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## Reconstructing the Dormant Commerce Clause Doctrine

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# RECONSTRUCTING THE DORMANT COMMERCE CLAUSE DOCTRINE

BRANNON P. DENNING\*

## ABSTRACT

*In this Article, I argue that the alleged incoherence and unpredictability of the dormant Commerce Clause doctrine (DCCD) is rooted in the Supreme Court's search, through the years, for a stable set of rules enabling it to distinguish permissible from impermissible state regulations of interstate commerce and commercial actors. Its lack of success, the Article argues, is due in large part to the Court's inability to settle on the constitutional command the doctrine was to enforce. Historically, the Court would promulgate a set of rules, apply them for a time, then alter or modify them as the rules became unsatisfactory.*

*Recent cases with similar facts, yet producing different results, suggest that the superficial stability the Court has achieved with the DCCD in recent years is largely an illusion. Both the "antidiscrimi-*

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\* Professor and Director of Faculty Development, Cumberland School of Law, Samford University. Thanks to Virginia Brasher for excellent research assistance. This paper has been in the works for nearly a decade. During that time—my entire time as an academic—I have benefited from discussion about the dormant Commerce Clause doctrine with those who are as fascinated by it as I am: Dan Coenen, David S. Day, Walter Hellerstein, Glenn Reynolds, Max Stearns, Edward Zelinsky, and especially Norman Williams, whose own fine unpublished work, *The American Common Market*, panicked me into finishing this Article. I also benefited from workshops at the University of Pennsylvania School of Law and at the American Enterprise Institute. Special thanks to Kim Roosevelt, Ted Ruger, and Mike Greve for arranging them, as well as to the participants in both, especially Todd Zywicki, Ed Baker, Nelson Lund, Ilya Somin, Matt Adler, Dan Polsby, Seth Kreimer, and Nathan Sales, for their comments and criticisms. Thanks, too, to Pat Kelley, who mentored me at Southern Illinois University and who read the Ur-version of this Article many years ago. Had it not been for the late Boris Bittker, this obsession with the dormant Commerce Clause doctrine would never have taken root. This Article is dedicated to his memory, as well as to my colleagues and students—past and present—for whom my dormant Commerce Clause doctrine obsession is a neverending source of amusement.

*nation principle" and the so-called "Pike balancing"—each representing one of the two tiers in the Court's standard of review—are experiencing the same decline and decay as prior rules regimes. Recent cases suggest that the Court appears poised once again to alter the DCCD but is proceeding in an undertheorized, ad hoc manner.*

*Using the "constitutional decision rules" model of constitutional interpretation developed by Mitchell Berman, and influenced by doctrinal theorists like Richard Fallon and Kermit Roosevelt, I argue that the DCCD could be improved by settling on a "constitutional operative proposition" rooted in the text and history of the Constitution and the Commerce Clause, and devising "decision rules" that would implement that constitutional command.*

*I conclude that the Framers centralized commercial regulation to prevent state regulations of interstate commerce likely to produce friction among states, incite retaliation, and undermine political union. I specifically reject any attempt to impute a free-trade ideology to the Framers. Decision rules enforcing the DCCD should, therefore, go no further than addressing the sorts of "discrimination" that produce this union-undermining effect. In particular, I would have the Court discard the "balancing" of burdens and benefits flowing from truly nondiscriminatory state and local laws. Applying the reconstructed decision rules to several difficult doctrinal areas, I argue, results in either a more satisfactory explanation for actions the Court has taken, or shows more clearly how the Court has incorrectly resolved particular issues.*

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*[N]ot only does the judicial history of the Commerce Clause show cyclical fluctuations, such as the long look will generally reveal in the Court's work, but that, in the shorter view, there is more confusion than in other areas. Lines of cases emerge, have their progeny and come to arid ends; and rules, formulas, and labels, to whose comfortable coherence judges unceasingly try to escape from the distress of disconnected judgments, have short lives, and if not abandoned, are soon gutted of meaning.*

—Alexander M. Bickel<sup>1</sup>

## INTRODUCTION

In some form, the dormant Commerce Clause doctrine (DCCD) has been a feature of American constitutional law for nearly two centuries.<sup>2</sup> Though it has undergone significant doctrinal evolution over the years,<sup>3</sup> the central premise—that the centralization of commercial regulatory authority in Congress implied judicially enforceable restraints on the states' regulation of interstate commerce<sup>4</sup>—has remained constant. Despite the Court's historic trouble stating and applying the DCCD, the current "rules" governing DCCD cases have remained relatively stable since the 1970s.

Black-letter law, in fact, could not be more clear. For non-tax regulations, the Court applies a two-tiered standard of review.<sup>5</sup> For those state or local laws that "discriminate," on their face or in their purposes or effects, against interstate commerce or interstate commercial actors, strict scrutiny applies, requiring the government

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1. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 100-01 (1957).

2. See *Gibbons v. Ogden*, 22 U.S. 1, 188-89 (1824) (interpreting the scope of the Commerce Clause and the extent of its restraint on states for the first time); Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1398 (2004).

3. See *infra* Part II.

4. See, e.g., Stephen K. Schutte, Comment, *Doctrinal Foundations of Section 1983 and the Resurgent Dormant Commerce Clause*, 77 IOWA L. REV. 1249, 1249 (1992).

5. See *infra* Part III.B.

to demonstrate a legitimate (i.e., non-protectionist) purpose for the law, and that there are no less discriminatory means to effectuate that interest.<sup>6</sup> It is a test that is nearly always fatal in fact.<sup>7</sup> For nondiscriminatory measures that nevertheless burden interstate commerce, a deferential balancing test is employed: to prevail, the challenger must demonstrate that the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."<sup>8</sup>

These rules are easy to recite, but their application is notoriously difficult, resulting in cases with similar facts being decided differently, and the different outcomes justified on the basis of tendentious distinctions.<sup>9</sup> A great deal of scholarship on the DCCD has sought to unify many of these divergent opinions with grand theories of the DCCD promising to reconcile apparently irreconcilable results.<sup>10</sup> While I propose my own grand theory of the DCCD in

6. See, e.g., *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

7. But see *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (refusing to invalidate state ban on import of baitfish, holding instead that preventing parasitic infection of native fish stocks was a legitimate purpose, and that no less discriminatory means were available to screen infected baitfish from healthy ones).

8. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The test is now known eponymously as the "*Pike* balancing" test, though balancing was employed by the Court prior to *Pike*. See, e.g., *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945).

9. See *infra* Part III.

10. For some of the major studies, see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause*, 21 HARV. J.L. & PUB. POL'Y 395 (1998); Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985); Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1 (2003); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981); Norman R. Williams, *The American Common Market* (Oct. 15, 2006) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=924311](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924311).

For general treatments, see BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 6.01-6.08 (1999 & Supp. 2008); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419-66 (3d ed. 2006); DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 209-342 (2004); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-1 to 6-27 (3d ed. 2000).

Dan Coenen has written important articles illuminating particular aspects of the DCCD.

this Article, I do it from the top down, instead of from the bottom up. In other words, I concede that a number of the Court's DCCD cases are, in fact, impossible to reconcile, suggesting that something is amiss in the Court's formulation of the doctrine, its application of it, or both.

I propose here to reconstruct the DCCD along a "decision rules" model. As explained in an important article by Mitchell Berman,<sup>11</sup> the creation of constitutional doctrine is best understood as consisting of two distinct operations. The first involves identifying the "constitutional operative proposition[,]," that is, what the text of the Constitution requires.<sup>12</sup> At the second step, the Court creates "decision rules" that implement that constitutional directive.<sup>13</sup> Building on Berman's insights, Kermit Roosevelt has used the model to identify pathologies in constitutional doctrine that often result from a conflation of doctrinal rules with constitutional operative propositions, where the rules are seen as ends instead of means.<sup>14</sup> As I argue below, the DCCD is currently showing signs of just this sort of "calcification," to use Roosevelt's term.

Part I briefly sketches the decision rules model of interpretation and Roosevelt's theory of calcification. Part II is a historical review of the DCCD; its thesis is that the Court wrestled with the question of which decision rules to adopt throughout the nineteenth and early twentieth centuries. Only in the second half of the twentieth

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See, e.g., Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998) [hereinafter Coenen, *Business Subsidies*]; Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). For extensive examination of the DCCD's application to state and local taxes, see generally JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* §§ 4.01-4.24 (3d ed. 1998 & Supp. 2007).

Important critiques of the DCCD include Eule, *supra*, Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998), Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569. See also Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition of Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29 (2002) [hereinafter Zelinsky, *Restoring Politics*].

11. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

12. *Id.* at 15.

13. *Id.*

14. See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

century did its decision rules for non-tax cases stabilize.<sup>15</sup> In Part III, I argue that the stability is now eroding; the DCCD is showing signs of calcification, resulting in, among other things, a conflation of decision rules with constitutional commands. This calcification, as well as the historic difficulty the Court has had maintaining stable decision rules for the DCCD, can be traced to the Court's historic failure to articulate an adequate constitutional operative proposition for the DCCD.

Part IV then supplies what the Court has not—at least not consistently: an operative proposition with firm historical and textual foundations. The best foundation for the DCCD is rooted in the Framers' desire to prevent the political instability that resulted from economic rivalries among the states during the Confederation period. Further, Part IV proposes a set of decision rules implementing that proposition. Finally, in Part V, I apply the new decision rules to recent controversies involving the DCCD. A brief conclusion follows.

### I. THE DECISION RULES MODEL OF CONSTITUTIONAL INTERPRETATION: AN OVERVIEW

Professor Mitchell Berman has argued that constitutional doctrine is created through a two-step process.<sup>16</sup> First, the reviewing court must establish constitutional meaning by adopting a "constitutional operative proposition[]." <sup>17</sup> In the next step, the court creates "constitutional decision rules (judicial statements of *how courts should decide* whether the operative propositions have been complied with)." <sup>18</sup> The choice of decision rules is important because the Court always has a choice in their fashioning, and its choice can shape the content of the norm itself.<sup>19</sup>

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15. This is an important and necessary qualification. The current DCCD rules for *tax* cases dates only to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), though *Complete Auto* synthesized and restated earlier doctrine. While some discussion of tax cases is necessary to tell the story I tell here, and while I think that the decision rules model has explanatory power vis-à-vis the Court's development of its tax jurisprudence, I will largely confine my analysis to non-tax regulations.

16. See Berman, *supra* note 11, at 15.

17. *Id.*

18. *Id.*; see also *id.* at 57-58.

19. See Roosevelt, *supra* note 14, at 1655-56 ("The insight of the decision rules model

### A. Identifying the Constitutional Operative Proposition

The first step in the process is the one that has traditionally received the most focus in constitutional theory: judicial determination of constitutional meaning. Not surprisingly, since his focus is elsewhere, Professor Berman does not spend much time on this step, other than to note that in performing it, “the courts may rely on any number of interpretive considerations, including such ‘modalities’ as text, history, precedent, structure, moral judgment and the like.”<sup>20</sup> Though opinions differ as to which, if any, of the modalities should drive the Court’s decisions,<sup>21</sup> there is general agreement that appeals to the modalities Berman mentions are at least legitimate forms that arguments about constitutional meaning can take.<sup>22</sup>

### B. Crafting Decision Rules and Constitutional “Calcification”

The theoretical purchase of a decision rules model<sup>23</sup> is its claim that the traditional accounts of constitutional interpretation that focus *only* on fixing constitutional meaning are incomplete.<sup>24</sup> Because constitutional norms, even once defined, have to be ap-

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is ... that the Court intentionally crafts decision rules that depart, in some cases quite substantially, from its understanding of constitutional operative propositions. The Court prescribes doctrinal rules that predictably lead to adjudicative outcomes that are erroneous in terms of its understanding of the actual meaning of the Constitution.”). Dan Coenen, too, has written thoughtfully about doctrinal rules designed to facilitate the application of constitutional norms. See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001) [hereinafter Coenen, *A Constitution of Collaboration*]; Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002).

20. Berman, *supra* note 11, at 9. The reference to “modalities” alludes to Philip Bobbitt’s work. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 6-8 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (1991).

21. For an effort to develop a theory about how the various modalities should be weighed, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

22. My own views are discussed *infra* during the larger discussion of the constitutional operative proposition for the DCCD. See *infra* Part IV.A.

23. Though I use the term “decision rules model,” I would include Professor Fallon’s work on constitutional implementation in this discussion. Both self-consciously focus on the creation and application of doctrinal rules to implement constitutional norms. RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 7-12 (2001).

24. See Berman, *supra* note 11, at 5-9.

plied to particular fact situations, courts—the Supreme Court in particular—have to self-consciously and intentionally generate rules at the point where constitutional norms meet those facts.

First, courts have a choice about how closely the rule should hew to the constitutional norm it will be enforcing. Should a court (1) formulate rules that closely track the operative provision, or (2) craft rules that depart from the operative proposition either by (a) overprotecting or (b) underenforcing it? After that decision is made, judges face a second question: what sorts of doctrinal tests are available, and which should be used?

Professors Berman, Roosevelt, and Fallon have a great deal to say about what these rules look like and what factors influence courts when designing them.<sup>25</sup> However, I will defer until later a discussion of the criteria Berman and others develop to assess various decision rules, as well as a description of common decision rules in American constitutional law. At this point, I want to introduce Kermit Roosevelt's fascinating take on the decision rules model.

Roosevelt has observed that constitutional decision rules and constitutional doctrine do not remain stable over time.<sup>26</sup> As doctrine "decays," it changes, sometimes becoming something quite different over time as courts attempt to shore it up.<sup>27</sup> During these times, doctrine can become highly unstable and unpredictable.<sup>28</sup> In some cases, the rules created simply collapse in on the operative proposition they were supposed to enforce.<sup>29</sup> The disconnect between constitutional ends and doctrinal means can result in an acoustic separation between the rules and the outcome of cases.<sup>30</sup>

This process of doctrinal decay and collapse was described by Professor Roosevelt as "constitutional calcification."<sup>31</sup> He writes that "[i]n a striking number of cases the Court has forgotten the reasons behind particular rules and has come to treat them as nothing more

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25. See FALLON, *supra* note 23, at 47-52; Berman, *supra* note 11, at 92-96; Roosevelt, *supra* note 14, at 1658-67.

26. See Roosevelt, *supra* note 14, at 1692-93.

27. See *id.*

28. See *id.*

29. See *id.*

30. See *id.*

31. *Id.*

than statements of constitutional requirements.”<sup>32</sup> Conflating “judicial doctrine and constitutional command tends to warp doctrine, frequently at significant cost to constitutional values.”<sup>33</sup> When this occurs, he argues, it is time to disentangle the decision rules and the constitutional operative propositions, clarifying the latter and designing new decision rules that best effectuate those constitutional norms.<sup>34</sup>

The history of the DCCD is best understood as a search by the Court for stable decision rules. And although the Court—finally—achieved some stability in its decision rules, those rules are beginning to show signs of the calcification that Roosevelt describes. That calcification, moreover, has occurred because the Court adopted decision rules *without* adopting a well-grounded constitutional operative proposition, or because it incorporated existing decision rules that implement a *now discarded* operative proposition. I will explain and defend these claims in Part III. In the next Part, however, I show that what looks like an almost promiscuous fashioning and discarding of doctrinal tests over the years was a temporally extended search for appropriate decision rules for the DCCD.

## II. THE SUPREME COURT AND THE DCCD: A SEARCH FOR DECISION RULES

The incoherence and inconsistency in the history of the DCCD reflects the Court’s adoption and discard of decision rules, many of which proved to be unsatisfying means for deciding future cases. The Court’s dissatisfaction stemmed from multiple sources. Often the decision rules themselves were flawed from the beginning; in other cases, the rules succumbed to the inevitable decay that attends doctrinal rules designed under conditions no longer extant.

But imperfect rules are only a part of the story, for in the early days, the Court attempted to design rules that tracked as closely as possible the constitutional operative proposition. One of the main

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32. *Id.* at 1652.

33. *Id.*

34. See *id.* at 1692, 1720. For the criteria used to fashion decision rules, see *infra* Part IV.B.

difficulties then—one with which the Court still struggles—is the lack of a satisfactory account of that proposition.

A detailed doctrinal history of the DCCD is at least deserving of a separate article—if not a book—in itself. Nevertheless, even a brief *tour d'horizon* of the DCCD's evolution from the Marshall Court to *Pike v. Bruce Church, Inc.*<sup>35</sup> will show that the Court has reeled from one set of decision rules to another. Though it finally achieved a superficial stability and coherence in its DCCD decision rules, Part III argues that this regime is under considerable strain and will not likely last much longer in its current form. Recent cases, moreover, strongly suggest that doctrinal change is already under way.

### A. Origins: The Marshall and Taney Courts

#### 1. The Marshall Court and the DCCD

The Marshall Court decided three cases in which limits on state power over interstate commerce were implicated.<sup>36</sup> Famously, these three cases, while suggestive of limits on state power absent congressional action, never actually invalidated a state law on that ground. In *Gibbons v. Ogden*, the New York steamboat monopoly was held to be in conflict with a federal coasting license.<sup>37</sup> In *Brown v. Maryland*, federal tariff laws, Marshall argued, constituted a

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35. 397 U.S. 137 (1970).

36. Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). See generally DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 168-81 (1985); ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 108-10 (1968); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 14-23 (1937); CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 10-11, 146-47, 233 n.76 (1996); SAMUEL J. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON: ARCHITECTS OF THE AMERICAN CONSTITUTION 213, 225-27 (1964); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 410 (2001) [hereinafter NEWMYER, JOHN MARSHALL]; R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 85 (1968) [hereinafter NEWMYER, MARSHALL AND TANEY]; THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 32, 142 (1956); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 485-86 (abridged ed. 1991); George L. Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. PA. L. REV. 23, 34 (1955); Williams, *supra* note 2, at 1441.

37. *Gibbons*, 22 U.S. (9 Wheat.) at 210.

license to import, which barred Maryland's imposition of a tax on importers of foreign goods.<sup>38</sup> In *Willson*, the Court concluded that the construction of a dam over a navigable waterway was *not* a forbidden regulation of interstate commerce, after first concluding that there was no congressional legislation on the subject (despite the fact that the plaintiff had a federal coasting license like the one in *Gibbons*).<sup>39</sup>

While *Gibbons* and *Brown* were preemption cases, *Willson* contained the first hint that the Commerce Clause contained implicit limits on state power. Without explaining why, Marshall concluded that "the act empowering the Black Bird Creek Marsh Company to place a dam across the creek[] can[not], under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state."<sup>40</sup>

The contending interpretations of the Commerce Clause at the time were irreconcilable. On the one hand were those who argued that the Constitution's assignment of power over "commerce among ... the [several] states" was exclusive and that the states were deprived of such power.<sup>41</sup> Marshall admitted in his *Gibbons* opinion that "there [wa]s great force in this argument," and that he was "not satisfied that it ha[d] been refuted."<sup>42</sup> Adopting that position would have hamstrung state efforts to exercise myriad "police powers," at least when the subjects of those powers were or could be part of interstate commerce.<sup>43</sup> This would have undoubtedly evoked a firestorm of protest from states, which were already beginning to be nervous about the Marshall Court's nationalist decisions.

But the alternative—that states had full concurrent power over interstate commerce, unless Congress had acted and its acts conflicted with state law—was equally unpalatable to the author of

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38. *Brown*, 25 U.S. (12 Wheat.) at 448-49. Much of *Brown* turned on an application of the Import-Export Clause of Article I, Section 10. *Id.*

39. *Willson*, 27 U.S. (2 Pet.) at 252; see CURRIE, *supra* note 36, at 175; KONEFSKY, *supra* note 36, at 226; WHITE, *supra* note 36, at 584.

40. *Willson*, 27 U.S. (2 Pet.) at 252.

41. See, e.g., *Gibbons*, 22 U.S. (9 Wheat.) at 209 (describing the argument of Daniel Webster, counsel for *Gibbons*, before the Court).

42. *Id.*

43. See WHITE, *supra* note 36, at 580 ("Marshall could hardly gainsay that the states had some reserved regulatory powers .... He conceded that a variety of state regulatory legislation would withstand constitutional scrutiny.").

*McCulloch v. Maryland*.<sup>44</sup> Marshall had held in *McCulloch* that even where concurrent power was undisputed, as it was in the area of taxation, instances of that power's exercise could be so incompatible with the plan of Union expressed in the Constitution as to render them unconstitutional.<sup>45</sup>

Marshall, a judicial politician *par excellence*, finessed the issue in *Gibbons*. First, he denied that states had a concurrent power over interstate commerce *qua* commerce as they had concurrent power to tax.<sup>46</sup> While conceding that states may exercise *some* power over interstate commerce, he argued that power stemmed from some other source:

All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.<sup>47</sup>

Marshall then located the source of this power in the ability of states to "regulat[e] their own purely internal affairs, whether of trading or police,"<sup>48</sup> a power that Congress did not possess. Among these powers he included "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc."<sup>49</sup>

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44. 17 U.S. (4 Wheat.) 316 (1819).

45. *Id.* at 435-36.

46. *Gibbons*, 22 U.S. (9 Wheat.) at 199-200 (distinguishing the power to tax from the power over interstate commerce). Even here, as he made clear in *Brown v. Maryland*, that power could not "be used so as to obstruct the free course of a power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat the power to regulate commerce." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448-49 (1827).

47. *Gibbons*, 22 U.S. (9 Wheat.) at 204; see HOBSON, *supra* note 36, at 142 ("The chief justice ... recognized the existence of a broad area of reserved state powers known as the 'police power.' At the same time he took great pains to maintain a conceptual distinction between the police power and the power to regulate commerce.").

48. *Id.* at 209.

49. *Id.* at 203-04; see CURRIE, *supra* note 36, at 174 ("Marshall ... took pains to emphasize that the states were not without all power to *impede* interstate or foreign commerce," but emphasized that the power was not the power to regulate commerce, but rather to exercise

Looking at these cases through a decision rules model, the constitutional operative proposition, as Marshall conceived it, was that the Constitution prohibited state laws attempting to regulate interstate commerce *as commerce*—even when Congress had not acted—while permitting police power regulations that might (as it would later be put) indirectly regulate interstate commerce.<sup>50</sup> The constitutionality of state power, then, turned on the purpose for which the state exercised it. As for the decision rules, they tracked the operative proposition; Marshall attempted to enforce it perfectly. But, as David Currie has observed, Marshall “made no real effort to explain [the distinction in *Willson*], though this was the first case in which he had to face the issue of the preemptive effect of the commerce clause itself; he left us to wonder what was the basis of the decision.”<sup>51</sup>

## 2. *The Taney Court*

If, as Kent Newmyer wrote, “[t]he Marshall Court had painted with broad strokes,” then “[t]he new age needed a lighter touch and more subtle shading.”<sup>52</sup> The Taney Court certainly provided both; in fact, the shading among the Justices was so subtle that Carl Swisher, the Taney Court historian, termed the variety of opinions in one DCCD case a “riot of diversity.”<sup>53</sup> Professor Currie was more blunt: prior to *Cooley*,<sup>54</sup> the Taney Court’s DCCD opinions “sub-

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other police powers); KONEFSKY, *supra* note 36, at 208-09 (noting the importance of “Marshall’s distinction between the regulation of commerce entrusted to Congress and local regulations which might have an incidental or ‘remote influence’ on commerce.”).

50. See HOBSON, *supra* note 36, at 142 (“From [counsels’] arguments Marshall fashioned a unique synthesis that leaned toward exclusive power while recognizing as a practical matter the states’ concurrent power in this area.”); WHITE, *supra* note 36, at 577 (“Marshall seemed to say ... first, that the states could freely regulate internal commerce; second, that Congress had exclusive power to regulate interstate commerce; and third, that when Congress did not choose to exercise its power the states were forbidden from acting.”); *id.* at 583-84 (emphasizing *Willson*’s insistence that exercises of the police power were not impermissible regulations of interstate commerce).

51. CURRIE, *supra* note 36, at 176.

52. NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 101.

53. 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, at 375 (1974); *see also* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 81 (1982).

54. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1852).

merged the unhappy reader in a torrent of verbiage ... without providing any meaningful guidance for future controversies."<sup>55</sup>

Still, it is important to remember, as then-Professor Frankfurter reminded his audience, that "Taney [did not] accomplish[] a wholesale reversal of Marshall's doctrines."<sup>56</sup> On the contrary, Marshall's opinions "challenged and confined the creative efforts of Taney."<sup>57</sup> Marshall's framing of the choices for the constitutional operative proposition—whether the commerce power delegated to Congress was exclusive or not—was still the starting point for the Court's discussions. The Justices, further, still sought a rule of decision that tracked the operative proposition closely.

Taney argued that Marshall's distinction between regulations of commerce and exercises of the police power was an untenable one, and rejected the exclusivity theory that clearly had Marshall's sympathy.<sup>58</sup> For Taney, state power over commerce existed side by side with that of Congress; only in the case of clear conflict between state and congressional regulation of commerce did state power have to give way.<sup>59</sup> The problem was attracting sufficient numbers of Justices to that position so that it might become the law. In three of the four important DCCD cases decided by the Taney Court, so many Justices spoke for themselves alone that "whether majority or minority," wrote Swisher, "[t]he opinions ... were so diverse that attempts to summarize could only confuse."<sup>60</sup>

Early Taney Court cases can therefore be described only in terms of their result, and positions of individual Justices noted. In *New*

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55. CURRIE, *supra* note 36, at 230.

56. FRANKFURTER, *supra* note 36, at 49; *see also* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 27 (rev. ed. 1926) (noting that early Taney Court cases, like *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837), "did not challenge in any way Marshall's opinion in *Gibbons v. Ogden*.... [And they] did not depart from Marshall's broad doctrines on interstate commerce as far as Marshall himself had gone in *Wilson* [sic] ....").

57. FRANKFURTER, *supra* note 36, at 46-47.

58. *Id.* at 52-53 (explaining that Taney denied Marshall's distinction between regulation of commerce and permissible exercises of the police power and rejecting propriety of attempts to inquire into legislative motive); SWISHER, *supra* note 53, at 373-74.

59. *See* NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 103 (noting that "Taney explicitly repudiated exclusivism and supported the power of states to legislate concurrently with Congress in the field of interstate commerce," while recognizing congressional primacy once it had acted).

60. SWISHER, *supra* note 53, at 388.

*York v. Miln*,<sup>61</sup> the Court—with only Justice Story dissenting—upheld New York’s requirement that masters of ships coming from out-of-state and foreign countries report the names and birth places of passengers and post bond to ensure passengers would not become public charges.<sup>62</sup> Justice Barbour, applying Marshall’s decision rule, declared that the New York law was a valid exercise of its police power and not a regulation of commerce.<sup>63</sup> Though *Miln* “settled nothing,”<sup>64</sup> it did seem an emphatic decision on the part of the Court *not* to “close[] the door to state power by opening the one to exclusivism deliberately left ajar by Marshall’s *Gibbons* opinion.”<sup>65</sup>

Subsequently, the *License Cases*<sup>66</sup> not only settled nothing, but they actually sowed more confusion. Though the Court unanimously upheld the right of Massachusetts, Rhode Island, and New Hampshire to regulate the sale of liquor<sup>67</sup>—even liquor imported into the state in its “original package”<sup>68</sup>—six Justices wrote nine separate

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61. 36 U.S. (11 Pet.) 102 (1837).

62. *Id.* at 136.

63. *Id.* at 130-43; CURRIE, *supra* note 36, at 204 (“[Justice Barbour] wrote for the Court a relatively straightforward opinion leaving open the question whether Congress possessed exclusive authority to regulate commerce.”); NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 102; SWISHER, *supra* note 53, at 363. Justice Barbour’s colleagues complained that his written opinion exceeded the modest position he advocated in conference, characterizing the police power as “unqualified and exclusive” and “flatly contradict[ing] the *Gibbons* opinion, which gave federal law priority in case of conflict.” NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 102; *see also* SWISHER, *supra* note 53, at 364. Barbour even gratuitously added that regulation of people could not be a regulation of commerce, *Miln*, 36 U.S. (11 Pet.) at 142, a vivid reminder that the question of congressional regulation of slavery and state regulation of free blacks within their territory lurked like Banquo’s Ghost in the background of antebellum cases involving the commerce power. SWISHER, *supra* note 53, at 363; *see also* HYMAN & WIECEK, *supra* note 53, at 80 (“This background of controversy [over state Negro Seamen Acts confining to ship or prison free blacks landing in slave state seaports] permeated the *Miln* opinion.”); SWISHER, *supra* note 53, at 359 (“Always in the background of judicial reasoning with respect to these controversies were the issues of slavery.”).

64. NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 103. Professor Currie characterized *Miln* as an “easy case” whose decision was amply supported by Marshall’s prior opinions. CURRIE, *supra* note 36, at 206.

65. NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 102.

66. 46 U.S. (5 How.) 504 (1847).

67. *Id.* at 568-70. For a description of the laws themselves, *see id.* at 504; *see also* SWISHER, *supra* note 53, at 372.

68. *See Thurlow*, 46 U.S. (5 How.) at 535-36. The “original package” doctrine was Marshall’s heuristic device for determining at what point “interstate” commerce lost its “interstate” quality, thus enabling states to tax those goods. Marshall’s solution, put forth in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), was that the state’s ability to tax kicked in whenever bulk goods were broken up and commingled with other goods for retail sale. *Id.*

opinions giving their reasons.<sup>69</sup> Swisher wrote of those opinions that "[t]he commentator on the opinions of the six Justices can no more bring them into harmony than could the Justices themselves."<sup>70</sup> Justices McLean and Grier (with Justice Woodbury partially agreeing) held to Marshall's dichotomy—regulation of commerce/exercise of the police power—and found the laws to be in the latter class.<sup>71</sup>

Chief Justice Taney, joined by Justice Catron, rejected both exclusivity and Marshall's classification, endorsing the proposition that Congress and the states had concurrent authority to regulate interstate commerce as long as Congress had not acted.<sup>72</sup> Amid this confusing throng, which has led commentators to argue that the *License Cases* "lack[ed] doctrinal significance,"<sup>73</sup> and were "less coheren[t]" than *Miln*,<sup>74</sup> there was only one suggestion of a way out of the thicket. Justice Woodbury's opinion suggested framing the issue in a way that presaged the rule adopted in *Cooley*.<sup>75</sup>

The *Passenger Cases*<sup>76</sup> continued the unedifying airing of multiple points of view that were the trademark of the Taney Court's DCCD opinions. Five Justices voted to strike down New York and Massachusetts' attempts to tax interstate and foreign passengers landed at their ports, but "no one spoke for the Court."<sup>77</sup> The Justices were stalemated over the exclusivity/concurrent power

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at 441-42. The original package doctrine was finally abandoned in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1975). See generally Walter Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power To Tax Imports*, 1976 SUP. CT. REV. 99.

69. CURRIE, *supra* note 36, at 225-26; NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 103; SWISHER, *supra* note 53, at 373-74; 2 WARREN, *supra* note 56, at 154.

70. SWISHER, *supra* note 53, at 373.

71. CURRIE, *supra* note 36, at 225; SWISHER, *supra* note 53, at 374. Justices McLean and Grier, however, disagreed as to the extent to which the commerce power was exclusive in Congress. NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 103; SWISHER, *supra* note 53, at 374-75.

72. CURRIE, *supra* note 36, at 226; NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 103-04; SWISHER, *supra* note 53, at 375. Justices Woodbury and Nelson agreed with the Chief Justice that the distinction between state regulations of commerce as commerce and exercises of the police power was artificial and untenable. CURRIE, *supra* note 36, at 226.

73. HYMAN & WIECEK, *supra* note 53, at 81.

74. *Id.* at 81-82; see also *id.* at 81 ("Out of this plethora of views, no doctrine at all emerged, and scarcely any result ....").

75. See *infra* Part II.B; see also SWISHER, *supra* note 53, at 375; WARREN, *supra* note 56, at 238 n.1.

76. 48 U.S. (7 How.) 283 (1849).

77. CURRIE, *supra* note 36, at 227.

question, with some Justices declining to invoke the Commerce Clause at all.<sup>78</sup> “The upshot,” wrote Professor Currie, “was almost total incoherence.”<sup>79</sup>

Professor Swisher concluded that “[h]owever great the yearnings for judicial synthesis after the fashion of that provided for the Marshall Court, it may be that publicly displayed judicial ferment had to precede the arrival of such synthesis.”<sup>80</sup> As it happened, synthesis was at hand; it came like a “bolt out of the blue”<sup>81</sup> just a few years after the *Passenger Cases*, and from the pen of a rookie Justice.

### *B. Cooley’s National/Local Test*

A Pennsylvania law requiring vessels entering the port of Philadelphia either to hire a local pilot, or to pay into a fund established for the relief of retired pilots and their families, was challenged as a violation of the Commerce Clause.<sup>82</sup> Justice Benjamin Curtis began his opinion in *Cooley* with a significant concession: the pilotage law was without a doubt a regulation of interstate commerce, and thus “appeared ... to reject Marshall’s metaphysical police power distinction altogether.”<sup>83</sup> But more importantly, Curtis reframed the issue completely, articulating a decision rule that focused on the *subject* of the regulation.<sup>84</sup>

As Curtis put it, “whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”<sup>85</sup> On the other hand, if the nature of the subject is such that “it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the

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78. *Id.* at 229.

79. *Id.* at 229-30.

80. SWISHER, *supra* note 53, at 377.

81. CURRIE, *supra* note 36, at 231.

82. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851).

83. CURRIE, *supra* note 36, at 231.

84. NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 105 (“[Curtis] inject[ed] some constitutional order into its interpretation of the commerce power.”); SWISHER, *supra* note 53, at 405 (“[Curtis] restate[d] the question.”).

85. *Cooley*, 53 U.S. (12 How.) at 319.

several states should deem applicable to the local peculiarities of the ports within their limits," then it may be left to the states to regulate, unless Congress preempted them.<sup>86</sup>

Despite the fact that "the opinion provides little guidance for distinguishing" between national and local subjects,<sup>87</sup> *Cooley* "devised a rule of thumb to guide the process of decision and thus gave clarity and some predictability to its efforts."<sup>88</sup> *Cooley* "began a new era."<sup>89</sup> If it was "an eloquent statement of indefiniteness," that indefiniteness "came to seem in some way manageable" in contrast to the confusion that preceded it.<sup>90</sup>

One of the things that makes *Cooley* so noteworthy is the fact that Curtis had crafted an entirely new decision rule that straddled the diametrically opposed operative propositions held by the Justices. Only the diehard exclusivists (Justices McLean and Wayne) and the most extreme states' rights Justice (Daniel) dissented.<sup>91</sup> Even Chief Justice Taney acquiesced in Curtis's compromise. That *Cooley* successfully finessed the question of the operative proposition, I think, accounts for its durability as a decision rule over the years.<sup>92</sup> Vestiges of this rule remain in the Court's current DCCD jurisprudence.<sup>93</sup> In fact, it would not be too grandiose to employ Alfred North Whitehead's metaphor and proclaim that all subsequent DCCD formulae are but a footnote to *Cooley*.<sup>94</sup>

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86. *Id.*

87. SWISHER, *supra* note 53, at 406 ("It left unanswered the question whether the Court would find to be local any interstate or foreign commerce other than that which Congress had designated as such ...."); see also CURRIE, *supra* note 36, at 233 (noting lack of criteria for differentiating between national and local subjects); NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 107 ("Curtis gave no clues beyond the case as to which aspects of commerce required uniformity, which diversity. Nor did he supply any specific criteria for determining these essential categories.").

88. NEWMYER, MARSHALL AND TANEY, *supra* note 36, at 107.

89. CURRIE, *supra* note 36, at 234.

90. SWISHER, *supra* note 53, at 407.

91. *Cooley*, 53 U.S. (12 How.) at 321, 325.

92. See also CURRIE, *supra* note 36, at 230 ("[Curtis] conjure[d] up out of the morass a solid majority for a brand new commerce clause interpretation that would play a prominent part in decisions for nearly a century.").

93. See *supra* note 6 and accompanying text.

94. Whitehead's comment was that all philosophy is a footnote to Plato. ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 39 (1979) ("The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.").

### C. *The Direct/Indirect Test*

However masterful the compromise, *Cooley's* distinction between national and local subjects, without more, would not decide any cases. *Cooley* "may have been the beginning of wisdom, but it required still more appreciation of questions of degree, questions of the extent of local need measured against the effects of local laws on interstate commerce."<sup>95</sup> The country, too, was changing, and "[c]onstitutional law [would have] to be stated in the light of the evolving pattern of economic life."<sup>96</sup> One of the most important evolutions would be the transformation of American life wrought by the railroad.<sup>97</sup> A second was the beginning of mass-produced consumer goods that could be advertised and sold nationwide.<sup>98</sup> Both had important implications for judicial enforcement of the DCCD.

First, these changes would, for all practical purposes, inter the exclusivity theory Marshall had been tempted to adopt in *Gibbons*. Despite the Court's continued invocation of exclusivity to justify some decisions striking down state laws, it was clear that states had concurrent power over interstate commerce, with a few developing exceptions. Because states were regulating and taxing interstate commerce, the Court would have to devise new decision rules to separate permissible from impermissible state action.

In the case of nondiscriminatory laws or taxes, the Court developed the "direct/indirect" test. But it was at this time that the Court also began to focus on whether a state or local law *discriminated* against interstate commerce—that is, whether laws treated out-of-state commerce or out-of-state commercial actors worse than their in-state counterparts. Thus, the modern analytical structure began to take shape. I will describe the emergence and application of the direct-indirect distinction in this section, drawing on Barry

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95. SWISHER, *supra* note 53, at 422.

96. *Id.*

97. See, e.g., James W. Ely, Jr., "the railroad system has burst through State limits": *Railroads and Interstate Commerce, 1830-1920*, 55 ARK. L. REV. 933 (2003).

98. See, e.g., 7 CHARLES FAIRMAN, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88*, pt. 2 at 663-64 (1987).

Cushman's outstanding survey.<sup>99</sup> In the next subsection, I take up the formulation of the antidiscrimination principle.

In addition to waging a campaign "to break down local barriers to interstate trade" through the antidiscrimination principle, the late nineteenth- and early twentieth-century Court also subjected "nondiscriminatory impediments to interstate trade" to its "exacting scrutiny."<sup>100</sup> The Court invalidated state laws regulating everything from liquor and cigarettes to the "operations of interstate carriers," the price of interstate goods, and the amount at which those goods could be taxed.<sup>101</sup> While the Court might refer to the "exclusive" power of Congress when it applied the antidiscrimination principle,<sup>102</sup> commentators began to realize that exclusivity as a constitutional operative position was no longer tenable. Continued reliance on exclusivity would mean an immense "regulatory vacuum" that it was not at all clear Congress could fill, given the limitations the Court had imposed on the Commerce Clause.<sup>103</sup>

But *Cooley's* opaque national/local rule was not much help either. The Court developed a new decision rule: "regulations touching a 'national' matter or burdening interstate commerce 'directly' were unconstitutional. But where 'local' matters were concerned, any valid exercise of the police power or the power to tax that affected interstate commerce only 'incidentally' or 'indirectly'" was a per-

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99. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).

100. *Id.* at 1101, 1103.

101. *Id.* at 1103-05. Cushman's article contains copious citations to the relevant cases. *Id.*

102. *See id.* at 1108 & n.98.

103. *Id.* at 1109-10. Later in his article, Cushman quotes at length the Court's opinion in *Kidd v. Pearson*, 128 U.S. 1 (1888), in which the Court upheld Iowa's prohibition on the manufacture of liquor against a DCCD challenge. Cushman, *supra* note 99, at 1122. The Court emphasized that were it to hold that "manufacture" was "commerce," the implications for the taxing and regulatory powers of the state would be dire. *Id.* Showing the tenacity of the theory of exclusivity, the Court declared that if commerce included manufacture or production, Congress would be vested with enormous power "to the exclusion of the States." *Id.* at 1122-23 (quoting *Kidd*, 128 U.S. at 21-22). Cushman writes:

If, as Lamar and his colleagues evidently maintained, the power to regulate commerce were exclusive, a definition of commerce that included "local" productive enterprise would have deprived states of the power to regulate such enterprise, even in the absence of congressional action. This would not merely have worked a revolution in federalism—it would have been the single greatest act of deregulation in American history.

*Id.* at 1124 (footnotes omitted).

missible exercise of state power.<sup>104</sup> Professor Cushman put it well, writing that:

[I]n an era in which federal efforts to regulate intrastate activities were the exception rather than the rule, the principal function of locating such activities in the local sphere and holding that they affected interstate commerce only indirectly was not to frustrate federal regulation, but instead to insulate state and local regulatory and taxing initiatives from dormant Commerce Clause attack.<sup>105</sup>

As Professor Cushman notes, the terms “direct” and “indirect” were employed “rather indiscriminately across a broad range of cases, causing no end of confusion and consternation among contemporary commentators.”<sup>106</sup> The cases can, however, be sorted into two broad classes. The first included the lineal descendent of *Cooley*: “local” matters “over which Congress’s jurisdiction was paramount but not exclusive,” such as nondiscriminatory labeling and inspection statutes, quarantine laws, and grain elevator rates.<sup>107</sup> “With respect to this class of cases,” Cushman writes, “the permissibility of state regulation did not preclude federal action. In each instance the opinion indicated that regulation of the matter in question was within congressional competence.”<sup>108</sup>

In the second class of cases, however, the effect on interstate commerce was said to be indirect or remote because the laws were not regulations of interstate commerce at all. Laws “might operate before interstate commerce had begun, or after it had ceased, but they did not regulate subject matter entrusted to Congress under the Commerce Clause.”<sup>109</sup> From this second class of DCCD cases, the Court derived its much criticized categories of direct/indirect effects that limited Congress’s affirmative power under the Commerce Clause and placed off-limits centralized regulation of production and

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104. *Id.* at 1110-12 & nn.104-09.

105. *Id.* at 1121.

106. *Id.* at 1114.

107. *Id.* at 1114-16.

108. *Id.* at 1116.

109. *Id.*

manufacture, which were said to precede commerce, but were not a part of it.<sup>110</sup>

In either case, the effect was similar: these categories “rescued from dormant Commerce Clause attacks” both “states’ powers of licensure and taxation” as well as their “regulatory powers.”<sup>111</sup> States could regulate insurance because, the Court held, insurance was not commerce.<sup>112</sup> Inspection laws were permitted to govern goods destined for, but not yet *in*, interstate commerce.<sup>113</sup> In both cases, the effects on interstate commerce were held to be indirect or remote. Other examples in both tax and regulatory cases abound in Professor Cushman’s article.<sup>114</sup>

In all the cases, the Court had designed decision rules that implemented (and attempted to improve upon) *Cooley*, while finessing the operative proposition. This was to be a recurring pattern in the Court’s history with the DCCD—failure to grapple with the underlying operative proposition coupled with promulgation of set after set of decision rules attempting to furnish officials and litigants with a yardstick by which to measure the constitutionality of their actions. And many of those rules—the direct/indirect test was no exception—would go on to meet the fate described by Alexander Bickel: slow erosion or ignominious abandonment.<sup>115</sup>

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110. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); Cushman, *supra* note 99, at 1126 (“Affirmative Commerce Clause doctrine during this period ... was the flip side of the Court’s dormant Commerce Clause jurisprudence.”); see also Cushman, *supra* note 99, at 1116-17 (“[T]he opinions in the second class might characterize ... statutes as ‘affecting’ interstate commerce ‘incidentally,’ ‘indirectly,’ or ‘remotely.’ But here these terms had a different significance. There was no suggestion in these cases that these were matters over which Congress might assert its regulatory authority. Such matters were ‘purely’ or ‘essentially’ ‘local,’ subject solely to state and local regulation, beyond the reach of the commerce power.”).

111. Cushman, *supra* note 99, at 1119.

112. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869); Cushman, *supra* note 99, at 1119.

113. See, e.g., *Turner v. Maryland*, 107 U.S. 38, 54-56 (1883); Cushman, *supra* note 99, at 1119.

114. Cushman, *supra* note 99, at 1120-21. An enormous number of cases arose from state regulation of railroads—everything from rates, to the size of crews, to the safety devices to be employed—scores of which garnered DCCD challenges. For an extremely helpful overview, see generally Ely, *supra* note 97, at 937-61. As Professor Ely ruefully notes, however, “[i]t is a futile quest to seek in the railroad cases a precise delineation of state authority to regulate aspects of commerce.” *Id.* at 961.

115. See *supra* note 1 and accompanying text.

*D. The Rise of the Antidiscrimination Principle*

Despite the ultimate sterility of the direct/indirect test, a contemporary decision rule, the antidiscrimination principle, has proven extremely robust, or, to continue the fertility metaphor, virile in the years following its emergence. Yet both its emergence and its constitutional pedigree remain something of a mystery. Beginning in the 1860s,<sup>116</sup> the Court upheld some nondiscriminatory taxes, but stressed the fact that the taxes imposed were no greater than those imposed on domestic goods or producers, without clearly explaining why their nondiscriminatory status was decisive.<sup>117</sup>

Then in the 1870 case of *Ward v. Maryland*,<sup>118</sup> the Court struck down a state law barring out-of-state salesmen from selling out-of-state products in Baltimore without a license.<sup>119</sup> The Court rested its decision on the Privileges and Immunities Clause of Article IV, Section 2,<sup>120</sup> but in a concurrence, Justice Bradley argued that the law also violated the Commerce Clause.<sup>121</sup> The Court then cited *Ward* as support for its 1876 decision in *Welton v. Missouri*, which struck down a Missouri tax imposed on peddlers of out-of-state goods.<sup>122</sup> Nor was *Welton* the only example of the Court importing an antidiscrimination norm from a related constitutional provision into the Commerce Clause. Earlier, in *Woodruff v. Parham*,<sup>123</sup> the Court recharacterized a Taney Court Import-Export Clause case as a DCCD case in the course of limiting the Import-Export Clause's application to foreign commerce only.<sup>124</sup>

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116. See Cushman, *supra* note 99, at 1101 ("As the national economy became increasingly integrated in the years following the Civil War, the Court began a conscious and increasingly aggressive campaign to break down local barriers to interstate trade through a 'free-trade' construction of the dormant Commerce Clause.").

117. See *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868); FAIRMAN, *supra* note 98, pt. 1 at 1403-04.

118. 79 U.S. (12 Wall.) 418 (1870).

119. *Id.* at 419, 432.

120. *Id.* at 430.

121. *Id.* at 432-33 (Bradley, J., concurring).

122. *Welton v. Missouri*, 91 U.S. 275, 276 (1876).

123. 75 U.S. (8 Wall.) 123 (1868).

124. *Id.* at 137-38. The earlier case was *Almy v. California*, 65 U.S. (24 How.) 169 (1861), in which the Taney Court struck down a California tax on the export of gold from the state. *Almy* relied in part on Chief Justice Marshall's casual comment in *Brown v. Maryland* that he supposed the Import-Export Clause applied to domestic as well as to foreign commerce. *Almy*, 65 U.S. (24 How.) at 173; *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827). For

*Welton* was frequently cited thereafter in a variety of cases striking down discriminatory taxes on everything from auctions of foreign goods,<sup>125</sup> to vessels carrying out-of-state goods,<sup>126</sup> to peddlers of out-of-state goods,<sup>127</sup> to liquor.<sup>128</sup> As Charles Fairman commented, "[t]hat exactions of long standing were now being challenged suggest[ed] a new sense of nationalism, to which the centennial decision in *Welton* gave expression."<sup>129</sup>

Whatever the impetus, the antidiscrimination principle proved such an attractive one to the Justices that in little over a decade after *Welton*, the Court expanded it to invalidate a facially neutral tax with discriminatory effects in *Robbins v. Shelby County Taxing District*,<sup>130</sup> and to non-tax regulations, like discriminatory inspection laws.<sup>131</sup> Though the local tax on drummers in *Robbins* did not draw an explicit geographical distinction with regard to the goods or the drummer himself, "drummers (unlike peddlers) were peculiarly and characteristically engaged in ... interstate sales."<sup>132</sup>

The question arises, however: why did the Court feel that the constitutional command of the Commerce Clause mandated an antidiscrimination principle at all? The Court offered several reasons. In *Welton*, the Court seemed to equate uniformity with nondiscrimination,<sup>133</sup> and supposed that, in the absence of congressional legislation *permitting* the discrimination, Congress's inaction

a discussion of all these cases, see generally Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and Camps Newfound/Owatonna v. Town of Harrison*, 70 U. COLO. L. REV. 155 (1999).

125. *Cook v. Pennsylvania*, 97 U.S. 566, 573 (1878).

126. *Guy v. Baltimore*, 100 U.S. 434, 439 (1879).

127. *Webber v. Virginia*, 103 U.S. 344, 350-51 (1880) (striking down a discriminatory charge of agent selling Singer sewing machines).

128. *Walling v. Michigan*, 116 U.S. 446, 455 (1886).

129. FAIRMAN, *supra* note 98, pt. 2 at 666.

130. 120 U.S. 489 (1887).

131. *See, e.g., Voight v. Wright*, 141 U.S. 62, 66-67 (1891); *Brimmer v. Rebman*, 138 U.S. 78, 84 (1891); *see also Cushman, supra* note 99, at 1103.

132. FAIRMAN, *supra* note 98, pt. 2 at 667; *see also id.* at 668 (noting that "in numberless instances the only feasible way to obtain orders was by personal solicitation, and in many branches ... by exhibiting samples"). The Court did not use a term like "discrimination in effects." It concluded, however, that the local exaction fell on interstate commerce itself, that is to say, "directly" on interstate commerce, which made it invalid. *Id.*

133. *See Cushman, supra* note 99, at 1102 ("The Constitution 'had its immediate origin in the necessities of commerce; and for its immediate object ... establishing a uniform and steady system.'" (quoting *Guy v. Baltimore*, 100 U.S. 434, 440 (1879))).

implied a desire that interstate commerce "shall be free and untrammelled."<sup>134</sup> Thus, some Justices conceived of the anti-discrimination principle as a particular application of *Cooley*. Other Justices saw it as a convenient rule for restraining the states without completely abrogating their power to tax interstate commerce.<sup>135</sup> Occasionally, members of the Court would give a historical reason—that preventing discriminatory laws was the reason that the Commerce Clause was drafted.<sup>136</sup>

### *E. "Balancing" and the Emergence of the Modern Approach*

The early twentieth century, then, saw the Court lurch towards an agreed-upon doctrinal formula, if not on that formula's application in each case. The direct/indirect test had emerged as a gloss on *Cooley's* national/local distinction, and the antidiscrimination principle could even be characterized (as it was by Justice Cardozo) as an example of the sort of "direct" restraint on interstate commerce denied to states.<sup>137</sup> Uncertainty still persisted, though, over the *constitutional* warrant for this implied restriction,<sup>138</sup> and it was not long before frustration over the inability to accurately predict what constituted a direct versus an indirect burden on commerce would lead to calls for yet another test.

The occasion was the Court's invalidation, in *DiSanto v. Pennsylvania*,<sup>139</sup> of a requirement that those selling tickets to passengers making overseas voyages be bonded.<sup>140</sup> The state defended the law as necessary to prevent fraud, but the Court found it a direct restraint on interstate and foreign commerce.<sup>141</sup> The harbinger of change was Justice Stone, who dissented from the Court's decision; Justices Holmes and Brandeis joined in his dissent. "[T]he purpose of the commerce clause," he complained, "was not to preclude all state regulation of commerce crossing state lines, but to prevent

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134. *Welton v. Missouri*, 91 U.S. 275, 279-80 (1876).

135. See, e.g., *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 501 (1887) (Waite, C.J., dissenting) (arguing that interstate commerce ought to be made to pay its own way).

136. See *infra* note 142 and accompanying text.

137. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

138. See *infra* Part IV.A.

139. 273 U.S. 34 (1927).

140. *Id.* at 35-36.

141. *Id.* at 37.

discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.”<sup>142</sup>

Adverting to *Cooley*, Stone noted that with regard to “matters of local concern which may properly be subject to state regulation and which, because of their local character, as well as their number and diversity, can never be adequately dealt with by Congress,” a state was free to regulate “so long as it does not impede the free flow of commerce.”<sup>143</sup> Inquiring whether a law was a “direct” or “indirect” burden, he argued, “seems ... too mechanical, too uncertain in its application, and too remote from actualities, to be of value.”<sup>144</sup> The Court was merely “using labels to describe a result rather than any trustworthy formula by which it is reached.”<sup>145</sup> His preferred solution was to uphold state laws that

because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.<sup>146</sup>

Stone’s critique caught the attention of scholars, who urged the Court to adopt the frank balancing of national and local interests that the *DiSanto* dissent proposed. John Sholley wrote that the Court should abandon its prior approaches in favor of conducting an “inquiry [extending] to a consideration of all the circumstances of the case. The test would be ... which interest, that of state or nation, should prevail.”<sup>147</sup> Many of the Court’s prior inquiries—into the purpose of the legislation or the “incidence of the burden ... whether direct or indirect”—might be considered as factors in the ultimate determination, but none would control.<sup>148</sup>

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142. *Id.* at 43-44 (Stone, J., dissenting).

143. *Id.* at 44.

144. *Id.*

145. *Id.*

146. *Id.*

147. John B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 592 (1936).

148. *Id.* at 593.

In *South Carolina State Highway Department v. Barnwell Bros.*,<sup>149</sup> Stone got the opportunity to make his *DiSanto* dissent the law. Upholding a state restriction on the size and weight of trucks traveling on state highway, Stone drew a distinction between discriminatory and nondiscriminatory state regulations. "The commerce clause, by its own force," he wrote, "prohibits discrimination against interstate commerce, whatever its form or method .... It was to end these practices that the commerce clause was adopted."<sup>150</sup> Because South Carolina's law was nondiscriminatory,<sup>151</sup> and "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways,"<sup>152</sup> the Court was inclined to permit the state leeway as long as Congress had not intervened. "There are [a] few [matters], local regulation of which is so inseparable from a substantial effect on interstate commerce."<sup>153</sup> When Congress was silent, and the state passed nondiscriminatory laws regulating local matters, "the judicial function ... under the commerce clause ... stops with the inquiry whether the state legislature ... has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."<sup>154</sup>

Seven years later, Stone—influenced perhaps by an article by Noel Dowling<sup>155</sup>—wrote the paradigmatic balancing opinion in

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149. 303 U.S. 177 (1938).

150. *Id.* at 185-86. Even before *Barnwell's* straightforward replacement of the direct/indirect test with what we came to know as "balancing," Justice Cardozo, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), struck down a state law prohibiting the in-state resale of milk purchased out-of-state if the price paid for the milk was lower than the state minimum. "Neither the power to tax nor the police power," Cardozo wrote, "may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Id.* at 527. Discrimination against interstate commerce was in and of itself a forbidden "direct" regulation of commerce. *Id.* at 522.

151. *But see Barnwell*, 303 U.S. at 182 (noting trial court finding that "from 85 to 90 percent of the motor trucks used in interstate transportation" exceeded the standards set by South Carolina).

152. *Id.* at 187.

153. *Id.*

154. *Id.* at 190.

155. See Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940). Dowling proposed that the Court adopt a balancing test along the lines of that which emerged in *Southern Pacific Co. v. Arizona*. *Id.* at 19-28. He wrote that "in the absence of affirmative consent a Congressional negative will be presumed in the courts against state action which in its effect upon interstate commerce constitutes an unreasonable interference with national interests, the presumption being rebuttable at the pleasure of Congress." *Id.* at 20. Dowling

*Southern Pacific Co. v. Arizona*.<sup>156</sup> Arizona had passed a statute regulating the length of passenger and freight trains that was markedly different from those in surrounding states.<sup>157</sup> The Court concluded that the statute was unconstitutional because the alleged safety benefits to railyard workers were outweighed by the costs to the railroads, which would have to avoid Arizona or uncouple and recouple train cars when passing through the state.<sup>158</sup> Of particular interest here, though, is Chief Justice Stone's refinement of the balancing test at which *DiSanto* and *Barnwell Bros.* hinted.

He began by noting that ever since *Willson* and *Cooley*, the Court has "recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."<sup>159</sup> Specifically, "the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress."<sup>160</sup> In such cases, "[w]hen the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation ... such regulation has been generally held to be within state authority."<sup>161</sup>

But even as to these matters, the Commerce Clause, "without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court ... is under the commerce clause the final arbiter of the competing demands of state and national interests."<sup>162</sup> Summarizing the Court's decisions, Stone concluded that

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gave five reasons for adopting his proposal: (1) it represented, in fact, what the Court was already doing in many of its cases; (2) it introduced no new or novel proposition, the test of "reasonableness" being familiar to members of the Court; (3) it was a "flexible" doctrine that took account of national and state interests; (4) it would likely be agreeable to Congress; and (5) it represented what might now be called, after Sunstein, an "incompletely theorized agreement" around which members of the Court could coalesce. *Id.* at 20-28.

156. 325 U.S. 761 (1945).

157. *See id.* at 771, 773.

158. *Id.* at 773.

159. *Id.* at 767.

160. *Id.*

161. *Id.*

162. *Id.* at 769.

[t]here has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.<sup>163</sup>

From those cases he articulated the following rule:

[T]he matters for ultimate determination here are the nature and extent of the burden which the state regulation ... imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule ... that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.<sup>164</sup>

Twenty-five years later, the Court decided *Pike v. Bruce Church, Inc.*<sup>165</sup> in which the Court confirmed that Chief Justice Stone's balancing approach had endured, and gave it a new name—"Pike balancing." According to the *Pike* Court:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.... 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.<sup>166</sup>

"Occasionally," it acknowledged, "the Court has candidly undertaken a balancing approach in resolving these issues ... but more

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163. *Id.* at 770.

164. *Id.* at 770-71.

165. 397 U.S. 137 (1970).

166. *Id.* at 142.

frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens."<sup>167</sup>

Though the case is famous for its articulation of the *Pike* test, the Court did not actually apply it, finding instead that the Arizona law requiring the labeling of cantaloupes prior to export ran afoul of another line of cases in which the Court "ha[d] viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."<sup>168</sup> A few years later, in *City of Philadelphia v. New Jersey*,<sup>169</sup> the Court was able to state flatly that discriminatory statutes raised the specter of economic protectionism and triggered a "virtually *per se* rule of invalidity."<sup>170</sup> By the end of the 1970s, then, the outlines of the now-familiar two-tiered standard of review were discernable,<sup>171</sup> and each, as we have seen, had deep roots in the Court's DCCD jurisprudence.

The point of this doctrinal safari is this: since Marshall, the Court has been searching for a coherent set of rules to decide DCCD cases sensibly. What has inhibited it, both then and now, is that the Court has often framed decision rules without a clear articulation of the constitutional operative proposition the rules implemented. My project for the remainder of this Article will be to reframe the DCCD's constitutional operative proposition (while discussing and rejecting much of the Court's prior attempts, such as they were, at framing one), and then to construct sensible decision rules that implement that proposition. First, however, I will show that the DCCD's current stability is an illusion. Contemporary doctrine, too, is showing signs of the strain.

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167. *Id.*

168. *Id.* at 145.

169. 437 U.S. 617 (1978).

170. *Id.* at 624.

171. See, e.g., Walter Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 51 ("The Supreme Court's recent Commerce Clause opinions reflect an apparent effort to rationalize and modernize the analytical framework for delineating the implied restraints that the Clause imposes on state legislation.").

### III. THE COURT, THE DCCD, AND "CONSTITUTIONAL CALCIFICATION"

Nothing gold can stay; doctrine, like everything else, eventually succumbs to the forces of entropy. As the preceding Part demonstrates, constitutional doctrine has a sort of half-life—a point at which it begins to degrade and decay. Eventually, old doctrine is replaced by something "better."

Building on the work of Fallon and Berman, Professor Kermit Roosevelt has offered a tentative account of doctrinal collapse and reformation. He asks, "how [does] the law become[ ] what the Court does?"<sup>172</sup> The substitution of judicial gloss for constitutional command, he explains, occurs when the doctrine itself is conflated with constitutional commands—when, in other words, we confuse decision rules with operative propositions.<sup>173</sup> What Roosevelt terms "calcification" comes in minor and major forms.<sup>174</sup> Either presages the need for doctrinal modification; the major form of calcification, however, can do great harm before it is replaced.

In this Part, I will describe Professor Roosevelt's theory of calcification and show that the contemporary DCCD is exhibiting signs of minor and major calcification. The doctrinal problems plaguing the DCCD strongly suggest that the lessons of the past have not yet been learned, and affirms the point with which I ended the last Part: that the doctrine still lacks firm grounding in the Constitution. That, in turn, has stymied the development of stable decision rules to implement the constitutional command.

#### *A. Decision Rules and Calcification*

##### *1. Minor Calcification*

Professor Roosevelt identifies "loss of fit" and "subterfuge" as minor forms of calcification attending the creation of doctrinal rules.<sup>175</sup> Loss of fit occurs when, through the passage of time,

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172. Roosevelt, *supra* note 14, at 1649.

173. *Id.* at 1689-1700.

174. *Id.* at 1686, 1692.

175. *Id.* at 1686, 1689.

"[a]pproaches that once appeared feasible and coherent may come to seem neither; practices that once seemed natural may start striking people as ideologically freighted, and later obviously invidious."<sup>176</sup> The Court might then have to change the rules it employs to decide those cases.<sup>177</sup> For example, sex discrimination claims were, as late as the late 1940s, decided under rational basis rules. This was indefensible by the early 1970s when perceptions about "discrimination against women had shifted from natural to invidious."<sup>178</sup>

"Subterfuge," however, occurs when the Court "succumb[s] to the temptation to get a particular case right ... rather than faithfully applying" the doctrinal rules it has created.<sup>179</sup> This may occur because the Court itself begins to sense a loss of fit, but lacks consensus on how to fix the doctrinal rules.<sup>180</sup> So, it puts a thumb on the scales. Think, for example, of the numerous cases in which the Court has applied a more searching form of rational basis review—rational basis with teeth—instead of recognizing a new fundamental right or suspect classification.<sup>181</sup> Subterfuge confuses lower courts and "makes the Court appear arrogant, unprincipled, or both" by "suggest[ing] a lack of faith in either the lower courts or the unannounced rule, or perhaps a belief that society will not accept it."<sup>182</sup>

## 2. Major Calcification

Major calcification, however, describes a more serious problem. Inevitably, over time, doctrine becomes more complex. Additional rules may be created, some of which depart substantially from the constitutional command, in order to deal with "the sort of problems

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176. *Id.* at 1686.

177. *Id.* at 1687.

178. *Id.* at 1687-88.

179. *Id.* at 1689-90.

180. *Id.*

181. *Id.*; see, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-44 (1985). Early sex discrimination cases did this as well. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

182. Roosevelt, *supra* note 14, at 1691.

presented by adjudication.”<sup>183</sup> When minor problems crop up, like those described above, they probably indicate that a change in the doctrinal rules is needed.<sup>184</sup> But “when a stable jurisprudential regime has persisted for a period of time,” the Court may begin to confuse the doctrine with the constitutional value or command it is supposed to implement.<sup>185</sup> “When this happens,” Roosevelt argues, “a number of undesirable consequences follow.”<sup>186</sup>

The confusion of ends (constitutional commands) and means (constitutional doctrine) may “warp[ ] doctrine,” either by causing a Court to discard doctrinal rules that do not make sense as constitutional commands, or by accepting doctrine as a constitutional command “and mak[ing] other doctrinal changes, in the same or related fields, in order to maintain consistency.”<sup>187</sup>

One example Roosevelt gives is strict scrutiny of racial classifications in equal protection cases.<sup>188</sup> Whereas the constitutional command—treat all persons equally—must apply to *all* persons, the doctrinal rules do not: “[D]ecision rules will have special favorites, as long as, and to the extent that, state actors have special victims.”<sup>189</sup> He criticizes the Court’s affirmative action jurisprudence, which scrutinizes affirmative action programs that are motivated to aid minorities, but do not evince animus towards Caucasians, as strictly as it would a program of invidious discrimination aimed at a particular racial group.<sup>190</sup>

Another consequence of confusing the Constitution with the rules the Court fashions to enforce it occurs “[w]hen the Court treats its decision rules as operative propositions,” thus announcing “as constitutional truths rules that should neither be followed by nonjudicial actors nor internalized by the general public.”<sup>191</sup> Simply because the Court has chosen doctrinal rules that cause it to stay its

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183. *Id.* at 1692.

184. *Id.* at 1692-93 (“Decision rules may lose fit over time if facts or background understandings change. When this happens, the Court may—indeed, should—change the decision rule to fit the new circumstances. In doing so, the Court is simply employing a new method to implement an unchanging operative proposition.”).

185. *Id.* at 1693.

186. *Id.*

187. *Id.*

188. *Id.* at 1700-07.

189. *Id.* at 1703.

190. *Id.* at 1704-05.

191. *Id.* at 1713.

hand in certain circumstances or with regard to certain subjects does not mean, perforce, that the Constitution's meaning is bounded by the Court's reticence.

The Court would likely hold that a law that requires all persons wishing to arrange flowers to be licensed as a florist<sup>192</sup> does not fail the rational basis test, but such holding should not be taken to mean that the Constitution *requires* states to pass such laws, or that such laws do not violate the constitutional rights of unlicensed, would-be flower arrangers.<sup>193</sup> To believe otherwise is to deny the agency of other branches of government in the interpretation and enforcement of the Constitution.<sup>194</sup> At that point, as the subtitle of Roosevelt's article says, "the law" then becomes no more than "what the Court does."<sup>195</sup>

### *B. Calcification and the DCCD*

A loss of fit, presaging changes in doctrinal rules, has been a hallmark of the DCCD. Marshall attempted to distinguish between regulations of commerce and exercises of the police power; Curtis distinguished between national and local matters, which either proscribed or permitted state regulation; the *Cooley* distinction was then replaced with an inquiry into a state regulation's direct or indirect effect on commerce, which, in turn, was replaced by an explicit weighing of interests.<sup>196</sup> The switch from one set of doctrinal rules to another was often a response to changes in circumstances that rendered the previous test unworkable or prior distinctions untenable.<sup>197</sup> And though—or perhaps *because*—the two-tiered stan-

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192. See, e.g., *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005) (upholding Louisiana licensing scheme for florists), *vacated* No. 05-30450, 2006 WL 2168631 (5th Cir. Aug. 1, 2006).

193. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (describing constitutional under-enforcement).

194. Roosevelt, *supra* note 14, at 1716-17.

195. *Id.* at 1649.

196. The Court's doctrinal history is further detailed in Part II, *supra*. Limits on the taxing power went through a similar progression, from the "original package" doctrine, to immunity of interstate commerce from state taxation, to *Complete Auto's* multi-factor test. See generally HELLERSTEIN & HELLERSTEIN, *supra* note 10, ¶¶ 4.06-18.

197. Academic commentary, for example, encouraged the Court's formal adoption of balancing in place of the direct/indirect test. See, e.g., Dowling, *supra* note 155; Sholley, *supra* note 147.

dard of review has been stable for several decades, instability appears to be creeping back in.

This Part applies Roosevelt's general observations to the DCCD. Although it is not a comprehensive overview of all recent cases, this Part argues that both tiers suffer from the minor and major problems that Roosevelt describes. Specifically, *Pike* balancing and the antidiscrimination rule exhibit signs of "loss of fit." Some recent DCCD decisions, moreover, smack of subterfuge, as the Court refuses, sometimes on dubious grounds, to follow its own doctrine to a result the doctrine itself seems to compel. More serious, however, are the signs that major calcification, too, has settled in; constitutional commands and decision rules have been conflated, producing confusion and incoherence, not to mention flawed decision rules.

### 1. *Pike Balancing*

#### a. *Loss of Fit*

Balancing local benefits and interstate burdens was originally touted as a superior decision rule to the direct/indirect test. Its advocates thought balancing to be better suited to determining whether the regulation of a particular subject required a national, as opposed to a local, rule.<sup>198</sup> The more cost to interstate commerce, relative to the local benefit, the more likely Congress should be the body to regulate the subject, if it was to be regulated at all.<sup>199</sup> From the late 1940s to the 1970s, when *Southern Pacific* and *Pike* enshrined balancing as a feature of the DCCD, balancing was a familiar—perhaps pervasive—feature of constitutional law.<sup>200</sup> "Totality of the circumstances" tests, "balancing," and the like proliferated during the Warren and Burger Courts.<sup>201</sup> It is not surprising that such tests were then in full flower, given that belief

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198. See, e.g., Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 530 (1997).

199. *Id.*

200. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

201. For examples, including those from outside the DCCD, see *id.* at 944-48, 963-72.

in the wisdom and capacity of courts to solve myriad social problems was at an all-time high.<sup>202</sup>

In the 1980s, however, scholars and judges began to question both the justification for employing balancing, as well as the capacity of judges—as opposed to other policymakers—to employ it well. Balancing, complained Alexander Aleinikoff in an influential article, was “surprising[ly] ... rudimentary.”<sup>203</sup> Balancing required the weighing of competing, but incommensurable, interests—incommensurable because of a lack of an identifiable metric.<sup>204</sup> The Court also picked and chose among interests, designating some important enough to be weighed explicitly, while ignoring others, including “the interests of non-parties.”<sup>205</sup> In actual use, “balancing takes place inside a black box,” and “raises the specter of the kind of judicial decisionmaking ... that balancing promised to overcome.”<sup>206</sup> Opinions in which it has been employed, he argued, “severely damaged the credibility of the methodology.”<sup>207</sup>

In addition to his internal critique of balancing, Professor Aleinikoff argued that balancing was subject to a powerful external critique as well, invoking the now-familiar concept of “institutional competence.”<sup>208</sup> Balancing benefits and burdens is what we expect legislatures to do when choosing among competing policies.<sup>209</sup> It is not immediately obvious why those legislative choices should be overridden by the Court in constitutional adjudication.<sup>210</sup> Balancing denigrated important constitutional values, equating them with other competing “interests” and then, perhaps, balancing them

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202. For an account of balancing's origins, see *id.* at 952-63.

203. *Id.* at 982.

204. *Id.* at 972-76. “The most troubling consequence of the problem of deriving a common scale are those cases in which the Court simply does not disclose its source for the weights assigned to the interests.” *Id.* at 976.

205. *Id.* at 977-78 (“Taking balancing seriously would seem to demand the kind of investigation of the world that courts are unable or unwilling to undertake.”); *id.* at 978-79 (discussing the fact that the interests of non-parties are relevant, but not considered, in much of the Court's balancing).

206. *Id.* at 976.

207. *Id.* at 982.

208. *Id.* at 984-86.

209. *Id.* at 984.

210. *Id.* at 984-86 (arguing that defenders of balancing “must suggest reasons why judgments assigning a social value to legislation are within the province and capacity of the courts.”).

away.<sup>211</sup> Further, a faux precision drives balancing and conceals value choices with objective-sounding “[t]hree-pronged tests, two-tier standards, and cost benefit analyses [that] litter the constitutional landscape.”<sup>212</sup>

Judicial critiques echoed the academic ones.<sup>213</sup> When balancing was explicitly adopted by the Court in DCCD cases, Justice Black dissented, arguing that second-guessing legislatures through balancing placed the Court in the position of a “super-legislature.”<sup>214</sup> Balancing the probabilities that shortening trains would reduce accidents, as opposed to lengthening them because of crowded yards and tracks, he noted in *Southern Pacific*, was “not ... a matter for judicial determination, but one which calls for legislative consideration.”<sup>215</sup>

On the current Court, Justice Scalia is famous for his critique of balancing in DCCD cases. Building on Justice Black’s criticism, Scalia has remarked that balancing the burdens and benefits of state regulations “is ill suited to the judicial function and should be undertaken rarely if at all.”<sup>216</sup> In another case, he complained that balancing asked courts to compare the incomparable—to “judg[e] whether a particular line is longer than a particular rock is heavy.”<sup>217</sup> Justice Thomas, another vociferous critic of the DCCD, has likewise argued that any test requiring the Court to assess:

(1) whether a particular statute serves a “legitimate” local public interest; (2) whether the effects of the statute on interstate commerce are merely “incidental” or “clearly excessive in

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211. *Id.* at 986-92 (“[A]s Ronald Dworkin has tirelessly argued, viewing constitutional rights simply as ‘interests’ that may be overcome by other non-constitutional interests does not accord with common understandings of the meaning of a ‘right.’” (footnote omitted)).

212. *Id.* at 992; cf. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985) (“During roughly the last thirty years a new style of opinion writing has emerged as the most common method of constitutional exegesis. This style emphasizes formalized doctrine expressed in elaborately layered sets of ‘tests’ or ‘prongs’ or ‘requirements’ or ‘standards’ or ‘hurdles.’” (footnotes omitted)).

213. Aleinikoff, *supra* note 200, at 966 (citing *Pike* balancing as a paradigmatic example of the genre); see also Nagel, *supra* note 212, at 167 n.10, 201-03 (using DCCD cases as examples of the “formulaic style”).

214. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 788 (1945) (Black, J., dissenting).

215. *Id.* at 794.

216. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

217. *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

relation to the putative benefits"; (3) the "nature" of the local interest; and (4) whether there are alternative means of furthering the local interest that have a "lesser impact" on interstate commerce ... surely invites us, if not compels us, to function more as legislators than as judges.<sup>218</sup>

While Justice Scalia has not been able to persuade his colleagues to discard *Pike* balancing completely,<sup>219</sup> it is perhaps no accident that the Court has not invalidated a state or local law under balancing since Justice Scalia has been on the Court.<sup>220</sup>

Though nominally retained as part of the doctrine's structure, we can see that—as with balancing generally—what was seen as an antidote to "formalistic" doctrinal rules about "direct and indirect effects" that concealed value judgments, has itself come into question, with scholars and judges criticizing balancing in the DCCD as both impossible and inappropriate for courts. Even when balancing was in full flower, actual cases often seemed to turn on something other than a frank comparison of burdens and benefits, as the next Part will show.

### *b. Subterfuge*

That the doctrinal formulae employed by the Court do not really determine the outcome of DCCD cases is another common complaint of judicial and academic critics. Many articles on the DCCD feature Herculean analyses of cases in an attempt to synthesize the "real" rules the Court is using.<sup>221</sup> Occasionally, Justices get into the act. Recall Justice Stone's complaint in 1927 that the direct/indirect test used "labels to describe a result rather than any trustworthy

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218. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting).

219. For a recent (though desultory) application of *Pike* balancing, see *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786, 1797-98 (2007).

220. The last case in which the Court did so was *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). See David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 49 (2007) (suggesting that Scalia's critique has impacted the Court's application of the DCCD).

221. Prominent recent examples include Regan, *supra* note 10, Stearns, *supra* note 10, and Williams, *supra* note 10. For older examples, see Dowling, *supra* note 155, and Sholley, *supra* note 147.

formula by which it is reached.”<sup>222</sup> Professor Regan, echoing Justice Stone, argued in a famous article that the balancing test Justice Stone helped establish was itself simply rhetorical cover for what the Court was really doing: rooting out purposeful economic protectionism.<sup>223</sup> The Court’s cases allegedly employing balancing have certainly given critics plenty of fodder.

Take *Pike v. Bruce Church, Inc.*,<sup>224</sup> for example, which lent its name to the balancing test employed in the absence of discrimination. The Court never really applied balancing in *Pike*.<sup>225</sup> The Court instead invoked its historic hostility to state laws requiring local processing of goods before export to strike down Arizona’s law requiring cantaloupes to bear some indication of their origin before being sent out of state.<sup>226</sup> Justice Stewart wrote that

the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.<sup>227</sup>

Likewise, in *Kassel v. Consolidated Freightways Corp.*,<sup>228</sup> a plurality of the Court purported to apply *Pike* balancing in invalidating Iowa’s restrictions on sixty-foot “doubles.”<sup>229</sup> While Justice Powell dutifully compared the burdens on the trucking company to the benefits (such as they were) of the ban, he repeatedly discussed evidence of discriminatory purpose behind the law, disclaiming all the while any reliance on such evidence in striking the law down.<sup>230</sup> Yet it is apparent (as it was to Justices Brennan and Marshall, who

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222. *DiSanto v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

223. Regan, *supra* note 10, at 1092 (“Despite what the Court has said, it has not been balancing .... [I]n movement of goods cases ... the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism.”).

224. 397 U.S. 137 (1970).

225. See *supra* note 168 and accompanying text.

226. *Pike*, 397 U.S. at 139, 142-43.

227. *Id.* at 145.

228. 450 U.S. 662 (1981).

229. *Id.* at 665.

230. *Id.* at 665-66 & nn.6-7.

concurrent, finding the law discriminatory)<sup>231</sup> that the evidence influenced the plurality, causing it to look skeptically at the safety justifications offered by the state in defense of its law.<sup>232</sup> Cases like *Pike* and *Kassel* led Donald Regan famously to conclude that balancing was largely a sham.<sup>233</sup>

### *c. Major Calcification*

After demonstrating *Pike* balancing's loss of fit and the tendency of the Court to engage in subterfuge when employing it, citing it as an example of major calcification may seem like piling on. But *Pike* balancing captures perfectly the conflation of decision rules with constitutional commands that Roosevelt describes.

Recall balancing's origins: *Cooley* was an attempt to sort permissible from impermissible state taxation and regulation of interstate commerce that improved upon Chief Justice Marshall's purpose inquiry.<sup>234</sup> *Cooley*'s national/local distinction was itself a decision rule that attempted to implement what was assumed to be a limit the Constitution imposed on states. But, as I will discuss in more detail in the next Part, the constitutional command here was pretty vague—akin to Thomas Reed Powell's famous "Restatement of Constitutional Law," in which "[t]he states may ... regulate interstate commerce, but not too much," and that "[h]ow much is too much is beyond the scope of this Restatement."<sup>235</sup>

Since Justice Curtis provided no *ex ante* criteria for distinguishing national from local matters, the direct/indirect test developed to implement the national/local distinction. By the mid-1940s, when balancing was institutionalized, the weighing of benefits and burdens was yet *another* set of decision rules implementing decision

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231. *Id.* at 679 (Brennan, J., concurring).

232. *Id.* at 671 n.12 (majority opinion) (noting that the exemptions in the statute benefiting in-state interests lowered the deference traditionally afforded state highway safety regulations).

233. Regan, *supra* note 10, at 1092 ("In the central area of dormant commerce clause jurisprudence, comprising what I shall call 'movement-of-goods' cases (*Pike v. Bruce Church, Inc.* may be taken as paradigmatic), the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism." (footnote omitted)).

234. See *supra* notes 87-94 and accompanying text.

235. Paul A. Freund, *Foreword to THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION*, at vii, ix (2002 ed. Columbia University Press 1956).

rules that were taken to be a constitutional command—that states could regulate local, but not national, subjects; evidence that burdens on interstate commerce clearly outweighed local benefits suggested that it was a national problem to be regulated by Congress, if at all.

The result was like a doctrinal game of Telephone in which the players have garbled or ignored the initial constitutional command, devising doctrine to implement prior, unworkable doctrine *as if that earlier doctrine itself was the constitutional command*. The Constitution does not say that states may regulate interstate commerce, but not too much; it does not allocate responsibility based on the national or local nature of the subject, or permit state regulation where burdens on interstate commerce do not clearly outweigh local benefits. But *Pike*'s decision rule acts as if it does.

## 2. The Antidiscrimination Principle

### a. Loss of Fit

*Pike* balancing is not the only feature of the DCCD's two-tiered standard of review to suffer from a loss of fit. Even the DCCD's antidiscrimination principle has, in certain of its applications, been criticized as too rigid, resulting in the invalidation of too many legitimate state and local laws. Critics charge that the antidiscrimination principle is a blunt tool, insufficiently sensitive to laws advancing important state and local interests.<sup>236</sup> At its worst, it is a tool for the promotion of an economic ideology that smacks of Lochnerian economic substantive due process. Other critics argue that it produces indefensible, incoherent results.<sup>237</sup>

The "blunt tool" school of criticism is most often voiced by scholars who are dissatisfied with the antidiscrimination principle's application to state and local attempts to deal with the problem of out-of-state garbage.<sup>238</sup> The Court's presumption that discrimination is a

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236. See *infra* note 237.

237. See *infra* notes 243-60 and accompanying text.

238. For a selection, see generally Jonathan H. Adler, *Waste & the Dormant Commerce Clause—A Reply*, 3 GREEN BAG 2D 353 (2000); Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155 (1997); Richard A. Epstein, *Waste & the Dormant Commerce Clause*, 3 GREEN BAG 2D 29 (1999); Richard A.

proxy for economic protectionism is not fine-grained enough to permit states to protect themselves from being adversely selected by garbage-exporting states, which forces them to bear the long-term costs of their citizens' waste generation.<sup>239</sup> Some urge the Court to decouple discrimination from protectionism, invalidating laws—even facially discriminatory laws—only if a protectionist motive is proven.<sup>240</sup>

The antidiscrimination principle's lack of subtlety has led some scholars (and judges) to suspect that the Court's rule proceeds from unexamined, unstated economic and political presuppositions, much like those of the *Lochner* Court. Professor Lisa Heinzerling has argued that

the Court's nondiscrimination principle promotes a certain vision of the proper role of government. The Court's concept of discrimination embodies a preference for markets over regulation, and its view of what counts as "regulation" rests on undefended assumptions—reminiscent of the *Lochner* period, when forced departures from the free market as shaped by common-law entitlements were constitutionally suspect but the common-law entitlements were not—about what counts as government action and what counts as inaction.<sup>241</sup>

Similarly, Professor Paul McGreal argued that the Court omits an inquiry—whether discrimination "harm[s] the welfare of the national economy"—from its DCCD cases that it had historically undertaken.<sup>242</sup> That question is now assumed away because "the

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Epstein, *Waste & the Dormant Commerce Clause—A Reprise*, 3 GREEN BAG 2D 363 (2000); Jess O. Hale, Jr., *Trash Is Commerce—Go Directly to Washington and Muddle Along: Solid Waste Management in Tennessee and the Commerce Clause*, 19 TUL. ENVTL. L.J. 293 (2006); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003); Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 755-56 (2000); Paula C. Murray & David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 HARV. ENVTL. L. REV. 71 (2003).

239. See, e.g., Bradford C. Mank, *Are Public Facilities Different from Private Ones?: Adopting a New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157 (2007); Catherine Gage O'Grady, *Targeting State Protectionism Instead of Economic Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571 (1997).

240. See, e.g., O'Grady, *supra* note 239, at 575.

241. Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 222.

242. McGreal, *supra* note 10, at 1194 (arguing that the DCCD "is concerned with state laws

Court assumes that discrimination between in-state and out-of-state competitors *necessarily* harms the welfare of the national economy,” and, in doing so, “the Court implicitly has adopted a neoclassical view of economics—that free competition among rational economic actors will necessarily improve the national economy.”<sup>243</sup>

A similar criticism was raised against one of the canonical DCCD cases, *H.P. Hood & Sons v. DuMond*,<sup>244</sup> in which Justice Robert Jackson paid powerful tribute to the virtues of the free trade zone the DCCD was allegedly intended to police, while invalidating a state refusal to license a milk-receiving station in New York because of the “destructive competition” it would engender.<sup>245</sup> According to one commentator:

The theoretical, legal, and economic consequences of Jackson’s reasoning ... were enormous. The primary assumptions of the opinion—that the existing distribution of wealth and the right of business to expand were “natural”—disjoined economics from politics. The assumption that society existed apart from its economic underpinnings shifted control of social processes from politics to the market. By subordinating politics, society, and the Constitution to the market, Jackson confirmed the social and economic status quo. In the process, New York’s dairy farmers were flung back upon that market.<sup>246</sup>

These critiques have, as with those levied against balancing, found champions on the Court itself. Chief Justice Roberts,<sup>247</sup> Chief

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that both: (1) discriminate between in-state and out-of-state actors that compete with one another, and (2) harm the welfare of the national economy”).

243. *Id.* at 1195-96.

244. 336 U.S. 525 (1949).

245. *Id.* at 529.

246. Jack Michel, Comment, *Hood v. DuMond: A Study of the Supreme Court and the Ideology of Capitalism*, 134 U. PA. L. REV. 657, 688 (1986).

247. See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1796, 1798 (2007); see also *Dept. Rev. v. Davis*, 128 S. Ct. 1801, 1809-10 (2008) (applying *United Haulers* to uphold a discriminatory tax exemption for income derived from bonds issued by a state and state’s political subdivisions, as opposed to income derived from private bonds or bonds issued by other states or their political subdivisions).

Justice Rehnquist,<sup>248</sup> and Justice Souter<sup>249</sup> have all opposed particular applications of the antidiscrimination principle on the ground that it involves the Court in enforcing its own vision of the market economy at the expense of state and local governments' visions. As Chief Justice Roberts recently put it, "[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition."<sup>250</sup> His former boss, Chief Justice Rehnquist, once chided the majority in a DCCD case for its "messianic insistence on a grim sink-or-swim policy of laissez-faire economics."<sup>251</sup>

While not necessarily quarreling with the ideological origins of the rule, one scholar has argued forcefully that the antidiscrimination principle's application is so irredeemably incoherent that it should be discarded.<sup>252</sup> Professor Edward Zelinsky has further

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248. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting).

249. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 424-25 (1994) (Souter, J., dissenting) ("No more than the Fourteenth Amendment, the Commerce Clause 'does not enact Mr. Herbert Spencer's Social Statics ... [or] embody a particular economic theory, whether of paternalism ... or of *laissez faire*.' ... The dormant Commerce Clause does not 'protec[t] the particular structure or methods of operation in a[n] ... market.' ... The only right to compete that it protects is the right to compete on terms independent of one's location.") (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) and *Exxon Corp. v. Maryland*, 437 U.S. 117, 127 (1978)).

250. *United Haulers Ass'n*, 127 S. Ct. at 1796; see also *id.* at 1798 ("The Counties' ordinances are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government. The haulers nevertheless ask us to hold that laws favoring public entities while treating all private businesses the same are subject to an almost *per se* rule of invalidity, because of asserted discrimination. In the alternative, they maintain that the Counties' laws cannot survive the more permissive *Pike* test, because of asserted burdens on commerce. There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.").

251. *W. Lynn Creamery*, 512 U.S. at 217 (Rehnquist, C.J., dissenting) ("The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of federalism which have long animated our constitutional jurisprudence.").

252. Zelinsky, *Restoring Politics*, *supra* note 10.

argued that the rule—at least in tax cases—no longer “fits” because a change in background circumstances now renders it useless.<sup>253</sup>

Professor Zelinsky argues that since the DCCD bars discriminatory taxes, but permits discriminatory cash subsidies despite the economic equivalence of both, the antidiscrimination principle is incoherent.<sup>254</sup> Assuming, as he does, that promotion and maintenance of free trade among the states is the relevant constitutional operative proposition,<sup>255</sup> permitting subsidies but barring taxes and other regulations is nonsensical.<sup>256</sup> Further, he argues that the process by which taxes are classified as discriminatory or nondiscriminatory is untenable.<sup>257</sup> Better doctrinal tools are available to courts to police state abuses;<sup>258</sup> if not, then aggrieved parties may seek redress from Congress.<sup>259</sup> Attempting to remedy these problems by “think[ing] harder” about doctrinal refinements is fruitless.<sup>260</sup> Better to move on, he concludes, since the problems that spawned the DCCD are largely a thing of the past.

### *b. Subterfuge*

It is, perhaps, a measure of the antidiscrimination principle’s loss of fit that the Court seems willing to employ subterfuge in many cases that seem to call for its employ. In this Part, I look at three pairs of cases, all with similar facts, which nevertheless produced opposite results. These pairs of cases suggest that something other than the rules laid down by the Court are driving their outcomes.

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253. See *id.* at 31; see also Edward A. Zelinsky, *Cuno v. DaimlerChrysler: A Critique*, 34 STATE TAX NOTES 37 (2003); Edward A. Zelinsky, *Ohio Incentives Decision Revisited*, 37 STATE TAX NOTES 850 (2005). For a response, see Brannon P. Denning, *Is the Dormant Commerce Clause Expendable? A Reply to Edward Zelinsky*, 77 MISS. L.J. 623 (2007).

254. See Zelinsky, *Restoring Politics*, *supra* note 10, at 29-30. For a brief restatement of his position, see Edward A. Zelinsky & Brannon P. Denning, Debate, *The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation*, 155 PENNUMBRA 196, 196 (2007), available at [http://www.pennumbra.com/debates/pdfs/commerce\\_clause.pdf](http://www.pennumbra.com/debates/pdfs/commerce_clause.pdf).

255. Zelinsky, *Restoring Politics*, *supra* note 10, at 77.

256. *Id.* at 34.

257. *Id.* at 36.

258. *Id.* at 78.

259. *Id.* at 84-87.

260. Zelinsky & Denning, *supra* note 254, at 213.

*i. Hunt, Exxon, and Discriminatory Effects*

The Court's DCCD cases involving facially neutral statutes alleged to have discriminatory effects are particularly troublesome for those who attempt to extrapolate principles from them.<sup>261</sup> Two cases in particular—*Hunt v. Washington State Apple Advertisers Commission*<sup>262</sup> and *Exxon v. Maryland*<sup>263</sup>—decided a year apart, raise suspicions that the Court was not entirely candid about the reasons for the respective outcomes.

In *Hunt*, the Court invalidated a North Carolina regulation prohibiting the use of state grading systems on closed containers of apples, allegedly as a consumer protection measure.<sup>264</sup> The effect was to prohibit the use of the grading system Washington had developed, which was acknowledged to be superior even to that of the FDA.<sup>265</sup> North Carolina, which had no grading system, prohibited its use, requiring that containers be marked with the FDA grade or no grade at all.<sup>266</sup> This, the Court recognized, stripped Washington apples of their competitive advantage, making North Carolina apples potentially more competitive, and forced Washington apple growers to bear costs not borne by in-state apples.<sup>267</sup>

The facts in the next Term's *Exxon* case seemed similar. In response to complaints from independent retail stations that oil companies and refineries were favoring their own retail stations over those of independent retailers during the early 1970s' gas shortages, the Maryland legislature passed a law restructuring the state's retail gasoline market.<sup>268</sup> The law barred producers or refiners of petroleum products from operating retail service stations in Maryland.<sup>269</sup> Maryland had no producers or refiners, and "[a]ll of

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261. For one valiant effort, see Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907, 925-36 (2005).

262. 432 U.S. 333 (1977).

263. 437 U.S. 117 (1978).

264. *Hunt*, 432 U.S. at 353-54.

265. *Id.* at 336.

266. *Id.* at 340.

267. *Id.* at 350-51.

268. *Exxon*, 437 U.S. at 120.

269. *Id.* at 120-21, 123.

the gasoline sold by Exxon in Maryland [was] transported into the State from refineries located elsewhere.”<sup>270</sup>

Exxon alleged that, though facially neutral, the statute discriminated against interstate commerce in its effects by protecting in-state retail gas stations from competition from those owned by out-of-state oil producers and refiners. “[T]he burden of the divestiture requirements,” Exxon noted, fell “solely on interstate companies.”<sup>271</sup>

In an opinion upholding the law, Justice Stevens replied that who the law burdened “does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level.”<sup>272</sup> Stevens distinguished *Hunt*, explaining that the Maryland statute “create[d] no barriers whatsoever against interstate independent dealers; it d[id] not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.”<sup>273</sup>

He emphasized the fact that “in-state independent dealers will have no competitive advantage over out-of-state dealers,” though “refiners will no longer enjoy their same status in the Maryland market.”<sup>274</sup> The simple fact that the burden of this particular regulation fell on a *subset* of out-of-state retail dealers did not “by itself, establish a claim of discrimination against interstate commerce.”<sup>275</sup> Only if “the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market,” Stevens added in a footnote, might “the regulation [be found to] have a discriminatory effect on interstate commerce.”<sup>276</sup> Because the regulation did not affect the “relative proportions of local and out-of-state goods sold in Maryland and ... [had] no demonstrable effect ... on the interstate flow of goods,” the statute was valid.<sup>277</sup>

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270. *Id.* at 121.

271. *Id.* at 125.

272. *Id.*

273. *Id.* at 126.

274. *Id.*

275. *Id.*

276. *Id.* at 116 n.16.

277. *Id.*

*Exxon*, on similar facts, seemed to change the rules laid down in *Hunt*, or at least applied them differently. North Carolina's regulation was facially neutral as well. Washington apple growers who complied with its terms could have imported into North Carolina and competed with that state's apples. Further, the Court had not required the Washington apple growers to prove that North Carolina's regulations reduced the interstate flow of apples. Some of the Court's claims in *Exxon*, moreover—for example, that the relevant comparison for the effects of the statute was between in-state and out-of-state *independent retail* sellers, as opposed to *all* retailers of gasoline (which would include the refiner-owned gas stations)—seem arbitrary and difficult to defend.<sup>278</sup>

What explains the difference between *Exxon* and *Hunt*? Professor Regan thought that the Court was simply convinced that a protectionist purpose lay behind North Carolina's statute, but not Maryland's.<sup>279</sup> Dan Coenen has suggested that what the Court was *really* up to was concluding that the prevention of vertical integration in the petroleum industry was a "legitimate" interest that could not be achieved in a less discriminatory way.<sup>280</sup> Perhaps, as a commentator in the *Harvard Law Review* argued, the Court felt the oil companies could take care of themselves in the political arena.<sup>281</sup> Whatever the

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278. Justice Blackmun put it well in his lone dissent:

To accept the argument of the Court, that is, that discrimination must be universal to offend the Commerce Clause, naively will foster protectionist discrimination against interstate commerce. In the future, States will be able to insulate in-state interests from competition by identifying the most potent segments of out-of-state business, banning them, and permitting less effective out-of-state actors to remain. The record shows that the Court permits Maryland to effect just such discrimination in this case. The State bans the most powerful out-of-state firms from retailing gasoline within its boundaries. It then insulates the forced divestiture of 199 service stations from constitutional attack by permitting out-of-state firms ... to operate 34 gasoline stations. Effective out-of-state competition is thereby emasculated—no doubt, an ingenious discrimination. But as stated at the outset, "the commerce clause forbids discrimination, whether forthright or ingenious."

*Id.* at 147 (Blackmun, J., dissenting) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1941)).

279. Regan, *supra* note 10, at 1236 ("Stevens says North Carolina discriminated and Maryland does not. There is only one thing he can possibly have in mind, namely, that the North Carolina legislature was motivated by protectionist purpose, while the Maryland legislature was not.").

280. COENEN, *supra* note 10, at 282 n.81.

281. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 74 (1978) (commenting that "it

explanation, the reasons given for distinguishing *Hunt* are unconvincing enough to suggest strongly that one or more unarticulated reasons for the holding dictated the outcome.

*ii. Missing Linkages: West Lynn Creamery and Walsh*

In another discriminatory effects case, *West Lynn Creamery v. Healy*,<sup>282</sup> the Court invalidated a Massachusetts tax-subsidy combination that imposed a facially neutral tax on all milk sales; tax revenue then funded a special subsidy given only to Massachusetts dairy farmers.<sup>283</sup> The result was that *only* out-of-state producers paid the tax; the effect of the combined tax and subsidy rendered the scheme unconstitutional.<sup>284</sup>

A few years later, Maine sought to provide relief to its citizens from high prescription drug prices using a similar scheme.<sup>285</sup> Maine taxed the sale of drugs by manufacturers and retail sellers, placed the funds in a dedicated fund, and used those funds to reimburse retailers for selling discounted drugs.<sup>286</sup> Retailers also received additional money for participating in the program.<sup>287</sup> The effect appeared to be that out-of-state drug manufacturers paid the tax, whereas retail sellers had their tax rebated, just like the in-state dairy farmers in *West Lynn Creamery*.<sup>288</sup>

The Court rejected the analogy. “*West Lynn*,” wrote Justice Stevens, “[wa]s ... not applicable to this case” because

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is difficult to believe that [Exxon and other oil companies'] viewpoint was not represented before the Maryland legislature. Realistically viewed, major oil companies are unlikely candidates for the role of the voiceless out-of-state business”).

282. 512 U.S. 186 (1994).

283. *Id.* at 190-91.

284. *Id.* at 194 (noting that taxes paid by Massachusetts farmers were “entirely—indeed more than—offset by the subsidy provided exclusively to Massachusetts dairy farmers”). See generally Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 MICH. L. REV. 2167 (1997).

285. See generally Brannon P. Denning, *The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]*, 29 AM. J.L. & MED. 7 (2003).

286. *Id.* at 9-10.

287. See generally *id.*

288. *Id.* at 9-10, 22-27.

[u]nlike the situation in *West Lynn* ... the Maine Rx Program will not impose a disparate burden on any competitors. A manufacturer could not avoid its rebate obligation by opening production facilities in Maine and would receive no benefit from the rebates even if it did so; the payments to the local pharmacists provide no special benefit to competitors of rebate-paying manufacturers.<sup>289</sup>

But those taxed and those subsidized in *West Lynn* were not, strictly speaking, competitors either. Chief Justice Rehnquist had complained in *West Lynn* that “the Court [was] strik[ing] down this method of state subsidization because the nondiscriminatory tax levied against all milk *dealers* is coupled with a subsidy to milk *producers*.”<sup>290</sup>

Although they were not competitors, the labelers and out-of-state manufacturers were precise proxies for in-state and out-of-state interests. Both were subject to the facially neutral tax, but *only* the in-state labelers received the “prescription fee” generated by the tax. In addition, out-of-state drug manufacturers (the only kind there were) were being taxed to subsidize a benefit given both to the residents receiving the discounted drugs, as well as the in-state pharmacists supplying them. Although the tax caught “labelers”—in-state retailers—the labelers benefited from the prescription fee they received out of the designated fund. The money flowing to the pharmacists who were both (nominally) subject to the tax, as well as responsible for administering the program, likely helped mollify the in-state retailers. In *West Lynn* this purchase of in-state quiescence was one reason the majority struck the program down. Justice Stevens wrote that

when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.<sup>291</sup>

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289. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 670 (2003).

290. *W. Lynn Creamery v. Healy*, 512 U.S. 186, 214 (1994) (Rehnquist, C.J., dissenting) (emphasis in original).

291. *Id.* at 200 (majority opinion).

Perhaps as in *Exxon*, members of the Court felt the pharmaceutical companies should be able to take care of themselves, but it again failed to announce a categorical exception to that effect.

*iii. Flow Control Ordinances and Forced-use Rules: C & A Carbone and United Haulers*

In 2007, the Court decided *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,<sup>292</sup> in which it created a heretofore unknown exception to the antidiscrimination rule: the rule does not apply if a state or local government discriminates in favor of a publicly owned facility—here a waste disposal unit that all persons served by the waste management district were obliged to use to process their garbage.<sup>293</sup> The outcome in *United Haulers* was in tension with an earlier case, *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>294</sup> in which the Court invalidated a very similar flow control ordinance. The difference was that in *Carbone*, the waste disposal site was (nominally) privately owned.<sup>295</sup>

But there is much less to this publicly/privately owned distinction than meets the eye. As Justice Souter noted in his *Carbone* dissent, and as Justice Alito noted in his *United Haulers* dissent, the Clarkstown facility was built and initially operated by a private firm, but was to be “sold” to the City for a nominal amount after a period of years during which the private firm would recoup its investment.<sup>296</sup> Justice Alito argued that the *Carbone* majority had seen the private-public distinction as irrelevant in its decision to invalidate the ordinance.<sup>297</sup>

Nevertheless, the *United Haulers* majority held that as the public-private issue had not been squarely before the Court in

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292. 127 S. Ct. 1786 (2007); see also *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1809-10 (2008) (applying *United Haulers* to uphold a discriminatory tax exemption for income derived from bonds issued by a state and state's political subdivisions, as opposed to income derived from private bonds or bonds issued by other states or their political subdivisions).

293. *Id.* at 1795 (“[W]e decide that ... flow control ordinances [discriminating in favor of a public facility] do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.”).

294. 511 U.S. 383 (1994).

295. *United Haulers*, 127 S. Ct. at 1804 (Alito, J., dissenting).

296. *Id.*; *Carbone*, 511 U.S. at 419 (Souter, J., dissenting).

297. *United Haulers*, 127 S. Ct. at 1805 (Alito, J., dissenting).

*Carbone*, that case did not control.<sup>298</sup> The majority justified exempting public entities from the strictures of the DCCD on several grounds, including: (1) the responsibility of governments to protect the health, safety, and welfare of their citizens that private entities do not exercise;<sup>299</sup> (2) the presence of legitimate non-protectionist goals furthered by such forced-use rules, aside from “simple economic protectionism”;<sup>300</sup> (3) respect for federalism, especially where traditional government functions were involved;<sup>301</sup> and (4) that “the most palpable harm imposed by the ordinances—more expensive trash removal—is likely to fall upon the very people who voted for the laws.”<sup>302</sup>

Justice Alito responded that merely reciting a police power justification for a law has never insulated state action from scrutiny under the DCCD.<sup>303</sup> Likewise, under the Court’s prior cases, the mere fact that some in-state interests were harmed as well did not immunize the flow control ordinance.<sup>304</sup> Moreover, he doubted that governments would be less likely to succumb to simple “economic protectionism” when favoring public entities as opposed to private ones.<sup>305</sup> Finally, he expressed surprise at the reappearance of the “‘traditional’ governmental function” argument, which the Court had discarded as unworkable in *Garcia v. San Antonio Metropolitan*

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298. *Id.* at 1795 (“*Carbone* cannot be regarded as having decided the public-private question.”).

299. *Id.*

300. *Id.* at 1795-96.

301. *Id.* at 1796 (“The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.... We should be particularly hesitant to interfere with the Counties’ efforts under the guise of the Commerce Clause because “[w]aste disposal is both typically and traditionally a local government function.” (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkmer Solid Waste Mgm’t Auth.*, 261 F.3d 245, 264 (2d Cir. 2001) (Calabresi, J., concurring))).

302. *Id.* at 1797.

303. *Id.* at 1809-10 (Alito, J., dissenting).

304. *Id.* at 1811 (noting that if legislation were discriminatory, “then regardless of whether those harmed by it reside entirely outside the State in question, the law is subject to strict scrutiny.”).

305. *Id.* at 1808 (“Experience in other countries, where state ownership is more common than it is in this country, teaches that governments often discriminate in favor of state-owned businesses (by shielding them from international competition) precisely for the purpose of protecting those who derive economic benefits from those businesses, including their employees.”).

*Transit Authority*.<sup>306</sup> In sum, he concluded, “[t]he public-private distinction drawn by the Court is both illusory and without precedent.”<sup>307</sup>

*c. Major Calcification*

The reluctance to apply the antidiscrimination principle in full seems to proceed from uncertainty as to its scope and discomfort with the implications of enforcing the principle to its conceptual limits. Lingered doubts about the principle’s constitutional pedigree, too, lurk in the background of these cases. Is antidiscrimination *really* a constitutional command, or is it merely a decision rule articulated to enforce some other, unarticulated constitutional value, such as ensuring that the political process is open or enforcing a constitutional preference for free trade?

Take, for example, the common assumption that the antidiscrimination principle is rooted in the Framers’ preference for free trade—that the “very purpose of the Commerce Clause was to create an area of free trade among the several States.”<sup>308</sup> Justice White once wrote that the “antidiscrimination principle ‘follows inexorably from the basic purpose of the [Commerce] Clause’ to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution.”<sup>309</sup> The Court’s duty is “to make the delicate adjustment between the national interest in *free and open trade* and the legitimate interest of the individual States in exercising their taxing powers.”<sup>310</sup>

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306. *Id.* at 1810-11. *Garcia* can be found at 469 U.S. 528 (1985).

307. *United Haulers Ass’n*, 127 S. Ct. at 1804 (Alito, J., dissenting).

308. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370 (1976) (quoting *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944)); *see also* *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977) (“It is now established beyond dispute that ‘the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.’”); *id.* at 329 (“The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses ‘would invite a multiplication of preferential trade areas destructive’ of the free trade which the Clause protects.”).

309. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981) (quoting *Boston Stock Exch.*, 429 U.S. at 329).

310. *Boston Stock Exch.*, 429 U.S. at 329 (emphasis added).

Reasoning from that premise, the Court was soon defining “discriminatory” to include the use of “state taxes to burden commerce in other States in an attempt to induce ‘business operations to be performed in the home State that could more efficiently be performed elsewhere,’”<sup>311</sup> and condemning the “distorting” effects of tariff-like regulations.<sup>312</sup> In *West Lynn Creamery v. Healy*,<sup>313</sup> to cite another example, Justice Stevens described the “the protective tariff or customs duty” as “[t]he paradigmatic example of a law discriminating against interstate commerce.”<sup>314</sup> Its constitutional infirmity, wrote Stevens, was that a tariff had “distorting effects on the geography of production”—it “violate[d] the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States.”<sup>315</sup>

In other words, where constitutional command is framed in terms of preserving free trade through a nondiscrimination principle, the Court subsequently articulated decision rules that promoted economic efficiency or sought to eliminate taxes and regulations with “distorting” effects on economic decisionmaking. One influential article, in fact, argued that the antidiscrimination principle prohibited state investment incentives that “subvert[ed] the allocative functions of the market and divert[ed] business activity from its economically most efficient location.”<sup>316</sup> The “distorting”—or, to use another adjective, “coercive”—effects of such incentives were cited by the Sixth Circuit in the celebrated *Cuno* case,<sup>317</sup> in which Ohio’s investment tax credit for expanding in-state business operations was held to violate the DCCD.<sup>318</sup>

311. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 406 (1984) (quoting *Boston Stock Exch.*, 429 U.S. at 336). For other cases quoting *Pike*’s “efficiency” language, see *Granholtz v. Heald*, 544 U.S. 460, 475 (2005); *S.-Cent. Timber Co. v. Wunnicke*, 467 U.S. 82, 100 (1984); *Hughes v. Alexandria Scrap Co.*, 426 U.S. 794, 821 (1976) (Brennan, J., dissenting).

312. See *infra* notes 313-15 and accompanying text.

313. 512 U.S. 186 (1994).

314. *Id.* at 193.

315. *Id.*

316. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 423 (1997).

317. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743 (6th Cir. 2004), *rev’d on other grounds sub nom. DaimlerChrysler, Inc. v. Cuno*, 547 U.S. 332 (2006).

318. *Id.* (holding that state taxpayer plaintiffs lacked standing to bring the suit). Professor

Yet, cast in such strong terms, the antidiscrimination principle *does* begin to resemble economic substantive due process. Surely a wide range of state activities—from school funding, to infrastructure investment, to tax policy—could “distort” the “efficient” allocation of business activity among states. Labeling such interstate differences as “discriminatory” and policing them through the DCCD would involve a radical expansion of the doctrine, and would empower the federal judiciary to superintend vast swaths of state and local economic policy. That the Court is alert to such dangers is evidenced by its apparent retreat from its more expansive versions of the antidiscrimination rule.

The Court has not, however, pulled back far enough for Justice Thomas. No current member of the Court—not even Justice Scalia—is as opposed to the DCCD as Justice Thomas. Justice Scalia, albeit grudgingly, is willing to concede the legitimacy of the antidiscrimination principle in at least some cases,<sup>319</sup> reserving the “illegitimate” label for *Pike* balancing.<sup>320</sup> Early in his career, Justice Thomas joined opinions in which the Court applied the antidiscrimination principle,<sup>321</sup> and even once proposed a textual substitute, the Import-Export Clause, for the DCCD,<sup>322</sup> or at least some of

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Enrich was plaintiff's counsel in *Cuno*.

319. He has recently emphasized his qualification that he will enforce the DCCD only in situations “indistinguishable” from those the Court has encountered in previous cases:

I have been willing to enforce on *stare decisis* grounds a “negative” self-executing Commerce Clause in two situations: “(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court.”

*United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1798 (2007) (Scalia, J., concurring) (quoting *West Lynn Creamery*, 512 U.S. at 210 (Scalia, J., concurring)). Justice Scalia believes that the “real” antidiscrimination principle is found in the Privileges and Immunities Clause of Article I, Section 2. *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 264-65 (1986) (Scalia, J., concurring in part and dissenting in part).

320. See, e.g., *United Haulers*, 127 S. Ct. at 1799 (Scalia, J., concurring) (“I am unable to join Part II-D of the principal opinion, in which the plurality performs so-called ‘*Pike* balancing.’ Generally speaking, the balancing of various values is left to Congress—which is precisely what the Commerce Clause (the *real* Commerce Clause) envisions.”).

321. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); Denning, *supra* note 124, at 218-19 (discussing cases in which Justice Thomas wrote or joined opinions applying the antidiscrimination principle).

322. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621 (1997) (Thomas, J., dissenting) (urging adoption of the Import-Export Clause to replace the DCCD);

it.<sup>323</sup> In 2003, however, Justice Thomas moved past Justice Scalia and urged a total rejection of the entire doctrine.<sup>324</sup>

In his *United Haulers* concurrence, Justice Thomas explicitly repudiated his youthful acquiescence to the DCCD<sup>325</sup>—the antidiscrimination principle in particular—and explained in some detail why he had taken the step of renouncing the doctrine completely. “The language of the [Commerce] Clause,” he explains, “allows Congress not only to regulate interstate commerce but also to prevent state regulation of interstate commerce.”<sup>326</sup> But the Court has “interpreted the Commerce Clause as a tool for courts to strike down state laws that it believes inhibit interstate commerce.”<sup>327</sup> The problem is that “there is no basis in the Constitution for that interpretation.”<sup>328</sup> He argued that the Court knows this, which is why it is forced to appeal to stare decisis whenever it invokes the DCCD.<sup>329</sup>

By invoking earlier decisions, however, the Court is building its doctrinal house on sand.<sup>330</sup> Earlier decisions, Justice Thomas continued, were “premised upon the notion that the Commerce Clause is an exclusive grant of power to Congress over certain subject areas,”<sup>331</sup> while “the modern jurisprudence focuses upon the way in which States regulate those subjects to decide whether the regulation is permissible,”<sup>332</sup> prohibiting discriminatory state regulations while permitting nondiscriminatory ones.

But policing discrimination is no more satisfying a basis for the doctrine, argued Justice Thomas, because “none of the cases the

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see also Denning, *supra* note 124, at 215-23 (critiquing Justice Thomas's proposal).

323. See *Camps Newfound/Owatonna*, 520 U.S. at 637-40 (Thomas, J., dissenting) (indicating that Import-Export Clause would apply only to taxes analogous to “[i]mposts and duties”); Denning, *supra* note 124, at 220-23 (noting consequences of narrowing the DCCD).

324. See, e.g., *United Haulers*, 127 S. Ct. at 1799 (Thomas, J., concurring) (“The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice.”).

325. *Id.* (“Although I joined *C & A Carbone, Inc. v. Clarkstown*, I no longer believe it was correctly decided.”) (citation omitted).

326. *Id.*

327. *Id.*

328. *Id.* (mentioning the Court's citations to *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873), and *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1852)).

329. See *id.* at 1799-1800.

330. *Id.* at 1799.

331. *Id.* at 1800.

332. *Id.*

Court cites explains how the absence or presence of discrimination is relevant to deciding whether the ordinances are constitutionally permissible, and at least one case affirmatively admits that the nondiscrimination rule has no basis in the Constitution.<sup>333</sup> The best the Court can do is gesture vaguely in the direction of some alleged purpose of the Framers.<sup>334</sup> Thus, he concludes, "cloaked in the 'purpose' of the Commerce Clause, the rule against discrimination that the Court applies ... exists untethered from the written Constitution [and] instead depends upon the policy preferences of a majority of this Court."<sup>335</sup>

Justice Thomas then noted the different ways in which the Court had articulated the purpose behind the antidiscrimination principle. In the earlier years, the Court would speak of the purpose as the prevention of the harmful effects of statutes on interstate commerce itself,<sup>336</sup> while "[m]ore recently, the Court has struck down state laws sometimes based on its preference for national unity,"<sup>337</sup> and at "other times on the basis of antiprotectionist sentiment."<sup>338</sup> What those disparate justifications have in common, Justice Thomas argues, is "the erroneous assumption that the Court must choose between economic protectionism and the free market."<sup>339</sup> On the contrary, wrote Justice Thomas, that choice is Congress's and, lacking its pronouncement on a subject, "the States are free to set the balance between protectionism and the free market."<sup>340</sup>

The upshot, he concluded, is an illegitimate and unprincipled doctrine, enforcing an illusory constitutional command found nowhere in the text.<sup>341</sup> In short, it has become a contemporary analogue to *Lochner v. New York*.<sup>342</sup> "The Court's negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the 'right' it vindicated in *Lochner*."<sup>343</sup> He chided the *United*

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333. *Id.*

334. *Id.* at 1799-1800.

335. *Id.* at 1800.

336. *Id.*

337. *Id.*

338. *Id.* at 1801.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 1802. *Lochner* can be found at 198 U.S. 45 (1905).

343. *United Haulers Ass'n*, 127 S. Ct. at 1802 (Thomas, J., concurring).

*Haulers* majority for “propagat[ing] the error by narrowing the [DCCD] for policy reasons ... that later majorities of this Court may find to be entirely illegitimate.”<sup>344</sup>

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One need look only at cases decided within the last two decades to see signs of the minor calcification Roosevelt described.<sup>345</sup> Balancing and the antidiscrimination principle, both seen as superior decision rules at one time, are now attacked as resting on controversial assumptions, ill-suited once taken to their logical conclusions, or both.

Balancing, long a target of DCCD critics, is said to presume an inappropriate role for courts and is built on a questionable value judgment.<sup>346</sup> To its critics, rigid application of the antidiscrimination principle also belies an unarticulated and questionable belief: that the Constitution embodies a preference for free trade *qua* free trade—for markets over regulation.

Furthermore, the more one attempts to reconcile DCCD cases with similar facts, but divergent results, the more one feels that the facile distinctions offered are intended to mask the “real” reasons for the decisions. Such subterfuge has, as Roosevelt noted, resulted in confusion among judges, litigants, and commentators alike.<sup>347</sup> In many cases it appears that everything is driving the result *except* the doctrinal rules laid down in prior cases.

The presence of minor calcification would be enough to justify revisiting the DCCD’s decision rules.<sup>348</sup> More disturbing are powerful critiques suggesting that major calcification—the conflation of constitutional operative proposition with decision rules—is also infecting the doctrine.<sup>349</sup> Justice Thomas’s *United Haulers* concurrence took aim at the DCCD’s Achilles’ Heel: its lack of convincing (or at least a consistently stated) constitutional authority.<sup>350</sup> The Court’s failure from the beginning to settle on a constitutional

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344. *Id.* at 1803.

345. See Roosevelt, *supra* note 14.

346. See *supra* Parts II.E, III.B.1.

347. See *supra* Part III.A.1.

348. See *supra* Part III.A.1.

349. See *supra* Part III.A.2.

350. See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1799-1802 (2007) (Thomas, J., concurring).

operative proposition doomed it to lurch from decision rule to decision rule, resulting in the DCCD's notorious confusion and incoherence.<sup>351</sup> The contemporary two-tiered standard of review is merely the latest product of this fundamental omission.<sup>352</sup> Over time, as Roosevelt observed, decision rules themselves can become so familiar that courts (and scholars) erroneously assume that, by applying them, the Court is doing what the Constitution commands.<sup>353</sup> Further compounding error, courts and scholars have derived some DCCD decision rules from earlier decision rules, taking the doctrine further and further from the constitutional command.<sup>354</sup>

In Part IV, I take up Justice Thomas's challenge. There is a constitutional basis for the DCCD, or at least for part of it, though he is correct that several justifications cited by the Court are not defensible. Part IV surveys and critiques contemporary constitutional justifications for the DCCD and offers an operative proposition, grounded in the Framers' intent to secure political union by removing obstacles to it, and to prevent economic predation among the states in particular. Building on the union-protecting theory of the DCCD, I will then offer decision rules for its implementation.

#### IV. CONSTRUCTING A DECISION RULES MODEL OF THE DCCD

Drawing on an earlier article, I first propose a more limited—yet more historically defensible—constitutional basis for the DCCD, superior to others the Court has offered in the past. I then discuss the factors that inform the design of decision rules. Finally, I construct new decision rules for the DCCD that implement the operative proposition. Although these rules tend to follow the Court's lead in prescribing strict scrutiny for laws violating the antidiscrimination rule, they depart from the current decision rules in two respects: (i) I would abandon *Pike* balancing, since it cannot be satisfactorily tied to the operative proposition offered here, and fares poorly under the evaluative criteria scholars have proposed for constitutional doctrine; and (ii) I would exempt from the definition

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351. See *supra* Parts II-III.A.

352. See *supra* note 163 and accompanying text.

353. See *supra* Part III.A.

354. See *supra* Part II.E.

of "discriminatory" those laws that do not risk retaliation by other states, thus potentially undermining political union.

### *A. The Constitutional Operative Proposition*

Professor Berman's article does not have very much to say about deriving the constitutional operative proposition.<sup>355</sup> It would be very easy for such a debate—involving as it does the whole range of questions regarding the legitimacy of various modalities of constitutional interpretation—to have hijacked his original paper. The same is true here. However, one must have *some* account (and defense) of a constitutional operative proposition, as the rules proceed from it.

Part of the DCCD's problem is that the Court has never settled on *one* operative proposition. The Court has offered several contenders; it sometimes offers more than one in the same opinion. The Court's reluctance to settle on the constitutional basis for the DCCD, and its conflation of the decision rules and operative propositions, have both sown confusion throughout the doctrine's history, and left it vulnerable to charges, like Justice Thomas's, that the entire doctrine lacks any constitutional basis and is thus illegitimate.<sup>356</sup>

#### *1. Critiquing the Court's Modern Contenders*

The Court has flirted with several possible constitutional bases for the DCCD. The doctrine's early history saw the proponents of exclusive and concurrent power contend for dominance before both were replaced by *Cooley's* rule of selective exclusivity.<sup>357</sup> In its

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355. See Berman, *supra* note 11.

356. See *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1799-1802 (2007) (Thomas, J., concurring).

357. See *supra* Part II. In his earliest critique of the DCCD, Justice Thomas alleged that the Court had historically relied on two justifications for the doctrine that, he pointedly noted, lacked any textual foundation. The first, which he wrote was likely "wrong from the outset," was the theory of exclusivity discussed above. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting). The second theory Justice Thomas cited was the "pre-emption-by-silence" theory (that because Congress retained affirmative power over commerce, its *inaction* on regulatory matters implicitly preempted state action). *Id.* at 614-15 (citing *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 493 (1887)). "To the extent that the 'pre-emption-by-silence' rationale ever made sense," he commented, "it, too, has long since been rejected by this Court in virtually every analogous area of the law." *Id.* at 615. That, he argued, left the DCCD without any "theoretical

articulation of the modern doctrine, however, the Court has moved away from exclusivity, in favor of other justifications. It has never settled on *one*; however, various Justices have advanced differing justifications, sometimes in the same opinion. Two are variations of an historical argument; the third is a structural, "political process" justification.

*a. The Framers, Free Trade, and the Commerce Clause*

In a number of cases, the Court has claimed that it was the Framers' intent that the courts enforce something like the DCCD against the states. This justification, however, comes in two distinct varieties. According to one form of this historical argument, the intent was to ensure that the rivalries that had so riven the states during the Confederation Era were not renewed. The Framers wanted to ensure the success of the new Union by "avoid[ing] the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."<sup>358</sup> Justice Jackson often wrote of "[t]he unedifying story of Colonial rivalry in preying upon commerce, which more than any one thing made our Federal Constitution a necessity."<sup>359</sup> Justice Cardozo had earlier expressed the opinion that,

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foundation." *Id.* at 617. In his latest assault on the DCCD, Justice Thomas has tended to stick to his criticism that the DCCD is without a textual foundation in the Constitution. *See United Haulers Ass'n*, 127 S. Ct. at 1799 (Thomas, J., concurring). As well he should: the two theoretical foundations he said had collapsed had been abandoned by the Court long before *Camps Newfound*. In that case, Justice Stevens endorsed the more modest "selective exclusivity" theory of the DCCD:

We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power.

*Camps Newfound*, 520 U.S. at 571 (majority opinion). No Court in recent memory has endorsed the preemption-by-silence rationale. Justice Thomas's criticisms are red herrings here. Even his argument that *Federalist No. 32's* discussion of exclusive and concurrent powers proves that no preclusive effect was intended is open to serious question. *See generally* Brannon P. Denning, *The Dormant Commerce Clause Doctrine and Constitutional Structure* (Feb. 19, 2001) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=260830](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260830).

358. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

359. *Indep. Warehouses, Inc. v. Scheele*, 331 U.S. 70, 94 (1947) (Jackson, J., dissenting);

in the Commerce Clause, the Framers embodied the belief that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."<sup>360</sup> This is the version I endorse, as I explain below.

But there is another version of the historical argument that is broader than the "preventing economic Balkanization" argument. In *Great Atlantic & Pacific Tea Co. v. Cottrell*,<sup>361</sup> for example, Justice Brennan wrote that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States."<sup>362</sup> Later, Justice White, echoing Justice Brennan, wrote that it was "now established beyond dispute that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.'"<sup>363</sup> The difference is that this historical justification tends to assume the Framers valued free trade as an end in and of itself, as opposed to a means to an end, such as the prevention of economic friction among states that led to political instability.

As noted earlier, with free trade or economic efficiency as a constitutional command, decision rules must then be crafted to implement those values.<sup>364</sup> Such decision rules would make the DCCD virtually indistinguishable from *Lochner's* economic substantive due process regime. Consequences aside, the free trade theory of the DCCD is almost surely wrong as a historical matter.

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see also *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534 (1949) ("[W]ant of a general power over Commerce led to an exercise of this power separately, by the States, [which] not only proved abortive, but engendered rival, conflicting and angry regulations."); *id.* at 533 ("When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began" that "came to threaten at once the peace and safety of the Union." (quotation omitted)).

360. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

361. 424 U.S. 366 (1976).

362. *Id.* at 370 (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

363. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)); see also *id.* at 329 (arguing that permitting states to enact protectionist laws "would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects") (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278 n.7 (1977) ("A State is ... precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the States." (quoting *Freeman*, 329 U.S. at 252)).

364. See *supra* Parts II-III.

It is true that the Framers wanted to centralize power over interstate commerce, thus constraining state power to pass commercial regulation to some degree. But wanting to restrain states implies no attachment to a particular economic school of thought. As Richard Collins has pointed out—and as I will argue below—the Framers sought “interstate commercial harmony rather than market efficiency.”<sup>365</sup> They were not doctrinaire free traders, and the Commerce Clause did not, to paraphrase Holmes, enact Mr. Adam Smith’s *Wealth of Nations*.<sup>366</sup> In my research, I found no indication that free trade *qua* free trade lay at the heart of the move to centralize economic regulation.<sup>367</sup>

*b. The Representation-Reinforcing Justification for the DCCD*

The Court has also justified the DCCD in structural, political process terms. Laurence Tribe succinctly described this approach:

Because regulation unduly burdening or discriminating against interstate or foreign commerce or out-of-state enterprise has been thought to result from the inherently limited constituency to which each state or local legislature is accountable, the Supreme Court has viewed with suspicion any state action which imposes special or distinct burdens on out-of-state interests unrepresented in the state’s political process.<sup>368</sup>

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365. Collins, *supra* note 10, at 64; see also 1 TRIBE, *supra* note 10, at 1057 (“The function of the clause is to ensure national solidarity, not necessarily economic efficiency.”); Eule, *supra* note 10, at 429 (“The Framers did not explicitly protect free trade.”).

366. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

367. *Accord* Collins, *supra* note 10, at 114-15 (“[T]he doctrine does not in any meaningful sense impose laissez faire as a substantive value.”).

368. 1 TRIBE, *supra* note 10, at 1052; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 83-84 (1980). Ely argued that the DCCD grew

out of the ... need to protect the politically powerless and proceeding by the ... device of guaranteed virtual representation. Thus, for example, early in the nineteenth century the Court indicated that a state could not subject goods produced out of state to taxes it did not impose on goods produced locally. By thus constitutionally binding the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature, it provided political insurance that the taxes imposed on the former would not rise to a prohibitive or even an unreasonable level.

*Id.* (citation omitted).

In the 1930s, Chief Justice Stone, in *South Carolina State Highway Department v. Barnwell Bros.*,<sup>369</sup> regarded the fact that the state weight and width restrictions on vehicles traveling on state highways were nondiscriminatory and "affect[ed] alike shippers in interstate and intrastate commerce in large number within as well as without the state [as] a safeguard against their abuse."<sup>370</sup> Later, in *West Lynn Creamery, Inc. v. Healy*,<sup>371</sup> for example, Justice Stevens wrote that the political process that works to prevent abuses cannot be counted upon to work when a state or local government imposes costs on out-of-state citizens and confers benefits on its own citizens.<sup>372</sup> "[A] State's own political processes," however, "will serve as a check against unduly burdensome regulations" when such laws are evenhanded, and the burdens fall "on local economic interest as well as other States' economic interests."<sup>373</sup> As recently as two Terms ago, Chief Justice Roberts argued that a facially discriminatory law that forced the use of a publicly owned facility for the disposal of garbage, thus potentially raising the costs of garbage disposal to two counties' citizens, was not unconstitutional because those affected could be counted upon to prevent abuses.<sup>374</sup>

Structural restraints inferred from the Constitution and applied to exercises of state power date from the Marshall Court. Marshall himself invoked the Constitution's structure in *McCulloch v. Maryland*<sup>375</sup> to invalidate state taxation of a federal bank.<sup>376</sup> But

369. 303 U.S. 177 (1938).

370. *Id.* at 187; see also *id.* at 185 n.2 ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.").

371. 512 U.S. 186 (1994).

372. *Id.* at 200.

373. *Id.*; see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) (arguing that facially neutral statute barring sale of milk in nonrecyclable plastic containers not discriminatory in effect or in purpose because interests of out-of-state plastic milk container manufacturer adequately represented by similarly-situated in-state interests).

374. *United Haulers Ass'n, Inc. v. Oenida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1797 (2007) ("Here, the citizens and businesses of the Counties bear the costs of the ordinances. There is no reason to step in and hand local businesses a victory they could not obtain through the political process.").

375. 17 U.S. (4 Wheat.) 316 (1819).

376. Responding to Maryland's arguments that the state's power to tax was subject to the discipline of the voters, Chief Justice Marshall responded that such arguments did not apply

trying to ground the DCCD on a similar theory—that the political process cannot be depended upon to produce out-of-staters—runs into serious difficulties.

First, there is the baseline problem: What is the constitutional threshold for adequate representation of out-of-state interests? And who in the regulating state is entitled to act as the surrogate for out-of-staters? Laurence Tribe has warned that

[t]he concept of surrogate representation should be deployed with care, since its logic cannot easily be contained. Beyond the commercial interests that may be offended by statutes and regulations limiting the availability of goods and services provided by out-of-state concerns, the Court could as easily rely on the political voice of in-state consumers to challenge such regulations before they are enacted.<sup>377</sup>

He later commented that “a political check in the form of consumer pressure is theoretically present in *every* case where discrimination against the interstate market is alleged.”<sup>378</sup> Thus reliance on it could easily “turn[] traditional Commerce Clause analysis on its head,” because if discrimination raises costs to out-of-state firms, in-state consumers ought to provide the political check; if there are no in-state surrogates, Tribe argues that this “comes very close to being proof that there has been no violation at all,” because the Court has said that the DCCD protects the market, not particular firms.<sup>379</sup>

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when the object being taxed was a federal instrumentality.

The people of a State ... give to their government a right of taxing themselves and their property, and ... prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

*Id.* at 427-28.

377. 1 TRIBE, *supra* note 10, at 1055.

378. *Id.* at 1056.

379. *Id.* at 1057. For the Court’s statement, see *Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978) (stating that the DCCD “protects the interstate market, not particular

The baseline problem, however, is symptomatic of another. Process theory is intended to surmount the countermajoritarian difficulty by justifying judicial intervention when democracy "breaks." But because, at the state and local level, we *expect* popularly elected legislators to seek to benefit their citizens, democracy is not only *not* broken when they do, it is working precisely as intended. Professor Tribe puts it well: "Economic localism cannot be characterized as a symptom of breakdown in local democratic processes."<sup>380</sup> "Because this defect is routine rather than exceptional," and "because of the speed with which the traditional representation-reinforcing model of judicial review switches from judicial deference to judicial activism in the sphere of interstate commerce," the Court often tries hard to find in-state surrogates for out-of-state interests, giving rise to the representation baseline problems described above.<sup>381</sup>

## 2. *The Commerce Clause as a Guarantee of Political Union*

The "political union" or anti-Balkanization theory of the DCCD is likely closest to what the Framers intended and what the Constitution was understood to do.<sup>382</sup> Therefore, I posit the following constitutional operative proposition: *The Constitution restricts states' abilities to tax or otherwise regulate interstate commerce in*

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interstate firms, from prohibitive or burdensome regulations.").

380. 1 TRIBE, *supra* note 10, at 1054.

381. *Id.*

382. Without opening an interpretive can of worms, I also want to be clear about what I regard as relevant in fashioning the proposition for the Commerce Clause and related clauses in the Constitution. I find that constitutional text and structure, history, and precedent form the principal (if not the exclusive) sources of evidence about constitutional meaning. Moreover, I believe that the Court generally should employ such sources to cabin the range of interpretive possibilities when it adjudicates constitutional questions, as opposed to the Justices regarding themselves as completely unconstrained in the range of interpretive choices. Further, insofar as members of the Court at least seem *interested* in historical arguments (even if it is not determinative for some Justices), ascertaining a historically based operative proposition would seem to provide a focal point or least common denominator on which Justices might agree, even if they ultimately disagree in particular applications. As I believe that such conventional sources furnish a good sense of what the Framers had in mind regarding restraints on state power to regulate interstate commerce, I will bracket the more difficult questions of what to do when conventional sources "run out," or when a stable body of precedent—perhaps one built on an original misunderstanding of constitutional meaning—has formed around a constitutional provision or set of provisions.

*ways that tend to undermine the political union established by the Constitution by adopting measures likely to provoke retaliation by other states.*

An earlier article of mine<sup>383</sup> identified instances of interstate commercial discrimination during the Confederation Era.<sup>384</sup> A number of states discriminated either against goods produced in other states, or against goods (of whatever origin) imported into the state from another state, often by charging higher tariffs or imposts on those out-of-state goods.<sup>385</sup> These practices encouraged the targets of the higher taxes to respond in kind.<sup>386</sup> While John Fiske probably overstated the degree to which states were on the verge of a shooting war in his influential history *The Critical Period in American History: 1783-1789*,<sup>387</sup> the confrontations were occasionally quite sharp.<sup>388</sup>

The conflicts, which increased as the American economy took a sharp downturn in the mid-1780s, were worrisome to moderate nationalists who feared that the constant cycles of discrimination and retaliation were pulling the new nation apart.<sup>389</sup> Further exacerbating the effects of these conflicts was the lack of institutional mechanisms at the confederal level to enforce the protections for interstate commerce provided in the Articles.<sup>390</sup> The interstate conflicts, the possibility that they would increase over time, and the inability to deal with them at the supra-state level finally convinced fence-sitters, like James Madison, that systemic reform

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383. See generally Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005).

384. Extreme critics of the DCCD have drawn on historians like Merrill Jensen and William Zornow, who argued that there was really *no* discrimination during that period, or that the extent of the discrimination was wildly exaggerated. See *id.* at 40-43, 67-77.

385. *Id.* at 59-66.

386. *Id.* at 62-63, 69-73.

387. JOHN FISKE, *THE CRITICAL PERIOD IN AMERICAN HISTORY: 1783-1798* (1888).

388. See Denning, *supra* note 383, at 62-63, 69-72.

389. See *id.* at 52-59.

390. Early drafts of the Articles contained even stronger protections for interstate commerce; these were stripped out when the Articles were considered and weaker versions were substituted. See *id.* at 78-81. But even the weaker versions, like Article IV, the forerunner of the Constitution's Privileges and Immunities Clause of Article IV, Section 2 were fairly explicit. See *id.* at 80-81. I regard it as significant that at state sovereignty's high tide there was recognition of the danger interstate commercial conflicts posed to the union, and the willingness to infringe upon state sovereignty to prevent such conflicts. *Id.* at 81.

was needed.<sup>391</sup> Thereafter, Madison became an advocate for constitutional reform, something he had hesitated to support before.<sup>392</sup>

In Philadelphia, the Framers included a number of provisions limiting state taxing and regulatory power where interstate and foreign commerce were concerned.<sup>393</sup> In addition to specific restrictions on states' powers to tax imports and exports<sup>394</sup> and impose duties of tonnage,<sup>395</sup> the Framers centralized control of interstate and foreign commerce, including it in Congress's enumerated powers.<sup>396</sup> But evidence both from Philadelphia and from the ratification debates—as well as from the early Supreme Court opinions—suggests that the Framers understood that limits on state power were implicit in the positive grant to Congress.<sup>397</sup> To the extent that the commerce power was discussed at all, it was understood to limit states separate and apart from the specific restrictions in Article I, Section 10.<sup>398</sup>

I do not claim that the Framers had a good idea of what form those limits took, nor that they had thought through the implications of such limits. It appears that thoughts about the scope of these limits remained inchoate for some time; Albert Abel found quite a number of state laws regulating—and even discriminating against—interstate commerce in the years between the Constitution's ratification and *Gibbons v. Ogden*.<sup>399</sup> But regardless of whether the limits went underenforced for a time,<sup>400</sup> the Framers

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391. *Id.* at 54-59.

392. *Id.*

393. *Id.* at 81-90.

394. U.S. CONST. art. I, § 10, cl. 2. Along with Chief Justices Marshall and Taney and Justice Thomas, I think that the Import-Export Clause was intended to apply to interstate as well as foreign commerce. See Denning, *supra* note 124.

395. U.S. CONST. art. I, § 10, cl. 3.

396. U.S. CONST. art. I, § 8, cl. 3. Control over commerce with the Indian tribes was centralized as well. *Id.*

397. See Denning, *supra* note 383, at 82-85.

398. *Id.* at 85-88.

399. See Albert S. Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Enterprise*, 18 MISS. L.J. 335 (1947); Albert S. Abel, *Commerce Regulation Before Gibbons v. Ogden: Trade and Traffic*, 14 BROOK. L. REV. 215 (1947); Albert S. Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Facilities*, 25 N.C. L. REV. 121 (1946).

400. There is also evidence that states amended their tariff and impost laws following the Constitution's ratification, which suggests they understood that the new constitution limited

(and to the extent that their opinions can be canvassed, the ratifiers) intended there to be *some limits*. The limits, moreover, were spawned not by any particular attachment to a free trade ideology, but rather by a conviction that parochial trade regulation inevitably caused conflict, and that such conflicts posed a long-term threat to the health of the Union.<sup>401</sup>

### *B. Crafting Decision Rules*

Because constitutional norms, even once defined, must be applied to particular fact situations, courts—the Supreme Court in particular—have to self-consciously and intentionally generate *rules* at the point where constitutional norms meet those facts. Professors Berman, Roosevelt, and Fallon have a great deal to say about what these rules look like and what factors influence courts when designing them.<sup>402</sup> This subsection will briefly summarize the criteria common to all three scholars useful for determining the form a decision rule should take. It will also review Fallon's taxonomy of common decision rules in constitutional law.

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their regulatory and taxing abilities. See Denning, *supra* note 383, at 73-74.

401. One might reasonably ask whether I am overestimating the danger to the Union realistically presented by trade disputes. Professor Zelinsky, for one, doubts that there would be any appreciable threat to national union if courts abandoned the antidiscrimination principle. See, e.g., Zelinsky, *supra* note 10, at 80, 84-87. If this is true, then whatever the historic pedigree of my constitutional operative proposition, it may make little sense in this day and age to create a judicially enforced doctrine around such a command. I am not as sanguine as Professor Zelinsky and others that the absence of significant barriers to trade among the states is something that can be taken for granted, or that widespread reinstitution of barriers would pose little or no threat to political stability in the United States. As the world economy has slowed, for example, commentary abounds on the reemergence of protectionism. See Bob Davis, *Global Ties Under Stress as Nations Grab Power*, WALL ST. J., Apr. 28, 2008, at A1 ("The global economy appears to be entering an epoch in which governments are reasserting their role in the lives of individuals and businesses. Once again, barriers are rising."); see also Brannon P. Denning, *Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L.J. 623, 644-45 nn.92-94 (2007) (collecting news articles about resurgent protectionism in the U.S., Europe, and Asia). Absent the DCCD, I do not think it too dystopian to predict that state and local governments, too, would seek to impose costs on outsiders. I am confident, then, that the Framers' efforts to ensure that trade wars not be permitted to introduce tensions between states continues to have relevance today. Whether my fears (and theirs) are overblown could ultimately be proven only by disabling the DCCD and seeing what happens, which I would be unwilling to do.

402. See FALLON, *supra* note 23, at 47-52; Berman, *supra* note 11, at 92-96; Roosevelt, *supra* note 14, at 1658-67.

### 1. General Considerations in Decision Rule Formation

In theory, a Court has three options when designing decision rules. First, it may attempt to enforce the operative proposition directly, crafting a decision rule that corresponds perfectly to the Constitution's command. For example, Justice Black thought the First Amendment "without deviation, without exception, without any ifs, buts, or whereases, [meant] that government shall not do anything to people ... either for the views they have or the views they express or the words they speak or write."<sup>403</sup> He was unwilling to endorse decision rules in First Amendment cases that deviated from "the clear wording of the First Amendment that 'Congress shall make no law ... abridging the freedom of the speech or of the press.'"<sup>404</sup> Justice Black criticized his colleagues for refusing to grant speech the absolute protection it received under his reading of the Constitution and instead "adopt[ing] various judicial tests which are applied on a case-by-case basis to determine if the speech in question is entitled to protection."<sup>405</sup>

As Professor Roosevelt has demonstrated, though, however normatively attractive the "direct enforcement" model of the Constitution is, it simply is not how the Constitution is interpreted in practice.<sup>406</sup> Moreover, it is not clear that direct enforcement is even *possible* in a wide range of cases.<sup>407</sup> With direct enforcement impossible in a large number of cases, the choice left open to courts is whether to craft doctrine—that is, decision rules—that either defer to other decisionmakers, thereby risking "underenforcement"

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403. HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 45 (1968).

404. *Id.* (quoting U.S. CONST. amend. I).

405. *Id.* at 49-50.

406. See KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 15 (2006) (noting that Court critics often contrast direct enforcement with judicial activism); see also FALLON, *supra* note 23, at 43 ("In 'ordinary' cases the Court—or at least a majority—treats the issue for decision as framed by established doctrine. Interestingly and significantly, the Justices assume that their obligation of fidelity to the Constitution is met by fidelity to an established structure for implementing the Constitution.").

407. ROOSEVELT, *supra* note 406, at 15-18 (giving examples, and concluding that "a judge cannot simply enforce the plain meaning of the Constitution" because "the clear meaning exists at a relatively high level of generality"); see also FALLON, *supra* note 23, at 42 (noting that most constitutional norms "are too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts").

of constitutional commands,<sup>408</sup> or employ less deferential rules, which run the risk of “overenforcing” those commands.<sup>409</sup> “Doctrine,” writes Professor Roosevelt, “is the nitty-gritty of constitutional adjudication. It is the set of rules that the Supreme Court creates to take it from the grand language of the Constitution to the actual outcomes of particular cases.”<sup>410</sup>

## 2. Criteria for Fashioning Decision Rules

As Professor Fallon describes the task, creating doctrine or decision rules requires the Court to “draw on psychology, sociology, and economics to craft doctrines that will work in practice, without excessive costs, and that will prove democratically acceptable.”<sup>411</sup> He, Berman, and Roosevelt furnish similar criteria for use in formulating decision rules. First, there are *institutional competence* concerns: whether or not in the ordinary run of cases the Court would be better off deferring to, say, legislatures, because of the Court’s doubts that it is in the best position to “get the right answer.”<sup>412</sup>

Institutional competence concerns are closely linked to the ability of the Court to reduce *error costs*. These can result from its invalidation of laws that ought to be upheld (false positives) or from upholding laws that should have been invalidated (false negatives).<sup>413</sup> Professor Berman lumps different sorts of error costs into a similar criteria that he calls “adjudicatory considerations” addressed to minimizing “adjudicatory errors.”<sup>414</sup> Although decision rules ought to seek optimal deterrence, thereby “reducing violations of constitutional meaning,”<sup>415</sup> care must be taken that “the

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408. The classic article on underenforcement is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

409. See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); see also Berman, *supra* note 11, at 133-36 (discussing the complexity inherent in determining whether a particular decision rule overprotects or overenforces a constitutional operative proposition).

410. ROOSEVELT, *supra* note 406, at 19.

411. FALLON, *supra* note 23, at 77.

412. ROOSEVELT, *supra* note 406, at 24-25.

413. *Id.* at 29-30.

414. Berman, *supra* note 11, at 93.

415. *Id.* Berman’s example is the Fourth Amendment’s exclusionary rule. *Id.* at 93-94.

adjudicatory process not render other actors unduly timid."<sup>416</sup> Berman terms these "protective considerations."<sup>417</sup>

At the same time, a court should be sensitive to *fiscal considerations*, which Professor Berman defines as those that "drive[] a court to craft doctrine in such a way as to reduce ... private and public litigation-related expenditures."<sup>418</sup> Fiscal considerations might—to take an example Roosevelt uses—lead a court to prefer rules over standards in some cases, providing those they govern with predictability and stability.<sup>419</sup> Decision rules should also seek to minimize friction with other branches—Berman terms these *institutional considerations*—as well as best "operationaliz[e] constitutional norms or policies"—Berman calls these *substantive considerations*.<sup>420</sup>

Roosevelt also urges attention to the *lessons of history* and *defects in democracy* as influencing the choice among deferential and non-deferential decision rules.<sup>421</sup> For example, scrutiny of classifications under the Fourteenth Amendment can be aided by history, which "might show that certain kinds of discrimination have frequently been used for improper purposes in the past.... This history justifies the Court in not deferring to the legislative judgment that such discrimination is innocent and in the public interest."<sup>422</sup> "The second

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416. *Id.* at 94.

417. *Id.* Both protective and deterrent considerations "are the two species of a broader genus of considerations we might call guidance-promoting." *Id.*; see also FALLON, *supra* note 23, at 51 (noting that because the information available to the Court "is almost always less than optimal ... the Court must assess the practical wisdom of rendering one or another ruling" from "within a fog of uncertainty"); *id.* ("[T]he Court's job is to frame rules that will clarify the law and guide future decisions, not only by lower courts, but also by nonjudicial officials. The Court must therefore attempt to achieve a delicate balance along several dimensions. It must consider the wisdom of alternative approaches in light of relative risks that crucial, underlying assumptions may be mistaken to one or another degree." (footnote omitted)). The uncertainty might be so great that, at the extremes, "it might be unwise to articulate any applicable norm at all." *Id.*

418. Berman, *supra* note 11, at 95.

419. ROOSEVELT, *supra* note 406, at 30-32; see also FALLON, *supra* note 23, at 49-50 ("In determining which rights to recognize, the Court must make calculations about judicial capabilities and about the potential costs of authorizing judicial involvement. The shape of constitutional doctrine reflects this concern."). Roosevelt offers the Court's willingness to distinguish between positive and negative rights, enforcing the latter but not the former, as one example. *Id.*

420. Berman, *supra* note 11, at 95.

421. ROOSEVELT, *supra* note 406, at 26-28.

422. *Id.* at 26.

kind of situation in which an anti-deferential rule is justified," Roosevelt writes, "is one in which structural problems make it likely that the legislature will fail to perform its cost-benefit balancing function accurately. An example of this sort of problem is a case in which the burdens of a law fall on out-of-staters."<sup>423</sup>

### 3. *Types of Decision Rules in Constitutional Law*

So how can doctrine overprotect constitutional norms? Underenforce them? What *types* of decision rules do we have to choose from when considering the criteria described above?

In his groundbreaking book, Professor Fallon offers a guided tour of decision rules commonly employed in constitutional law, identifying seven different types of doctrinal tests:

(1) *Forbidden-content tests* are those in which "statutes, regulations, or policies [are identified] as absolutely unconstitutional based on their content."<sup>424</sup>

(2) *Suspect-content tests* regard as suspect—but do not necessarily absolutely forbid—certain legislation based on its content.<sup>425</sup>

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423. *Id.* at 27. Professor Fallon mentions two other factors relevant to doctrine-creation: "ultimate ideas of constitutional justice" and "democratic acceptability in light of reasonable disagreement." FALLON, *supra* note 23, at 48, 51. The former, Fallon writes, means that when designing doctrine, Justices should—where possible—adopt an interpretation that would "make the Constitution the best that it can be" using "principles that—at some level—can fairly be viewed as widely shared." *Id.* at 48.

Further, the Court should "attach significance to reasonable disagreement in determining ... which values the Constitution is best understood as encompassing at a particular time." *Id.* at 51. According to Professor Fallon, "[t]he Court can reasonably view itself as having a limited proxy to deliberate about constitutional issues on behalf of the people; if its judgment sufficiently sways opinion, the requirement of democratic acceptability will be met." *Id.* at 52. If not, then the Court might be seen as "intruding contestable values into a domain where it is reasonable to think that no constitutional problem exists." *Id.*

Clashes among value judgments can be guided by three other considerations. First, the degree to which a Justice is confident of the correctness of his or her decision should inform the extent to which the decision "yield[s] to concerns of democratic unacceptability." *Id.* at 53. Second "is the seriousness of the error or injustice that could result from yielding to concerns of democratic unacceptability." *Id.* Finally, there is "the actual likelihood that a judicial ruling would indeed prove democratically unacceptable, the number of people who would feel the grievance, and the reasonableness and strenuousness of their objection." *Id.*

424. FALLON, *supra* note 23, at 78. His example is government-compelled worship. *Id.*

425. *Id.*

(3) *Balancing tests* are those in which courts weigh competing considerations to determine a statute's permissibility.<sup>426</sup>

(4) *Non-suspect content tests*, like the rational basis test, "reflec[t] strong presumptions of constitutional validity."<sup>427</sup>

(5) *Effects tests* "focus not on the explicit content of a statute or policy, but on its effects," like policies that "impose high costs on those appealing criminal convictions."<sup>428</sup>

(6) *Purpose tests* invalidate "legislation or other governmental policies ... if developed or applied for constitutionally illegitimate reasons."<sup>429</sup>

(7) *Appropriate deliberation tests* "ask[ ] more generally whether a challenged statute or policy results from fair or appropriate deliberative processes."<sup>430</sup>

Fallon is careful to note that the categories are far from hermetically sealed or mutually exclusive.<sup>431</sup>

Not all the tests are used with equal frequency, he points out:

[A]lthough some commentators have characterized the current era of constitutional law as an "age of balancing," balancing tests have relatively less influence within constitutional doctrine than is often thought.... [F]orbidden-content, effects, and appropriate deliberation tests play relatively small roles in contemporary doctrine.... [S]uspect- and non-suspect content tests dominate large, important areas of constitutional law.... [C]ontemporary constitutional doctrine reflects a larger concern with the legitimacy of governmental purposes than is often appreciated. Many doctrines prescribe invalidation of actions taken for forbidden reasons; other tests function as surrogates for direct inquiries into governmental purposes.<sup>432</sup>

The contemporary DCCD furnishes examples of doctrinal rules in all their complex variety. Heightened scrutiny of state and local laws deemed "discriminatory" have decision rules that embody

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426. *Id.*

427. *Id.*

428. *Id.* at 79.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 81 (footnotes omitted).

suspect-content, effects, and purpose tests.<sup>433</sup> Discriminatory laws are upheld only if the government bears its burden of proving both a non-protectionist end, and lack of less discriminatory means.<sup>434</sup> An argument can even be made that where facially discriminatory measures are challenged, the Court sometimes comes close to employing a forbidden content test.<sup>435</sup> By contrast, review of nondiscriminatory state regulations employs a deferential non-suspect content form of balancing.<sup>436</sup>

### *C. New Decision Rules for the DCCD*

The two-tiered standard of review reflects the confusion over the operative proposition that underlies the DCCD. Because, as I argued above, the best operative proposition is one that focuses on state and local laws likely to undermine political union, a better set of decision rules is required to enforce it. Some of the current decision rules are inadequate to the task, and fare badly under the criteria described above. Others could benefit from reexamination using Berman, Fallon, and Roosevelt's criteria.

#### *1. Goodbye to Balancing*

A majority of the Court has not struck down a state or local law using *Pike* balancing in over twenty-five years.<sup>437</sup> Reconstruction of the DCCD ought to begin with an explicit acknowledgement of what the Court has already done *sub silentio*: repudiation of balancing as a decision rule in DCCD cases. If the Constitution were primarily designed to prevent frayed relations among states caused by economic predation and retaliation, then truly nondiscriminatory laws—an important caveat to which I will return below—should not be subject to DCCD scrutiny at all. A law treating in-state and out-of-state commerce alike poses little or no risk of triggering a round of retaliatory lawmaking in other states. Whatever constitutional

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433. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981).

434. See *supra* note 8 and accompanying text.

435. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

436. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

437. See *supra* note 220 and accompanying text.

objections might be lodged against such a law, that it violates the DCCD does not seem to be one.

Balancing forces courts, on limited information, to second-guess legislative judgments as to things that are not readily reducible to a common metric. If courts balance aggressively, they will overdeter legislatures passing nondiscriminatory laws for the benefit of their citizens, which undermines federalism. Balancing calls into question courts' institutional competence (given their limited capacity for fact-finding), raises institutional concerns by creating friction between them and popularly elected legislatures, and increases litigation costs to parties through the use of an unpredictable and unstable standard. Balancing is likely to generate large numbers of false positives if enforced aggressively. Moreover, to the extent the constitutional norm at issue is concerned with a type of *discriminatory* legislation, it hardly operationalizes that norm by focusing on *nondiscriminatory* laws. If covert discrimination is the worry, one is better off creating decision rules that address such discrimination, as opposed to balancing burdens and benefits.

## 2. Policing Discrimination

As noted above, the Supreme Court has relied on the antidiscrimination principle as a decision rule to enforce the DCCD, sometimes (but not always) tracing the rule to a constitutional command prohibiting states from regulating commerce in ways inimical to political union.<sup>438</sup> In addition to this fudging of the constitutional operative proposition the rule enforces, the Court has also been imprecise in its definition of "discrimination." This combination has sometimes resulted in aggressive implementation of the antidiscrimination principle, threatening to convert the DCCD into a form of economic substantive due process.<sup>439</sup> In recent cases, the Court has trimmed the principle's sails, though in a largely ad hoc manner. This section seeks to bring the antidiscrimination principle in line with the operative proposition that it should be enforcing.

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438. See *supra* Part IV.A.1.

439. See *supra* Part III.B.2.

a. *"Discrimination" and the DCCD: The Current Decision Rule*

Currently, the Court employs the following definition of "discrimination" in DCCD cases: "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid."<sup>440</sup> Thus, the current decision rule is a non-deferential, suspect-content rule that places the evidentiary burden on the government once a *prima facie* case of discrimination has been made.

The current rule, however, is both under- and overinclusive. It is underinclusive because it is not clear that a direct benefit to in-state economic interests is required. For example, in *City of Philadelphia v. New Jersey*,<sup>441</sup> the Court invalidated New Jersey's ban on the importation of out-of-state wastes not necessarily because any in-state economic interest benefited, but because the Court concluded that New Jersey could not address its admittedly legitimate environmental concerns by isolating itself, closing its borders to the entry of undesirable products.<sup>442</sup> In fact, at least in facial discrimination cases, plaintiffs are required to show neither benefits nor burdens (other than the fact of the discrimination) in order to have the Court apply the "virtually *per se* rule of invalidity."<sup>443</sup>

Further, the definition is overinclusive, because the Court has held that economic interests must be similarly situated, for example, by being competitors. In *General Motors Corp. v. Tracy*<sup>444</sup> the Court wrote that

any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions ... when the allegedly competing entities provide different products, as here, there is a threshold question

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440. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). For a recent use of this definition, see *Granholt v. Heald*, 544 U.S. 460, 472 (2005).

441. 437 U.S. 617 (1978).

442. *Id.* at 626-27.

443. *Id.*

444. 519 U.S. 278 (1997).

whether the companies are indeed similarly situated for constitutional purposes.<sup>445</sup>

The Court further explained:

This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.<sup>446</sup>

The definition might also be said to be overinclusive because of the categorical exclusions from or exceptions to the DCCD that the Court has created over the years. The oldest is the exception for discriminatory laws that have congressional sanction. Congress may use its affirmative commerce power to permit what the DCCD would otherwise forbid.<sup>447</sup> Another is the market-participant exception, which permits states imitating private participants in particular markets by, for example, buying goods and services with taxpayer money or selling state-produced goods or services, to discriminate between in-state and out-of-state economic actors.<sup>448</sup>

In 2007, the Court excluded another category from its antidiscrimination decision rule by exempting laws "benefit[ing] a clearly public facility" over "particular private businesses," at least where "all private companies [i.e., in-state and out-of-state] [are treated]

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445. *Id.* at 298-99 (footnote omitted).

446. *Id.* at 299; *see also* Pharm. Research & Mfrs. Ass'n of Am. v. Walsh, 538 U.S. 644, 668-70 (2003) (rejecting discriminatory effects claim against state law requiring drug companies to rebate portion of purchase price of drugs to state, which used rebates to subsidize purchase and sale of discounted drugs, and noting that "the Maine Rx Program will not impose a disparate burden on any competitors"); Exxon Corp. v. Maryland, 437 U.S. 117 (1978) (rejecting discriminatory effects claim against state law prohibiting petroleum refiners from owning retail service stations on ground that nothing prevented out-of-state independently-owned service stations from competing with those owned by in-state residents).

447. *See generally* COENEN, *supra* note 10, at 292-96.

448. *See generally id.* at 302-14.

exactly the same.”<sup>449</sup> Just two terms ago, the Court extended this exception in a case involving state tax exemptions for income derived from in-state, but not out-of-state, bonds.<sup>450</sup>

On one level, these undertheorized exclusions and exemptions reflect the vices of major and minor calcification discussed above,<sup>451</sup> which I will not rehash here. But if the Court is rethinking the DCCD in general, and the antidiscrimination principle in particular, following a decision rules model of adjudication could inject clarity and coherence long absent from the doctrine.

*b. The Easy Case of Facial Discrimination*

Like nearly all operative propositions, the proposition posited above—that the Constitution and the Commerce Clause limit state commercial regulation likely to undermine political union—can dictate the outcome of few cases as stated. The question then becomes what form decision rules implementing this norm should take?

A decision rule rooted in the avoidance of disunion should be just overinclusive enough to both take account of the frequency of unconstitutional action (DCCD cases represent a sizeable portion of constitutional challenges to state and local laws) and of legislative pathologies (the desire to favor one’s residents at the expense of outsiders), as well as clear enough to provide guidance for policymakers who try to avoid running afoul of the DCCD and the antidiscrimination principle. It should, at a minimum, invalidate “classic protectionist devices that shield[] local enterprise from external competition: tariffs, embargoes, and quotas,”<sup>452</sup> as well as other laws that “invi[t] retaliatory regulation of other products, and ... create an incentive for protected local competition to arise or for outside producers to move operations into the state.”<sup>453</sup>

At the same time, both the possibility of a state or local government’s avoiding invalidation by satisfying the requirements of strict

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449. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. at 1786, 1795 (2007).

450. *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801 (2008).

451. See *supra* Part III.B.

452. *Collins*, *supra* note 10, at 75.

453. *Id.* at 76.

scrutiny, and of congressional action to permit what, as a default rule, the antidiscrimination principle prohibits, should satisfy Berman's concern with ensuring that the judiciary will enforce the antidiscrimination principle without permitting the fear of a false positive to deter them. Congress provides the ultimate backstop through its ability to sanction laws invalidated by courts if it feels courts have gone too far in applying the rule.

By these measures, the current antidiscrimination rule performs tolerably well when applied to those laws that are facially discriminatory—that is, laws that explicitly refer to the geographic origin of goods or services and single out for unfavorable treatment those from out of state. History illustrates that certain taxes and other trade regulations—tariffs, embargoes, imposts, and the like—that sought to secure benefits for citizens of the enacting state, while imposing costs on out-of-state residents, posed a serious threat to the stability of the Confederation in the mid-1780s.<sup>454</sup> The term “discrimination” is a useful shorthand to describe this kind of unequal treatment based on the geographic origin of the regulated economic actor.

As a decision rule, the antidiscrimination principle is a prophylactic rule, potentially overenforcing the operative proposition barring commercial regulations that risk igniting trade wars and disrupting political union. The Court has tried to compensate for this by, as noted above, both applying a suspect- (as opposed to a forbidden-) content test, and by creating categorical exclusions from the DCCD.<sup>455</sup>

Nevertheless, the antidiscrimination principle fares pretty well by Berman, Fallon, and Roosevelt's criteria for decision rules. The Court would seem to be on solid ground choosing a non-deferential decision rule. “Discrimination” was a special concern of the Framers—a concern reflected in the text of the Constitution itself,<sup>456</sup> rules focusing on implementing that special concern would seem best suited to serving Berman's substantive considerations.<sup>457</sup> Or as Professor Fallon would describe it, decision rules focusing on

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454. See *supra* notes 383-401 and accompanying text; see also Denning, *supra* note 383.

455. See *supra* notes 433-36, 447-50 and accompanying text.

456. See *supra* notes 393-98 and accompanying text.

457. See *supra* note 420 and accompanying text.

commercial discrimination best *implement* the constitutional command itself.<sup>458</sup>

As Professor Roosevelt eloquently put it, “decision rules will have special favorites, as long as, and to the extent that, state actors have special victims.”<sup>459</sup> And the history of state action throughout the life of the DCCD demonstrates that state legislatures often succumb to the temptation to provide benefits to their citizens at the expense of someone else, preferably some out-of-state actor.<sup>460</sup> Because of this propensity to externalize costs, the normal political processes that are counted on to police legislatures are often unavailable to those affected by the regulations—this is Roosevelt’s “democracy deficit.”<sup>461</sup>

The current antidiscrimination rule also has the apparent benefit of clarity and predictability, which allows for ease of application by courts and clear guidance for policymakers choosing laws. It would thus seem to do well minimizing error costs and enforcement costs, while not taxing courts’ institutional competence.

Relatedly, giving courts a clear idea of what they are supposed to be enforcing also minimizes fiscal concerns and enforcement costs. Here, too, the antidiscrimination principle performs relatively well—especially with regard to those laws explicitly drawing geographical distinctions between economic competitors.

### *c. Hard Cases: Discriminatory Effects and Discriminatory Purpose*

It is tempting to restrict the antidiscrimination decision rule to facially discriminatory laws, as some DCCD critics have urged.<sup>462</sup>

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458. See FALLON, *supra* note 23, at 5.

459. Roosevelt, *supra* note 14, at 1703.

460. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427-28 (1819).

461. See ELY, *supra* note 368, at 77-87. My reliance on a democracy deficit to justify a decision rule does not contradict my earlier critique of the “representation-reinforcing” theory of the DCCD. See *supra* Part IV.A.1.b. When deciding how best to implement the operative proposition—especially when considering whether a court should craft a deferential or non-deferential rule vis-à-vis legislatures—it seems entirely appropriate to consider whether conditions exist that make one skeptical about the legislators’ ability and incentive to self-police.

462. Notably Justice Scalia. See, e.g., *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 262, 264 (1987) (Scalia, J., concurring in part and dissenting in part) (criticizing the DCCD and urging its abandonment).

But if we do, the constitutional operative proposition will go underenforced. Laws can easily be written to eliminate any explicit mention of geographical origin, thus concealing the true target of the regulation and, perhaps, the true intention of legislators. Current DCCD decision rules deal with this by also applying strict scrutiny to those laws that, though facially neutral, discriminate in either purpose or effect.

The problem, discussed elsewhere,<sup>463</sup> is that because the Court has never been transparent about how one ascertains discriminatory purpose or which effects warrant application of strict or heightened scrutiny, it is difficult to predict when the Court will apply the latter, as opposed to the deferential *Pike* balancing. This means that the "rule" begins to look like a standard, with all the attendant loss of predictability, stability, and transparency.

But here again, I would argue, adopting a decision rules model could aid constitutional decisionmaking. Policing effects and purpose are necessary to ensure the operative proposition is optimally enforced—or at least not grossly underenforced because of the ease of evasion on the part of state and local governments. Therefore it makes sense to apply the same suspect-content test to facially neutral statutes with discriminatory effects or discriminatory purposes, because the latter could undermine the operative proposition as effectively as an overtly discriminatory law.

The problem is that an initial determination must be made about standards of proof for both effects and purpose. Additional decision rules (which I will call subrules, for clarity's sake) are needed to explicate the decision rules implementing the operative proposition.

What we want to avoid is the elevation of form over substance: permitting a clever state or local legislative body simply to omit explicit geographic distinctions from a law, which otherwise operates to disadvantage only out-of-state goods or economic actors as effectively as if it were facially discriminatory. But what sorts of effects, and what amount, should suffice to shift the burden back to the state? In general, as I have argued before, the concern is scrutinizing laws "whose effects *insulate one locality's economic actors from competition by out-of-state economic actors*,"<sup>464</sup> because

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463. See Denning & Lary, *supra* note 261, at 916-37.

464. *Id.* at 933.

the tendency would be for all states to do the same, igniting a low-level trade war among the states. The Court's own cases have found the following effects to be discriminatory:

- Effectively barring the import or sale of an imported good;<sup>465</sup>
- Raising costs of doing business in a state for out-of-state competitors of in-state producers, which costs are not also borne by the in-state interests;<sup>466</sup>
- Stripping competitive advantages from out-of-state competitors, thus leveling the playing field to the advantage of in-state producers;<sup>467</sup>
- Creating a tax and subsidy scheme that operates in such a way that *only* the out-of-state actor is taxed.<sup>468</sup>

This is a non-exclusive list;<sup>469</sup> the Court would not be restricted to these, but it seems that such effects would most closely resemble facially discriminatory statutes likely to trigger retaliation by other states, perhaps through imitation. Moreover, it is important to remember that all a finding of discriminatory effects does is shift the burden back to the state to demonstrate both an innocent aim and the lack of less discriminatory means.

States may even assist courts in flagging other states' overreaching by filing amicus briefs urging invalidation. Chris Drahozal has found that the Court is more likely to sustain DCCD challenges to

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465. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522, 527 (1935) (striking down law barring the sale of milk purchased for less than minimum price set by state, as applied to milk purchased in another state).

466. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-51 (1977) (invalidating regulation barring use of state grades on apples where Washington had developed state-of-the-art grading system, and North Carolina had no separate grading system, stating that "[t]he first, and most obvious [effect] is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected").

467. *Id.* at 351.

468. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (concluding that tax-subsidy scheme was similar to a "protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State").

469. For example, Dan Farber and Robert Hudec have suggested that another discriminatory effect might occur when a statute "regulate[s] on the basis of some characteristic that, while purportedly neutral, has little independent significance and is in reality a proxy for geographic differences—that is, the characteristic is shared by virtually all in-state firms and virtually no out-of-state firms." Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 *VAND. L. REV.* 1401, 1416 (1994).

state laws where other states urge it to do so.<sup>470</sup> His hypothesis is that states act as "fire alarms," aiding the Court in monitoring compliance with the DCCD.<sup>471</sup> The willingness of states to file briefs with the Court urging invalidation (or not) could be strongly suggestive of which laws states view as most threatening to their own interests (and the interests of their citizens).

Constitutional law relies on effects tests in part to smoke out illegitimate or unconstitutional purposes that may have contributed to the passage of the law. In many areas of constitutional law (like race and sex discrimination), discriminatory effects or disparate impact are not sufficient to prove discrimination; you must also prove discriminatory intent.<sup>472</sup>

Invalidating laws on the basis of allegedly unconstitutional motives of legislators has a checkered history in constitutional law.<sup>473</sup> The Court itself has occasionally stated that motive is irrelevant; judicial and academic critics have argued that it is incoherent to speak of the "motive" of a multimember legislative body.<sup>474</sup> And yet, purpose inquiries continue to be common in constitutional doctrine.<sup>475</sup>

Under the DCCD, proof of *either* purpose or effects is sufficient.<sup>476</sup> As with effects, however, the Court has not given any clear indication of *how* one might go about proving discriminatory purpose, or even why purpose should be considered.<sup>477</sup>

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470. Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 235 (1997).

471. *Id.*

472. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

473. See, e.g., Coenen, *A Constitution of Collaboration*, *supra* note 19 (tracing the controversy over purpose inquiries).

474. See, e.g., *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) (arguing that it "is virtually impossible to determine the singular 'motive' of a collective legislative body, ... and this Court has a long tradition of refraining from such inquiries") (citations omitted).

475. See, e.g., Coenen, *A Constitution of Collaboration*, *supra* note 19; see also Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1 (2007).

476. See, e.g., *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 n.15 (1981).

477. As for the defense of a purpose-based inquiry, I have always found Donald Regan's defense of purpose inquiries in the DCCD persuasive. Regan notes that because of the possibility of evading explicit prohibitions against protectionism by cloaking laws in neutral terms, those explicit prohibitions will inevitably underenforce the relevant constitutional

Regan argues that “a motive can ‘contribute substantially’ to the adoption of a law ... without being the dominant motive,” but confessed that the question of “how much contribution is substantial” was one “where precision is impossible.”<sup>478</sup> He does offer that the burden of proof on “substantial contribution” should be based on a preponderance of the evidence.<sup>479</sup>

The Eighth and Fourth Circuits have gone further, offering subrules for what sorts of evidence would be admissible to establish the presence of discriminatory purpose.<sup>480</sup> Both borrow from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>481</sup> which articulated factors to be used in ascertaining whether discriminatory intent was present in claims of racial discrimination.<sup>482</sup> Taken together,<sup>483</sup> the circuit court cases generally permit introduction of:

- The historical background of the decision to enact a law;
- The sequence of events leading up to the law’s enactment, especially where the sequence suggests irregular timing or the use of irregular procedures;
- The legislative or administrative history of the law, including statements of purpose appearing on the law itself, or statements offered in support of the law; and

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norm. Regan, *supra* note 10, at 1144-45. Further, a purpose-based inquiry inhibits no legitimate state action, but merely that action undertaken for an illegitimate end (what Regan terms “protectionism”). *Id.* at 1145. “Let the state avoid this improper goal, and it can do what it wants.” *Id.* Further, he argues that “[t]he business of the courts (when they are engaged in judicial review) is to see that legislatures do their duty,” *id.* at 1146-47, including, presumably, avoiding legislating to constitutionally proscribed ends. If a “protectionist purpose contributed substantially to the adoption of the law,” Regan argues, then courts should strike it down. *Id.* at 1151. Smoking out illegitimate motives “is just the kind of problem courts are best at. Courts must ascertain the purpose with which some agent ... acted in many areas of law.” *Id.* at 1152. He calls such inquiries “the judge’s daily fare.” *Id.*

478. *Id.* at 1149. He does offer this: “If only one legislator out of many is motivated by protectionist purpose, then protectionist purpose does not contribute substantially even though that legislator’s vote is crucial.” *Id.*

479. *Id.* at 1151.

480. See *S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 593-95 (8th Cir. 2004); *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2003); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001).

481. 429 U.S. 252 (1977).

482. See *id.* at 267-68; see also *Washington v. Davis*, 426 U.S. 229 (1976).

483. For block quotations from the cases, see Denning & Lary, *supra* note 261, at 923.

- Gaps that exist between means and ends; for example, the inclusion of exemptions that benefit existing in-state commercial interests.<sup>484</sup>

Again, the list of possible sources of discriminatory purpose is not meant to be exhaustive; and even if there were sufficient evidence to conclude that a *prima facie* case for discriminatory purpose had been met, the rules would still permit the state to prove a valid interest and lack of less discriminatory means.

*d. Limiting the Decision Rule*

I have argued here that “discrimination” is a tolerably good proxy for the potentially-trade-war-provoking state commercial regulations the Commerce Clause was intended to limit. Not only should the Court invoke the rule against laws that are facially discriminatory, but it should also create rules to enforce the principle against facially neutral laws with discriminatory effects, laws motivated by a discriminatory purpose, or both.

To tie the decision rule more closely to the operative proposition, I propose that states have an opportunity to prove that the regulation is not the sort that would produce the kind of tit-for-tat response corrosive of political union. Although the Court offers the opportunity to prove a legitimate interest and the lack of less discriminatory alternatives as part of the current decision rule, my additional “out” for state or local laws, like the Court’s own categorical exclusions,<sup>485</sup> would mean that a court would never get to that point. If the state carries its burden, the inquiry—at least under the DCCD—ends.

Although this sounds novel, it actually approximates what the Court seems to be doing in practice already, though for better reasons. Moreover, such categorical exclusions are not unknown in constitutional law. To give but one example, the Court has long excluded certain categories of speech from constitutional protection, in large part because of the judicial determination that the values underlying the First Amendment are not served by strictly scrutinizing laws regulating speech in those categories (including obscene

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484. *Id.*

485. See *supra* notes 432-38 and accompanying text.

speech and “fighting words”).<sup>486</sup> In Part V, I will show how this limit can explain the outcome of recent DCCD decisions better than the Court itself does.

## V. APPLYING THE NEW DECISION RULES MODEL: FOUR HARD CASES

One might reasonably ask what difference, if any, my new decision rules model would make in the DCCD. In this Part, I attempt an answer, testing both the constitutional operative proposition and the decision rules I proposed in Part IV against four cases that pose difficulties in the DCCD. My modest claim is that my reconstruction of the DCCD justifies some decisions better than the Court itself has done and, in one or two cases, suggests that the Court was in error, and why. Although the case studies here cannot lay claim to being a comprehensive survey, I do feel confident in saying that they represent some of the more troubling aspects of the DCCD. If my decision rules model of the DCCD can shed light in the hard cases, it does not seem unreasonable to conclude it would be helpful in the range of easier cases as well.

### A. *Dean Milk v. Madison and the Problem of “Local” Discrimination*

In *Dean Milk Co. v. Madison*,<sup>487</sup> the Court applied a form of strict scrutiny to a Madison, Wisconsin ordinance prohibiting the sale of milk in Madison unless it had been pasteurized within a five-mile

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486. See, e.g., DANIEL A. FARBER, *THE FIRST AMENDMENT* 13 (2d ed. 2003) (“Historically, some kinds of speech were considered to be simply outside the scope of the First Amendment.”). While this is an oversimplification today, “[t]hese categories of speech continue to receive special treatment.” *Id.*

The Court may have signaled its intention to do something similar with the Second Amendment’s right to keep and bear arms. In the recent *Heller* decision, the majority suggested, in dicta, that some gun control regulations were “presumptively lawful.” See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 & n.26 (2008).

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

*Id.*

487. 340 U.S. 349 (1951).

radius of the city center.<sup>488</sup> In his opinion, Justice Clark concluded that Madison had "erect[ed] an economic barrier protecting a major local industry against competition from without the State" and that the ordinance "plainly discriminate[d] against interstate commerce."<sup>489</sup> In a footnote, the Court declared it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce," citing the 1891 case of *Brimmer v. Rebman*.<sup>490</sup>

*Brimmer* involved a Virginia statute prohibiting the sale of meat that was slaughtered more than one-hundred miles from the point of sale, unless it had been inspected and the inspector paid a penny per pound as a fee.<sup>491</sup> In his opinion for the Court, Justice Harlan regarded the "inspection fee" as a tax that discriminated against interstate commerce and thus violated the DCCD.<sup>492</sup> He continued:

Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."<sup>493</sup>

The quoted language was itself taken from another inspection case, *Minnesota v. Barber*,<sup>494</sup> in which Justice Harlan struck down a state law prohibiting the sale of meat within any municipality unless it had been slaughtered within twenty-four hours after its inspection.<sup>495</sup> Justice Harlan justified the language quoted above, stating that "[t]he people of Minnesota have as much right to protection against the enactments of that State, interfering with the

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488. *Id.* at 350.

489. *Id.* at 354. The plaintiff was an Illinois corporation that sold milk in both Illinois and Wisconsin. *Id.* at 349.

490. *Id.* at 354 n.4 (citing *Brimmer v. Rebman*, 138 U.S. 78 (1891)).

491. *Brimmer*, 138 U.S. at 80-81.

492. *Id.* at 82 ("Any local regulation which, in terms or by its necessary operation, denies ... equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden on commerce among the States, and, therefore, void.")

493. *Id.* at 82-83 (quoting *Minnesota v. Barber*, 136 U.S. 313 (1890)).

494. *Barber*, 136 U.S. 313.

495. *Id.* at 318-19.

freedom of commerce among the States, as have the people of other States.”<sup>496</sup> Despite the evenhandedness of the Minnesota statute, Harlan concluded that “its necessary effect [was] to burden or obstruct commerce with other States.”<sup>497</sup>

As recently as 1992, the Court reaffirmed *Dean Milk* and the older cases. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*,<sup>498</sup> the Court invalidated portions of a state law prohibiting county landfills from accepting out-of-county solid waste, citing *City of Philadelphia v. New Jersey*.<sup>499</sup> The Court rejected the claim that the statute was evenhanded, because it applied to *all* out-of-county waste, regardless of its inter- or intrastate origins. Citing *Dean Milk* and *Brimmer*,<sup>500</sup> Justice Stevens replied that “our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.”<sup>501</sup>

It is not obvious under contemporary theories of the DCCD that laws favoring *local* (as opposed to *state*) economic actors are “discriminatory” and should trigger strict scrutiny. If the point is to prevent states from favoring in-state interests over those from out-of-state, then what justifies strictly scrutinizing laws that treat in-state and out-of-state commerce alike, visiting identical disabilities on both in pursuit of some local goal, like health or sanitation? These decisions are particularly troublesome if one views the antidiscrimination principle as a necessary preventative to imposing costs on nonvoting outsiders. In these cases, affected in-state residents could serve as virtual representatives for those from out-of-state. Thus, the standard of review should be balancing, at best.

But if the DCCD is really about preventing political disintegration, or at least preventing centrifugal cycles of discrimination and retaliation, then the rules about local discrimination make sense. If state laws targeting out-of-state commerce for disfavored treatment are prohibited because of the fear of “Balkanization,” then it makes

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496. *Id.* at 326.

497. *Id.*

498. 504 U.S. 353 (1992).

499. *Id.* at 355 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)).

500. *Id.* at 361-63.

501. *Id.* at 361.

little sense to permit a state or local government to cover just enough in-state activity to have its laws regarded as "evenhanded" and escape heightened scrutiny.

The consequences would seem clear otherwise: local governments countrywide could protect their own economic actors by passing similar laws; suddenly the problem of Balkanization is not confined to fifty states, but to thousands of county and municipal governments. The danger to political integration is unmistakable, and is inconsistent with the Framers' purposes in centralizing control over commerce as permitting state-level discrimination.

*B. Cuno v. DaimlerChrysler, Inc. and Economic Development Incentives*

No recent case illustrates the difficulties inherent in the Court's treatment of "discriminatory" state laws better than *Cuno v. DaimlerChrysler, Inc.*,<sup>502</sup> in which the Sixth Circuit struck down an Ohio tax credit that reduced taxes for manufacturers—whether they were headquartered in the state or not—making certain in-state investments.<sup>503</sup> The appeals court found that the tax credit, which would have reduced preexisting tax liabilities, impermissibly "coerced" DaimlerChrysler to invest in Ohio as opposed to elsewhere.<sup>504</sup> The Supreme Court granted certiorari, but then dismissed on the ground that the state taxpayers lacked standing.<sup>505</sup> The issue persists, however, and if plaintiffs can ever survive standing challenges, the issue might again end up in the Supreme Court.<sup>506</sup>

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502. 386 F.3d 738 (6th Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 1854 (2006).

503. *Id.* *Cuno* generated a great deal of literature at the time. For a sampling, see, e.g., Symposium, *DaimlerChrysler v. Cuno and the Constitutionality of State Tax Incentives for Economic Development*, 4 GEO. J.L. & PUB. POL'Y 15,164 (2006); Zelinsky & Denning, *supra* note 254. The Court's theory of coercion was borrowed from Walter Hellerstein and Dan Coenen. See Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (1996).

504. *Cuno*, 386 F.3d at 745-46.

505. *DaimlerChrysler, Inc. v. Cuno*, 126 S. Ct. 1854, 1862-64 (2006). On the Court's opinion, see Brannon P. Denning, *DaimlerChrysler Corp. v. Cuno, State Investment Incentives, and the Future of the Dormant Commerce Clause Doctrine*, 2005-2006 CATO SUP. CT. REV. 173, 174-79.

506. See Morgan L. Holcomb & Nicholas Allen Smith, *The Post-Cuno Litigation Landscape*, 58 CASE W. RES. L. REV. (forthcoming 2008) (discussing the contemporary state of tax incentive litigation).

The Sixth Circuit's decision in *Cuno* highlights a particular difficulty in an alleged facial discrimination case. In the paradigmatic facial discrimination case, State A passes a law that draws a distinction between domestic goods or services and those coming from out-of-state. State A's goods or services are treated better, in some way, than those from, say, State B. In *Cuno*, however, the investment tax credit was made available to *any* entity, regardless of geographical origin, making the requisite capital investment *in the state*. It was this geographic differentiation that the lower court seized on, holding that the requirement rendered the tax credit "coercive."<sup>507</sup>

But what makes the right answer so difficult to perceive is that, unlike in some other cases,<sup>508</sup> this was not an attempt to favor in-state firms over their out-of-state competitors doing business in the state. Nor would DaimlerChrysler's taxes go *up* if they did not make the investment—it faced no penalty for not locating additional facilities in Ohio.<sup>509</sup> It is thus difficult to locate the out-of-state interest burdened by the decision to extend a tax credit to in-state capital investment.

Although there was case law supporting the outcome in *Cuno*, much of it tended to adopt decision rules built on the assumption that the elimination of economic inefficiencies in regulation was at the heart of the Commerce Clause's restrictions on states.<sup>510</sup> Counsel for the plaintiffs, Peter Enrich, went farther, arguing that any state laws that "distort" economic decisionmaking violate the DCCD.<sup>511</sup> On the other hand, others, like Edward Zelinsky, argued that *Cuno* was the *reductio ad absurdum* of the antidiscrimination principle because it treated economically identical events (tax incentives vs. subsidies) differently, permitting the latter but not the former, and compromised the free trade principle at the heart of the DCCD.<sup>512</sup> Professor Zelinsky argued that (in tax cases at least) the whole concept should be scrapped.<sup>513</sup>

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507. *Cuno*, 386 F.3d at 745-46.

508. See, e.g., *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

509. See also *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984).

510. See *supra* notes 358-67 and accompanying text.

511. See Enrich, *supra* note 316.

512. See Zelinsky & Denning, *supra* note 254.

513. See *id.*

If one accepts my reformulation of the constitutional operative proposition for the DCCD as well as some version of the decision rule I propose, the difficulty posed by the Ohio tax credit at issue in *Cuno* (and perhaps the differential treatment by the Court of discriminatory subsidies) dissolves. It is difficult to see how one state's subsidy of a particular activity, whether it is through cash or some tax credit, *if offered to in-state and out-of-state firms equally*, would begin the cycle of discrimination and retaliation that would threaten interstate harmony. At most, it would seem to set states in competition with one another to attract the particular activity they sought to stimulate.<sup>514</sup> Only by arguing either (a) that this sort of competition is as inherently harmful as that the Framers sought to prevent, or (b) that the DCCD was intended to safeguard free trade *simpliciter*, could the argument for invalidating subsidies or even *Cuno*-like tax credits gain any traction.

Given that subsidies were known (and approved of, or at least not complained about) during the Framing Era,<sup>515</sup> proposition (a) would seem to be a hard argument to make successfully. As for proposition (b), my (and others') argument here and elsewhere tends to show otherwise. Subsidies may be bad policy, make little economic sense, and contribute nothing to economic growth in a state,<sup>516</sup> but that does not make them unconstitutional. Striking them down would constitutionalize economic efficiency and authorize courts to strike down economically inefficient state laws that impact out-of-state economic actors. Huge numbers of state and local laws would become vulnerable as a result. In such a case, comparisons to *Lochner*-era substantive due process would be irresistible.

### C. United Haulers, Davis, and the Public-Private Distinction

Another "hard case" concerns the justification for the recently created exemption from DCCD scrutiny of certain publicly owned

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514. Though this might require explanation and defense that would lengthen an already lengthy article, I think that these facts might also go far to justify the market-participant exception. At most, it seems, one state's decision to buy in-state goods or trade only with in-state residents when spending its citizens' money or selling goods the state produced itself would likely only stimulate other states to do the same. This, in turn, could actually produce broadly distributed benefits as state and local governments compete for citizens.

515. See Coenen, *Business Subsidies*, *supra* note 10, at 970.

516. See, e.g., Enrich, *supra* note 316, at 442-43.

facilities apparently announced in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*<sup>517</sup> in 2007 and extended in *Department of Revenue v. Davis*. The Court justified its holding that forcing all waste haulers in a given area to use a publicly owned facility, thereby prohibiting the export of garbage for out-of-area processing, was constitutional<sup>518</sup> on several grounds: (1) that public entities often exercise police powers on behalf of their citizens;<sup>519</sup> (2) therefore laws favoring public entities are not necessarily motivated by "simple economic protectionism";<sup>520</sup> and (3) the DCCD should not be interpreted to constitutionalize free trade values;<sup>521</sup> (4) particularly when the government was engaged in a "traditional governmental function" like trash collection.<sup>522</sup> For good measure, it suggested (5) that because the burden fell on those who would have to pay higher prices, haulers wishing to export waste for processing elsewhere were virtually represented in the political process.<sup>523</sup>

The problem with the Court's rationales is that many of them have been deemed irrelevant in past cases, would prove too much if adopted, are beyond the Court's institutional competence, or some combination of all three. Take (1) for example: just about any commercial regulation could also be characterized as an exercise of the police power—that much has been clear since the Marshall Court era.<sup>524</sup> Recognizing this, the Court has turned aside arguments against DCCD scrutiny based on the "convenient apologetics of the police power."<sup>525</sup> Further, contrary to the suggestion of (2), the Court's current standard of review condemns not only illicit *means*

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517. 127 S. Ct. 1786 (2007).

518. *Id.* at 1795.

519. *Id.*

520. *Id.* at 1795-96.

521. *Id.* at 1796.

522. *Id.*

523. *Id.* at 1787.

524. See *supra* notes 36-51 and accompanying text.

525. See *Morgan v. Virginia*, 328 U.S. 373, 380 (1946); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 780 (1945); cf. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 287-88 (1978) ("It is a basic principle of Commerce Clause jurisprudence that '[n]either the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of the residents.'" (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935))).

(like economic protectionism), but *ends* as well, like prohibiting the import or export of a good or service.<sup>526</sup>

Finally, although I could hardly argue with (3), given my account of the constitutional operative proposition, I find it strange that the Court would suggest in (4) a wish to resurrect the “traditional governmental function” test it abandoned as unworkable in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>527</sup> And I would bet that the Court does not really intend to commit itself to that doctrine’s exhumation either.

What I *do* think that the Court was doing, though, was struggling for a limiting principle for the concept of “discrimination” that it could not quite articulate. Were the Court to commit to a vision of the DCCD rooted in the political union theory described in Part IV, it could have written a more convincing opinion. Favoring local waste-processing where in-state and out-of-state haulers alike were required to use the local processing facility was permissible not because export-minded haulers were virtually represented by other interests,<sup>528</sup> but because the Court intuited that the forced-use requirement posed no (or little) threat to the DCCD’s core values. It is hard to see how the Oneida-Herkimer ordinance could spark retaliation by similarly situated counties or states in the same way that, say, forcing only out-of-state haulers to use the local public facility would.

The problem with the reasons the Court gave is that they might support extension of the exemption where it is not appropriate as the Court did in *Department of Revenue v. Davis*,<sup>529</sup> in which the Court upheld an income tax exemption for in-state, but not out-of-state public bonds. The Court extended *United Haulers to Davis* and upheld the tax exemptions, in part on the theory that raising money through the use of municipal bonds is a “traditional governmental

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526. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) (stating that “the evil of protectionism can reside in legislative means as well as legislative ends” and invalidating prohibition on importation of out-of-state garbage for in-state disposal).

527. 469 U.S. 528, 543-46 (1985) (rejecting as unworkable the concept of “traditional governmental functions” as a limit on congressional authority under the Commerce Clause to regulate states as states).

528. See *supra* Part IV.A.1.b (describing the flaws with the representation-reinforcing theory of the DCCD).

529. 128 S. Ct. 1801 (2008).

function” and a valid exercise of the state’s police power, because the exemption enabled the state to do this more cheaply.<sup>530</sup>

Although that may be true, it does not necessarily warrant the extension of *United Haulers* to *Davis*. As Justice Kennedy observed in his *Davis* dissent, “[t]hat 41 States have local protectionist laws similar to this one proves the necessity of allowing settled principles against discrimination to operate in an important national market.”<sup>531</sup> Following New York’s enactment, other states followed suit, proving, for Justice Kennedy, that “[i]n the wake of one trade barrier, retaliatory measures follow, as the Framers well knew. The widespread nature of these particular trade barriers illustrates the standard dynamics of politics and economics, demonstrating once more the need to avoid validating this law as somehow in the States’ own interests.”<sup>532</sup>

*Davis* was a hard case that the Court decided as if it were an easy one.<sup>533</sup> Requiring the State to demonstrate that there is no trade war going on or that the exemption is markedly different from a tariff, as opposed to permitting it to invoke the “convenient apologetics of the police power” or a newly created and undertheorized precedent like *United Haulers* might prevent the latter’s “exemption” from eventually swallowing the rule.

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530. *Davis*, 128 S. Ct. at 1810-11.

531. *Id.* at 1829 (Kennedy, J., dissenting).

532. *Id.*; see also Brief for Respondents at 26-27, *Dep’t of Revenue v. Davis*, No. 06-666 (U.S. Sept. 21, 2007) (“Kentucky’s scheme, combined with the similar laws of other States, has precisely the effect of fostering an ongoing, low-level trade war, and is a textbook example of a law the Commerce Clause was intended to prevent.”); 1 JEROME HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ¶ 4.13[2][e] (3d ed., 1998) (“[I]f ever one needed proof that such discriminatory state taxes Balkanize our national capital markets, one need look no further than the state-specific municipal bond funds that have arisen directly as a result of these discriminatory state taxes.”).

533. For an argument that *Davis* was an easy case—for affirming the lower court, see Ethan Yale & Brian Galle, *Municipal Bonds and the Dormant Commerce Clause After United Haulers*, 115 *TAX NOTES* 1037, 1038-39 (2007). Norman Williams and I have written a detailed critique of *Davis* and the new “public entities” exception to the DCCD. See Norman R. Williams & Brannon P. Denning, *The New Protectionism and the Dormant Commerce Clause* (unpublished work-in-progress).

*D. Exxon v. Maryland and the Problem of Discriminatory Effects*

I have left the hardest question for last: would adopting the new decision rules that I propose help the Court decide discriminatory effects cases, like *Exxon v. Maryland*?<sup>534</sup> Stated another way, was forcing oil producers and refiners to divest their retail service stations a kind of commercial regulation that could conceivably create friction among states? Was the law akin to a tariff, embargo, or impost that would produce resentment and, possibly, retaliation in other states?

Certainly if State A explicitly barred corporations located in State B from operating their businesses in State A, one would expect the DCCD to prohibit such a law. On a superficial level *Exxon* is easily distinguished: Maryland's law did not *explicitly* bar out-of-state refiners and producers from owning retail service stations, while permitting in-state refiners and producers to do so. Assuming, as I have, that DCCD decision rules ought to guard against under-enforcement of the relevant constitutional norm by closing avenues of easy evasion, the question then becomes whether—despite being facially neutral—the law's practical effects rendered it similar enough to a facially discriminatory law to warrant the application of strict scrutiny.

Here, in part, is where my decision rules model is an improvement over the current rule. The latter will invalidate if discriminatory effects are proven, and the Court has done so in the past. But the Court has never specifically indicated what effects are discriminatory. Looking at a few of the subrules I propose above,<sup>535</sup> I think that Maryland should have been required to put forth a legitimate interest and demonstrate that divestiture of petroleum producers and refiners was the only way to achieve its interest.

First, "producer and refiner owned retail service stations" was a near-perfect proxy for "out-of-state economic interests." According to Justice Blackmun's dissent, "[o]f the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms, operating 98% of the stations in the class."<sup>536</sup> By

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534. 437 U.S. 117 (1978); see *supra* Part III.B.2.b.i for a description of *Exxon*.

535. See *supra* Part IV.C.2.

536. *Exxon*, 437 U.S. at 138 (Blackmun, J., dissenting).

contrast, “[o]f the class of stations statutorily insulated from the competition of the out-of-state integrated firms ... more than 99% were operated by local business interests.”<sup>537</sup>

Second, the law did not simply “raise costs” to out-of-state interests not borne by those in-state, as in the *Hunt* case,<sup>538</sup> it barred out-of-state interests from competing in that market altogether. “In *Hunt*,” Justice Blackmun noted, “the statute merely increased costs and deprived Washington growers of the competitive advantages of the use of their grading system.”<sup>539</sup> Maryland, by contrast, “ban[ned] the refiners and producers from the retail market altogether ....”<sup>540</sup>

Third, the ban on producer/refiner-owned retail stations stripped competitive advantages from the producers and refiners who competed in the retail gasoline market on price, as opposed to competing on brand recognition.<sup>541</sup> “Only with ... control [of price, hours, and other business details] can sufficient sales volume be achieved to produce satisfactory profits at prices two to three cents a gallon below those of the major branded stations.”<sup>542</sup> The law also leveled the playing field in favor of the locally owned retail stations, insulating them from competition.<sup>543</sup>

Taken together, the law functions as close to a facially discriminatory law as possible without mentioning geography specifically. As Justice Blackmun noted in his dissent, *Exxon* authorized states to “insulate in-state interests from competition by identifying the most potent segments of out-of-state business, banning them, and permitting less effective out-of-state actors to remain.”<sup>544</sup> To the extent that the powerful out-of-state interests—like oil producers—are closely identified with particular states, we might expect

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537. *Id.*

538. See *supra* notes 264-67 and accompanying text.

539. *Exxon*, 437 U.S. at 148 (Blackmun, J., dissenting).

540. *Id.*

541. *Id.* at 138 (“According to repeated testimony ... nonbranded stations can compete successfully only if they have day-to-day control of the retail price of their products, the hours of operations of their stations, and related business details.”).

542. *Id.* at 138-39.

543. *Id.* at 140 (“Indeed, rather than restricting their ability to compete, the Maryland Act effectively and perhaps intentionally improves their competitive position by insulating them from competition by out-of-state integrated producers and refiners.”).

544. *Id.* at 147.

to see a response in kind, inaugurating the very cycle of discrimination and retaliation that the DCCD should forestall.

### CONCLUSION

The decision rules model of constitutional interpretation is a particularly helpful lens through which to examine the past and future of the DCCD. Not only does it explain the Court's erratic—almost capricious—development of the doctrine, it also provides insight into the reason the rules the Court created always failed. Failure to connect rules with constitutional commands made the conflation of rules with commands inevitable.

That cycle appears to be repeating itself with the DCCD's contemporary doctrine, and the Court seems poised to alter its decision rules once again. Instead of proceeding in an ad hoc manner, as it has done in the past and seems inclined to repeat, I have argued here that the Court should explicitly establish a constitutional command rooted in text and history, then lay down rules that enforce that command. I have argued, contrary to critics, that a constitutional basis for the DCCD *can* be found; that it roughly approximates the current "antidiscrimination rule," but that the rule itself needs to be defined more narrowly, lest the rule be mistaken for the explicit command—a command often misunderstood as a constitutional imperative for free trade *simpliciter*. Further, the Court, I have argued, should explicitly abandon "balancing" as part of the DCCD, a step it appears to have already taken *sub silentio*.

It is obviously impossible to hypothesize the full range of factual situations to which the decision rules model I propose would have to apply. The model would, if adopted by the Court, have to evolve. It would also be as susceptible to calcification as any doctrinal regime. Nevertheless, my aim here has not been to utter the final word on the DCCD, but rather to look at the problems of the DCCD and propose solutions that track what the Court seems to hint at in its decisions, and that can find firm footing in the text and history of the Constitution. I will count my effort successful if I move someone to argue that I have erred in either the diagnosis or the prescriptions.