View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Valparaiso University

ValpoScholar Valparaiso University Law Review

Volume 49
Number 3 *Spring 2015*

pp.723-805

Spring 2015

Dormant Commerce Clause's Aging Burden

Sam Kalen

Follow this and additional works at: https://scholar.valpo.edu/vulr

Part of the Law Commons

Recommended Citation

Sam Kalen, *Dormant Commerce Clause's Aging Burden*, 49 Val. U. L. Rev. 723 (2015).
Available at: https://scholar.valpo.edu/vulr/vol49/iss3/9

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

DORMANT COMMERCE CLAUSE'S AGING BURDEN

Sam Kalen[*]

Stare decisis means little in a changing society when for every new case the number of possible precedents is practically unwieldy. Without principles as guides, the body of precedents becomes an uncharted sea; and reliance on principles is worse than useless unless these principles receive critical scientific attention.[1]

I. INTRODUCTION

Constitutional dogma occasionally changes with the passage of time, but sometimes not swiftly enough.[2] *Citizens United v. FEC* poignantly illustrates how doctrines can morph within a few decades; the same occurred not long ago when the Tenth Amendment quickly surfaced as a potentially significant constitutional barrier only to depart shortly thereafter.[3] It occurred again when the Court reversed its position on

---

[*] Winston S. Howard Distinguished Professor, University of Wyoming College of Law. The author would like to thank Stephen Feldman for his helpful comments and suggestions, as well as the editorial board of the Valparaiso University Law Review.

[1] MORRIS R. COHEN, LAW AND SOCIAL ORDER 197 (1933) (emphasis omitted).

[2] Thomas R. Powell, *Commerce, Pensions, and Codes*, 49 HARV. L. REV. 193, 238 (1935) ("Dogmas derived from conditions that have long since changed or vanished may persist as eternal truths in the minds of men trained to regard legal precedents with something approaching veneration.").

[3] *Compare* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913, 916–17 (2010) (holding that under the First Amendment the government may not suppress political speech on the basis of the speaker's corporate identity and that it was unconstitutional for federal statues to bar corporate expenditures for electioneering communications), *with* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 233 (2003) (affirming "the District Court's judgment finding the plaintiffs' challenges to BCRA § 305, § 307, and the millionaire provisions non justiciable, striking down as unconstitutional BCRA § 318, and upholding BCRA § 311"), *and* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668–69 (1990) (holding that "[b]y requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections"); *compare* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (explaining that Congress's authority is limited to that under the Commerce Clause and that these limits are built within the restrains of the governmental system), *with* The Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976) (reaffirming that states and individuals and corporations have different challenges to Congress' power to regulate commerce; and that "Congress may not exercise that power so as to force directly upon the States it choices as to how essential decisions regarding the conduct of integral governmental functions are to be made").

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

state sodomy laws, and in other less significant areas as well.[4] Propitious circumstances might propel change, or too slowly evolving social conditions might impede necessary reform. Either way, the past—often cloaked under the lawyer's rubric of *stare decisis*—cannot cabin the future. But discerning precisely when following past constitutional doctrine becomes too inimical to progress tests the judiciary's conscience.[5] Such moments, therefore, neither occur lightly nor often prior to a robust debate.[6] For roughly thirty years, voices have encouraged the Court to revisit either all or part of the inherent restraint on state action embedded in theory of the Commerce Clause, "universally regarded as the great unifying clause of the Constitution."[7]

After all, the Court's vacillating approach toward the Dormant Commerce Clause ("DCC") reflects, perhaps as much as any other particular constitutional provision, the tension between dynamic and static constitutionalism when confronting societal transition. "The law, it is often said, reflects the climate of social, political, and economic

---

[4] *Compare* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that individual private rights have liberties under the Due Process Clause and that the State cannot hold private sexual conduct as a crime), *with* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that there are no constitutional protection under rational basis review for acts of sodomy and that states were free to outlaw those practices); *compare* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005) (holding that the "substantially advances" formula is not a valid takings test (internal quotation marks omitted)), *with* Agins v. City of Tiburon, 447 U.S. 255, 263 (1980) (holding that because a taking had not occurred the Court could not apply remedies such as a mandamus or declaratory judgment to recover damages). The Court reaffirmed that, because Chevron argued a "substantially advances" formula instead of the "*Lucas*-type total regulatory taking, a *Penn Central* taking, or a land-use exaction," the Court found Chevron was not entitled to summary judgment on that claim. *Id.* (internal quotation marks omitted).

[5] *See* DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 2–3 (2006) (explaining how legal consciousness reflects a "body of ideas through which lawyers experience legal issues); *see also* Karl E. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U.L. REV. 876, 876 & n.2 (1979) (referring to legal consciousness); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937–1941, 62 MINN. L. REV. 265, 268 (1978) (portraying how legal consciousness influenced the Court's approach toward the Wagner Act and labor). *See generally* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 29, 38–39, 399 (1986) (referencing how Michael Kammen implicitly places this notion under the umbrella of "constitutionalism" as a consensus oriented mechanism for achieving both progress and stability in a changing cultural community).

[6] *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724 (1988) (arguing whether stare decisis can provide an acceptable ground for preserving the existing constitutional edifice without simultaneously licensing further departures from original understanding); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879–80 (1996) (discussing various components of the common law approach to constitutional interpretation).

[7] Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337 (1934).

https://scholar.valpo.edu/vulr/vol49/iss3/9

opinion, the *Zeitgeist* of any given period in history."[8] Perhaps more than any other jurist, the German philosopher Friederick Karl von Savigny explained how law mirrors aspects of the *Volksgeist* (shared assumptions or spirit of the people) or prevailing "dominant" national conscience.[9] But spirits evolve slowly, pushing and pulling between the past and present—and possibly the future. The Court moderates these forces, and in the process reflects the cultural changes occurring in society.[10] When caught in this tug of war between outmoded principles and precedents and modern circumstances, the Court naturally must push the law forward in a manner that maintains a dialogue with the past. Bruce Ackerman describes such periods as "jurisgenerative events."[11] These events occur iteratively in a dynamic process along with economic change, and explaining when and how the judiciary accomplishes this is the "heart of legal history."[12] The difficulty, as Roscoe Pound warned, is that such events could reflect a rational dialogue or perhaps they are "equally likely to be a contingent product of whatever analogy happened to be available during the formative stages of a particular institution or doctrine" and later followed with "irrational persistence, though it may become ineffective in practice and inconsistent with the developing experience of the community."[13]

And so it has with the DCC. During the transitory period of the 1940s, Justice Rutledge wrote:

---

[8] BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 3 (Greenwood Press, 1974).

[9] JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW 421–22 (Harvard University Press, 1950) (stating "Friedrich Karl von Savigny, the unchallenged founder of historical jurisprudence, and the study of the relation between social and legal development" (internal quotation marks omitted)); *see* Mitchell Franklin, *Legal Method in the Philosophies of Hegel and Savigny*, 44 TUL. L. REV. 766, 776 (1970) (arguing the law according to Savigny became the expression of the *Volksgeist*).

[10] *See* JOHN E. SEMONCHE, KEEPING FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 11 (1998) (stating the Court engages in a "dialogue with the past," inquiring into what has changed and whether *new problems* warrant "reevaluating and reconstituting" prior decisions).

[11] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 41 (1991). It is at these moments, he posits, that the Court can employ rhetorical devices to achieve *intergenerational synthesis*. *Id*. at 122–23 (discussing *Carolene Products*).

[12] Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668, 684 (1933) (discussing the economic and range of problems brought before the Supreme Court); *see* ANTHONY CHASE, LAW & HISTORY: THE EVOLUTION OF THE AMERICAN LEGAL SYSTEM 45 (1997) ("It is the legal system's constant efforts both to remain consistent with the past and to reflect the dominant interests of the present—or perhaps even to anticipate a revolution just around the corner—which lies at the heart of legal history.").

[13] DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 444 (2013).

> The continuing adjustment of the clause has filled many of the great constitutional gaps of Marshall's time and later. But not all of the filling has been lasting. Great emphases of national policy swinging between nation and states in historic conflicts have been reflected, variously and from time to time, in premise and therefore in conclusion of particular dispositions.[14]

He continued by observing "their sum has shifted and reshifted the general balance of authority, inevitably producing some anomaly of logic and of result in the decisions."[15] Suggesting that the Commerce Clause and its negative implication had finally reached stasis by 1946, he acknowledged that, "in its prohibitive, as in its affirmative or enabling, effects the history of the commerce clause has been one of very considerable judicial oscillation."[16]

The dialectic surrounding the DCC has produced a cascading fugue of commentary, seemingly evading why the modern DCC analysis is the way it is.[17] At the cusp of the resurgence of the DCC jurisprudence,

---

[14] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 413 (1946).

[15] *Id.*

[16] *Id.* at 420.

[17] *See, e.g.*, Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1764–65 (2004) (deflecting some of the criticism that has fallen on the DDC). Jim Chen writes:

> Its many opponents characterize the dormant Commerce Clause as the Voldermort of American constitutional law, a dastardly doctrine with no basis in the text of the Constitution. . . . Justice Scalia and Thomas stand far taller than other critics of the dormant Commerce Clause. . . . [They] call it the "negative" Commerce Clause.

Id.; Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 44 (1988) ("academic criticism continues unabated on one front: the dormant commerce power doctrine and its expansive influence on the interpretation of federal commercial statutes"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1475 (2007) (arguing that the dormant Commerce Clause is a constitutional default rule because its enforceability is contingent on the absence of congressional authorization of interstate discrimination); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 8 (1999) (arguing that the existing approaches to the Commerce Clause are inadequate and instead the authors push for a "Neo-Federalist" methodology, which examines the meaning of the Commerce Clause through originalism and applies that understanding in light of modern challenges); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092–93 (1986) (arguing in support of how the Court has applied the dormant Commerce Clause jurisprudence and that the Court should primarily be concerned with preventing purposeful protectionism); 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, 893–94 (1985) ("the commerce clause may be viewed as embodying the *nondiscrimination principle* . . . the affirmative grant of the

Julian Eule argued that the interests sought to be protected by the DCC could be better served through the privileges and immunities clause of article IV, section 2 of the Constitution. Martin Redish and Shane Nugent too argued that neither the structure nor language of the Constitution warranted continued adherence to DCC dogma.[18] Emerging scholarship aptly explores the jurisprudential justification for the doctrine, with many scholars illustrating the implicit and erroneous assumptions animating DCC jurisprudence.[19] Perhaps, the best of these

---

commerce power to Congress was to prevent discrimination by the states against interstate commerce and out-of-state interests in favor of local commerce and in-state interests"). *See generally* Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895, 896 (1990) (examining the issues arising from the rubric of the dormant Commerce Clause); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1097 (1988) ("It is a maxim of constitutional law that states may not discriminate against citizens of other states to enrich their own citizens. But like many supposed truths, this maxim is subject to exception."); Earl Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 47–49 (1981) (providing information on how the current approach and opposition within the court on state regulation of interstate commerce by comparing his model to what is used by the courts); *see also* Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 CALIF. L. REV. 1203, 1205 (1986) (concentrating on the current era, arguing that the "Supreme Court's rules concerning state discrimination against interstate commerce are reasonably clear; that they fit together and rest on tenable reasons; and that they have produced reasonably uniform results"); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 126 (1979) (attempting to "return the dormant commerce clause from its position of isolation and incoherence to be reintegrated with the rest of the Constitution"); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 493 (1981) (defining the proper scope of state authority to favor state residents in the distribution of public resources). *See generally* DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 212 (2004) (explaining "five reasons rooted in economic theory suggest why the 'national common market,' safeguarded by the dormant [c]ommerce [c]lause principle, has had these wealth-maximizing effects" (citations omitted)).

[18] *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 599 (1987) (arguing that the implicit structural argument for the dormant Commerce Clause does not have textual authorization but the implicit principle is valid); Richard D. Friedman, *Putting Dormancy Out of its Misery*, 12 CARDOZO L. REV. 1745, 1745 (1991) (suggesting that the doctrine is "an historical anomaly" that "has long outlived its usefulness").

[19] *See generally* Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 11–13 (2003) (arguing against jurists and legal scholars who condemn the dormant Commerce Clause). Rather, Stearns believes that the dormant Commerce Clause has two important dimensions, state laws, tariffs and subsidies, and laws through which "individual states undermine other states in their efforts to adopt common pro-commerce strategies that represent one of two or more stable, pure Nash equilibrium outcomes." *Id*. at 11; *see also* Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1117, 1120 (2012) (applying the constitutionality of the Commerce Clause jurisprudence through the lenses of game theory and identifying common features of cases where "the Court has limited state powers on the dormant side, and has sustained or restricted congressional powers on the affirmative side of its jurisprudence."); Maxwell L. Stearns, *The New*

is Brannon Denning, who rejects any balancing under the DCC and offers a decision rule model capable of addressing the perceived interests being served by the DCC.[20] Others suggest that the DCC's anti-discrimination principle is economically flawed, nestled erroneously upon an unstated economic assumption that the relevant actors are competing in the same market.[21] More recently, I along with others, have questioned the extra-territorial appendage to the modern DCC analysis.[22] Previously, I explained how the concept emerged from a long-since eroded paradigm imbued with spherical connotations and defined conceptually by dual federalism and geographically by simplistic notions of territoriality.[23] And finally the DCC continues to influence Commerce Clause scholarship as well, with inquiries exploring hidden meanings in the Court's struggle with the reciprocal affirmative

---

Commerce Clause Doctrine in Game Theoretical Perspective, 60 VAND. L. REV. 1, 9 (2007) (offering a new framework to the dormant Commerce Clause doctrine that attempts to resolve insights that remain in tension by offering a normative account of the doctrine and a framework for implementing the policy based on decided case law).

[20] *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 516 (2008) ("[T]he Court . . . should explicitly abandon 'balancing' as part of the DCCD, a step it appears to have already taken *sub silentio*."); *see also* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 93 (2006) ("[S]uch balancing had long been criticized as an improper arrogation of legislative duties. Such criticisms continue among the DCCD's vocal critics." (footnote omitted)); Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 409 (2008) (engaging critically with existing DCC theories, suggesting an overriding commitment to deliberative equality).

[21] Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 217–23 (1995) (questioning the Court's nondiscrimination formulation); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1196 (1998) ("[T]he Court implicitly has adopted a neoclassical view of economics—that free competition among rational economic actors will necessarily improve the national economy." (footnote omitted)). *Cf.* Michael S. Greve, *The Dormant Commerce Clause as an* Ex Ante *Rule*, 3 J. L. ECON. & POL'Y 241, 241–42 (2007) (favoring anti-discrimination principle as sensible option).

[22] *See* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 979 (2013) (explaining how since 2003, the Court limited extraterritoriality principles); Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735, 1735 (1988) (arguing that the extraterritoriality principles are too formal and that these theories work poorly on the regulations of states); Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 384 (2013) (analyzing the judicially construed doctrine and how the modern DCC approach does not warrant strict adherence to precedent); *see also* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 920 (2002) (advocating a narrow reading of the cases).

[23] *See* Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417, 424 (1988) (examining the twofold impact of dual federalism and its ancillary theory of territorial sovereignty).

and negative implications.[24] Stephen Calabresi, for instance, argues that Congress' Commerce Clause power is exclusive, effectively questioning the last 100 years of DCC jurisprudence premised upon the notion that Congress can sanction state actions that otherwise would violate the DCC.[25] The issue, though, necessarily resuscitates the omnipresent dialogue about federalism overall, whether courts must police spheres of jurisdiction, protecting the states and Congress from one another.[26]

The urgency of exploring how the DCC should respond to the politics, language, and circumstances of the present moment is critical. We live in global economy, with consumers purchasing products as easily from China as from a neighboring city. Typically, cities, more than states, sometimes compete in the international financial arena, generally leaving the economic marketplace both localized and globalized. And with gridlock at the federal level "inhibiting or impeding progress, allowing entrenched interests to maintain their privileged status," it has become incumbent upon state and local governments to experiment with programs for addressing our modern challenges.[27] But experimental efforts in several areas, including natural resources and climate, product bans and food systems, as well as land use planning, become unnecessarily inhibited or chilled by past DCC

---

[24] *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 (2001) (arguing that despite various interpretations of the Constitutional Convention, the ratification debates, and the Federalist Papers, commerce cannot be used in a broad sense, rather should be interpreted by a narrow viewpoint); Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 254–56 (2005) (arguing that the Supreme Court has not interpreted this standard under a narrow originalistic reasoning and suggesting that the clause inhibits Congress from acting in a manner not affording uniformity in treatment among the states); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (arguing that the expansive construction of the Commerce clause is wrong and inconsistent with proper interpretation); Barry Friedman and Genevieve Lakier, *"To Regulate," Not "To Prohibit": Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 256, 258–59 (2012) (exploring the power to regulate); Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 33–38 (1998) (explaining the interpretational development by various justices on the Commerce Clause).

[25] *See* Steven G. Calabresi, *The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 U. CIN. L. REV. 1447, 1513 (2013) (cautioning that under the Commerce Clause, Congress cannot delegate certain powers because it is unconstitutional).

[26] *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215 (2000) (affirming the concept articulated by Herbert Wechsler, but on different grounds); Harry N. Scheiber, *Federalism and the American Economic Order, 1780–1910*, 10 LAW & SOC'Y REV. 57, 57–58 (1975) (exploring how federalism operated in an economic realm for allocating power between the states and national government).

[27] Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2120 (2013).

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

jurisprudence.[28] This is all because the Court avoided the sublime current transcending the development of the Commerce Clause,

---

[28] Ethan S. Williams, Comment, *Last Call for the* Pike *Test? The Constitutionality of State Unique-Mark Requirements on Beverage Containers Under the Commerce Clause*, 6 J. MARSHALL L.J. 283, 287 (2012) (arguing that the state's Bottle Bill is constitutional under the Commerce Clause because it provides a public benefit and promotes the prevention of fraudulent redemption of out-of-state beverage containers). *See, e.g.*, Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907, 908–09 (2005) (analyzing the conflict between local business and large retail store size cap ordinances to DCCD challenges); Justin Shoemake, Note, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891, 895 (1999) (analyzing the dormant Commence Clause challenge to the fiscal criteria of Vermont's Act 250). *See generally* Michael H. Abbey, Note, *State Plant Closing Legislation: A Modern Justification for the Use of the Dormant Commerce Clause as a Bulwark of National Free Trade*, 75 VA. L. REV. 845, 848 (1989) (analyzing the constitutional jurisprudence and how its current interpretation has been left open for judicial manipulation); Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 25 ENVTL. F. 50, 55 (July/Aug. 2008) (applying the dormant Commerce Clause principles to the leakage issue in California). *See also* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 969, 970 (1998) (analyzing the superstructure for evaluating monetary subsidies in the post-*West Lynn Creamery* era); Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 792–95 (2010) (addressing the multistate constitutional ambiguities on the regulation of energy production and how courts uphold state regulations of energy issues when there are not overt economic protections); Brannon P. Denning, Smokey and the Bandit *in Cyberspace: The Dormant Commerce Clause, the Twenty-First Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 299–300 (2002) (arguing that by striking down state regulations, courts have ignored constitutional text by indulging in broad applications of the Supreme Court's narrow interpretation of the Twenty-first Amendment, and by construing narrowly state power); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, U. OF ARIZ. 1, 3 (2008), *available at* http://www.rehnquistcenter.org/ Climate%20Change%20and%20Federalism%20REV.pdf, *archived at* http://perma.cc/ DGV8-CCFG (considering "the constitutional authority of states to pursue climate change mitigation measures when Congress has not acted or has legislated but without clearly addressing the validity of state measures." (footnote omitted)). Others too question conventional wisdom. *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001) (discussing the flaws of the conventional wisdom to the dormant Commerce clause). The authors argue to deviate from the emerging constitutional wisdom and show that the dormant Commerce Clause allows states to have more flexibility with internet transactions than previously regarded. *Id.*; Ward A. Greenberg, Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 MICH. L. REV. 186, 188 (1987) (explaining how the "Constitution does not recognize a distinction between retrospective and prospective affirmation statutes[]" but that all affirmation statutes hinder interstate commerce and are "an unconstitutional extraterritorial exercise of state legislative power"); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 792 (1996) (analyzing the restraint that the Commerce Clause imposes on state tax incentives and subsides); Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131, 131 (2011) (examining the dormant Commerce Clause as it pertains to water export); Michael J. Ruttinger, Note, *Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*,

https://scholar.valpo.edu/vulr/vol49/iss3/9

reconciling how to limit some state and local programs once the Court extricated linguistic masks and dual federalism from Commerce Clause jurisprudence.

Contemporary scholarship generally portrays how the DCC, originated first with Chief Justice Marshall, became tempered by the local/national distinction announced by Justice Curtis in *Cooley v. Board of Wardens of the Port of Philadelphia*, only to be replaced shortly thereafter by distinguishing between direct and indirect effects, with the succeeding period between 1937 and the 1940s marking a transformative shift toward the Court's modern approach toward the Commerce Clause.[29] This is when the Court ostensibly abandoned a pretense of spheres of jurisdiction and attendant dual federalism paradigm.[30] The Court then subsequently "firmed up" the "current framework" with its "1970 . . . decision in *Pike v. Bruce Church, Inc.*"[31] The *Pike* Court succinctly suggested that even-handed state or local regulations affecting interstate commerce would be subjected to a balancing of the asserted local interests against the interest of nationally uniformity.[32] Of course, state or local regulations that discriminate against interstate commerce,

---

106 MICH. L. REV. 545, 545 (2007) (advocating an "'Inconsistency Principle' as the best way to understand the Court's concern with extraterritorial regulation").

[29] Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 312–14, 321 (1851) (holding that the provisions regarding state pilotage law was not in contention with the second and third clauses of the tenth section of the first article of the Constitution, rather that the state had authority to legislate the law). *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 2 (2010) ("Roughly between 1937 and 1942, the Supreme Court significantly altered the law of federal-state relations, including the federal power to regulate commerce and to tax and spend for the general welfare."); Denning, *supra* note 20, at 437–40 (drawing on the analysis of Barry Cushman's survey on the application of the direct-indirect distinction); Michael L. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 409–10 (1998) (discussing the Court's action in *Cooley*). Lawrence states that:

> [T]he Court attempted to merge its previous dormant-commerce-clause holdings into a single doctrine standing for the proposition that, in the absence of conflicting congressional action, States may regulate those aspects of interstate commerce that are so local as to require diverse treatment, whereas Congress alone may regulate those aspects of the same that require a single, uniform rule.

Id. at 409 (footnote omitted).

[30] *See* Garrick B. Pursley, *Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1371 (2011) (discussing the change from the old dual federalism view between national and state government and exclusive spheres of authority).

[31] Mehmet K. Konar-Steenberg & Anne F. Peterson, *Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior Under the Dormant Commerce Clause Doctrine*, 80 UMKC L. REV. 139, 142 (2012) (referring to Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

[32] *See infra* notes 409–10 and accompanying text (explaining how *Pike* was a foundational case for DCC balancing analysis).

on their face, in purpose, or effect, would be subjected to a strict scrutiny analysis.[33]

Constitutional development, unfortunately, is not so simple. The Court is an institutional actor, comprising transitory personnel, reacting to advocates, operating within a changing economic, social, political, and cultural milieu, and struggling to adjust past rhetoric to current challenges.[34] And yet, when modern scholars purportedly examine the historical account of the DCC, they often do so through shaded lenses. They search for utilitarian theories, occasionally scouring cases for hidden decisional rules, but often relegate the importance of exploring why the DCC doctrine developed the way it did.[35] The overly—yet too often parroted—simplistic mosaic of the negative aspect of the Commerce Clause obscures how horizontal federalism, the unresolved background debate over exclusive or concurrent jurisdiction, impeded the next phase in developing an analytically sound DCC doctrine and accompanying decisional rules. This next stage likely would have interred any pretense of "balancing" in DCC analysis. Balancing merely served as a temporary rhetorical device for the Progressives' attack against formalism, one that avoided outright any debate over federalism and ostensibly maintained a cloak of having a dialogue with the past.[36] It achieved, therefore, an intergenerational synthesis.

This Article mines the evolution of the DCC and the Court's constant dialogue with its past, illustrating the Court's struggle with the Constitution's framers' acceptance of *imperium in imperio* and how it

---

33 *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007) ("[W]hen a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of 'simple economic protectionism.' Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism." (citations omitted)); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353–54 (1977) ("When discrimination against commerce of the type [the Court has] found . . . the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."); *Pike*, 397 U.S. at 142 ("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 punitive local benefits."); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (holding that a State cannot discriminate by erecting an economic barrier to protect against competition, even if reasonable and adequate to conserve legitimate local interests).

34 *See generally* G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094, 1098 (2005) (explaining the change of the Court during the New Deal era).

35 *See, e.g.*, Lawrence, *supra* note 29 at 399–40 (searching for the hidden order).

36 *See infra* Part III.B (discussing how Progressives rejected classical formalism and instead promoted active governmental guidance).

impeded embracing concurrent federal/state jurisdiction over interstate commerce—or, at least, an internally consistent coherent theory justifying the converse. Understanding this dialogue requires, at the outset, an appreciation of how the doctrine emerged during the nation's formative years. Part II of the Article, therefore, examines the pre-Civil War period, focusing first on the framers and then on how the Court left unresolved whether the Commerce Clause vests Congress with exclusive jurisdiction. The DCC became trapped in an unstable vortex between nationalism and a desire to maintain diversity and experimentation at the local level. The Court in *Cooley* responded by mirroring President Jackson's political solution by attempting to appease both factions.[37]

Next, Part III explores how the country's changing political, economic, and social landscape merged with Fourteenth Amendment principles to foster judicial rhetoric premised upon distinct spheres of jurisdiction, including a constitutional *right* to engage in interstate commerce.[38] William Nelson explains how judges during the post-Civil War period mirrored anti-slavery language when employing a formalistic approach toward deciding cases, where they would reason from perceived objectively determined rules of structure and principle.[39] Yet, once this rhetoric confronted the progressive subservience toward facts and deference to the legislative body, the product was an optically palatable judicial rhetoric purportedly tying the past to the present, but glossing over the undeniable reality that the DCC had no clothes.[40]

Parts IV and V then review how the progressive tendency toward nationalism and emphasis on empirical information merged with the doctrine from *Cooley* to produce the foundation for a balancing test in DCC dogma.[41] Recent scholarship amply explores how the New Deal Court's approach toward the Constitution reflects an evolving legal consciousness rather than any discrete transformative occurrence.[42] Barry Cushman, in particular, portrays how the Justices struggled with

---

37 *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 321 (1851) (holding that the State law did not conflict with any law of Congress).

38 *See infra* Part II (discussing the early factors that influenced the Commerce Clause).

39 William E. Nelson, *The Impact of Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 554–58 (1974).

40 *See generally* MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11 (1947) (describing intellectual response to formalism).

41 *See infra* Parts IV–V (establishing a foundation for a balancing test).

42 *See generally* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 484 (1997) (finding that the New Deal era should be looked at as one that was a revolution of federalism). Gardbaum opines that the New Deal Court employed concurrent jurisdiction to vest states with greater authority, arguably downplaying how the rise of progressivism and focus on nationalism impeded the adoption of actual concurrent jurisdiction. *Id.* at 496–97.

jurisprudential continuity.[43] And G. Edward White masterfully dispels some contemporary myths by explaining how the New Deal era reflects a particular constitutional moment defined by the social, economic, and political circumstances, and how modern constitutional dogma did not simply arrive quickly on the New Deal stage and usher in modernism.[44] But neither analysis explains the persistence of an admittedly narrower, yet still present, federal exclusive power over certain activities affecting interstate commerce. The Court may have "dramatic[ally] shift[ed]" its "methodological approach in constitutional cases from the 1920s to the 1940s[,]" but not so dramatically because it retained aspects of "boundary tracing" under the guise of a balancing test whose genesis was a boundary case itself—*Cooley*.[45]

In Part III, I describe how the Court maintained a dialogue with its past but engaged in an internal conversation over its role in supervising spheres of jurisdiction—acknowledging the dilemma its tests posed, yet accepting an exclusivity paradigm.[46] And Part IV explains how the progressive embrace of *Cooley* favored nationalist tendencies by maintaining exclusivity for matters warranting national uniformity.[47] In lieu of justifying such an approach under a dual federalism paradigm, however, the progressives, and in particular Professor Thomas Reed Powell and his correspondence colleague Chief Justice Stone, could tout how prior cases conformed to this approach if one examined the facts—another progressive creed.[48] This left the roots of DCC dogma in place, as if the law itself remained stable; and all this could be accomplished under the rubric of balancing local and national interests. And here, the Article reviews in detail how Professor Powell and the Chief Justice combined to produce the *Southern Pacific Railroad Co. v. Arizona* decision.[49] Part V then picks up with *Pike* and how the litigants continued to reflect uncertainty surrounding DCC dogma and how the Court uncritically accepted balancing without addressing why the

---

43 *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 208–25 (1998) (noting the difficulty Justices encountered in keeping continuity in their decisions).

44 *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 15 (2000) (finding that changes in the constitutional jurisprudence in relation to the New Deal was largely affected by policy judgments relating to human experience).

45 White, *supra* note 34, at 1098, 1110.

46 *See infra* Part III (discussing the Court's evolution).

47 *See infra* Part IV (exploring the influence of *Cooley*).

48 *See infra* Part IV (expanding on Professor Thomas Reed Powell's and Chief Justice Stone's progressive approach).

49 *See infra* notes 344–415 and accompanying text (elaborating on *Southern Pacific Railroad Co.*).

Commerce Clause mandated certain spheres beyond state control in an age where dual federalism had long since faded.[50]

II. EARLY FOUNDATIONS

A. *The Federalist Agenda*

The tapestry woven by pre-Civil War era circumstances provides limited insight into the nature and scope of the negative aspect of the Commerce Clause. Two hundred years of academic and judicial commentary have yet to produce even marginal consensus into what the framers expected about the Commerce Clause's role in restricting the rights of the states and local communities. In *Covington & Cincinnati Bridge Co. v. Kentucky*, the Court identified how the Commerce Clause serves as the fulcrum for deciding when matters rest: (1) exclusively within the states' jurisdiction; (2) exclusively within Congress' jurisdiction, except when Congress affirmatively allows otherwise; or (3) may be concurrently exercised by Congress and the States.[51] While the concept of "commerce" naturally transforms with a changing society, how the Court ultimately drifted toward the third but remained encumbered by the second is the story of the DCC.[52]

---

[50] *See infra* Part V (expounding on *Pike* and how the litigants reflected uncertainty regarding the DCC dogma).

[51] Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204, 209 (1894). To the extent a matter permits concurrent jurisdiction, it is only until Congress expresses its will and supersedes any inconsistent state efforts. *Id.* at 212. *See, e.g.*, Houston v. Moore, 18 U.S. (5 Wheat.) 1, 75–76 (1820) (finding a federal exercise of authority precluded state prosecution under state militia act).

[52] *See Covington*, 154 U.S. at 222 (holding that the statute in question was one that was exclusively in Congress' control). Randy Barnett's review of contemporary materials suggests that commerce is limited to economic exchanges. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104 (2001). Robert Natelson's examination confirms Barnett's review of the prevailing rhetoric surrounding "commerce," circumscribing it to activities surrounding the law merchant. Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 799–800, 846 (2006); Robert G. Natelson & David Kopel, Commentary, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56 (2010), http://www.michiganlawreview.org/assests/fi/109/natelsonkopel.pdf, *archived at* http://perma.cc/6GNU-3MJ9 (finding that there is little question to what the meaning of "commerce" entails in the legal and everyday usage). Unfortunately, Barnett and Natelson's primary materials focus on legal sources rather than perhaps more broadly recognizing that the founders were well versed in moral and political philosophy when writers like Adam Smith, William Paley, and others addressed "commerce." Jack Balkin amply undermines Barnett's cribbed analysis. Balkin, *supra* note 29, at 15–19*; see also* Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress's Powers*, 2012 U. ILL. L. REV. 1703, 1704–06, 1709–11 (2012) (responding, in part, to Balkin). *Compare* Nelson & Pushaw, *supra* note 17, at 110 (stating

Promoting commerce undoubtedly fostered a belief during the new world of American exceptionalism—a nation destined toward progress in lieu of the cyclical history surrounding past civilizations.[53] While some founding fathers, such as Benjamin Franklin, were familiar with Adam Smith,[54] most of the contemporary discussion about the nature of the economy and the role of the Constitution focused on foreign commerce, imposts, and taxation.[55] The framers' paramount concerns

---

that the concept includes all economic activity), *with* Richard A. Epstein, *supra* note 24, at 1388–89 (arguing for narrow interpretation of "commerce"). *See generally* STUART BRUCHEY, ENTERPRISE: THE DYNAMIC ECONOMY OF A FREE PEOPLE 58–62 (1990) (providing a picture of the economy during the nation's formative years); THOMAS C. COCHRAN, FRONTIERS OF CHANGE: EARLY INDUSTRIALISM IN AMERICA 8 (1981) (discussing technological innovations that started the surge of industrialization); RONALD E. SEAVOY, AN ECONOMIC HISTORY OF THE UNITED STATES FROM 1607 TO THE PRESENT 1–166 (2006) (exploring agriculture and economic development); CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846, at 4–5 (1991) (explaining the changing society of early America and its effect on the economy); Lawrence A. Harper, *Mercantilism and the American Revolution*, *in* 1 PIVOTAL INTERPRETATIONS OF AMERICAN HISTORY 76, 78–80 (Carl N. Degler ed., 1966) (discussing the early English tariffs and trade in America); James A. Henretta, *The Transition to Capitalism in America*, *in* THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY 218, 218–20 (James A. Henretta, Michael Kammen & Stanley N. Katz eds., 1991) (discussing America's early economy and its move toward a more market-driven labor force).

[53] *See* RALPH LERNER, THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC 195–221 (1987) (suggesting that "commercial republicanism," a belief in the power of equality in economic progress as expressed by A. Smith and others, animated aspects of the revolutionary dialogue); GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 106–07 (2002) (stating that trade promoted harmony); *see also* ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS 184–236 (1980) (finding that this dialogue fostered American exceptionalism and favored progress); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 337–47 (1991) (discussing that commerce was occasionally tied to societal cohesion). In her seminal work on the rise of the social sciences and the persistence of American exceptionalism, Dorothy Ross observes how "American exceptionalism implied a particular kind of political economy as well as a particular kind of historical stance." DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 26 (1991).

[54] *See* Thomas D. Eliot, *The Relations Between Adam Smith and Benjamin Franklin Before 1776*, 39 POL. SCI. Q. 67, 67 (1924) (explaining that Franklin and Smith knew each other and were familiar with each other's work, but the author questions assumption that they were friends). *Cf.* ROBERT E. WRIGHT, ONE NATION UNDER DEBT: HAMILTON, JEFFERSON, AND THE HISTORY OF WHAT WE OWE 39 (2008) (explaining that Adam Smith's work was not widely read until later, but founders were "conversant" with his ideas). *See generally* Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897 (2002) ("[T]here is good evidence that many of the founders, including Jefferson, Madison, and Wilson, were reading his work.").

[55] James Madison, for instance, explained the importance of Congress's authority over foreign commerce:

> The want of authority in Congress to regulate commerce had produced in foreign nations, particularly Great Britain, a monopolizing policy, injurious to the trade of the United States, and destructive to their navigation[.] . . . The same want of a general power over commerce led

were to ensure that only Congress could affect and promote foreign commerce, a principle that became embedded unambiguously in the Constitution, and to secure Congress' authority to regulate interstate commerce.[56] But the power of the purse, the ability to raise sufficient revenue, as well as establish credit and incur debt drove the framers'

> to an exercise of the power, separately, by the states, which not only proved abortive, but engendered rival, conflicting, and angry regulations.

5 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 115, 119 (2d ed. 1836) [hereinafter ELLIOT'S DEBATES]; *see also* DAVID WALTER BROWN, THE COMMERCIAL POWER OF CONGRESS: CONSIDERED IN THE LIGHT OF ITS ORIGIN: THE ORIGIN, DEVELOPMENT, AND CONTEMPORARY INTERPRETATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, FROM THE NEW JERSEY REPRESENTATIONS, OF 1778, TO THE EMBARGO LAWS OF JEFFERSON'S SECOND ADMINISTRATION, IN 1809 1–152 (1910) (discussing the dialogue surrounding foreign trade and state tariffs, imposts, tonnages and duties).

[56] *See* Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 1 (2004) ("All of the concrete programs intended to be forwarded by giving Congress the power to regulate commerce were restrictions on international trade . . . ."). Unfortunately, discussions surrounding federal authority over commerce often occurred along with language about imposts, tonnage duties, tariffs and regulating foreign commerce—separate clauses in the Constitution. *See* BROWN, supra note 55, at 40–41. One example is the proposed amendment to the Articles of Confederation that would have given the Confederation the "sole and exclusive power" to regulate trade among the states and foreign governments, laying prohibitions and imposts and duties on imports/exports. *Id.* at 41–42. Pre-dating the federal convention, the Annapolis and Alexandria conferences explored interstate trade; the Annapolis conference, in particular, resolved squabbling between Virginia and Maryland over commerce along and use of the Chesapeake Bay and Potomac River. GERALD W. GAWALT, GEORGE MASON AND GEORGE WASHINGTON: THE POWER OF PRINCIPLE 58–60, 141 (2012); *see also* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 19 (2009) (extrapolating on how the Articles of Confederation did not have provisions for uniform regulations among the states and thus the states were in frequent competition with each other); Denning, *supra* note 20, at 59–66 (finding a description of the internecine activities before the Constitution). In his essay *The Continentalist*, Alexander Hamilton championed the importance of affording a national government with superintending power over commerce, albeit adding a preference for "common direction." Alexander Hamilton, *The Continentalist*, *in* THE WORKS OF ALEXANDER HAMILTON, 243, 271 (Henry Cabot Lodge ed., 1904), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1378&chapter=64156&layout=html&Itemid=27, *archived at* http://perma.cc/X2P3-M6V9; Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1884–96 (2011) (explaining that the Framers felt a need to adopt a uniform trade policy among the states). *But cf.* Edmund W. Kitch, *Regulation and the American Common Market*, *in* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 7, 15–19 (A. Dan Tarlock ed. 1981) (exploring three issues under the Articles: Foreign trade; tariffs at ports; and—albeit discounting—trade among the states). *See generally* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1169–92 (2000) (explaining that the Committee was specifically precluded from transacting business with foreign ministers without the approval of Congress).

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

dialogue about commerce.[57] They, too, undoubtedly recognized the possible need for uniform commercial intercourse.[58] It was, after all, an era marked by the "release of energy," in the words of James Willard Hurst, to facilitate the country's transition from a mercantile/agrarian economy to the modern market economy.[59] Yet, such sentiments do not necessarily establish that the commercial power is exclusive in Congress rather than concurrent between Congress and the states.

The framers assuredly sought to establish a government capable of protecting interstate trade.[60] They expected that the federal government would enjoy sufficient authority to address "injurious impediments to the intercourse between the different parts of the Confederacy . . . ."[61] James Madison explained how Congress needed this "superintending authority" to ensure harmonious imports, exports, and traffic among the

---

57 *See generally* E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at xiv–xv (1961) (expounding on how the power of the purse was "a determinant of sovereignty"); THOMAS K. MCCRAW, THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY 1 (2012) (exhibiting how the United States, in its founding years, operated in almost bankruptcy); WRIGHT, *supra* note 54, at 237 (elaborating on how the early American funding system led the country to prosper).

58 *See* ELLIOT'S DEBATES, *supra* note 55, at 115 ("[C]onsider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony[] . . . .").

59 *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 7, 22, 29 (1956) (discussing how the release of energy related to objective law measures). Such juridical behavior, however, does not support a laissez faire approach to economic and social behavior. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 84–85 (1996); *see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 31–35 (1977) (reflecting on the change the nineteenth century underwent from agrarian society to modern property laws); William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 LAW & HIST. REV. 97, 124–25 (2000) (stressing that "law's instrumental role in the allocation of scarce resources in nineteenth-century America should [not] be confused with a . . . laissez-faire approach"); Donald J. Pisani, *Promotion and Regulation: Constitutionalism and the American Economy*, 74 J. AM. HIST. 740, 741–42 (1987) (explaining how the Constitution provided a framework for the first phase of industrialization); Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790–1987*, 75 CAL. L. REV. 415, 418 (1987) (finding that *laissez faire* ideology did not stand in the way of state action).

60 THE FEDERALIST NO. 11, at 89–91 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (elaborating on Hamilton's thoughts on protecting trade between the states). While in *Federalist No. 11* Hamilton writes in terms of "unrestrained intercourse between the States[,]" context is critical. *Id.* at 89. Hamilton here is persuading the reader about the importance of a "unity of commercial" trade of an "American system," primarily foreign, to ensure a continued "aggregate balance" of trade in products. *Id.* at 90–91.

61 *Id.* at 144–45.

https://scholar.valpo.edu/vulr/vol49/iss3/9

states.[62] But this intended grant of federal authority, however, does not implicitly suggest the converse.[63] The framers, after all, purportedly resolved the dilemma of an *imperium in imperio* with a new form of government exercising legal authority dependent upon subject matter rather than territorial boundaries, and how this nascent arrangement would work was not likely fully explored.[64] *Federalist No. 32* provides a possible window into the framers' approach toward distinguishing between concurrent federal/state jurisdiction and exclusive federal jurisdiction. In this part of the *Federalist Papers*, Alexander Hamilton suggested that states would enjoy aspects of sovereignty, except in areas the Constitution transferred to the United States. He wrote that such a transfer would occur in one of three instances:

> [W]here the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.[65]

According to Hamilton, this last category omitted instances where concurrent jurisdiction might precipitate clashing policies.[66] Hamilton's

---

[62] *Id*. at 268. Madison favored Benjamin Franklin's proposal to add to Congress' power the express authority to create canals and federally charter internal improvement companies. *Id.* Madison had written to Thomas Jefferson about the importance of vesting the national government with "the positive power of regulating trade" and addressing issues where "uniformity is proper." *To Thomas Jefferson (March 19, 1787)*, *in* 9 THE PAPERS OF JAMES MADISON 317–18 (Robert A. Rutland et al. eds., 1975) (relaying Madison's correspondence to Jefferson regarding trade regulation).

[63] *See* Friedman & Deacon, *supra* note 56, at 1906, 1908 (finding that discussions at the Convention of the domestic commerce power supported exclusivity). Friedman and Deacon suggest otherwise, but arguments for or against an intent toward exclusivity all rest on weak inferences. *Id.*

[64] *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 172–73 (2010) (describing how the federalists overcame the *imperium imperio* question); Alison LaCroix, *Drawing and Redrawing the Line: The Pre-Revolutionary Origins of Federal Ideas of Sovereignty*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 58, 72 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009) (discussing how in the context of the 1773 debates, the Council made a delineation between superior and subordinate powers and moved beyond taxation to the theoretical problem of *imperium in imperio*).

[65] THE FEDERALIST NO. 32, *supra* note 60, at 198 (Alexander Hamilton).

[66] *Id*. (clarifying that the exercise of concurrent jurisdiction may produce "occasional interferences in the *policy* of any branch of [an] administration, but would not imply [a] direct contradiction"). In *The Federalist No. 17*, Hamilton explored how state governments

analysis suggests that, if the regulation of interstate commerce is exclusive, it is because state jurisdiction "would be absolutely and totally *contradictory* and *repugnant*."[67]

Exclusive jurisdiction appeared reserved for subjects the Constitution assigned to Congress and correspondingly expressly removed from state jurisdiction. Hamilton, for example, referenced the power to tax in Article I, Section 8 Clause 1, as illustrating one subject where Congress's power to levy and collect taxes and duties on imports and exports precluded similar state regulation—the Constitution barred state regulation because of the corollary clause in article I, section 10, limiting the states' ability to impose any imposts or duties on imports or exports.[68] Hamilton explained that "[t]his restriction implies an admission that if it were not inserted the States would possess the power it excludes; [and that in all other respects the States' power is] undiminished."[69]

When over a century later scholars combed the constitutional period to justify and promote the progressive ideal of a new nationalism, they latched onto what few morsels they found. A remarkable scholar of the period, therefore, observed "[i]t is impossible to read the correspondence of Madison, Hamilton, Mason, and others without perceiving the imperative necessity that they felt of committing the regulation of trade and commerce to a single national authority."[70] Some constitutional historians merely deploy *Gibbons v. Ogden* to support the claim that the framers looked at the Commerce Clause as an exclusive grant intended to negate certain state actions.[71]

Courts and scholars, however, generally conflate the framers' discussion about imposts and tonnage duties for foreign imports or exports with the more general category of commerce. Addressing the

---

more than Congress would likely encroach on the others' interests, professing that Congress would be ill-disposed to address matters of mere local concern. *Id*. at 118–19. In doing so, while suggesting that the regulation of commerce resided in the "first instance" with Congress, he missed an obvious opportunity to emphasize exclusivity had he believed it applied. *Id*. at 118.

[67] *Id*. at 198.

[68] *Id*. at 199 (describing the tax regulation found in the Constitution).

[69] THE FEDERALIST NO. 32, *supra* note 60, at 199 (Alexander Hamilton). Jack Rakove suggests that, while modern scholars overlook *Federalist No. 32*, it was "closely read" during the period. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 195 (1996).

[70] George L. Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. PA. L. REV. 23, 26 (1955).

[71] *See, e.g.*, BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 47–49 (1993) (discussing how Marshall broadened the view of the Commerce Clause to include all economic intercourse).

concern that states might need to defray the costs of inspection before exporting products to foreign nations, James Madison suggested that states could explore ways of doing so and the check against any abuse "was the right in the general government to regulate trade between state and state."[72] Indeed, Madison originally suggested federal supremacy could be achieved by having potentially discriminatory state trade regulation subjected to a federal (the Senate) veto power.[73] When a measure for state duties on tonnage was presented by Mr. M'Henry and Mr. Carroll, Madison apparently "was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority."[74] And then, replying to the proffer that Congress would need exclusive jurisdiction over commerce, Mr. Sherman observed "[t]he power of the United States to regulate trade, being supreme, can control interferences of the state regulations, when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction."[75] Over a century later, the Court in *Prudential Insurance Co. v. Benjamin* used these exchanges to support a DCC.[76]

Also, considerable attention often focuses on an overly generous interpretation of correspondence between James Madison and Joseph C. Cabell, roughly forty years after the Constitution.[77] While the Court affords weight to the views of those contemporary with the Constitution's formation, this correspondence alone provides a weak

---

[72] ELLIOT'S DEBATES, *supra* note 55, at 539.

[73] *See* Alison L. LaCroix, *What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41, 44, 52 (2011) (explaining how Madison insisted that Congress have the power to veto state laws). Modern readers should be wary of ascribing too much significance to such sentiments, without first appreciating that preemption principles and the doctrine of judicial review and supremacy had yet to evolve. These doctrines eventually obviated the need for Madison's "negative." *Id.* at 44–45, 48–49; *see also* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 483–84 (2010) (discussing how Madison's federal negative was defeated).

[74] ELLIOT'S DEBATES, *supra* note 55, at 548.

[75] *Id.*

[76] *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 419 n.17 (1946) (quoting statements of Madison and Sherman debating the commerce clause).

[77] *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994) (citing a letter from Madison to Cabell regarding the commerce clause); Balkin, *supra* note 29, at 14 n.43 (examining a letter from Madison to Cabell, in which Madison expressed his belief that the scope of commerce should be construed differently depending on its purpose); Collins, *supra* note 17, at 55 (suggesting that "Madison's statement that the commerce power was 'intended as a negative' is direct support for the substance of a dormant commerce power doctrine").

foundation for building an entire doctrine.[78] A few years before his death, James Madison wrote Cabell and suggested that regulating "commerce" was entrusted exclusively to the federal domain; these letters led Albert Abel to infer that view on the delegates during the convention.[79] Abel's 1941 article became widely accepted during a period when scholars and jurists perceived the necessity of justifying an expansive approach toward federal regulation of commerce.[80] But an overly broad reading of Madison's 1829 letter ignores its context.[81] Later in life, Madison believed that the country's economy could not succeed on the basis of an agrarian society alone, because overproduction had led to depressed land prices and insufficient domestic and even foreign markets.[82] As such, he recognized the constitutionality of tariffs and opposed aspects of doctrinaire Jacksonianism.[83] This is when Madison justified national power to encourage manufacturing and create jobs for an exploding population unable to sustain itself on productivity from the land.[84] His letters were intended to achieve the particular objective of securing Congress' ability to promote manufacturing.[85] To suggest,

---

[78] *See* Golan v. Holder, 132 S. Ct. 873, 886 (2012) (considering the views of early contemporaries of the Constitution).

[79] *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 469, 492 (1941) (examining Madison's opinion that the clause was designed as "merely 'a negative and preventative' function" and thus in federal control).

[80] *See infra* note 219 and accompanying text (discussing the effect of the nineteenth century dual federalism paradigm on twentieth century economy).

[81] *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 197–98 n.108 (1995) (suggesting that Madison's correspondence reflects an appreciation for Congress's supremacy under the Commerce Clause rather than exclusivity or acceptance of DCC).

[82] *See* DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 176–85 (1989) (examining Madison's theories regarding agrarianism and the economy).

[83] *See id*. at 123–26 (stating that Madison believed "the constitutional assault on the tariff [to be] absurd").

[84] *See id*. at 127 (explaining that Madison thought Congress should be involved in manufacturing). Madison used broad strokes to express his point, but implicit in his discussions was the need for federal power, not necessarily a restriction on state domestic authority. *Id.* at 133. For instance, in 1831 he wrote:

> A review of the state of our commerce and navigation; of the abortive efforts and conflicting regulations among the states, of the distracted condition of affairs at home, and the utter want of respect abroad, during the period between the peace of 1783 and the convention of 1787, could not fail to open the eyes of many who have been misled, and to cherish in all a love for a constitution which has brought such a happy order out of so gloomy a chaos.

Id. (quoting a letter from Madison to Everett, dated Nov. 14, 1831).

[85] *See id.* at 127–28. (demonstrating that Madison wanted to encourage manufacturers). Madison further suggested that continued acquiescence to Congress' authority to regulate

therefore, that this correspondence supports a DCC ignores historical context, as well as the unsettled debate surrounding the role of the judiciary in securing supremacy of federal laws and eventually developing doctrines of preemption.[86]

B. The Court's Early Struggle

The Supreme Court's early forays into the negative component of the Commerce Clause similarly resolves neither the concurrency/exclusivity dilemma nor supports a modern DCC. Chief Justice Marshall accepted that the Constitution necessarily entrusts certain matters to Congress's exclusive jurisdiction.[87] Justice Story initially limited exclusivity to matters removed from state jurisdiction or involving "a direct repugnancy or incompatibility" in a concurrent exercise of power, although he later endorsed Marshall's treatment of the Commerce Clause as exclusive.[88]

In *Gibbons v. Ogden*, the Chief Justice held that New York's grant of monopoly rights for the operation of a steamboat conflicted with the

---

manufacturing since 1787 suggested the need for stability in that view, to avoid societal disruption. *See* MCCOY, *supra* note 82, at 127–28. This is evident when reading Madison's Sept. 18, 1828 letter to Cabell, in its entirety. Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *available a*t http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces18.htl, *archived at* http://perma.cc/PU5F-XZ7Q; *see also* Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces19.html, *archived at* http://perma.cc/TF3-GYHX (stating curtly that the clause was "intended as a negative and preventive provision[,]" with no real elaboration).

86 *See generally* RAKOVE, *supra* note 69, at 176 (quoting letter from Madison to Jefferson about judicial authority).

87 *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248–49 (1833) (suggesting simultaneously that the Constitution did not restrain the states absent express constitutional restrictions on the exercise of that power, while the Constitution assigned some matters to Congress when "the people of all the states feel an interest"); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819) (explaining that when Congress has jurisdiction, state governments cannot interfere).

88 *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 48–49 (1820) (Story, J., dissenting) (revealing that powers are not exclusive unless specifically granted in the Constitution). Story's opinion suggests he would admit state power unless concurrent powers would be "repugnant" or "incompatible," allowing Congress the ability to exercise and preempt state legislation if it chooses to exercise its power. *Id.* at 49–52; *see also* 1 & 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION §§ 515–18, 669 (1833) (referring to the power as exclusive). *See generally* Daniel J. Hulsebosch, *Debating the Transformation of American Law: James Kent, Joseph Story, and the Legacy of the Revolution*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 1, 4–6 (2009) (noting that both Justice Story and Chancellor Kent supported a national economic market, although they disagreed about whether commerce power was concurrent).

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

federal Coasting License Act of 1793.[89] Arguing for the appellant, Daniel Webster rejected the concept of concurrent powers, and urged an expansive view of the Commerce Clause.[90] Responding, Marshall reasoned that Congress exercises capacious power under the Commerce Clause, embracing all aspects of commercial intercourse, including navigation.[91] Appreciating the framers' division of sovereignty, he necessarily noted that jurisdictional lines could not be defined merely by geographic limits but instead, rather, operated "within the territorial jurisdiction of the several States."[92] Marshall further distinguished between two spheres of jurisdiction, the commercial power delegated to the federal government and that reserved to the states under the Constitution.[93] States retained their power to regulate police or trade "which does not extend to or affect other States[,]" and which is completely within a state.[94] Responding to the threat that state quarantine and inspection laws would become unconstitutional, Marshall admitted that, while such laws affect interstate commerce, states may exercise "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government[.]"[95] Marshall indicated that if the object of the state law is permissible, then the means chosen would be acceptable even if resembling those that could be employed by the federal government under the commercial power.[96] The Chief Justice arguably misread (possibly deliberately) the federal statute as superseding state law, deftly avoiding the principle issue in the case—the DCC, but he nevertheless left little doubt that he believed that the Commerce Clause vested exclusive authority in Congress.[97] But, as Herbert Johnson cogently

---

[89] 22 U.S. (9 Wheat.) 1, 221 (1824).

[90] *See generally* HERBERT A. JOHNSON, GIBBONS V. OGDEN: JOHN MARSHALL, STEAMBOATS, AND THE COMMERCE CLAUSE 73–74 (2010) (discussing Webster's arguments regarding state power under the Commerce Clause); Haskins, *supra* note 70, at 25 (explaining that the Commerce Clause created a uniform law).

[91] *Gibbons*, 22 U.S. (9 Wheat.) at 189–94.

[92] *Id*. at 196.

[93] *Id*. at 123–24.

[94] *Id*. at 194. The eminent jurist Chancellor Kent held below that Congress' commerce power was concurrent. "Not only was it not designated to be exclusive," he believed, "but it was also arguably concurrent by virtue of the fact that the states were prohibited from imposing duties or taxes on exported goods." JOHNSON, *supra* note 90, at 33.

[95] *Gibbons*, 22 U.S. (9 Wheat) at 203.

[96] *Id*. at 204.

[97] *See* Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1399, 1414–17 (2004) (evaluating the progression of Marshall's discourse on the DCC). Williams suggests that Marshall's discussion of the DCC ultimately mirrored what Chief Justice Taney later adopted. *Id.* at 1401–02. This is because, while Marshall purportedly endorsed exclusive federal power, he eschewed vesting the Court with the superintending power of judicial

https://scholar.valpo.edu/vulr/vol49/iss3/9

notes, "virtually all of its lasting material was merely dictum, well beyond relevance to the narrow ruling of the case."[98]

For the next several decades, the Court's sensitivity toward slavery, internal improvements, and temperance inhibited consensus among the Justices over whether the commercial power was concurrent or exclusive.[99] According to Owen Fiss, Chief Justice Marshall first announced—through dicta—in *Brown v. Maryland* the concept of a DCC.[100] But two years later, the Chief Justice accepted William Wirt's argument that a state could authorize a dam to promote the public welfare and safety, unless superseded by congressional action.[101] Yet the Justices disagreed over whether Congress or the states could promote internal improvements.[102] In cases implicating temperance and slavery, the Court similarly failed to resolve how to approach the allocation of

---

review to implement the DCC. *Id.* at 1460. Here, Williams chronicles the events surrounding a seamen act and slavery in South Carolina, illustrating the difficulty of any DCC holding, particularly in light of the pending legislative proposals affecting the Court's ability to engage in judicial review. *Id.* at 1467–69, 1471. Although issues surrounding slavery, temperance, and internal improvements chilled a willingness on some of the Justices to render potentially sweeping decisions, it does not necessarily translate into a belief by Justices about the proper role of the Court or Congress for the DCC. But Williams' thorough treatment of *Gibbons* underscores the importance of appreciating contextualism. *Id.* at 1478–82; *see* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1127–34 (2001) (underlining the unimportance of *McCulloch* and *Gibbons* on national issues); *see also* JOHNSON, *supra* note 90, at 35 ("Neither Kent nor Marshall after him was willing to accept the broad modern recognition of a [DCC] power existing independently from an actual congressional enactment."); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631, 635 (1978) (observing that Marshall avoided the issue). *Cf.* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 24–26 (1937) (noting that Marshall neither employed his exclusive jurisdiction theory nor adopted Webster's selective exclusiveness, possibly recognizing the need for incremental decision-making).

[98] JOHNSON, *supra* note 90, at 159.

[99] *See generally id.* at 50 (noting issue during Marshall's tenure); Kalen, *Reawakening the Dormant Commerce Clause*, *supra* note 23, at 429–38 (discussing that various social problems hampered the Court's efforts in determining the scope of the Commerce Clause).

[100] 25 U.S. (12 Wheat.) 419, 448 (1827); 8 OWEN M. FISS, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 267 (1993) ("Marshall must have read the Commerce Clause to have a preemptive power that would nullify state laws regulating interstate commerce.").

[101] *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (explaining that if Congress expressly regulates something, then a conflicting state law would be void); *see also* FISS, *supra* note 100, at 267–68 ("Marshall must have read the Commerce Clause to have a preemptive power that would nullify state laws regulating interstate commerce."); JOHNSON, *supra* note 90, at 155–58 (discussing *Willson*).

[102] *See* Searight v. Stokes, 44 U.S. (3 How.) 151, 180 (1845) (Daniel, J., dissenting) (denying power to Congress); STORY, *supra* note 88, at § 150 (affirming Congress's power).

Produced by The Berkeley Electronic Press, 2015

state and federal power. In the *License Cases*, for instance, the Justices rejected exclusivity but without any majority opinion.[103] When the debate shifted to state programs affecting the movement of people, potentially implicating jurisdiction over slavery, the opinions became even less clear.[104] In *Mayor of New York v. Miln*, for example, a majority appeared willing to accept certain state efforts, while Justice Story promoted exclusiveness couched in dual federalism rhetoric.[105] Additionally when the issue surfaced again in the *Passenger Cases*, the Court issued separate opinions that "were so diverse that attempts to summarize could only confuse."[106]

Consequently, the simplistic exclusive paradigm sponsored by the Federalists appeared doomed from the outset, and when tested in the realm of internal improvements proved untenable. Internal improvements critical for economic growth and territorial expansion often could not await Congress, and generally depended upon state

---

[103] Pierce v. New Hampshire, 46 U.S. (5 How.) 504, 504–05 (1847) (providing separate opinions of each Justice).

[104] *See* Prigg v. Pennsylvania, 41 U.S (16 Pet.) 539, 609 (1842) (reviewing the cooperation between states). Additionally, interstate tensions underscored the consideration of the Fugitive Slave Clause to such a degree that Justice Story commented on the "friendly and courteous spirit" surrounding the two states effort to procure Court review. *Id.* *See generally* DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR 66–67 (2006) (acknowledging the strained relationship between Chief Justice Marshall and Judge Johnson). Lightner, for instance, describes how Chief Justice Marshall, during the steamboat controversy, was quite aware of Justice Johnson's lower court decision invalidating South Carolina's pro-slavery seamen act. *Id.* In 1841, the Court avoided deciding the constitutionality of a Mississippi statute, although various opinions addressed the application of the commerce power. Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 510–13 (1841). *See generally* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 266–71 (1981) (discussing the effect of *Groves* on state and federal laws regarding the transport of slaves). Additionally, when addressing whether the power was exclusive or concurrent, Justice Story parroted Chief Justice Marshall's focus on the nature and object of the power afforded Congress, particularly over a matter warranting uniformity and whose origin and establishment occurred with the Constitution rather than pre-dated it. *Prigg*, 41 U.S. at 622–25. He further remarked that a state's police power is distinguishable from Congress power, suggesting that the states' power would continue to apply but could not "interfere with, or . . . obstruct the just rights" constitutionally guaranteed to slave owners. *Id.* at 625. Chief Justice Taney objected to Story's allegedly unnecessary discussion of exclusivity. *Id.* at 626–27 (Taney, C.J., concurring).

[105] 36 U.S. (11 Pet.) 102, 153, 157–58 (1837) (Story, J., dissenting) (stating that if the subject is regulated by Congress, then the state's act could be unconstitutional). *See generally* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 208–09, 221–24 (1985) (noting that Story may have assisted in drafting *Gibbons*, and ultimately favored strong exclusivism).

[106] 48 U.S. (7 How.) 283, 430–35 (1849); 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE TANEY PERIOD, 1836–1864, at 388 (1974).

chartered—often at the time single purpose—corporations.[107] While undoubtedly Henry Clay's American System tilted toward ordered economic progress at the national level, his opponent President Jackson too favored some federal support.[108] Yet sectional interests and jealousies dominated the debate.[109] When vetoing the Maysville Road internal improvement project, President Jackson acknowledged Congress' past internal improvement measures and yet expressed reservation about their constitutionality, proclaiming instead that such projects, in the words historian Daniel Walker Howe, "were better left to private enterprise and the states."[110] Both then and later, Jackson offered a distinction between subjects national in scope, and those that are local, with the latter entrusted to the states.[111]

This moderating economic and political solution then morphed into legal doctrine, with the Court in *Cooley* settling on what later nineteenth century writers would call a middle ground of partly exclusive and partly concurrent jurisdiction.[112] It was here that Chief Justice Taney, who had unsuccessfully argued the case for Maryland in *Brown v. Maryland*, could attempt to entrench his lost effort.[113] And it was in

---

[107] *See, e.g.*, Perrine v. Chesapeake & Delaware Canal Co., 50 U.S. (9 How.) 172, 183–84, 192 (1850) (considering whether a corporation has the right to charge a toll to passengers or vessels who pass through the canal). The Court often construed charters narrowly, even when states jointly worked together with corresponding charters to promote commerce between their jurisdictions. *Id.* *See generally* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 146 (1971) (summarizing that the Court tried to account for public good and economic needs).

[108] *See generally* DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 123–49 (1979) (expanding upon Clay's debates and relationships with various members of the Supreme Court and government).

[109] Congress, for instance, rejected the former Federalist Joseph Hemphill's proposed national highway, while passing a more localized Maysville Road improvement project; *see* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 327–28 (2005) (explaining Hemphill's difficulty in achieving a national highway because of the political climate in deciding which entity had power to regulate).

[110] DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 358, 557–59 (2007). Sean Wilentz posits that Martin Van Buren and a young James K. Polk assisted drafting this moderate message. WILENTZ, *supra* note 109, at 328.

[111] *See* Andrew Jackson, *Veto Message, Dec. 6, 1832*, THE AMERICAN PRESIDENCY PROJECT *available at* http://www.presidency.ucsb.edu/ws/?pid=67040, *archived at* http://perma.cc/N665-2N9U (explaining that President Jackson vetoed the act because the Federal Government would be given too much power over a state issue).

[112] Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319–21 (1851) (describing the methods Congress used to determine jurisdiction). *See, e.g.*, Louis M. Greeley, *What is the Test of a Regulation of Foreign or Interstate Commerce?*, 1 HARV. L. REV. 159, 174 (1887) (ascertaining the differences and similarities between exclusivity and concurrency).

[113] *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–76 (1840) (clarifying that power must belong to either Congress or the states). Chief Justice Taney reviewed how to examine

Produced by The Berkeley Electronic Press, 2015

Cooley where the Court would attempt to craft rules for highly charged transportation disputes such as the construction of the Wheeling Bridge.[114] Justice Benjamin R. Curtis accepted what has become known as the concept of "selective exclusiveness." Pennsylvania required vessels without a pilot and weighing over seventy-five tons entering any port other than on the Delaware River pay a pilotage fee. Curtis admitted that the state pilotage statute regulated commerce, but upheld the law by reasoning that Congress' power was not exclusive over subjects local in character; rather, only when regulation demands national uniformity is Congress' power exclusive.[115]

Curtis reasoned that, because pilotage laws are a valid subject for congressional action, indeed a matter upon which Congress had legislated, such laws must be regulations of commerce.[116] Yet Curtis posited that if one treats Congress' power over commerce as exclusive, then arguably Congress could not re-convey that power to the states by authorizing future state legislation.[117] This dilemma is critical to Curtis' opinion, because, in 1789, Congress approved state pilotage laws.[118] Such was the problem of an exclusivity assumption Justice Story and others generated—either the power is not exclusive or Congress could not authorize states to legislate on local matters.[119] The latter conclusion

---

concurrent jurisdiction where he reflected the prevailing sentiment for distinguishing between powers expressly conferred on Congress and equally expressly denied to states, and those powers granted to Congress but not specifically denied to states. *Id.*; *see* FISS, *supra* note 100, at 267–68 (stating that Taney, among others, denied that Congress had preemptive power). The former he held were exclusive in Congress, while the latter were only so if "similar authority in the states would be absolutely and totally contradictory and repugnant[.]" *Holmes*, 39 U.S. at 574. Similar language appeared in Justice Story's opinion in *Houston v. Moore*. *See* 18 U.S. (5 Wheat.) 1, 22 (1820) (reemphasizing that sometimes Congress does not have to overrule a state's law). Taney's moderating approach toward federal authority corresponds with his willingness to expand federal admiralty jurisdiction. *See* SWISHER, *supra* note 106, at 444–45, 455 (evaluating Taney's reasoning behind the Court's decision).

114 *See Cooley*, 53 U.S. at 311 (holding that the complainant's rights were exempted from payment because the law conflicted with the Constitution); ELIZABETH BRAND MONROE, THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY 128–30 (1992) (explaining the Court's jurisdiction for crafting rules on waterways and Chief Justice Taney's opposition to the reasoning); SWISHER, *supra* note 106, at 408–417 (discussing the *Cooley* case and the reasoning behind the Court's decision).

115 *See Cooley*, 53 U.S. at 316–17. Elsewhere in the opinion, Justice Curtis suggested that such laws "rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them[.]" *Id*. at 312.

116 *Id*. at 325.

117 *Id*. at 318.

118 *Id*. at 302.

119 *Id*. at 319.

would have required invalidating the 1789 statute.[120] Curtis escaped this box by concluding that it was necessary to examine the nature of the power, which he treated as synonymous with the subject being regulated.[121] "If they are excluded," he wrote, "it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States."[122] Here, Curtis's reasoning follows Hamilton's *Federalist No. 32*, suggesting that only when a uniform, nationwide rule is required would the nature of the power demand that it be within the exclusive domain of Congress.[123] And Congress' 1789 statue illustrated that the matter was susceptible to local rather than uniform regulation.[124]

By the end of the century, a leading Commerce Clause monograph proclaimed that *Cooley* reflected the "most satisfactory solution" to the issue and had "been followed in every case in the Supreme Court upon this subject."[125] Many of the Court's opinions followed Curtis's reasoning in *Cooley*.[126] These opinions suggested that the critical factor for assessing state or federal regulations was whether the character of the regulated object was local or national, with states capable regulating only the former.[127] Yet the allure of *Cooley* began to wane later in the century,

---

[120] *Cooley*, 53 U.S. at 319–20.

[121] *Id*. at 320.

[122] *Id*. at 318.

[123] *Id*.

[124] *See id*. at 319–20 (reaffirming the importance of considering local influence on legislation). Justices McLean and Wayne dissented, with McLean taking the position that Congress' power is exclusive. *Id*. at 324–25 (McLean, J., dissenting). Justice Daniel concurred, treating the law as matter inherent in state sovereignty and not a commercial regulation. *Cooley*, 53 U.S. at 325–26 (Daniel, J., concurring).

[125] E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 28 (1898).

[126] *See, e.g.*, Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 721–22 (1865) (adopting the *Cooley* rationale). *Gilman* involved the construction of a bridge over a navigable river when the bridge threatened to interfere with the navigation of vessels over a certain size that travelled under the arches. *Id*. at 715. For a divided Court, Justice Swayne observed that municipalities must consider the convenience of their citizens and the passage from one state to another across the river. *Id.* at 722. He then declared that states exercise concurrent jurisdiction over commerce local in character, while the federal commercial power extends only to those subjects calling for uniform rules and national legislation. *Id.* at 726–27, 729–30; *see also Ex parte* McNiel, 80 U.S. (13 Wall.) 236, 239–40 (1871) (upholding state pilotage law even though it was a regulation of commerce); Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450, 460, 463 (1864) (establishing the need for a uniform law to protect the public); The Albany Bridge Case, 69 U.S. (2 Wall.) 403, 403 (1864) (discussing, in the Court's four-to-four decision, state's power to pass a law authorizing the erection of bridges over navigable rivers).

[127] *See, e.g.*, Western Union Tel. Co. v. James, 162 U.S. 650, 655 (1896) (affirming that Congress has jurisdiction over national matters and the state over state matters); Pittsburgh & S. Coal Co. v. Bates, 156 U.S. 577, 587–88 (1895) (stating that states may regulate where

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

with a changing economy and the passage of the Fourteenth Amendment and accompanying rise of rights jurisprudence.

III. THE NASCENT DORMANT COMMERCE CLAUSE

A. A New Economy and Federal Right to Engage in Interstate Commerce

Throughout the post-civil-war era until roughly the 1920s, states, Congress, and the courts all explored how federalism could or should respond to the newly evolving national economy. The economy changed radically during this period, as Ray Ginger explains:

> From 1877 to 1892 the United States grew—in population, in wealth, in output per man-hour, in the value of real estate. In these years the economy became industrial. The society became urban. Vast corporate

Congress does not); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204, 212 (1894) (providing that "laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammeled"); Hamilton v. Vicksburg, Shreveport & Pac. R.R., 119 U.S. 280, 282 (1886) (favoring local input in transportation matters); Huse v. Glover, 119 U.S. 543, 548–49 (1886) (explaining that even though the state must act for the public good, those decisions are usually subject to congressional oversight); Morgan's Steamship Co. v. Louisiana Bd. of Health, 118 U.S. 455, 464–65 (1886) (establishing that until Congress acts, state laws are valid); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 217 (1885) (holding that states cannot interfere with waterways); Cardwell v. Am. Bridge Co., 113 U.S. 205, 208 (1885) (describing that states can regulate actions related to internal police power); Parkersburg & Ohio River Transp. Co. v. Parkersburg, 107 U.S. 691, 700–01 (1883) (stating that wharf law should be determined by local law until overruled nationally); Escanaba & Lake Mich. Transp. Co. v. Chicago, 107 U.S. 678, 687–88 (1883) (expounding that the state may regulate until Congress decides to act); Packet Co. v. Catlettsburg, 105 U.S. 559, 564–65 (1881) (deciding that a municipality may erect wharves and forbid landing elsewhere); Wilson v. McNamee, 102 U.S. 572, 575 (1880) (upholding state pilotage law because of congressional affirmance, although part of general commercial law); Webber v. Virginia, 103 U.S. 344, 351 (1880) (finding that issues national in nature should be within Congress' exclusive jurisdiction); Lord v. Steamship Co., 102 U.S. 541, 543–44 (1880) (defining Congress' jurisdiction over commerce as having to do with nationwide commerce); Wisconsin v. Duluth, 96 U.S. 379, 386–87 (1877) (asserting that Congress may regulate harbor improvements and preempt state laws, but not exercise exclusive jurisdiction); Pound v. Turck, 95 U.S. 459, 464 (1877) (confining the actions of the state to matters that only affect internal issues); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 279–80 (1872) (finding transportation of merchandise or passengers to be of a national nature, thus requiring exclusive legislation by Congress); Cushing v. Owners of the John Fraser, 62 U.S. (21 How.) 184, 187–88 (1858) (holding that states may regulate ships lying in the harbor); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 444 (1856) (reasoning that allowing local jurisdiction on a national issue will disrupt uniformity in all ports). *Cf.* Newport & Cincinnati Bridge Co. v. United States, 105 U.S. 470, 492 (1881) (holding that Congress can exercise concurrent jurisdiction over the subject).

https://scholar.valpo.edu/vulr/vol49/iss3/9

> bureaucracies were forged. Power was caught up into the hands of a few men as never before in this country.[128]

But with it a new bureaucratic middle class emerged, facilitating the growth toward the twentieth century consumer economy.[129] This was an economy fueled by a marketing revolution that transferred marketing from merchants to manufacturers.[130] And with these changes, disparity in the distribution of wealth and bargaining power changed dramatically.[131] Morton Keller, in his seminal work on the late nineteenth century, reviews how these changes pushed the need not only to regulate the economy but also to facilitate it.[132] This precipitated what William Novak describes as forging a new relationship between law and business—and modern capitalism.[133]

The Court as an institution responded cautiously to legislative measures targeting the vicissitudes of societal changes.[134] Under the

---

[128] RAY GINGER, AGE OF EXCESS: THE UNITED STATES FROM 1877 TO 1914, at 36 (1965). The late 1800s witnessed rapid urbanization. *See* HAROLD U. FAULKNER, POLITICS, REFORM AND EXPANSION 1890–1900, at 10 (1959) (stating that between only 1880 and 1900, population in towns over 8000 was one fifth of the nation). By 1915, urban residents outnumbered their rural counterparts, and the railroad system ensured that the bulk of rurally grown agricultural products would be "consumed in U.S. cities." SEAVOY, *supra* note 52, at 187.

[129] GINGER, *supra* note 128, at 46–47, 49 (explaining that economies of scale pushed industry consolidation, concentration and vertical integration, and ultimately led to the growth of the trusts and monopolies). A new managerial (professional worker) class emerged, and wholesale merchants transitioned to jobbers—and ultimately to large scale retail chains like J.C. Penny, Woolworths, Wanamaker, and Sears. SEAVOY, *supra* note 52, at 245.

[130] *See* GLENN PORTER & HAROLD C. LIVESAY, MERCHANTS AND MANUFACTURERS: STUDIES IN THE CHANGING STRUCTURE OF NINETEENTH-CENTURY MARKETING 131–53 (1971) (explaining the transfer from the old marketing network to independent groups with manufacturer-owned distribution facilities.). Alfred Chandler chronicles how the modern corporation, principally with its organizational and manufacturing structure, distribution and marketing systems, along with its purchasing power, emerged between 1880s and the early 1900s. *See generally* Alfred D. Chandler, Jr., *The Beginnings of "Big Business" in American History*, *in* 2 PIVOTAL INTERPRETATIONS OF AMERICAN HISTORY 107, 132 (Carl N. Degler, ed. 1966); *see also* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 484–500 (1977) (tracing the broader development of the modern business enterprise from the 1840s to World War II).

[131] *See* FAULKNER, *supra* note 128, at 72–93 (discussing the increase in poverty that accompanied the progress of the late 1800s).

[132] MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 171–81 (1977).

[133] *See* William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377, 390–91 (2010) (detailing the combination of law and business in modern capitalism).

[134] *See* KELLER, *supra* note 132, at 289 (explaining that the period is often characterized by traumatic forces propelling societal change clashing with entrenched ideas pushing backward). This clash produced an era, in the words of the title of a work by historian

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

rubric of "political economy," scholars began to champion and expand on Adam Smith's theories and promote political economy as a science.[135] The legal bar before the Civil War undoubtedly was aware of the principles of "political economy," but many pre-war judges believed that "economic" issues—often in the context of taxation, were better entrusted to legislative judgments.[136] But after the war the issues became exceedingly complex. General incorporation laws for the first time allowed an increasing number of foreign corporations to engage in business outside their incorporating state, facilitating trade in the newly minted industrial revolution.[137] The economy witnessed new corporate organizational structures accompanying the rise of a more robust manufacturing sector, facilitating a changing labor force, and an ever increasing diversity in wealth and concentration of money. Classicists believed in competitive markets and free trade. Embedded in their theory was the idea that free trade—that is, unfettered by legislative intrusion—reflected natural law and any interference with the natural law conflicted with "our traditions and inherited rights of security."[138]

This paradigmatic shift became more pronounced during Chief Justice Fuller's tenure than during the Waite Court years.[139] The Fuller

---

Robert Wiebe, "searching for order." ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877–1920, at 1–10 (1967).

[135] *See generally* SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865–1901, at 203–08 (1956) (discussing the "New Political Economy"); Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 398–443 (2012) (describing economic history).

[136] The eminent Ohio Judge, Frederick Grimke, suggested that the "science of political economy" was relevant to legislatures, not courts. *See* Perry v. Torrence, 8 Ohio 521, 522 (1838) (reviewing taxation of steamboats); *see also* Mobile v. Yuille, 3 Ala. 137, 143 (1841) (stating that "enlightened views of political economy . . . must be addressed to the legislative department" when reviewing limit on price of bread).

[137] *See* KELLER, *supra* note 132, at 431–33 (detailing the expansion of businesses due to lessened restrictions on interstate trade). Keller explains how, later, the Court's treatment of foreign corporations assisted in averting the need for a general federal incorporation law. *Id*. at 588–90.

[138] Joseph S. Auerbach, *The Legal Aspect of "Trusts,"* 169 N. AM. REV. 375, 376–77 (1899); *see also* GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900–1912, at 16–37 (1958) (describing the rise of *laissez faire* thought). *See generally* FINE, *supra* note 135, at 29–31 (giving a brief overview of the rise of the laissez faire economic doctrine); KELLER, *supra* note 132, at 182 (noting that "[m]ost educated men of the time believed that natural laws controlled the market, the flow of money, and the cost of labor").

[139] *See generally* PAUL KENS, THE SUPREME COURT UNDER MORRISON R. WAITE, 1874–1888, at 15–31 (2010) (analyzing the stance that the Supreme Court took on federalism while Morrison Waite was Chief Justice). The Waite Court followed a traditionalist federalism paradigm. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 15–16 (2011) (tracing the nuances in the Waite Court's approach to the Reconstruction amendments); Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 53–56 (1978) (noting the effect of the Waite

https://scholar.valpo.edu/vulr/vol49/iss3/9

Court, sitting near the epicenter of the country's "experiencing sweeping social and economic change," began protecting vested property interests against both federal and state legislative efforts.[140] Although aggregately the Court's decisions do not necessarily reflect a *laissez faire* Court, the judicial rhetoric employed by some Justices facilitated aspects of a free trade economy.[141] This became evident in certain Justices' nationalist tendencies. The Court, after all, had federalized the law of commercial contracts in an effort to facilitate a national economy.[142] A late nineteenth century observer echoed this sentiment, when he wrote that diversity is:

> [I]ntolerable, in a commercial age, when it affects the laws of trade and commerce in communities bound to each other by railroads and telegraph wires, and depending on one another by the daily exchange of articles of food and wear, of machinery and raw material, and dealing together without regard to state lines, past or present.[143]

And the classical legal doctrine corresponded with the Court's approach toward liberty of contract, with the Court invalidating some programs that "arbitrarily interfere[d] with private business, or impose[d] unusual and unnecessary restrictions upon lawful occupations."[144] Some Justices

---

Court's "dual federalism" in upholding much state legislation). That Court, after all, upheld the Granger Laws, with Justice Field dissenting. Munn v. Illinois, 94 U.S. 113, 135–36 (1876). Also, Chief Justice Waite echoed Chief Justice Marshall's broad construction of the commerce power, concluding it is not only Congress' power but "duty . . . to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation." Pensacola Tel Co. v. Western Union Tel Co., 96 U.S. 1, 9 (1877).

[140] JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910, at 57, 70–71 (1995) (demonstrating the Court's interest in defending vested property rights from any legislative interference). Owen Fiss observes that the Fuller Court decisions "embod[ied] principles of economic nationalism and . . . a mandate to keep the commercial arties of the nation free and open." FISS, *supra* note 100, at 266 (footnote omitted).

[141] *See* Swift v. Tyson, 41 U.S. 1, 20 (1842) ("It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances . . . but also in payment of and as security for, pre-existing debts."). *See generally* LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 150 (1999) (explaining that the Court was not *laissez faire*).

[142] *See Swift*, 41 U.S. at 18–19 (determining that the opinion of local tribunals is not conclusive with regard to commercial law).

[143] Lewis N. Dembitz, *Uniformity of State Laws*, 168 N. AM. REV. 84, 84 (1899).

[144] Lawton v. Steele, 152 U.S. 133, 137 (1894). Christopher Tiedeman's treatise, *Limitations of Police Power*, often epitomizes *laissez faire* constitutionalism. ARNOLD M. PAUL,

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

avowedly believed that "the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."[145] Justice Field, often associated with *laissez faire* constitutionalism, echoed the sentiment of those who distrusted the legislative process and opposed special privileges or perceived class legislation.[146] And later Chief Justice Taft would write that "[f]reedom is the general rule" and only "exceptional circumstances" warranted their abridgement.[147]

Yet, how past constitutional dogma would accommodate corresponding centripetal and centrifugal forces favoring federalization and an escalating need for state police power regulation, respectively, eventually became untenable under the prevailing paradigm of dual federalism. "[C]onstitutional issues [after all,] pervaded the discussion of nearly all matters of public policy during the Gilded Age—issues such as regulating railroads, suppressing unsafe or fraudulent products, labor issues, counteracting monopolies and trusts[.] . . ."[148] Republicans favored strong national government and governmental intervention,

---

CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895, at 16–17 (1969). David Mayer explains how Tiedeman "separated law from popular will" and believed judges could discern legal principles from a "prevalent sense of right." David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 119–20 (1990). Less doctrinaire was Thomas M. Cooley's, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States*. *See generally* KELLER, *supra* note 132, at 345 (calling Cooley's treatise "[t]he most influential" of its kind); FINE, *supra* note 135, at 142–44 (praising Cooley's treatise); TWISS *supra* note 8, at 18–19 (discussing Cooley's intentions in writing the treatise).

145 Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughter-House Co., 111 U.S. 746, 764 (1884) (Bradley, J., concurring); *see also* ROBERT B. HIGHSAW, EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH 101–118 (1981) (discussing White's embrace of dual federalism in commerce clause context).

146 *See* Charles W. McCurdy, *The* Knight *Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304, 310–11 (1979) (analyzing the Court's break from precedent and explaining their belief that the "commercial power [of Congress] continues until the commodity has ceased to be the subject of discriminatory legislation by reason of its foreign character"); Wallace Mendelson, *Mr. Justice Field and Laissez-Faire*, 36 VA. L. REV. 45, 48 (1950) (noting Field's resolute opposition to "communism" and the Granger cases). Field, according to Kens, "seriously distrusted" the legislative process. PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 164, 216 (1997).

147 Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U.S. 522, 534 (1923) (reviewing whether business affected by a public interest). For Taft's nationalist approach toward the Commerce Clause as a mechanism for facilitating a national market, see Stanley I. Kutler, *Chief Justice Taft, National Regulation, and the Commerce Power*, 51 J. AM. HIST. 651, 652 (1965).

148 Michael Les Benedict, *Constitutional Politics in the Gilded Age*, 9 J. GILDED AGE & PROGRESSIVE ERA 7, 12 (January 2010).

https://scholar.valpo.edu/vulr/vol49/iss3/9

while the Democrats resisted federal intervention or federal power.[149] In some areas, states appeared reluctant to regulate a particular sector fearing that the industry would relocate to more forgiving neighboring states—what we now often call "race to the bottom" or "degenerative competition."[150] And often the progressive interest in reform at the federal level merged with industry support for federal regulation in lieu of local efforts that might thwart a more rational or stable national market.[151] While notable decisions invalidated some state efforts, the Court concomitantly occasionally limited federal regulation as well.[152] David Currie, therefore, cautions against suggesting that the Court during the 1888 through 1910 period was "hostile to either state or federal authority."[153] Instead, modern scholarship posits that the Court

---

149 *Id*. at 14–16.

150 David A. Moss, *Kindling a Flame Under Federalism: Progressive Reformers, Corporate Elites, and the Phosphorus Match Campaign of 1909–1912*, 68 BUS. HIST. REV. 244, 247 n.5 (1994) (employing the term "degenerative competition" to describe what occurred).

151 Herbert Hovenkamp makes this point when exploring railroad rate regulation, and David Moss finds the same scenario occurring for the prohibitory tax on phosphorous matches. Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017, 1020 (1988); Moss, *supra* note 150, at 274 n.69.

152 *See, e.g.,* Adair v. United States, 208 U.S. 161, 180 (1908) (holding that, while the power to regulate interstate commerce is broad, it does not supersede fundamental rights); *see also* Hopkins v. United States, 171 U.S. 578, 588 (1898) (concluding that live-stock commission merchants are not engaged in interstate commerce, despite the fact that live-stock travels between states during a transaction, because their business is buying and selling live-stock consigned to them in various locations); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *modified on reh'g*, 158 U.S. 601, 637 (1895) (exempting federal income tax from interstate commerce); United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) (finding that manufacturing is not commerce).

153 David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910*, 52 U. CHI. L. REV. 324, 325 (1985). The Court remarkably upheld the federal injunctive power in *In re Debs*, 158 U.S. 564, 600 (1895), even absent an explicit authorizing federal law. Currie, *supra*, at 344; *see also* KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 252 (2009) ("Of the 217 state laws struck down by the Court from its start in 1920, [forty-eight] were voided in the peak decade of the 1880s, and the justices, while displaying deference to Congress, still struck down [thirty-two] federal acts between the Civil War and 1937. That being said, the fact is that the Court upheld state and federal enactments overwhelmingly." (footnote omitted)); KELLER, *supra* note 132, at 176 ("[T]he Court joined the other sectors of the postwar polity in affirming the principle that government might act concretely, positively, [and] indeed aggressively in the realm of economic policy."); WILLIAM M. WIECEK, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937*, at 135 (1998) (noting that after 1898 Court ushered in new era of activism). The Court's response to the Granger Movement, in *Munn v. Illinois*, 94 U.S. 113 (1876), incidentally involving a commerce clause challenge, illustrates its willingness to affirm particular state economic initiatives. *See* 7 CHARLES FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864–1888, PART TWO 353–55 (1987) (discussing *Munn v. Illinois*, allowing state regulation of grain elevators). *See generally* GEORGE H. MILLER, RAILROADS AND THE GRANGER LAWS 59–96 (1971) (discussing the *Munn*

Produced by The Berkeley Electronic Press, 2015

appeared more interested in protecting economic individualism by applying classical notions of vested liberty and property interests.[154]

But how the Court distinguished between a state's permissible exercise of its police power, Congress' legitimate exercise of its commerce power, or a matter entrusted solely to either state or federal power entails appreciating more than a mere clash of economic interests: it requires an appreciation of the unique interplay of the changing society, economic theory, and the prevailing yet fading paradigm of dual federalism. This complex dynamic generated three dominant themes from this era.

To begin with, the Court's conservatives facilitated interstate corporate expansion by creating a *federal constitutional right* to engage in interstate commerce—a *right* that only Congress could hinder.[155] Absent congressional action, citizens enjoyed a "perfect freedom of trade."[156] Arguably conflating due process and Commerce Clause rhetoric, the Court's dicta hinted that Congress itself could only intercede with this

---

v. Illinois decision); Edmund W. Kitch & Clara Ann Bowler, *The Facts of* Munn v. Illinois, 1978 SUP. CT. REV. 313, 313–20 (providing the facts of *Munn v. Illinois*); Harry Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 329, 329–402 (Donald Fleming & Bernard Bailyn, eds. 1971) (discussing the implications of *Munn v. Illinois*).

[154] *See* ELY, *supra* note 140, at 79–81 (discussing the Court's use of traditional vested and liberty property rights to protect economic individualism); *see also* JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME RESPONDS TO A CHANGING SOCIETY, 1890–1920, at 419–34 (1978) (reviewing the Court's docket during this period, and concluding that the Court generally accommodated societal change by upholding most federal and state programs).

[155] Western Union Tel. Co. v. Kansas, 216 U.S. 1, 21 (1910) ("[I]t is a right which every citizen of the United States is entitled to exercise under the Constitution[.]"). Commentators too employed "rights" language when discussing interstate commerce. *E.g.*, Frederick H. Cooke, *The Right to Engage in Interstate Transportation*, *etc.*, 21 YALE L.J. 207, 207 (1912); E. Parmalee Prentice, *The Origin of the Right to Engage in Interstate Commerce*, 17 HARV. L. REV. 20, 20 (1903).

[156] Brown v. Houston, 114 U.S. 622, 633 (1885) ("It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale."). When a prohibition targeted selling products entering a state, the Court treated its application to out-of-state companies as "violat[ing] . . . the rights of citizens of other States arising under the commerce clause[.]" Schollenberger v. Pennsylvania, 171 U.S. 1, 16 (1898). Conversely, in *Kidd v. Pearson*, the Court explored whether a prohibition could affect exporting commerce; and, while recognizing the difficulty of drawing the line separating commerce from the police power, the Court echoed the prevailing refrain that Congress enjoys exclusive jurisdiction over interstate commerce and the states enjoy jurisdiction over "purely internal domestic commerce." 128 U.S. 1, 17–18, 26 (1888).

right upon "adequate justification."[157] This corresponded well with the conservative philosophy promoting economic and legal individualism. The *right* operated as a legal conduit: permitting foreign corporations to carry out business throughout the country by protecting viable interstate markets in goods and products, while retaining a sphere for state and local regulation.[158] That retained sphere excluded what the Court considered as interstate commerce.[159] And this approach reflected the persuasiveness of the conservative bar championing the cause of the new corporate structure.[160] Singer Manufacturing Co. was one of the companies at the forefront.[161] In *Welton v. Missouri*, for instance, the Court held that a license tax imposed on the selling of sewing machines manufactured outside of the state impermissibly taxed foreign goods before they had become part of the general mass of state property.[162] "In holding such discriminatory legislation unconstitutional, *Welton* became the leading case."[163] It was followed a decade later by *Robbins v. Taxing District of Shelby County*, where the Court held that Tennessee could not require that drummers for out of state companies obtain a license and pay a fee before plying their trade.[164]

If activities associated with interstate commerce involved the exercise of a federal right, then only Congress could regulate that right.[165] Optically, at least, this approach seemed consistent with both Chief Justice Marshall's opinion in *Brown* and Chief Justice Taney's decision in *Cooley*. States could regulate local matters, including local activities indirectly affecting commerce, consistent with *Cooley*; but the

---

157 Thomas R. Powell, *The Police Power in American Constitutional Law*, 1 J. COMP. LEG. & INT'L. L. 160, 166 (1919).

158 *Id*.

159 *Id*.

160 *See also* TWISS, *supra* note 8, at 214, 218–19 (explaining the Court's transition to dual federalism, which gave way to the new corporate structure); PAUL, *supra* note 144, at 22–23 (noting "the role of the bar as a balancing factor in the tension between populism and conservatism"). *See generally* McCurdy, *supra* note 97, at 637–43 (describing how the Court acted without the weight of precedent).

161 McCurdy, *supra* note 97, at 642.

162 91 U.S. 275, 281–83 (1875); *see also* McCurdy, *supra* note 146, at 310–11 (analyzing the Court's break from precedent in the *Welton v. Missouri* decision).

163 FAIRMAN, *supra* note 153, at 665.

164 120 U.S. 489, 492–94 (1887).

165 *E.g.*, Hall v De Cuir, 95 U.S. 485, 487 (1877) ("There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States."). It later became axiomatic for the Court to assert "the elementary and long-settled doctrine . . . that there can be no divided authority over interstate commerce[.]" Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913). *But cf*. Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1847 (2007) (analyzing the impact of dual federalism, although arguably without addressing the nuances identified in this Article).

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

Constitution assigned matters requiring national uniformity exclusively to Congress—consistent with Chief Justice Marshall's opinions.[166] Justice Field illustrated this sentiment in *County of Mobile v. Kimball*.[167] And Justice Fuller, in *Leisy v. Hardin*, similarly pronounced the exclusive nature of Congress' authority over matters purportedly demanding uniformity.[168] Justice Fuller, in particular, exhibited his bias toward a strong national economic marketplace, and he successfully persuaded his colleagues to incorporate Marshall's original package doctrine for foreign imports into commerce clause jurisprudence.[169] Explicitly rejecting the concurrent theory embraced by Chief Justice Taney, Justice Fuller allocated power between federal and states by deciding when a matter constituted interstate commerce.[170] An expanded notion of commerce, assuming exclusivity, necessarily meant circumscribing state authority.[171]

This became evident in the now infamous *United States v. E.C. Knight Co*.[172] There, Congress sought to regulate combinations in restraint of

---

166 William R. Howland, *The Police Power and Inter-State Commerce*, 4 HARV. L. REV. 221, 223 (1890) ("The commercial powers of Congress are not in terms exclusive; but it is now settled that they are exclusive where the subject-matter is national in character, and admits of and requires a uniform rule.").

167 102 U.S. 691, 696–707 (1880).

168 135 U.S. 100, 119 (1890); WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888–1910, at 167 (1950).

169 *See* KING, *supra* note 168, at 167–69. King's generous treatment of Fuller suggests that Fuller tried to "unshackle the future from the past[,]" and yet the Court undermined his approach only four years later, in *Plumley v. Massachusetts*. *Id*. at 238–39. Justice Harlan recognized the unmanageability of Fuller's embrace of the original package doctrine: "It . . . would encourage American merchants and traders seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business." F. May & Co. v. New Orleans, 178 U.S. 496, 503 (1900); *see also* Austin v. Tennessee, 179 U.S. 343, 350 (1900) (providing the cigarettes and original package doctrine).

170 ELY, *supra* note 140, at 127. After "conceding the weight" to be afforded to the "eminent jurist," Fuller was:

> [C]onstrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids, rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced.

Leisy, 135 U.S. at 118; *see also id*. at 119 ("the power to regulate commerce . . . is exclusive").

171 Hooper v. California, 155 U.S. 648, 655 (1895) ("If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise . . . that power would embrace the entire sphere of mercantile activity in any way . . . and would exclude state control over [domestic matters.]").

172 156 U.S. 1, 16–18 (1895). Fuller's opinion omitted referencing earlier dicta (in case where he dissented) that manufacturing corporations engaged in local or domestic business were outside of interstate commerce. Crutcher v. Kentucky, 141 U.S. 47, 58 (1891).

https://scholar.valpo.edu/vulr/vol49/iss3/9

trade for activities that included manufacturing.[173] For the Court, Justice Fuller explained how states traditionally had protected against unlawful restraints upon commerce within their borders, and that Congress had exceeded its bounds when it intruded upon that authority.[174] Had he ruled otherwise, he likely believed that, absent federal legislation, state regulation of domestic corporations or even foreign corporations doing business within another state would violate the DCC—after all, an exclusive paradigm would not tolerate allowing state regulation of "commerce."[175] And so he drew the problematic distinction between manufacturing and commerce.

The incipient federal constitutional right to engage interstate commerce precipitated the ancillary principle that states may not discriminate against interstate commerce. The Court's language in *Walling v. Michigan*, involving a state-imposed tax on the business of selling liquor into the state from out-of-state manufacturers, is illustrative.[176] When Michigan convicted an agent for a Chicago manufacturer of refusing to pay the tax, the State Supreme Court upheld the tax, concluding that the tax applied equally to all sellers and did not discriminate against non-residents.[177] The Supreme Court had earlier signaled the need to address discrimination when it held that:

> [N]o State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.[178]

---

173 *Knight*, 156 U.S. at 6–8.

174 *Id*. at 15–16; *see* McCurdy, *supra* note 146 at 336 (discussing history of state government freely deciding on matters of commerce without considering interstate commerce ramifications).

175 *See* McCurdy, *supra* note 146, at 335 (explaining that the court's concerns that states could lose control over right to regulate foreign corporations if a monopolization standard was adopted).

176 *See* Walling v. Michigan, 116 U.S. 446, 456–57 (1886) (discussing that Congress regulates commerce between states and cites to judicial history regarding federal control over interstate commerce to support its decision).

177 People v. Walling, 18 N.W. 807, 810 (Mich. 1884).

178 Guy v. Baltimore, 100 U.S. 434, 439 (1879). The Court suggested that this rule was necessary to avoid annul[ing] Congress' power to regulate interstate and foreign commerce. *Id*. at 439–40.

The Michigan statute undoubtedly had a discriminatory motive: an earlier version of the statute, after all, discriminated on its face against non-residents.[179] The Court, therefore, concluded that as a discriminatory measure it operated as a regulation of interstate commerce within Congress' exclusive domain.[180]

Finally, the Court assumed responsibility for ensuring that states could not, through subterfuge, interfere with the federal right to engage in interstate commerce and Congress' corresponding exclusive power over it.[181] The Court assessed whether a state's purported exercise of the police power appeared rational or rather served as a ruse limiting market entry.[182] Decisions often teetered on the Court's perception about whether a particular state measure "appears" to have had a sufficiently reliable motivation other than class or economic protectionist.[183] When the Court became convinced that a state measure was little more than class legislation or an effort to protect a local market, the DCC became an easy foil to strike down the measure.[184] Many of the late nineteenth century cases, therefore, turned on whether the Court became convinced that the state had acted legitimately—or reasonably—when purporting to regulate for public health, welfare, or safety.[185] This inquiry occasionally fused the Commerce Clause and the Fourteenth

[179] *Walling*, 116 U.S. at 449. The Court also explained how the tax effectively targeted drummers for out-of-state liquor manufacturers. *Id.* at 459.

[180] *See id.* at 455–456 (discussing the necessity of a national system to regulate certain classes of interstate trade); *see also* Scott v. Donald, 165 U.S. 58, 99–101 (1897) (invalidating tax for inspection program effectively discriminating against out of state products); Voight v. Wright, 141 U.S. 62, 66 (1891) (invalidated Virginia flour inspection program).

[181] *Walling*, 116 U.S. at 460.

[182] *Id. See, e.g.*, Hennington v. Georgia, 163 U.S. 299, 303–04 (1896) (whether a "real or substantial relation to [health or safety] objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge").

[183] *See Walling*, 116 U.S. at 456–58 (discussing the motivation for the state law).

[184] *See id.* at 458–61 (finding the state act to be a violation of the commerce clause).

[185] *E.g.*, Reagan v. Farmers' Loan and Trust Co., 154 U.S. 362, 399 (1894) (protection of property interest warrants inquiring into "the reasonableness and justice of the rates"). The Court played comfortably in a "reasonableness" sandbox, examining, for instance, the reasonableness of rate regulation under the Fourteenth Amendment. *See* Smyth v. Ames, 169 U.S. 466, 547 (1898) (examining the reasonableness and fairness of return for the value of property as compared to what the public was entitled to demand); Chicago & G. T. Ry. Co. v. Wellman, 143 U.S. 339, 344 (1892) (stating that the legislature has the power to fix railroad rates, but the judiciary may intercede if the rates are unreasonable); Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418, 458 (1890) (explaining that the element of reasonableness is a question for judicial investigation, which requires "due process of law for its determination"). Even in liberty of contract cases, "the Fuller Court was prepared to recognize major exceptions . . . when a state could demonstrate the reasonableness of its regulations[]"—such as in Muller v. Oregon, 208 U.S. 412, 418–23 (1908). ELY, *supra* note 140, at 101.

Amendment principles.[186] Barry Cushman highlights this "cross pollination" when portraying the New Deal Court.[187]

This "cross pollination" surfaces particularly in Justice John Marshall Harlan's Commerce Clause opinions. Several of his prominent police power opinions upheld state regulation of economic transactions.[188] And these opinions often examined whether the state acted arbitrarily or in a hostile manner against interstate commerce.[189] In *Minnesota v. Barber*, the Court examined the "natural and reasonable effect" of the regulation and whether a sufficient relationship existed between the means and the ends.[190] Legitimate railroad safety measures survived scrutiny when the Court perceived the measure was rationally related to a legitimate state police power purpose.[191] Yet, if a measure appeared unrelated to

---

186 *See* PAUL, *supra* note 144, at 42–45 (explaining the judicial review of reasonableness); *see also* BERNARD C. GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION 24 (1932) (discussing the suggestion of a reasonableness test in cases). "[T]he language of some of the cases has consciously or unconsciously employed the idioms of the 'due process' cases." *Id.*; *see also id.* at 49–50, 79–81 (treating due process and Commerce Clause together); *id.* at 372 (noting that there is not difference in the result whether a property tax is tested by the Commerce Clause or the Fourteenth Amendment).

187 *See* CUSHMAN, *supra* note at 43, 107–12 (examining the change in the judicial interpretation of the due process clause and the commerce clause); *see also* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1089 (2000) (analyzing the developments in commerce clause jurisprudence in relation to substantive due process and the dormant commerce clause doctrine).

188 *See* PRZYBYSZEWSKI, *supra* note 141, at 149–50 (citing Justice Harlan's noticeable inclusion of state police power considerations in his decisions). Conversely, Justice Harlan also affirmed Congress' power to regulate the interstate traffic of lotteries. Champion v. Ames, 188 U.S. 321, 355 (1903).

189 Geer v. Connecticut, 161 U.S. 519, 543–44 (1896) (dissenting, Justice Harlan explained that Connecticut acted arbitrarily and "inconsistent with the liberty belonging to every man," and violated the Commerce Clause by denying citizens the ability to sell lawfully obtained game into the interstate market). Congress responded by passing the Lacey Act, prohibiting the interstate sale of dead wild animals or birds killed or shipped in violation of state law. Lacey Act, ch. 553, 31 Stat. 187 (1900).

190 Minnesota v Barber, 136 U.S. 313, 320–26, 328–29 (1890) (invalidating state meat inspection statute). A searching means/end inquiry reflected the Court's general approach toward police power measures. *See* FISS, *supra* note 100, at 162 (*Lochner* reflected means/ends inquiry); *see also id.* at 165 (noting that even when dissenting in *Lochner*, Justice Harlan articulated the same approach, permitting sufficiently established health objectives but not economic class legislation).

191 New York, N. H. & H. R. Co. v. New York, 165 U.S. 628, 632 (1897); *see* Wabash, St. Louis, and Pac. Ry. Co. v. Illinois, 118 U.S. 557, 573 (1886) (holding that it would hinder the transportation of goods and chattels if every state on the train route could impose regulations concerning price, compensation, or taxation). Railroad rate regulation, conversely, highlighted the difficulty with dual markets, such that by 1886, the issue reached its crescendo when the Court touted the "freedom" of interstate commerce in holding that states could not regulate the rates for interstate railroad transportation. *Id.* *Contra* Illinois Cent. R.R. v. Illinois, 163 U.S. 142, 154 (1896) (declining to uphold train stop measure that would require a fast-mail train to go seven miles out its way creating

Produced by The Berkeley Electronic Press, 2015

traditional "police power" aims, Harlan had little trouble invoking the Commerce Clause. In *Brimmer v. Rebman*, for instance, Justice Harlan invalidated Virginia's meat inspection statute, reasoning that the constitutional right to send wholesome meat into Virginia could not be inhibited by a statute that denied equality in markets.[192] Because the Court found inescapable the conclusion that the statute was not legitimately aimed at health, the inspection program necessarily targeted—and, therefore, illegitimately directly burdened—interstate commerce.[193] The same concern over hostile state efforts led Harlan to question Kansas' effort to extract roughly $20,000 for its school fund from Western Union's ability to do intrastate business.[194] This prodded Harlan to champion the need to ensure "the freedom of interstate commerce against hostile state or local action," but allow local regulations "established in good faith" to apply to those engaged in commerce and only incidentally affecting, and not obstructing or conflicting, with the "substantial rights of those engaged in interstate commerce."[195] Indeed, several of Harlan's opinions illustrate how ostensible health and welfare measures became embroiled in the tension between ineffective state regulation and coalescing forces favoring

---

significant delays to passengers and cargo). The Court believed the stop was an unconstitutional hindrance and an obstruction of interstate commerce. *Id*. *See generally* Hovenkamp, *supra* note 151, at 1017 (discussing federal regulations within context of public interest); THOMAS K, MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 61 (1984) (describing the power of the railroads). "Ultimately, the railroads grew so powerful and so vital to the national economy that continued reliance on state regulation alone became futile[,]" particularly after *Wabash*. *Id*.

[192] 138 U.S. 78, 81–83 (1891) (holding that the Virginia tax discriminated against products from other states); *see also* Voight v. Wright, 141 U.S. 62, 67 (1891) (denying equality in a state's market directly burdens interstate commerce).

[193] *Brimmer*, 138 U.S. at 83; *see* PRZYBYSZEWSKI, *supra* note 141, at 154 (noting Harlan did not respond to allegations by the state attorneys that moneyed interests were challenging state sovereignty). Linda Prezybyszewski writes that Harlan considered the state's health justification a "ruse." *Id*. Congress responded by passing the Animal Industry Act, ch. 60, 23 Stat. 31 (1884), a recognition of state power to effect quarantines for foreign vessels at state ports, Act of Feb. 15, 1893 (National Quarantine Act), ch. 114, 27 Stat. 449–452 (1893), the Meat Inspection Act, ch. 555, 26 Stat. 1089 (1891), and in 1906 it mandated inspecting meat traveling in interstate commerce, Pure-Food Act of 1906, Pub. L. No. 384, 34 Stat. 768 (1906).

[194] *See* Western Union Tel. Co. v. State of Kansas *ex rel*. Coleman, 216 U.S. 1, 7, 34–36 (1910) (stating that a state may impose conditions so long as those conditions do not offend the Constitution or United States laws).

[195] *Id*. at 26.

federal regulation—forces arguably at odds with the Court's approach toward exclusivity.[196]

B. The Genesis of DCC Balancing

These tensions eventually became too problematic under the Court's prevailing jurisprudence. With the new century, the Court struggled to maintain its dialogue with the past, or its precedent, and to respond to the challenges confronting a dramatically changing society. "The twentieth century began amid a remarkable structural transformation of the economy. Since the 1870s, a constellation of circumstances—a nationwide railway network, abundant raw materials, emerging technologies, available finance capital, [and] favorable government policies—had produced a new kind of industrial firm."[197] The necessity of addressing growing class inequality associated with the concentration of wealth and power in big businesses undermined the loci of individualism dominating the second of the nineteenth century. The illusion of classical economic theory and its corresponding focus on individualism, to the extent practiced, became transparent. It succumbed to the widely touted need to address health and safety threats posed by the new economy.[198] And classical economic theory

---

[196] *See* Powell v. Pennsylvania, 127 U.S. 678, 686 (1888) (providing the classic illustration of the dairy industry's battle against oleomargarine, and Justice Harlan's initial decision upholding state legislation); *see also* McCray v. United States, 195 U.S. 27, 58–64 (1904) (stating that the judiciary does not hold the power to hold a legislative act unconstitutional if it reasonably relates to public health); Collins v. New Hampshire, 171 U.S 30, 33–34 (1898) (noting a New Hampshire statute's arbitrary oleomargarine color requirement when selling the product, the court held the statute to be invalid as a prohibitory law). *Cf.* Schollenberger v. Pennsylvania, 171 U.S. 1, 14–25 (1898) (invalidating law). *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 75 (1993) (describing how some perceived Powell as embodying class legislation); Benedict, *supra* note 148, at 17 (discussing prominence of fight over oleomargarine); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 108–18 (1989) (discussing the causes of state antimargarine laws and the subsequent judicial invalidation based on their prohibitory nature).

[197] MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920, at 150 (2003). *See generally* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933, 78 (1990) (describing the events and changes around the turn of the century that influenced public opinion and policy); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS 4 (1988) (exploring the transition from competitive to corporate capitalism).

[198] *See* Russell Nye, *Progressivism: Anti-Business Reform*, *in* CONFLICT OR CONSENSUS IN AMERICAN HISTORY 304, 304–05 (Allen F. Davis & Harold D. Woodman eds., 1966) (discussing the change in the American political and social perspective on the influence of wealth in government and the subsequent relationship to injustice in the political system).

Produced by The Berkeley Electronic Press, 2015

effectively yielded to the emerging consumer economy.[199] The soon to be President Herbert Hoover even rejected laissez faire doctrine when promoting regulation as mechanism for ensuring equal opportunity.[200] By the 1930s, therefore, a "widespread popular conviction" existed "that the free market was hopelessly flawed."[201]

Progressives and subsequently New Dealers embraced the role of government, and corresponding the belief that through scientific management experts could resolve economic and social problems.[202] Historian David Kennedy explained how progressives touted the need for "[a]ctive governmental guidance" to "superintend the phenomenal economic and social power that modern industrialism" had concentrated "into fewer and fewer hands."[203] Steeped in pragmatism, they rejected classical formalism and elevated facts over abstractions.[204] This surfaced in the legal arena, in particular, with recognition by historical

---

199 SEAVOY, *supra* note 52, at 213; *see also* FINE, *supra* note 135, at 206, 242 (explaining the rejection of classical economics for one based on the complexities of consumption). *See, e.g.*, WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 7 (1993) (examining the rise of the consumer economy and its impact on society).

200 *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 11–13, 46–47, 54–55 (1999); AMITY SHALES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 34–35 (2007) (discussing Hoover's belief that "America must move toward regulation"); *see also* LEACH, *supra* note 199, at 354 (noting his rejection of *laissez-faire* capitalism).

201 MCCRAW, *supra* note 191, at 210.

202 *See* HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 265–70 (1909) (championing democratic nationalism). The *New Republic's* founder, Herbert Croly, published Promise of American Life, where he rejected liberal individualism and extoled the virtues of democratic nationalism and strong governmental intervention. *Id.* Early participants with the *New Republic* included Judge Learned Hand and Felix Frankfurter. CHARLES FORCEY, THE CROSSROADS OF LIBERALISM: CROLY, WEYL, LIPPMANN AND THE PROGRESSIVE ERA, 1900–1925, at 181 (1961). Frankfurter reportedly even served as a conduit for Justice Brandeis, with the former publishing in the journal some of Brandeis' views. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 165 (1981) (discussing Brandeis' beliefs).

203 KENNEDY, *supra* note 200, at 32–33. *Cf.* WIECEK, *supra* note 153, at 255–59 (discussing the efficacy of progressive label and ability to synthesize accepted progressive principles). *See generally* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 26–27 (1973) (indicating the trend toward the political involvement of social scientists to exert some means of objective control).

204 *See generally* GARY J. JACOBSOHN, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT 52–57 (1977) (discussing the shift away from legal formalism in favor of pragmatic approach); HENRY F. MAY, THE END OF AMERICAN INNOCENCE: A STUDY OF THE FIRST YEARS OF OUR TIME 1912–1917, at 20–23 (1959) (noting the influence of progressive movement); ROSS, *supra* note 53, at 144, 154–157 (examining the influence of the sciences upon the progressive thought); WHITE, *supra* note 40, at 11–15 (explaining the campaign against legal formalism); MORTON WHITE, PRAGMATISM AND THE AMERICAN MIND: ESSAYS AND REVIEWS IN PHILOSOPHY AND INTELLECTUAL HISTORY 41–43 (1973) (noting that the rejection of formalism was a result of the increased emphasis on social thought).

jurisprudes, sociological jurisprudes, and legal realists that juridical rules were a product of time, culture, place, and circumstances, rather than a priori pre-ordained principles, and as such could be molded.[205] As governmental actors occasionally clashing over attitudes toward big business, they generally opposed concentrated wealth and favored government programs promoting equality of health, welfare, and economic opportunity—all within the citadel of capitalism.[206] With the emerging consumer economy, their belief in expert management corresponded with the perceived underlying problem with the economy, of matching production to consumption, and overseeing labor/management relations to ensure appropriate wages.

---

[205] *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 35 (1995) (discussing "The Metaphysical Club"). The legal realists, including even historical and sociological jurisprudes, comprised an eclectic and idiosyncratic group, although many arguably seemed bound together by a Kantian faith in rational, empirical, scientific processes. *See also* JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY 1–5 (1990) (discussing the changes in legal thought); LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960, at 67 (1986) (noting the realists influenced legal education in encouraging teaching methods that students could apply to factual situations thereby fusing law with the social sciences); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 110–13 (1994) (examining the goals of a fact based approach to law); PURCELL, *supra* note at 203, 74–94, 140–42 (explaining the similar characteristics and motivations of the realists); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 1520 (1995) (discussing the rejection of legal formalism and the trend in legal education to embrace the social sciences); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 99–100 (1978) (examining the influence of political, social, intellectual history upon jurisprudential modes and social movements). Arthur Schlesinger aptly captured their focus, observing:

> The new jurisprudence found a host of persuasive teachers—notably, perhaps, Felix Frankfurter and Thomas Reed Powell of Harvard and Edward S. Corwin of Princeton. Under their influence, a new generation of lawyers and political scientists abandoned the notion that judicial pronouncements were delivered by the stork. They tried instead to reconstruct the various carnal factors—economic, political, psychological, as well as legal—which so evidently entered into every decision. In due course this effort produced an even more radical school.

ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 486 (1960).

[206] *See* MELVIN I. UROFSKY, LOUIS D. BRANDIES: A LIFE 300 (2009) (explaining Brandeis's influence in the debate concerning government control over business interests). "Perhaps more than any other reformer of his time, Louis Brandeis stood as the opponent of big business and monopoly." *Id.* Some scholars accepted concentration as natural, favoring "commensurately powerful public controls." KENNEDY, *supra* note 200, at 121. *See generally* SAMUEL P. HAYES, THE RESPONSE TO INDUSTRIALISM, 1885–1914, at 166–73 (1995) (discussing the progressives' push to increase government funding to aid various public interests, while also curbing the amount of mergers and monopolies); SCHLESINGER, *supra* note 205, at 69–207, 271.

Heralding an engaged federal government capable of readjusting economic relationships, progressives challenged the judiciary's willingness to scrutinize legislative judgments. Charles Beard, after all, had accused the Court of interpreting the Constitution to protect predominate economic interests.[207] Justice Brandeis echoed the emergent progressive sentiment in *Erie Railroad Co. v. Tompkins* when, in overruling *Swift v. Tyson*, he elevated legislative supremacy and democratic decision-making over unnecessary judicial intrusion into areas constitutionally assigned to a legislature.[208]

Another aspect of progressivism, however, became pronounced. Progressive lawyers embraced facts, not legal masks—those formulaic or talismanic constitutional tests shrouding reality. And the era's progressive icon Justice Brandeis brought "[p]rogressivism . . . to the Court."[209] Justice Brandeis famously introduced the concept of a Brandeis brief, marshaling facts to persuade a court, but the corollary is often overlooked—that a court would agree to examine and respond to an advocate's factual arguments.[210] This promoted judicial examination of the "effect" of particular measures, instead of relying on illusory or

---

[207] *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 162–63 & n.1 (1986) (noting that the effect of judicial control upon Congress was not the original intent of the framers).

[208] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (holding that the doctrine of *Swift v. Tyson* was an unconstitutional assumption of judicial power); Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–23 (1842) (holding that the federal courts had the authority to create federal common law when deciding matters not yet addressed by that state legislature). *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 172–73 (2000) (discussing Brandeis' opinion addressing *Swift* in the *Erie* decision). "Brandeis as much as any progressive valued expertise; that had made him a champion of scientific management. But unlike some reformers, he believed in democratic decision making, and the fact that the people could sometimes choose poorly did not trouble him." UROFSKY, *supra* note 206, at 349.

[209] WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910–1921, at 142 (1999).

[210] *Id.* at 168 (noting that Justice Holmes, Harold Laski, and Roscoe Pound urged that Brandeis avoid this brief writing style as a Justice). Factual inquiries often dictated the Court's assessment of businesses affected with a public interest. In *Dorchy v. Kansas*, 264 U.S. 286, 289 (1924), Justice Brandeis accepted the judgment in *Chas. Wolff Packing Co. v. Court of Indus. Relations of Kansas*. *Id.* In *Chas. Wolff Packing Co. v. Court of Indus. Relations of Kansas*, 262 U.S. at 522, 536 (1923), the Court rejected relying on a legislative declaration that the business was so affected. Conversely, in *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1931), Justice Brandeis upheld a statute limiting an agent's commission for the sale of fire insurance, reasoning that no facts adduced or judicially known warranted overturning the legislative judgment about the evils warranting correction. *Id.* In *O'Gorman*, Brandeis generally referenced Henry W. Biklé's article. *Id.* at 258 n.3; *see* Henry Wolf Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 1011 (1925) (noting, under the *Cooley* DCC test, the question is necessarily a factually-based practical judgment).

malleable legal tests. It meant, for instance, that a court could reach beyond the legislative realm, beyond a statute or its legislative history, and measure a statute's constitutionality based on extrinsic facts as presented or judicially known.[211] This became evident in the Court's treatment of both DCC and intergovernmental immunity cases. In *Metcalf v. Mitchell*, for example, Justice Stone—a follower of Justice Brandeis—emphasized practicality and effects.[212] Of course, elevating the criticality of facts rendered constitutional distinctions subservient to *post-hoc* factual judgments.[213]

Indeed, Justice Frankfurter aptly observed that Brandeis' penchant for empirical rather than hypothetical evidence prompted him to examine each case separately, as if the Court could effectively determine whether the state legislature had over (unreasonably) regulated interstate commerce.[214] This, after all, characterizes much of 1920s

[211] *See* Ribnik v. McBride, 277 U.S. 350, 359–63 (1928) (noting Justice Stone's dissent). For example, Justice Stone employed a methodology that first presumed a measure's constitutionality, and then "indulged" an assumption that a state legislature appreciated local conditions necessitating regulation, with the Court capable of taking judicial notice of Brandeis brief type facts warranting—in this case, involving employment agency fees—state regulation. *Id.*

[212] 269 U.S. 514, 523–24 (1926); *see* Miller v. Schoene, 276 U.S. 272, 279 (1928) (noting that in a due process case, Stone implicitly examined and *sub silentio* accepted the state's factual argument about need to order the removal of ornamental red cedar trees). In *Tyson v. Banton*, 273 U.S. 418, 451 (1927), Justice Stone chastised the majority's invocation of illusory tests or phrases such as business affected with a public interest. Even though he assented to the majority opinion in *Lochner*, Justice McKenna earlier opined that "[l]egislation cannot be judged by theoretical standards [but] must be tested by the concrete conditions which induced it[.]" Mutual Loan Co. v. Martell, 222 U.S. 225, 233 (1911). Other Justices too began employing more fact-suggestive language when discussing an activity's relationship to commerce. *See, e.g.*, Chicago, Burlington & Quincy R.R. Co. v. Harrington, 241 U.S. 177, 180 (1916) (noting that Justice Hughes used "so closely related" along with "direct" relationship to interstate commerce); Rast v. Van Deman & Lewis Co., 240 U.S. 342, 360 (1916) (examining "influence and effect" in upholding state program); Shanks v. Del., Lackawanna, & W. R.R. Co., 239 U.S. 556, 558, 560 (1916) (noting that Justice Van Devanter that federal employer liability act refers to interstate commerce in a practical, not legal sense, and whether activity "so closely related" to interstate transportation, concluding in the case that activity "too remote"); Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 47, 50 (1912) (recognizing that Justice Van Devanter that federal employer liability act applies to activities with "real or substantial relation" to interstate commerce).

[213] *See, e.g.*, Atchison, Topeka, & Santa Fe Ry. Co. v. Harold, 241 U.S. 371, 375–76 (1916) (examining actual movement of product in interstate commerce). *Post hoc* factual inquires under a "rule of reason" became the *sine qua non* of antitrust law. KELLER, *supra* note 132, at 32.

[214] *See* Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 77 (1931) (stating that state action interstate commerce analysis should be determined on a case by case basis, without hypotheticals). *See, e.g.*, Davis v. Farmers' Co-Op. Equity Co., 262 U.S. 312, 315–17 (1923) (taking judicial notice that an undue burden on commerce, and

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

progressivism.[215] In *Jay Burns Baking Co. v. Bryan*, for instance, Justice Butler regaled his colleagues about what he had learned about bread making to establish that the majority had improperly assumed that Nebraska had acted arbitrarily when it exercised its police power and adopted standards for bread being sold at retail.[216] The Court held that the State's measure was "not necessary" under the Court's assessment of the evidence, and as such violated the Fourteenth Amendment.[217] Brandeis responded caustically that "[t]o decide, as a fact, that the prohibition . . . is not necessary . . . is, in my opinion, an exercise of the powers of a super-Legislature—not the performance of the constitutional function of judicial review."[218] But Justice Brandeis' deference to legislative expertise became overshadowed by his style of reasoning and marshaling facts to discredit the majority, and Justice Stone unfortunately conflated the two—and in so doing ultimately stalled the DCC's development.

In DCC domain, after all, insuperable problems emerged as the constitutionality of programs teetered on past formulaic or talismanic tests. The decaying, yet still hovering nineteenth century dual federalism paradigm, posed a catch-twenty-two for the twentieth century economy and the Court's response.[219] States could regulate local activities only incidentally or indirectly affecting commerce, yet were barred from burdening or directly regulating commerce regardless of the

---

making his own assessment that the burden was so high that it "unreasonably" and "unduly" burdened commerce).

[215] *See* Henry F. May, *Shifting Perspectives on the 1920's*, *in* 2 PIVOTAL INTERPRETATIONS OF AMERICAN HISTORY 210, 213 (Carl N. Degler, ed. 1966) ("The typical economic thought of the twenties, while it avoided Utopian extremes, shared with the other social sciences an unlimited confidence in the present possibilities of fact-finding and saw in the collection and use of statistics much of the promise and meaning of the era.").

[216] 264 U.S. 504, 514–16 (1924).

[217] *Id*. at 517.

[218] *Id*. at 534; *see* Cudahy Packing Co. v. Hinkle, 278 U.S. 460, 467–70 (1929) (examining Justice Brandeis' dissenting opinion); Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 91–92 (1927) (presenting Justice Brandeis' dissent); Adams v. Tanner, 244 U.S. 590, 597–616 (1917) (dissenting opinion of Justice Brandeis). This occurred also with state regulation of ice manufacturers. *See* UROFSKY, *supra* note 206, at 578–80 (discussing Justice Brandeis's dissenting style and philosophy); *see also* Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 42–54 (1928) (examining Justice Brandeis dissenting opinion); N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 154–70 (1917) (dissenting opinion of Justice Brandeis).

[219] EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 20 (1934) (presenting a colorful metaphor how the Court had ensured an open and expansive highway extending throughout the country, with neither the states nor Congress capable of placing needed stop signs).

https://scholar.valpo.edu/vulr/vol49/iss3/9

state's purpose.[220] If, therefore, *E.C. Knight* remained, the regulatory vacuum would mirror the forces producing the dynamic confronting health and safety reformers—leaving only a federal prohibitory tax as the possible solution. But the Court later removed that option when it explored the purpose behind the tax and concluded that only revenue infused purposes would suffice.[221] The challenge to the 1921 Grain Future Trading Act, primarily affecting transactions on Chicago's Board of Trade, presented the classic problem.[222] As a prohibitory tax whose "manifest purpose" was other than revenue, the Court rejected it; it also refused to sanction the Act under the Commerce Clause, not only ostensibly because Congress did not include evidence of its relationship to interstate commerce,[223] but also because the Court itself could not discern how futures contracts for delivering grain might *directly* impede interstate commerce.[224] If, conversely, the Court overturned *E.C. Knight* but left intact its tests for analyzing the constitutionality of state regulation, then potentially only Congress could protect against health

---

220 *See* Shafer v. Farmers' Grain Co. of Embden, 268 U.S. 189, 199 (1925) (suggesting that this approach prevailed yet acknowledging the tenuous line between acceptable and impermissible state legislation). Citizens, Justice Van Devanter intimated, enjoyed a "common right" to engage in legitimate interstate activities subject only to Congress' superintending power. *Id.* Earlier, he noted Congress' exclusive charge over interstate commerce, when extending the concept of commerce to include purchasing along with transportation. *See* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290–91 (1921) (discussing that the right to buy shipment does not come from state laws); *see also* Pennsylvania v. West Virginia, 262 U.S. 553, 596 (1923) (noting importance of maintaining uniformity in the commercial intercourse of natural gas, as a "single nation").

221 *See* United States v. Butler, 297 U.S. 1, 55, 57–59 (1936) (highlighting the reasoning for taxes); *see also* Linder v. United States, 268 U.S. 5, 22–23 (1925) (upholding application of the Narcotic Law, but noting caveat about other motives); United States v. Constantine, 296 U.S. 287, 295–96 (1935) (concluding that federal penalty tax imposed for violating state liquor law invaded state's police power). *Butler's* focus on the taxing power was likely a product of a hasty conference. SCHLESINGER, *supra* note 205, at 470–71. In *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 37 (1922), the majority indicated that "[o]ut of respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject." *Id.* The Court later upheld taxes likely intended to affect behavior. *See* Sonzinsky v. United States, 300 U.S. 506, 512–14 (1937) (noting the power and deference given to Congress to impose taxes).

222 *See* Hill v. Wallace, 259 U.S. 44, 68 (1922) (examining whether the regulation is constitutional under the Commerce Clause).

223 *Id.* at 66–69.

224 *See Id.* at 69 (stating that sales from future deliveries are not interstate commerce). The Court distinguished United States v. Patten, 226 U.S. 525, 535–36, 543 (1913), where it upheld a conspiracy conviction against traders on the New York Cotton Exchange that allegedly were running a corner on the available supply of cotton, artificially driving up the price. *Id.* In *Patten*, the Court seemed convinced that the transactions themselves created "artificial conditions" burdening interstate commerce—it "restrict[ed] the common liberty to engage" in such commerce. *Id.* at 541.

and safety threats. This would occur because the Court imbued only Congress with exclusive authority over "commerce."[225]

Neither scenario seemed plausible. The Court's rubric left activities *indirectly* yet *substantially* affecting interstate commerce, as well as activities *directly* yet *minimally* affecting interstate commerce, without ostensible legislative oversight.[226] If the Court found sufficient evidence that the transaction being regulated *directly* burdened interstate commerce, then it upheld the exercise of federal power.[227] Once Justice Holmes' stream of commerce decision nudged the law forward, both his and other opinions involving the Sherman Antitrust Act demonstrated the relationship between local transactions and interstate commerce.[228] In *Stafford v. Wallace*, for instance, Chief Justice Taft employed Chief Justice Marshall's rhetoric for broad national power when upholding the Packers and Stockyards Act of 1921, affording Congress considerable latitude to regulate monopolies affecting the interstate trade in livestock, while conversely issuing another opinion "on the Federal taxing power [that] would have made the Great Nationalist turn over in his grave."[229] The Court also upheld the Interstate Commerce Commission's regulation of intrastate (local) rates for railroads when necessary to avoid the disparity between interstate and intrastate rates.[230] In 1914, Justice

[225] *See* Kidd v. Pearson, 128 U.S. 1, 21 (1888) (noting that if commerce were interpreted broadly it would exclude states from regulating agriculture, fishing, horticulture, stock-raising, or almost "every branch of human industry").

[226] *Hill*, 259 U.S. at 69.

[227] *Id*.

[228] *See* Swift & Co. v. United States, 196 U.S. 375, 399 (1905) (noting that a burden that obstructs interstate trade is not permitted). Before *Swift*, the Court already limited *E.C. Knight* to situations bearing "no distinct relation[ship] to commerce between the states[.]" United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 313 (1897). In *Loewe v. Lawlo*r, 208 US. 274, 297 (1908), the Court limited *E.C. Knight* to situations where the object and intention was not to obstruct or restrain commerce. *Id*; *see* Mulford v. Smith, 307 U.S. 38, 42–43 (1939) (holding that it is illegal to obstruct and burden interstate commerce); Bd. of Trade of City of Chi. v. Olsen, 262 U.S. 1, 40 (1923) (finding that the manipulation of the market for futures obstructs and burdens interstate commerce); Stafford v. Wallace, 258 U.S. 495, 499–500 (1922) (noting that the conspiracy violated the Anti-Trust Act); United States v, Ferger, 250 U.S. 199, 203 (1919) (finding that a congressional exercise of authority over counterfeiting upheld absent any evidence of intent to ship in interstate commerce, because of "relation to and influence upon" commerce); *see also* Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 114 (1993) (tracing the development and implications of the doctrine). *But cf.* Hill v. Wallace, 259 U.S. 44, 67–68 (1922) (invalidating the Grain Future Trading Tax).

[229] 258 U.S. 495, 512, 528 (1922) (holding that the Sherman Antitrust applies to the "practices and obstructions" that burden interstate commerce); ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 244 (1964).

[230] *See* R.R. Comm'n of Wis. v. Chi, B. & Q. R. Co., 257 U.S. 563, 588 (1922) ("interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet

Hughes in the *Shreveport Rate Cases* established that federal power was necessary for the security of the traffic as a consequence of the "close and substantial" relationship between instate and interstate traffic.[231] The years of labor unrest equally demonstrated how commerce and local wage transactions became inseparable, and yet economic biases seemed to dictate which sovereign could regulate strikes.[232]

Also, lingering ubiquitous language about exclusive federal jurisdiction for areas demanding uniformity posed an analytical problem. The Court's language suggested two distinct spheres of jurisdiction.[233] Either juridical lines would block passage from one sphere to another, or the Court would need to justify decisions on some other *ex ante* basis.[234] This became evident in the liquor cases. In *Clark Distilling Co. v. Western Maryland Railroad Co.*, the Court deftly avoiding confronting the argument.[235] The Court previously held that interstate transport of liquor demanded uniformity—subject to Congress' exclusive

when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce"); *see also* Am. Express Co. v. S.D., 244 U.S. 617, 629 (1917) (finding that the government, under the authority of the Commerce clause, can standardize monopolies that have a direct impact on commerce).

[231] Houston, E. & W. Tex. R.R. Co. v. United States, 234 U.S. 342, 351 (1914).

[232] *See* Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of N. Am., 274 U.S. 37, 47–49 (1927) (treating local strikes as conspiracies ultimately designed to affect a company's ability to sell products into the interstate market, forcing unionization). Because strikers' *intent* is to affect the flow of products outside of a state, the Court held strikes are (and *de facto* could be) regulated under the antitrust laws. *Id*. The Court noted that the means chosen would "directly and substantially curtail[], or threaten[] thus to curtail, the natural flow in interstate commerce[.]" *Id*. at 54. "Congress," according to the Court, "with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted." Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 613 (1914); *see also* Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295, 309–10 (1925) (holding that interstate trade and commerce cannot be restricted); Duplex Co. v. Deering, 254 U.S. 443, 478 (1921) (granting an injunction restraining actions that interfere with interstate commerce); Loewe v. Lawlor, 208 U.S. 274, 308–09 (1908) (overturning a lower court's dismissal of a case for damages arising from restrictions on interstate commerce); United States v. Brims, 272 U.S 549, 553 (1926) ("The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well."). The Court's approach toward strikes elicited one of Brandeis' most stinging dissents. *See* PURCELL, *supra* note 208, at 146–47 (discussing Justice Brandeis's opinions and dissents regarding labor injunctions).

[233] *See* Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 327 (1917) (reasoning that interstate commerce is divided into two classes).

[234] *Id*. at 327–29.

[235] *See id*. at 331–32 (finding that state prohibitions cannot attach to intoxicant movements).

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

control.[236] When Congress thereafter sought to sanction state regulation, first in the Wilson Act and then in the Webb-Kenyon Act, the question naturally arose in *Clark Distilling Co.* how Congress could authorize disparate (non-uniform) regulation over matters within its exclusive sphere (because it was a matter demanding uniformity)? With baffling reasoning, the Court responded:

> [T]hat because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and . . . so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution.[237]

Even the nation's leading constitutional scholars could not easily explain how this could be so, if the power over interstate commerce is, indeed, exclusive.[238]

Conversely, in *Lemke v. Farmers' Grain Co. of Embden, North Dakota*, the Court invalidated North Dakota's Grain Grading and Inspection Act.[239] The Act addressed a cooperative association's marketing of North Dakota produced grain into the Minnesota market.[240] The majority treated the Act as a regulation affecting and burdening interstate commerce.[241] The Court rejected North Dakota's pitch that the law was a valid police power measure, until superseded by a federal statute, by merely claiming that it "passe[d] beyond the exercise of its legitimate authority" when it deprived the association of its "privilege" to engage in commerce by burdening commerce.[242] The Court arguably accepted the legitimacy of the State's effort to protect against fraud, but held that the State could not "encroach" upon a "field . . . under federal control."[243] Dissenting, Justice Brandeis retorted that, as a legitimate

---

236 *See id*. at 326–27 (discussing uniformity).

237 *Id*. at 331.

238 *See* Thomas Reed Powell, *The Validity of State Legislation Under the Webb-Kenyon Law*, 2 SO. L. Q. 112, 127 (1917) (noting the power to regulate commerce is given to Congress by the Constitution); *see also* Dowling, *infra* note 303, at 17 (discussing Professor Noel Dowling's analysis).

239 258 U.S. 50, 61 (1922) (holding the act invalid because it goes beyond the state's police power).

240 *Id*. at 53–54.

241 *Id*. at 52.

242 *Id*. at 59.

243 *Id*. at 61.

https://scholar.valpo.edu/vulr/vol49/iss3/9

police power measure, the statute would only be unconstitutional if Congress had so legislated or the law "directly" burdened interstate commerce.[244]

Di Santo v. Pennsylvania perhaps best illustrates an emerging *Zeitgeist* and the desire to fit precedent within it.[245] Pennsylvania's statute required a license for selling steamship tickets for foreign commerce, as well as a bond to ensure against fraud or misrepresentation and proof of good moral character.[246] In one short paragraph of analysis, Justice Butler's majority opinion merely concluded that the statute directly burdened foreign commerce and, therefore, was unconstitutional.[247] Butler's analysis primarily rests on *McCall v. California*, which was nothing more than an extension of *County of Mobile v. Kimball* and *Robbins v. Shelby Taxing District*.[248] And those cases all held that states could not impose a requirement on the federal right to engage in interstate commerce.[249] Justice Brandeis issued a caustic dissent, joined by Justice Holmes.[250] He began by exhorting the majority's failure to recognize the threat animating the state's exercise of its police power, a threat recognized by other states as well.[251] With surgical skill he methodically undermined the majority's assumptions, but demonstrated less alacrity in conceptualizing how to escape the rhetoric of the past.[252] On the one hand, he suggested possibly overruling *McCall*, while on the other, employed the Court's precedent to suggest how cases rest on factual judgments about whether a particular statute obstructs, directly burdens or discriminates against interstate commerce.[253]

Separately dissenting in *Di Santo*, joined by Justices Holmes and Brandeis, Justice Stone suggested that the pre-existing formulations were unnecessary terms capable of being distilled into a principled factual

---

[244] *Id*. at 64.

[245] *See* Di Santo v. Pa., 273 U.S. 34, 37 (1927) (noting that the majority did not depart or expand precedent).

[246] *Id*. at 35–36.

[247] *See id*. at 37 (stating that a state statute is invalid if it interferes or burdens interstate commerce, regardless of the intended purpose of the statute).

[248] *See* McCall v. Cal., 136 U.S. 104, 108–09 (1890) (holding that the legislature cannot tax, license, or condition so that interstate commerce is obstructed).

[249] *See supra* note 228 and accompanying text (stating that Congress has the police power to regulate interstate trade).

[250] *Di Santo*, 273 U.S. at 37–43.

[251] *Id*. at 37–39.

[252] *Id*. at 37–38.

[253] *See id*. at 39, 41 (illustrating that Brandeis rejected state measures designed to discriminate against interstate commerce, treating them as impermissibly directly burdening interstate commerce); *see also* Buck v. Kuykendall, 267 U.S. 307, 315–16 (1925) (distinguished an instance where the indirect burden on interstate commerce was not "unreasonable").

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

inquiry.[254] He opined that labels such as "direct" and "indirect" are "too mechanical," and that instead the Court should examine the array of facts: did the program discriminate against or create an obstacle or barrier to the free flow of commerce, considering "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[?]"[255] He equally argued that a court could legitimately assess factually whether the regulation was one of a "local concern" or infringed a "national interest in maintaining the freedom of commerce across state lines."[256] Not coincidentally, Justice Stone's dissent occurred a year after he emphasized the importance of examining facts and actual effects in the context of an intergovernmental immunity claim.[257]

Justice Cardozo's struggle with New York's milk pricing laws similarly presented the emblematic problem. G.A.F. Seelig, Inc. purchased milk from Vermont sellers at prices below the allowed minimum purchase price under New York law, and New York therefore denied the company's license to sell that milk into the New York market.[258] "The New York Milk Control Law was enacted in an attempt to relieve the depressed condition of dairy farmers and to stabilize the chaotic marketing and distribution structure."[259] Cardozo began by observing that states could not erect barriers against commerce, joining together constitutional provisions about imposts, duties, and commerce.[260] From there, he noted how the Commerce Clause operated

[254] *See Di Santo*, 273 U.S. at 43–45 (taking note of Justice Stone's dissenting opinion). Holmes had earlier suggested that he would find discriminatory regulations for natural resources acceptable, and that a state could regulate resources prior to entering the stream of commerce. *See* Pennsylvania v. West Virginia & Ohio, 262 U.S. 553, 600–01 (1923) ("products of a State until they are actually started to a point outside it may be regulated by the State" (citing Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923))). In 1922, Justice Holmes also concluded fairly simplistically that America's past-time, major league baseball, fell outside of commerce. *See* Fed. Base Ball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200. 208–09 (1922) (holding baseball is state regulated).

[255] *Di Santo*, 273 U.S. at 44.

[256] *Id*. at 44–45 (taking special note of key words "local concern[,]" "local character," "more than local in character[,]" and "peculiarly local").

[257] *See* Noel T. Dowling et al., *Mr. Justice Stone and the Constitution*, 36 COLUM. L. REV. 351, 354–58 (1936) (taking note of Justice Stone's dissenting opinions).

[258] *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 520 (1935) (holding that a license will not be issued to a milk creamery that sells at prices lower than the established minimum threshold).

[259] Comment, *Milk Regulation in New York*, 46 YALE L.J. 1359, 1360 (1937) (footnote omitted).

[260] *See Baldwin*, 294 U.S. at 521–22 (discussing the constitution in conjunction with other economic ramifications). A year earlier the Court examined whether New York acted arbitrarily or discriminatorily in enacting New York's milk price control law. Nebbia v. New York, 291 U.S. 502, 536–37 (1934); *see also* Borden's Farm Prods. Co. v. Ten Eyck, 297

https://scholar.valpo.edu/vulr/vol49/iss3/9

to prevent interstate competition and jealousies.[261] "National solidarity" and the idea that all U.S. citizens should "sink or swim together" undergird his analysis.[262] And here, the State's interest was "too remote and indirect" to justify the direct burden on interstate commerce.[263] Yet, Cardozo's decision in *Henneford v. Silas Mason Co.* upheld Washington State's compensating use tax, which accomplished essentially the same result as in *Seelig*.[264] Even Cardozo's biographer suggests that Cardozo poorly explained the distinction between the two cases.[265]

Judges and scholars uniformly recognized the idiosyncratic nature of the Court's opinions.[266] One observer, for instance, lamented that the

---

U.S. 251, 261 (1936) (reviewing the prices based on trade names); Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 274–78 (1936) (noting Justice Cardozo's dissenting opinion observing no distinction in this case invalidating distinction based on whether well-advertised trade names and other *Ten Eyck* case); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 172 (1934) (upholding New York order fixing minimum producer and resale prices).

[261] *Baldwin*, 294 U.S. at 522–23.

[262] *Id*. at 523, 527 (illustrating that an "economic barrier" is an "unreasonable clog upon the mobility of commerce").

[263] *See id*. at 524 (noting the type of interstate commerce obstruction that is not allowed). Cardozo acknowledged the line between permissible and impermissible regulation was one of "degree[,]" suggesting the inquiry turns on whether the object of the regulation is normally associated with commerce and whether the effect on commerce is drastic. *Id*. at 525–26. He also accepted the original package doctrine as an "illustration of principle." *Id*. at 526–27.

[264] Henneford v. Silas Mason Co., 300 U.S. 577, 583–84 (1937).

[265] *See* ANDREW L. KAUFMAN, CARDOZO 531–32 (1998) (taking note of the fact there was not a clear distinction drawn between the two cases). Cardozo wrote Justice Hughes suggesting a willingness to examine both the legislative justification and necessity for national legislation. *Id*. at 519–20. Kaufman suggests that Cardozo examined "whether the impact of the activity was predominantly local or not." *Id*. at 521. Frankfurter, however, cautions that Cardozo adhered to "classic doctrines for constitutional adjudication" and seemingly justifies Cardozo's opinion in *Seelig* as an area less important to Cardozo and decided based on prevailing precedent. Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 39 COLUM. L. REV. 88, 117–18 (1939).

[266] *See generally* James M. Beck, *Nullification by Indirection*, 23 HARV. L. REV. 441, 454–55 (1910) (analyzing the impact of Supreme Court decisions); Henry Wolf. Biklé, *The Silence of Congress*, 41 HARV. L. REV. 200, 220–24 (1927) (considering various Supreme Court decisions in conjunction "with the doctrine that Congress has exclusive power to regulate commerce among the states"); Robert Eugene Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 381, 452, 482–83 (1919) (discussing the scope of the national police power); Bernard C. Gavit, *Jurisdiction over Causes of Action Against Interstate Carriers*, 3 IND. L.J. 130, 130–38 (1928) (examining the jurisdiction of state courts over interstate carriers and related causes of action); Thurlow M. Gordon, *The Child Labor Law Case*, 32 HARV. L. REV. 45, 51–52 (1918) (exploring the Court's decision in the Child Labor Law Case); Charles W. Needham, *The Exclusive Power of Congress over Interstate Commerce*, 11 COLUM. L. REV. 251, 260 (1911) (explaining when a conflict of law arises); Clarence G. Shenton, *Interstate Commerce During the Silence of Congress*, 23 DICK. L. REV. 78,

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

decisions reflected the Court's judgment about the level of confusion attendant with particular state efforts.[267] Irving Brandt's widely read *Storm over the Constitution* suggested that the Court ignored the framers by defending a plutocracy's aversion to strong nationalism.[268] The Court's imponderable dilemma became pronounced. Against a backdrop of treatises and articles on the police power generally, attention shifted to the Commerce Clause specifically.[269] In 1928, George Reynolds published a text on the regulation of interstate carriers, chronicling the rise of federal authority and concomitantly chaotic aspects of precedent.[270] His analysis generally portrayed how the Court's decisions could not be grouped according to economic effects on commerce.[271] Four years later, Bernard Gavit published a comprehensive analysis of the Court's jurisprudence, observing the "utter confusion[]" of "[t]he language of the cases" and "repeated expressions of self-evident contradictions."[272] In 1933, Professor Corwin attributed the Court's difficulty to the doctrine of dual federalism.[273] Then, in 1934, he published *The Twilight of the Supreme Court,* and two years later *The Commerce Power Versus States Rights*, where he advanced powerful arguments supporting Congress' broad Commerce Clause power.[274] Also in 1936, Corwin explained how the direct/indirect

---

139, 160–64 (1918) (concluding that "considerable uncertainty prevails" regarding the validity of state regulations affecting interstate commerce).

[267] *See* Shenton, *supra* note 266, at 107, 139 (discussing state regulation of packages by statute).

[268] IRVING BRANT, STORM OVER THE CONSTITUTION 242–43 (1936); *see also* DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 17 (1936) (portraying judges as political actors, thwarting progress).

[269] *E.g.*, ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 66 (1904); THOMAS REED POWELL, THE SUPREME COURT AND STATE POLICE POWER, 1922–1930, at 40–41 (1932).

[270] *See* GEORGE G. REYNOLDS, THE DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS BETWEEN THE NATION AND THE STATES 117 (1928) (noting expansion of federal control).

[271] *Id*.

[272] GAVIT, *supra* note 186, at 3 (1932); *see also* JANE PERRY CLARK, THE RISE OF A NEW FEDERALISM: FEDERAL-STATE COOPERATION IN THE UNITED STATES 5 (1938) (discussing the lack of predictability in the interpretation of the Constitution); JOSEPH E. KALLENBACH, FEDERAL COOPERATION WITH THE STATES UNDER THE COMMERCE CLAUSE 10 (1942) (examining whether the framers intended to confer exclusive power on Congress); F.D.G. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 9–10 (1937) (discussing the interpretation of the commerce clause); John B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 559 (1936) (contrasting the exclusive and concurrent theories in defining the sphere of state power).

[273] Edward S. Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 481 (1933).

[274] CORWIN, *supra* note 219, at xxvii; EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS 17–19 (1936).

https://scholar.valpo.edu/vulr/vol49/iss3/9

phrases served as linguistic devices, originally intended to free the states from an otherwise restrictive view of exclusive authority in Congress, which then were improperly transplanted into *E.C. Knight* and Congress' power.[275] In 1937, Dean Alfange wrote that *E.C. Knight* reflected the Court's power of legislating by unbridled interpretation of the Constitution, and that it allowed big business to play the states against the Federal Government, or vice versa, whenever it suited their needs.[276] Further, Felix Frankfurter published his classic *The Commerce Clause Under Marshall, Taney and Waite*, chronically how the early Chief Justices addressed the issue of exclusivity.[277]

The early New Deal Court fueled the debate by invalidating aspects of President Roosevelt's program, particularly the National Industrial Recovery Act ("NIRA"). In *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated (nine to zero) the fair practice and wage and hour provisions of the Live Poultry Code established by Roosevelt.[278] Chief Justice Hughes warned that, if Congress' commerce power extends to such matters of domestic or local concern, then states would be at the sufferance of Congress.[279] Hughes employed direct/indirect rhetoric and rejected sanctioning federal power when merely indirect effects were present, and he further recounted how the law focused on local activities—"building is as essentially local as mining, manufacturing or growing crops[.]"[280] The opinion's rhetoric also reached back to Chief Justice Marshall's opinion in *Brown*, suggesting that the chickens had come to rest in New York and ceased to be in interstate commerce—and conversely were subject to regulation by the state.[281] But the holding seemed predictable. After all, the able jurist Judge Learned Hand thought it unconstitutional and Felix Frankfurter feared having this test case go to the Court.[282] Justice Brandeis afterward exhorted his friends

---

[275] E. S Corwin, *The Schechter Case—Landmark, or What?*, 13 N.Y.U. L.Q. Rev. 151, 161–62 (1936).

[276] DEAN ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL 147, 149 (1937).

[277] FRANKFURTER, *supra* note 97, at 1, 7.

[278] 295 U.S. 495, 551 (1935) (invalidating the fair, wage, and hour provisions of the Live Poultry Code).

[279] *Id.* at 544.

[280] *Id.* at 547. Concurring, Justice Cardozo (joined by Stone) could not sanction congressional regulation of wages and hours for intrastate transactions, employing language from Judge Hand's lower court opinion. *Id.* at 554 (Cardozo, J., concurring). Finding directness here he feared would render the test conceptually unbounded. *Id.*

[281] *See* FISS, *supra* note 100, at 267 (stating Chief Justice Marshall's dictum of DCC in *Brown v. Maryland*).

[282] *See* SCHLESINGER, *supra* note 205, at 278 (stating the Court removed a federal prohibitory tax when it explored the purpose behind the tax and concluded that only revenue infused purposes would suffice); Cushman, *supra* note 228, at 132 (noting reluctance about the case); *see also* Ralph F. Fuchs, *A Postscript—The* Schechter *Case*, 20 ST.

on how the President had gone too far in attempting to centralize virtually everything.[283]

A perturbed FDR responded with his famous horse and buggy press conference.[284] He suggested that the interstate commerce discussion brought the country back to the *E.C. Knight* days, ignoring how the country had evolved from "the horse-and-buggy age when that clause was written" and when "[t]here [was not] much interstate commerce at all—probably [eighty or ninety percent] of the human beings in the thirteen original States were completely self-supporting within their own communities."[285] Since that time, he continued, the country and commerce changed radically; it had become "inter-dependent" with goods and products from the states tied together, necessitating the need for congressional authority over matters indirectly affecting commerce.[286]

The ensuing clamor urging that the Court revisit its approach to the Commerce Clause could not be divorced from ostensible reciprocal limitations under the DCC. After all, the rhetoric for one necessarily influenced the other. And for activities untethered to interstate commerce directly, the dilemma became accentuated when, in 1936, the Court also held that liberty of contract prevented New York from prescribing minimum wages for women working in New York

LOUIS L. REV. 297, 299, 301–03 (1935) (noting that *Schechter* was a difficult case to argue, and that the government's brief, along the lines of a Brandies brief, tried to present economic facts). New Deal advocate Robert Jackson admitted how the N.I.R.A. was a bold experiment, with the Recovery Administration perhaps too unfocused and "[t]he [*Schechter*] case was far from ideal as a test case." ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 113 (1949).

283 JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 136–37 (2010); *see* SHALES, *supra* note 200, at 243 (stating President Herbert Hoover rejected laissez faire doctrine when promoting regulation as mechanism for ensuring equal opportunity). Earlier, progressive journalist Walter Lippmann expressed a similar sentiment. *See* KENNEDY, *supra* note 200, at 186 (discussing the need for government guidance in modern industrialism). In his 1937 congressional testimony, Professor Corwin later testified that he too had problems with the Act, not necessarily its constitutionality. 2 CORWIN ON THE CONSTITUTION: THE JUDICIARY 257–58 (Richard Loss ed., 1987). Later, in *Carter v. Carter Coal*, the Court rebuffed the Bituminous Coal Conservation Act, expressing the truism that the national legislative and state police powers could not invade the others' turf. 298 U.S. 238, 323 (1936).

284 *See* KENNEDY, *supra* note 200, at 328 (quoting Roosevelt's speech).

285 4 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE COURT DISAPPROVES 209 (1938) (citing Franklin D. Roosevelt, Horse & Buggy Speech); *see also* SHESOL, *supra* note 283, at 147–50 (discussing Justice Brandeis' opinion that the President had gone too far in attempting to centralize everything).

286 SHESOL, *supra* note 283, at 149–50.

Kalen: Dormant Commerce Clause's Aging Burden

laundries.[287] Justice Stone wrote his sister that "[s]ince the Court last week said that this could not be done by the national government, as the matter was local, and now it is said that it cannot be done by local governments even though it is local, we seem to have tied Uncle Sam up in a hard knot."[288] An open dialogue about the DCC then surfaced among the Justices.

Whether or not one considers 1937 a watershed constitutional moment, it serves as a convenient loci for exploring how the DCC began its final journey to its modern pedestal.[289] It was 1937 when the Court purportedly abandoned a dual federalism paradigm that distinguished between local intrastate and national interstate activities, by affirming Congress' power to address local intrastate activities with a "close and substantial relation" to commerce.[290] Commensurately, a year later the

---

[287] Morehead v. N.Y. *ex rel.* Tipaldo, 298 U.S. 587, 610–11 (1936). The Court principally relied on *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). *Id*. at 604. Dissenting, Chief Justice Hughes emphasized the legislative findings and the considerable factual material presented to the Court justifying the measure. *Id*. at 625–27 (Hughes, C.J., dissenting). Also dissenting, Justice Stone added that "[i]t is difficult to imagine any grounds, other than our own personal economic predilections," for objecting to such a legislative effort. *Id*. at 633 (Stone, J., dissenting). *Tipaldo*, of course, became fleeting. *See* West Coast Hotel Co. v. Parish, 300 U.S. 379, 401 (1937) (relying on *Adkins*, the court "fled" away from the *Tipaldo* opinion).

[288] *See* Kennedy, *supra* note 200, at 329 (quoting Stone's private letter).

[289] *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 213, 236 (1995) (examining what the author calls "The Constitutional Revolution of 1937"); PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES: 1918–1969, at 98–99, 127 (1972) (evaluating the changes in the Supreme Court between 1929 and 1937); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 40 (1993) (discussing "The Revolution of 1937"); WHITE, *supra* note 44, at 6 (2000) (evaluating The New Deal); Cushman, *supra* note 43, at 208–25 (stating that the justices struggled with jurisprudential continuity); *see also* Cushman, *supra* note 228, at 105 (discussing the effects of the New Deal); Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95–96, 99–100 (1999) (reviewing Justice Roberts' opinions to explore constitutional change); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1893–1894 (1994) (analyzing "the so-called 'switch in time' of 1937[]" (footnote omitted)); David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 127–28 (1998) (supporting the argument for a constitutional revolution). Of course, William Leuchtenburg notes that Justice Roberts' votes in the minimum wage cases, first in *Tipaldo* and later in *West Coast Parish*, were not a product of the pending FDR court packing plan. LEUCHTENBURG, *supra* at 289. Indeed, Justice Frankfurter later reported that Roberts would have voted differently in *Tipaldo* and overruled *Adkins* had a majority of justices so agreed. Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313–14 (1955). For a recent account of the infamous FDR court packing plan, see Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. 2089, 2103 104 (2013).

[290] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding National Labor Relations Act). The Court abandoned the need to employ a "stream of commerce" theory, instead concluding that Congress exercises plenary power to protect interstate commerce.

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

Court held that states could regulate—albeit within limits—local activities that directly affect interstate commerce. In *South Carolina State Highway Department v. Barnwell Brothers Inc.*, the Court, through Justice Stone, reviewed an injunction restraining South Carolina's limit on the weight and width of motor vehicles permitted on its highways.[291] The plaintiffs claimed the measure violated the Fourteenth Amendment, was superseded by the 1935 Federal Motor Carriers Act, was arbitrary and unreasonable in light of the federal aid supporting the highway system, and impermissibly directly and substantially burdened interstate commerce.[292] The Court already had held that absent discrimination or federal legislation, states could prescribe uniform regulations to promote safety on interstate highway systems.[293]

Justice Stone responded by emphasizing that states enjoy considerable leeway in regulating matters of "local concern" even though a regulation may affect interstate commerce.[294] His opinion initially intimated that the boundary for impermissible state regulation would be breached when a measure discriminates against interstate commerce.[295] The reason, he suggested, was a political process one: if a state favored in-state over out-of-state economic interests, the "political restraints" that normally surround regulation would not be present.[296]

Id. at 37. "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power . . . ." *Id*. The "close and substantial relation" test surfaced earlier in the interstate carrier cases. *See, e.g*. Houston, E. & W. Tex. R.R. Co. v. United States, 234 U.S. 342, 351 (1914) (reasoning that Congress' authority to regulate interstate carriers "necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic[]"). *See generally* Cushman, *supra* note 228, at 143–50 (describing the litigation in *NLRB v. Jones & Laughlin Steel*).

[291] 303 U.S. 177, 178 (1938). South Carolina had regulated traffic on its highways starting in the 1920s, and only two years earlier the Court had denied certiorari in a similar challenge to the South Carolina law. South Carolina v. John P. Nutt Co., 185 S.E. 25 (1935), *cert. denied*, 297 U.S. 724, 724 (1936).

[292] *Barnwell Bros*., 303 U.S. at 181.

[293] Morris v. Duby, 274 U.S. 135, 143 (1927).

[294] *Barnwell Bros*., 303 U.S. at 184–85; *see also id*. at 187 ("a state can . . . materially affect[]" interstate commerce); *id*. at 189 ("But so long as the state action does not discriminate, the burden is one which the Constitution permits . . . .").

[295] *Id*. at 185 n.2. Elsewhere he further emphasized that "[t]he commerce clause by its own force, prohibits discrimination against interstate commerce, whatever its form or method[.]" *Id*. at 185; *see also id*. at 187 (equal treatment "a safeguard against [] abuse"); *id*. at 189 ("It may not, under the guise of regulation, discriminate against interstate commerce.").

[296] *Id*. at 185 n.2.

https://scholar.valpo.edu/vulr/vol49/iss3/9

He reiterated this point two years later in a DCC tax case.[297] Echoing the sentiments of Justices Black, Frankfurter and Douglas, he noted that Congress could legislate when that body believes the burdens on commerce are too great—a judgment that necessarily "is a legislative, not a judicial, function[.]"[298] Indeed, his opinion is almost annoyingly riddled with refrains that certain determinations are legislative, not judicial. And strikingly absent from the opinion, however, is any suggestion that the Court should examine the nature or extent of any burden on interstate commerce.[299]

Yet Stone's attempt to weave a hundred years of cases into a coherent pattern, premised upon perceived long-standing doctrines, elicited throughout his opinion seemingly idiosyncratic language.[300] Stone variously asserted that states may "materially interfere with interstate commerce[]" when addressing local interests, but equally intimated that they must act within their "province" and that "the means of regulation chosen are reasonably adapted to the end sought[,]" that the Commerce Clause operated to prevent nominally "local" regulation from securing "local benefit[s] by throwing the attendant burdens on those without the state[,]" as "preclud[ing] the subordination of the efficiency and convenience of interstate traffic to local service requirements"—when, for instance, restrictions might be "unnecessarily harsh."[301] And he undoubtedly conflated his approach toward the Fourteenth Amendment and the DCC when he believed that a Court could examine whether a measure (the *end*) was truly local and if the *means* were sufficiently tailored to achieving the local objective.[302] While

---

297 McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45 n.2 (1940) ("[T]o the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.").

298 *Barnwell Bros.*, 303 U.S. at 190; *see also id.* ("[C]ourts do not sit as Legislatures, either state or national."). "[F]airly debatable questions . . . are not for the determination of courts[.]" *Id.* at 191. "[C]ourts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment." *Id.*

299 HERBERT WECHSLER, PRINCIPLES, POLITICS, & FUNDAMENTAL LAW 118 (1961) (extolling Stones' approach and yet downplaying *Barnwell's* emphasis). Even so, *Barnwell* curiously is inserted in some textbooks under the heading for modern balancing. KATHLEEN M. SULLIVAN, GERALD GUNTHER, CONSTITUTIONAL LAW 222 (17th ed. 2010).

300 Cushman, *supra* note 228, at 148 (observing how Chief Justice Hughes engaged in a similar effort in *Jones & Laughlin Steel*, while trying to preserve some semblance of dual federalism).

301 *Barnwell Bros.*, 303 U.S. at 186 n. 4 & 186–90 (footnote omitted).

302 *Id.* at 187. In *Buck v. Kuykendall*, Justice Brandeis indicated that state highway measures that "indirect[ly] burden" interstate commerce must be reasonable. 267 U.S. 307, 315 (1925). He invoked *Michigan Public Utilities Comm'n v. Duke*, where the conservative

he sought to rest the DCC on discrimination, he nevertheless joined the Commerce Clause inquiry with his response to the Fourteenth Amendment challenge when examining whether the means the state choose were "without [a] rational basis."[303] As every student of constitutional history learns, this is precisely Stone's contribution to equal protection jurisprudence in his famous footnote four of *United States v. Carolene Products Co.*[304]

IV. PROFESSOR THOMAS R. POWELL, *COOLEY*, AND *SOUTHERN PACIFIC*

But seven years after *Barnwell*, when Justice Stone yet again battled DCC jurisprudence, he—whether deliberately or not—swerved the law slightly backward.[305] By this time, the Court enjoyed a markedly different composition: Hugo L. Black (1937), Stanley F. Reed (1938), Felix Frankfurter (1939), William O. Douglas (1939), Frank Murphy (1940),

---

Justice Butler had indicated that state measures must be necessary, uniform and reasonable. 266 U.S. 570, 576–77 (1925).

[303] *Barnwell Bros.*, 303 U.S. at 192. Supporting review, Justice Stone cited an equal protection case. *Id.* (citing Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936)) (involving an equal protection challenge to New York's law on the sale of milk and distinguishing between those with well-advertised trade names and those without). And while it appears that his inquiry into the merits relates to the Fourteenth Amendment claim, he did not clearly separate the analysis. *Barnwell Bros.*, 303 U.S. at 190–96. Samuel Konefsky's biography of Stone illustrates *Barnwell's* ambiguity, with Konefsky initially suggesting that Stone focused on whether the state measure discriminates against interstate commerce, and yet later suggesting that the test is whether it discriminates or "actually impede[s] the mobility of such commerce." SAMUEL J. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 62, 65 (1946); *see* Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 11–14 (1940) (reviewing Stone's attitude toward multiple burdens in tax cases, and observing how Stone's disagreement with some of his colleagues centered on whether discrimination in "effect" as well as "purpose" violated the DCC, with some justices opposing its expansion to "effects"). Of course, exploring "purpose" mirrored the substantive due process inquiry of conservative Justices. *See* Nebbia v. New York, 291 U.S. 502, 539, 556 (1934) (McReynolds, J., dissenting) ("we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power").

[304] 304 U.S. 144, 152 n.4 (1938). The Chief Justice believed that the Court could examine legislative judgments to ensure protection for minority groups denied sufficient access to the democratic process. *Id.*; *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 601 (1940) (Stone, C.J., dissenting) (expressing support for the freedoms guaranteed to all under the Fourteenth Amendment); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948–52, 966 (1987) (chronicling the rise of balancing, including in DCC context and noting relationship to due process analysis). *See generally* Barry Cushman, *Carolene Products and Constitutional Structure*, 2012 SUP. CT. REV. 1, 54 (analyzing the role of due process in Commerce Clause analysis).

[305] S. Pac. Co. v. Arizona, 325 U.S. 761, 783–84 (1945); *see infra* note 348 and accompanying text (stating that Stone endorsed an approach by Columbia Law Professor Noel T. Dowling and Harvard Law Professor Thomas Reed Powell in favor of the railroad industry).

Robert H. Jackson (1941), Wiley B. Rutledge (1943), and shortly thereafter Harold H. Burton (1945), Frederick M. Vinson (1946), Tom C. Clark (1949), and Sherman Minton (1949).[306] The historic mechanical tests as applied to Congress' Commerce Clause power had been abandoned in favor of a more expansive test in *Wickard v. Filburn*, and in the intergovernmental immunity context, the Court had eroded the notion of jurisdictional spheres endemic to dual federalism.[307] The chasm left by the progressive attack on the Court's earlier legal consciousness could not be more pronounced than in the DCC arena. Once it became no longer tenable to distinguish between commerce and not commerce—the former funnel for channeling activities toward the federal or state spheres under an exclusivity paradigm, the Court lost its theory and accompanying test for classifying permissible and impermissible state and local regulation. In other words, it threatened to lose its engagement and relationship with the past. Post-World War II, however, demanded some theory.[308] Hence, pernicious consequences seemed inevitable if the

---

[306] MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953, at 15–30 (1997).

[307] 317 U.S. 111, 125 (1942) (holding that Congress could regulate local matters substantially affecting interstate commerce); *see* United States v. Rock Royal Co-Op, 307 U.S. 533, 568 (1939) ("inextricably intermingled with and directly affects" product moving in interstate market). "The authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *Id.* at 569–70; *see also* United States v. Darby, 312 U.S. 100, 121 (1941) ("so commingled with or related"); United States v. Wrightwood Dairy, 315 U.S. 110, 119 (1942) (intrastate activities that "so affect interstate commerce, or the exertion of the power" is necessary to achieve legitimate end; "in a substantial way interfere with or obstruct" Congress' power; intrastate and interstate "inextricably commingled"); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 1–2 (1950) (discussing the shift from a focus on constitutional rights to constitutional powers). *See generally* Thomas R. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633, 633–34 (1945) (considering the state of intergovernmental tax immunity before and after the October 1937 term of the Supreme Court); Thomas R. Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757, 757–58 (1945) (examining intergovernmental tax immunities after 1937).

[308] *See generally* DUXBURY, *supra* note 205, at 200–99 (analyzing the prevailing theories post World War II); STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERISM: AN INTELLECTUAL VOYAGE 188–98 (2000) (examining the consequences of the postmodern period); PURCELL, *supra* note 203, at 95 (suggesting that new movements in law challenged "central assumptions of traditional theory"); WILLIAM M. WIECEK, 12 THE OLIVER WENDELL HOLMES DEVISE: THE BIRTH OF THE MODERN CONSTITUTION, THE UNITED STATES SUPREME COURT, 1941–1953, at 440–63 (2005) (evaluating American jurisprudence after the war); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 280–82 (1973) (discussing the elements of Realism); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 999–1000 (1972) (considering the struggle between Sociological Jurisprudes and Realists).

Produced by The Berkeley Electronic Press, 2015

Court were to fall back on a pure concurrent theory—leaving state and local regulation unrestrained would prompt federal legislation and potentially greater centralization; it optically would untether the past without judicial rhetoric sufficient to provide reasoned justification; it would leave unchecked too many activities warranting scrutiny, ranging from taxing airplanes to racial discrimination on common carriers.[309] The only alternative would be for the Court to breath greater life into the privileges and immunities clause.[310]

Reluctant to untether the Court's rope to its past, the Justices began exploring how to employ rhetoric tying its past to present proclivities.[311] In 1941, Robert Jackson unabashedly wrote that "liberal-minded lawyers" needed to participate in the evolutionary process of interpreting the Constitution and responding to society's challenges.[312] However, how the Court would accomplish this became muddled under a progressive paradigm that promoted nationalism, legislative democracy, and facts over legal fictions. Several of the Justices

---

309 *See* Northwest Airlines v. Minnesota, 322 U.S. 292, 304 (1944) (observing that local taxes aggregated might balkanize and retard air travel, and that while older legal philosophy might have supported a state's right to tax, this is "one of those cases where legal philosophy has to take account of the fact that the world does move." (Jackson, J., concurring)). Justice Black too concurred in Justice Frankfurter's majority opinion, suggesting the need for congressional action. *Id*. at 301–02 (Black, J., concurring). Chief Justice Stone dissented, believing Minnesota's tax imposed an unconstitutional burden on interstate commerce, in light of the threatened multiple tax burdens facing the airline industry. *Id*. at 308 (Stone, C.J., dissenting). But Stone's penchant for merging the Due Process and Commerce Clauses surfaced again, with the Justice observing "it has met the problem of burdensome multiple taxation by the several states through which such vehicles pass by recognizing that the due process clause or the commerce clause or both preclude each state from imposing on the interstate commerce involved an undue or inequitable share of the tax burden." *Id*. at 313–14; *see* Morgan v. Virginia, 328 U.S. 373, 386 (1946) (invalidating a Virginia statute that allowed segregation of passengers of public motor carriers). *See generally* Thomas R. Powell, Northwest Airlines v. Minnesota*: State Taxation of Airplanes—Herein Also of Ships and Sealing Wax and Railroad Cars*, 57 HARV. L. REV. 1097, 1097 (1944) (explaining that the problem in taxing airplanes and ships arises because they do not remain in a single state).

310 *See* Madden v. Kentucky, 309 U.S. 83, 90–93 (1940) (explaining discriminatory ad valorem tax punishing out-of-state deposits is not a privilege of national citizenship, rejecting a privileges and immunities claim), *overruling* Colgate v. Harvey, 296 U.S. 404 (1935). Dissenting in *Colgate*, Justice Stone would have upheld a discriminatory tax, reasoning that the Court would need to find a "clear indication that the purpose or effect is a hostile or oppressive discrimination against particular persons or classes." *Colgate*, 296 U.S. at 437 (Stone, J., dissenting).

311 *See* UROFSKY, *supra* note 306, at 40–42 (emphasizing the justices' different approaches).

312 JACKSON, *supra* note 282, at xiv. Justice Jackson later objected to a perceived extraterritorial operation of a state tax. General Trading Co. v. State Tax Comm'n of Iowa, 322 U.S. 335, 339–40 (1944) (Jackson, J., dissenting). "I can think of nothing in or out of the Constitution which warrants this effort to reach beyond the State's own border[.]" *Id*. at 340.

individually explored different paths for achieving this result—albeit wary of precedent. For instance, in *Milk Control Board of Pennsylvania v. Eisenberg Farm Products*, Justice Roberts, who later expressed uneasiness with his colleagues' penchant for abandoning precedent, recognized that states could indirectly affect interstate commerce when controlling local conditions, and suggested that knowing when a measure is a legitimate effort to control local conditions is necessary as a consequence of "our dual form of government[]" and arises due to the "application in connection with the myriad variations in the methods and incidents of commercial intercourse."[313] He endorsed balancing by suggesting that the Court's function would be to "weigh[] the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record."[314] But Roberts' perfunctory nod toward balancing would linger, while the Justices for the next decade plodded along until they could coalesce around an accepted rhetoric and theory.

Barnwell's almost exclusive focus on discrimination, averting *post-hoc* inquiries, appeared destined for consensus.[315] Although diverging on policy, both Justices Douglas and Frankfurter appeared comfortable with a discrimination-laden test.[316] Frankfurter suggested that, in the economic sphere where both the federal government and the states "may move," the line between exclusive and concurrent jurisdiction "depends ultimately upon the philosophy of the Justices regarding our federalism."[317] But he equally wrote about the Commerce Clause

---

313 306 U.S. 346, 352 (1939); *see* Mahnich v. Southern Steamship Co., 321 U.S. 96, 113 (1944) (Roberts, J., dissenting) (reasoning that the majority disregards precedent).

314 *Id*. Commenting later, Roberts observed that the Court asked whether the state measure interfered with interstate commerce, by either taxing directly interstate commerce, obstructing commerce, or imposing burdensome regulations on interstate business. *See* OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION: THE OLIVER WENDELL HOLMES LECTURES 39 (1951) (discussing the considerations of interstate commerce cases).

315 McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 44–45 & n.2 (1940) (rejecting "mechanical or artificial distinctions" and instead seemingly appearing to focus on whether the tax operated to disadvantage or prohibit—that is, discriminate—against interstate commerce). *Cf.* Clark v. Gray, Inc., 306 U.S. 583, 595 (1939) (accepting state justification for treating in-state and interstate transportation of cars differently). For the intricacies of the *Berwind* case, see Thomas R. Powell, Note, *Sales and Use Taxes: Collection from Absentee Vendors*, 57 HARV. L. REV. 1086, 1092 (1944).

316 *See* Int'l Harvester Co. v. Dep't of Treas. of Ind., 322 U.S. 340, 345–49 (1944) (examining whether the state tax discriminated against interstate commerce); General Trading Co. v. Tax Comm'n of Iowa, 322 U.S. 335, 338 (1944) ("obviously hostile or practically discriminatory toward interstate commerce"); *see also* Hale v. Bimco Trading, Inc. 306 U.S. 375, 379–81 (1939) (invalidating Florida's unjustified discriminatory treatment of out-of-state cement).

317 Frankfurter, *supra* note 214, at 68. Endorsing his perceived understanding of Justice Brandeis, he wrote:

protecting free trade among the states and the inability of states to tax transactions outside their domain.[318] Others too focused principally on discrimination.[319] Conversely, Justice Black generally believed that "[t]he control of future conduct, the prevention of future injuries and the formulation of regulatory rules in the fields of commerce and taxation, all present legislative problems."[320] Jackson initially sided with Justices Frankfurter, Black, and Douglas in suggesting that the Court should avoid examining whether a state's regulation interfered with some *post hoc* judicially perceived need for national uniformity—albeit later endorsing the Court's role of averting economic balkanization.[321]

Yet the progressive nationalist tendency and accompanying need for uniformity in some areas garnered considerable support. Early progressives touted the need to distinguish between local matters and those demanding uniformity.[322] The prominent Commerce Clause treatise in the late nineteenth century described as a well settled rule the formulae from *Cooley* distinguishing between "matters admitting

> "[Justice Brandeis] is keenly mindful that the Nation spans a continent and that, despite the unifying forces of technology, the States for many purposes remain distinctive communities. As to matters not obviously of common national concern, thereby calling for a centralized system of control, the States have a localized knowledge of details, a concreteness of interest and varieties of social policy, which ought to be allowed tolerant scope."

Id. at 68; *see also* Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767, 777, 780 (1947) (Frankfurter, J.) ("Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority."). Frankfurter described as "statecraft" the role of judges in accommodating changing conditions to "past utterances" when employing the Commerce Clause. FRANKFURTER, *supra* note 97, at 21–22.

318 *See* McLeod v. Dilworth Co., 322 U.S. 327, 330–31 (1944) (providing the background and purpose of the Commerce Clause). Justice Frankfurter seemingly accepted the Court's precedent, invoking cases such as *Hall v. De Cuir* to invalidate a state statute, and yet favored Congressional exercise of authority when necessary to achieve national uniformity. Morgan v. Virginia, 328 U.S. 373, 388 (1946) (Frankfurter, J., concurring).

319 *See* Best & Co. v. Maxwell, 311 U.S. 454, 457 (1940) (Justice Reed) (focusing on discrimination due to the challenged statute). "The commerce clause forbids discrimination, whether forthright or ingenious." *Id*. at 455.

320 J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 328 (1938) (Black, J., dissenting). In *Morgan*, Justice Black again expressed dissatisfaction with the Court's willingness to assess whether a regulation unduly burdened interstate commerce. 328 U.S. 373, 386–87 (1946) (Black, J. concurring).

321 *See* JACKSON, *supra* note 282, at 290 (providing an excerpt from a dissent by Black, Frankfurter, and Douglas). Justice Jackson, however, did not easily abandon old dogma. *See* UROFSKY, *supra* note 306, at 118–19, 124–25 (analyzing Justice Jackson's position on interstate commerce and state regulation).

322 PRENTICE & EGAN, *supra* note 125, at 27–28.

uniform regulation" and those of a "local nature."[323] Subsequent academic scholarship would coalesce around and build off *Cooley*.[324] Notions of national uniformity and discrimination permeated the Court's continuing dialogue with itself in several facets of its effort to respond to an ever-changing society.[325] Even the negative reactions to Justice Brandeis' *Erie* opinion focused on promoting centralization and uniformity.[326]

Of course, *Cooley's* recrudescence in the post-New Deal era shrouded and, consequently, perpetuated the inherent aspect of dual federalism and exclusivity. Reynolds' 1928 treatise amply synthesized the Court's precedent, observing how *Cooley* chartered a middle ground between Justice Taney's concurrent jurisdiction approach in the *License Cases* and Justice Marshall's ostensible federal exclusivity, with the Court examining the *subject* rather than the *power* being exercised.[327] This merged with the progressive penchant for empirical facts and the realist acceptance of the role of the judiciary. Reynolds acknowledged that the task of exploring economic facts associated with the need for national uniformity naturally involved a legislative type function, but saw no alternative to having the Court inquire into such economic facts until displaced by Congress.[328] This is where Reynolds, perhaps laying the foundation, explained how the Court must naturally engage in balancing:

> But regardless of the formulae used, the Court frequently reaches its decision by a process of balancing

[323] *Id*.

[324] *See, e.g.*, Biklé, *supra* note 266, at 202 (stating that subsequent cases have affirmed *Cooley v. Board of Wardens*). In 1928, George Reynolds suggested that, if Congress had not expressly or impliedly through specific legislation preempted state laws, the role of a court would be to examine whether it (a) regulates interstate commerce; (b) whether it regulates a matter requiring "a single uniform rule or plan of regulation," and *if not*, and only then (c) whether it "burden[s] interstate commerce?" REYNOLDS, *supra* note 270, at 365.

[325] *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 75 (1938) (examining the relationship between discrimination and the challenged interstate commerce regulation); *see also* PURCELL, *supra* note 208, at 156–57 (discussing Brandeis's criticism of diversity jurisdiction).

[326] *See* PURCELL, *supra* note 208, at 212–21 (focusing on centralization and uniformity); *see also* Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547, 559 (1947) (invoking *Erie* and a national common law equivalent to support Congress's exclusive authority to regulate matters requiring uniformity). In *New State Ice*, Brandeis extolled the virtues of diversity and state experimentation. New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

[327] *See* REYNOLDS, *supra* note 270, at 84–85 (comparing the different decisions and eras of the Court).

[328] *See id*. at 88, 410–11 (emphasizing the Court's role in relation to Congressional deference).

> the local need for state action against the interference with interstate commerce resulting therefrom, a process which cannot be performed intelligently without an accurate and detailed knowledge of economic facts.[329]

And when the subject matter required uniformity, Reynolds indicated that it fell within Congress' exclusive domain.[330] Yet Barnard Gavit's treatment of the Commerce Clause warned that *Cooley's* doctrine "is unnecessary and results only in confusion," possibly contributing to "incongruous result[s]" by establishing a "hybrid jurisdictional line[]"—that is, resurrecting the politically palatable yet intellectually unsatisfying selective exclusiveness theory.[331]

The struggle over how to modernize a *Cooley*-infused paradigm elicited different responses. The competing approaches surfaced in *McCarroll v. Dixie Greyhound Lines*, where, for example, Arkansas imposed a tax on vehicles entering the state carrying more than twenty gallons of gas in the tank or in an auxiliary tank, to offset the costs of ostensibly maintaining the state highways.[332] The lower court had held that "[in]controvert[ably]" the tax directly burdened interstate commerce, and could only be sustained if the state affirmatively established a reasonable relationship between the tax and its purported purpose.[333] McReynolds' perfunctory majority opinion merely indicated that states could not directly burden interstate commerce—precedent simply dictated the outcome.[334]

Justice Stone, however, was less sanguine about precedent and simple tests. Writing a concurrence for himself and the Chief Justice, as well as Justices Roberts and Reed, he emphasized how the Court, when reviewing questionable state measures, must be satisfied that the state

---

[329] *Id*. at 366, 411. Others advocated a similar solution. Sholley, *supra* note 272, at 592–94. As of 1936, Sholley observed how the Court had yet to resolve the concurrent/exclusive jurisdiction question. *Id*. at 559.

[330] *See* REYNOLDS, *supra* note 270, at 91, 291, 408–09, 413 (expounding on Congress' role to promote uniformity); *see also id*. at 373 (noting but not emphasizing discrimination).

[331] GAVIT, *supra* note 186, at 19–20.

[332] 309 U.S. 176, 177 (1940).

[333] Dixie Greyhound Lines, Inc. v. McCarroll, 101 F.2d 572, 574 (8th Cir. 1939).

[334] In *Interstate Transit v. Lindsey*, 283 U.S. 183 (1931), the Court concluded that, while states could not directly tax the privilege of engaging in interstate commerce, they could impose a charge upon interstate traffic commensurate with the costs of maintaining or using the state highway. *Id*. at 186. A tax would "be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory." *Id*. Earlier cases suggested that, absent directly interfering or burdening interstate commerce, the regulation would have to be shown to be discriminatory. *See* Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U.S. 45, 50–51 (1927) (discussing use of precedent for interstate commerce cases).

measure (means) bears a sufficiently observable *relationship* to the ends (offset impacts to the highway).[335] And if it does not, Stone suggested that it would be considered as discriminatory and invalidated. Implicit in Justice Stone's opinion is the assumption that the Court could examine the degree of interference with commerce to assess if the measure exceeded some un-predetermined line.[336] Yet equally implicit is the converse: the lack of any suggestion that cases could be decided by *ex ante* spheres of jurisdiction.

This was problematic for Justices Black, Frankfurter, and Douglas. They appreciated the difficulties attendant with apportioning financial responsibility for constructing and maintaining the modern interstate highway system, "involv[ing] incalculable variants and . . . beset with perplexities."[337] To these three Justices, however, that task belonged to legislatures, not courts. The role of the judiciary, they believed, was limited to examining whether Congress has preempted the field or the state measure discriminates against interstate commerce.[338] While recognizing that uniformity and thus federal legislation would be preferable, they resisted the temptation to perform essentially a legislative function.[339]

Justice Stone's moderating approach nevertheless appears trapped between two worlds—the realization of a fading nineteenth century paradigm and the impulse to maintain continuity with opinions grafted

---

[335] *McCarroll*, 309 U.S. at 181 ("some fair relationship[,]" "apparent relationship[,]" "the relationship"); *id* at 182 ("relieve the state from the constitutional prohibition against the taxation of property moving in interstate commerce"). In another tax (gross receipts) case, Stone accepted taxes for activities involved in interstate commerce, unless the state "discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state." Gwin, White & Prince v. Henneford, 305 U.S. 434, 438–39 (1939).

[336] In *Union Brokerage Co. v. Jensen*, for example, Stone wrote that "[t]he incidence of the particular state enactment must determine whether it has transgressed the power left to the States . . . although it is related to a phase of a more extensive commercial process." 322 U.S. 202, 210 (1944)

[337] *McCarroll*, 309 U.S. at 184.

[338] *Id*. at 184–85.

[339] *Id*. at 188–89 ("We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States."). Justice Black elsewhere dissented from a Justice Stone opinion, warning that the Court was engaged in too much conjecture about discrimination, and that "if national regulation to prevent 'multiple taxation' is within the constitutional power of this Court, it would seem to be time enough to consider it when appellant or some other taxpayer is actually subjected to 'multiple taxation.'" Gwin, White & Prince v. Henneford, 305 U.S. 434, 445 (1939) (Black, J., dissenting). Black further repeated his plea that absent state discrimination, Congress, not the courts, should establish when and how commerce should be free. *Id*. at 455.

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

from that paradigm. Stone recognized the inherent flaws with dual federalism, and in taxing cases permitted the states sufficient leeway if the tax was apportioned to the local aspects of the interstate activity.[340] He rejected ill-suited "mechanical" tests and remained wedded toward the progressives' reliance on facts and equally gravitated toward exclusive national authority when necessary to preserve a perceived need for uniformity.[341] The Commerce Clause, he accepted, served as a "nationally unifying force."[342] And while he began invoking *Cooley* and *Willson Bridge* to justify distinguishing between local matters and subjects warranting uniformity, that distinction alone would not suffice without the Court first acknowledging and then incorporating the need for examining facts.[343] This occurred when the Court accepted balancing as both a current flowing through past cases, allowing continued vitality to precedent, and as means to justify state regulation except in areas the Court concluded required uniformity.

In *Southern Pacific*, Justice Stone ultimately endorsed an approach advanced by Columbia Law Professor Noel T. Dowling and Harvard Law Professor Thomas Reed Powell, the latter appearing on behalf of the railroad industry.[344] Dowling, whom Chief Justice Stone corresponded with and would cite in *Southern Pacific*, appreciated the urgency of abandoning formulaic tests and theories of marginal utility, and yet in praising Justice Stone he remained captured by the past.[345] He reviewed how the Justices debated the Court's ability to invalidate state measures other than those involving purposeful discrimination, with Stone favoring the Court's "role as mediator between state and nation."[346] Justices Black, Frankfurter, and Douglas thought otherwise.[347] Dowling rejected Justice Black's approach, but in doing so exhibited little

---

340 *Gwin*, 305 U.S. at 441; *see also* Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 651 (1942) (permitting deference to states for taxes apportioned to local aspects of the interstate activity).

341 *See* Parker v. Brown, 317 U.S. 341, 360 (1943) (discussing the test to determine when interstate commerce begins and ends).

342 Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

343 *Parker*, 317 U.S. at 360–62. States, he accepted, could employ legitimate, non-discriminatory means to achieve local objectives (matters peculiarly local and not likely to be addressed by Congress), and when those means affected interstate commerce the Court could accommodate the competing national and local interests by examining relevant factors—effectively balancing. *Id*. at 362–63, 367.

344 *See generally* Brief for the Association of American Railroads as Amicus Curiae, Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (No. 56) (listing Professor Powell on the brief).

345 Robert Post, *Federalism in the Taft Court Era: Can it be Revived?*, 51 DUKE L.J. 1513, 1534 n.76, 1536 n.86 (2002) (referencing the Stone Papers).

346 Dowling, *supra* note 303, at 16–17.

347 *Id*. at 16.

https://scholar.valpo.edu/vulr/vol49/iss3/9

tolerance for appreciating the Court's evolving dialogue about the DCC and effectively relegated the importance of discrimination.[348] Dowling advocated that, absent "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[]"—a presumption capable of being rebutted by affirmative Congressional action.[349]

Dowling's analysis not only elevated *Cooley*, but it equally countenanced undoubtedly classic dual federalism decisions.[350] Indeed, he noted elsewhere that only a constitutional amendment would permit states to regulate matters otherwise prohibited by the DCC, denying Congress the ability to sanction state action.[351] And he expressly endorsed the Court's ability to assess the "reasonableness" of a measure, and balance as a policy matter the national and local interests.[352] "[T]he judicial sifting of the facts would have the manifest merit of sharpening the issues and facilitating legislative efforts in the event that Congress, dissatisfied with the judicial results, should desire to take corrective action of its own."[353] He capped his plea with a Justice Stone quote that

---

[348] *See* Dowling, *supra* note 326, at 547 n.1 (reveling in his and Justice Stone's approach prevailing over that of Justice Black in a subsequent article).

[349] Dowling, *supra* note 303, at 20. Twice Dowling indicated that Stone clearly articulated the theory of congressional consent. *Id.* at 17–18, 27. Dowling never cites Henry Biklé's earlier article echoing the same theme. Biklé, *supra* note 266, at 200. Gavit, conversely, suggested that the silence theory "says—nothing." GAVIT, *supra* note 186, at 7 (footnote omitted).

[350] *See* Dowling, *supra* note 303, at 20–21 & n.34 (referencing classic dual federalism cases).

[351] *See* Noel T. Dowling & F. Morse Hubbard, *Divesting an Article of its Interstate Character: An Examination of the Doctrine Underlying the Webb-Kenyon Act*, 5 MINN. L. REV. 100, 100–31, 253–281, 117 (1921) (indicating that a constitutional amendment is needed to regulate). Dowling apparently believed the only mechanism for sanctioning state action would be if Congress could "divest" an article of commerce of its "interstate character." *Id.* at 122, 268–69, 277–78, 280. He nevertheless recognized that states enjoy reserved police power for matters within their domain. *Id.* at 281; *see also* Dowling, *supra* note 326, at 556–58 (questioning Congress' ability to enact the McCarran Act allowing state regulation of insurance). But Dowling overlooked that in *James Clark Distilling Co. v. Western Maryland Railway Co.* where the Court focused on both divesting an article of its interstate character and divesting individuals of their individual "right" to engage in interstate commerce. 242 U.S. 311, 325, 330 (1917). In *Whitfield v. Ohio*, the Court permitted congressional sanctioning of state regulation of convict made goods still in unbroken original packages. 297 U.S. 431, 439–40 (1936).

[352] Dowling, *supra* note 303, at 21. Dowling further suggested that the Court's function simply extended a substantive due process inquiry into a statute's reasonableness. *Id.* at 21–22.

[353] *Id.* at 23.

the Court's Commerce Clause decisions "have united to bind the several states into a nation."[354]

Southern Pacific became a natural vehicle for Stone to explore Dowling's approach.[355] The case involved Arizona's 1912 Train Limit Law, as subsequently codified and republished in 1939.[356] Arizona's statute prohibited trains larger than seventy freight cars (exclusive of caboose), or passenger trains larger than fourteen cars.[357] The State initiated a test case, seeking to enforce the law against Southern Pacific once the railroad company admittedly ran trains exceeding the statutory limit—and became subject to a $500 fine.[358] Arizona Superior Court Judge Levi S. Udall conducted a non-jury trial consisting of forty-six days of testimony, eighteen volumes of transcripts, seventy-three witnesses, and over 400 exhibits.[359] Judge Udall firmly believed that certain matters fell within Congress' exclusive domain, with freedom rather than restrain of commerce should the norm.[360] Therefore, he found that train length requirements were national, not local matters that would have extra-territorial effects and required uniformity.[361] He also combined Fourteenth Amendment jurisprudence and the DCC, when observing that, in areas of concurrent jurisdiction, states may not act unreasonably, arbitrarily, or in a manner that substantially or directly regulates, obstructs, impedes or burdens interstate commerce.[362] And he concluded that the evidence established a heavy and unreasonable burden on interstate commerce, examining for himself whether the law promoted safety.[363] The State Supreme Court then reversed—precipitating the urgency for having the Court resolve its dialogue with its past.[364]

---

[354] *Id.* at 28 (footnote omitted).

[355] *See S. Pac. Co. v. Arizona*, 325 U.S. 761, 768 (examining Dowling's approach).

[356] *Id.* at 763.

[357] *Id.*

[358] *See* Brief for Appellant, Vol. I: The Law at 8, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (No. 56) (stating that the case was a test case).

[359] Statement as to Jurisdiction at 22, 24–25, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (No. 56).

[360] *See id.* at 27 (establishing Judge Udall's arguments of regulation).

[361] Brief for Appellant, *supra* note 358, at 50–51 (summarizing findings of fact number fifteen).

[362] *Id.* at 52.

[363] *See id.* at 29–30 (examining the safety of the Train Limit Law).

[364] State *ex. rel.* Conway v. S. Pac. Co., 145 P.2d 530, 536 (Ariz. 1943). The court lamented that the parties cited approximately 325 cases. *Id.* at 534. A three-judge district court had invalidated Nevada's train safety measure. S. Pac. Co. v. Mashburn, 18 F. Supp. 393, 394 (D. Nev. 1937), *per curium*. *Cf.* Missouri-Kansas-Texas R. Co. v. Williamson, 36 F. Supp. 607, 616 (W.D. Okla. 1941) (upholding Oklahoma law).

In roughly 600 pages of legal arguments before the U.S. Supreme Court, the parties painstakingly reviewed prior cases absent any appreciation for the DCC's dynamic character. Southern Pacific's brief on jurisdiction presented conflicting cases, untethered by temporality.[365] It referenced cases, for instance, extending back to *Hall v. DeCuir* that matters requiring national uniformity are entrusted exclusivity to Congress or that state statutes could not operate extra-territorially; it deployed pre-*Barnwell* cases suggesting that purported state police power measures could not "directly, substantially, and unreasonably obstruct[], burden[], and interfere[] with interstate commerce[.]"[366] The railroad company further argued that prior cases concluded that the same or similar laws had been held to violate the Commerce Clause as well as the Fourteenth Amendment.[367] Strikingly, however, the blurring of congressional preemption and exclusivity became apparent. Struggling with articulating what today we term field preemption, the company also claimed "states are powerless either to annul, augment, or supplement the congressional regulation."[368] Here, Southern Pacific invoked *Erie*, where the Court reasoned "that the police power of the state could only exist from the silence of Congress upon the subject, and ceased when Congress acted or manifested its purpose to call into play its exclusive power."[369] Yet, this continued persistence of *exclusivity* was inconsistent with the emerging paradigm: Congress' power is not "exclusive" but rather *supreme* once it acts.[370]

Indeed, Southern Pacific's principal brief cited together *Brown*, *Cooley*, *Hall*, *Welton*, the late nineteenth century cases, as well as 1930's cases.[371] The company primarily argued that Congress enjoys exclusive jurisdiction over matters national in character or demanding national uniformity.[372] According to Southern Pacific, the subject matter and its

---

[365] *See* Statement as to Jurisdiction, *supra* note 359, at 9–16 (comparing cases which had different rulings on train regulations).

[366] *Id.* at 10–11.

[367] *See id.* at 13–21 (explaining each case which violated the Commerce Clause or the Fourteenth Amendment).

[368] *Id.* at 11; *see also id.* at 12–13 (suggesting that Congress had entered the field of train safety, the company invoked The Federal Safety Appliance Act and the Interstate Commerce Act).

[369] 233 U.S. 671, 682 (1914).

[370] *See id.* at 682–83 (discussing Congress's exclusive power).

[371] Brief for Appellant, *supra* note 358, at 55–56.

[372] *See id.* (explaining how the Train Law invades regulation). In its reply brief, Southern Pacific reiterated Congress' exclusive jurisdiction over matters requiring national uniformity, and the irrelevancy of the purpose of a state's purported exercise of its police power. Appellant's Reply Brief at 3, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (No. 56).

effect on interstate commerce dictates whether something is national.[373] And courts must decide on "the basis of the facts developed by the record or judicially known to the Court, and in the light of applicable principles[]" whether "the subject-matter is of exclusive national concern[.]"[374] The brief joined this argument with the veritable smorgasbord of pre-*Barnwell* tests, ranging from states' inability to regulate extra-territorially, that states are prohibited from directly, materially, or substantially interfering with, or burdening or obstructing interstate commerce, that the law invaded a field occupied by Congress, and finally that Arizona's statute was arbitrary, capricious and violated the Fourteenth Amendment.[375]

Arizona responded somewhat simplistically, mixing late nineteenth century Fourteenth Amendment and Commerce Clause jurisprudence.[376] It argued that, when reviewing a state's exercise of its police power, the Court's function is limited to examining whether the measure has a rational basis, and here Arizona explained why it believed the measure had such a basis.[377] The State categorically denied the judiciary's ability to examine the extent of the burden on interstate commerce when reviewing the measure's reasonableness.[378] Congress, it argued, could exercise that function when deciding whether regulatory measures affecting commerce warranted local or national regulation.[379] Of course, the State had a problem with the lack of any articulated purpose for the state legislation, and the State responded that "[t]he necessary effect of the statute and not its stated purpose determines its validity."[380]

The stridency of the parties' briefs was tempered by the amicus briefs. The United States and the railroad industry amicus briefs presented the Court with a middle ground between the State and company's positions.[381] Both briefs emphasized how the judiciary must assess whether the challenged matter requires national uniformity and the practical effect of the measure on commerce when compared against

---

[373] *See* Brief for Appellant, *supra* note 358, at 56–57 ("Such regulations, because of their inevitable extra-territorial effects, would create constant difficulty and embarrassment.").

[374] Appellant's Reply Brief, *supra* note 372, at 4.

[375] Brief for Appellant, *supra* note 358, at 59–60, 62, 64.

[376] *See* Brief for Appellee at 79, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (No. 56) (stating that the state treated the issues "together because in the final analysis each presents the identically same questions"); *see also id.* at 81 (stating that these are the same arguments "dressed in different clothes[]"); *id.* at 88 (explaining that there is no "logical" distinction).

[377] *See id.* at 80–118 (examining the rational basis analysis of the court).

[378] *Id.* at 18, 42.

[379] *Id.* at 33.

[380] Brief for Appellee, *supra* note 376, at 89.

[381] Brief for the United States as Amicus Curiae at 15–16, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (No. 56).

the local benefits.[382] The United States principally argued that Congress exercises exclusive jurisdiction over national matters demanding uniformity.[383] But the railroad industry brief joined by Professor Thomas Reed Powell presented what would prove the most persuasive or perhaps most prescient argument.[384]

Powell arguably was "the pre-eminent teacher of his generation in constitutional law," and his participation likely influenced Stone: the two were friends, former colleagues, and corresponded occasionally even during the pendency of the case.[385] As a progressive, Powell like other academics eschewed cloaking reason with linguistic covers,[386] and yet occasionally appeared seemingly temperate in his public writing.[387] He had critiqued Corwin's *Twilight of the Supreme Court*, for instance, by suggesting that it was too theoretical and skewed by Corwin's motive of justifying stronger federal power and legislative activity.[388] In 1932, Powell noted that "seldom does the Constitution clearly dictate a decision[]" and the Court exercises arbitrary (albeit not necessarily acting arbitrarily) power when rendering decisions, although the Court "does

---

382 *See id*. at 11 (explaining when a state law interacts with the commerce clause).

383 *Id*. at 19.

384 *See generally* Brief for the Ass'n of Am. R.R. as Amicus Curiae at 89, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (No. 56) (providing that Powell was one of the three attorneys representing the Association of American Railroads).

385 KAMMEN, *supra* note 5, at 315; *see id*. at 248–49 (describing Professor Powell); Alpheus Thomas Mason, *Harlan Fiske Stone Assays Social Justice, 1912–1923*, 99 U. PA. L. REV. 887, 894 n.42 (1951) (noting 1935 correspondence and friendship). They had corresponded before as well. *See* Post, *supra* note 345, at 1535 n.83 (referencing the Stone Papers).

386 *See* POWELL, *supra* note 269, at 3 (referencing "alien rubrics"). Powell followed Holmes in treating the Constitution as a living document implemented by judges influenced by time and circumstances. Thomas R. Powell, *Current Conflicts Between the Commerce Clause and State Police Power 1922–1927*, 12 MINN. L. REV. 321, 323 (1928) [hereinafter Powell, *Current Conflicts*].

387 *See* SCHLESINGER, *supra* note 205, at 457 (quoting Powell 1937 letter to J.N. Ulman deriding the conservative Four Horsemen). He particularly chastised Justice Sutherlands' opinion in the minimum wage case involving women. GILLMAN, *supra* note 196, at 176–77.

388 Thomas Reed Powell, Book Review, 48 HARV. L. REV. 879, 881 (1935) (reviewing EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT). Powell's writings evince an acute sensitivity toward precision and respect for the Court. Mastering subtlety, for instance, he wrote that most of the Court's constitutional cases, referencing as examples Commerce Clause cases, "fit together nicely if you bend an intellectual corner here and there." Thomas Reed Powell, *From Philadelphia to Philadelphia*, 32 AM. POL. SCI. REV. 1, 12 (1938). He was highly critical of Pearson and Allen's *The Nine Old Men*. *See* Thomas Reed Powell, Book Review, 46 YALE L.J. 561, 561 (1937) (reviewing DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN). Nor was he charitable to Charles Warren's historic *Congress, The Constitution and the Supreme Court*. Thomas Reed Powell, Book Review, 49 HARV. L. REV. 514, 514–15 (1936) (reviewing CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT). Publically, he quite wittingly ridiculed a prominent book on the Constitution by James Beck. KAMMEN, *supra* note 5, at 249.

what it prefers to do when it prefers to do as nearly as possible what it has done before."[389] Not surprisingly, therefore, he commented how in the DCC "we enter a realm where literary interpretation comes in at best only as an oracle whose voice is the voice of those who preside over the sanctuary."[390]

His writings on the police and commerce powers focused on facts and intermingling DCC and Fourteenth Amendment concepts. For instance, he treated the Fourteenth Amendment as prohibiting a state from influencing conduct beyond its borders.[391] Yet like Dowling, he also arguably wrote as if accepting relics of a dual federalism and corresponding exclusivity paradigm.[392] While he lamented direct/indirect tests as a "framework of a compass without a needle[,]" he nevertheless maintained states could not directly regulate "marketing of products across state lines[.]"[393] To him, states enjoyed sufficient latitude when exercising their police power, but the "general ordering" of industries necessitated federal not state power.[394] If faithfully employed, however, the "tests" would leave some industries unregulated.[395] Instead, he argued that courts could exercise practical judgment to protect against either state discrimination or a state regulating interstate commerce "too much."[396]

His *Southern Pacific* brief echoed these themes.[397] The brief touted the importance of "practical considerations" in having the judiciary

---

389 CORWIN, *supra* note 283, at 221 (quoting Powell during 1937 congressional testimony).

390 Powell, *Current Conflicts*, *supra* note 386, at 322.

391 *See* Powell, *supra* note 2, at 194 (explaining the barriers against state action).

392 *Id*. at 194, 207.

393 *Id*.; *see* Powell, *Current Conflicts, supra* note 386, at 322–25 (exploring the definition of "regulate").

394 *Id*. at 196. Powell rejected that states exercise concurrent power over commerce on matters requiring uniformity, and yet he justified allowing states to regulate such matters when congressionally sanctioned by simply calling the regulation an exercise of the police power not superseded by either a tacit or explicit congressional directive otherwise. Powell, *supra* note 238, at 135. Powell also demonstrated his strong nationalist sentiment when eulogizing Chief Justice Marshall's "supporting the exercise of wide national powers and in circumscribing the centrifugal propensities of the several States." Thomas Reed Powell, *The Great Chief Justice: His Leadership in Judicial Review*, 2 WM. & MARY L. REV. 72, 92 (1955).

395 *See* Powell, *supra* note 2, at 232 (explaining the result of implementing federal power).

396 Powell, *Current Conflicts*, *supra* note 386, at 491; *see also* Thomas Reed Powell, *State Production Taxes and the Commerce Clause*, 12 CALIF. L. REV. 17, 19 (1924) ("looking through Supreme Court doctrine to the practicalities of the Supreme Court adjustments"). Practical judgment infused his scholarship, informing his view that courts could examine each case to decide whether a state acted reasonably. *See* Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. OF PHIL., PSYCHOL. & SCI. METHODS 645, 649 (1918) (stating the judgment of the court is practical).

397 Brief for the Ass'n of Am. R.R. as Amicus Curiae, *supra* note 384, at 86.

protect the national commercial interest.[398] Some subjects resided within Congress' exclusive jurisdiction over commerce, while others, he suggested, arguably fit within "concurrent" jurisdiction—although he avoided distinguishing between the two by adroitly suggesting that, regardless, the Arizona law failed all tests.[399] He argued that, for a century, Congress relied on having courts perform this function. Courts, therefore, must examine practically the "burden" on interstate commerce.[400] They do so to ensure that only Congress may regulate matters warranting national uniformity.[401] And courts do so, he intimated, by exploring the efficacy of the purported local benefit and the corresponding burden on interstate commerce.[402] This is what he advanced early in the brief and reflects the brief's overall structure.[403] It also is what he suggested that Chief Justice Stone had undertaken in his *Di Santo* dissent, and followed from the Justice's observation about the importance of protecting out-of-state interests from being disadvantaged in the political process.[404] Underscoring the somewhat sophomoric nature of the arguments, Powell even argued that Arizona's law conflicted with existing federal law and therefore the Commerce Clause—when, in fact, his point was the statute had been preempted and violated the Supremacy Clause.[405]

After quickly dispatching any pretense of preemption, the Court accepted Powell's dominant argument—citing for good measure Professor Dowling's law review article.[406] With his penchant for employing string cites and suggesting temporal consistency in the

---

398 *Id*. at 7–8, 54, 85 (discussing the importance of considerations).

399 *Id*. at 6. "[I]t is Congress and not the states which has the power over interstate commerce[.]" *Id*. at 67. Indeed, the brief endorsed the inherent dual federalism concept of examining the "extraterritorial" effect of state regulations. *Id*. at 41, 49, 64, 73–77.

400 *See id*. at 86 (suggesting examining the burden is a necessary corollary to protecting against discriminatory state regulation).

401 *See* Brief for the Ass'n of Am. R.R. as Amicus Curiae, *supra* note 384, at 48–49 ("The question is simply whether or not the subject to be regulated and the character of regulation are such as require, when tested by the standard of superior fitness and propriety, that diverse and possibly conflicting local commands be avoided in the national interest."); *see also id*. at 50 ("uniform control by a single authority"); *id*. at 55 (citing *Cooley*).

402 *See id*. at 8, 22, 35, 54 (explaining how courts review the benefit and burden on interstate commerce).

403 *Id*.

404 *See id*. at 59, 64–65 (reviewing the proposition presented by Chief Justice Stone and discussing out-of-state interests and disadvantages in the political process).

405 *See* Brief for the Ass'n of Am. R.R. as Amicus Curiae, *supra* note 384, at 20–21 (establishing the Arizona law was in conflict with the federal law and as such, in violation of the Commerce Clause).

406 *See* S. Pac. Co. v. Arizona, 325 U.S. 761, 768 (1945) (noting the Court's citation to Dowling's law review article).

Court's treatment of the DCC, Chief Justice Stone explained how the DCC served to ensure that matters requiring national uniformity would not be substantially interfered with by state or local regulations, unless otherwise permitted by Congress. This was necessary to protect "national commerce." Here he could cite, as if all the seemingly random cases were reconcilable, *Gibbons*, *Cooley*, *Leisy*, *De Cuir*, and even *Welton*.[407] But the *Cooley* formulae proved victorious, coupled now with Powell's practical suggestion that difficult cases demanded that the Court examine the competing demands for local regulation against any national interest warranting uniformity.[408] Only Justices Black and Douglas, in dissent, offered the last gasp for a discrimination-laden approach toward the DCC.[409]

Of course, Justice Stone's juridical style ignored tough issues. He avoided sanctioning any "theory" animating the DCC, by instead relying on the progressive mantra of facts of what the Court had *done* since the early days.[410] He emphasized the need for uniformity on important national matters, and yet simultaneously echoed the derided concept that states could not "materially restrict the free flow of commerce[.]"[411] He included a citation to *Cooley* when noting the absence of political restraints for state regulation affecting out-of-state activities, as if the dual federalism paradigm from the *Cooley* era had some relevance to the newly constructed political constraint argument.[412] He later emphasized the practical necessity of uniform legislation when a multiplicity of states might be regulated similar conduct beyond their borders.[413] And he quite willingly skirted the Arizona Supreme Court's factual findings on the importance of the state regulation, by instead referencing the trial court findings and accepting the Court's role of examining whether the asserted state regulatory purpose would achieve its purpose only "slight[ly]" or "problematical[ly]."[414] The inquiry effectively transformed the progressive marshaling of facts justifying legislative

---

407 *See id*. at 767–69 (identifying citations to cases utilized in the Court's decision).

408 *See id*. at 769–70 (discussing the Court, not the state legislature, is the final adjudicator of demands of the state and national interests). Stone added that Congress' years of acquiescence implicitly sanctioned the Court's ability to examine "relevant factual material" to avoid "destructive consequences to the commerce of the nation." *Id*. at 770.

409 *Id*. at 784–96 (dissenting from the majority decision).

410 *Id*. at 770.

411 *S. Pac. Co. v. Arizona*, 325 U.S. at 770.

412 *See id*. at 767 n.2 (examining the lack of political restraints articulated in *Cooley* with regard to the regulation of out-of-state activities).

413 *See id*. at 775 (emphasizing the need for uniform legislation).

414 *Id*. at 775–76, 779.

judgments into an implicit Fourteenth Amendment factual examination for possibly undermining those judgments.[415]

V. SOLIDIFYING BALANCING IN THE MOST UNFORTUNATE WAY

Over the next quarter century, Chief Justice Stone's constitutionalism would become institutionalized and seeming immune from critical examination. By 1970, *laissez faire* dialogues and dual federalism had long since faded, and the Court accepted the inevitable—that the new economy left many state regulatory measures affecting interstate commerce.[416] Justice Stone and the New Deal Court purportedly resolved that problem by allowing federal regulation on matters substantially affecting interstate commerce, and upholding state regulation on matters affecting interstate commerce—unless they discriminated against interstate commerce or involved an area warranting national uniformity.[417] With these changes, the Court abandoned the concept of exclusivity. Once it had done so, however, the Court failed to confront the obvious—it had once again created a line, this time a shifting one that would move according to the particular facts of a case, without ever asking why. It did this in the name of protecting a free national market and averting state balkanization.[418]

The lingering issues with the DCC became apparent in *Pike v. Bruce Church, Inc*.[419] *Pike* has since become the "canonical source" for modern DCC balancing.[420] There, a three-judge panel of the district court

---

[415] *Id*. at 781 (concluding that the state had gone "too far").

[416] WHITE, *supra* note 44, at 262 (explaining that by the late 1940s, "police power" as a category disappeared from the leading constitutional law textbooks, underscoring the demise of spheres of jurisdiction).

[417] *See supra* Parts III–IV (discussing The New Deal).

[418] *See*, *e.g.*, Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 356–57 (1951) (discussing the potential consequences of an alternative decision); *see also* Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949) (establishing the protection of a free market).

[419] 397 U.S. 137, 146 (1970) (discussing issues with DCC). Articles specifically about *Pike v. Bruce* generally appear cryptic. *See, e.g.*, Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 612–15 (1997) (crediting *Pike*, inappropriately, with the emergence of the anti-discrimination component to the DCC); s*ee also* David S. Day, *Revisiting* Pike*: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 HAM. L. REV. 45, 46–47 (2004) (examining *Pike* and the Commerce Clause Doctrine).

[420] SULLIVAN & GUNTHER, *supra* note 299, at 217; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 437 (2006) (evaluating *Pike* as a source for the balance of DCC). While Professor Chemerinsky suggests that Day examines the origins of *Pike,* Day's article merely analyzes *Pike* without purporting to explain its origins. *See id*. at 437 n.78 (suggesting *Pike* in the beginning was analyzed by Day); *see also, e.g.*, Day *supra* note 419, at 46–60 (discussing the protection of a free national market as the purpose of the changes).

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

enjoined Arizona from enforcing the Arizona Fruit and Vegetable Standardization Act.[421] Appellants informed the Court, "[a]lmost all states for whom the raising of fruits and vegetables constitutes an important industry have enacted some type of law prescribing minimum standards of quality and pack for produce shipped out of the state."[422] Neither the lower court nor the parties recognized that the New Deal Court had begun the process of eroding defunct approaches. Yet at least for Arizona, prior cases generally survived unless the state programs targeted out of state businesses. The classic case involved Florida's effort to protect its branding for citrus fruits, by prohibiting the sale of immature fruit or fruit otherwise unfit for consumption.[423] The Court's obvious results oriented opinion justified the measure as involving a reasonable means for securing a legitimate end, and as such represented an exercise of the state's police power to address a local concern.[424]

The *Pike* facts seemed destined to produce a problematic decision. Bruce Church, Inc. ("Bruce") was a California corporation, engaged in all facets of producing, marketing, and transporting fruits and vegetables in Arizona and California for markets throughout the country.[425] At the time of the lawsuit, the company had four processing or packing facilities in Arizona, where the crops were prepared for out-of-state shipment.[426] It also had been engaged with the Department of the Interior and Colorado River Indian Tribes to develop operations on an Indian reservation, at Parker, Arizona.[427] The year before, the company had shipped its cantaloupes grown at Parker to its processing plant in California, thirty-one miles away.[428] The Arizona Fruit and Vegetable Standardization laws were in effect then, and the State was aware of and permitted these shipments as well as other companies' out-of-state shipments—allegedly for years.[429] California, where the cantaloupes

---

[421] *Pike*, 397 U.S. at 146.

[422] Appellant's Brief at 44, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301) (footnote omitted). The parties further added to this list, after briefing, that the State of New York had amended its Agriculture and Markets Law to establish standards for the packing and grading of lettuce. *See* Supplemental Brief of Appellee at 2–3, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301) (adding additional information to the Appellee's brief).

[423] *See, e.g.*, S. J. Sligh v. Kirkwood, 237 U.S. 52, 62 (1915) (stating the delivery and shipment in interstate commerce of citrus fruits may be made a criminal offense).

[424] *Id*. at 59–60, 62 (holding that the fruit at issue was not an article of commerce, and further that the Court was merely reviewing the statue as applied, without facts about whether the fruit might have been a useful product outside the state).

[425] *Pike*, 397 U.S. at 139.

[426] *Id*.

[427] *Id*.

[428] *Id*.

[429] Complaint at 40, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301).

https://scholar.valpo.edu/vulr/vol49/iss3/9

were being shipped, had "the same or very similar" standardization laws as Arizona, and nothing in the case suggests that Bruce would not comply with California's laws.[430] Any cantaloupes re-entering Arizona, therefore, would have been processed and packed in accordance with similar standardization requirements.[431] Arizona even agreed that the inspections would be similar, and California inspectors provided Bruce with certificates that were then submitted to the Arizona inspectors.[432] Arizona further admitted that this procedure had been followed for two years without objection or complaint by the state.[433]

But when Bruce planted its crop in 1968, Arizona informed the company that it would enforce its standardization laws, and it would continue to do so the next year to ensure that the case would not become moot.[434] This naturally prompted Bruce to allege a constitutional violation, asserting a federal right "to engage in interstate transportation of its own products, free from undue or unreasonable restraints by the Defendants[.]"[435] If the state prevented the company from shipping its product to its California processing facility expeditiously, the company claimed that it would lose approximately $700,000, and jeopardize its program with the Interior Department and Colorado River Tribes.[436] Within three weeks of the complaint being filed, the district court issued

---

430 *Id*. at 12.

431 *See id*. (discussing transported crops would not be returned for marketing or sale in Arizona until they have been processed and packed). Later in oral argument Rex Lee would equivocate on this point.

432 *Id*. at 40.

433 *See* Stipulation of Facts at 38, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301) (explaining similar procedures occurred in Arizona and California); *see also id.* at 40 (noting Arizona stipulated that others shipped products to California without complying with the standardization laws); *id.* at 42 (stating defendant was aware that others in Arizona had been shipping products into California for processing, packing and shipment to other states).

434 *Id*. at 41, 48 (stating that Bruce planted its crop in January, for a June harvest, and Arizona issued its written notice in March). Arizona's insistence on testing the constitutionality of its standardization laws, particularly in this circumstance and given the history of its implementation, suggests much more than what the case's official record reveals. Arizona and Bruce fought over whether Bruce would build a processing plant at the Parker Ranch, with a proposed legislative amendment narrowly defeated that would have permitted Bruce to use the California facilities. Appellant's Brief, *supra* note 422, at 10–11. *Cf*. Appellee's Brief at 22, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301) (questioning discussing legislation). California's border facility, however, apparently afforded the necessary economies of scale and strategic location for interstate shipping. *Id*. at 12, 15–16.

435 Complaint, at 1; *see also* Complaint, at 9 ("constitute an unreasonable and undue burden upon, and obstruction of, interstate commerce[]"). Bruce further alleged that the Agricultural Adjustment Act, as amended, preempted the standardization law. *Id*. at 10.

436 *See* Stipulation of Facts *supra* note 433, at 45–46 (discussing the alleged aftermath should the state prevent shipping).

a preliminary injunction. A trial occurred six months later, and within the next month the court issued its opinion enjoining the application of the statute. The court discussed the merits of the case in a single short paragraph, simply stating that, under *Foster Fountain Packing Co. v. Haydel*, *Johnson v. Haydel*, *Shafer v. Farmers Grain Co*., and *Lemke v. Farmers Grain Co*., the standardization law unlawfully burdened interstate commerce.[437]

At oral argument, Arizona admitted that its purpose was to solidify its place as one of the top three cantaloupe producing states by ensuring that the packing occurs in state.[438] Arizona further informed the Court that Bruce's particular Parker cantaloupes were some of the highest quality produced in Arizona and the State naturally wanted them identified as Arizona cantaloupes.[439] Its legal arguments were equally simplistic. Arizona variously argued that commerce had not yet begun, that the standardization law did not "delay" any commerce and were the sort of program warranting diversity under *Cooley*, and that Arizona was not seeking to insulate itself or protect from competition its cantaloupe market.[440] Its brief employed cases without any appreciation for changing constitutional dogma, or when cases were decided; and *Barnwell*, Arizona argued, collapsed the Commerce Clause and Fourteenth Amendment inquiries by asking whether the state had acted within its "province" and with reasonably adapted means to achieve the stated objective.[441]

The company's brief similarly deployed cases as if constitutional dogma remained stagnant. It correctly observed that the law protects goods as soon as they enter the stream of commerce, here the harvesting.[442] From there it argued historic tests—that states could not directly interfere with or burden interstate commerce, because to do so

---

[437] Appendix at 62, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301).

[438] *See* Appellant's Brief, *supra* note 422, at 43 (discussing the state's reasoning).

[439] *Id*.

[440] *Id*. at 12–13. Arizona dismissed *Baldwin v. Seelig* and similar cases as irrelevant because the State had not purposely sought to "isolate itself as an economic unit[.]" *Id*. at 34. The State's reply focused on arguing that economic objectives are legitimate as long as they do not insulate the state from competition. *See* Appellant's Reply Brief at 2, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301) (reviewing the State's reply).

[441] Appellant's Brief, *supra* note 422 at 12. At oral argument Arizona referred to the inquiry as one of substantive due process. *See* Transcript of Record at 4, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (No. 301), *available at* http://www.oyez.org/cases/1960-1969/1969/1969_301, *archived at* http://perma.cc/43TN-V7PG (reviewing the record). The State relied principally on *Barnwell* and *Cooley* as establishing the governing principles. Appellant's Brief, *supra* note 422, at 20.

[442] *See* Appellee's Brief, *supra* note 434, at 44 (establishing goods are protected by the law upon entering commerce).

would be an unreasonable exercise of state power.[443] It rejected applying the distinction between the need for uniformity versus diversity, although it added that the case obviously involved a matter warranting uniformity.[444]

Justice Stewart's short and unanimous opinion avoided any independent engagement with the cases, merely responding to the advocates. The Court first agreed that state regulation of products destined for interstate markets triggered a DCC inquiry.[445] It then invoked *Huron Portland Cement Co. v. City of Detroit* as synthesizing the principle emerging from apparently stagnant constitutional doctrine "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[446] And then citing *Southern Pacific*, Stewart observed how a court could assess the legitimacy of the local interest, as well as its effect on commerce, and perhaps explore in Fourteenth Amendment parlance other less destructive means, occasionally doing this under a balancing approach.[447] While the Court then accepted that Arizona could constitutionally seek to promote its economic interests by touting how Arizona produces superior cantaloupes, it nevertheless discounted the State's motive—at one point referring to "the State's tenuous interest."[448] Indeed, when the Court ended its opinion by agreeing that the law violated the DCC, it observed that the State lacked any compelling interest and the Commerce Clause does not "permit a State to require a

---

[443] *See id*. at 39–41, 57, 62 (determining a state's interference is an unreasonable exercise of power). The brief averred that states may not advance local economic interests when doing so burdens interstate commerce. *Id*. at 79, 82; *see also id*. at 85 (stating that availability of non-discriminatory means underscores unreasonableness of state program).

[444] *See id*. at 69 (discussing uniformity). Bruce agreed with the lower court about the propriety of relying upon *Toomer*, *Haydel*, *Schafer*, and *Lemke*, along with the Court's admonition in *Dean Milk* that states may not erect "economic barrier[s]." *Id*. at 74.

[445] *Pike*, 397 U.S. at 141–42 (establishing that state regulation of interstate market products warrants a DCC inquiry).

[446] *Pike*, 397 U.S. at 142; Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960). In *Huron*, however, Justice Stewart reached back to nineteenth century cases to establish that even-handed state regulation could not unduly burden interstate commerce—by "materially affect[ing] interstate commerce in an area where uniformity of regulation is necessary." *Id*. at 444; *see also id*. at 448 (noting that no impermissible burden was placed on commerce).

[447] *See Pike*, 397 U.S. at 142 (reviewing an alternative balancing approach).

[448] *Id*. at 143–45; *see also id*. at 146 (referring to the State's "minimal" interest). Stewart added, "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." *Id*. at 145.

Produced by The Berkeley Electronic Press, 2015

Valparaiso University Law Review, Vol. 49, No. 3 [2015], Art. 9

person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders"—said another way, it lacked a legitimate interest![449]

And with *Pike*, modern DCC dogma became solidified.

VI. CONCLUSION

The negative aspect of the Commerce Clause is one of the few meta-Constitutional principles reflecting a perceived higher law surrounding the adoption of the Constitution. From the DCC's very inception, courts struggled with the framers' intent, and yet nineteenth century jurists consistently deployed the concept to promote a national economic marketplace. The Court removed from state jurisdiction subjects warranting national uniformity, whether under an exclusivity paradigm, or later simply because the Court said so. The difficulty today is that it is doing so under the guise of a balancing test that masks an implicit acceptance of *Cooley's* political solution of only partially concurrent jurisdiction. Partially concurrent, however, means exclusive on some things. Absent facial, purposeful, or actual discrimination, that means also a *post hoc* judgment, whether a subject falls on one side or the other. But the charge to draw this particular line of demarcation through balancing developed despite the demise of dual federalism and the acknowledgement that defining "commerce" in the modern world will not work.

The task emerged from the progressive push toward nationalism, reverence toward facts, and acquiescence toward governmental intervention. Yet once the Court accepted an enlarged Commerce Clause, it no longer was necessary to embrace a *Cooley*-infused paradigm. Nor could the Court thereafter gird its analysis in a historically consistent theory behind the Commerce Clause itself. And even Professor Powell readily admitted that any judicially drawn line would be a product merely of the clash amongst advocates (implicitly questioning the Court's competence perhaps).[450] Charles Black, Jr., therefore, famously suggested that in lieu of such "Humpty-Dumpty textual manipulation," the Court instead should honestly resort to the underlying theory of the Constitution to promote a unitary nation, and from there draw any necessary restraints on state or local action.[451] Unfortunately, the clause's history has been less about an honest

[449] *Id*. at 146.

[450] *Current Conflicts*, *supra* note 386, at 631–32.

[451] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 29 (1969).

https://scholar.valpo.edu/vulr/vol49/iss3/9

dialogue and more about grappling with discerning amorphous boundaries hidden in the clause itself. Perhaps, therefore, the time is ripe to remove the shadow of DCC dogma.