

## University of Minnesota Law School Scholarship Repository

---

Minnesota Law Review

---

2004

# The Dormant Commerce Clause Doctrine: Prolegomenon to a Defense

Brannon P. Denning

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

Part of the [Law Commons](#)

---

### Recommended Citation

Denning, Brannon P, "The Dormant Commerce Clause Doctrine: Prolegomenon to a Defense" (2004). *Minnesota Law Review*. 743.  
<https://scholarship.law.umn.edu/mlr/743>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## Correspondence

# The Dormant Commerce Clause Doctrine: Prolegomenon to a Defense

Brannon P. Denning<sup>†</sup>

I appreciate Jim Chen's thoughtful comment<sup>1</sup> on my recent article about the dormant Commerce Clause doctrine (DCCD) and the Privileges and Immunities Clause of Article IV.<sup>2</sup> It is quite flattering that my article prompted his own reflections on the DCCD. As Professor Chen noted, my Privileges and Immunities Clause piece, and an earlier piece on the Import-Export Clause,<sup>3</sup> demonstrated that easy solutions proposed for replacing the DCCD with this or that piece of constitutional text were not even trades, and that their champions, Justices Scalia and Thomas, either had not thought through the implications of their proposals—i.e., underprotection of interstate commerce—or were simply not advertising this aspect of their proposals.<sup>4</sup> Implicit in both pieces is my belief, which I share with Professor Chen, that the DCCD is a beneficial doctrine, perhaps one of the most important doctrines in constitutional law, and one that is unfairly maligned among scholars and judges.

---

<sup>†</sup> Associate Professor of Law, Cumberland School of Law at Samford University.

1. Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764 (2004).

2. Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003).

3. Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 U. COLO. L. REV. 155 (1999).

4. In an unpublished essay, I have also addressed the argument that Hamilton's taxonomy of exclusive and nonexclusive federal power in *The Federalist No. 32* undermines support for the notion that the DCCD can be inferred from the grant of power to Congress over commerce in Article I, Section 8. See Brannon P. Denning, *The Dormant Commerce Clause Doctrine and Constitutional Structure* (Feb. 19, 2001), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=260830](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260830).

In neither piece, however, did I attempt a comprehensive defense of the DCCD against the familiar litany of charges that it is atextual and contrary to the original intent of the Framers;<sup>5</sup> or that, whatever its historical pedigree, it is “unworkable” in practice.<sup>6</sup> My only attempts at defending the DCCD as a permissible structural interpretation of the Constitution came first in an article about the Court’s now-regular employment of structural or penumbral interpretation,<sup>7</sup> and later in an unpublished essay whose main focus was rebutting Justices Scalia and Thomas’s argument that *The Federalist No. 32* “proves” that there is no basis for the argument that the Commerce Clause was an exclusive grant of power to Congress.<sup>8</sup>

Nor can I offer a comprehensive defense here. What I will do in the pages that follow, however, is outline a defense of the DCCD on historical and textual grounds, and suggest that the doctrinal problems that exist with the DCCD do not warrant either despair or, as Justice Thomas has announced, refusal to enforce it at all.<sup>9</sup> In doing so, I will also register (very) mild disagreement with Professor Chen’s own defense of the DCCD.

---

5. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (claiming that the DCCD has “no basis in the text of the Constitution”); *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Scalia, J., concurring) (calling the DCCD the “negative Commerce Clause” because it “does not appear in the Constitution”); Martin H. Redish & Shane V. Nugent, 1987 DUKE L.J. 569, 617 (arguing that the DCCD “lacks a foundation or justification in either the Constitution’s text or history”); Amy M. Petragani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1216 (1994) (arguing that the DCCD is “absolutely without support in the text of the Constitution or the intent of the Framers”).

6. See, e.g., *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting) (arguing that the DCCD makes “little sense” and “has proved virtually unworkable in application”).

7. Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1108–13 (1997) (discussing the DCCD).

8. Denning, *supra* note 4.

9. See *Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142, 2148 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that he will no longer enforce the DCCD because it “has no basis in the text of the Constitution, makes little sense, and [is] virtually unworkable in application” (quoting *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting))); *Pharm. Research & Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855, 1878 (2003) (Thomas, J., concurring) (same).

## I. WHY THE DCCD NEEDS A DEFENSE

Professor Chen is characteristically modest when he describes his essay as “an extended letter to the editor.”<sup>10</sup> In fact, he has made inroads on another of the arguments routinely deployed by jurists and scholars against the legitimacy of the DCCD: that the silence-by-Congress rationale is specious because no significance can be constitutionally assigned to *lack* of action by Congress.<sup>11</sup> Professor Chen, sharing none of my previously expressed qualms, writes that courts’ use of the DCCD is little different from the Marshall Court’s creation of the inter-governmental tax immunity doctrine or the broad preemptive effects given by the Court to statutes that are often completely silent about the scope of their preemptive effects.<sup>12</sup> The Court, he notes, has claimed power under the DCCD forthrightly (in contrast to some of the Court’s more extravagant applications of its implied preemption doctrines) for good, pragmatic reasons (i.e., to secure economic union) and has given Congress the option of overriding it. Thus, no good reason exists not to infer from the *lack* of congressional exercise of its override option that the DCCD is a member in good standing of the family of legitimate constitutional law doctrines.<sup>13</sup>

“If the deepest criticism of the dormant Commerce Clause,” he writes, “is that its absence of firm textual support in the Constitution renders this an unusually political and therefore presumptively improper ‘policy-laden’ body of decisions, defenders of this doctrine can afford to concede the point.”<sup>14</sup> Once conceded, he invites defenders to say “So what?” and points to a number of other similarly situated doctrines, some of which, like sovereign immunity, are dear to the hearts of the Court’s members who so vigorously oppose the DCCD.<sup>15</sup>

Towards the end of his essay, Professor Chen implies that the DCCD does not need a defense at all. Professor Chen is willing to concede the point that the DCCD has scant textual basis in the Constitution. But while “*constitutional* silence will

---

10. Chen, *supra* note 1, at 1769.

11. See, e.g., *Camps Newfound/Owatonna*, 520 U.S. at 615 (Thomas, J., dissenting) (arguing that “preemption-by-silence” arguments have “been rejected by this Court in virtually every analogous area of law”).

12. Chen, *supra* note 1, at 1777–82.

13. *Id.* Part III.

14. *Id.* at 1795 (footnote omitted).

15. *Id.* at 1798.

always be the great flaw in the dormant Commerce Clause," he finds "congressional silence" redemptive and "the most promising cure."<sup>16</sup> The DCCD has lasted, and is perceived as legitimate, he notes, because it *works*; if it didn't exist, we'd have to invent it.<sup>17</sup> Further, he suggests that the DCCD's legitimacy does not depend on its fidelity to the original understanding of the Framers.<sup>18</sup>

I agree with Professor Chen that good pragmatic reasons existed for the courts to enforce the economic union that the Constitution was written, in part, to secure. Further, I think that claims of the unworkability of the doctrine are overstated by judges and scholars. However, such arguments are likely to persuade neither judges who use different tools to assess legitimacy of constitutional doctrine, like Justices Scalia and Thomas, nor other scholars for whom the correspondence between constitutional doctrine, on the one hand, and text, structure, and history, on the other, is of central importance. Merely to say that the Court does this elsewhere—in effect to give a "*tu quoque*" response—will be minimally convincing to the DCCD's critics. I think it essential, in order to blunt the force of arguments that the DCCD is illegitimate because it has no basis in text or history, to meet such arguments on their own terms.

## II. THE DCCD AND CONFEDERATION-ERA COMMERCIAL DISCRIMINATION

Claims that the DCCD has no basis in the original understanding of the Constitution's framers are often made, but not well supported. They essentially come down to the belief that given the states' interest in protecting their sovereignty in the Founding Era, it is unlikely that states and their citizens would have consented to the Constitution had they understood it to restrict their ability to regulate commerce to the degree that the DCCD does. Alternatively, if they did have such an understanding, they would have thought that any such restrictions would come from Congress, not from unaccountable federal courts.<sup>19</sup> Allusions in the Supreme Court opinions to trade wars

---

16. *Id.* at 1797.

17. *See id.* at 1790.

18. *Id.* at 1795–96 ("Why indeed does constitutional law fritter away its best intellectual resources on the bootless search for original meaning, when every other field of human enterprise understands that a 'science which hesitates to forget its founders is lost?'" (footnote omitted)).

19. *See* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S.

and interstate discrimination during the Confederation Period are overstated, says at least one scholar,<sup>20</sup> relying on mid-twentieth century studies by revisionist historians like Merrill Jensen<sup>21</sup> eager to dispel the “Critical Period” thesis of John Fiske,<sup>22</sup> which maintained that only far-sighted, nationalist framers saved the Union in the 1780s from dissolution—a dissolution that would have been precipitated at least partially by trade conflicts among the states.

Far from being a figment in the fevered imagination of nationalists, discrimination against commerce coming from other states was instituted by a number of states, including Virginia, New York, and South Carolina, either by imposing higher imposts on imported goods or by imposing discriminatory tonnage duties on ships entering the state’s harbors. This, in turn, produced considerable ill will among states whose merchants were the targets of such taxes. As I demonstrate in a paper currently in progress,<sup>23</sup> the frequency with which states attempted to raise revenue at the expense of their neighbors or acted to encourage native manufacturers was a matter of concern to mod-

232, 264 (1987) (Scalia, J., concurring in part and dissenting in part) (“I think it beyond question that many ‘apprehensions’ would have been ‘entertained’ if supporters of the Constitution had hinted that the Commerce Clause, despite its language, gave this Court the power it has since assumed.”); FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* 19 (Quadrangle Paperback 1964) (1937) (describing the DCCD as “an audacious doctrine, which, one may be sure, would hardly have been publicly avowed in support of the adoption of the Constitution”).

20. See, e.g., Edmund W. Kitch, *Regulation and the American Common Market, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* 18 (A. Dan Tarlock ed., 1981) (arguing that historians show there is but a single “recorded instance of one state imposing a restriction on commerce coming from other states”).

21. MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION: 1781–1789* (1950); William F. Zornow, *Georgia Tariff Policies: 1775 to 1789*, 38 GA. HIST. Q. 1 (1954); William F. Zornow, *Massachusetts Tariff Policies: 1775–1789*, 90 ESSEX INST. HIST. COLLECTIONS 194 (1954); William F. Zornow, *New York Tariff Policies: 1775–1789*, 37 PROC. N.Y. ST. HIST. ASS’N 40 (1956); William F. Zornow, *Tariff Policies in South Carolina: 1775–1789*, 56 S.C. HIST. MAG. 31 (1955); William F. Zornow, *The Tariff Policies of Virginia: 1775–1789*, 62 VA. MAG. HIST. & BIOGRAPHY 306 (1954). Zornow purports to verify Jensen’s findings, though I dispute his evaluation of the evidence. See *infra* note 23 and accompanying text.

22. JOHN FISKE, *THE CRITICAL PERIOD IN AMERICAN HISTORY: 1783–1789*, at 144–54 (1888).

23. Brannon P. Denning, *State Commercial Discrimination During the Confederation Period: “Critical Period” or “Teapot Tempest”* (unpublished manuscript, on file with author).

erate nationalists like James Madison. The inability of the Confederation Congress to bring states to heel—despite the fact that many of these imposts and duties violated free trade provisions present in the Articles of Confederation<sup>24</sup>—persuaded those, like Madison, who had resisted the idea of a convention to revise the Articles, that systemic reform was necessary.

### III. A TEXTUAL BASIS FOR THE DCCD

The Framers' response to their perception of widespread commercial discrimination, and their fears that the pattern of discrimination and retaliation would get worse if left unremedied, is telling. Not only did the Framers grant broad taxing and regulatory powers to Congress,<sup>25</sup> but those powers were matched by corresponding restrictions on the powers of states. The Privileges and Immunities Clause of Article IV,<sup>26</sup> the Import-Export Clause,<sup>27</sup> the Tonnage Clause,<sup>28</sup> and the restrictions on treaties, compacts, and other agreements<sup>29</sup> provide strong textual evidence that state power over commerce is not, as is often argued, concurrent with congressional power, but is more circumscribed. Thus, I think that Professor Chen's concession of the lack of textual basis for the DCCD<sup>30</sup> is a bit hasty.

It cannot be denied that there is no explicit delegation of power to federal courts to enforce these restrictions,<sup>31</sup> but that surely proves too much. There is no explicit mention of the power of judicial review, either; and there is surely no constitutional text specifying that judicial review is to be employed to enforce particular constitutional provisions. As scholars have demonstrated generally, however, the lack of a "judicial review clause" means neither that there is no textual basis for the exercise of judicial review, nor that judicial review was not understood by the Framers to be a tool that federal courts would

---

24. See, e.g., ARTICLES OF CONFEDERATION arts. IV, VI. (U.S. 1781).

25. U.S. CONST. art. I, §§ 1, 3.

26. *Id.* art. IV, § 2.

27. *Id.* art. I, § 10, cl. 2.

28. *Id.* art. I, § 10, cl.3.

29. *Id.* art. I, § 10, cls. 1, 3.

30. See *supra* text accompanying note 14.

31. See *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) (discussing the "lack of any clear theoretical underpinning for judicial 'enforcement' of the Commerce Clause," which is "[o]n its face . . . a charter for Congress, not the courts").

employ.<sup>32</sup> Similarly, there is at least some evidence that the delegates to the Philadelphia Convention had the judiciary in mind as the body that would enforce the restrictions that the Constitution imposed on states.<sup>33</sup>

As he did in *Camps Newfound/Owatonna*,<sup>34</sup> Justice Thomas might respond that the portions of text I have described here—even assuming judicial review was intended to be an enforcement mechanism—provide at best incomplete support for the DCCD, because (1) the Framers seemed to be primarily concerned about state *taxation* of interstate commerce, particularly discriminatory taxation, but (2) the DCCD has been applied to a wide range of state commercial regulations that do *not* involve “imposts” and “duties” or their modern equivalents.

As to the first objection, the presence of the Privileges and Immunities Clause of Article IV, especially when read in light of its predecessor in the Articles of Confederation,<sup>35</sup> suggests

---

32. See, e.g., FEDERALIST NO. 78 (Alexander Hamilton); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 894–913 (2003) (offering textual evidence for the existence of judicial review); RANDY E. BARNETT, THE ORIGINAL MEANING OF THE JUDICIAL POWER 13–17 (Boston Univ. Sch. of Law Working Paper Series, Working Paper No. 03-18, 2003), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=437040#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437040#PaperDownload). Antifederalists, like the Massachusetts essayist “Brutus,” predicted that the judicial power provided for in Article III meant that courts, especially the Supreme Court, would exercise judicial review. See *Brutus XI*, Jan. 31, 1788, reprinted in THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 162–63 (Herbert J. Storing ed., 1985).

33. In one interesting exchange, when the delegates at the Philadelphia Convention debated whether states should be permitted to levy duties on imports and exports if absolutely necessary to execute state inspection laws, some delegates opposed the exception, fearing it would swallow the prohibition. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 588–89 (Max Farrand ed., rev. ed. 1966); Denning, *supra* note 3, at 205–06. When opponents asked about safeguards against state abuse of the exception, Madison replied that there “will be the same security as in other cases—The jurisdiction of the supreme Court must be the source of redress.” 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, *supra*, at 589; see Denning, *supra* note 3, at 206.

34. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

35. See ARTICLES OF CONFEDERATION art. IV, cl.1 (U.S. 1781).

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend



that the Framers' interests in protecting interstate commerce extended beyond oppressive revenue measures only. Article IV, Section 2 broadly prescribes nondiscrimination between in-state and out-of-state residents with regard to "privileges and immunities," a phrase not apparently limited to matters involving taxation. Second, proponents of a more minimalist conception of the DCCD (or a textual substitute, like the Import-Export Clause) have not made any case of which I am aware why the Court should be worried *only* about taxes, and not about other regulations that burden interstate commerce through discrimination or otherwise, which could be considered functional equivalents of taxes.<sup>36</sup> Critics do not seem especially worried that, for example, the First Amendment protects activity that extends beyond actual "speech"<sup>37</sup> or is inhibited by other branches of government,<sup>38</sup> despite the text of the First Amendment, which is addressed solely to Congress. To ignore

---

so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant . . . .

*Id.* In my forthcoming work, I devote a section to John Dickinson's unsuccessful, but not totally fruitless, efforts to secure protections for interstate commerce in the Articles of Confederation. The protections that were included, from which Article IV's Privileges and Immunities Clause derives, were, alas, "parchment barriers" owing to the lack of any meaningful enforcement mechanism. See Denning, *supra* note 23.

36. *Camps Newfound/Owatonna*, 520 U.S. at 575.

To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the Constitution provides. We noted . . . "[t]he paradigmatic . . . law discriminating against interstate commerce is the protective [import] tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." Such tariffs are "so patently unconstitutional that our cases reveal not a single attempt by a State to enact one."

*Id.* (citations omitted) (all alterations except the first in original).

37. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that burning the American flag is expressive activity protected by the First Amendment); *Cohen v. California*, 403 U.S. 15 (1971) (applying the First Amendment to a jacket emblazoned with a message opposing the draft); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (holding that the First Amendment protects the right to wear armbands symbolizing opposition to the Vietnam War); *United States v. O'Brien*, 391 U.S. 367 (1968) (discussing First Amendment protection for symbolic speech).

38. See, e.g., *N.Y. Times v. United States*, 403 U.S. 713 (1971) (per curiam) (holding that the First Amendment limits the executive branch's ability to enjoin publication of allegedly sensitive material); DANIEL A. FARBER, *THE FIRST AMENDMENT* 1 (2d ed. 2003) ("The First Amendment speaks only of Congress. But free expression is also protected against abridgement by the President and the federal courts.").

the apparent *purpose* of the Framers—to inhibit states from restricting the flow of interstate commerce and undermining economic union—seems to me wooden literalism.<sup>39</sup>

#### IV. DOCTRINAL PUZZLES OF THE DCCD

If I have been successful in demonstrating the shortcomings of the proffered alternatives to the DCCD<sup>40</sup> and in persuading some that the textual and historical critiques of the DCCD are ultimately unfounded in light of available evidence, then the remaining critiques of the DCCD embody some form of what Professor Chen terms the “swamp monster’ characterization.”<sup>41</sup> It is true that the rules of the DCCD are easier stated than applied. As Professor Dan Coenen has written, the DCCD “requires courts to make tough contextual judgments as they work their way through an endless stream of cases involving every imaginable form of state law.”<sup>42</sup> For its part, the Supreme Court has “set out an overarching structure—complete with great chambers, meandering side halls, and nooks and crannies—for evaluating dormant Commerce Clause cases.”<sup>43</sup> This “doctrinal complexity” is compounded, Coenen observes, “because the Court sometimes structures its analysis in ways that do not fit neatly within [its] framework.”<sup>44</sup>

Professor Coenen and his colleague Walter Hellerstein have—individually and collectively—cleared out a good deal of the DCCD’s doctrinal underbrush.<sup>45</sup> But doctrinal puzzles re-

---

39. Denning, *supra* note 3, at 220 (criticizing Justice Thomas’s proposal to employ the Import-Export Clause to invalidate discriminatory taxes, *but only* such taxes, and not regulations functionally equivalent to taxes).

40. Denning, *supra* note 2; Denning, *supra* note 3.

41. Chen, *supra* note 1, at 1792–93.

42. DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 210 (2004).

43. *Id.* at 220.

44. *Id.* at 222.

45. See, e.g., Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998); Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795 (1997); Dan T. Coenen, *The Impact of the Garcia Decision on the Market-Participant Exception to the Dormant Commerce Clause*, 1995 U. ILL. L. REV. 727; Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989); Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 MICH. L. REV. 2167 (1997); Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413 (1997); Walter Hellerstein, *Is “Internal Consistency” Fool-*

main. I will mention two, to which I hope to turn in the near future.

*Facially Neutral Statutes with Discriminatory Effects*—It is hornbook law that these statutes trigger strict scrutiny as if the statute were discriminatory on its face.<sup>46</sup> The problem is that the Court's decisions in this area have become increasingly difficult to apply. A number of questions require answering. Which effects count as "discriminatory" ones? Do the effects have to advantage an in-state economic competitor? Do the effects have to result in a net loss of interstate commerce to qualify? What role, if any, does legislative purpose play in assessing the question of discriminatory effects? Should discriminatory purpose be the *sole* trigger for strict scrutiny, regardless of effects?

The lack of answers to these questions and the inconsistent answers the Court has given have created problems in the lower courts, and have resulted in courts upholding laws that, though facially neutral, appear to embody naked protectionism.<sup>47</sup> Given the financial straits in which many states currently find themselves, the urge to benefit in-state economic actors and force out-of-state actors to pay for it is irresistible. Only the most ham-handed legislature will impose the sort of facially discriminatory measures that the Court has deemed "virtually 'per se' illegitimate."<sup>48</sup> Without clear signals from the

---

*ish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L.J. 789 (1996).

46. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981) (holding that courts may find discrimination under the DCCD by proof of either a discriminatory effect or a discriminatory purpose); *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 402 (1994) (O'Connor, J., concurring) ("Where . . . a regulation 'affirmatively' or 'clearly' discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism."); COENEN, *supra* note 42, at 224 ("The Court has indicated that state laws may run afoul of the dormancy doctrine because they are (1) facially discriminatory; (2) discriminatory in effect; or (3) discriminatory in purpose.").

47. See, e.g., *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) (upholding a state ban on the direct shipment of cigarettes); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001) (upholding a law whose effect was to prohibit manufacturers from selling cars over the Internet to Texas citizens).

48. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). For a recent ham-handed effort to discriminate against out-of-state corporations, see *S. Cent. Bell v. Alabama*, 526 U.S. 160 (1999) (striking down a discriminatory corpo-

Court that effects on out-of-state commerce or commercial actors will be rigorously scrutinized, states have every incentive to draft protectionist laws retaining the fig-leaf of facial neutrality.

*Extraterritoriality*—The advent of the Internet, and the attendant problems of regulating activity that is not easily confined within geographical boundaries, has renewed interest in another of the DCCD's doctrinal peculiarities: the extraterritoriality principle, which holds that states may not regulate conduct that occurs outside their boundaries. Despite Professor Regan's insistence that extraterritoriality does not implicate the DCCD at all,<sup>49</sup> courts have continued to classify it as an outgrowth of the DCCD. Why does the Court talk about it in connection with the DCCD and not, say, the Due Process Clause? And what is the scope of the principle? As Jack Goldsmith and Alan Sykes have noted, if the Supreme Court's extraterritoriality decisions are taken seriously, then reams of state laws are at risk.<sup>50</sup> I suggest in a forthcoming chapter in a book on firearms litigation that strong extraterritoriality claims could be made against gun litigation—particularly where plaintiffs request relief in the form of injunctions from state courts requiring changes in the nationwide marketing, manufacture, and distribution of products by out-of-state manufacturers.<sup>51</sup>

The Court may have signaled an intention to prune substantially the extraterritoriality branch of the DCCD last Term,<sup>52</sup> but it did not overrule its prior cases, with which lower courts continue to struggle. Given the Internet's transcendence of geographical boundaries and the ability of states to "project" their legal rules into other jurisdictions through, among other

---

rate tax).

49. See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987).

50. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001).

51. Brannon P. Denning, *Constitutional Limitations on Regulating the Gun Industry Through Tort Litigation: The Second Amendment and the Dormant Commerce Clause*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORT* (Timothy D. Lytton ed., forthcoming 2005).

52. *Pharm. Research & Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855 (2003) (rejecting the claim that the Maine prescription drug benefit operated with impermissible extraterritorial effects).

vehicles, mass tort law, extraterritoriality, too, seems to require explanation and a defense, if one is possible.

Despite the conundrums the Court has created, I heartily agree with Professor Chen that the Court's DCCD decisions "no more constitute a quagmire than decisions on . . . affirmative action, the public forum doctrine, the religion clauses, and regulatory takings."<sup>53</sup> Complexity is no excuse for refusing to understand and clarify the law, and no excuse for refusing to enforce it.<sup>54</sup> The DCCD may be one of the more confusing doctrines in constitutional law—it may even be "the dullest subject in constitutional law"<sup>55</sup>—but there are those of us who love it, and will continue laboring to understand and clarify it.

### CONCLUSION

Only Charles Black could have constructed a persuasive defense of the DCCD in as few pages as I have taken up here.<sup>56</sup> And I'm no Charlie Black. More evidence and further explanation will be required to make my historical and textual case for the DCCD. A great deal more research and thought will go into clearing up some of the doctrinal puzzles the DCCD has produced. But I am grateful for the opportunity, occasioned by Professor Chen's generous attention to my previous work, to chart a course for future inquiry into the DCCD.

---

53. Chen, *supra* note 1, at 1793.

54. *See supra* note 9.

55. Daniel A. Farber, *The Zapp Complex*, 5 CONST. COMMENT. 13, 14 (1988).

56. *Cf.* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (defending *Brown* in less than ten pages).