07 (3d ed. 1986); Anson & Shenkan, supra note 14, at 76-77; Eule, supra note 18, at 429-35; Tushnet, supra note 18, at 141-42.
135 See, e.g., Eule, supra note 18, at 429-35.
state laws to sustain. But efficiency is not the central national value served. The framers sought economic union, but the focus of their concern was interstate commercial harmony rather than market efficiency.\textsuperscript{136} When state taxes or regulations burden interstate commerce, they not only reduce allocational efficiency but also interfere in policy choices of other states. When states burden foreign commerce, they interfere in policy choices of other states or of the federal government or both. When states engage in economic warfare against each other, ultimate losers are smaller and weaker states and those with less favorable geography. A basic purpose of the framers was to curb interstate exploitation by stronger states and by those with geographic advantages.\textsuperscript{137}

2. Burdens on Commerce

When the dormant commerce power doctrine is viewed through the prism of interstate harmony, its rules become more orderly and logical. The doctrine is not concerned with severity of burdens on interstate and international markets in general; its focus is on those kinds of market interference that set state against state or that invade policy choices of other states or of the federal government. To raise a serious claim under the doctrine, a claimant must make a threshold showing that a state law imposes more costs on border-crossing transactions than on those occurring entirely within the state. When state law burdens internal and border-crossing or external transactions equally, there is no threat to interstate commercial harmony and the national interest is preserved.\textsuperscript{138}

State taxes and regulations that impose this threshold burden fall into two broad categories. The first type burdens import or export transactions more than local ones to protect internal market interests against external competition. This is protectionism, reviewed under the Court's antidiscrimination rule. Under this rule, categorical discrimination against external competition is, with minor exceptions, invalid.\textsuperscript{139}

The second category involves burdens on border-crossing commerce that arise from the cumulative power of states to tax or regulate an interstate transaction or business more than once, and from the cost of complying with inconsistent state laws imposed on interstate transactions: multiple and conflict burdens respectively. A routine example of multiple burdens arises from ordinary property taxes. If two states impose an

\textsuperscript{136} See L. Tribe, American Constitutional Law 25 (Supp. 1979).
\textsuperscript{137} See The Federalist No. 6 (A. Hamilton) (J. Cooke ed. 1961); 1 Records of the Federal Convention, supra note 30, at 19, 164; C. Rossiter, supra note 72, at 47.
\textsuperscript{138} For example, when states forbid all commerce in unhealthy or dangerous products, such as "controlled substances," tobacco products, or throw-away beverage containers, their laws are sustained. See notes 198, 227-30, 235 and accompanying text infra.
annual property tax on railroad cars, cars that travel between them pay
two taxes, while those remaining within one state pay only one. Minor
costs abound, and the Court is only concerned with severe
ones. The issue is easiest to pose hypothetically. If one state requires
that all trucks be painted red and its neighbor requires all to be blue, the
imposition on trucks traveling only within either of them is minor, but
that on trucks crossing the border is intolerable.140

Multiple and conflict burdens can be said to have discriminatory
effects because transactions within one state enjoy lower state-imposed
costs. But these burdens inhere in a federal system; to eliminate them
totally would require a unitary legal system. Recognizing this, some
have argued that the dormant commerce power doctrine must therefore
be confined to deliberate discrimination against interstate commerce or a
like standard.141 Although the Court does not agree, its rules limit the
concept of forbidden discrimination to protectionism.142

3. Distinguishing Import-Export Commerce from Commerce in Transit
and External Commerce

The Court's decisions implicitly depend on an important analytical
distinction between state laws that burden only the state's imports or
exports (interstate or foreign), and those that burden commerce in transit
through the state or transactions outside it. Impositions on import-ex-
port commerce are valid unless protectionist, that is, unless they categor-
ically discriminate in favor of transactions within the state and against
directly competing import or export transactions.143 Other burdens on
import-export commerce are labeled "nondiscriminatory" and sustained.

Impositions on commerce in transit or external transactions may be
invalid even if they are not categorically discriminatory. Nondiscrimina-
tory multiple and conflict burdens are invalid when they substantially
burden commerce in transit through a state or transactions outside it.144
In these cases, the Court's principal instrument is allocation of jurisdic-
tion to the state with greatest interest in a subject. This is accomplished
under its nexus test, which bars impositions by states with insufficient
interest, under its apportionment test, which divides taxing jurisdiction
among interested states, and under its balancing test, which requires sub-

140 See text accompanying notes 290-300 infra. An actual case not materially different from
the hypothetical was Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959), striking down Illi-
nois's requirement that trucks have contour mudflaps.
141 See note 52 supra.
142 See text accompanying notes 189-91 infra.
143 See notes 189-98 and accompanying text infra.
144 See text accompanying notes 247-52 infra.
stantial local justification for burdensome transportation regulations.\textsuperscript{145}

The distinction between import-export commerce, and commerce in transit and external commerce is based upon several factors. One is the obvious policy proposition that a state has greater legitimate interest in regulating and taxing its imports and exports than in imposing on commerce in transit through the state or on transactions outside its borders. In the latter group of cases, other states have much greater legitimate interest. A second is that market forces counteract important kinds of state parochialism respecting state imports and exports but are less effective to restrain impositions on commerce in transit or on external transactions.\textsuperscript{146} Third, local politics effectively discipline state lawmaking in cases of nondiscriminatory regulations of imports and exports, but do not do so for impositions on commerce in transit or external transactions.\textsuperscript{147} The last two factors are related because when markets adjust to bring costs home to the enacting state, its political process more effectively restrains its legislature.

The Court's opinions do not distinguish between import-export cases and others. Perhaps this is because the two categories separate only partially. Many actual cases involve exclusively import-export commerce and are subject only to the antiprotectionism norm.\textsuperscript{148} But state laws affecting commerce in transit or external transactions usually have some effect on import-export and local commerce as well. The Court's concern is with cases in which imposition on commerce in transit or on external transactions predominates. Despite this complication, distinguishing between import-export commerce and the other categories is quite useful for analytical purposes, as succeeding Sections will demonstrate.

\textbf{B. Evaluating the State Autonomy Interest}

\textit{1. Cost Exporting and Local Political Restraint}

In \textit{South Carolina State Highway Department v. Barnwell Bros.},\textsuperscript{149} the Court identified cost exporting and local political restraint as measures of a state's interest in regulating. The decision sustained a state law that limited weights and widths of trucks using state highways. Justice


\textsuperscript{146} See text accompanying notes 164-81 infra.

\textsuperscript{147} See text accompanying notes 149-63 infra.


\textsuperscript{149} 303 U.S. 177 (1938).
Stone's opinion for the Court said that the commerce clause prohibits state legislation that "by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." Stone concluded:

The present regulations, . . . if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

Although Justice Stone said that his point had been "often expressed," he did not cite any prior opinion that articulated it. Justice Cardozo had earlier stated the cruder variant that a state may not "project its legislation into [other states]." Stone applied this view to tax cases, and many opinions since Barnwell have mentioned local political restraint as a factor in dormant commerce power analysis.

Stone's point has obvious political virtue. When the people of a state pay the price, they should be able to suppress commercial activity that they deem harmful. When they impose the cost of suppression on outsiders, they interfere in policy choices of other states or the federal government, and judicial intervention may be warranted.

When one emphasizes effects on outsiders who cannot vote in the state, it sounds like a version of the political branch of the process theory of judicial review. However, modern process theorists usually assume the personal-rights perspective of the Bill of Rights and fourteenth amendment. Given its origin, purpose, and application, the political theory of the interstate commerce clause is based on a state-versus-state con-

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150 Id. at 186.
151 Id. at 185 n.2.
152 Id. at 187.
153 Id. at 185 n.2.
157 See text accompanying notes 397-99 infra.
cept of political rights. The dormant commerce power doctrine limits a state’s ability to exploit other states; it does not give personal rights to every nonresident business harmed by state commercial regulation.

Economic aspects of Stone’s norm are as significant as political elements, and they reinforce a state-versus-state focus. When a sovereign’s laws impose costs on those outside its borders, its lawmaking process is inefficient. Taxes and regulations are like other products; when costs are not borne by producers, these costs are disregarded, and we get more of the products than an efficient market would supply. When costs imposed by legislation are exported, political discipline that tends to minimize these costs is relaxed, and there is a greater chance that the law will reduce aggregate welfare. When legislation benefits locals and burdens their out-of-state competitors, the legislative goal is protectionism.

Efficiency of local lawmaking is a basic justification for state autonomy in the federal system. Local lawmaking can be more exactly tailored to particular problems and can more readily experiment with different solutions. Competition among legal systems generates efficiencies as jurisdictions compete to attract and retain people and capital. Local lawmaking best serves these ends when people and resources are mobile and when local laws do not export significant costs. When government costs borne at home become relatively large, a state’s products are less competitive than products of states imposing lower costs. Local politics then restrain the legislature. When the same costs are largely exported, political restraint weakens or disappears. To the extent that the dormant commerce power doctrine invalidates only cost-exporting legislation, it defers to efficient local lawmaking and complements competition among legal systems.

Stone’s norm thus offers an attractive measure of legitimate state interest in regulation from either a political or economic perspective. Applying it to actual markets and actual politics, however, leads to complexities that blunt theoretical appeal and limit the concept’s usefulness. There are several problems: laws never export all of the costs they impose, the political process responds much better to concentrated interests

158 See text accompanying notes 69-94 supra.
159 See R. Posner, supra note 134, at 602-03.
than to dispersed ones, determining the actual incidence of state-imposed costs is very difficult because markets reallocate costs in complex ways, and market reallocation of government costs can vary significantly between the short and long term.

Some state laws that burden interstate or foreign commerce are fair charges for governmental services provided or for spill-over costs of the regulated activity. These charges cannot justly be criticized as exported costs. And every law adversely affects some market actors in the state. Import tariffs benefit local producers and the public treasury, but they harm importers and consumers. Burdened out-of-state corporations often have local shareholders, subsidiaries, or other allied interests. Commerce in transit through a state benefits local providers of fuel, food, and lodging, and they share its burdens. When internal costs are large, and those bearing them are practically able to influence the political process, legislative efficiency improves, and there is less justification for judicial intervention.

Even if substantial costs are borne internally, local political processes are inefficient when captured by concentrated and organized interests. Political allocation of goods chronically disadvantages small consumers. Local benefits of a state import quota are enjoyed by local producers, and costs of the law are spread widely among the consuming public; political restraint is weak even though costs fall heavily within the state. Those paying the cost may be unaware of it. Even if aware, they have greater difficulty organizing and bankrolling their opposition than does the benefited industry. Collective action is restrained by information costs, organizing costs, and free-rider problems. Conversely, when a state law burdens unorganized local consumers but outside interests bearing some of the costs are concentrated, the external interests may be able to galvanize political action by internal consumers.

2. Market Reallocation of Government-Imposed Costs

Market forces partially counteract parochial lawmaking. Two significant factors in the United States are the constitutionally protected rights of persons to migrate freely to other states and of citizens to pursue commercial opportunities in other states on the same terms as local citizens. These rights enable consumer and labor markets to adjust to state manipulations, which disciplines local lawmaking. Likewise, the threat of capital migration, aided by the common national currency and by national banking regulation, limits parochial legislation. These fac-

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164 See text accompanying notes 112-14 supra.
tors distinguish the American national market from international markets, in which migration and nonresident enterprise are often restrained by law, mobility is usually impeded by cultural barriers and other personal costs, and capital transfers are hindered.\textsuperscript{165}

Another form of market adjustment is the "pass-on" of government-imposed costs, when directly burdened parties charge these costs to their suppliers or customers. Sometimes what seem to be exported costs are in fact borne significantly at home, even in the short run, and vice versa. Moreover, it is often difficult to determine the degree to which such adjustments occur.\textsuperscript{166} But this is not a major factor in legal doctrine. When a law discriminates against interstate or foreign commerce or imposes on an external transaction, pass-on may return some of the costs to the regulating state. But the Court may reasonably require the regulating state to prove that costs apparently exported in fact fall at home. In the converse case, when costs imposed at home are exported by pass-on, the burden of proof is on parties challenging the regulations. Since proof is difficult, the issue is largely disregarded.

Pass-ons are not only difficult to prove, they are often difficult to recognize. Political restraint is not affected by unknown pass-ons. If everyone mistakenly thinks costs are borne locally, the political process behaves as though they are and disciplines government. If everyone mistakenly thinks costs are exported, the political process tends to burden interstate mobility of resources. If a reviewing court shares the misapprehension that costs are exported, the law is likely to be struck down. If a trial aided by hindsight reveals that costs intended to be exported in fact fall predominantly on local merchants, the court might leave adjustment to the local political process. The issue is more complex if costs are borne only by local consumers, who often have limited political influence.\textsuperscript{167}

Market substitutions in response to state-imposed costs perform a more important role in adjusting costs imposed by parochial legislation. In many situations, substitutions eventually bring enough costs home to the enacting state to restore efficiency to its lawmaking. Efforts to export costs to those outside the jurisdiction succeed only temporarily. California's manipulation of the raisin market to raise prices\textsuperscript{168} presumably generated substitution of other foods for raisins and stimulated competing

\textsuperscript{165} See European Economic Community, The First Stage of the Common Market 38-43 (1962).
\textsuperscript{167} See text accompanying note 163 supra.
production of raisins and of substitute foods elsewhere. Eventually, California raisin producers bore a significant part of the costs of the state’s regulation.\textsuperscript{169}

Adjustment always occurs when state laws facially treat local and border-crossing commerce the same but favor predominantly local products over predominantly imported products. One effect is to stimulate out-of-state production of the favored product. Another is to stimulate production of other substitutes everywhere. The same is true for laws that restrict the form in which business may be done. Even if such state laws have short-term parochial effects, long-term effects on interstate commerce may be negligible or may even promote it.

One important limit on market substitution is market power. If a state and its producers, or a cartel of states, have sufficient control of a particular natural resource, substitution may be only partial. The same occurs to a lesser extent when production or developed markets are concentrated in one state.\textsuperscript{170} If a state is a large enough importer, its tariffs are paid partly by producers in exporting states.\textsuperscript{171}

This limit must be qualified in turn. In the short run, substitution for monopolized resources is only partial. But parochial trade legislation encourages external producers to discover or invent lower-cost substitutes, so long-term substitution is usually more effective.\textsuperscript{172} Moreover, modern technological advances and increases in international trade have probably improved the effectiveness of substitutions. Perception of this change may have already contributed to greater judicial deference in certain dormant commerce power cases.\textsuperscript{173}

The most durable form of market power is state control over ports and trade routes, imposing costs on all commerce in transit through the jurisdiction. Unless the jurisdiction’s territory is very small, substitution never entirely overcomes government-imposed costs. A state enjoys monopoly power to that extent. Like a private monopolist, it can raise prices and restrict trade.\textsuperscript{174}

\textsuperscript{169} See R. Posner, supra note 134, at 602-04; McLure, supra note 161, at 74-75. This proposition is hardly new to modern economics. Taney and Johnson argued it to the Court in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 432 (1827).

\textsuperscript{170} See R. Posner, supra note 134, at 603-04; Levmore, supra note 161, at 601; Williams, supra note 166, at 310-11.


\textsuperscript{172} See C. McConnell, Economics 594-95 (9th ed. 1984).


\textsuperscript{174} See R. Posner, supra note 134, at 604-05; Brown, supra note 93, at 232; Kitch, Regulation, supra note 14, at 38; Levmore, supra note 161, at 570-72.
Delay is a second limitation on market substitution. Often it takes a relatively long time for markets to bring regulatory or tax costs home to the enacting jurisdiction. Much damage to allocational efficiency and to interstate commercial harmony may occur in the meantime.\textsuperscript{175} Again, technological advances and greater international integration have probably shortened adjustment times.

A third limit, already mentioned, is the capture of local politics by concentrated interests. When protectionists are politically ascendant in all states, allocational efficiency and interstate harmony suffer substantially even though local consumers or other dispersed interests pay most of the costs.\textsuperscript{176} The latter condition is common in international markets.\textsuperscript{177}

These complexities show that efforts to measure precisely the degree to which costs imposed by state laws fall on in-state interests and are adequately reflected in local political processes would be difficult for an economics institute, and impossible for a court hearing episodic lawsuits. But the concept provides a useful rough measure that identifies the kinds of parochial laws that are likely to export costs and to resist local political discipline. This in turn helps to determine which state has the greatest interest in regulation and taxation and when jurisdiction by more than one state is justified.\textsuperscript{178}

The interaction among cost exporting, local political restraint, and the market underlies the important distinction between states' burdens on their imports or exports, and those on commerce in transit or external transactions. For import-export commerce, durable cost exporting is unlikely. At least one major party to every transaction is in the state, and market adjustments often return regulatory costs to the state that imposes them.\textsuperscript{179} Import-export regulations cause problems when strong

\textsuperscript{175} See McLure, supra note 161, at 76-78.  
\textsuperscript{177} See M. Kreinin, supra note 171, at 306.  
\textsuperscript{178} Cost exporting and local political restraint distinguish the dormant commerce power doctrine from that of substantive due process. See generally McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34 (examining substantive due process). The commerce power doctrine restrains states only when local politics do not adequately reflect state-imposed costs, and the state has not justified imposing on outsiders as a class. It is best viewed as restraining interference by one state in other states' choices among private market ordering and various forms of government regulation. Substantive due process, by contrast, is purely antimajoritarian, assuring a personal right to freedom from unjustified government interference in private market ordering regardless of the view of any political majority, local or national. See J. Nowak, R. Rotunda & J. Young, supra note 7, § 11.4, at 350-60. For a contrary view that does not distinguish between the two doctrines, see Farber, supra note 18, at 399; cf. Kitch, Regulation, supra note 14, at 29-30 (arguing that the doctrines are not very different); Tushnet, supra note 18, at 141-42, 147-50 (arguing that differences between the doctrines are unimportant for constitutional purposes).  
\textsuperscript{179} See text accompanying notes 162-63, 166-73 supra.
states with market power exploit the weak, and when local political processes are captured by organized and concentrated interests. Protectionism is overtly hostile to other states and induces retaliation until protectionists are in control everywhere, to the detriment of all consumers.

By contrast, state regulation and taxation of commerce in transit through a state, or of other external transactions where buyer and seller are outside the state, export costs more substantially and permanently. Few local interests are benefited by trucks, trains, buses, telegraph wires, or pipelines crossing a state. Market adjustments overcome some costs, but monopoly power over geographic routes, sunk costs of prior investments, and related factors for other markets allow a significant degree of permanent cost exporting. Weak local political restraint is straightforward. It corresponds to the self-interest of the state as a whole rather than to that of local trade associations. Political temptation to extract a high price for passage is constant over time.

Judicial doctrine reflects this distinction rather clearly. Laws that regulate solely import-export trade are sustained unless categorically protectionist. Laws that substantially burden interstate transportation, commerce in transit, or other external markets, by contrast, are often struck down in an effort to allocate jurisdiction among interested states or to limit conflicting regulations.

C. Curbing Protectionism in State Import-Export Commerce

The dormant commerce power doctrine invalidates states' burdens on their import-export commerce only for protectionism manifested by discrimination against interstate or foreign commerce. Other forms of state parochialism are sustained because the states' interest in import-export regulation is strong, and market and political restraints effectively curb this type of legislation.

1. Protectionism and Police Power

Under the dormant commerce power doctrine, a state's interest in protecting local enterprise against outside competition is never legitimate. Accordingly, Supreme Court decisions outlaw state protectionism. Protectionism can be effected only by Congress or with its permission. Congress cannot overtly disadvantage one or a few states, so

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180 See text accompanying notes 182-204 infra.
181 See text accompanying notes 247-331 infra.
internal protectionism is to a modest extent curtailed altogether.\(^{183}\)

Classic protectionism meant shielding domestic producers against competition from imports.\(^{184}\) The Court also condemns measures that protect local buyers rather than producers, and that restrict exports rather than imports.\(^{185}\) When a law creates a categorical advantage for an identifiable market group within the state against its external competitors, the law is protectionist and usually struck down.

Laws that suppress interstate or foreign trade without protecting specific local groups against outside competition can be struck down as well, but not based on protectionism. Taxation and regulation of inter-state transportation enterprises, for example, impose costs on outsiders for local benefit. They tend to protect local trade to some extent because they raise overall costs of interstate or foreign trade more than those of internal commerce. But the principal local advantage is tax revenue or regulatory gain to persons other than competitors of the burdened class, purposes that are legitimate uses of police power.\(^{186}\) The Court does not label such laws protectionist or discriminatory; the words are usually absent from opinions in these cases.\(^{187}\)

The distinction between protectionist and police-power purposes is clear at the extremes but murky on the margin. Many laws have both protectionist and police-power purposes and effects. State laws are struck down only when categorically protectionist or nearly so.\(^{188}\)

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\(^{183}\) The Constitution expressly requires that federal taxes and duties be "uniform" throughout the nation and forbids federal preferences of the ports of one state over those of another. U.S. Const. art. I, § 8, cl. 1; id. § 9. The Court gives Congress broad latitude under these provisions, sustaining reasonable geographic distinctions. See United States v. Ptasynski, 462 U.S. 74, 84-86 (1983) (finding that uniformity clause does not bar tax that advantages one state). But deliberate disadvantage of one state was struck down in Coyle v. Smith, 221 U.S. 559 (1911). Of course, nothing precludes Congress from authorizing protectionism in particular industries. See Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 433-38 (1946).


\(^{186}\) This definition of police power does not accord with definitions that omit taxes. And many definitions of police power would include the protectionist laws that are contrasted here. But this definition is occasionally employed by the Court in dormant commerce power cases. See, e.g., Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 427-29 (1963). Compare the uses of "police power" in takings cases. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (sustaining city's prohibition of brickyards as valid exercise of police power).


\(^{188}\) See notes 189, 221-46 and accompanying text infra.
2. Categorical Discrimination Against Interstate or Foreign Commerce

The Court outlaws protectionism in import-export commerce through its antidiscrimination rule. The rule presumes the invalidity of state laws that categorically discriminate against interstate or foreign commerce. \(^{189}\) The rule was probably induced by classic protectionist devices that shielded local enterprise from external competition: tariffs, embargoes, and quotas. \(^{190}\)

The antidiscrimination rule covers only laws that favor local interests over their direct external competitors. In other words, it largely corresponds with protectionism. Costs imposed uniformly on interests that happen in fact to be mostly outside the state, or multiple or conflict burdens on interstate or foreign commerce, are not categorically protectionist; when such "police power" laws are challenged, the Court describes them as "nondiscriminatory" and reviews them under its nexus, apportionment, and balancing tests. \(^{191}\)

Laws that categorically discriminate are seldom justified because their predominant purpose and effect are almost always protectionist. \(^{192}\) To sustain categorical discrimination, a state must show that its law effectively abates external costs or other market failures particularly associated with movement into or out of the state. In other words, it must show that a legitimate state purpose cannot be achieved by nondiscriminatory means. \(^{193}\) This rule can be criticized as overbroad because there are always less burdensome means to carry out state objectives. But this would misapply the rule to nondiscriminatory cases. The rule applies only to state efforts to justify categorical discrimination against interstate

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\(^{190}\) The Court's first references to discrimination against interstate commerce appear to be Justice Miller's dicta in Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 138, 140 (1869) and Hinson v. Lott, 75 U.S. (8 Wall.) 148, 151-53 (1869). Justice Miller expressly distinguished Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), as a case based on discrimination and by implication distinguished Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) and Almy v. California, 65 U.S. (24 How.) 169 (1861). See Woodruff, 75 U.S. (8 Wall.) at 138-40. The discrimination concept was not articulated in Brown, Crandall, or Almy, but it was clearly raised by the appellee in Woodruff, see 75 U.S. (8 Wall.) at 127-30, and addressed by the Court, see id. at 138. After Woodruff, the discrimination concept came into common usage. See, e.g., Welton v. Missouri, 91 U.S. 275, 279-81 (1876) (invalidating license tax on dealers in goods produced out of state); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 432 (1871) (finding that license statute for nonresident traders violated privileges and immunities clause).

\(^{191}\) See notes 247-331 and accompanying text infra. A few facially nondiscriminatory laws have been struck down as protectionist in effect. See notes 216-24, 325-31 and accompanying text infra. On a few occasions, however, the Court has strayed into broader definitions of discrimination in reviewing "police power" laws. See notes 282-89 and accompanying text infra.

\(^{192}\) But see text accompanying notes 332-69 infra (at least some subsidies are excepted from antiprotectionism rule).

or foreign commerce. So limited, it works quite well. Reasonable quarantines and inspections are legitimate grounds for discriminating against import commerce;\(^{194}\) temporary public emergencies justify restricting exports.\(^{195}\)

Some discriminatory laws do not immediately gain market advantage for anyone within the state against outside competitors and, thus, are not overtly protectionist. For example, tariffs or regulations imposed on imported goods that have no direct local competitors have legitimate purposes such as public revenue or other more widely distributed state benefits.\(^{196}\) These laws are nevertheless invalid when they discriminate categorically.\(^{197}\) They seek advantage for locals over those outside the state, inviting retaliatory regulation of other products, and they create an incentive for protected local competition to arise or for outside producers to move operations into the state. Protectionism in these instances is potential rather than actual, but it would be complicated for courts to identify those cases in which potential protectionism is likely to become actual. More important, legitimate state purposes involved can be as readily achieved by nondiscriminatory laws; the discriminatory feature of such laws simply serves no legitimate purpose.\(^{198}\)

The Court's antidiscrimination rule has considerable practical utility. The rule treats all states alike, is reasonably certain of application, generates direct welfare gains, and does little harm to important state autonomy interests. When commercial regulations or taxes are complex, the antidiscrimination rule focuses on a particular feature of the statutory scheme. It corresponds closely with governing policy considera-

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194 See, e.g., id. (upholding law prohibiting importation of baitfish). The Court expresses this exception more colorfully in the case of the privileges and immunities clause: discrimination against nonresidents is justified when they "constitute a peculiar source of the evil at which the statute is aimed." Toomer v. Witsell, 334 U.S. 385, 398 (1947).


196 The same is true of export tariffs or regulations imposed on goods that are all exported, although these are rare. Regarding impositions on goods that are mostly exported, see text accompanying notes 236-46 infra.


198 By contrast, the Court sustains nondiscriminatory laws that impose on goods produced out of state. Because there are no local competitors to protect, such laws have no protectionist effects on present markets, and they serve legitimate state purposes. Requiring nondiscriminatory form guards against future protectionism. Accordingly, states structure taxation and regulation of commerce in these goods as facially nondiscriminatory laws. A prominent example is heavy taxation and regulation of tobacco products. See, e.g., Packer Corp. v. Utah, 285 U.S. 105 (1932) (upholding ban on advertising of tobacco products); Austin v. Tennessee, 179 U.S. 343 (1900) (sustaining ban on cigarette sales).
tions. The concept of discrimination focuses precisely on special costs imposed on goods crossing the state's borders. The rule leaves states broad discretion to regulate local commerce; legitimate state purposes can almost always be achieved by rules that are not categorically discriminatory. Discrimination is a reliable indicator of protectionism because both concepts are defined as treating directly competing local and out-of-state interests differently. The rule's two exceptions—for states as market participants and for quarantines and related public emergencies—are logical and reasonably easy to apply. These factors probably account for its relative popularity; many critics of other dormant power rules approve of this one.

Cost exporting is not an essential consideration in applying the antidiscrimination rule. State laws that discriminate against commerce moving into or out of the state export some but not all costs imposed; disadvantaged outsiders share costs with their customers or suppliers in the state. Since market adjustments return costs to the regulating state in the long run, costs are often not exported at all. Cost exporting is more long-lived when the regulating state has significant market power, that is, when a strong state exploits weak states.

Although protectionist laws do not effectively export costs, they are overtly hostile to other states and establish favored local interests. When benefited interests are concentrated and organized, they often capture local political control, particularly when ultimate losers are local consumers. Even when markets bring government-imposed costs home, interest group politics maintain protectionist laws. Inertial effects of American lawmaking processes further lock in parochialism. Protectionist politics invite retaliatory protectionism by other states, until protectionists dominate in all states at great cost to both interstate

199 This statement ignores an important practical factor. Discriminatory rules are politically easier to enact; a nondiscriminatory alternative may not get enough support. A prominent example was the law prohibiting importation of waste originating out of state in City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), which could not have been passed in nondiscriminatory form. This sort of parochial state interest, depending entirely on beggar-thy-neighbor politics, ought to be disregarded.

200 See text accompanying notes 194-95 supra, 332-69 infra.

201 See, e.g., Eule, supra note 18, at 438-43; Tushnet, supra note 18, at 130-41, 163-65. But see Brown, supra note 93, at 224-25 (criticizing overly simplistic applications of discrimination concept).

202 See text accompanying notes 168-73, 178-79 supra.

203 See note 163 and accompanying text supra.

commercial harmony and allocational efficiency.

3. Problems in Defining Discrimination

Varying definitions of discrimination occasionally cause confusion in applying the antidiscrimination standard. A few aberrant jurists and academics have replaced discrimination against interstate or foreign commerce with personal discrimination against nonresident merchants, a concept that if fairly applied would probably cause the Court to invalidate more state laws.  

A second definitional issue arises when states attempt to justify an overtly discriminatory law on the ground that the burden compensates for other governmental costs the state imposes on local competitors. The Court accepts this “complementary burden” justification when in-state costs are the same or very similar to those imposed on import-export commerce, so that a discrete scheme is not protectionist. The best known cases are those sustaining compensating use taxes. But the Court has rejected broader attempts to justify discriminatory taxes or regulations by reference to different impositions on locals.  

Some scholars argue that the Court has been too lenient in sustaining sales and compensating use tax schemes because use taxes disadvantage certain classes of outside merchants depending on local tax structures in other states and because they stifle interstate price competition.

Supporters of the Court’s view have the better argument. Sales

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205 For a discussion of the personal rights theory of the dormant commerce power doctrine, see notes 397-416 and accompanying text infra. Within the Court, this concept has mostly been confined to dissenting opinions. See, e.g., Hughes v. Oklahoma, 441 U.S. 322, 339, 344-45 (1979) (Rehnquist, J., dissenting); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 136-45 (1977) (Blackmun, J., concurring in part and dissenting in part); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 820-21 (1976) (Brennan, J., dissenting).


Another common form of compensating tax is the tax on transportation companies “in lieu” of local property taxes. See Hellerstein, supra, at 420-22. But this form of tax does not categorically discriminate against interstate commerce.


208 See R. Posner, supra note 134, at 605-07; Brown, supra note 93, at 233-37.

209 See 1 J. Hellerstein, supra note 145, at 143 (“[T]he holdings of the cases are beyond criticism.”).
and compensating use tax schemes are not categorically protectionist in their impact on private markets; states seek to neutralize advantages for out-of-state competitors created by their domestic taxes. Taxes collected pay for governmental services consumed by interstate commerce, and it should pay its share. Policy reasons in favor of use taxes are akin to those allowing protectionist subsidies: the schemes impose heavily on enacting states’ voters so that local political restraint is strong, and a contrary rule would curtail useful state undertakings.\textsuperscript{210} Those condemning the schemes implicitly rely on a substantive preference for laissez faire, while the Court’s focus is on state interference in the affairs of other states.

On the other side, these decisions have been criticized as overly intrusive because the Court does not allow states enough leeway in justifying taxes that facially discriminate against interstate commerce.\textsuperscript{211} The question is whether interstate taxpayers challenging a tax must prove that their goods are actually taxed more than local competitors’, or whether it is sufficient to prove potentially higher levies. The majority’s benchmark is potential discrimination. Its test requires that if all states imposed the challenged tax, there would be “no impermissible interference with free trade.”\textsuperscript{212} This vague test oversimplifies analysis, although its results are defensible.\textsuperscript{213}

A third area of difficulty is various attempts to distinguish between

\textsuperscript{210} See notes 347, 350-56 and accompanying text infra.


\textsuperscript{212} \textit{Tyler}, 107 S. Ct. at 2820 (quoting \textit{Armco}, 467 U.S. at 644-45). Dissenters would require external challengers to prove that they actually paid higher taxes than local competitors. See \textit{Tyler}, 107 S. Ct. at 2823-26 (Scalia, J., concurring in part and dissenting in part); \textit{Armco}, 467 U.S. at 646-68 (Rehnquist, J., dissenting).

\textsuperscript{213} The test is not a useful predictor because it does not answer the question of what is an “impermissible interference with free trade.” The Court must determine whether domestic taxes and those levied on interstate commerce are sufficiently alike so that an apparently discriminatory scheme is not protectionist. In \textit{Tyler} and \textit{Armco}, state laws that imposed both production and wholesaling taxes measured by a percentage of gross value were held not substantially equivalent. See \textit{Tyler}, 107 S. Ct. at 2817-21; \textit{Armco}, 467 U.S. at 642-43. But these two events are not very distinct. Goods produced and immediately sold are, from the taxpayer’s perspective, taxed twice at the same time and in the same way.

However, the dissenters’ view offers worse problems. Some challengers would meet the test when their home states imposed the same tax as the importing state. Other states would have an incentive to conform to the system by taxing competitively, a competition that would be dominated by more powerful states. Also, the complementary tax defense must stop somewhere; courts cannot review the impact of a state’s entire legal code on commerce. The majority’s rule for this defense is confined to categorical discrimination, is reasonably manageable and predictable, and undoubtedly curbs protectionism and furthers interstate trade.
facial discrimination and discriminatory effect, an effort that occasionally becomes tangled with a search for discriminatory or protectionist intent. This confusion probably derives from attempts to analogize commerce clause law to equal protection standards, particularly those of the heightened scrutiny variety. The effort is mistaken. Racial or other suspect discrimination is itself a constitutional wrong. The commerce clause antidiscrimination rule is instrumental to carrying out the policy prohibiting protectionism. Actual impact on trade is what matters for judicial scrutiny under the commerce clause. This does not depend on whether discrimination against external competitors is facial or purposeful, but whether it is categorical. When all benefited parties are within the state and all burdened direct competitors are outside, a local law imposes categorical discrimination, of which tariffs and embargoes are paradigm examples. This is equally protectionist whether discrimination appears on the face of the law or requires account of other facts.

The definition of discrimination is straightforward when the law at issue is one of uniform statewide application, but local ordinances have generated some controversy. A local law that favors those within the city or county over those outside it burdens some direct competitors within the same state. The Court has properly treated these laws as categorically discriminatory and protectionist. These laws have the same tendency toward economic isolation as a statewide tariff. In theory, competitors outside the city but within the state provide some political check on protectionism. In practice, however, it is likely that their influence is channeled into creating similar trade duchies in their own cities or counties. Moreover, all protectionist legislation benefits only favored classes of locals over outside competitors and over local consumers or other unorganized groups. There is no reason why cities or other local governments should be excepted from the antidiscrimination rule because of in-state losers.

The Court’s decision in Dean Milk Co. v. City of Madison illustrates both the definition of categorical discrimination and its application to local ordinances. In Dean Milk, a city ordinance did not distinguish on its face between local and interstate commerce; it burdened all non-local milk producers, within and without the state. The Court never-

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214 See, e.g., Smith, State Discriminations Against Interstate Commerce, 74 Calif. L. Rev. 1203, 1239-52 (1986). On protectionist intent, see text accompanying notes 430-75 infra.
215 See notes 216-19 and accompanying text infra.
218 The ordinance prohibited the sale of milk produced more than twenty-five miles from the city and barred the sale of pasteurized milk that was not pasteurized at a local plant. Id. at
theless held that it discriminated against interstate commerce. This result was correct because the ordinance, like a tariff, categorically discriminated against interstate commerce.

Likewise, the Court has consistently struck down state and local “drummer” taxes on local agents of outside producers. These did not facially discriminate against imports, but had precisely the same effect as tariffs. Categorical discrimination against interstate commerce was obvious. However, the Court in the drummer cases described the wrong as discriminatory effect. This invited confusion with very different cases involving only partial, rather than categorical, discrimination against interstate commerce.

4. Partial Discrimination

State laws that are not categorically discriminatory are also struck down if they are predominantly protectionist. In these cases, a state law favors locals in its practical effect, but also benefits some outsiders. When only import-export commerce is involved, the Court evaluates protectionism under its balancing test. The state must show that its law reasonably effectuates a nonprotectionist (“legitimate”) purpose. States usually prevail on the protectionism norm; invalidation under this standard alone is rare.

350-51.

218 Id. at 356. In H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949), the Court invalidated a state’s denial of a milk export license that protected a local market from competition both inside and outside the state. *Hood* well illustrates the ineffectiveness of political restraint within the same state to curb local protectionism; a statewide law was at issue, but it was administered for local protection. The opinion was ambiguous about discrimination. See *Hood*, 336 U.S. at 531, 539. But in later cases, the Court has cited *Hood* for its discussion of discriminatory commercial regulation. See, e.g., Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978).

219 See, e.g., West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390 (1957); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940); Asher v. Texas, 128 U.S. 129 (1888); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); see also 1 J. Hellerstein, supra note 145, at 140.

220 Confusion between categorical and partial discrimination deprives the discrimination rule of its useful precision because many state taxes and regulations have at least some partially discriminatory effects. The Court cannot eliminate all such effects without imposing a unitary national system of regulation. This confusion has not affected any Court holding in an import-export case, but it has affected at least one opinion striking down multiple tax burdens on interstate transportation. See American Trucking Ass'ns v. Scheiner, 107 S. Ct. 2829 (1987), discussed in text accompanying notes 282-89 infra.

Some scholars define discrimination to include partially discriminatory effects, thus characterizing cases that the Court views as nondiscriminatory as posing issues of discrimination. See, e.g., Eule, supra note 18, at 461-74.

221 See note 122 supra.

222 Most invalidations of laws that do not discriminate categorically involve laws that burden commerce in transit or external transactions, as well as import-export commerce. See
One of the few modern invalidations under this rule was *Hunt v. Washington State Apple Advertising Commission*,\(^\text{223}\) in which the Court struck down a North Carolina apple-labeling law that had the “discriminatory effect” of favoring local apple growers over those in some but not all other states.\(^\text{224}\) Although the opinion did not note the important difference in impact on trade between partial discrimination and categorical, but nonfacial, discrimination, *Hunt* surely was correctly decided. The discrimination was practically categorical. This sort of law should be invalidated to prevent easy technical avoidance of the rule against categorical discrimination.

The Court usually sustains state regulations that partially discriminate against state imports or exports. Such burdens on imports commonly arise in two circumstances. One is when a state law burdens a product that is mostly made outside the state to the benefit of a competing but different product made within.\(^\text{225}\) The other is when a state requires that business be transacted in a form that favors local firms.\(^\text{226}\) In both situations, burdened outside sellers claim to be victims of discrimination. Moreover, they can often show evidence of parochial legislative purpose. But the Court calls these laws nondiscriminatory and upholds them.

This policy is not logically compelled. It would be rational to define forbidden discrimination to encompass favoritism for local products over imports that are substitutes but not direct competitors, and for forms of selling most convenient for local businesses. But the Court wisely has not done so for two reasons: market corrections effectively limit the burden on interstate commerce, and judicial invalidation would substantially impair important state autonomy interests.

*Minnesota v. Clover Leaf Creamery Co.*\(^\text{227}\) is an example of local-product favoritism. The Court sustained an environmental law that favored paper milk containers over plastic ones. At the time, Minnesota produced no disfavored plastic, paper was a major local industry, and


\(^{224}\) Id. at 351-52. The Court said that it did not need to decide whether the law was passed with protectionist intent, id. at 352, but it based its decision on a finding of discrimination. See id. at 350-53; see also Dayton Power & Light Co. v. Lindley, 58 Ohio St. 2d 465, 474, 391 N.E.2d 716, 721 (1979) (invalidating tax on coal because of “discriminatory effect”); cf. Mapco, Inc. v. Grunder, 470 F. Supp. 401, 408-09 (N.D. Ohio 1979) (finding that tax involved in *Lindley* constituted invalid “protectionism”).

\(^{225}\) See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (sustaining environmental law favoring paper milk containers over plastic ones where paper was a major local industry).

\(^{226}\) See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (sustaining prohibition of retail gasoline sales by oil producers and refiners).

there were trial court findings that these facts had influenced the legislature. The Court determined that the environmental purpose was not a sham, but it would not probe the legislative judgment that the two products differed in relevant ways. Long-term economic effects of this kind of parochialism are uncertain. Minnesota's line drawing helped the paper industry in all states, not just at home.

*Exxon Corp. v. Governor of Maryland* illustrates valid state regulation of the form of doing business. Maryland prohibited retail gasoline sales by vertically integrated oil companies. At the time, all burdened sellers were outside the state, and most benefited competitors were local. In sustaining the regulation, the Court relied in part upon the state's legitimate interest in deterring preferential retailing by big oil companies. Again, long-term market effects were uncertain. Out-of-state firms that operated retail gasoline stations were stimulated to invest in Maryland, and interstate capital allocation may have wound up very much as it was before regulation.

Product differentiations and rules on how selling may be done, even when parochial, are based on current market conditions. Market adjustments change these conditions, sometimes rapidly, restoring market discipline to the state's political process. The Court's concern is with permanent, less adventitious discrimination. Categorical discrimination

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228 Id. at 460, 463 n.7, 473.
229 See id. at 465-70. Compare Hebe Co. v. Shaw, 248 U.S. 297 (1919) (sustaining ban on condensed skimmed milk that was intended to prevent fraud on consumer) and Plumley v. Massachusetts, 155 U.S. 461 (1894) (sustaining ban on yellow margarine in order to prevent consumer confusion) with Collins v. New Hampshire, 171 U.S. 30 (1898) (striking down requirement that margarine be colored pink). In *Hebe* and *Plumley*, the states offered plausible police power purposes; in *Collins*, New Hampshire did not.
230 *Clover Leaf Creamery*, 449 U.S. at 473.
232 Id. at 123, 125-26.
233 Id. at 124-25.
234 In *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), the Court struck down Florida's ban on certain investment firms with principal operations outside the state. Unlike the statute in *Exxon*, the Florida statute was not evenhanded; it discriminated categorically in favor of local enterprises, against out-of-state competitors. Id. at 42.

"Green River" ordinances forbidding all door-to-door selling have been sustained because they further residential privacy, safety, and quiet, despite resulting advantages to local retailers. See *Breard v. City of Alexandria*, 341 U.S. 622, 638-41 (1951). By suppressing door-to-door selling, these ordinances stimulate mail-order selling as well as local retailing, and they do not favor local goods over imported goods.

resists market adjustments, while partially discriminatory effects are susceptible to change.

Genuine attacks on spill-over costs rarely justify categorical discrimination but often require line drawing that has partially discriminatory effects. Nevertheless, more aggressive judicial intervention is inappropriate because it would severely hamper legitimate state interests. States wanting to suppress commodities thought to be bad, such as "controlled substances," tobacco products, or throw-away beverage containers, would have to justify such "discrimination." As a result, courts might allow one state to suppress imports of a local product, while prohibiting others from pursuing similar policies. For example, it would have been odd to deny Maryland a regulation that was plainly valid in other states that had local gasoline production.235

The Court also sustains state laws that particularly burden export products. When a state and its producers have market power over supply of a resource that is mostly exported, state-imposed costs are largely exported, at least in the short run.236 States have often taken this opportunity to shift costs beyond their borders. California's restriction of raisin supplies,237 Oklahoma's limits on natural gas production,238 Montana's thirty percent coal severance tax,239 and Pennsylvania's anthracite coal tax240 are famous examples of laws that succeeded, at least temporarily, in exporting most of the costs imposed.

The Court rightly refused to invalidate them for several reasons. One already mentioned is that these laws are not categorically protectionist because benefited locals are not competitors of burdened outsiders. Therefore, long-term market adjustments reduce cost exporting and improve local political accountability.241 Also, by prohibiting categorical discrimination against interstate or foreign commerce, the Court imposes some political restraint.

Another reason to sustain these laws is the states' important, legiti-

235 See Exxon, 437 U.S. at 128 n.18 (naming four other jurisdictions with similar laws).
236 See, e.g., R. Posner, supra note 134, at 603-04; Levmore, supra note 161, at 617-18. Similarly, when a state constitutes a large part of the market consuming a product that is largely imported, taxes on that product will be partly exported to outside producers. See notes 170-71 and accompanying text supra. When a developed market or industry is concentrated in one state, it has some market power to tax imports and exports, limited by the threat of external competition or migration of the industry. See, e.g., Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) (invalidating tax that favored in-state transfers of securities in New York); Hatch v. Reardon, 204 U.S. 152 (1907) (upholding tax on stock transfers made in New York as applied to intrastate transactions).
241 See text accompanying notes 168-74 supra.
mate interests in regulating and taxing local production. The Court has no sound way to measure the extent of legitimate interests, so it cannot define how much state taxation or regulation is too much.242

A third reason to uphold these laws is the normative judgment that natural advantages belong to the people of the state. Therefore, it is proper for state residents to enjoy their benefits.243 One may disagree with the Court’s application of this value from either a state or national perspective. The Court’s doctrine may be criticized as insufficiently deferential to state interests because states are not allowed to exploit their geographic location244 or to discriminate with respect to resources.245 Or the Court may be criticized as too generous to states because much state resource wealth was conferred gratis by the federal government.246 The Court’s rule, however, is reasonable because it invalidates only laws in which the enacting state's interest and political restraint are weak.

D. Curbing Burdens on Commerce in Transit and External Transactions

1. Allocating Jurisdiction

State laws that are not categorically discriminatory impose greater costs on interstate or foreign commerce than on local trade whenever more than one state regulates or taxes and multiple or conflict burdens result.247 When such laws burden a state’s import-export commerce, their effects are partially protectionist because local businesses bear lower costs than out-of-state competitors. The extent of protectionist impact is a relevant factor in determining validity. But because these costs arise from states pursuing legitimate police power purposes, there is no presumption of invalidity as there is for categorical discrimination. The dormant commerce power doctrine limits these costs only when they significantly burden commerce in transit through the enacting state or commerce occurring essentially outside it.248 In these circumstances, the

242 See Hellerstein, supra note 18, at 45-63; Regan, supra note 18, at 1173; Williams, supra note 166, at 299-309. See generally 1 J. Hellerstein, supra note 145, at 151-65 (discussing taxes on natural resources sold out of state). As the Court has noted, the degree to which the burdens of these laws are actually exported would be very difficult to measure satisfactorily. See Commonwealth Edison, 453 U.S. at 628; id. at 651 & n.16 (Blackmun, J., dissenting).
244 See text accompanying notes 179-81 supra and 270-75 infra.
245 Pennsylvania v. West Virginia, 262 U.S. 553, 595-600 (1923). Chief Justice Rehnquist’s votes in resources cases may be based on this argument. See note 495 and accompanying text infra. Regarding state-owned resources, see notes 337, 357-58 and accompanying text infra.
247 See text accompanying notes 140-42 supra.
248 As previously explained, this statement must be qualified to recognize the invalidity of a
state laws seriously interfere in matters of primary concern to other states, and political and market restraints are ineffective.249

To limit multiple and conflict burdens on commerce in transit and external transactions, the Court allocates jurisdiction to the states with the strongest interest. However, the Court's opinions do not refer directly to the concept of allocation of jurisdiction; it is an analytical description of what the Court does. Allocation is carried out under the Court's standard tests for taxes and for regulations. The tax test requires apportionment of taxing jurisdiction among interested states, so that the overall burden on interstate commerce is comparable to that on intra-state commerce.250 Another part of the tax test denies taxing jurisdiction to states lacking an adequate nexus with the transaction or taxpayer.251 The effect of this requirement is to allocate taxing jurisdiction to a state or states with an adequate nexus. The Court's balancing test for regulations, on the other hand, says nothing about either allocation or nexus, but in fact the test is applied to deny jurisdiction to states with insufficient interest, that is, for lack of an adequate nexus.252

Sections 2 and 3 discuss the two basic forms that the allocation remedy takes: unitary allocation, which confines jurisdiction to one state, and apportionment of taxing jurisdiction among several states. Section 3 also explains the relevance of states' claims for compensation for services provided to, or for costs imposed by, interstate commerce. Sections 4 and 5 discuss application of the allocation principle in two important areas: transportation and commerce in transit, and state regulation of external markets.

While the Court's rulings improve allocational efficiency, their essential aim is to protect policy choices of the states with the greatest interest in a transaction from interference by other states. If the most interested states elect not to tax or regulate, their laissez-faire decisions are not undercut by other states.

When the dormant commerce power doctrine succeeds in allocating authority to the state or states most strongly interested in a subject, efficiency is improved in another way. The state most strongly interested is usually the state in which costs of regulation principally fall, and its local political process then restrains excessively burdensome legislation.253

few protectionist laws that are not quite categorically discriminatory, but are practically so. See text accompanying notes 223-24 supra.
249 See text accompanying notes 159-63, 174 supra.
250 E.g., Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980); see also text accompanying notes 264-69 infra (discussing apportionment requirement).
253 See text accompanying notes 156-63 supra.
2. Unitary Allocation

Many state regulations and tax laws are subject to unitary allocation; the Court confines jurisdiction to the state with the strongest interest in the subject matter. When this is done, multiple and conflict burdens that would arise if two or more states had jurisdiction are prevented. The Court precludes jurisdiction of other states on the basis of insufficient interest, as expressed in several distinct rules. Taxing jurisdiction is denied for lack of nexus. Judicial jurisdiction is denied under the due process clause for lack of "minimum contacts." Jurisdiction to require foreign corporations to qualify to do local business is denied when they do exclusively interstate commerce. Jurisdiction to tax ships has been precluded under the "home port rule," limiting property taxes to a ship's principal home. Regulatory jurisdiction is precluded under the Court's balancing test. That test also allocates taxing jurisdiction in foreign commerce, where the Court has no power to apportion.

The Court is likely to allocate exclusive jurisdiction to one state when buyer and seller are both located there, or the state confines its

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254 A state may have sufficient interest for one kind of jurisdiction but not for another over the same person or corporation. For example, states can at times tax foreign corporations that they cannot require to qualify to do local business. See Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 40 n.6 (1974) (Rehnquist, J., dissenting). Jurisdiction to tax is accorded greater deference because the mediate remedy of apportionment reduces multiple burdens, the state's interest in taxing is always important, and local political restraint on taxes is usually more effective than it is on regulations.

255 The Court has rested decisions on both the commerce clause and the due process clause. See National Bellas Hess, 386 U.S. at 756-60 (1967) (no jurisdiction to impose sales tax on mail-order seller with no agents or property in the state); see also 15 U.S.C. § 381 (1982) (denying state power to impose net income tax on sellers that merely solicit orders in state). Use of the term "allocation" seems to have originated in the tax field. See 1 J. Hellerstein, supra note 145, at 328 n.95. But at least one scholar has used the term allocation to describe only what is now called apportionment. See Freund, Umpiring the Federal System, 54 Colum. L. Rev. 561, 570-71 (1954).

256 See Hanson v. Denckla, 357 U.S. 235, 251 (1958); see also Davis v. Farmers Coop. Equity Co., 262 U.S. 312, 315-17 (1923) (commerce clause barred nonresident's state court suit against corporation when corporation's only contact with state was presence of local soliciting agents).


258 See 1 J. Hellerstein, supra note 145, at 128-32. For a short period, airplanes may have been subject to the same rule. See id. at 132-34. The Court now requires apportionment for both. See id.

259 Edgar v. MITE Corp., 457 U.S. 624, 634-39 (1982); see note 122 supra; notes 302-17 and accompanying text infra.


261 See Edgar, 457 U.S. at 641-43 (invalidating takeover regulation that directly interfered with interstate transactions).
imposition to a distinctly local aspect of an interstate transaction,262 or the state's regulations and taxes specifically address the local costs of a regulated business.263 In these respects, unitary allocation resembles the tax requirement of apportionment: the effect of unitary allocation is to "apportion" different parts of an interstate transaction to different states.

3. Tax Apportionment

When more than one state has a sufficient nexus to an interstate transaction or business, multiple taxation is avoided by requiring apportionment. Each state must limit its tax on an interstate transaction or business to a fraction of the tax it imposes on an intrastate transaction or business, based on the proportion of the taxed activity occurring in the state.264 Taxes commonly apportioned include income taxes on interstate firms and property taxes on instrumentalities of interstate transportation. Income taxes are apportioned according to the percentage of a firm's sales and other activities in the taxing state.265 Property taxes are apportioned based on time present or miles traveled in the taxing state.266

The apportionment requirement for nondiscriminatory taxes necessarily accords states discretion to select an apportionment formula. This avoids judicial prescription of uniform national apportionment rules. Any reasonable basis for apportionment protects a formula against facial attack, and applications are invalid only in cases of extreme disproportion.267 However, the Court’s deference probably varies according to the subject of a tax. Most modern apportionment cases have challenged state income taxes on enterprises doing in-state business.268 The state's interest in the subject is strong, local political restraint is effective, and interstate competition for investment restrains state excesses. Exact ap-

264 See, e.g., Central Greyhound Lines v. Mealey, 334 U.S. 653, 661-63 (1948); Watson, Allocation of Business Income for State Income Tax Purposes, 25 Minn. L. Rev. 851, 879-914 (1941). The Court has held that apportionment is required by both the commerce clause and the due process clause of the fourteenth amendment. See Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).
266 See Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) (sustaining apportioned tax); cf. Japan Line v. County of Los Angeles, 441 U.S. 434 (1979) (invalidating state tax on property owned abroad under foreign commerce clause because Court was powerless to correct resulting multiple taxation by apportioning tax among nations).
268 See, e.g., Container Corp., 463 U.S. 159.
portionment of income taxes is difficult anyway. Under these circumstances, the Court is quite right to defer generously to state apportionment formulas.

Apportionment of taxes on interstate transportation, the subject of many earlier Court precedents, may warrant more active judicial review. The state’s interest is less important, costs are more readily exported, local political restraint is weaker, and interstate competition is reduced by monopoly power over trade routes and related factors. Moreover, more accurate apportionment is feasible.

4. Transportation and Commerce in Transit

The most important application of the allocation principle is to limit multiple and conflict burdens that states impose on commerce in transit. In their impact on border-crossing commerce, such laws are not protectionist because they do not benefit local competitors of burdened enterprises. Rather, states seek valid police power objectives: revenue, safer and less congested highways or railroads, cleaner air, less noise, noncompetitive jobs for residents. But multiple costs and conflicting rules result, and unique geographic location gives states monopoly power to extract high prices from goods or passengers in transit. The strategic city astride a trade route exacting tribute from all who pass has been with us since ancient times. It is no coincidence that many prominent cases have arisen in places with favorable geography.

When state laws impose heavily on goods passing through the state, they interfere in transactions of primary concern to the states importing and exporting those goods. Cost exporting is substantial and durable. Few local interests benefit from trucks, trains, buses, telegraph wires, or pipelines crossing a state, or from the goods they carry. Market adjustments overcome some costs, but monopoly power over geographic routes allows a significant degree of permanent cost exporting. Because almost the whole state benefits from impositions on commerce in transit, local

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269 See, e.g., Wallace v. Hines, 253 U.S. 66 (1920); text accompanying notes 276-89 infra; see also 1 J. Hellerstein, supra note 145, at 126-34 (discussing current approach to commerce clause); id. at 632-54 (discussing transportation companies).
270 See R. Posner, supra note 134, at 604-05. This observation also applies to communications enterprises that are location-specific. However, new fiberoptic and satellite technology has reduced state power to exploit communications in transit.
271 See, e.g., C. Oman, The Byzantine Empire 4-6 (1892) (discussing commercial control of Bosporus by Byzantium).
political restraint is ineffective to moderate the temptation to extract a high price for passage.

Judicial protection of commerce in transit cannot be carried out under simple legal rules. The antidiscrimination rule applies, but after judicial enforcement of that rule for more than a century, most costs that state governments impose on transportation do not categorically discriminate against interstate commerce generally or against commerce in transit. In addition, nondiscriminatory laws typically impose costs on transportation enterprises that conduct import-export and local commerce as well as commerce in transit. Although laws may primarily burden commerce in transit, their effect is rarely, if ever, limited to commerce in transit.

Laws that demand higher costs from transportation than from other businesses have partially protectionist effects. Higher transportation costs reduce competition from distant suppliers and customers in proportion to their distance from markets. On the other hand, transportation firms should pay their fair share of local taxes, and states have legitimate health, safety, environmental, and other concerns that can be met only by restrictions that fall heavily on transportation. Moreover, the Court must not deter states from providing transportation facilities and improving their infrastructure by restricting their just claims for payment.

These conflicts are a central dilemma of dormant commerce power law. On the one hand, multiple and conflict burdens on transportation impose heavy costs, exploit monopoly power over movement of goods through a state, protect local producers and customers by raising the shipping costs of their distant competitors, and are poorly disciplined by local politics. On the other hand, federal law should not create a preferential status for the transportation industry and other national and international firms. Since the Court cannot achieve precise balance between these interests, its rules inevitably give the benefit of doubt either to state autonomy or to interstate movement. For many decades, the tilt favored interstate enterprise under categorical rules forbidding direct burdens on interstate commerce or any state regulation of subjects that required national uniformity. The balance has shifted in favor of state autonomy in close cases. The modern Court also leaves more to market adjustment. As the Court pulled back, Congress enacted some statutory restrictions on state taxes.

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274 But see text accompanying notes 282-89 infra.

a. **Taxes.** The Court’s tax tests apportion jurisdiction to tax transportation so that interstate commerce pays taxes that are comparable to those levied on local firms. A specific application of the nexus rule prohibits ad valorem taxes on goods in transit.\(^{276}\)

The thorniest issue posed by state taxation of interstate transportation arises from state claims for payment for governmental services rendered. This is a formal balancing factor in the Court’s tax validity test,\(^{277}\) but it has been misunderstood. It has no application to purely import-export cases, which turn on protectionism or discrimination.\(^{278}\) Rather, the payment factor applies in cases when a nondiscriminatory law imposes on commerce in transit, and the state argues that its law is justified as compensation for services. The most common application is to sustain highway taxes that pay for road construction and maintenance.\(^{279}\) A more obvious application is to cases in which a state collects a fee measured by services consumed rather than a tax.\(^{280}\)

The Supreme Court often defers to payment claims because excessive judicial intrusion could deter useful state undertakings. Its policy is expressed in Justice Clarke’s aphorism that interstate commerce “must pay its way.”\(^{281}\) However, less deference is shown to the extent that a state tax falls on commerce in transit rather than on import-export and

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\(^{276}\) See Maryland v. Louisiana, 451 U.S. 725 (1981); Minnesota v. Blasius, 290 U.S. 1 (1933); cf. 1 J. Hellerstein, supra note 145, at 134-38 (stating that viability of traditional rule barring taxation of goods in transit is uncertain as applied to fairly apportioned tax).

\(^{277}\) See P. Hartman, State Taxation of Interstate Commerce 122-30 (1953).

\(^{278}\) See text accompanying notes 189-98 supra and 385-93 infra. Thus, a taxpayer involved in import-export commerce may not prevail on the claim that it pays for more than it receives. See, e.g., Commonwealth Edison Corp. v. Montana, 453 U.S. 609, 617-29 (1981).


\(^{280}\) See, e.g., Packet Co. v. City of St. Louis, 100 U.S. 423 (1880) (permitting city to impose fees for use of its wharves); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (upholding pilotage fee); text accompanying notes 377-93 infra (discussing charges for state services or property).

\(^{281}\) Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252, 259 (1919); see also Powell, State Income Taxes and the Commerce Clause, 31 Yale L.J. 799, 799-800 (1922). This concept surfaced in Justice Miller’s opinion in Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 137 (1869).
local commerce. Moreover, there are disagreements and some doctrinal confusion within the Court. These points are illustrated by *American Trucking Associations v. Scheiner.*

The Court overturned Pennsylvania's annual "flat" tax on trucks using state highways. Although there were ample nonhighway precedents supporting invalidation of what amounted to an unapportioned property tax on instrumentalities of interstate transportation, the Court had sustained most highway levies as payment for road use. The dissenters in the case rightly argued that the decision was against the weight of precedent. The traditional reasoning in this class of cases required a state to justify failure to apportion its tax by its claim to payment for highway construction and maintenance. In other words, the Court had balanced the burdens imposed on commerce in transit and partially protectionist effects on import-export commerce against state payment claims.

Rather than distinguish precedents on traditional grounds, the majority rested its decision on "discrimination" against interstate commerce. Payment for highway use was relegated to an affirmative defense to discrimination, and commerce in transit was not mentioned at all. This went beyond the traditional definition of discrimination to embrace any multiple burden involving only partially discriminatory effects. Since the Court surely cannot intend to strike down all multiple burdens (else we have no federal system), resting its decision on discrimination so defined converts that concept from a useful legal rule into a post hoc conclusion.

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283 See id. at 2831.
285 See *American Trucking,* 107 S. Ct. at 2848 (O'Connor, J., dissenting); id. at 2851 (Scalia, J., dissenting).
286 As Justice O'Connor noted, that balance might reasonably have been struck more strongly against states in the first place, but sharply altering the balance here confronted stare decisis more directly than the majority acknowledged. See id. at 2848-51 (O'Connor, J., dissenting).
287 Id. at 2842-43.
288 See id. at 2838-47. The truckers argued another theory of discrimination as well. When it enacted the tax at issue, Pennsylvania inartfully reduced its annual registration fee for local trucks by the amount of the tax, so that the immediate burden fell only on trucks registered in other states. Id. at 2835-36. This action reduced a charge previously imposed only on local trucks. Although the Court did not expressly rely on this alternate theory, it may have influenced the outcome; Pennsylvania's action departed from established interstate accommodations on truck registration fees.
289 The Court's leading precedents had sustained "flat" state highway taxes. See Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950); Aero Mayflower Transit Co. v. Board of R.R. Comm'r's, 332 U.S. 495 (1947). The *Aero Mayflower* Court unanimously and expressly decided
b. Regulation. Transportation regulation generates a distinct problem. In reviewing other kinds of regulation, the Court can abate the costs of conflicting and multiple state rules by allocating jurisdiction to the one state with the greatest interest in the subject. For regulation of transportation passing through several states, unitary allocation is not feasible. The states of origin and destination have the dominant interest in goods carried, sufficient to prohibit their taxation en route. But all affected states have a strong regulatory interest in instrumentalities of transportation passing through their territory. No state's interest predominates. Some forms of regulation, such as speed limits, port rules, and minimum crew laws, impose no extra costs on transportation passing through compared with local commerce. But others, such as mudflap size, truck size, and train length requirements, impose great costs when neighbors regulate inconsistently.

The Court first recognized this problem in Justice Curtis's famous dictum in Cooley v. Board of Wardens, asserting that states cannot regulate subjects requiring national uniformity. That rule, though only occasionally enforced, was unduly rigid; it denied jurisdiction to all states. In many other instances, state safety laws were upheld as "local" in nature. Since 1937, the Court has eased the uniformity rule to allow conflicting regulations in more circumstances. In addition to laws justified as safety measures, laws have been sustained based on political restraint when costs fall substantially and evenhandedly on both local and import-export commerce as well as on commerce in transit. Some regulations are valid because states regulate compatibly with their neighbors. Only the aberrant law of a state that is unable to show substan-

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that the tax was not discriminatory. See 332 U.S. at 501, 503. Brice had a vigorous dissent from Justice Frankfurter, but he would not have rested invalidity on finding discrimination. See 339 U.S. at 548, 556-57 (Frankfurter, J., dissenting).

Prior to Brice, the Court had struck down several "flat" highway taxes, but each decision was based on the judgment that the state had not fairly related the tax to payment for highway use. None rested on finding discrimination. See id. at 561 app. (Frankfurter, J., dissenting). American Trucking may have been consistent with these precedents on the ground that the taxes at issue did not fairly relate to costs of highway use. See American Trucking, 107 S. Ct. at 2836. But that does not seem to have been the basis for the Court's decision. See id. at 2836, 2843-47.

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292 Id. at 319. Justice Story had used a similar implied uniformity argument in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), finding that the fugitive slave clause in article IV is exclusive of state authority over the subject. Id. at 622-25.
294 See, e.g., Peik v. Chicago & N. Ry., 94 U.S. 164, 177-78 (1877).
296 See Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 665-72 (1981); Raymond
tial safety justification is overturned.

For example, in *Kassel v. Consolidated Freightways Corp.*, the Court struck down Iowa's truck length law. Iowa's differences from her neighbors imposed heavy costs on commerce in transit through the state. The law was not protectionist because burdened outsiders were not competitors of benefited locals. But costs imposed fell almost entirely on commerce in transit because the state had enacted special exceptions for import-export and local commerce. The exceptions diminished already weak local political restraint. Thus, costs were almost entirely exported, and market adjustments would not overcome the state's actions. The state's exceptions also belied its safety and road maintenance justifications.

Some members of the Court confused the case by focusing on the interests of neighboring states that might have received increased truck traffic when trucks detoured around Iowa. This was unimportant because if Iowa could deter trucks from passing through the state, so could other states. The main problem was extra costs imposed on buyers and sellers of goods passing through or forced to go around Iowa, which interfered with legitimate interests of the states of origin and destination.

In sum, state laws burdening transportation typically impose on commerce in transit, import-export commerce, and local commerce in different proportions according to circumstances. Judicial review applies both the antiprotectionism norm governing import-export commerce and the allocation and uniformity tests for commerce in transit, seeking to confine a state to its fair share of taxes or payment for services and to require that regulations relate to important local matters.

5. *Interference in External Markets*

Regulations that interfere in external markets must meet the Court's allocation and antiprotectionism norms. State laws regulating corporate takeovers, for example, restrain share sales occurring entirely outside the regulating state. They prevent some takeovers altogether and raise costs of others substantially. Impositions compound when more than one state regulates the same target corporation. The statutes are not categori-


298 Id. at 671.

299 Id. at 678.

300 See id. at 675 n.18, 675-77. Justice Brennan's concurring opinion labeled the state's law protectionist. See id. at 680, 685, 686 (Brennan, J., concurring). This seems incorrect. See text accompanying notes 186-87 supra.

301 See Jarrell, State Anti-Takeover Laws and the Efficient Allocation of Corporate Control:
cally discriminatory, but their purpose and effect can be protectionist in some circumstances. When the target and its management are local, legislative motives might include protecting incumbent management and restraining firms from leaving the state.

The Court reached opposing results in reviewing Indiana's and Illinois's antitakeover statutes. It struck down the Illinois law in *Edgar v. MITE Corp.*,\(^{302}\) but it sustained Indiana's in *CTS Corp. v. Dynamics Corp. of America*.\(^{303}\) In each case, most of the target's shareholders, and the raider attempting to buy their shares, were located outside the regulating state.\(^{304}\) Each state attempted to use its status as incorporator of the target corporation and home of a sizable minority of its shareholders to regulate transactions between parties outside the state.\(^{305}\) Ironically, the Indiana law that was sustained had protectionist effects as applied, while the invalidated Illinois application did not.\(^{306}\)

To justify different outcomes, the Court relied on two distinctions between the statutes,\(^{307}\) both of which related to the allocation principle. First, the Illinois statute had much broader application. It regulated corporations of other states, corporations doing little or no business in the state, and corporations lacking local shareholders.\(^{308}\) The heart of the *MITE* decision was the Court's judgment that the regulated transactions between buyers and sellers outside Illinois were not sufficiently Illinois's

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\(^{302}\) *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

\(^{303}\) *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987).

\(^{304}\) See *Edgar v. MITE Corp.*, 107 S. Ct. at 1651-52; *MITE Corp. v. Edgar*, 107 S. Ct. at 1651-52; *MITE*, 457 U.S. at 641-42.

\(^{305}\) See *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. at 1652.

\(^{306}\) See *MITE Corp. v. Edgar*, 457 U.S. at 645-46.

\(^{307}\) In *MITE*, the target was incorporated in Illinois but had its principal place of business in Pennsylvania. There was no indication that it did substantial business in Illinois or that incumbent management had any connection with Illinois. The Indiana statute sustained in *CTS* was interpreted to require that the target be incorporated in Indiana and have either its principal place of business or at least substantial assets in the state. See *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. at 1651-52.

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affair to justify so much interference. The case was but a step beyond Hanson v. Denckla; Illinois just barely met the due process test of minimum contacts.

By contrast, Indiana’s law was limited in scope to insure that Indiana would have the greatest interest of any state. It was confined to corporations that were chartered in the state, had a large number of local shareholders, and were principally based or had major operations there. If jurisdiction to regulate takeovers was allocated to one state, Indiana was the proper choice. To strike down the Indiana statute would effectively have been to hold that no state could regulate because regulation confined to share sales occurring within any one state would be ineffective.

The Court also relied upon the states’ form of regulation in evaluating the statutes. Indiana required a shareholder vote on whether shares bought by an acquiring corporate raider should have any voting rights, and the state justified its law based on the state’s interest in governance of its own corporations and in protection of the interests of small shareholders. By contrast, Illinois empowered a state official to forbid takeovers whenever the official viewed them as substantively unfair. Thus, Indiana was acting more in the traditional role of regulating internal corporate governance, and its law was arguably less burdensome.

These cases presented competing visions of the dormant commerce power doctrine. Some Justices have been willing to apply the doctrine to promote allocational efficiency in interstate markets. To them, both statutes should have been invalid because both effectively stifled takeovers, suppressing allocational efficiency in the interstate market in corporate control. But the Court’s majority, consistent with most precedents, was concerned with discriminatory, multiple, or conflicting regulations. By confining regulatory power to a single state and requiring it to act without categorical discrimination, the majority enforced the doctrine’s traditional norms.

An important issue left open is what state, if any, has a sufficiently dominant interest to regulate takeovers under facts such as MITE’s, where a corporation formed under the laws of one state does business

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309 See id. at 641-46.
312 See id. at 1650-51.
313 Id. at 1651.
314 See MITE, 457 U.S. at 626-27.
315 See, e.g., CTS, 107 S. Ct. at 1655-56 (White, J., dissenting).
316 See, e.g., id.
317 See id. at 1640.
elsewhere. *MITE* can be read in two ways on this issue. If *MITE* held Illinois’s law *facially* invalid because it would apply to some firms incorporated in other states or lacking local shareholders, then perhaps any state law confined to its own corporations will be upheld. On the other hand, if *MITE* held Illinois’s law invalid *as applied* to the facts of *MITE*, which involved a firm actually incorporated in Illinois and having a significant number of local shareholders, then the Indiana statute’s application only to firms doing substantial local business is the only important distinction. If the latter reading is correct, there may be no state able to regulate on facts like *MITE*’s. The incorporating state’s interest was insufficient under *MITE*. Likewise, a state, other than the state of incorporation, where a corporation does the largest share of its business would not have a sufficient interest in corporate governance to justify protectionist and external effects.

Perhaps the essential distinction between the Indiana and Illinois laws was the form of regulation. The Indiana law sustained in *CTS* regulated the voting rights of its own corporation, and the Illinois law invalidated in *MITE* controlled the fairness of share purchases. If that is the crucial distinction, and doing substantial local business is not essential, *MITE* is simply a limit on state regulation of foreign corporations. In that event, Delaware has the power to stifle takeovers of half the major firms in the country.

Price fixing cases also involve direct interference in the business of another state. In *Baldwin v. G.A.F. Seelig, Inc.*, the Court struck down New York’s attempt to impose a minimum price for milk purchases from in-state and out-of-state dairy farmers. Firms importing milk into New York were required to show that they had paid out-of-state farmers the price set by New York. The scheme was protectionist because it required that transportation costs be added to the minimum price, mandating a price advantage for dairy farmers closest to markets. It also favored producers who were less efficient than the interstate market average. The Court's opinion relied on the latter

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*318 The Court’s opinions are polysemous on this question. *MITE* reads like a typical opinion holding a statute invalid as applied. See *MITE*, 457 U.S. at 644 (expressly rejecting Illinois's attempt to justify its law as applied to the facts). Justice Powell, who wrote the majority opinion in *CTS*, seemed to distinguish *MITE* on grounds that assumed it to be based on facial invalidity. See *CTS*, 107 S. Ct. at 1651-52. Justice Powell’s opinion is tantalizingly ambiguous, and the issue is not elucidated by Justice White’s dissent in *CTS*. See id. at 1653 (White, J., dissenting).

*319* 294 U.S. 511 (1935).

*320* See id. at 519.

*321* See id. at 520 n.1, 527-38. The Court noted this fact, but did not rely on it for its decision. See Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 376 (1964).

*322* *Baldwin*, 294 U.S. at 522, 527. This would be protectionist if New York farmers were
factor. The Court also stressed that New York was regulating transactions in Vermont. Because Vermont clearly had the greater interest in these transactions, New York’s law was struck down as applied.

In Brown-Forman Distillers Corp. v. New York State Liquor Authority, the Court invalidated maximum price fixing. A New York law mandated that wholesale liquor prices charged in New York by interstate producers be no higher than the lowest price they charged anywhere in the nation during the previous month. The Court held this to be unwarranted protectionism to benefit New York liquor buyers. Liquor producers operating only in New York were not directly burdened by the rule but had to conform substantially to it or be undersold. It is unlikely that the law affected New York imports or exports of liquor at all. The Court presumed that the law improperly burdened interstate commerce by forcing up the price of liquor in other states, particularly smaller ones. In other words, New York was exploiting market power as a large consumer to gain advantage at the expense of smaller states. The dissent stressed the absence of proof that the law had these effects, while the majority seemed willing to assume them.

E. Market Participant Immunity

1. Protectionist Subsidies

In addition to regulations or taxes that discriminate against interstate commerce, a state may favor local commerce with subsidies. Direct cash subsidies to local producers, if derived from general tax revenues, have almost the same economic effect on external competition as tariffs. Nevertheless, the Supreme Court has held that the antiprotectionist subsidies generally less efficient than their competitors in other states. See Brown, supra note 93, at 234.
ECONOMIC UNION

ism rule does not apply to at least some kinds of protectionist subsidies. In *Hughes v. Alexandria Scrap Corp.*, the Court upheld Maryland's cash bounties to state-registered processors of abandoned automobile hulks. Although the state's scheme categorically favored in-state processors over external competitors, the Court held that protectionist subsidies by states as "market participants" are immune from the dormant commerce power doctrine.

Although the Court stated that the question presented in *Alexandria Scrap* was "without precedent," prior decisions indirectly supported its holding by sustaining state regulation of natural resources and of markets in which the state was actively involved. The Court has followed that subsidies are paid from general state tax revenues. This means that the state's tax rates, including taxes paid by subsidized producers, are adjusted to pay for the subsidy, offsetting part of its cost. I also use the term "subsidy" to mean a positive benefit paid out of state funds or other property. Tax exemptions, although they are sometimes called "tax subsidies," are not immune from dormant commerce power scrutiny. See *Westinghouse Corp. v. Tully*, 466 U.S. 388 (1984).

Although the Court's opinion did not specifically limit the scope of its announced rule to protectionist subsidy cases, I believe the limitation to be implied by other precedents. See text accompanying notes 363-69, 379-93 infra.

The Maryland law could have been sustained on narrower grounds because it did not categorically discriminate against interstate commerce. Although the law explicitly favored transactions within Maryland over exports and transactions wholly outside the state, it also stimulated imports. Thus, it had partially discriminatory effects. See *Alexandria Scrap*, 426 U.S. at 820 (Brennan, J., dissenting). Moreover, the scheme as a whole may not have burdened interstate commerce. Maryland may have created the market it skewed. See id. at 814-16 (Stevens, J., concurring). Finally, Maryland had a legitimate interest in disadvantaging outside processors because these businesses attracted many more hulks abandoned outside Maryland. See id. at 812-13 (Brennan, J., dissenting).

334 426 U.S. at 807.

335 Id. at 810. Several scholars have argued that the decision was wrong. See Blumoff, The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly, 1984 S. Ill. U.L.J. 73, 108-12; Varat, supra note 246, at 501-08, 562-64; The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 70-78 (1983); Note, 18 B.C. Indus. & Com. L. Rev. 893, 921-28 (1977). Contra Regan, supra note 18, at 1196 n.203.

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336 426 U.S. at 807.

337 See *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 357 (1908) (water), limited by *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954-58 (1982); *Geer v. Connecticut*, 161 U.S. 519, 604-06 (1896) (game), overruled by *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979); *McCready v. Virginia*, 94 U.S. 391, 396-97 (1876) (planting oysters in state-owned river bed); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855) (oysters in state-owned submerged lands). *Sporhase* and *Hughes* were based on the judgment that the states' ownership claims to water and wild game were fictional, and the commerce involved was actually private. See *Sporhase*, 458 U.S. at 951-54; *Hughes*, 441 U.S. at 335-56. Both opinions imply that if the state had actually owned the resource, its preference for residents would have been valid.

338 See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183-85 (1868) (insurance, which was heavily regulated); *Nathan v. Louisiana*, 49 U.S. (8 How.) 73, 81 (1850) (banking, in which states often had substantial ownership). *Paul*'s definition of commerce was repudiated in
The Reeves Court offered four reasons for market participant immunity: support in case law for the distinction between states as "market participants" and as "market regulators," state sovereignty, difficulties in analyzing state actions in the market, and equitable treatment of public and private market participants. The Court's first argument, that precedents "comport" with the rule, was somewhat circular. It did not address the propriety of distinguishing clear precedents against state protectionism when states are involved in the market.

The Court's second ground was state sovereignty. This is logically sound if one accepts the Court's distinction between state activities and state regulation of private persons that was the basis for National League of Cities v. Usery and for the Court's decisions on state immu-


Florida's prohibition on sales of unripe citrus fruit was sustained against a dormant commerce power attack in Sligh v. Kirkwood, 237 U.S. 52 (1915). According to the opinion, the state's purpose may have been to enhance the market reputation of local fruit. See id. at 61. However, rather than according Florida market participant immunity and upholding the law as an active subsidy, the Court concluded that the ban was valid as a public health measure. Id. at 61-62.

The same policy reasons that justify market participant immunity may underlie the Court's earlier precedents sustaining compensating use taxes and other taxes designed to neutralize advantages for interstate commerce created by a state's domestic taxes. Subsidies impose costs on voters, so that local political restraint is strong. See notes 206-10 and accompanying text supra.

342 447 U.S. at 436.
343 Id. at 437.
344 See id. at 438.
nity from federal taxes. In the dormant commerce power context, deference to state sovereignty may be as much a pragmatic policy as a normative one. In *Reeves*, South Dakota’s cement production and distribution scheme was a complex, affirmative undertaking that required active state involvement in the market. The Court stressed that states might be unduly discouraged from useful activities if the commerce clause limit were enforced against them.

The third justification was that when states act in a proprietary capacity, cases are “difficult to assess under traditional commerce clause analysis.” One reason is the lack of announced rules when a state trades rather than governs. State trading that consistently favors local suppliers or customers may be protectionist, or local parochial preferences may be justified by market conditions. Lacking an explicit statute, rule, or contract, reviewing courts would have difficulty determining when local firms have no market advantage justifying the state’s preference.

In addition, active subsidies are difficult to assess because they are pervasive. State or local public works subsidize all firms that enjoy public benefits worth more than the taxes they pay. Many public works decisions have parochial motivation. Highways and public buildings are located to favor in-state interests, grants are made to chambers of commerce, and tourism offices advertise local businesses. Quality inspection programs enhance local products at state expense. These actions are

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346 See, e.g., *New York v. United States*, 326 U.S. 572 (1946). The distinction is questioned in *Varat*, supra note 246, at 494-99. There are analogs in other constitutional doctrines. States as buyers were immune from the due process strictures of *Lochner v. New York*, 198 U.S. 45 (1905); in *Atkin v. Kansas*, 191 U.S. 207 (1903), the Fuller Court upheld a state law setting an eight-hour limit on the working day of employees of the state or any of its subdivisions and of employees of public works contractors. Also, bona fide state residence as a condition for distribution of state benefits is impervious to attack under the equal protection clause. See *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (involving free public education); cf. *Truax v. Raich*, 239 U.S. 33, 39-40 (1915) (distinguishing regulation of private markets from “the regulation or distribution of the public domain, or of the common property or resources of the people of the State” and regulation of “persons who are engaged on public work or receive the benefit of public moneys”).

Other intergovernmental immunity cases are based on the same policy: the constitutional scheme requires state governments to have basic freedom from federal control in conducting state operations. The Court has read partial state immunity into the antitrust laws. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). And it construes the word “person” in federal statutes not to include states unless contrary intent is clear. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979).

347 See *Reeves*, 447 U.S. at 438-39, 441, 446. This notion appears occasionally in earlier opinions. See, e.g., *Veazie v. Moor*, 55 U.S. (14 How.) 568, 574 (1852) (stating that such enforcement would “effectively prevent or paralyze every effort at internal improvement by the several states”).

348 *Reeves*, 447 U.S. at 439.

protectionist; they give local firms competitive advantages over outsiders. To police them under the dormant commerce power would be more intrusive than review of regulations and taxes, and line drawing would be quite difficult. The Court would have to evaluate the degree of subsidy in every public service that favors residents.

Subsidies are also difficult to assess as burdens on commerce. When a state is one of many buyers or sellers in a reasonably competitive private market, the state's parochial actions may impose a negligible burden on the market. In paying subsidies, the state does not directly impose on any outsider; rather, it aids local competitors.\textsuperscript{350} In some instances, subsidies stimulate commerce that would otherwise not exist. It is hard to see why out-of-state traders should have a federal right to share in commerce created by the state.\textsuperscript{351} Sometimes subsidies distort an existing private market in favor of local enterprise; their effect is then similar to that of invalid regulations and taxes. It would, however, be difficult to separate subsidies that burden preexisting trade from those that stimulate new trade.\textsuperscript{352}

The Reeves Court's fourth ground for decision—a concern for "evenhandedness" in the marketplace\textsuperscript{353}—was less substantial. The Court argued that states as market participants should have the same freedom, and be subject to the same market restraints, as private market actors.\textsuperscript{354} This reasoning begs the question because a state's unique response to parochial politics is the basis for the dormant commerce power limitation itself. Invocation of the concept of "evenhandedness" without accounting for the unique position of states as political bodies is circular. Market restraints may satisfactorily limit the damage states as spenders can do, but it is hard to see what that has to do with "evenhandedness."

The Court's third and fourth grounds hint at a somewhat different basis to justify the exception for states as market participants. Subsidies do not distort local politics nearly as effectively as do protectionist regulations and taxes or transportation regulations. Subsidy costs are directly borne internally. The immediate expense is borne by the state treasury or other state property.

In all cases, political restraint works more reliably when states spend their citizens' tax money on subsidies than when they merely allo-

\textsuperscript{350} The issue is more difficult when a subsidy has the form of reducing or forgoing, for local firms only, a charge or condition imposed on outsiders. See note 378 and accompanying text infra.


\textsuperscript{352} See id. at 809 n.18.

\textsuperscript{353} 447 U.S. at 439.

\textsuperscript{354} See id.
cater advantages among classes of private persons through regulation. While the general consumer interest is a weak restraint on regulation that raises prices, the general taxpayer interest is stronger. Voting taxpayers may not pay precise attention to every item of state expenditure, but they do pay attention to the overall burden. This in turn disciplines legislatures to be more cautious when they spend than when they regulate. Interstate competition for people and capital makes this restraint more effective at the state than at the national level.

The Reeves Court also suggested that since a state's property belongs to its people, local favoritism is appropriate. Yet, the state treasury and state property are, for the most part, simply accumulations of state taxes, collected from out-of-state merchants as well as locals. Even so, reservation of resources for state citizens exports costs to a lesser degree than laws that selectively impose on outsiders. The treasury and other property of a state are sufficiently related to the tax burden on its own citizens to restrain subsidies by normal political discipline.

These reasons persuasively support the Court's implicit conclusion that policing subsidies is less important to national market interests and more intrusive upon state autonomy than judicial review of taxes and regulations. They do not, however, dictate judicial abstention. For example, under the Treaty of Rome, policing subsidies is an important function of the European Court of Justice. But the Treaty has standards, albeit vague ones, about the kinds of subsidies that are invalid. Moreover, political traditions in the United States are much charier of direct subsidies than European traditions.

Alexandria Scrap, Reeves, and White involved procurement and active subsidies rather than direct, passive subsidies. Alexandria Scrap and White concerned governmental procurement; in each case the state's primary aim was to purchase goods or services, and in doing so it favored local suppliers. Although Reeves was closer to a pure subsidy for residents, the state was engaged in a complex, affirmative undertaking and was actively participating in the market.

Passive subsidies may not enjoy the same immunity from dormant commerce power scrutiny that procurement and active subsidies have

355 See M. Kreinin, supra note 171, at 301-02 (comparing political restraint on tariffs with that on subsidies).
356 See Tiebout, supra note 161, at 416, 422 n.18.
357 See Reeves, 447 U.S. at 438-39 n.11; see also Varat, supra note 246, at 504-08 (discussing this issue extensively).
received. The Reeves Court suggested that a statute reserving state-owned natural resources to residents might require a different result. That would constitute a transfer subsidy—a largely passive interference in private markets. The Court has left open the possibility that passive cash or property subsidies, those not involving affirmative state undertakings, will be subject to the antiprotectionism norm of the doctrine. Moreover, two of the Court's bases for distinguishing procurement and active subsidies from other objects of the dormant commerce power doctrine do not apply to passive subsidies. The deterrent effect of commerce clause scrutiny on worthwhile state projects would not justify judicial deference to passive subsidies. Likewise, the problem of assessing state commercial activity that may be based on legitimate proprietary interests and market conditions would not extend to passive subsidies. Although distinguishing passive subsidies from affirmative subsidies or procurement cases may require some difficult line drawing, it is analytically feasible.

Should the subsidy immunity extend to passive, direct subsidies that underwrite local producers? The crucial factor should be the effectiveness of local politics and of competition between states to restrain excessive resort to passive subsidies. The past record strongly suggests that they are effective. The prevalence of passive subsidies in other nations provides some basis for caution. But even when political discipline and interstate competition fail, Congress can intervene to restrain excessive subsidies. On balance, the better rule is immunity for all subsidies. The rule is simple to apply—it eliminates the problems of distinguishing between passive and active subsidies—and judicial intervention is unnecessary.

Another unsettled issue is that of "downstream" restrictions, when states impose on trading partners protectionist conditions that restrict

359 See Reeves, 447 U.S. at 443-44. But see note 337 and accompanying text supra. The Reeves Court's distinction might have been based upon market power over scarce resources rather than upon the general question of subsidy. But the Court's emphasis on the state's complex undertaking suggests that it intended the latter reason. See 447 U.S. at 444. Professor Varat argues that the Reeves dictum precludes favoritism for citizens in allocating scarce state-owned resources. See Varat, supra note 246, at 554-60; cf. Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources, 1979 Sup. Ct. Rev. 51, 76-79 (arguing that state power to distribute state-owned resources does not extend to conditions on disposition that "independently burden" interstate commerce).

360 Reeves was decided by a 5-4 vote, and the Court has consistently described the immunity to be for "market participants," rather than for subsidies. See, e.g., Reeves, 447 U.S. at 436, 440. Thus, the Court could readily distinguish a new case involving passive subsidies.

361 See notes 344-52 supra.

resale or other private trading outside the state. Dicta in the White\textsuperscript{363} and Reeves\textsuperscript{364} opinions said that such restrictions would be a different case. The Court later struck down an Alaska law that required buyers of state timber to process it in the state before export.\textsuperscript{365} The plurality distinguished this restriction on the disposition of goods purchased from the state from market participant subsidies.\textsuperscript{366} It reasoned that a state has greater interest in transactions in which it is directly involved than in subsequent disposition of the goods it sold.\textsuperscript{367} Also, downstream restrictions have a greater regulatory impact than subsidies because they govern private transactions remote from the state’s immediate commercial involvement.\textsuperscript{368}

The dissent countered that the state merely paid “the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber.”\textsuperscript{369} Thus, according to the dissent, the law served as a subsidy to local timber processors.

The distinction between downstream restrictions and direct subsidies is sound. Downstream restrictions require disclosure of parochial standards and enforcement against recalcitrants; they resemble regulations in form. They are not important to maintain a state’s freedom to undertake useful public works. While direct subsidies tend to affect mainly the transactions they create, downstream restrictions interfere with independent, private market transactions and will often reach transactions that would otherwise occur entirely outside the state. Since costs are more likely to be exported or concealed in indeterminate prices, political restraints on downstream restrictions are more attenuated than those on direct subsidies.

The dissent’s rule exempting all conditions attached to subsidies, including downstream restrictions, would be workable. Interstate competition would deter states from demanding too much. However, the plurality’s rule is a better line between the competing policies of a national common market and state freedom of action.

2. Restricting Imports of Subsidized Goods

The exclusion of state-subsidized goods also raises commerce clause

\textsuperscript{363} White v. Massachusetts Council of Constr. Employees, 460 U.S. 204, 211 n.7 (1983).

\textsuperscript{364} Reeves, Inc. v. Stake, 447 U.S. 429, 444 n.7 (1980).


\textsuperscript{366} See South-Cent. Timber, 467 U.S. at 98 (plurality opinion).

\textsuperscript{367} See id.

\textsuperscript{368} Id. at 99.

\textsuperscript{369} Id. at 103 (Rehnquist, J., dissenting).
issues. Nations sometimes restrict imports of goods because of government subsidies to exporting producers. When states prohibit imports of goods subsidized by other states in one situation—goods produced in other states' prisons. These laws were initially attacked under the dormant commerce power. Before the Court could settle the question, Congress expressly authorized such state laws, and the Court sustained them. When states exclude subsidized foreign goods, serious issues of interference in national trade policy arise. Exclusion of state-subsidized domestic goods might be sustained in extreme cases such as those involving prison-made goods. However, allowing exclusion generally would create a sweeping exception to the Court's antiprotectionism rule, because all states aid their own in countless ways. On the other hand, unless preempted by federal statute or treaty, states themselves can decline to purchase subsidized goods under the market participant exception.

3. Charges

When states impose charges or conditions for state services or for use of state property, their actions are often literally those of market participants. These actions, unlike subsidies to local industry, directly burden outsiders, rather than indirectly causing them competitive harm. As noted previously, states are entitled to fair payment for services provided or for use of state property, and they may reasonably condition use of state property. A state participating in the market may charge less to

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371 See People v. Hawkins, 157 N.Y. 1, 51 N.E. 257 (1898); Arnold v. Yanders, 56 Ohio St. 418, 47 N.E. 50 (1897).


375 This would be so particularly if the statute banned all prison-made goods, including those from the enacting state. See Whitfield v. Ohio, 297 U.S. 431 (1936).

376 See text accompanying notes 332-35 supra.

377 See text accompanying notes 277-80 supra.
local commerce than to its external competitors as a form of protectionist subsidy.\textsuperscript{378}

When charges or conditions exceed the state's expenditures, state justification is weaker. The Court's allocation and uniformity rules limit charges or conditions that can be imposed on commerce in transit or external commerce, even when nondiscriminatory.\textsuperscript{379} This limitation is illustrated by the fact that state ownership of highways has not immunized highway taxes and regulations from the dormant commerce power.\textsuperscript{380} Where a state burdens commerce in transit by charging merchants for the use of state-owned property with geographic advantages, costs are exported just as effectively as when state taxes or regulations exploit geography to impose on commerce in transit. Local political restraint on charges is then just as weak as in regulation or tax cases. Charges are subject to none of the discipline that subsidies evoke.\textsuperscript{381} Dormant commerce power limits apply.

Charges or conditions for services or the use of state property in import-export commerce are another matter. As previously noted, a state's regulation of its import-export commerce is generally supported by stronger state interests and is more effectively restrained by market and political forces. Restrictions on import-export commerce are invalid only when categorically protectionist or discriminatory.\textsuperscript{382}

In some nineteenth-century cases, the Court sustained nondiscriminatory wharfage charges for use of public landings.\textsuperscript{383} These decisions contrast with stricter judicial limits in telegraph and highway cases, in which commerce in transit was more heavily involved.\textsuperscript{384}

The Court confronted an interesting mix of these issues in Western

\textsuperscript{380} See text accompanying notes 279-89 supra. Similar rules governed disputes about state and local "pole taxes" levied on telegraph companies. See City of St. Louis v. Western Union Tel. Co., 148 U.S. 92, 97 (1893).
\textsuperscript{381} See text accompanying notes 355-56 supra.
\textsuperscript{382} See text accompanying notes 182-203 supra.
\textsuperscript{383} Compare Ouachita Packet Co. v. Aiken, 121 U.S. 444 (1887) (sustaining allegedly excessive wharfage charges for use of public landing) and Transportation Co. v. Parkersburg, 107 U.S. 691 (1883) (sustaining allegedly extortionate wharfage charges for use of public landing) with Mayor of Vidalia v. McNeely, 274 U.S. 676 (1927) (striking down, under commerce clause, city's attempt to give monopoly landing right to one ferry company) and Guy v. Baltimore, 100 U.S. 434 (1880) (striking down, under commerce clause, public wharfage charges that discriminated between in-state and out-of-state goods) and Cannon v. New Orleans, 87 U.S. (20 Wall.) 577 (1874) (striking down, under duty-of-tonnage clause, "levee dues" on any ship that moored or landed at the port whether or not at a public landing).
Oil & Gas Association v. Cory.\textsuperscript{385} Petroleum companies challenged California's ad valorem charge imposed on imported and exported petroleum products passing through pipelines across state-owned tidal and submerged lands between tankers and refineries. The state defended the charge on the ground of market participant immunity.\textsuperscript{386}

The court of appeals struck down the charge as an ad valorem tariff on goods in transit.\textsuperscript{387} The court's reasoning was doubtful because the goods were not being shipped through California. Rather, they were imports and exports of refineries in the state.

The charge in \textit{Western Oil} did not facially discriminate against interstate or foreign commerce. But because of the location of state tidal and submerged lands, the charge operated virtually as a tariff. Dealers in imported and exported products paid the charge, but local competitors did not. Its effectiveness was bolstered by its relation to the state's wharfage charges at public tanker landings.\textsuperscript{388} The effectiveness of the charge also depended on the existence of alternative ways to ship, such as private tanker landings or private submerged or tide lands, and on competition between California and other states. Since the charge operated as a tariff, it was categorically protectionist.

Market participant immunity allows some forms of state protectionism, but California's reliance on the immunity defense was doubtful. The state had a monopoly on shoreline sites used by oil companies.\textsuperscript{389} Moreover, the tax could not be justified as compensation for state facilities or services. The land that was subject to the charge was unimproved, and the state did not provide it with any services.\textsuperscript{390} The charge did not support any affirmative investment in infrastructure that might be discouraged by judicial intervention.

Although import-export commerce was involved, this was a rare case in which durable cost exporting to other states was probable. Moreover, the federal interest in foreign commerce was involved, and the Court has traditionally deferred less to states in foreign commerce cases than in cases involving interstate commerce.\textsuperscript{391} Even the public wharfage decisions that sustained charges for the use of public landings did not allow explicit discrimination,\textsuperscript{392} so that precedent did not support un-
qualified market participant immunity for charges.

Nevertheless, the case was a close one. Competition between California and other states and private owners may have been sufficient restraint. If the petroleum companies built expensive facilities without first bargaining to limit charges of this kind, they were improvident. We can assume that they would not do so again.

F. Summary

This Part's review of the dormant commerce power doctrine can be briefly summarized. The doctrine's essential purpose is to promote interstate commercial harmony by restraining state interference in the affairs of other states. Interference arises from two basic causes, state protection of local commerce against external competition, and extra costs that result when more than one sovereign regulates or taxes the same person or transaction. The latter costs are of two kinds—multiple burdens, and conflict costs caused by inconsistent regulations.

The competing constitutional value is state autonomy. States have distinctly greater legitimate interest in regulating and taxing their import and export commerce than they have in imposing on commerce in transit through their territory or on transactions occurring outside their borders. Accordingly, judicial review is more deferential when states regulate their import-export commerce. State statutes are upheld unless categorically protectionist, that is, unless they categorically favor a commercial group within the state over its external competitors. Even categorical protectionism is sustained when states are market participants or states justify protectionism for quarantines. Other parochial regulation of import-export markets is left to market and political restraint, which is effective.

State impositions on commerce in transit and on external transactions are struck down not only on the basis of protectionism but also for excessive multiple or conflict burdens. The Court reduces multiple and conflict burdens by allocating jurisdiction to a single state, by requiring apportionment of certain state taxes, and by requiring substantial justification of costly conflict burdens on interstate transportation.

that sound like market participant immunity, but no other Justice joined him. See id. at 444 (Waite, C.J., dissenting); see also Mayor of Vidalia v. McNeely, 274 U.S. 676 (1927) (invalidating town license requirements for passenger ferries operated on boundary waters between states).

393 See Western Oil & Gas Ass'n, 105 Cal. App. 3d at 567 n.4, 164 Cal. Rptr. at 475 n.4.
III

PERSONAL RIGHTS THEORIES

Two concepts derived from the constitutional law of individual rights have been misapplied to the dormant commerce power doctrine. One advocates guarding personal rights of nonresident merchants under the political process theory of judicial review. The other applies the special legislative motivation standard of modern suspect classification law under the equal protection clause.

In a sense these theories are a second coming. In the period of economic due process, from 1890 to 1937, the dormant commerce power doctrine became entangled with asserted personal rights to economic freedom under the fourteenth amendment. Litigants often made alternative claims under both theories, and the Court occasionally said that there is a "right" to engage in interstate commerce. Since 1937, the Court has largely disentangled the two doctrines.

The distortions the new theories create are not obvious because most of them produce results that do not differ from the Court's in the great majority of cases. The distortions are troublesome nonetheless. Personal rights theorists claim that their creations would be more deferential to state autonomy than is the Court's doctrine. The contrary is more likely correct. Like other brands of modern judicial activism centering on individual rights, personal rights theories would probably broaden judicial intrusion under the dormant commerce power. That would be acceptable if these theories produced compensating gains in efficiency, certainty of result, or other useful ends. But they would not; results would become less certain and the doctrine less efficient if the doctrine lost its anchor to the original purposes of economic union and interstate harmony.

A. Political Process Theory as Constitutional Justification

Advocates of personal rights theories for the dormant commerce power reject the Court's existing approach as unjustified in text or history, or as outdated. In particular, Professor Julian Eule argues that the best constitutional justification for policing interstate commerce is the political process theory of Justice Stone and Dean Ely.

Ely has eloquently expanded on Stone to defend much of the mod-

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394 See note 18 and accompanying text supra; text accompanying notes 397-416 infra.
395 See note 19 and accompanying text supra; text accompanying notes 430-71 infra. This theory does not explicitly advocate personal rights for anyone. But the legislative motivation concept it applies is used to secure personal equality, so the concept implicitly brings to disadvantaged classes of persons the rights-based norm of legislative intent.
396 See, e.g., Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).
397 See Eule, supra note 18, at 437-46.
ern Court’s activism as justified to cure defects in democratic political processes. Accordingly, Eule argues that state laws burdening interstate commerce or disadvantaging nonresidents should be invalidated only to reinforce political accountability. And this occurs only when courts void state laws that predominantly disadvantage nonresidents of the state—those unable to vote in its elections.

Ely’s theory has been powerfully criticized. The most important argument against his theory is that it assumes that majoritarian democracy is the predominant constitutional value in every situation. When individual rights against state or federal government are at issue, this assumption begs the question. The same is true when the issue relates to constitutional structure, and the traditional structure is less than perfectly democratic.

The dormant commerce power raises the latter problem. The constitutional issue posed by the doctrine cannot be made into one of majoritarian democracy without disregarding the federal system altogether. The issue is a federal system choice between states and the nation, “determining the locus of power in a federal union.” If states are the proper political units to exercise power over interstate commerce absent a governing act of Congress, it is entirely appropriate for their voters to make laws to their own advantage at the expense of other states and their residents. This is an inherent sovereign power. If the nation is the proper unit, the interests of states and their residents who are burdened by laws of other states may be a relevant concern. Since the essential question is to which level of government the Constitution delegates this power, Ely’s theory is no help.

Moreover, if the Court decides on some other ground (such as an implicit commerce clause purpose to further economic union and interstate commercial harmony) that the proper political unit is the nation rather than the states, the problem of political accountability for the dormant commerce power disappears because Congress has full discretion to

401 I doubt that Ely would agree with Eule’s application of his theory. Ely mentions the concept of virtual representation in connection with the dormant commerce power doctrine, but he seems to be referring to the doctrine’s application rather than to its constitutional basis. See J. Ely, supra note 398, at 83-84. For Eule’s application, see text accompanying notes 405-11 infra.
amend any decision of the Court. The same would be true if the Court had followed Justice Daniel's view and rejected the doctrine; Congress could create it by statute. Process theory says that judicial activism on behalf of unrepresented nonresidents is justified, but one can return to the constitutional text and respond that Congress's power is a sufficient and sufficiently accountable protection for that interest.

Process theory presents another insuperable difficulty. The dormant commerce power doctrine applies to foreign as well as interstate commerce. When one tries to recast the doctrine from promotion of economic union into personal rights of nonresident traders, the foreign commerce branch becomes politically absurd. It is inconceivable that the framers intended to confer personal rights on foreign merchants or consumers.

B. Political Process Theories and Judicial Rules

Even if political process theory does not justify the constitutional decision to police interstate commerce, it might be employed as the best sorting mechanism for the interstate branch of the dormant commerce power doctrine. This hypothesis assumes the constitutional decision in favor of judicial protection of interstate commerce. It addresses the issue of the best way to achieve that goal. Personal rights advocates derive no presumptive superiority from process-based constitutional theories. They must show that they offer a better way to further interstate commercial harmony and a national common market.

As explained in Part II, the Court's existing doctrine prohibits protectionism, allocates jurisdiction to minimize multiple and conflict burdens on interstate commerce, and limits conflicting regulations of interstate transportation. The allocation branch tries to limit jurisdiction to the state with the greatest interest in the subject, usually the state in which the largest share of regulatory costs fall, or to apportion jurisdiction among interested states. This inquiry often coincides with attempts to prohibit excessive burdening of outsiders. And some concept of discrimination is common to both process theories and the Court's antiprotectionism norm. Moreover, some rules of the Court's allocation doctrine are based alternatively on the commerce clause and on the due process clause. Hence, the results of applying a personal rights theory

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402 See, e.g., O'Fallon, supra note 18, at 408.
may not differ dramatically from existing doctrine, at least for interstate commerce.

Professor Eule's analysis of his proposed theory confirms this estimate. He quibbles with the Court's decisions protecting interstate transportation from conflicting state laws, but in the end approves of them. His principal criticism is saved for import-export cases that involve only the antiprotectionism norm. He says that many of these cases, such as *H.P. Hood & Sons v. Du Mond* and *City of Philadelphia v. New Jersey*, were wrongly decided against states because the costs of regulation were not exported, but rather fell mostly within the state. Other decisions sustaining state laws, such as *Exxon Corp. v. Governor of Maryland* and *Minnesota v. Clover Leaf Creamery Co.* were equally wrong because costs were imposed on outsiders.

This analysis is incorrect. As noted in Part II, most import-export regulations do not reliably impose costs on outsiders, except where a state enjoys significant market power. Usually the losers are consumers in the enacting state. If proof of net cost exporting are required, as Eule advocates, most protectionism cases should be decided for the state.

The antiprotectionism rule serves important policy aims that would be impaired if Eule's analysis were adopted. The rule prevents overt hostility to other states and retaliation by competitors, the oppression of weaker states by stronger, and the damage to allocational efficiency caused by the political dominance of protection-seeking special interests. A further practical reason is the simplicity and certainty of the antiprotectionism rule. Eule's alternative, requiring proof of the incidence of taxes and regulatory costs, is impossibly complex. His judgments about the incidence of government-imposed costs in *Hood, Clover Leaf Creamery*, and *Exxon* are unproved and would be very difficult to prove satisfactorily.

Personal solicitude for nonresident merchants like Exxon leads to difficult problems. Severe restrictions on commodities a state deems bad, such as tobacco or plastic containers, often burden outside merchants. Many laws will fall unless the Court gets into the substantive business of

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405 See Eule, supra note 18, at 463-64, 467-68, 475. Eule omits tax laws from his discussion.

408 Eule, supra note 18, at 463, 476-82.
411 Eule, supra note 18, at 444-46, 463, 466.
412 See text accompanying notes 169-73, 179-81 supra.
413 See text accompanying notes 166-67, 202-04 supra.
414 See Hellerstein, supra note 18, at 74-77; text accompanying notes 162-78 supra.
second-guessing state judgments about the worthiness of various commodities or methods of selling. Common market theory has no problem sustaining such regulations and avoids these difficulties by defining protectionism as legislation that burdens only direct competitors.415

Moreover, if merchants have personal rights under the commerce clause, they have a strong case for retroactive judicial remedies, remedies that can be highly disruptive of state and local government. If the doctrine’s principal beneficiaries are other states and federal foreign trade policy, for whom merchant litigants are merely private enforcers, remedies can more readily be prospective only.416

In sum, process theory supplies no justification for the basic constitutional decision in favor of judicial policing of interstate commerce. Its application to foreign commerce is absurd. Finally, as a sorting device, it is inferior to the Court’s common market theory, which focuses on state interference in the legitimate affairs of other states.

C. Personal Rights Theories and Laissez Faire

Critics of the dormant commerce power doctrine occasionally argue that the doctrine balances state autonomy against the substantive value of laissez faire, and that there is no support for that substantive value in the records of 1787.417 The latter proposition has force, but not the former. As explained in Part II, the doctrine does not in any meaningful

415 See text accompanying notes 189-91, 225, 227-30 supra.
416 The Supreme Court has not decided whether businesses that win dormant commerce power cases have a federal right to a retroactive remedy. By “retroactive remedy” I mean a remedy for taxes or other actions occurring before suit is filed or taxes that are paid under protest. These remedies severely disrupt state and local government, and there should be no federal right to them.

In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276-77 (1984), the state raised the retroactivity issue indirectly by arguing that plaintiff companies had passed the invalid tax at issue on to their customers, so the companies should not get a refund. The Court declined to address the issue and remanded it to the state courts. See id. at 277. The same thing occurred in Tyler Pipe Indus., v. Washington Dept’ of Revenue, 107 S. Ct. 2810, 2822-23 (1987), and in American Trucking Ass’n v. Scheiner, 107 S. Ct. 2829, 2847-48 (1987). State immunity may also limit retroactive remedies. See American Trucking Ass’n v. Gray, 108 S. Ct. 2, 4 (Blackmun, Circuit Justice 1987).

The issue is complicated by the structure of tax litigation. Under 28 U.S.C. § 1341 (1982), those challenging state taxes must ordinarily do so in state courts. State laws usually require that disputed taxes be paid under protest and actions filed for refunds; injunctions are not allowed. Such state laws require refunds of the taxes paid under protest and those paid during the pendency of the refund action, so in many cases no federal remedy issue arises. If a federal issue were raised about such refunds, there should be a right to them; from the protest and filing, the state is on notice of the dispute and can plan accordingly. This would be analogous to prospective equitable relief under the doctrine of Ex parte Young, 209 U.S. 123, 160-66 (1908).

417 See notes 133-35 and accompanying text supra.
sense impose laissez faire as a substantive value.418 The state with the greatest interest in a subject may tax or regulate severely, even ban all private commerce in a commodity, subject only to the rule against protectionism.419 When the doctrine confines jurisdiction to one state and that state elects not to tax or regulate, the effect favors laissez faire; but that is a substantive choice of the interested state, not of the Supreme Court. The doctrine to some extent fosters competition among states,420 which may also result in a reduction of state regulation or taxation. Again, substantive choices are made by state governments, not by the Court.

Personal rights theories, although typically offered as less intrusive alternatives to the Court's doctrine, are likely to lead to greater judicial protection of laissez faire. The established rule that Congress may abolish or alter the dormant commerce power doctrine is based on the assumption that the issue is one of federalism and that Congress is the appropriate body to adjust the federal balance of power.421 Congress has much less authority to alter personal rights.422 This suggests that adoption of a personal rights theory might lure the Court into reviewing federal statutes to determine their compatibility with free trade. Although a number of scholars have supported this idea, none has analyzed it in detail.423

Expansion of judicial review to police federal commercial legislation would be unjustified and unwise. It would be unjustified because the commerce clause by its terms is an unqualified grant of power to Congress. Before 1937, the Court attempted to police federal legislation to protect state sovereignty; it has since largely abandoned the attempt.424 Regardless of the correct view of that issue, there is no basis in constitutional history for the Court to limit congressional exercises of the com-

418 See notes 135-37 and accompanying text supra.
420 See text accompanying notes 161-63 supra.
423 See, e.g., Tushnet, supra note 18, at 147-50; Varat, supra note 246, at 569-71.
425 See J. Nowak, R. Rotunda & J. Young, supra note 7, § 4.9, at 151-56.
merce power to consent to state laws. Constitutional history supports the dormant commerce power doctrine as a promotion of interstate harmony, not of economic efficiency.

Extending judicial review in aid of a national common market to federal, as well as state, legislation might go further and revive substantive due process limits on economic legislation. Respecting dormant commerce power issues, national legislation can impair a common market more than the Court otherwise allows only by authorizing the states to do what the Court would otherwise forbid. Congress cannot disadvantage particular states, and its structure counters many interstate or regional beggar-my-neighbor actions.

Advocates of extended judicial review target federal regulations and taxes that, in their view, unduly restrict national markets directly rather than by authorizing interstate parochialism. Judicial policing of this kind can be based only on a substantive preference for unregulated markets; it has no roots in interstate rivalry and nothing to do with the concept of a common market. There is no basis in 1787 constitutional history for such a value, and the Court’s prior attempt to find it in the fourteenth amendment has been soundly criticized. It should not now be revived under cover of the commerce clause or under the privileges and immunities clause.

In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Court said that Congress could validate state laws existing at the time of its action but not subsequently passed laws, see id. at 318; see also Stoutenburgh v. Hennick, 129 U.S. 141 (1889) (voiding business licensing law); The License Cases, 46 U.S. (5 How.) 504 (1847) (upholding state liquor control laws). These were directed against prospective laws only, based on the strict nondelegation doctrine that is no longer followed. See J. Nowak, R. Rotunda & J. Young, supra note 7, § 4.8, at 149-50.

See note 183 and accompanying text supra.

See, e.g., Tushnet, supra note 18, at 152-56; Varat, supra note 246, at 570-71.

See, e.g., J. Nowak, R. Rotunda & J. Young, supra note 7, § 4.9, at 154-56.

Professor Eule advocates shifting the locus of the dormant commerce power doctrine to the privileges and immunities clause, which prohibits some state laws that discriminate against citizens of other states. See Eule, supra note 18, at 446-55. As he acknowledges, this would require extensive revision of existing privileges and immunities clause law. Id. Professor Black had earlier advocated the same thing. See Black, Perspectives on the American Common Market, in Regulation, Federalism and Interstate Commerce 59 (A.D. Tarlock ed. 1981). Previously, Black had argued that the doctrine should be implied from the structure of the Constitution as a whole. See C. Black, Structure and Relationship in Constitutional Law 20-22 (1969). Professors Regan and Sedler also advocate this view. See Regan, supra note 18, at 1110-25; Sedler, supra note 18, at 887-90, 991-99.

The structural argument is plausible as an original reading of text and history. The privileges and immunities theory depends on whether one reads that clause as a guarantee of personal rights, as Professor Eule does, or as an adjustment of federalism to limit interstate rivalry. The former reading raises the problems discussed in the text. Under the latter, which is more consistent with the original history of the Constitution, that clause would also be a plausible locus for the dormant commerce power doctrine. But neither it nor the structural argument is superior to the Court’s existing doctrine, so values of repose and continuity oppose
D. Protectionist Intent

Professor Donald Regan advocates importing the legislative motivation standard from the fourteenth amendment to govern the dormant commerce power doctrine. He argues that for "movement of goods" cases, the correct constitutional rule in theory, and the one that the Court unconsciously follows, is to forbid only purposeful state protectionism. Advocate that the Court strike down a law only when protectionist purpose contributed "substantially" to its passage. Professor Regan believes that his rule would be "narrower" than what most of us think is current Court doctrine, and that it would avoid the relative evil of balancing.

As explained in Part II, the Court invalidates state laws regulating or taxing the state's imports and exports, only when they are protectionist, that is, when these laws categorically favor local interests over their external competitors. But in cases involving commerce in transit or transactions outside the legislating state, partially protectionist or non-protectionist laws can be invalid based on multiple or conflict burdens. Hence, application of Professor Regan's rule to the movement of goods through a state or between external points would radically alter the doctrine by requiring a decision based solely on protectionist intent.

Applied to import-export cases, Regan's theory more closely corresponds in outcome with the Court's doctrine, and most of the cases he discusses are in the import-export category. For these cases, the question he raises is whether protectionist intent should be the controlling indicium of protectionism.

There are two differences between Court opinions and Professor Regan's test. The Court expressly relies on balancing, and Professor Re-

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430 Professor Regan defines "movement of goods" cases as "all dormant commerce clause cases except: (1) cases involving state regulation of the instrumentalities of interstate transportation, such as railroads or trucking; (2) cases involving state taxation of interstate commerce; and (3) cases involving the state as market participant..." Regan, supra note 18, at 1098-99.

431 See Regan, supra note 18, at 1093, 1098-99, 1110-60, 1284-87; see also Farber, supra note 18, at 400-06 (advocating that, for regulations, dormant commerce power doctrine be confined to cases of intentional discrimination against interstate commerce). These articles advocate very different approaches. Professor Regan is generally satisfied with what the Court does and favors only a change in articulated grounds. Professor Farber urges a revision that, in his own word, is "radical." Id. at 404.

432 See Regan, supra note 18, at 1148. Regan expressly omits taxes and transportation from his rule, very much narrowing its scope, although he occasionally pulls cases from these fields into his analysis. See id. at 1092-93, 1098-1101, 1174, 1182-92, 1243-44.

433 See id. at 1283.

434 See text accompanying notes 189-91 supra.

435 See text accompanying notes 247-49, 270-331 supra.

436 See note 430 supra.

437 See Regan, supra note 18, at 1105, 1221.
gan condemns balancing in movement-of-goods cases. Second, Regan advocates relying on protectionist intent or motive as distinct from effects or results. His express reliance on the equal protection test for racial or similar discrimination clearly demonstrates his emphasis on separate proof of intent. By contrast, the Court has said that it need not decide whether protectionism or discrimination was deliberate. Most of its opinions, and its governing tests, say nothing about intent.

The Court need not discuss or rely on intent because almost all of the import-export laws that the Court strikes down as protectionist discriminate categorically against interstate or foreign commerce. Such rules have categorically protectionist effects, and it is usually obvious that protectionism was intended. In these cases, an independent finding of intent would not change outcomes; it would simply insult state legislatures gratuitously.

An intent standard could make a difference when partially discriminatory laws are attacked as protectionist, or when categorically discriminatory rules are seriously defended, as in quarantine cases. Under existing precedents, partially discriminatory laws that burden only imports or exports are struck down very rarely. A challenger must show substantially protectionist effects. States defend these laws based on legitimate (nonprotectionist) purposes. The Court sustains the laws unless their practical impact is very close to categorical discrimination and their justification is weak. The test is deferential to states; most laws are sustained.

A rule that depends on intent independent of effects, and that precludes balancing would surely invalidate more state laws than the existing doctrine. It would broadly apply to partial discrimination in import-export commerce and to most movement-of-goods cases involving multiple and conflict burdens because most of these generate some protectionist effects. Partially discriminatory laws that reasonably carry out legitimate purposes would also be struck down when a challenger persuades a court that protectionist intent contributed substantially to passage. Current doctrine routinely sustains this type of legislation; Regan's rule would not.

438 See id. at 1174-82.
439 See id. at 1143 n.87.
440 See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352 (1977) ("[W]e need not ascribe an economic protectionist motive to the North Carolina Legislature to resolve this case. . . ."). Regan argues extensively that this statement does not mean what it says. See Regan, supra note 18, at 1221-28; see also Pike v. Bruce Church, Inc., 397 U.S. 137, 145-46 (1970) (finding intent irrelevant); Halliburton Oil Well Cementing Co. v. Relly, 373 U.S. 64, 72 (1963) (acknowledging that state tax law at issue may have discriminated accidentally but striking law down anyway).
441 See text accompanying notes 221-46 supra.
Professor Regan's discussion offers several illustrations among recent cases won by states. He claims that the challenged laws were sustained based on lack of proof of protectionist motive. However, innocent motive clearly was not a controlling factor in *Minnesota v. Clover Leaf Creamery Co.* because the law was sustained despite an explicit trial court finding of protectionist purpose. In *Exxon Corp. v. Governor of Maryland,* the Court similarly upheld a statute, even though protectionist purpose likely played a role in its enactment. Regan argues that if protectionist intent had been proved, the laws ought to have been struck down. His test is excessively intrusive into an area

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442 See Regan, supra note 18, at 1233-43.
443 See id.
445 449 U.S. at 474-77 (Powell, J., concurring in part and dissenting in part). The trial court struck down the law based on both the commerce clause and the equal protection clause, finding that the state legislature had intended to favor local paper producers over outside plastic producers. See id. at 474-75 (Powell, J., concurring in part and dissenting in part). This is the sort of finding that Regan would make determinative. The Supreme Court reversed in the face of the finding.

Justice Brennan's majority opinion said that protectionism may be shown by proof of either "discriminatory effect" or "discriminatory purpose." 449 U.S. at 471 n.15. He did not indicate what measure of effect or purpose he would use. But we know from a number of other opinions that Justice Brennan and, perhaps, Justice Marshall have an enthusiasm for actual legislative motive review that is not shared by other members of the Court. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 681-85 (1981) (Brennan, J., concurring); id. at 704-05 (Rehnquist, J., dissenting). The opinions in *Kassel* are particularly misleading because they speak in terms of protectionism in a case that was not a protectionism case. See note 300 and accompanying text supra. Moreover, whatever his views on the equal protection clause, Justice Brennan's disposition in *Clover Leaf* belies an interest in motive review under the dormant commerce power doctrine.

447 See id. at 140-42 (Blackmun, J., concurring in part and dissenting in part). In general, protectionist intent is more common than Regan assumes. He wants to validate based on a "hypothetical innocent legislature" test. Regan, supra note 18, at 1155. This seems to be a standard of purity both rare and adventitious in the real world of politics.

Another case in which Regan would invalidate when a court did not was *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984). The state had enacted a statute reducing by five cents its motor fuel excise tax on gasohol manufactured in Colorado. See id. at 180. This law was patently invalid. See *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982) (invalidating similar statute). Warned by the Minnesota case, the Colorado legislature repealed its law and replaced it with a like reduction for gasohol made at small facilities whether located in Colorado or out of state. See *Archer Daniels*, 690 P.2d at 180. The effect was to continue the tax incentive for all existing Colorado producers but deny it to the plaintiff, a large out-of-state firm. The state court required proof of protectionist purpose to make out a commerce clause violation, and the majority stubbornly held that purpose had not been proved. Id. at 184. Although protectionist intent seems obvious, the court's result was not clearly wrong. Tax incentives for small businesses are a legitimate state purpose well served by the revised statute. Moreover, market adjustments are effective; the statute disadvantages any future large producer in the state and aids any small ones outside it. See text accompanying notes 169-70, 225-34 supra.

448 See Regan, supra note 18, at 1096, 1235, 1235 n.324.
where legitimate state interest is strong, and market corrections are effective. It is unlikely that the Court will adopt the test for general use. It has rejected a clear chance to do so, adhering instead to its traditional reliance on state justification.

The intent issue is cloudier when a state seriously attempts to justify categorical discrimination against interstate or foreign commerce. Many quarantine laws facially discriminate against interstate commerce and have overtly protectionist effects but are sustained by the Court. In Maine v. Taylor, the Court’s opinion first assessed the state’s justification. The Court added that to sustain categorical discrimination, a state must also show that its legitimate purpose cannot be achieved by nondiscriminatory means. It did not require an absence of protectionist intent. But later the Court responded to the plaintiff’s arguments about protectionism in terms that were ambiguous about intent. The opinion might implicitly support Regan’s test.

The Court should not take the bait. Only the most innocent or mindless legislator could be unaware of the protectionist effects of a quarantine law. Thus, the validity of these laws would turn on whether

\[\text{footnotes} 449\] See text accompanying notes 145-47, 168-73 supra.
\[\text{footnotes} 450\] See CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637 (1987). Professor Regan’s article was cited in Justice Powell’s majority opinion to support the statement that “the principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.” Id. at 1648. Given the historical importance of the allocation and uniformity norms of the doctrine, this statement was misleading. The majority opinion determined that the Indiana antitakeover law did not discriminate, based upon the traditional standard of categorical discrimination against interstate commerce. See id. at 1648-49. In applying the doctrine, the Court ignored the argument that the law was intended to protect jobs of local managers and workers and the tax base of local communities threatened by corporate takeovers. The dissent would have overturned the law based on both protectionism and interference in external transactions, but it did not rely on Regan’s theory. See id. at 1655-56 (White, J., dissenting).
\[\text{footnotes} 451\] 477 U.S. 131 (1986).
\[\text{footnotes} 452\] See id. at 140-51.
\[\text{footnotes} 453\] See id.
\[\text{footnotes} 454\] See id. at 148-50. In this passage, the Court rejected the finding of protectionist intent relied on by the court of appeals to overturn the statute, and it decided that the state’s legitimate purpose was not “merely a sham or a ‘post hoc rationalization.’” Id. at 149 (quoting Hughes v. Oklahoma, 441 U.S. 322, 338 n.20 (1979)). But it did not endorse a separate, substantial intent standard.
\[\text{footnotes} 455\] Older quarantine opinions were written in the summary style formerly predominant and provide little guidance. In Mintz v. Baldwin, 289 U.S. 346 (1933), Justice Butler’s opinion rejected the dormant commerce power argument in three terse sentences. See id. at 349-50. These included the statement that the order at issue “[u]ndoubtedly... was promulgated in good faith and is appropriate for the prevention of further spread of the disease among dairy cattle and to safeguard public health.” Id. at 349-50. In Reid v. Colorado, 187 U.S. 137 (1902), Justice Harlan said that as the state’s means “do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the State is entitled to accomplish.” Id. at 152.
states can convince courts that such obvious effects were not substantially intended. Because protectionist and quarantine effects are often identical, the test would sometimes turn entirely on the legislature's subjective motive. Instead, the controlling standard should be the factual necessity for discrimination to serve a legitimate quarantine purpose. This exception to the antidiscrimination rule ought to be strict, lest the exception swallow the rule. But it will produce greater predictability than a legislative intent standard. Legitimate quarantines are better characterized as justified protectionism than as nonprotectionist.

Professor Regan's intent standard applies the principles of modern equal protection law to commercial discrimination. Under equal protection doctrine, any amount of deliberate discrimination against suspect classes is branded a constitutional wrong. Purposeful racial discrimination can be proved by disparate effects when a law does not substantially achieve any legitimate purpose. But a law that does substantially achieve a legitimate state purpose is nevertheless invalid if racial animus aided its passage.

The constitutional policy underlying the equal protection doctrine is, however, fundamentally different from that underlying the dormant commerce power doctrine. Racial discrimination is a nearly absolute wrong for governments at any level, tolerated only for remedial purposes. Protectionism, by contrast, is forbidden only to the states; the federal government often pursues protectionist policies in foreign trade and consents to some protectionism by states. States may also pursue protectionist policies when they act as market participants. Moreover, protectionism is simply a particular way that state governments aid their people—the fundamental obligation of all governments and an essential element of a federal system. Protectionism rather strictly defined is condemned because harm to other states and to the nation clearly outweighs local benefit, and states can achieve any legitimate aim without it. But other forms of parochialism, including discrimination in favor of products that happen to be local, are sustained as integral to state autonomy and even useful to interstate competition.

The Court's implicit definition of protectionist intent is simply the

456 Cf. Personnel Adm'v. Feeney, 442 U.S. 256, 278-80 (1979) (veterans' preference law was not intended to discriminate against women); id. at 281 (Marshall, J., dissenting) (expressing view that veterans' preference evinces purposeful gender-based discrimination).
460 See notes 182-83 and accompanying text supra.
461 See text accompanying notes 332-58 supra.
462 See text accompanying notes 225-30 supra.
common law notion of intending the natural and probable results of one's actions. The doctrine's concern is essentially with prospective burdens on commerce. What matters is whether the enforcement of a law is protectionist, not whether it was wrong to pass it in the first place. Even when a law was passed for innocent reasons, once the state knows of protectionist effects, continued enforcement is intentional to the extent relevant to dormant commerce power analysis. As Justice Cardozo suggested in *Baldwin v. G.A.F. Seelig, Inc.*, protectionist effects should be assumed to be intended.

Professor Regan's *betes noires* are misguided judges and academics known as "balancers." However, his own thesis relies on balancing to derive his constitutional rule that condemns deliberate state protectionism. His criticism of balancers refers only to balancing tests that weigh competing factors in every case. In other words, he disapproves of what Professor Henkin called ad hoc balancing, but accepts and applies what Henkin termed definitional balancing.

Regan may have the problem backward. If Congress were to pass a statute authorizing courts to strike down laws with substantially protectionist effects that do not reasonably serve a nonprotectionist purpose, we would not criticize the courts for making decisions on an ad hoc, case-by-case basis. The controversial aspect of the dormant commerce power doctrine is that the Supreme Court created this standard with no more guidance from Congress than silence. Some critics claim that ad hoc balancing produces inconsistent or otherwise unsatisfactory results. Of course, that problem often can be cured by judicial tinkering, by developing clearer rules. The basic constitutional choice to restrict protectionism and multiple and conflict burdens on interstate commerce, which

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463 This statement assumes, as I have argued elsewhere in this Article, that the basic purpose of the dormant commerce power doctrine is interstate commercial harmony, not personal rights for out-of-state merchants. See text accompanying notes 61-84 supra.


465 See id. at 522 ("[T]he avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.").

466 See Regan, supra note 18, at 1207-09.

467 See id. at 1110-25. Regan does rely on one erroneous argument. He says that protectionist tariffs transfer welfare from outside producers to their local counterparts. Id. at 1118. As explained previously, however, long-run tariff costs are predominantly borne by consumers in the imposing state. See text accompanying notes 165-67, 176-77 supra.


469 See, e.g., id. at 1048-49 (pointing to dangers allegedly inherent in ad hoc balancing); Anson & Shenkkan, supra note 14, at 81-85 (arguing that because of difficulties associated with ad hoc balancing, Congress, not courts, should decide when to override state regulations); Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 Geo. Wash. L. Rev. 47, 58-64, 89 (arguing that ad hoc balancing has failed to produce consistent results).
lies at the heart of most academic criticism of the dormant commerce power doctrine, was made by definitional balancing. It is not an ad hoc standard.

Indeed, Professor Regan's test may be more ad hoc than the Court's because it requires findings of fact about actual legislative intent in each case. The Court's test, on the other hand, depends on evaluation of the state's justifying purpose, and this is what Regan finds objectionably ad hoc. But under the Court's current test, results can be predicted because the Court's concept of sufficient justification can be derived from decided cases. Relying on proof of protectionist intent, as Regan proposes, would likely produce more surprises.

In general, when opposing constitutional or other legal policies and their relation to one another are agreed upon and well defined, we should not be troubled that courts decide which value predominates in specific contexts. We accept that the judicial function extends to matters of degree. Disagreements begin when courts arguably use balancing tests to create new constitutional rights, to construct elaborately formal constitutional rules, to mask true grounds of decision, to reach decisions that do not seem empirically consistent, or to exercise what critics believe is excessive discretion.

Several of these objections have been raised about dormant commerce power rules. The most frequent criticism has been that the doctrine reaches inconsistent results. The Court has openly said that it balances national interests against state autonomy, and it usually describes the national interest as "free trade," an imprecise and mildly misleading term. In fact, the basic national interest is interstate commercial harmony. In import-export cases, this interest is adequately served by forbidding protectionism, as Professor Regan demonstrates. The protectionism inquiry involves narrowly focused balancing.

In external market and commerce in transit cases, protectionist, multiple, and conflict burdens are weighed against state autonomy. The Court assesses the nature of the burden and the state's interest according to established categories and criteria. This balancing is far from the rudderless vessel many critics assume. The argument that the Court has been inconsistent has some force, but the issue is much too difficult for

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It is hard to improve on Holmes' often-quoted articulation: "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).


472 See text accompanying notes 247-331 supra.
summary conclusion. Significantly, the Court continues to follow Justice Miller's 1869 articulation of the doctrine, Justice Strong's 1873 opinions, and Justice Curtis' 1851 effort in *Cooley v. Board of Wardens*. That is more consistency than we have in many other areas of constitutional law.

IV

ARE GAINS WORTH LITIGATION COSTS?

Professor Kitch argues that the dormant commerce power doctrine should be abandoned because it is less efficient than the "inter-sovereign" remedy of relying on negotiations between states to overcome trade barriers. The record in international markets, however, casts doubt on the efficacy of political bargaining as an effective way to achieve free trade. Protectionist politics, high transaction costs when politicians are bargainers, free rider problems, and great political temptations to burden outsiders have impeded trade agreements throughout recorded history. Much political bargaining is impaired by the bilateral monopoly problem. The European Economic Community is the most promising modern attempt to meet these problems systematically. But it has turned to mechanisms that resemble the Supreme Court's dormant commerce power doctrine, which Kitch would eschew.

Professor Kitch suggests two answers to objections based on the unsatisfactory history of international trade. One is simply the assertion that the greater affinity among American states than among foreign nations would make negotiated solutions to trade barriers more common domestically. Kitch is probably right about the greater facility of trade negotiations in a federal system; but it does not follow that his regime would be more effective than judicial supervision. The numerous protectionist and exploitative laws that have emerged from state legislatures show that potential trade barriers are significant. It is guesswork at best to suppose that these differences would be effectively overcome by negotiations and agreements among states. Indeed, other federal systems

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475 53 U.S. (12 How.) 299 (1851).
476 See Kitch, Regulation, supra note 14, at 13-14, 20-21, 52 n.35.
477 See, e.g., M. Kreinin, supra note 171, at 270, 306.
480 See Kitch, Regulation, supra note 14, at 13-14, 37, 46.
have not seen fit to try Kitch's solution.481

Professor Kitch also argues that the dormant commerce power doctrine has the insidious effect of inducing Congress to enact heavy-handed federal regulation that is worse than the state laws it replaces. He claims that the Interstate Commerce Act and federal dairy regulations were induced by the Court's disabling of state regulations.482 The observation that judicial intervention may inspire congressional action has been made by others, and it has some empirical support.483 Market competition almost always generates political pressures for protection.

Kitch believes that federal regulation is an absolute evil—an assumption that many persons would dispute. He also gives insufficient weight to the direct political support for statutes like the Interstate Commerce Act.484 At least some of the federal laws that Kitch does not like would have been enacted regardless of judicial disabling of state regulation. Moreover, federal regulation has at times appeared to result from an excess of state regulation rather than from a void created by judicial invalidation. For example, banking has been subject to comprehensive federal regulation, although the Court had not been policing state regulation. Arguably, the incentive for federal regulation was too much state power rather than too little.485 The Court's failure to forbid discriminatory regulation of intrastate railroad rates led to federal regulation.486 Also, the dormant commerce power doctrine has been more important in policing state taxes than regulations, and there is no evidence that invalidation of state taxes has generated anticompetitive federal actions.487

481 See notes 498-99 and accompanying text infra.
482 See Kitch, Regulation, supra note 14, at 46, 123.
484 See P. Dempsey & W. Thoms, supra note 483, at 11 (stating that even before Wabash, St. L. & R. Ry. v. Illinois, 118 U.S. 557 (1886), "Congress had passed two bills [imposing] constraints upon the rail industry"). Kitch acknowledges this. See Kitch, Regulation, supra note 14, at 123.
486 Compare The Shreveport Rate Case, 234 U.S. 342 (1914) (affirming Interstate Commerce Commission regulation of intrastate rates) with The Minnesota Rate Cases, 230 U.S. 352, 412-17 (1913) (holding intrastate rates subject to state authority).
487 Recent reductions in the judicially imposed limits on state taxing powers have provoked Congress into enacting several statutory limits on state taxes. See note 275 and accompanying text supra. If the Court were to abdicate its role completely, there would still be some industry pressures on Congress to enact more limitations. But these laws would not suppress competi-
The benefit Kitch seeks is assumed economic gains from increased competition among states to attract and keep investments. He uses the example of competition among states in the formulation of business corporation acts to support his theory. But as explained in Part II, the dormant commerce power doctrine improves the effectiveness of interstate competition (so long as there is no comprehensive federal preemption). It is unlikely that competition among business corporation acts would have succeeded so well without judicial protection of foreign corporations from parochial state legislation. Moreover, in the field of state taxation, there has been extensive interstate cooperation to implement the tax allocation rules imposed by the Court. These efforts avoid tariff-like barriers and promote interstate competition.

These objections aside, Professor Kitch asks an important question. The dormant commerce power doctrine and its preemption counterpart have significant public and private litigation costs that should be outweighed by political and economic gains from greater economic union. Some challenges to state commercial laws take years to work their way through the courts. Important state taxes have been held hostage by the process. Even if gains justified costs in the past, changing conditions may have altered the balance. It is reasonable to suppose that market substitutions have become a more effective deterrent to state parochialism than ever before. This allows the Court to leave adjustments to the marketplace.

In sum, Professor Kitch's preference for intersovereign trade bargaining seems hopelessly utopian in light of the history of international commerce. But the Court should carefully consider the costs of judicial supervision in determining the scope of the doctrine.

CONCLUSION

It is fashionable to suggest that the dormant commerce power doctrine is not worth its costs because modern cases are about relatively minor matters such as train car lengths and mudflaps. This description of modern cases has force, at least for cases about regulations, if not taxes.
But current cases are partly a product of the doctrine’s past impact on state legislation. The doctrine’s most important effect has been on state tax codes, which are designed around the Court’s rules. Today’s codes apportion interstate taxes, impose few tariff-like measures, do not tax goods in transit, and do not single out transportation for heavy exactions. There is at least some connection between the modern tax codes and a century of judicial supervision. The doctrine may have also contributed to the interstate mobility of corporations, and has shielded a national transportation network against constricting state laws.

On the other hand, these claimed successes of the doctrine have not been conclusively proved. Possibly, little would be different without judicial involvement.494 Perhaps Congress would have done a better job absent judicial involvement. Perhaps interstate bargains would have achieved more. But, the burden of persuasion ought to rest on those advocating change. The most powerful argument against the Court jetisoning the dormant commerce power doctrine is the value of continuity and repose. The doctrine has been enforced for more than a century; its preemption companion has been with us longer than that. Both are subject to popular revision by Congress, which has impliedly demonstrated its support for the Court’s decisions. These are persuasive reasons to require a strong case against the current doctrine from those who would change or eliminate judicial pursuit of economic union.495

This burden has not been met by popular outcry. Political oppos-

494 The insurance industry has been continuously exempt from the dormant commerce power doctrine, so it provides one basis for comparison. See note 107 supra. It is heavily regulated by states, often in ways that would otherwise violate the doctrine. Yet, interstate insurance business has not been shut out.

The insurance industry is not the best measure of the doctrine’s importance to interstate commerce, however. Unlike other industries, it does not depend on the movement of goods; shipments of policies can be done by mail, which is beyond the reach of state laws. Most disputes between states and the insurance industry have been about resident agents, over whom states would have considerable jurisdiction anyway. In addition, the Court has not left insurance regulation entirely to the states; it has imposed particularly vigorous equal protection standards. See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Fidelity Deposit Co. v. Tafoya, 270 U.S. 426 (1920); 1 J. Hellerstein, supra note 145, at 64-73.

495 Critics whose concern is state autonomy have a less drastic remedy than abolition of the doctrine, which is illustrated by Chief Justice Rehnquist’s votes. He has voted to invalidate state laws only when the Court was unanimous, and a few times he has dissented alone. See, e.g., Armco, Inc. v. Hardesty, 467 U.S. 638, 646 (1984) (Rehnquist, J., dissenting); Japan Line v. County of Los Angeles, 441 U.S. 434, 457 (1979) (Rehnquist, J., dissenting); Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 34 (1974) (Rehnquist, J., dissenting).

Yet, Rehnquist has not called for repudiation of the doctrine. He appears to recognize the values it serves, but he gives greater weight to the competing value of state autonomy, particularly in the special field of natural resources cases. See, e.g., Sporhase v. Nebraska ex rel Douglas, 458 U.S. 941, 961 (1982) (Rehnquist, J., dissenting) (ground water); Hughes v. Oklahoma, 441 U.S. 322, 339 (1979) (Rehnquist, J., dissenting) (minnows); City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (Rehnquist, J., dissenting) (solid waste disposal).
tion to the doctrine is nonexistent. The battle is confined to the academic/judicial complex. This doubtless explains the failure of academic critics to suggest that Congress, rather than the Court, change or abolish the doctrine. A statutory change, by contrast to judicially imposed revisions, would allow taking of evidence, careful review in advance, drawing of more pragmatic lines, and use of economic experts. Scholars who believe that a great change is needed might turn their talents to drafting a statute to realize their visions.

Another reason for caution in revising the dormant commerce power doctrine is its relationship to preemption doctrine. As numerous observers have pointed out, preemption rules closely parallel dormant commerce power doctrine in the many cases in which a federal statute regulates to the same end as a state law but does not command invalidation of the state law. Radical revision of the dormant commerce power doctrine would presumably require reexamination of preemption doctrine as well. If judicial invalidation is entirely illegitimate when Congress has said nothing, it is hard to see why it is entirely legitimate when Congress has said something about the subject but nothing to command the states. Moreover, existing preemption law achieves some efficiencies by limiting the instances when commerce is subject to two sets of regulations rather than one. If preemption were confined to the rare cases in which Congress expressly commands that state commercial laws be struck down, multiple regulation might increase markedly. Adjustment of this area ought to be initiated by Congress rather than the Court.

In Canada and Australia, the judiciary supervises national common markets that are quite similar to ours. This is not surprising because

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496 Some commentators have proposed that Congress substitute a federal administrative agency for the Court. See, e.g., Farber, supra note 18, at 407-10; Freund, Judicial Review and Federalism, in Supreme Court and Supreme Law 86, 100-95 (E. Cahn ed. 1954) (taxation only); Kurland, supra note 492, at 291-92. While advocates state obvious reasons in favor of this proposal, potential difficulties, including agency competence, influence of lobbyists, and extra layers of judicial review of agency action, warrant careful review. See Freund, supra note 255, at 571-72.


our doctrines influenced theirs. Their voluntary adoption of similar schemes, following careful deliberation, suggests that our method serves a general need of federal systems. The European Common Market is the newest attempt to achieve economic integration across sovereign boundaries. It too has adopted judicial supervision as a primary control. All four systems have much in common.

A persuasive case for the doctrine's contraction or retraction must rest instead on a showing that interference with state autonomy costs more than the doctrine achieves. This is in part an economic proposition that has not been proved. It is in part a political judgment that is reflected in Court appointments and in congressional politics. But a legal rule that was as compatible with Coolidge as with Roosevelt has little to do with important allocations of power between Washington, D.C., and the states. The essential policy question is whether the Court's promotion of the framers' goal of economic union achieves net political and economic gains. After a century and a half of practical experience, our governmental institutions assume that it does. Academic challengers have not yet made a contrary case.

500 See id.; V. MacKinnon, supra note 498, at 111.