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THE DORMANT COMMERCE CLAUSE AND THE CONSTITUTIONAL BALANCE OF FEDERALISM

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Through the passage of time, the dormant commerce clause doctrine has acquired a patina of legitimacy; the doctrine frequently is used by the judiciary to overturn state regulation of commerce. Professor Martin Redish and Shane Nugent argue that time alone cannot legitimize such actions by the courts, and that the Constitution provides no textual basis for the exercise of this authority. Moreover, they contend that the doctrine actually undermines the carefully structured federal balance embodied in the text. They further argue that nontextual rationales are flawed, and that jurisprudence based on the text of the Constitution can deal adequately with discriminatory state legislation currently overturned by reference to a "dormant" commerce clause.

Since the early 1940s,¹ Congress's power to regulate interstate commerce² has grown through judicial interpretation to the point where today it is virtually unlimited in its reach.³ But as is the case with all of

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1. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

2. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cl. 3.

3. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Commerce clause extends federal minimum-wage regulation to state and local public entities.); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Regulation of local restaurants was within the scope of the commerce clause.). See generally 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §§ 4.1-10 (1st ed. 1986).

Congress's powers enumerated in article I of the Constitution,⁴ the commerce power need not be exercised by Congress. Thus, despite the extension of the commerce power, Congress has left numerous areas free from federal statutory regulation. Moreover, even when Congress has invoked its authority, substantial room has been left for state regulation in certain areas.⁵

In a number of instances, however, although Congress has failed to enact legislation preempting state commerce regulation, the Supreme Court nevertheless has invalidated a state regulation as a violation of the commerce clause.⁶ The Court has done so when it has found that such regulation either discriminates against out-of-state interests or unduly burdens the free flow of commerce among the states.⁷ The commerce clause in its "dormant" state⁸ is thought to invalidate such state regulation, although it is accepted that Congress may choose to overrule the judicial invalidation of a particular state regulation by statutorily authorizing it.⁹

Traditionally, the dormant commerce clause was considered an arcane aspect of American constitutional law that fell far behind individual liberties as a generator of academic or student interest. In recent years, however, the dormant commerce clause has been the subject of a resurgence of both scholarly¹⁰ and judicial¹¹ concern. Leading constitutional

4. See, e.g., U.S. CONST. art. I, § 8.

5. See, e.g., *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987) (regulation of purchase of corporate securities); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (regulation of storage and disposal of nuclear reactor waste).

6. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (State statute requiring prescribed packaging for native fruit sold outside state unconstitutionally burdened interstate commerce.); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (State statute requiring specified type of rear fender mudguard for trucks unconstitutionally burdened interstate commerce.).

7. See generally 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 3, §§ 11.1-10.

8. The label "dormant" has been criticized as misleading:

The term connotes something with the potential for action, yet currently in repose. It is clear that what remains dormant is Congress, and not the commerce clause. The clause's limitation on state regulation can certainly be termed implicit, silent, or negative, but dormancy does not accurately describe the situation.

Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425, 425 n.1 (1982).

9. In *Southern Pacific Co. v. Arizona ex rel. Sullivan*, Chief Justice Stone, speaking for the Court, stated that Congress has "undoubted" power to "permit the states to regulate the commerce in a manner which would otherwise not be permissible." 325 U.S. 761, 769 (1945). See generally *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-40 (1946) (McCarran Act constitutionally validated state statute that discriminated between foreign and domestic insurance companies.).

10. See, e.g., *Eule, supra* note 8; Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395 (1986); Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Schwartz, *Commerce, the States, and the Burger Court*, 74 NW. U.L. REV. 409 (1979); Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis*

scholars have recalled that, like it or not, ours is a complex federal system, giving rise to numerous constitutional problems inherent in the division of authority between two levels of political sovereignty. The dormant commerce clause, as an example of one such problem, is thus seen as worthy of renewed study.

Much of the recent literature has focused largely on the substantive standards to be employed in deciding whether state regulation is permissible. To that end, these works have attempted primarily to determine the proper purposes to be served by the clause and the specific content that the doctrine should possess—often reaching conflicting conclusions on these issues.¹² Such efforts, we believe, are reminiscent of an argument over the proper lapel widths to be placed on the emperor's new clothes. With limited exceptions, the recent literature expends relatively little effort attempting either to find the textual source or to prove the legitimacy of the dormant commerce clause.¹³ Our position is that no such legitimate constitutional source exists: the simple fact is that there is no dormant commerce clause to be found within the text or textual structure of the Constitution.¹⁴

If we are correct in our assertion that the dormant commerce clause finds no authorization in the constitutional text, then the Supreme Court

in Terms of Constitutional Structure, 31 WAYNE L. REV. 885 (1985); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

11. In recent years, the Supreme Court's interest in the area appears to have increased dramatically. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986) (State statute banning importation of baitfish upheld as serving legitimate local purpose of preventing parasitic infection of native fish.); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (State statute limiting in-state liquor pricing to outside-state wholesale price violated the commerce clause.); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (State statute requiring timber from state lands to be partially processed in-state unconstitutionally burdened commerce.); *see also* Farber, *supra* note 10, at 400 (noting the Court's increasing willingness to strike down state statutes in commerce clause cases).

12. Professors Eule and Tushnet, for example, emphasize "the process-oriented protection of representational government" as the concept's ultimate rationale. Eule, *supra* note 8, at 443; Tushnet, *supra* note 10, at 150. Professor Regan, on the other hand, has argued that in interpreting the dormant commerce clause "the Court is concerned and should be concerned only with preventing purposeful [state] protectionism." Regan, *supra* note 10, at 1093.

13. Professor Regan has expended the greatest effort in this attempt. *See infra* notes 103-10 and accompanying text; *see also* Sedler, *supra* note 10, at 968-99.

14. After the initial draft of this article was completed, Justice Scalia filed a partial dissent in which he anticipated some of our basic conclusions.

[T]he language of the Commerce Clause gives no indication of exclusivity. Nor can one assume generally that Congress' Article I powers are exclusive; many of them plainly coexist with concurrent authority in the States. Furthermore, there is no correlative denial of power over commerce to the States in Art. I, § 10, as there is, for example, with the power to coin money or make treaties. . . .

....

The least plausible theoretical justification of all is the idea that in enforcing the negative Commerce Clause the Court is not applying a constitutional command at all, but is

has no power to use the clause to invalidate state commerce legislation. Our federal constitutional democracy prohibits the unrepresentative federal judiciary from invalidating decisions of the state legislatures except when authorized by some provision or combination of provisions of the Constitution, or when clearly contrary to congressional action.¹⁵ Absent textual foundation, the dormant clause cannot stand, regardless of whatever valuable social, economic or political policies the concept might be thought to foster.

It is true, of course, that on occasion scholars have argued that the Court may "read into" the Constitution's broad precepts that lack a specific basis in text—what has been referred to as the "unwritten constitution."¹⁶ Such a position has in fact been specifically urged as a justification for the dormant commerce clause.¹⁷ Although the issue is

merely interpreting the will of Congress, whose silence in certain fields of interstate commerce (but not in others) is to be taken as a prohibition of regulation.

Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue, 107 S. Ct. 2810, 2827-28 (1987) (citations omitted); see also CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1652-53 (1987) (Scalia, J., concurring in part and concurring in the judgment).

While Justice Scalia's position is similar to ours in ultimate result, we believe that our textual, historical, theoretical and policy analyses provide a firm and detailed theoretical grounding for Justice Scalia's conclusions.

15. See generally Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987). Thus, in an earlier article one of the authors stated:

[W]hile the Court may necessarily exercise considerable freedom in defining and applying constitutional language, it does not follow that it can supplement the specific provisions of the Constitution by writing new ones, rather than interpreting existing ones. For, if recognized, such a power knows no logical bounds: if the Court's constitutional pronouncements are not required to have at least an arguable basis in the document's language, the Court's decisions inescapably become mere fiat, insulated from reasoned debate other than in the purely legislative sense of debating the normative wisdom of whatever "constitutional" rule the Court is considering devising.

Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1130 (1981). This restriction on the judiciary stands in contrast to the other branches:

Neither theoretically nor practically does the judiciary have a freedom to function equivalent to that possessed by the executive and legislative branches. While those branches are authorized and able to act on an ad hoc basis and usually to decide solely on the basis of their views of normative policy, the judiciary is confined institutionally by the flow of past legal developments, by the concern about future applications of its decisions, and by the constraints of the governing documents that it interprets. . . . The unrepresentative nature of the federal judiciary largely confines the legitimacy of the judiciary's operation. Once the judiciary departs from this practice and instead attempts to operate without concern for any factor other than its own personal and isolated preferences, it has abandoned its role and therefore its legitimacy in a democratic system.

Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine* (Book Review), 85 COLUM. L. REV. 1378, 1400 (1985).

16. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (advocating judicial role beyond "pure interpretive" model); see also M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* ix, 91-145 (1982) (supporting extraconstitutional policymaking by the judiciary in human rights context).

17. See Regan, *supra* note 10, at 1110-25; Sedler, *supra* note 10, at 977-82.

largely beyond the scope of this article,¹⁸ we believe this approach lacks any basis in constitutional democratic theory.¹⁹ Even if we were to assume that a judicial supplement to the text may, under certain circumstances, be accepted, such a view could not justify recognition of the dormant commerce clause. For we will demonstrate that not only is there no textual basis to support recognition of such a concept, but also that the dormant commerce clause actually contradicts, and therefore directly undermines, the Constitution's carefully established textual structure for allocating power between federal and state sovereigns. If this is the case, then invocation of the dormant commerce clause would constitute a considerably greater judicial usurpation of constitutional authority than would a mere judicial supplement to a text otherwise silent on the matter.

Ultimately, we conclude that the dormant commerce clause is invalid because it reverses the political inertia established by the Constitution. Under the dormant commerce clause, the federal judiciary—the organ of the federal government most insulated from state influence and the organ traditionally feared most by the states²⁰—makes the initial legislative judgment whether state regulation of interstate commerce is reasonable. If the Court strikes down economic regulations, the states must somehow force Congress to reverse the decision of the Court through legislation—a process made difficult because of Congress's inherent political inertia. Our historical and textual analyses lead us to conclude that this is clearly not the plan of the Constitution. State power to regulate interstate commerce was designed to be determined solely by the political judgment of Congress, where the states retain enough political power to *block* congressional action, since Congress's inertia is not against them.²¹ As such, the constitutional balance favors the states since Congress must overcome its own political inertia to reverse a state regulatory action.²²

Moreover, we will argue that the failure to adhere to this constitutional balance effectively undermines many of the basic advantages thought to be derived from a federal system, not the least of which is the

18. The question is considered in greater detail in Redish & Drizin, *supra* note 15, at 17-23. It is argued "that as a matter of neither constitutional nor democratic theory may the Supreme Court adjudicate constitutional challenges without regard to constitutional text." *Id.* at 4. This article will incorporate by reference the analysis of the role of textualism in constitutional democratic theory contained in that earlier publication.

19. See *infra* notes 156-70 and accompanying text.

20. See *infra* notes 140-46 and accompanying text.

21. See *infra* notes 133-39 and accompanying text.

22. The analysis may well be different, however, if the ground for judicial invalidation is the discriminatory effect of state regulation on out-of-state residents. Such a situation might well implicate the privileges and immunities clause. See *infra* notes 190-219 and accompanying text.

desire to encourage individual state experimentation.²³ This benefit of federalism should be sacrificed only when the negative impact on the nation's economy is so severe that preemptive congressional action can overcome the hurdles of political inertia.²⁴

This article proceeds in six parts. In the first section of the article, we examine the origins and development of the dormant commerce clause in Supreme Court decisions.²⁵ Next, we argue that the dormant commerce clause has no basis in the Constitution, considering and rejecting the conceivable arguments that find a textual or quasi-textual authorization for the clause.²⁶ In the third section of the article, we proceed to demonstrate the inconsistency of the clause with the Constitution's allocation of authority within the nation's federal structure.²⁷ We then critique and reject the possible nontextual justifications for the dormant commerce clause.²⁸ The fifth section proceeds to examine the methods of federal and state regulation of interstate commerce that would remain after the demise of the dormant commerce clause.²⁹ Finally, we discuss and reject the "democratic process" critique of the dormant commerce clause.³⁰

I. THE ORIGINS AND DEVELOPMENT OF THE DORMANT COMMERCE CLAUSE

The Supreme Court has used the dormant commerce clause to invalidate a myriad of state regulations affecting interstate commerce. For example, the Court, relying on the clause, has invalidated state licensing

23. See *infra* notes 119-55 and accompanying text.

24. Certain commentators, largely on grounds of political theory, have argued that the dormant commerce clause can properly serve only one value, namely, the "democratic process" concern that state legislation might disproportionately affect out-of-state residents, who were unrepresented in the legislative process. See Eule, *supra* note 8, at 438-43; Tushnet, *supra* note 10, at 130-31. As so revised, the clause would protect only against state legislation discriminating against out-of-state residents. This has led one of these commentators to suggest that the dormant commerce clause, as a separate concept, is no longer necessary, since the privileges and immunities clause may be construed to perform the same function. Eule, *supra* note 8, at 446-48. Purely in terms of result, this conclusion is similar to our own. It is our position, however, that despite this coincidental similarity in result the internal logic of this theoretical critique is fundamentally flawed in several respects, see *infra* notes 234-40 and accompanying text, and in any event ultimately fails because of its lack of grounding in constitutional text. See *infra* notes 246-48 and accompanying text.

25. See *infra* notes 31-78 and accompanying text.

26. See *infra* notes 79-118 and accompanying text.

27. See *infra* notes 119-55 and accompanying text.

28. See *infra* notes 156-89 and accompanying text.

29. See *infra* notes 190-226 and accompanying text.

30. See *infra* notes 227-48 and accompanying text.

requirements,³¹ train length restrictions,³² mudguard requirements,³³ truck length prohibitions,³⁴ and various produce regulations.³⁵ But upon what constitutional or interpretive foundation does the dormant commerce clause rest? Because the Court has for many years simply assumed the dormant commerce clause's constitutional legitimacy, it is not as easy as one might think to discover the original constitutional theory behind the concept's creation.

A. Chief Justice Marshall and the Dormant Commerce Clause.

The opinions of Chief Justice Marshall in the landmark cases of *Gibbons v. Ogden*³⁶ and *Willson v. Black Bird Creek Marsh Co.*³⁷ provide a starting point in the search for the origins of the dormant commerce clause. In *Gibbons*, the New York legislature had granted a monopoly to operate steamships between New Jersey and New York. Gibbons argued that the monopoly was invalid under the commerce clause, as well as under federal navigation legislation.³⁸ The Court, however, dismissed the question as to whether a state could, in accordance with the Constitution, regulate commerce among the several states.³⁹ Instead, Chief Justice Marshall maintained that the "sole question" before the Court was: "can a State regulate commerce . . . among the States, while Congress is regulating it?"⁴⁰ The Court answered this question in the negative, holding that Congress, pursuant to the commerce clause, had enacted a constitutionally valid law, regulating the same subject matter as the New York act, and that therefore the federal act controlled under the supremacy clause.⁴¹

Before reaching the Court's actual decision, the Chief Justice flirted with the concept that the Constitution's grant of power to Congress to

31. *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927) (license requirement for vendors of steamship tickets to or from foreign countries); *Buck v. Kuykendall*, 267 U.S. 307 (1925) (license requirement for common carriers using public highways).

32. *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

33. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

34. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

35. *Huut v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (apple packaging requirement); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (milk pasteurization and sale requirements); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (milk price regulation).

36. 22 U.S. (9 Wheat.) 1 (1824).

37. 27 U.S. (2 Pet.) 245 (1829).

38. 22 U.S. (9 Wheat.) at 186.

39. *Id.* at 199-200.

40. *Id.* at 200.

41. *Id.* at 200-22. Justice Johnson, concurring in the judgment, would have invalidated the New York monopoly on the grounds that the constitutional grant of power to regulate commerce among the states precluded a state from exercising a concurrent power to regulate such commerce. *Id.* at 222-39.

regulate commerce among the states necessarily precluded the states from exercising a concurrent power over the same object.⁴² Although the Court purported to avoid deciding the question whether the states could constitutionally regulate commerce in the absence of preemptive federal legislation, the Chief Justice's opinion is famous for answering this very question in dicta.

Marshall appears to have believed that the state and federal governments possessed very different powers over interstate commerce. In considering the argument that the state and federal governments had concurrent power to regulate interstate commerce, just as the state and federal governments had concurrent power to levy taxes,⁴³ he raised a possible distinction between the exercise of the two powers:

In imposing taxes for State purposes, [the States] are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce . . . among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.⁴⁴

Marshall found "great force in this argument," and noted that "the Court is not satisfied that it has been refuted."⁴⁵

Marshall did not establish the dormant commerce clause in *Gibbons*,⁴⁶ although according to Justice Frankfurter, he could have garnered the votes to do so.⁴⁷ Still, the opinion contributed to the concept's development. It is, however, the Chief Justice's opinion in *Willson v. Black Bird Creek Marsh Co.*,⁴⁸ which most directly demonstrates that Marshall recognized a negative aspect to the commerce power. In this

42. *Id.* at 197-210.

43. *Id.* at 198-200.

44. *Id.* at 199-200.

45. *Id.* at 209. This argument has given rise to the view that Congress's power to regulate interstate commerce is exclusive. See F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 17 (1937 & photo. reprint 1964).

46. See 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 3, § 11.2.

47. F. FRANKFURTER, *supra* note 45, at 16.

48. 27 U.S. (2 Pet.) 245 (1829). The Marshall Court had one other opportunity to consider the commerce power before deciding *Willson*. But in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), Marshall maintained that the sole question before the Court was whether a state could constitutionally require an importer to take out a license before selling imported goods in that state. *Id.* at 436. The Court held that a Maryland license fee for the sale of imports was a tax on imports which violated the Constitution's article I, section 10, clause 2 limitation on the states, which proscribed the states from levying imposts or duties on imports without the consent of Congress. *Id.* at 445. The Court also held that the license fee was invalid because it "must be in opposition to the act of Congress which authorizes importation" passed pursuant to Congress's article I, section 8, clause 3 power to regulate commerce. *Id.* at 448.

decision the Chief Justice first used the term "dormant" in connection with the commerce clause.

In *Willson*, Delaware had authorized the building of a dam across a navigable creek.⁴⁹ The plaintiffs contended that the authorizing act was in conflict with the federal government's power to regulate interstate commerce.⁵⁰ The Court rejected the challenge to the statute and summarily declared:

We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the [federal] power to regulate commerce in its *dormant* state, or as being in conflict with any law passed on the subject.⁵¹

Thus, the *concept* of a dormant commerce clause can be traced back to Marshall's opinions in *Gibbons* and *Willson*. Neither of these cases, however, provided guidance as to the *nature* of the "dormant state" present within the commerce clause.⁵²

B. *Cooley and the Selective Dormant Commerce Clause.*

In the years after *Gibbons* and *Willson*, the Court on occasion expressed reluctance to invoke a dormant commerce clause,⁵³ and it was not until *Cooley v. Board of Wardens*⁵⁴ that the doctrine became firmly established in Supreme Court jurisprudence. In *Cooley*, the controversy centered upon a Pennsylvania statute requiring ships to engage a local pilot when entering or departing the port of Philadelphia. Failure to do so resulted in a sixty dollar penalty.⁵⁵ Justice Curtis, writing for the majority, rejected several attacks upon the statute,⁵⁶ ultimately upholding it

49. 27 U.S. (2 Pet.) at 250-51.

50. *Id.* at 251-52. Noting that Congress had not passed any act that would preempt the Delaware statute, the Court maintained that "[t]he repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question." *Id.* at 252.

51. *Id.* at 252 (emphasis added).

52. *See id.*; *Gibbons*, 22 U.S. (9 Wheat.) at 189. After *Willson*, Marshall was unable to pass on any other questions regarding the commerce clause. Marshall did hear the first oral argument in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837), but died before a decision had been reached. *See* 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 3, § 11.3.

53. *See, e.g.*, *The License Cases*, 46 U.S. (5 How.) 504, 578-79 (1847) (opinion of Taney, C.J.).

54. 53 U.S. (12 How.) 299 (1851).

55. *See id.* at 311-12.

56. *Id.* at 312-15. First, the statute was attacked as an impermissible impost or duty on imports, exports or tonnage under article I, section 10, clauses 2 and 3. *Id.* at 312-14. Second, *Cooley* argued that Pennsylvania was imposing an unconstitutional duty, rather than regulating pilotage. *Id.* at 314. Finally, the statute was assailed because it allegedly gave a preference to the port of Philadelphia and required a vessel from another state to pay a duty in violation of the prohibition of such practices contained in article I, section 9, clause 5. *Id.* at 314-15.

as a constitutional regulation of commerce.⁵⁷

Justice Curtis, in his analysis, rejected the argument that Congress had been granted exclusive power to regulate commerce by referring to a federal statute enacted in 1789;⁵⁸ this statute permitted state regulation of pilotage by then-existing or thereafter-enacted state statutes.⁵⁹ He maintained that if the Constitution stripped the states of all power to regulate commerce, then Congress could not delegate such a power to the states. Because the 1789 act sanctioned such state statutes, there was "necessarily implie[d] a constitutional power [on the part of the state] to legislate."⁶⁰

Justice Curtis then argued that:

[I]t would be in conformity with the contemporary exposition of the Constitution [when it was ratified] . . . to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise [of the same power] by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations.⁶¹

Curtis reasoned that the power to regulate commerce must be viewed in terms of the subject being regulated. While some subjects required a uniform federal rule, others required diverse regulations that only the states could provide.⁶² From this Curtis concluded that:

Either absolutely to affirm, or deny that the nature of [the commerce] power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform

57. *Id.* at 321.

58. Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 53, 54.

59. 53 U.S. (12 How.) at 317-18.

60. *Id.* at 318.

61. *Id.* at 318-19 (citing *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251 (1829); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819); *THE FEDERALIST* No. 32 (A. Hamilton)). Curtis noted that a state power to regulate the District of Columbia, for example, would be incompatible with the grant of such a power to Congress. *Id.* at 318.

62. Justice Curtis reasoned that:

[W]hen the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Id. at 319.

system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain.⁶³

Thus, by focusing on the objects of commerce rather than the power itself, Curtis ultimately avoided answering the difficult question of whether Congress's power to regulate commerce was exclusive. Instead, he struck a pre-Civil War judicial compromise. His approach simultaneously avoided confrontation with states' rights advocates, yet reserved for the Court the ability to invalidate objectionable state legislation under a theory of *partial* exclusivity. Moreover, the case before the Court provided the perfect vehicle for the articulation of the selective doctrine with little contemporary objection, since the Court found that Congress had permitted the states to regulate the commerce in question.

At the close of his opinion, Curtis reemphasized the Court's adoption of a narrow, "selective" approach to questions concerning the regulation of interstate commerce. He rationalized that the Court's opinion was confined to the precise question before it⁶⁴ and did not "extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation."⁶⁵ Thus was born the "*Cooley* Rule of Selective Exclusiveness."⁶⁶ Under the *Cooley* rule, only those state regulations affecting a specific category of interstate commerce—that which by its very nature requires exclusive federal regulation—are invalid by direct application of the commerce clause.

C. *Welton and the Dormant Commerce Clause.*

Nearly twenty-five years after the *Cooley* decision, the Court attempted to supplement the justification for the dormant commerce clause. *Welton v. Missouri*⁶⁷ involved a Missouri protectionist statute, requiring a "peddler's" license for merchants selling goods that came

63. *Id.* Curtis maintained that the Pennsylvania statute did not regulate the type of commerce falling into the "exclusive" category. *Id.* at 319-20. He further noted that the federal act of 1789 "manifest[ed] the understanding of Congress, at the outset of the government, that the nature of th[e] subject [before the Court] is not such as to require its exclusive legislation." *Id.* at 320.

64. *Id.* Justice Curtis failed to consider Chief Justice Marshall's view of the commerce clause, which permitted states to enact legislation pursuant to their "police power" that could have a substantial effect on commerce. *See id.* at 311-21.

65. *Id.* at 320.

66. *See* 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 3, § 11.4. The Court in *Cooley* noted that the state statute had a nondiscriminatory effect since the statute applied to residents and nonresidents alike, despite an exemption for any vessels engaged in the Pennsylvania coal trade. 53 U.S. (12 How.) at 311, 313. The "nondiscriminatory" effect of the Pennsylvania statute has been considered an important element in the *Cooley* decision. *See* 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 3, § 11.4.

67. 91 U.S. 275 (1875).

from other states. If, however, the goods were produced within Missouri, no license was required.⁶⁸ The Court invalidated the statute pursuant to the dormant commerce clause doctrine announced in *Cooley*, stating that:

[I]t has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.⁶⁹

The *Welton* Court argued that uniformity of commercial regulation is necessary to protect articles of commerce from hostile legislation.⁷⁰ Thus, Justice Field declared that "[t]he fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. *Its inaction on this subject . . . is equivalent to a declaration that inter-State commerce shall be free and untrammelled.*"⁷¹

Possibly recognizing the dormant commerce clause's tenuous textual basis, Field attempted to characterize the concept as an inference of congressional intent from Congress's failure to enact its own regulatory legislation.⁷² The Court, however, never fully explicated this supplemental justification for the dormant commerce clause. Nonetheless, it has become a firm part of dormant commerce clause jurisprudence.

D. *The View of the Modern Court.*

The modern Court appears untroubled by the lack of any textual justification for the dormant commerce clause. In *Southern Pacific Co. v. Arizona ex rel. Sullivan*,⁷³ the Court noted that the states could neither impede the "free flow" of commerce nor regulate elements of interstate commerce requiring national uniformity.⁷⁴ The Court refused to choose between its previously articulated justifications for the dormant commerce clause, because "[w]hether . . . this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, or upon the presumed intention of Congress, where Congress has not spoken, the result is the

68. *Id.* at 275.

69. *Id.* at 280.

70. *Id.* at 281.

71. *Id.* at 282 (emphasis added).

72. *Id.* Justice Field cited three cases in support of the "views here expressed": *The State Freight Tax Case*, 82 U.S. (15 Wall.) 232 (1872); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). Not one of the cases which Field cited, however, alluded to the idea of inferring congressional intent from congressional silence.

73. 325 U.S. 761 (1945).

74. *Id.* at 770.

same.”⁷⁵ Instead, the Court continues to employ the dormant commerce clause, regardless of its constitutional justification, by summarily adhering to precedent:

For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.⁷⁶

Since *Southern Pacific*, the Court has not reconsidered the constitutional basis of the dormant commerce clause. Rather, in unquestioning reliance on the clause, the Court has continued to invalidate certain state regulations affecting interstate commerce.⁷⁷

In some respects, there seems to be little remarkable about the interpretation of the commerce clause originally established in *Cooley*. When Congress expressly determines, as it did in *Cooley*, that the nature of the commerce in question does not require exclusive regulation, the states may exercise power over that commerce. Alternatively, when Congress determines, by the enactment of federal legislation, that certain objects of commerce require exclusive federal regulation, the conflicting state regulations are clearly invalid under the supremacy clause.⁷⁸ It is, however, under a third scenario that the troubling effect of the *Cooley* doctrine is revealed. Under *Cooley*, when Congress has not regulated the objects of commerce in question, the *Court itself* determines whether the nature of the commerce requires exclusive federal regulation. Thus, the Court, in testing state legislation, essentially makes what amounts to an intrinsically legislative determination as to whether a particular type of commerce requires exclusive federal regulation.

II. THE ASSERTED CONSTITUTIONAL RATIONALES FOR THE DORMANT COMMERCE CLAUSE

Together, the Supreme Court and constitutional scholars have advanced three theories to reconcile the dormant commerce clause with the

75. *Id.* at 768 (citations omitted).

76. *Id.* at 769. “[I]n general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn” *Id.* at 770 (citing *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 441 (1939)).

77. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 678-79 (1981) (truck length limitations); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (waste importation prohibition); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970) (cantelope packing requirements); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 530 (1959) (truck mudguard requirements).

78. U.S. CONST. art. VI, cl. 2; see, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971) (striking part of a state motor vehicle law inconsistent with federal Bankruptcy Act under the supremacy clause).

constitutional text. The first of these argues that the textual grant of the commerce power to Congress automatically provides an implicit constitutional negation of concurrent state power.⁷⁹ The second theory finds support for the dormant commerce clause in the historical evidence surrounding the decision of the framers to give the commerce power to the national government.⁸⁰ The third theory argues that Congress's failure to regulate a particular aspect of interstate commerce necessarily implies a congressional decision to leave the subject unregulated; thus, any state regulation of commerce is inherently inconsistent with congressional intent and therefore invalid under the supremacy clause.⁸¹ In this section, we critically examine—and reject—these three conceivable methods for rationalizing the dormant commerce clause with the Constitution's text.

A. *The Dormant Commerce Clause and the Text of the Commerce Power.*

Both article I, section 10⁸² and the privileges and immunities clause of article IV⁸³ impose certain limits on state behavior.⁸⁴ None of these prohibitions, however, can be (or has been) relied upon as a basis for recognition of the dormant commerce clause.⁸⁵ Thus, no constitutional provision supports the holding in *Cooley* that the states may not regulate certain objects of commerce if the Court determines that these objects of

79. See *infra* notes 82-102 and accompanying text.

80. See *infra* notes 103-10 and accompanying text.

81. See *infra* notes 111-18 and accompanying text.

82. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10.

83. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

84. See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518, 523-34 (1978); see also *infra* notes 119-22 and accompanying text.

85. Interestingly, the dormant commerce clause operates in much the same manner as the conditional prohibitions in article I, section 10, clauses 2-3. In those situations, states are prohibited from taking certain actions, unless Congress affirmatively authorizes such behavior. Neither of these clauses, however, concerns the general power to regulate interstate commerce.

commerce require exclusive federal regulation.⁸⁶

A second facet of dormant commerce clause theory is that Congress may authorize state economic regulation that has been invalidated under the dormant commerce clause.⁸⁷ Clearly, the aforementioned prohibitions do not provide a textual basis for this element of the doctrine, either. Rather, the Court generally has maintained that the dormant commerce clause derives directly from the article I, section 8 grant to Congress of a power to regulate interstate commerce.⁸⁸ That provision states that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁸⁹ The commerce clause is not a self-executing power; rather, it is a power that is given to Congress, to use or not, as it deems necessary. Nowhere does the text of the Constitution or its amendments deny the exercise of this same power to the states.⁹⁰

On the basis of the constitutional text, then, one of two conclusions may be reached. One possibility is that the very existence of this constitutional grant of power to the federal government necessarily proscribes the states from exercising *any* power over interstate commerce. This view amounts to adoption of what is generally referred to as the "dual federalism" model of the constitutional allocation of power between the state and national governments: "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States."⁹¹ Alternatively, the clause may be taken to mean that the grant of power to Congress *enables* Congress to override state regulation of interstate commerce and, if necessary, to preempt state regulation of commerce under the supremacy clause. Absent such affirmative congressional action, the states are free to regulate interstate commerce (subject, of course, to traditional limitations on states' exercise of legislative jurisdiction).⁹² This second theory constitutes an application of the "cooper-

86. See *supra* notes 54-66 and accompanying text. The Court's subsequent supposition that congressional silence manifests Congress's intention that these objects of commerce remain unregulated does not rise to the level of constitutional interpretation. We address that issue separately. See *infra* notes 112-18 and accompanying text.

87. See *In re Rahrer*, 140 U.S. 545, 562-65 (1891); see also *supra* note 9.

88. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318-21 (1851).

89. U.S. CONST. art. I, § 8, cl. 3.

90. See *supra* notes 82-86 and accompanying text.

91. Mason, *Federalism: The Role of the Court*, in *FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 24 (V. Earle ed. 1968).

92. It should be noted that the absence of a direct constitutional prohibition on state power does not automatically vest a state with power it never possessed prior to the adoption of the Constitution. Illinois, for example, could not purport to regulate commerce between Maryland and Virginia, having no impact on Illinois, simply because the Constitution does not expressly deny such power. Illinois never had this power in the first place.

ative" model of federalism.⁹³ Our conclusion is that the dormant commerce clause is not consistent with either theory.

1. *The Dual Federalism Model.* In the "dual federalism" model of American constitutional government, the state and federal governments each exercise their own exclusive area of jurisdiction.⁹⁴ According to Professor Edward Corwin, the dual federalism model is composed of four principles:

1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4. The relation of the two centers with each other is one of tension rather than collaboration.⁹⁵

Put another way, the dual federalism model encompasses "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions."⁹⁶ For our purposes, the important component of the dual federalism model is the assumption that if a power is committed to one sovereign, it cannot be exercised by the other sovereign. Thus, granting a power to the federal government automatically denies that power to the state governments.⁹⁷

Even if one were to accept the dual federalism model as the controlling theory of American federalism, the dormant commerce clause still cannot survive. Under this model, the Constitution's textual grant of power to Congress would simultaneously deprive the states of *any* power to regulate interstate commerce—a result substantially different from established dormant commerce clause doctrine.⁹⁸ Moreover, Congress could not constitutionally authorize the states to enact legislation affecting commerce if the constitutional grant of power to regulate commerce deprived the states of *all* power to enact any legislation affecting interstate commerce, for Congress presumably cannot cure such a lack of constitutional power.

In any event, the dual federalism model of American constitutional government is not the accepted theory of American federalism.⁹⁹ In-

93. See generally D. ELAZAR, *THE AMERICAN PARTNERSHIP* (1962).

94. *Id.* at 22.

95. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

96. Mason, *supra* note 91, at 24-25.

97. Of course, the reverse is true as well.

98. See *supra* note 78 and accompanying text.

99. See Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 882-88 (1985) (tracing historical development of dual federalism and its import).

deed, it is questionable whether it ever represented the controlling model of constitutional government.¹⁰⁰ That the Constitution itself did not contemplate so rigid a division of sovereign power is, ironically, established by the very existence of the direct constitutional prohibitions on state power contained in article I, section 10.¹⁰¹ If the Constitution's drafters had contemplated a dual federalism model, the prohibitions contained in article I, section 10 would have been superfluous—the very grant of those powers to Congress in article I, section 8 would have automatically precluded the concurrent exercise of state power in any of these areas. Two facts make it clear that the Constitution contemplates at least a certain potential overlap of state and federal legislative power. First, despite the express grant of congressional power in article I, section 8 over many of the same subjects, the framers deemed it necessary to include the express prohibitions of article I, section 10. Second, in a number of instances, including, in particular, the commerce power, the grant of a power to Congress in section 8 is not matched by a corresponding prohibition of state power in section 10.

2. *The Cooperative Federalism Model.* If one were to reject the dual federalism model and instead adopt the alternative view that the states can exercise a “concurrent power” over commerce, the constitutional grant of power to Congress to regulate commerce again breaks down as textual support for the dormant commerce clause. Assuming that the states and the federal government both retain power over interstate commerce, there exists no principled basis for the Court *ever* to invalidate state regulation, at least in the absence of congressional preemption, on the basis of the text of the commerce clause.¹⁰²

B. *Historical Support for the Dormant Commerce Clause.*

Since it is impossible to construe the text of the commerce clause to justify the dormant commerce clause concept, the clause's advocates have instead attempted to find support in various contemporaneous statements of the framers. Of course as an initial objection, we seriously question the relevance of any framers' understandings not manifested in the text of the Constitution; for it was the text, not some unstated understanding, that was ratified into law. In any event, we believe that the

100. See D. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 3-9 (3d ed. 1984) (examining historical data relevant to debate between “dualists” and “cooperatives”); D. ELAZAR, *supra* note 93, at 304-05 (“Co-operative” federalism explains the nature of the American federal system.).

101. See *supra* note 82.

102. It should once again be emphasized that state regulation of interstate commerce conceivably could come into conflict with a specific constitutional prohibition and therefore be void.

historical evidence provides no firm support for the dormant commerce clause's existence. The historical arguments generally center on two ideas: first, the framers' intent in creating the commerce power, and second, the restrictive meaning of "commerce" at the time of the Constitutional Convention.

1. *The Intent of the Framers.* That the framers did assume the existence of the dormant commerce clause is the position of Professor Donald Regan. He remarks that "[t]here is much evidence that the main point of [the] grant [of power over interstate commerce] . . . was not to empower Congress, but rather to disable the states from regulating commerce among themselves."¹⁰³ He further notes that "[t]he framers wanted commerce among the states to be free of state-originated mercantilist impositions. Giving Congress the power to regulate internal commerce was one way of denying [the] states that power, under the view . . . that [the] granted regulatory powers were exclusive."¹⁰⁴

If, however, the framers intended such a result, why did they fail to incorporate this principle into the text? Why, instead of convolutedly phrasing their intended *prohibition* on state power in terms of an express *grant* of federal power, did the framers not simply include a direct prohibition on the exercise of state power? After all, in both articles I¹⁰⁵ and IV¹⁰⁶ the framers expressly imposed numerous direct prohibitions on state power. Their failure to do the same for the general power to regulate interstate commerce, then, strongly rebuts Professor Regan's assertion concerning their intent.

Professor Regan further notes that there is evidence suggesting that Congress was given the commerce power in order to prevent state economic protectionism. But this is exactly the point—*Congress* was given the power. That Congress was constitutionally vested with the legislative power to disable the states from regulating interstate commerce in no way implies that the *Constitution itself* automatically denies the states such power. In this context, it is important to note that the historical references generally cited in support of the dormant commerce clause speak only of the potential dangers to national unity caused by interstate economic friction. They do not specifically refer to the need for *judicial* oversight to prevent this problem in the absence of congressional action.¹⁰⁷ Thus, the framers were clearly aware of the dangers of interstate

103. Regan, *supra* note 10, at 1125.

104. *Id.*

105. U.S. CONST. art. I, § 10. See *supra* note 82; *infra* notes 119-23 and accompanying text.

106. U.S. CONST. art. IV, § 2. See *supra* note 83; *infra* notes 119-23 and accompanying text.

107. Forty years after the ratification of the Constitution, Madison stated that the commerce power "was intended as a negative and preventive provision against injustice among the States them-

economic friction, and chose to deal with the problem *solely* by the vesting of a power in Congress, rather than by imposition of a direct constitutional prohibition (other than the privileges and immunities clause).

2. *The Restrictive Meaning of "Commerce."* Professor Regan also maintains that the framers had a much narrower understanding of the term "commerce" than is the case today. Thus, "as Congress' power over interstate commerce is now understood, we cannot treat that power as exclusive. But that does not mean the framers could not have regarded as exclusive the much narrower power they were thinking of."¹⁰⁸ It is certainly true that the modern expansive interpretation of both the terms "commerce" and "among the several States" in the commerce clause is considerably broader than those terms were understood in the

selves." Letter from James Madison to Joseph Cabell (Feb. 13, 1829), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 15 (1884). This statement has been cited as historical support for the dormant commerce clause. See, e.g., Eule, *supra* note 8, at 431 (Commerce power is a negative on the states rather than a positive federal power.). While a fair reading of Madison's letter might be thought to indicate that the commerce clause was intended to be a negative on the states, such an interpretation goes too far. On its face, Madison's language can be construed to mean that Congress *alone* was given the power to negate state regulations of commerce. Madison's letter must be considered in its entirety and in the context in which it was written in order to understand the type of negative on the states imposed by the commerce clause.

In his letters to Joseph Cabell, Madison discussed Congress's power to regulate commerce. In his first letter, Madison attempted to explain the constitutionality of "the power in Congress to impose a tariff for the encouragement of Manufactures." Letter of James Madison to Joseph Cabell (Sept. 18, 1828), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 316 (1910). Madison noted that "[t]he Constitution vests in Congress expressly 'the power to lay & collect taxes duties imposts & excises;' and 'the power to regulate trade.'" *Id.* at 317 (emphasis added). The important point is that Madison referred to the granting to Congress of power over commerce as a power that Congress would "exercise" and "use." *Id.* He declined to comment on the wisdom of the tariff and closed: "In the exercise of the [commerce] power, [the members of Congress] are responsible to their Constituents, whose right & duty it is, in that as in all other cases, to bring their measures to the test of justice & of the general good." *Id.* at 340. Conspicuously absent was any discussion of the clause itself as a limit on the states. Nor was the clause discussed in terms that would indicate that it was a self-executing provision.

In another letter, Madison addressed Congress's power over interstate commerce. He wrote: Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Letter of James Madison to Joseph Cabell (Feb. 13, 1829), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A, Ch. CCCLXVI at 478 (M. Farrand rev. ed. 1937) (emphasis added) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

Taken together, Madison's letters reveal an understanding of the commerce clause providing little support to the dormant commerce clause's proponents. While the power over interstate commerce may have been intended to have been a negative on state legislation, Madison apparently believed—as the text itself indicates—that the power was to be exercised by Congress, not the Court.

108. Regan, *supra* note 10, at 1125.

late eighteenth century; nevertheless, one might argue that the framers themselves may well have contemplated the possibility of changes in interpretation over time.¹⁰⁹ Moreover, Professor Regan's suggestion also must be rejected because of its fatal internal inconsistency in the choice of governing interpretative theory: either we adopt an "originalist" model of constitutional interpretation, in which event all of Congress's exercises of that power beyond the original understanding are invalid; or we do not, in which event all of Congress's exercises of the power are equally valid, and no distinction at all would be drawn on this basis. Such an attempt to employ two totally different—and mutually inconsistent—modes of constitutional interpretation for the very same clause must be rejected as unprincipled in this context. In any event, it is difficult to understand why any constitutional consequences should flow from such a distinction since the Court has never drawn such an originalist/nonoriginalist dichotomy in applying the dormant commerce clause. Thus, even if accepted, Professor Regan's argument could not be employed to justify the modern doctrine.

Most importantly, Professor Regan's analysis ignores two important facts. First, as we have already argued, the view that the framers assumed the commerce power to be exclusive is undermined by the explicit prohibitions of article I, section 10. Thus, the text itself rebuts the inferences which Professor Regan draws from the framers' understanding of the term "commerce." Second, as we shall demonstrate below,¹¹⁰ the dormant commerce clause actually contradicts and undermines the textual structure of federalism. In terms of the Constitution's plan, there is all the difference in the world between a direct prohibition on state power on the one hand, and the vesting in Congress of an option to invalidate state action on the other.

C. *The Dormant Commerce Clause as an Inference of Congressional Intent.*

In *Welton v. Missouri*,¹¹¹ the Court attempted to supplement the *Cooley* justification for the dormant commerce clause. The theory advanced was that Congress's failure to regulate a particular type of interstate commerce implicitly manifests an intention to leave that particular type of commerce unregulated. By using such an analysis, the Court avoids interpreting the text of the commerce clause, because Congress has somehow "acted" pursuant to its commerce power and thus has

109. See generally Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (hermeneutical investigation into meaning of "original intent" for Founding Fathers).

110. See *infra* notes 119-23 and accompanying text.

111. 91 U.S. 275 (1875); see *supra* notes 67-72 and accompanying text.

manifested its "intent." State legislation, then, is invalidated pursuant to the supremacy clause, rather than pursuant to the commerce power—it is a simple matter of federal preemption. Alternatively, Congress's failure to overrule the Court's dormant commerce clause decisions can be viewed as manifesting Congress's intention to condone both the judicial exercise of the power and the propriety of the result. Nevertheless, under either scenario, congressional failure to legislate cannot legitimately be transformed into legislation, for both theoretical and practical reasons.

When the Supreme Court invalidates state regulation of commerce under the dormant commerce clause by relying on a congressional failure to regulate a particular type of commerce, the Court relies on what can only be the most abstract of legislative intentions. The Court apparently need not point to a specific congressional refusal to regulate the particular type of commerce: that is, a failure to pass a specific piece of legislation.¹¹² Instead, the Court can rely on the fact that this type of commerce has not yet been regulated by Congress. Based on this fact alone, the Court *assumes* that Congress was aware of possible problems arising in this area of commerce, but nevertheless intended that it remain unregulated. No theoretical canon of legislative construction and no practical reality of the legislative process can justify so sweeping an assumption about congressional intent.

The Court's interpretation of Congress's intention ignores at least two plausible explanations for the congressional failure to legislate. Initially, Congress may not even be aware that a particular type of commerce is being regulated by the states, much less that uniform national regulation (or the lack thereof) is required. Further, in light of the complete absence of a record or text upon which to derive Congress's intent, it is at least equally probable that Congress intended that the regulation of the particular type of commerce be left to the individual states to regulate as they see fit, rather than that it be left completely unregulated.

Regardless of the Court's interpretation of Congress's intent, it is "improper to transform a congressional failure to legislate into the equivalent of legislation."¹¹³ Under the terms of the Constitution, only the "Constitution, and the Laws of the United States which shall be

112. This fact distinguishes the dormant commerce clause cases from the analysis employed by the Court in *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972). In *Flood*, the Court refused to overturn its earlier decisions finding that baseball was not a business for purposes of the antitrust laws, in light of numerous unsuccessful attempts by Congress to overrule those decisions. In any event, with the exception of this one difference, *Flood* is itself subject to much of the same criticisms we level at the dormant commerce clause as an inference of congressional intent.

113. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 82 (1984).

made in Pursuance thereof . . . shall be the supreme Law of the Land."¹¹⁴ Before Congress enacts a law, the proposed legislation must undergo thorough examination, debate and, ultimately, enactment in both chambers of Congress. Congressional failures to legislate are not, by definition, subject to this process.

No more persuasive is the argument that congressional failure to overrule a judicial invalidation of state legislation amounts to congressional acceptance of the Court's action. "[R]eliance on a congressional failure to overrule a limiting judge-made doctrine . . . effectively condones through legislative inertia what was initially an improper and unauthorized judicial usurpation of legislative authority."¹¹⁵ The Court is merely attempting to transform a usurpation of congressional power into the status of constitutionally enacted legislation—without the constitutional passage of the legislation.¹¹⁶ As Professor Thomas Merrill aptly notes:

The argument based on the possibility of congressional override ignores the institutional reality that, given its crowded agenda, Congress is far more likely not to act than to act with respect to any particular issue presented for its attention. The theoretical possibility of congressional override cannot disguise the fact that lawmaking by federal courts would in most cases give the last word to the federal courts rather than to Congress. In practice, therefore, institutionalization of lawmaking by federal courts would represent a major shift in policymaking power away from Congress and toward the federal judiciary, in violation of the constitutional scheme.¹¹⁷

Congress simply does not have available to it the time and resources to police adequately the Court's jurisprudence and at the same time consider the vast amount of legislation that is introduced each session.¹¹⁸ Thus, the dormant commerce clause is not supported by the constitutional text, by the contemporaneous statements of the framers, or by any inferences from congressional failure to legislate.

114. U.S. CONST. art. VI, cl. 2.

115. Redish, *supra* note 113, at 82.

116. *Id.*

117. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 22-23 (1985) (footnotes omitted).

118. For example, during the 98th Congress, 11,156 measures were introduced into both Houses of Congress. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1987, at 235, table 404 (1987). Of the 11,156 measures introduced, only 677 measures were enacted—roughly 6%.

III. THE DORMANT COMMERCE CLAUSE AND THE CONSTITUTION'S STRUCTURE OF FEDERALISM

A. *The Constitution's Three-Level Structure for Controlling State Power.*

The Constitution's text establishes an intricate, three-level structure for the allocation of power between the state and federal governments. In one category of situations the states are expressly and absolutely prohibited from enacting certain types of legislation. In the second category, the states must overcome Congress's institutional inertia in order to obtain congressional authorization for the state legislation. In the third category, the states are free to enact legislation; Congress, however, has authority to preempt or overrule such state action by legislation enacted pursuant to one of its enumerated powers.

First, the Constitution expressly precludes certain types of state legislation. The states, for example, may not "coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligation of Contracts."¹¹⁹ Additionally, a state cannot discriminate against citizens of other states.¹²⁰ These provisions place absolute constitutional prohibitions on state power to enact these measures. Consequently, absent constitutional amendment, the states are permanently enjoined from enacting such measures, and Congress, by itself, lacks authority to authorize such state action.

Second, the Constitution places several prohibitions on the exercise of state power that are not absolute, but rather conditional. Article I, section 10 provides that:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage . . .¹²¹

The states, therefore, cannot act in these areas absent affirmative authorization by Congress, unless the state enactment falls under one of the enumerated exceptions. In this context, the political inertia falls against the exercise of state power, because of the inherent difficulty in obtaining

119. U.S. CONST. art. I, § 10, cl. 1.

120. U.S. CONST. art. IV, § 2.

121. U.S. CONST. art. I, § 10, cls. 2-3.

affirmative congressional action.¹²²

Finally, Congress's enumerated powers in article I, section 8, when read in conjunction with the terms of the supremacy clause,¹²³ make clear that those powers neither expressly nor conditionally denied to the states may be exercised by them, subject to reversal or preemption by legislation enacted pursuant to one of Congress's enumerated powers. These constitutional provisions, when taken together, make up the Constitution's infrastructure for allocating governmental power between the state and federal systems.

The dormant commerce clause substantially undermines this constitutional balance of federalism, by imposing a judge-made barrier to state regulation of interstate commerce that can be overcome only by means of affirmative congressional action. There are two basic reasons why the reversal of political inertia brought about by the dormant commerce clause so fundamentally conflicts with the workings of this three-level constitutional structure. It is to an examination of these reasons that we now turn.

B. *The Benefit of Political Inertia: Barriers to the Legislative Process.*

Absent the dormant commerce clause, the states would be able to enact economic legislation unless it ran afoul of the Constitution's direct textual prohibitions on state economic legislation or has been preempted by an act of Congress. Under these circumstances, the Constitution establishes the inertia *in favor* of the exercise of state power, because the states do not need to overcome any federal barrier before they enact their economic legislation; affirmative congressional action (either before or after enactment of the state law) is required to invalidate the legislation. When the Court invokes the dormant commerce clause, however, the inertia is reversed, turning the constitutional balance of federalism against the states.

Any attempt to obtain a specific piece of legislation from Congress presents a nearly insurmountable task for the state, given the realities of the federal legislative process. During each Congress, thousands of measures are introduced into each house.¹²⁴ Of the thousands of measures introduced, only a small percentage are enacted into law.¹²⁵ The congressional legislative process is an arduous one that may entail a series of compromises from the time the bill is introduced until it is finally

122. See *infra* notes 124-29 and accompanying text.

123. U.S. CONST. art. VI, cl. 2.

124. See *supra* note 118.

125. *Id.*

voted upon by the members of each house.¹²⁶ Further, the process is lengthy, time-consuming, and replete with opportunities for delaying or killing a bill.¹²⁷ The process, moreover, contains a time constraint. Each bill introduced must be passed by both houses before the expiration of that Congress's two-year term.¹²⁸ If the bill is not passed within the two-year period, it automatically dies and must be reintroduced in the following Congress, and the process begins once again.¹²⁹

These difficulties can only be aggravated by the Court's initial determination that the state enactment places an undue burden on commerce, regardless of whether the Court has made the correct decision. As a general matter, "Congress is far more likely not to act than to act with respect to any particular issue presented for its attention."¹³⁰ When the Supreme Court has already spoken on the matter, it is even less likely that Congress will take issue with the Court's determination that the invalidated state statute placed an undue burden on interstate commerce.

Thus, the most obvious reason that states would prefer congressional to judicial oversight of their regulation of interstate commerce is the considerably greater likelihood of congressional inaction than of congressional action. While the judiciary cannot itself initiate a review proceeding, once a legal challenge is privately instituted (a very likely event,

126. See generally R. DAVIDSON & W. OLESZEK, CONGRESS AND ITS MEMBERS 263-85 (2d ed. 1985) (discussing congressional rules and procedures). Congress has a highly decentralized power structure. When a bill is introduced, it is referred to the appropriate committee, which in turn frequently will refer the bill to the appropriate subcommittee. Sometimes, a bill is referred to more than one committee in either the House or Senate because of overlapping committee responsibilities. W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 12-14 (2d ed. 1984). Once the bill has been referred to the appropriate committee or subcommittee, the committee members will often solicit the opinions of the government agencies that would be affected by the passage of the bill. The committee will probably hold hearings on the bill as well. At some point, the committee will "mark up" or rework the bill before voting on it. If the mark-up has been extensive, the committee may reintroduce the bill in its "clean" form. J. VAN DER SLIK, AMERICAN LEGISLATIVE PROCESSES 208 (1977). After the committee has taken action on the bill, a report is issued and the bill is placed on the House's calendar for consideration by all of the members of the House in which the bill was introduced. Once one House has passed a bill, it is introduced in the second House, provided that the bill was not simultaneously introduced into both Houses of Congress. After the bill has been introduced in the second House, the bill undergoes the same basic process. At any point in the legislative process, a bill can be delayed, defeated or substantially modified. Coalitions must be built and maintained in order to garner the votes necessary to ensure passage of a bill. Various committees, interest groups, or influential individuals may be able effectively to kill a bill by forming and sustaining an opposition coalition on the committee or subcommittee level. W. OLESZEK, *supra* at 14-16.

127. See *supra* note 126; see also L. FROMAN, THE CONGRESSIONAL PROCESS: STRATEGIES, RULES AND PROCEDURES 17 (1967).

128. W. OLESZEK, *supra* note 126, at 16-17.

129. *Id.*

130. Merrill, *supra* note 117, at 22-23 (citing G. GILMORE, THE AGES OF AMERICAN LAW 95-96 (1977)).

given that state economic regulations will negatively affect at least some private industry) the courts will be required to rule, one way or the other, on the validity of a state's interstate economic regulation. In contrast, the bureaucracy of Congress will be provoked to action only in those instances in which the harm deriving from the state's regulation is deemed truly substantial.

C. *Comparing Congressional and Judicial Oversight:
The States' Perspective.*

There are important political reasons why the states would prefer congressional to judicial control of their interstate economic regulations, above and beyond the simple difference in political inertia. Initially, a strong argument could be fashioned that Congress, as an institution, is better equipped to make the type of policy decision that the Court now makes under the dormant commerce clause. "Congress has the superior institutional capability to gather the relevant economic information, and Congress operates on the political basis considered most appropriate for resolving normative questions."¹³¹ Several members of the Court have expressed this same thought:

Unconfined by "the narrow scope of judicial proceedings" Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether [the state enactment] is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.¹³²

The judiciary has less access to relevant information than does Congress, which can marshal its committee and agency resources to hold hearings and engage in debate before deciding the matter at hand. While this can be said of any decision of the judiciary, it is of particular import in dormant commerce clause cases because the decision made under the dormant commerce clause is essentially a legislative determination.

Even if one were to reject the conclusion that Congress is better equipped to make the proper determination under the commerce clause, there is still a substantial factor weighing against the Court's use of the dormant commerce clause. The view has been widely held, at the time of ratification as well as in modern times, that the states have a special ability to protect their interests through resort to the national political pro-

131. Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 84 (1980).

132. *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 189 (1940) (Black, Frankfurter & Douglas, JJ., dissenting).

cess. The modern basis for this view was articulated by Professor Wechsler, who noted that Congress evinces an inherent tendency to avoid new intrusions into the affairs of the states.¹³³ The constitutional distribution of power between the three branches of the federal government, particularly the allocation of the lawmaking power to Congress, he reasoned, is an essential means of protecting the states from federal intrusions.¹³⁴ Wechsler concluded that "[f]ederal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands."¹³⁵ More recently, Dean Choper has become an effective advocate of the same position,¹³⁶ and the current Supreme Court has itself relied upon the unique political relationship between the states and Congress in fashioning its doctrines of constitutional federalism.¹³⁷

Nor did recognition of the states' potential influence in Congress go unnoticed by the framers. Madison, for example, argued that:

As a security of the rights & powers of the States in their individual capacities, ag[ainst] an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on . . . [t]he responsibility of the Senators and Representatives in the Legislature of the U. S. to the Legislatures & people of the States.¹³⁸

Indeed, state influence was thought by some to be so great that the fear was expressed that Congress might at some point actually be "captured" by the states.¹³⁹

The long history of antagonism between the states and the federal judiciary stands in striking contrast to the traditionally close political relationship between the states and Congress. In fact, it was the lack of

133. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

134. *Id.*

135. *Id.* at 559.

136. See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176-77 (1980); see also Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100, 126-27 n.161 (1985).

137. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-55 (1985). In a previous article, one of the authors has criticized the *Garcia* Court's reliance on the states' political influence in Congress to justify the effective exclusion of judicial review in interfederal constitutional disputes. See Redish & Drizin, *supra* note 15, at 34, 36-38. There is no inconsistency, however, in recognizing the political reality of the states' influence in Congress and its relevance to the allocation of supervisory authority between court and Congress on the one hand, and rejecting reliance on this fact as the basis for the total abdication of judicial enforcement of the constitutional protections of federalism on the other hand.

138. Letter of James Madison to Edward Everett (Aug. 28, 1830) in 9 THE WRITINGS OF JAMES MADISON 338, 395-96 (1910).

139. See Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 51-52 (1981).

restraints on the federal judicial power that gave rise to much of the opposition to the adoption of the Constitution. While the framers agreed that there should be one supreme judicial tribunal for the United States,¹⁴⁰ the establishment of inferior federal courts met with opposition from both within and without the Convention. For example, the mandatory creation of inferior federal courts was opposed in the Convention because the creation of the lower federal courts would make "an unnecessary encroachment on the jurisdiction <of the States.>"¹⁴¹ Lower federal courts were also seen as "creat[ing] jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere."¹⁴² James Monroe saw the creation of lower federal courts as "highly improper and altogether unnecessary."¹⁴³ Even creation of the Supreme Court was opposed, because it was feared that the Court would "swallow up all other courts of judicature"—mainly the state courts—and would deprive the citizens of the states of their civil liberties.¹⁴⁴ The fear was expressed that because of the existence of the federal judiciary the state courts would "soon be annihilated," and that the federal courts would destroy the rights that the states guaranteed to their citizens.¹⁴⁵

The states' mistrust of the federal judiciary continued well after the Constitution's ratification. In fact, modern commentators have suggested that the sole purpose behind the adoption of the eleventh amendment was the fear that the federal courts would extend their jurisdiction to include states, despite the absence of congressional authorization.¹⁴⁶ Thus, from the time of ratification to modern times, significant differ-

140. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 11 (2d ed. 1973).

141. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 107, at 124 (J. Madison, June 5).

142. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 107, at 45-46 (J. Madison, July 18).

143. Monroe, *Some Observations on the Constitution*, in 5 THE COMPLETE ANTI-FEDERALIST 278, 304 (H. Storing ed. 1981).

144. *Essays by the Impartial Examiner*, Va. Independent Chronicle, Feb. 27, 1788, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 143, at 172, 182.

145. *Essay by a Georgian*, Gazette of State of Georgia, Nov. 15, 1787, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 143, at 129, 134.

146. See Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975). Professor Nowak contends that:

[A] convincing argument can be made that the drafters of the eleventh amendment were only responding to the judicial assumption of jurisdiction in suits brought by Tories against states. It is also probable that the states' interest in the amendment was similarly limited. The states were concerned that the federal courts, with whom they had no lobbying power, would, if *Chisholm* were not overruled, impose other retroactive liabilities on them. They feared that they would have no political recourse if life-tenured judges could assume jurisdiction in controversial actions, such as Tory suits. No evidence exists that the states had the same fear of congressional authorization of suits against states. Indeed, given the assumption of state debts by the Congress in the period following the Revolutionary War it is

ences have existed between the states' relationship with Congress and the states' relationship with the federal judiciary.

It should now be clear why the Constitution left to Congress the power to review most efforts by the states to regulate interstate commerce. While the framers selected what they deemed especially egregious or disruptive state economic practices for express constitutional prohibition,¹⁴⁷ they apparently decided that in the great majority of situations the exercise of state authority should be presumed valid, subject solely to the political check of Congress's preemptive power.¹⁴⁸

D. *The Constitutional Preference for Congressional Control and the Value of Federalism.*

One might argue, of course, that judicial oversight is preferable for the very reason that state regulation of interstate commerce is more likely to stand under exclusive congressional review. But for present purposes, policy issues are beside the point. We have argued that (1) the Constitution's text clearly provides for initial congressional, rather than judicial review of state regulation of interstate commerce (assuming the regulation violates no other constitutional prohibition),¹⁴⁹ and that (2) there are important practical differences between the two forms of review.¹⁵⁰ Once the constitutional preference is clearly ascertained, it is not appropriate—short of resort to the amendment process—for the courts to question the constitutional choice.

If one were to debate the issue purely as a matter of federalism policy, however, it is by no means clear that judicial oversight should be deemed preferable to exclusive congressional review. Initially, as we have already noted, examination of the relative fact-gathering capabilities of the two institutions demonstrates the probable superiority of the legislative branch.¹⁵¹

Moreover, that exclusive congressional control, for reasons already discussed,¹⁵² is likely to result in considerably fewer invalidations of state regulation of interstate commerce is wholly consistent with the values

most likely that these representatives had implicit faith in the congressional ability to balance the interests of the state and federal governments.

Id. at 1440-41. See also Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 683-88 (1976) (discussing the eleventh amendment as an exemplification of the principle of sovereign immunity).

147. See U.S. CONST. art. I, § 10; art. IV, § 2; see also *supra* text accompanying notes 105-06.

148. See U.S. CONST. art. VI, cl. 2.

149. See *supra* notes 82-118 and accompanying text.

150. See *supra* notes 119-48 and accompanying text.

151. See *supra* notes 131-32 and accompanying text.

152. See *supra* note 130 and accompanying text.

sought to be fostered by the choice of a federal system in the first place. Under the dormant commerce clause, the Supreme Court invalidates state regulations when they either discriminate against out-of-state residents or when they unduly burden interstate commerce, albeit in a non-discriminatory manner. Because we believe that discriminatory state regulations may be satisfactorily dealt with through resort to other constitutional provisions,¹⁵³ effectively the only type of case to be discussed is that involving nondiscriminatory burdens. When, one might ask, are state regulations likely to impose an undue burden? The answer is, when the state regulations differ markedly from the regulations imposed by its neighboring states, for it is then that those moving in interstate commerce would have to adjust each time they crossed a new state line.¹⁵⁴ But the alternative is virtually parallel state regulation. The obvious cost to a federal system of such federally imposed state regulatory orthodoxy is the loss of a principal advantage of a federal system: the use of the states as small-scale social laboratories, so that other states—or the federal government itself—might benefit by the experience, without incurring all of the possible risks that might result from a similar nationwide experiment.¹⁵⁵

A possible response might be that under the dormant commerce clause, such state experimentation is not *inherently* precluded; it is only when the Court concludes that the burdens imposed by a particular state regulation outweigh its possible benefits that the regulation fails. The fact remains, however, that judicial invalidation is considerably more likely than congressional invalidation. Thus, the structure adopted by the Constitution's text attempts to foster widespread state experimentation, while simultaneously providing the safety net of congressional preemption in those situations in which the interference with the flow of interstate commerce is truly substantial. Under this constitutional structure, those involved in interstate commerce are put on notice that they may be subjected to different regulations in different states, much as they already must be aware that they may be subjected to differing substantive

153. See *infra* notes 190-226 and accompanying text.

154. See, e.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). Illinois enacted a statute requiring the use of a contour rear fender mudguard on trucks and trailers operated on the highways of the state. The Supreme Court held the statute invalid under the dormant commerce clause, noting that the state "did not attempt to rebut the . . . showing that the statute in question severely burdens interstate commerce," despite the fact that the statute was clearly nondiscriminatory. *Id.* at 528.

155. See generally Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985) (discussing existing system of federal conditional grant programs in the context of individual rights and proposing several alternatives).

legal liabilities in different states. This is simply the cost of our having chosen a federal system of government.

IV. NONTEXTUAL JUSTIFICATIONS FOR THE DORMANT COMMERCE CLAUSE

Several scholars have articulated what can be termed “nontextual” justifications for the dormant commerce clause—*i.e.*, justifications not based on the Constitution’s text or history, but which nevertheless are thought to legitimize the clause’s continued existence in its present form. We will limit our examination to three such justifications. First, we consider what can be called, for lack of a better term, the “implicit structural” argument for the dormant commerce clause.¹⁵⁶ This theory maintains that while no explicit textual authorization may exist for the dormant commerce clause concept, the principle is implicit within the constitutional structure and is therefore valid. Second, we consider a “subconstitutional” justification for the dormant commerce clause, namely the concept of “constitutional common law.”¹⁵⁷ Finally, we consider whether the longevity of the dormant commerce clause doctrine in itself should present a barrier to the doctrine’s demise.¹⁵⁸ Ultimately, none of these justifications should be accepted, either because they represent illegitimate constitutional theories, or cannot properly be applied to justify the dormant commerce clause.

A. *The Dormant Commerce Clause as a Product of the Implicit Constitutional Infrastructure.*

Professor Regan relies on a “structural argument” to legitimize the Court’s use of the dormant commerce clause.¹⁵⁹ An important aspect of Professor Regan’s structural argument is that it “does not need to be supported by an argument from any single short bit of text (which is what lawyers normally mean by a ‘textual’ argument), so long as there is no short bit of text that contradicts the structural argument.”¹⁶⁰

Professor Regan maintains that the dormant commerce clause’s function is to foster the national interest in avoiding state protectionism.¹⁶¹ The thrust of his thesis is that under an ideal constitution,¹⁶² and in the absence of contrary congressional action, the Court should limit

156. See *infra* notes 159-70 and accompanying text.

157. See *infra* notes 171-86 and accompanying text.

158. See *infra* notes 187-89 and accompanying text.

159. Regan, *supra* note 10, at 1110-25.

160. *Id.* at 1124.

161. *Id.* at 1112-25.

162. *Id.* at 1110-11.

state power to regulate the economy by preventing the "states from engaging in protectionism . . . directed at other states."¹⁶³ He suggests three objections to state protectionism that, when taken together, form a structural foundation against such practices that justifies the Court's use of the dormant commerce clause.¹⁶⁴ First, "it is inconsistent with the very idea of political union."¹⁶⁵ Second, it "cause[s] resentment and invite[s] protectionist retaliation" that "is likely to generate a cycle of escalating animosity and isolation . . . eventually imperiling the political viability of the union itself."¹⁶⁶ Third, it is inefficient because "it diverts business away from presumptively low-cost producers without any colorable justification in terms of a federally cognizable benefit."¹⁶⁷ Based on these objections, Regan concludes that the dormant commerce clause's existence can be rationalized, despite the absence of explicit textual authorization.¹⁶⁸

For reasons of American political theory,¹⁶⁹ we have a great deal of trouble with any argument that would vest in an unrepresentative judiciary the power to invalidate legislative actions on grounds not even arguably mentioned *somewhere* in the Constitution's text. It is common knowledge that the constitutional text is sufficiently broad to justify numerous modifications of legal doctrine in light of changing social needs and values.¹⁷⁰ One should be properly suspicious, then, of any claims that the Constitution can be found to embody a fundamental—albeit implicit—principle, untied to any textual provision or combination of provisions.

Indeed, as Professor Regan's theory aptly illustrates, one making such an argument is likely to be faced with an inherent "Catch 22": presumably only principles that are deemed truly fundamental may be found within the Constitution's implicit structure; yet the more fundamental the principle, the more puzzling is its omission from the explicit constitutional text. For present purposes, however, the point to be emphasized is that there is no legitimate basis for reading into the Constitution some *implicit* principle limiting state power to regulate interstate commerce.

163. *Id.* at 1094.

164. *Id.* at 1112-25.

165. *Id.* at 1113.

166. *Id.* at 1114.

167. *Id.* at 1119.

168. *Id.* at 1124-25.

169. *See supra* note 15.

170. *See generally* Powell, *supra* note 109 (arguing that the personal intention of the various framers should not guide modern interpretations of the Constitution). *But see* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 3, § 23.5(c) (listing a variety of theories for discerning the meaning of the Constitution).

This is because, as we have shown, the constitutional text was apparently structured for the very purpose of establishing Congress as the sole overseer of state regulation of interstate commerce—a goal that made political sense at the time of the ratification and remains equally valid to the present day. Thus even if one were to concede that, in appropriate circumstances, implicit structural principles may be ascertained, surely it would be illegitimate to adopt such a principle when to do so would directly undermine a carefully structured, explicit textual balance.

B. *The Dormant Commerce Clause as Constitutional Common Law.*

Several constitutional scholars have articulated what can be termed a “subconstitutional” basis for the dormant commerce clause: constitutional common law. Professor Henry Monaghan is the leading advocate of the generic concept of constitutional common law. He has argued:

[A] surprising amount of what passes as authoritative constitutional “interpretation” is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.¹⁷¹

Monaghan was “driven to conclude that the Court has a common law power” after he examined several cases in which the Court applied a judicially created doctrine designed to deter violations of constitutional rights by prohibiting the use of evidence obtained in violation of the fourth, fifth and sixth amendments—the exclusionary rule.¹⁷² He reasoned that either the Court was mistaken in applying the exclusionary rule in these cases or that the Court was exercising a common-lawmaking power.¹⁷³ Unable to recognize the Court’s human frailty, he adopted the latter position.¹⁷⁴

For our purposes what is interesting about Professor Monaghan’s paradigmatic explanation of the Court’s applications of the exclusionary rule is his reference to the dormant commerce clause as “one of the most salient illustrations” of constitutional common law.¹⁷⁵ Monaghan noted that the Court had consistently recognized Congress’s power to overrule dormant commerce clause decisions by appropriate legislation, and quite rightly asked how such a result could obtain if the Court actually were

171. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

172. *Id.* at 3-10.

173. *Id.* at 10.

174. *Id.* Monaghan believed that it was “too late in the day to conclude that” the Court was mistaken. *Id.*

175. *Id.* at 15.

interpreting the Constitution.¹⁷⁶ He rejected the Court's two proffered justifications for the dormant commerce clause, asserting that the "most satisfactory" explanation for the dormant commerce clause decisions was the Supreme Court's development of what he termed constitutional common law, derived from—but not directly based in—the text of the commerce clause.¹⁷⁷ This commerce clause common law would advance the commerce clause's purported "national, free-trade philosophy," he contended, by negating state-imposed obstructions to free trade.¹⁷⁸

Before focusing on the specific issue of the dormant commerce clause as constitutional common law, it is appropriate initially to examine the legitimacy of the broad concept. The abstract concept of constitutional common law is both puzzling and troubling. These issues do not arise except in cases in which a court is considering invalidation of state or federal legislative or executive action—that is, the actions of the representative branches of government. If the court takes such action, it has authority to do so only when it has found the challenged law or activity to violate a provision of the Constitution; in a constitutional democracy, it lacks authority to reach such a result on any other basis. Yet if the court has, in fact, invalidated legislation because of a conflict with a provision of the Constitution, whence does Congress derive authority to overrule that constitutional interpretation?

Constitutional common law, in Professor Monaghan's view, is a species of Judge Friendly's "specialized" federal common law.¹⁷⁹ When the Court first created federal common law, it had to point to some authoritative text as the source of the substantive law it had just manufactured.¹⁸⁰ Thus, the Court was forced to rely on statutes, treaties and constitutional provisions when it articulated federal common law.¹⁸¹ Monaghan argued that, because federal courts were recognized as having the power to fashion federal common law where authorized to do so by statute, it follows *ipso facto* that the Court could fashion constitutional common law.¹⁸² But there is a significant difference between judicial creation of *statutory* common law and *constitutional* common law: the for-

176. *Id.*

177. *Id.* at 15-17.

178. *Id.* at 17. Monaghan explained that the reason the dormant commerce clause cases were not deemed to be the result of common law jurisprudence was that traditional *Marbury* nullification was the accepted norm and that the dormant commerce clause invalidation did not "'look like' the affirmative creation of federal regulatory rules." *Id.*

179. *Id.* at 10-11. See Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (praising *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) for facilitating the development of a limited, but "predictable and useful" federal common law).

180. Monaghan, *supra* note 171, at 12.

181. *Id.*

182. *Id.* at 12-13.

mer arises from congressionally created authority and can therefore logically be overridden by Congress, while the latter is supercongressional, and thus not subject to congressional reversal. In a sense, then, the term "constitutional common law" is an oxymoron, since it combines in one phrase authority that is simultaneously beyond yet within congressional power to overrule.

There is, however, no need at this point to provide a detailed analysis of the merits of constitutional common law. For present purposes, we need not contest the legitimacy of constitutional common law as an abstract category of Supreme Court jurisprudence. Even if one accepts the validity of the concept as a general matter, recognition of the dormant commerce clause as constitutional common law would be improper.

The federal common law process requires that the Court rely on the relevant authoritative text—in this case the Constitution—for guidance in formulating the appropriate common law rule.¹⁸³ But, as Professor Monaghan himself noted, the Court must also consider the structure of the text, its place, and the "need for a uniform national rule of law."¹⁸⁴ This is because federal common law of any sort is designed to play a gap-filling role in federal jurisprudence.¹⁸⁵ To be legitimate, then, constitutional common law must at the very least further the policies of a particular constitutional provision and be in accord with the Constitution's structure of government.

If our view of the delicate structural balance of federalism manifested in the text is accepted,¹⁸⁶ the dormant commerce clause does considerably more than play a gap-filling role in constitutional jurisprudence. In our view, the dormant commerce clause is in direct opposition to the Constitution's structure for controlling state power, and thus undermines the constitutional balance of federalism. As such, the dormant commerce clause cannot properly be said to further the commerce clause's purposes, because those purposes inherently include exclusive congressional oversight of most state regulation of interstate commerce. Nor can it be said to be in accord with the constitutional structure of government or federalism. Characterizing the dormant commerce clause as constitutional common law therefore does not justify the Court's continued use of the clause.

183. Under the Rules of Decision Act, 28 U.S.C. § 1652 (1982), "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision" for the federal courts. *Id.*

184. Monaghan, *supra* note 171, at 12.

185. See *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Federal common law implements the federal Constitution and statutes, and is conditioned by them.").

186. See *supra* notes 119-23 and accompanying text.

C. *The Longevity of the Dormant Commerce Clause Doctrine as a Barrier to Its Own Demise.*

A final conceivable nontextual justification for the dormant commerce clause is the simple fact that the concept has been employed by the judiciary at least since the time of *Cooley*, and therefore has become part of our accepted judicial and political tradition. It is therefore practically inappropriate and theoretically unnecessary to abandon the doctrine, even if it originally amounted to a judicial usurpation of authority not found anywhere in the constitutional text.

We have considerable trouble with such an argument. Initially, as a purely descriptive matter there is something disingenuous about a rigid, blind appeal to precedent as a defense of otherwise questionable Supreme Court doctrine. In numerous areas of constitutional law, the Court has not hesitated to abandon even well-known precedent when it found it outmoded or morally offensive.¹⁸⁷ Such an attitude should be at least as prevalent when the attack on Supreme Court doctrine is that the relevant decisions usurp power nowhere authorized in constitutional text.

Moreover, as a normative matter, an argument solely from precedent amounts to a form of "proof by adverse possession": if the Court has usurped authority for a long enough period without generating sufficient opposition to break through imbedded public inertia, that usurpation becomes valid, for no reason other than that the Court has managed to get away with it. Some might respond that a practice conducted without interruption for so long a period has effectively become part of our systemic tradition, and this factor provides the requisite legitimizing basis.¹⁸⁸ But the fact that a practice has lasted long enough that it could be described as a "tradition" surely has not in the past prevented us from challenging the practice's normative basis, as is clearly demonstrated by our rejection of such long-established practices as slavery and the "sepa-

187. Compare *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned . . .") with *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) ("Any language in *Plessy v. Ferguson* contrary to this finding is rejected."); compare *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding that congressional regulations cannot "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions") with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (the attempt in *National League of Cities* to "draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is . . . unworkable").

188. Cf. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (Judicial abstention with respect to certain cases properly within a federal court's jurisdiction "is much more pervasive than is generally realized" and such "discretion is wholly consistent with the Anglo-American legal tradition.").

rate-but-equal" doctrine. Similarly, our allocation of governmental authority is established to a large extent by the text and textual structure of the Constitution, and a clear departure from that structure does not attain legitimacy merely because of the length of its existence.¹⁸⁹

V. POST-MORTEM: LIFE WITHOUT THE DORMANT COMMERCE CLAUSE

Now that the dormant commerce clause has met its belated demise at our hands, important questions remain. Must state regulations that unduly burden or discriminate against interstate commerce be deemed constitutional? Could a state, consistent with the Constitution, effectively "Balkanize" the nation by setting up guards at its borders to collect an entrance tax from nonresidents? Could it impose custom duties on goods shipped from other states? May it provide economic benefits to its resident businesses while flagrantly denying them to out-of-state competitors? A pragmatist might argue that the dormant commerce clause, regardless of its constitutional foundation, is required to invalidate just such state legislation. But even absent the dormant commerce clause, the Constitution provides a textual structure for the regulation of commerce which can quite effectively prevent an economic Armageddon at the hands of the states.

Initially, there is no doubt that Congress, pursuant to its commerce power, has authority to preempt all such state legislation, and it is highly likely that it would do just that in the face of such flagrant, harmful state protectionism. Indeed, under our view of the constitutional balance, Congress was given power in article I to regulate interstate commerce in large part to provide a legislative safety net against state economic Balkanization. The potentially most egregious state legislation, however, would likely never even require affirmative congressional preemption. This section is designed to explore how the textual structure of federal-

189. Paul Brest has argued that uninterrupted departures from constitutional text may become part of our normative tradition, because "it is only through a history of continuing assent or acquiescence that the document could become law." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 225 (1980) (footnote omitted). We disagree, for as one of us has argued previously:

if one accepts the values of predictability and stability that inhere in the moral dictate of the rule of law, it is by no means clear that incremental and furtive alteration or abandonment of a society's governing document . . . should be morally acceptable. Otherwise, we would effectively be condoning any governmental usurpation of authority that did not somehow break through the inertia of public passivity. A morally preferable solution . . . would be to accept the force of the governing document, unless it is altered by means of the process ordained in the document itself, or by means of a true revolution, which openly and clearly rejects the document in favor of a new political compact and governing structure.

Redish & Drizin, *supra* note 15, at 29-30.

ism would—or could—operate in the absence of the dormant commerce clause.

A. *Comparing the Commerce and Privileges and Immunities Clauses.*

Article IV, section 2 of the Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹⁹⁰ The Court has recognized that the dormant commerce clause and the privileges and immunities clause have a "mutually reinforcing relationship" which "stems from their common origin in the Fourth Article of the Articles of Confederation";¹⁹¹ nevertheless, there exist notable distinctions between the clauses, in both interpretation and application.

The privileges and immunities clause was purportedly designed to promote interstate harmony and cooperation in order to prevent the dissolution of the Union.¹⁹² Each state was to be constitutionally prohibited from placing out-of-state citizens at a disadvantage. The text of the Constitution, however, sheds little light on exactly what constitutes the "Privileges and Immunities of Citizens in the several States." The clause has been said to be an abbreviated version of the privileges and immunities clause contained in the Articles of Confederation.¹⁹³ Thus, to determine the nature of the constitutional protection of commerce afforded by the clause, we examine two areas: first, the privileges and immunities clause contained in the Articles of Confederation and the development of the parallel clause in the Constitution; and second, the Supreme Court's interpretation of the privileges and immunities clause.

1. *The Privileges and Immunities Clause of the Articles of Confederation and Its Constitutional Parallel.* The Constitution's predecessor, the Articles of Confederation, contained a similar but more textually elaborate guarantee of interstate comity. Article IV of the Articles of Confederation stated:

[T]he free inhabitants of each of these States . . . 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

190. U.S. CONST. art. IV, § 2.

191. *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

192. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984) ("The Privileges and Immunities Clause . . . imposes a direct restraint on state action in the interests of interstate harmony.").

193. *Simson, Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 383 (1979).

inhabitants thereof respectively¹⁹⁴

Note that under the Articles of Confederation, out-of-state residents were *textually* guaranteed that they could engage in commerce in other states "subject to the same duties, impositions and restrictions as the inhabitants" of the situs state.

Charles Pinckney, generally recognized as the author of article IV's privileges and immunities clause,¹⁹⁵ wrote in 1787 that "[t]he 4th article, respecting the extending [of] the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation."¹⁹⁶ At the Convention, the clause became part of the Constitution with virtually no debate.¹⁹⁷ As Professor Simson has noted: "it seems reasonable to infer that familiar principles—specifically, those spelled out in the provision of the Articles of Confederation on which the clause plainly was based—were widely understood to inform the clause."¹⁹⁸

If such an interpretation of the constitutional privileges and immunities clause had been adopted consistently, it would have been similar in at least certain respects to the operation of the dormant commerce clause. Both would have prohibited state economic protectionism that discriminated against nonresidents; and therefore to the extent that the dormant commerce clause is concerned solely with such discrimination, the overlap would be substantial. Even so, significant differences would remain. Initially, the reach of the dormant commerce clause has never been limited to discriminatory state regulations. Rather, the Court has struck down even regulations neutrally applied to residents and nonresidents alike if they are found to unduly burden interstate commerce.¹⁹⁹ Scholars have debated the theoretical merits of this extension,²⁰⁰ but there can be little doubt that it remains an accepted element of the Supreme Court's dormant commerce clause jurisprudence.²⁰¹ There exists, however, no rational means of construing the terms of the privileges and immunities clause to extend beyond discriminatory state regulations. Secondly, even as to discriminatory legislation, a major difference exists between the impact of the two clauses. Supreme Court applications of

194. ARTICLES OF CONFEDERATION art. IV.

195. Simson, *supra* note 193.

196. C. Pinckney, Observations on the Plan of Government Submitted to the Federal Convention, In Philadelphia, on the 28th of May, 1787, *reprinted in* 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 107, app. A, ch. CXXIX, at 112.

197. Simson, *supra* note 193, at 384 (citing 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 107, app. A, ch. CXXIX, at 437).

198. *Id.*

199. See *supra* notes 73-77 and accompanying text.

200. See, e.g., Regan, *supra* note 10, at 1091; Eule, *supra* note 8, at 425.

201. See *supra* notes 73-77 and accompanying text.

the dormant commerce clause may be reversed by congressional legislation;²⁰² decisions enforcing the privileges and immunities clause—like judicial interpretations of all other constitutional provisions—are beyond congressional reach.

If these were the only differences between the effect of the two clauses, little would be lost, as a practical matter, by abandoning the dormant commerce clause. While it is possible that nondiscriminatory state legislation could have a negative impact on national interests, such regulation is not nearly as threatening to the goal of national unity as is discriminatory legislation. In the relatively rare instance in which nondiscriminatory legislation is truly harmful, the availability of congressional preemptive power under the commerce clause should provide adequate protection. Nor is it clear that the availability of congressional reversal of Supreme Court holdings is either necessary or even wise, since the practice is so strikingly aberrant from traditional constitutional theory.

For reasons that are not entirely clear, however, the Court, at least in modern times, has declined to find all state discriminatory legislation invalid under the privileges and immunities clause. Instead, it has adopted the approach originally taken in the 1823 circuit court case *Corfield v. Coryell*,²⁰³ extending constitutional protection under the privileges and immunities clause only if out-of-state residents were discriminated against in the exercise of so-called "fundamental" rights.²⁰⁴ In *Corfield*, Justice Washington rejected the argument that a citizen of one state could "participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens."²⁰⁵ He enumerated several general categories of protected privileges and immunities, including the ability "to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property . . . and an exemption from higher taxes or impositions than are paid by the other citizens of the state."²⁰⁶

Whether more recent interpretations have returned to the earlier broad construction, however, is unclear.²⁰⁷ In any event there appears to

202. See *supra* notes 124-30 and accompanying text.

203. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

204. Simson, *supra* note 193, at 379-80; see *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (discriminatory hunting license fees upheld because equal access to state elk not vital for well-being of nation).

205. 6 F. Cas. at 552.

206. *Id.*

207. See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (invalidating Alaskan statute requiring all oil and gas leases, rights-of-way permits or easements for gas or oil pipelines, and unitization agreements to contain a provision giving hiring preference to qualified Alaskans over nonresidents).

be no textual, historical or policy reason that binds the Court to the "fundamental rights" interpretation. Indeed, if anything, the opposite is true: there appears to be no textual basis for the imposition of such a requirement.

2. *The Supreme Court's Interpretation.* Advocates of the dormant commerce clause have argued that modern Supreme Court doctrine shows that the commerce and privileges and immunities clauses serve different constitutional purposes, and therefore both clauses are required.²⁰⁸ Although at one point the Court has noted that there exists a "mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause,"²⁰⁹ at other times it has declared that the commerce and privileges and immunities clauses serve different constitutional purposes.²¹⁰ In *United Building and Construction Trades Council v. Mayor of Camden*,²¹¹ for example, Justice Rehnquist wrote that "[t]he two Clauses have different aims and set different standards for state conduct."²¹² He stated that "[t]he Commerce Clause acts as an *implied* restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce."²¹³ Rehnquist distinguished the privileges and immunities clause, stating that it "imposes a *direct* restraint on state action in the interests of interstate harmony. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce."²¹⁴

We remain unpersuaded by Chief Justice Rehnquist's proffered distinctions, however. Initially, the distinction premised on the implied or direct nature of the regulation has nothing to do with the *purposes* served by the clauses; it merely underscores the lack of any textual support for the dormant commerce clause. Similarly, the fact that judicial application of the dormant commerce clause "must give way before the superior authority of Congress" also has nothing to do with the purposes of the two clauses; it once again merely underscores the aberrant nature of the

208. See Regan, *supra* note 10, at 1202-06.

209. *Hicklin*, 437 U.S. at 531.

210. See *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984).

211. 465 U.S. 208 (1984).

212. *Id.* at 220.

213. *Id.* (emphasis added).

214. *Id.* (emphasis added). Similarly, Professor Jonathan Varat argues that "[a]t the most elementary level, the primary concern of the commerce clause is business that involves more than one state, whereas the core concern of the interstate privileges and immunities clause is the treatment received within a state by the citizens of other states." Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 499 (1981).

dormant commerce clause in constitutional theory. Finally, Rehnquist's contention that the privileges and immunities clause was designed to foster "interstate harmony" and the avoidance of "discrimination against out-of-state residents"²¹⁵ actually underscores the theoretical similarity of the two clauses. While the Court has declared that the rights protected under the privileges and immunities clause are those rights "bearing upon the vitality of the Nation as a single entity,"²¹⁶ it similarly has noted that the commerce clause was created because of "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation,"²¹⁷ and that "[i]t is . . . beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization."²¹⁸ Moreover, the Court has consistently invalidated discriminatory state regulations pursuant to the dormant commerce clause, because "the peoples of the several states must sink or swim together, and . . . in the long run prosperity and salvation are in union and not division."²¹⁹ Thus, it appears that the Court has recognized the same right under both the privileges and immunities and the dormant commerce clauses—the right of an out-of-state resident to be free from discriminatory state regulations of commerce.

B. *The Privileges and Immunities Clause and the Corporations Problem.*

To this point, we have established that, both doctrinally and theoretically, the privileges and immunities clause could adequately fulfill at least the primary function now served by the dormant commerce clause. There remains, however, one current doctrinal aspect of privileges and immunities clause jurisprudence that could effectively prevent that clause from serving as an adequate substitute for the dormant commerce clause. The Court has consistently maintained that a corporation is not entitled to the protection granted by the privileges and immunities clause because corporations are not "citizens."²²⁰ The Court's failure to extend the pro-

215. 465 U.S. at 220.

216. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

217. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (quoting court below, 7 F. Supp. 776, 780 (1934)).

218. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

219. *G.A.F. Seelig*, 294 U.S. at 523.

220. In both *Hope Ins. Co. v. Boardman*, 9 U.S. (5 Cranch) 57, 59 (1809), and *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), the Court held that a corporation was not a citizen because a corporation was an artificial legal entity, and as such, could not sue or be sued in federal court. In *Deveaux*, the Court, however, concluded that the corporation's stockholders could sue and be sued in federal court under the corporation's name. 9 U.S. (5 Cranch) at 91-92.

Thirty years later in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839), the Court refused to extend *Deveaux* in order to recognize that corporations enjoy the protection of the privi-

tection of the privileges and immunities clause to corporations presents an obvious practical problem, because of the enormous amount of commerce that is conducted by corporations. The scope of the privileges and immunities clause is not the primary focus of this article and therefore an exhaustive examination of the corporations issue is not included. Nevertheless, it can be reasonably argued that corporations should, in fact, be afforded the protections of article IV.

From a policy perspective, there can be little doubt that corporations should receive the protections of the privileges and immunities clause. A substantial portion of business in the nation—and therefore interstate business as well—is conducted by corporate entities. To the extent the clause is designed to establish interstate harmony, as Chief Justice Rehnquist has suggested,²²¹ the exclusion of corporations from the clause's scope precludes fulfillment of this goal. Thus, the only conceivable basis for the exclusion of corporations is a textual argument: the word "citizens" cannot rationally be defined to include corporations. But in light of the generally liberal interpretations traditionally given constitutional language, such an argument is disingenuous. The term "person" in the fourteenth amendment²²² has been consistently interpreted to include corporations,²²³ and the term "citizens" in the diversity jurisdictional statute,²²⁴ which in turn is premised on the use of the same term in article III of the Constitution,²²⁵ includes corporations by its language. Why, then, should we hesitate to treat the same term in article IV in the same manner?

leges and immunities clause. Chief Justice Taney, writing for the Court, maintained that if a corporation were permitted to enjoy the privileges and immunities of citizens, it would also have to bear the accompanying liabilities of citizens. *Id.* at 586. This result, he concluded, would reduce the corporation to "a mere partnership in business" and the corporation's stockholders would be liable for the full extent of the corporation's obligations. *Id.* Consequently, the Chief Justice refused to extend to corporations the protection of article IV's privileges and immunities clause. *See id.* at 586-87.

Similarly, in *Paul v. Virginia*, the Court responded to the assertion that the privileges and immunities clause applied to corporations by declaring that "[t]he term citizens . . . [in the privileges and immunities clause] applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed." 75 U.S. (8 Wall.) 168, 177 (1868). The Court continued that corporations only possess those rights contained in their charters and not their shareholders' rights as citizens of a state. *See id.* at 180. The Court has maintained this position to date. 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 3, § 12.7.

221. *See supra* note 215 and accompanying text.

222. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

223. *See, e.g.,* *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

224. 28 U.S.C. § 1332 (1982).

225. U.S. CONST. art. III, § 2, cl. 1.

If, however, corporations cannot, for some unknown reason, be extended rights under the privileges and immunities clause, an alternative remains. Congress could, pursuant to the commerce clause, prohibit discrimination by the states against out-of-state corporations engaged in interstate commerce. Additionally, Congress could preempt state regulations of commerce that discriminate against corporations by prescribing its own substantive federal regulations. Either of these alternatives would be consistent with the Constitution's text, and would not alter the constitutional balance of federalism.²²⁶

VI. THE DEMOCRATIC PROCESS MODEL AS AN ALTERNATIVE TO THE TEXTUAL CRITIQUE

A. *The Nature of the Democratic Process Model.*

In recent years, several commentators have reached an ultimate conclusion similar in many respects to our own: that the sole legitimate rationale for judicial invalidation of state legislation burdening interstate commerce is the discriminatory impact of that legislation on out-of-state residents. At least one of those scholars has also concluded that that function can adequately be performed by resort to the privileges and immunities clause.²²⁷ But while this view and our own are similar in result, the theoretical analyses leading us to our respective conclusions are quite different. In fact, however, we believe that the reasoning of those scholars who have previously reached this result is fundamentally flawed in several respects.

Earlier commentators have argued that "[t]he time-honored rationales for traditional dormant commerce clause jurisprudence have become historical vestiges,"²²⁸ and that "[i]n the end . . . we are left with only a single justification for judicial displacement of state legislative judgments in the commercial area—the process-oriented protection of representational government."²²⁹ This theory, which we label the "democratic process" model, turns on the fact that the out-of-state citizens affected by a state's commercial regulations are not represented in the legislature that enacted them. Its origins can be found in the opinion of Justice Stone, speaking for the Court in *South Carolina State Highway Department v. Barnwell Bros., Inc.*:²³⁰

Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its

226. See *supra* note 123 and accompanying text.

227. Eule, *supra* note 8, at 446-55.

228. *Id.* at 435.

229. *Id.* at 443.

230. 303 U.S. 177 (1938).

burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.²³¹

Those who believe this to be the key factor argue:

When regulations promulgated by a legislative body fall solely or predominantly on a group represented in the legislature there is cause to believe the enactment will be rationally based, efficacious, and no more burdensome than is necessary to achieve the proffered purpose. When the state enacts legislation . . . falling principally on out-of-staters not represented in the regulating body, such a presumption is unwarranted.²³²

As Professor Tushnet has argued, this theory "can be viewed as a political application of the economists' theory of externalities: because a legislative body may underestimate the burdens that its proposals place on people who do not participate in its selection, the resulting statutes may be inefficient."²³³

To reach their ultimate conclusion, advocates of the democratic process model as the sole rationale for judicial invalidation of state regulation must establish two points: (1) that the rationale of their model is valid, and (2) that no other conceivable policy rationale justifying a broader based dormant commerce clause is equally valid. While our conclusion, reached through analysis of the textual structure, is coincidentally similar to that of the democratic process proponents, we believe that their approach—tied purely to policy considerations, rather than a textual anchor—fails to meet either criterion for success.

B. *The Flawed Logic of the Democratic Process Model.*

Initially, we believe that advocates of the democratic process model cannot rationalize a test that turns solely on grounds of discrimination, because even if accepted, the model proves too much. Once we agree that the key factor is lack of representation in the legislative process, *any* state regulation affecting the residents of other states ("foreign" residents) whether discriminatory or not—is rendered suspect. For whether or not the regulation disproportionately affects foreign residents, the fact remains that the foreign residents have had no say in the promulgation of

231. *Id.* at 185 n.2.

232. Eule, *supra* note 8, at 445. Professor Tushnet argued for a similar rationale. See Tushnet, *supra* note 10, at 132-33 (suggesting that political restraints are likely to be inadequate in instances where organized local consumers, as opposed to local producers, share in the burdens imposed upon foreign shippers). Unlike Professor Eule, Professor Tushnet apparently intends not to shift the analysis to the umbrella of the privileges and immunities clause, but rather to infuse traditional dormant commerce clause jurisprudence with this "representational" analysis.

233. Tushnet, *supra* note 10, at 129 n.14.

the regulation that affects them. It is the very fact of this representational absence that violates the premise of the democratic process model. Moreover, it is at least conceivable that some in-state residents may have favored a regulation that foreign residents might oppose, even though the regulation will affect both equally. It is also conceivable that some in-state residents subjected to the regulation did oppose it, but lacked the political strength to overcome its supporters in the legislature. In such an event, if those foreign residents affected by the regulation had also been represented in the legislature, the regulation might well have failed.²³⁴

Advocates of the democratic process model respond that, in terms of economic efficiency, a regulation equally affecting both those represented and those unrepresented in the state's legislative process is much more likely to be efficient and rational, because of the absence of the equivalent of economic externalities.²³⁵ Such an analysis, to borrow a phrase from Professor Regan, smacks of "utopian Coaseism."²³⁶ It is absurd to suggest that the generally nondehberative legislative process is always—or even often—likely to result in the most rational or efficient result.²³⁷ But even if it did, that fact is largely beside the point. If the value to be served is representational, as the model's advocates have asserted,²³⁸ the fact remains that whether or not the regulation can ultimately be deemed efficient or rational, the foreign residents affected by it have had no say in its adoption. This fact would seem to be critical, since by its nature a model premised on notions of democratic theory is concerned with *process* values,²³⁹ rather than the wisdom of a particular outcome. If it were otherwise, a truly wise and benevolent dictatorship could be as morally acceptable a form of government as democracy, a

234. A possible illustration would be anti-union legislation, enacted in a weak union state, that affects various unions in neighboring states where unions are politically powerful.

235. See *supra* note 232 and accompanying text.

236. Regan, *supra* note 10, at 1115 n.56. The phrase recalls Professor R.H. Coase's analysis of "social costs," which assumes away transaction costs and places great reliance on affected parties' ability to redistribute burdens through negotiation. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 5-6, 15 (1960).

237. This, at least, is the view taken by the so-called "public choice" literature. See generally Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878-83 (1987) (public choice models often grounded in notion that political choices are determined by efforts of special interest groups).

238. See *supra* notes 229-33 and accompanying text.

239. See, e.g., Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288 (1966). Professor Walker stated:

The most distinctive feature, and the principal orienting value, of classical democratic theory was its emphasis on individual participation in the development of public policy. . . . Although the classical theorists accepted the basic framework of Lockean democracy, with its emphasis on limited government, they were *not* primarily concerned with the *policies* which might be produced in a democracy; above all else they were concerned with *human*

conclusion rejected by democratic theorists.²⁴⁰ In short, the interest in economic efficiency as an outgrowth of a concern over adequate representation amounts to a non sequitur. Thus, acceptance of the democratic process model cannot logically stop with invalidation of discriminatory legislation; even nondiscriminatory legislation affecting foreign residents suffers from the same process-based defect.

C. *The Rejection of Alternative Values.*

It is important to recall that advocates of the democratic process model base their conclusion not on any analysis of constitutional text, but rather on grounds of reason and political theory.²⁴¹ Once the textual anchor is abandoned, advocates of any model for judicial action must of course meet a burden of explaining why their approach is preferable, as a matter of logic and political theory, to any other conceivable model. Under this standard, the democratic process model must fail. Even if one were to concede the logic of the democratic process model as a basis for invalidating discriminatory legislation, the model's advocates have not adequately disposed of all conceivable alternative values that a reviewing court might reasonably adopt as a rationale for overturning state regulation—values that would not be adequately fostered solely by the prohibition of discriminatory state legislation. Thus, absent a basis in constitutional text to support their conclusion, democratic process advocates fail to justify their ultimate solution.

While democratic process advocates attempt to dispose of certain conceivable values that might be served by the dormant commerce clause,²⁴² they neglect to deal with the one value possessing the strongest

development, the opportunities which existed in political activity to realize the untapped potentials of men

Id. See also Bachrach, *Interest, Participation, and Democratic Theory*, in NOMOS XVI: PARTICIPATION IN POLITICS 39, 41 (J. Pennock & J. Chapin eds. 1975) ("Democratic participation . . . is a process in which persons formulate, discuss, and decide public issues that are important to them and directly affect their lives.").

240. See, e.g., J. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 45-53 (London 3d ed. 1865); see also P. BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* 98 (1967) ("[M]an's dignity . . . is dependent upon an opportunity to participate actively in decisions that significantly affect him.").

241. This is clearly true of Professor Tushnet. See generally Tushnet, *supra* note 10. Professor Eule acknowledges the possible textual difficulties with the dormant commerce clause, Eule, *supra* note 8, at 430, but does not seem to find them dispositive, largely because of what he understands to be Madison's intent. *Id.* at 431. Moreover, he suggests that "[l]ogic points inexorably to the courts" as the federal governmental body that "was to bring the states back in line when they transcended their authority." *Id.* It appears clear that if the absence of textual support were the only problem with the dormant commerce clause, Professor Eule would not favor its rejection.

242. Professor Eule assumes the justification for the dormant commerce clause to be the value of free trade, and then proceeds to reject it. Eule, *supra* note 8, at 432-37. He concludes that "[i]n the end . . . we are left with only a single justification for judicial displacement of state legislative judg-

historical foundation and the most reasonable grounding in American political theory: the avoidance of Balkanization among the states resulting from trade policies that tend to disrupt the union. This was clearly the greatest problem under the Articles of Confederation, and played an important role in the establishment of the congressional commerce power in article I.²⁴³ While discriminatory state legislation may, of course, bring about such disunity, even nondiscriminatory state regulation that significantly burdens the free flow of commerce from state to state may give rise to this danger.²⁴⁴ Hence, if a reviewing court—freed from all textual restraints—were to conclude that the avoidance of Balkanization, rather than concern over representation, constitutes the primary theoretical focus, it could very easily adhere to the Court's current balancing test for determining the validity of evenhanded, nondiscriminatory state regulation burdening interstate commerce.²⁴⁵

D. *The Democratic Process Model and the Constitutional Text.*

Perhaps the greatest fallacy of the advocates of the democratic process model is their apparent assumption that a reviewing court is authorized to pick and choose among conceivable normative political theories in deciding when to invalidate state legislation.²⁴⁶ To be sure, there are numerous textual provisions so broadly phrased that a reviewing court—almost by necessity—will be called upon to ascertain and apply specific political or moral values.²⁴⁷ But as our examination of the textual structure has shown, the limitations on state authority to regulate interstate commerce are not among them.

It so happens that the result reached by these theorists largely comports with the textual structure that we have discerned. This fact appears to be, at most, helpful icing on the cake to these theorists, in no way essential to their ultimate conclusions.²⁴⁸ We have demonstrated, however, that even if one were to abandon textual constraints in favor of the fundamental normative assumptions made by the democratic process theorists, their ultimate conclusion is at best unproven and at worst in-

ments in the commercial area—the process-oriented protection of representational government.” *Id.* at 443.

243. See E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 46 (12th ed. 1958).

244. See *supra* text between notes 112 and 113.

245. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

246. See *supra* note 241 and accompanying text.

247. See Redish & Drizin, *supra* note 15, at 51.

248. See *supra* note 241.

correct. But even if their theoretical assumptions were universally conceded and their logical inferences inescapable, the approach would remain fundamentally flawed. This is because in a constitutional democracy a reviewing court at the outset must anchor any judicial invalidation of majoritarian action in the language of the Constitution. Absent such a basis in text, all normative issues of political theory remain irrelevant to the exercise of the court's judicial review power.

VII. CONCLUSION

The dormant commerce clause lacks a foundation or justification in either the Constitution's text or history, and, despite the efforts of respected constitutional scholars, the clause cannot be satisfactorily rationalized outside the text of the Constitution. More importantly, the dormant commerce clause alters the delicate balance of federalism clearly manifested in the constitutional text. By vesting initial oversight power in the judiciary, rather than Congress, the dormant commerce clause shifts the political inertia against the states in the regulation of interstate commerce, and leaves federal oversight of state regulation in the hands of the governmental body traditionally thought to be least responsive to state concerns.

It is by no means clear that leaving oversight, at least of nondiscriminatory state regulation, exclusively in congressional hands is likely to be harmful to the interests of the federal system. Judicial prohibition of such regulation could in many instances stifle individual state experimentation by requiring orthodoxy in interstate treatment.

If the Court were to overrule its existing doctrine and reject the dormant commerce clause, the nation would not be reduced to a Balkanized confederation. On the contrary, as we have demonstrated, the Constitution provides a textual allocation of power designed to prevent just such an occurrence. For example, article IV's privileges and immunities clause can be construed to prohibit the states from discriminating against the citizens of other states who engage in commerce. The power to control nondiscriminatory state regulation, however, is granted to Congress, not to the Court. It is Congress which must affirmatively exercise the power to regulate interstate commerce. For those critics who perceive this scheme to be socially or politically inadequate—a conclusion, we should emphasize, that we reject—the only alternative is resort to the amendment process in order to provide textual relief from any perceived inadequacies. It is time to recognize that the dormant commerce clause is little more than a figment of the Supreme Court's imagination—hardly a legitimate basis, in a democratic society, upon which to premise judicial invalidations of state legislative action.