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DORMANCY VERSUS INNOVATION: A NEXT GENERATION DORMANT COMMERCE CLAUSE

SAM KALEN*

Over the last half century, countries have clung tenaciously to the concept of nation-states while economies around the globe became inextricably linked. National markets morphed into international markets with consumers, not just industries, unfettered by political boundaries. The nature of environmental threats changed as well: from easily perceived and immediate harms to subtle and yet insidious harms with manifestations not readily perceptible to the average person. Instead of the infamous Cuyahoga River fire, mercury-infected fish floating in the Great Lakes, or smokestacks emitting enough particulate matter to envelop a city, we now have multifaceted, multilayered international problems, ranging from increased ozone depleting substances and diminishing ocean resources to rising populations with changing eating habits and land use patterns and, of course, rising greenhouse gas (GHG) emissions and the resulting global consequences. That we now live in Thomas L. Friedman's *Hot, Flat, and Crowded*¹ world is uncontested; yet constitutional dogma still dictates that we have a national market protected from some parochial state and local regulation. The negative or dormant aspect of the Commerce Clause (DCC) presumes that certain national issues are reserved exclusively to Congress

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1. THOMAS L. FRIEDMAN, *HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA* (2008).

and state and local governments are prohibited from intruding into those areas absent congressional assent.²

This reservation of regulatory authority is increasingly problematic, as consequences of globalization are as much local as national. The polar local and international stages have eclipsed the national arena. The present political paradigm only exacerbates this duality. Today's Congress lacks the congeniality that existed fifty years ago, and any suggestion that its members can achieve consensus through rational, interest group pluralism appears dominated instead by public choice theory.³ In lieu of gamesmanship, we now have partisan gridlock.⁴ And it seems unlikely to change anytime soon. But people continue to live, eat, shop, and recreate at a local level—indeed, one that is now primarily urban. Expectedly, therefore, we are witnessing an escalating emphasis on *place* and the rise of *localism*, prompting local communities to assert control over their own economic and environmental destiny.⁵ This, of course, parallels the emergence of the urban center, which has become the economic engine for states and, indirectly, the nation. Today, as Professor Richard Schragger explains, “[W]hen one speaks about the free trade constitution, one is mostly speaking about inter- and intra-metropolitan trade; to talk about the national economy is to talk mostly about urban-based development and urban-based trade flows.”⁶ And urban centers will continue to explore opportunities for asserting greater influence over their surroundings, affecting the flow of capital, permitting different types of industries, and specifying the conditions in which those industries will be allowed to operate.⁷

2. Professor Pursley suggests that we should view the DCC as a conceptual element in what he labels a “State Preclusion Thesis.” Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 529 (2012).

3. See, e.g., JIM ROSSI, REGULATORY BARGAINING & PUBLIC LAW 61-67 (2005) (exploring public choice theory in deregulated markets).

4. Jonathan Weisman, *Senate’s Long Slide to Gridlock*, N. Y. TIMES, Nov. 25, 2012, at A1.

5. See DAVID J. HESS, LOCALIST MOVEMENTS IN A GLOBAL ECONOMY: SUSTAINABILITY, JUSTICE, AND URBAN DEVELOPMENT IN THE UNITED STATES 5-8 (2009).

6. Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1095 (2008) (footnotes omitted).

7. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 484, 539 (2009). See generally JEB BRUGMANN, WELCOME TO THE URBAN REVOLUTION: HOW CITIES ARE CHANGING THE WORLD 27-32 (2009); MATTHEW E. KAHN, GREEN CITIES: URBAN GROWTH AND THE ENVIRONMENT 50-66 (2006).

Yet, creative state and local solutions for addressing modern challenges are becoming increasingly suspect under the DCC. And as state and local programs outpace federal efforts to respond to such wide-ranging challenges as climate change and reduced fossil fuel consumption, the DCC operates as the proverbial sword of Damocles hanging over these programs.⁸ The DCC surfaces, for instance, when states restrict the import of carbon-intensive energy⁹ or when they require the purchase of local renewable resources.¹⁰ Also, states' regional efforts to address climate change may implicate the DCC, to the extent that such programs address the problem of leakage of GHG emissions to areas outside of the regional effort.¹¹ In particular, California's progressive approach for addressing

8. With the emphasis on reduced fossil fuel dependence and the need for local communities to secure new energy resources, the likelihood of an ever-growing movement toward distributed energy is poised to have local communities become energy islands, marginally tied to an interstate grid. See JEFFREY RUSSELL & STEVEN WEISSMAN, BERKELEY LAW, CTR. FOR LAW, ENERGY & THE ENV'T, CALIFORNIA'S TRANSITION TO LOCAL RENEWABLE ENERGY: 12,000 MEGAWATTS BY 2020, at 2-4 (Public Draft Feb. 27, 2012) available at [http://www.law.berkeley.edu/files/Transition_to_Local_Renewable_Energy_February_2012_DRAFT\(1\).pdf](http://www.law.berkeley.edu/files/Transition_to_Local_Renewable_Energy_February_2012_DRAFT(1).pdf). But with such a future, subnational level communities are likely to protect themselves through some trade barrier restrictions, only to implicate DCC concerns. See Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 250 (1999).

9. See Patricia Weisselberg, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions from Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?*, 42 U.S.F. L. REV. 185, 204-05 (2007).

10. See Stephen C. Braverman, *State Renewable Portfolio Standards and the Commerce Clause*, 25 NAT. RESOURCES & ENV'T 15, 16-17 (2011); Steven Ferrey et al., *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 DUKE ENVTL. L. & POL'Y F. 125, 158, 178 (2010); see also Joel H. Mack et al., *All RECs Are Local: How In-State Generation Requirements Adversely Affect Development of a Robust REC Market*, ELECTRICITY J., May 2011, at 8.

11. See William Funk, *Constitutional Implications of Regional CO₂ Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. ENVTL. L. & POL'Y 353, 363-69 (2009); Joseph Allan MacDougald, *Why Climate Law Must Be Federal: The Clash Between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems*, 40 CONN. L. REV. 1431, 1444-46 (2008); Juliet Howland, Comment, *Not All Carbon Credits Are Created Equal: The Constitution and the Cost of Regional Cap-and-Trade Market Linkage*, 27 UCLA J. ENVTL. L. & POL'Y 413, 446-55 (2009); Margaret C. Hupp, Comment, *Congressional Consent Under the Compact Clause: Plugging the Leaks in the Regional Greenhouse Gas Initiative*, 84 TUL. L. REV. 469, 480 (2009); Mary Bede Russell, Note, *What's It to You?: The Difficulty of Valuing the Benefits of Climate-Change Mitigation and the Need for a Public-Goods Test Under Dormant Commerce Clause Analysis*, 94 IOWA L. REV. 727, 743-44 (2009).

climate change has raised DCC concerns,¹² and recently prompted a district court to invalidate the state's low carbon fuel standard.¹³ Stifling these and similarly laudable local efforts is problematic and, more importantly, unnecessary.

Nothing about the DCC necessitates deploying the judicially constructed doctrine in the same manner that it exists today. As our society and constitutional doctrines have changed since the early republic, so too has the approach to the DCC. It has witnessed four different generations of analysis, with each new generation struggling to match the needs of society at the time with the policy animating the DCC. And nothing about the latest generation of tests under the DCC warrants strict adherence to *stare decisis*. After all, different generations have produced different tests for measuring the constitutionality of state and local programs allegedly violating the negative prohibition.

Part I, therefore, reviews the first three generations of DCC analysis, illustrating how the emerging dual federalism paradigm influenced the Court's DCC cases prior to the New Deal. Part II then examines the changing and now modern DCC, demonstrating that the Court intended to narrow the scope of the Clause. It was during this period that the Court crafted tests, particularly a balancing test, with minimal analysis or thought. But the modern DCC tests have not necessarily reduced the Clause's impact, as expected by the New Deal Court, so Part III examines how the DCC has cabined state and local programs. Part IV unmaskes the inherent problem with the tests now being deployed and offers an alternative approach to the DCC.

I. Growth of the Dormant Commerce Clause

The development of the DCC reflects a fluid process for distinguishing: (1) those instances when states may exercise exclusive jurisdiction, (2) those circumstances where states and Congress may exercise concurrent jurisdiction, and (3) those subjects reserved exclusively to Congress except when Congress affirmatively chooses to permit state regulation.¹⁴

12. See Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 37 ENVTL. L. REP. 10653, 10654 (2007).

13. *Rocky Mountain Farmers Union v. Goldstene*, Nos. CV-F-09-2234 LJO DLB, CV-F-10-163 LJO DLB, 2012 WL 217653, at *1 (E.D. Cal. Jan. 23, 2012); see *infra* notes 175-79 and accompanying text.

14. See *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 209-13 (1894). The Court's application of other clauses indicated that the presence of concurrent jurisdiction only lasts until Congress expresses its will and supersedes any inconsistent state

Undoubtedly, the framers of the Constitution feared state regulation of foreign commerce, and, to some degree, further internecine trade wars among the former colonies.¹⁵ But little in that history suggests anything more than that the framers recognized the need to vest Congress with the power to regulate trade both locally and internationally. It does not, for instance, begin to illuminate what subjects might fall into which of the three identified categories.

In *Federalist No. 32*, Alexander Hamilton presaged the third circumstance, describing three instances when the United States would need to exercise exclusive authority:

efforts. *See, e.g.*, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 75-76 (1820) (finding a federal exercise of authority precluded state prosecution under state militia act). Congress's authority over naturalization generated a similar inquiry. *See Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 269-70 (1817); *United States v. Villato*, 28 F. Cas. 377, 377-78 (C.C.D. Pa. 1797) (No. 16,622); *Collet v. Collet*, 6 F. Cas. 105, 107 (C.C.D. Pa. 1792) (No. 3001).

15. *See* Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 1 (2004) ("All of the concrete programs intended to be forwarded by giving Congress the power to regulate commerce were restrictions on international trade . . ."). For an excellent account of the practices prior to the Constitution, see Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 59-66 (2005-2006). *See also* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1884-96 (2011). That the framers recognized the possible need for uniform commercial intercourse seems apparent. *See* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 115 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] ("[C]onsider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony . . ."). "It is impossible to read the correspondence of Madison, Hamilton, Mason, and others without perceiving the imperative necessity that they felt of committing the regulation of trade and commerce to a single national authority." George L. Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. PA. L. REV. 23, 26 (1955). But such sentiments obscure whether the power is exclusive or concurrent. Often, the sentiments were linked to foreign commerce. James Madison explained:

The want of authority in Congress to regulate commerce had produced in foreign nations, particularly Great Britain, a monopolizing policy, injurious to the trade of the United States, and destructive to their navigation . . . The same want of a general power over commerce led to an exercise of the power, separately, by the states, which not only proved abortive, but engendered rival, conflicting, and angry regulations.

ELLIOT'S DEBATES, *supra*, at 119. Friedman and Deacon attempt to illustrate why the framers intended exclusivity, and while I find their account a bit too cursory, it is not the purpose of this article to engage in that debate. *See* Friedman & Deacon, *supra*, at 1905.

[W]here the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.¹⁶

Hamilton's example suggests that he omitted the regulation of commerce as one reserved exclusively to Congress.¹⁷ Invoking the power to tax in Article I, Section 8, Clause 1, Hamilton suggested that Congress's power to levy and collect taxes and duties on imports and exports precluded similar state regulation, reasoning that state regulation was barred because of the corollary clause in Article I, Section 10, which restricted the states' ability to impose any imposts or duties on imports or exports.¹⁸ He explained that "[t]his restriction implies an admission that if it were not inserted the States would possess the power it excludes; [and that in all other respects the States' power is] undiminished."¹⁹ When responding to the concern that states might need to defray the costs of inspection before exporting products, James Madison suggested that states could explore ways of doing so and the check against any abuse "was the right in the general government to regulate trade between state and state."²⁰ When a measure for state duties on tonnage was presented by Mr. M'Henry and Mr. Carroll, Madison apparently "was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority."²¹ Apparently responding to the suggestion that Congress would need exclusive jurisdiction over commerce, Mr. Sherman replied: "The

16. THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. It is not necessarily clear whether the word "commerce" itself includes simply mercantile trade or something else. Others note this issue too, further underscoring the limited utility in resorting to the framers' "actual" intent. See Johnson, *supra* note 15, at 2-3; Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56-59 (2010). Occasionally, at least, the colonists used "commerce" in lieu of the word "trade," such as when referring to treaties of commerce. See ELLIOT'S DEBATES, *supra* note 15, at 88.

18. THE FEDERALIST NO. 32, *supra* note 16, at 198-99 (Alexander Hamilton).

19. *Id.* at 199.

20. ELLIOT'S DEBATES, *supra* note 15, at 539.

21. *Id.* at 548. James Madison later suggested that regulating "commerce" was entrusted exclusively to the federal domain; it was Madison's subsequent letters that led Albert Abel to infer that view on the delegates during the convention. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 469, 492 (1941).

power of the United States to regulate trade, being supreme, can control interferences of the state regulations, when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.”²²

Early nineteenth-century decisions often focused on whether a particular activity was entrusted to the states’ police power, assigned to Congress, or, quite possibly, subject to concurrent federal-state jurisdiction.²³ The same year that Congress passed the 1824 General Survey Bill expected to facilitate the development of roads and canals, the Supreme Court issued *Gibbons v. Ogden*.²⁴ This seminal case involved New York’s legislative grant of an exclusive right to operate steamboats over the state’s navigable waters to Robert Livingston and Robert Fulton.²⁵ Following New York’s lead, other states began granting similar exclusive rights or passing retaliatory measures.²⁶ The case arose after an initial round of litigation, with Aaron Ogden eventually obtaining the rights previously held by Livingston and Fulton, and Ogden suing his former partner, Thomas Gibbons, who sought to operate boats in New York waters.²⁷ Gibbons defended by arguing that his boats were licensed under the laws of the United States and duly enrolled at Perth Amboy, New Jersey.²⁸

The Court held that the state monopoly conflicted with the federal Coasting License Act of 1793,²⁹ putting an end to a generally regarded

22. ELLIOT’S DEBATES, *supra* note 15, at 548. Barry Friedman and Daniel Deacon, in attempting to buttress their argument that the framers expected that the Commerce Clause vested exclusive jurisdiction in Congress and that the courts would supervise and review intruding state legislation, suggest that Sherman too supported exclusive jurisdiction. Friedman & Deacon, *supra* note 15, at 1900. Yet their argument arguably relies too heavily on broad statements by the framers about judicial review. *See id.* at 1896-1903.

23. *See* Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417, 424-50 (1988).

24. 22 U.S. (9 Wheat.) 1 (1824).

25. *Id.* at 1. In 1812, the New York judiciary upheld several of these statutes. *Livingston v. Van Ingen*, 9 Johns. 507, 590 (N.Y. 1812), *overruled by* *N. River Steam Boat Co. v. Livingston*, 3 Cow. 182 (N.Y. Sup. Ct. 1825).

26. *See* 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 598 (1947). Professor Kent Newmyer notes that “[s]uch practices threatened to fractionalize national commerce and retard the use of new transportation—the steamboat in 1824, perhaps the railroad six years later.” R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 50 (1968). The Court was well aware of the potential impact of these retaliatory statutes on commerce. *See* *Mayor of New York v. Miln*, 36 U.S. (2 Pet.) 102, 159-60 (1837) (Story, J., dissenting).

27. *Gibbons*, 22 U.S. (9 Wheat.) at 2.

28. *Id.* at 27.

29. *Id.* at 239 (Johnson, J., concurring). New York Chancellor James Kent, from whose state the case arose, was quite dismayed at this use of the Coasting License Act. He observed

onerous monopoly.³⁰ But Chief Justice John Marshall's opinion for the Court suggested that Congress exercised an expansive power under the Commerce Clause that reached "every species of commercial intercourse," including navigation.³¹ This power, quite naturally, did not end at jurisdictional lines, but rather operated "within the territorial jurisdiction of the several States."³²

Chief Justice Marshall further distinguished between two spheres of jurisdiction: the commercial power delegated to the federal government and that power reserved to the states under the Constitution.³³ States retained their power to regulate or police trade "which does not extend to or affect other States," and which is completely within a state.³⁴ The power of taxation is one example.³⁵ Responding to the specter of state quarantine and inspection laws thereby becoming unconstitutional, Chief Justice Marshall admitted that, while such laws affected interstate commerce, states could exercise "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government."³⁶ If, according to Chief Justice Marshall, the state law's *object* was permissible, then the *means* chosen would be acceptable, even if those

that when Congress passed the Act, "it never occurred to any one" that the Act was a regulation of commerce and prohibitory of any such state grants; instead, Kent indicated that the Act was designed "to exclude foreign vessels from commerce between the states, in order to cherish the growth of our own marine, and to provide that the coasting trade should be conducted with security to the revenue." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 435 (Lacy ed. 1889). For a convincing argument that Chief Justice Marshall deftly navigated between the need to articulate a theory of the Commerce Clause and a desire to avoid having the Court be seen as an opponent of state legislation, see Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1401-02 (2004). Historian Charles McCurdy makes this point as well. See Charles McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631, 635 (1978).

30. See generally 1 WARREN, *supra* note 26, at 612-28. Warren speculated that Justice Story might have written the opinion because Chief Justice Marshall at that time had an injured shoulder and the Justices occasionally wrote opinions for their colleagues. See *id.* at 608; G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 14-15, 19-20, 20 n.72 (1984) (noting the speculation that Chief Justice Marshall may have dictated the opinion in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)).

31. *Gibbons*, 22 U.S. (9 Wheat.) at 193.

32. *Id.* at 196.

33. *Id.* at 194-96.

34. *Id.* at 194.

35. *Id.* at 198-200.

36. *Id.* at 203.

means mirrored what might be employed by the federal government under the commercial power.³⁷

Until midcentury, the Court's either willingness or ability to outline the boundaries of exclusive federal versus concurrent state power became impeded by a changing Court, slavery, temperance, and deciding whether internal improvements were federal or state concerns.³⁸ No clear consensus emerged for resolving whether a regulatory object was one reserved exclusively to Congress, one subject to exclusive state jurisdiction, or one subject to concurrent state jurisdiction.³⁹ Then, in *Cooley v. Board of Wardens*, the Court employed a somewhat talismanic test: whether the particular subject matter was national or local in scope, with the former reserved exclusively to Congress.⁴⁰ This belief, that issues could be categorized as either national or local, permeated much of the Court's nineteenth-century jurisprudence.⁴¹ It served as the basis for Justice Story's opinion in *Swift v. Tyson*, where he distinguished between "local" law and the general commercial law which required uniformity and was governed by the law of nations.⁴² If the object of the regulation required uniform, national legislation, then the subject would be reserved exclusively to

37. Justice William Johnson concurred, emphasizing that the state law conflicted with Congress's exclusive jurisdiction over interstate commerce. *Id.* at 236 (Johnson, J., concurring).

38. See Kalen, *supra* note 23, at 429.

39. See generally *id.* at 429-38.

40. 53 U.S. (12 How.) 299, 319 (1851), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 180 (1995).

41. See Kalen, *supra* note 23, at 438-43; see also ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 80 (1904) ("A further distinction is based upon a difference between the local and the national aspect of commerce . . ."). See generally Charles A. Heckman, *The Relationship of Swift v. Tyson to the Status of Commercial Law in the Nineteenth Century and the Federal System*, 17 AM. J. LEGAL HIST. 246 (1973). Justice Story's principal biographer notes that Justice Story's opinion in *Swift v. Tyson* apparently reflected a general consensus at the time. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 336 (1985). And one commentator later lamented that "[c]ommercer blended into contract: contract merged with the whole body of general law; and when this point had been reached, torts and even real property fought an unequal battle against the desire of the national judiciary to free itself from unquestioning obedience to local law." MITCHELL WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS 136 (1949).

42. 41 U.S. (16 Pet.) 1, 18-19 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). See generally TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 37-43 (1981).

Congress.⁴³ In *County of Mobile v. Kimball*, for instance, Alabama's program for dredging a channel and constructing an artificial harbor survived a constitutional challenge, with the Court concluding that the program merely "aided" commerce and admitted of local, rather than uniform, regulation:

The subjects . . . upon which Congress can act under this power are of infinite variety Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities.⁴⁴

This fits comfortably into the prevailing dual federalism framework for allocating power between spheres of jurisdiction.⁴⁵ And it further suggested another talismanic test: any direct regulation of interstate commerce necessarily intruded into the sphere reserved to Congress in the first instance.⁴⁶

43. *Cooley*, 53 U.S. at 318. Yet, "[i]t was not until after the Civil War," Professor David Currie explains, "that the commerce clause had been unambiguously employed to strike down state legislation, but in the remaining years of the Court's first century it had been wielded with increasing frequency to protect commerce against state interference." DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 31 (1990).

44. 102 U.S. 691, 697 (1880).

45. See *supra* notes 31-43 and accompanying text; *infra* notes 51-52.

46. See, e.g., *Harman v. Chicago*, 147 U.S. 396, 411-12 (1893) (holding that a local license fee directly burdened interstate commerce); *McCall v. California*, 136 U.S. 104, 114 (1890). In *Hall v. DeCuir*, the Court invalidated Louisiana's Equal Accommodation Act, which prohibited racial discrimination against passengers on interstate carriers. 95 U.S. 485, 491 (1877). The statute, according to the Court, operated directly upon interstate commerce. *Id.* at 488. Similarly, in *Wabash, St. Louis & Pacific Railway v. Illinois*, the Court held that Illinois's regulation of rates for carriers engaged in interstate traffic constituted an impermissible direct burden on commerce. 118 U.S. 557, 577 (1886); see also *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310, 316 (1917) (holding a railroad speed check unconstitutional); *Hous. & Tex. Cent. R.R. v. Mayes*, 201 U.S. 321, 331 (1906) (holding a railroad requirement for furnishing cars unconstitutional); *Cleveland, Cincinnati, Chi. & St. Louis Ry. v. Illinois*, 177 U.S. 514, 523 (1900) (invalidating railroad stop statute); *Ill. Cent. R.R. v. Illinois*, 163 U.S. 142, 154 (1896) (holding that a requirement of interstate traffic to make certain stops was an impermissible direct burden on commerce). To the extent the Court concluded that a statute only indirectly burdened interstate commerce, it survived. "The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance." *N.Y., Lake Erie & W. R.R. v. Pennsylvania*, 158 U.S. 431, 439 (1895); see also *Mo., Kan. &*

II. Fourth Generation DCC

The nineteenth century talismanic tests soon succumbed to the evolving constitutional paradigm of the New Deal era. The Court no longer appeared comfortable with the existing three broad generations of tests which focused on spheres of jurisdiction, including, first, whether the DCC operated as an exclusive or concurrent grant of power and whether a particular area commanded a national or local focus; or next whether an issue could be categorized as part of the states' police powers or part of the federal commercial power; or later whether the statute operated directly upon interstate commerce or only indirectly burdened interstate commerce. Justice Holmes foreshadowed the Court's ultimate rejection of the nineteenth-century tests when he introduced the "current of commerce" theory expanding the scope of Congress's Commerce Clause power.⁴⁷ Justice Holmes's opinion mirrored the emerging scholarly criticism of both the affirmative and the negative aspects of the Commerce Clause, the latter stymieing modern state regulation.⁴⁸ Progressives favoring state or national regulation attacked the Court's prior tests as too restrictive.⁴⁹ After all,

Tex. Ry. v. Haber, 169 U.S. 613, 627-28 (1898); *Hennington v. Georgia*, 163 U.S. 299, 318 (1896); *Postal Tel. Cable Co. v. Adams*, 155 U.S. 688, 700 (1895); *Budd v. New York*, 143 U.S. 517, 545 (1892); *Sherlock v. Alling*, 93 U.S. 99, 104 (1876).

47. See *Swift & Co. v. United States*, 196 U.S. 375, 399 (1905). The growth of the vertically integrated national market and the ability of states to levy gross receipt taxes on businesses likely shaped the Court's evolving skepticism about prior DCC tests. See *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 438-41 (1939) (examining the DCC and imposition of gross receipt taxes); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 324-33 (1938) (Black, J., dissenting) (reviewing the DCC and gross receipt taxes and suggesting laws should be measured against an unfair and unjust standard). In a license tax case involving insurance, Chief Justice Rutledge reviewed the DCC generally and observed that "its implied negative operation on state power has been uneven, at times highly variable" and "slippery." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 418 (1946). See generally Allison Dunham, *Gross Receipts Taxes on Interstate Transactions (Ain't God Tough on Indiana)*, 47 COLUM. L. REV. 211, 214-16 (1947).

48. See, e.g., James M. Beck, *Nullification by Indirection*, 23 HARV. L. REV. 441, 454-55 (1910); Henry Wolf Bickl , *The Silence of Congress*, 41 HARV. L. REV. 200, 220-24 (1927); Robert Eugene Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 381, 452, 482-83 (1919); Thurlow M. Gordon, *The Child Labor Law Case*, 32 HARV. L. REV. 45, 51-52 (1918); Charles W. Needham, *The Exclusive Power of Congress over Interstate Commerce*, 11 COLUM. L. REV. 251, 260 (1911); Clarence G. Shenton, *Interstate Commerce During the Silence of Congress*, 23 DICK. L. REV. 78, 139, 160-64 (1918).

49. See generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

during the Court's first century, opponents of state regulation marshaled the clause with increasing frequency to shield economic activity from state interference.⁵⁰ And it equally limited the reach of progressive federal legislation that intruded into the states' domain.⁵¹ Scholars such as Professor Noel T. Dowling therefore detailed the bankruptcy of these formalistic tests and encouraged charting of a new direction.⁵² Echoing his dissent in *Di Santo v. Pennsylvania*,⁵³ Chief Justice Stone, first in *South Carolina State Highway Department v. Barnwell Brothers*⁵⁴ and later in *Southern Pacific Co. v. Arizona ex rel. Sullivan*,⁵⁵ implicitly offered another approach for resolving DCC issues. Chief Justice Stone, favoring legislature policy judgments,⁵⁶ noted that Congress "may determine

50. CURRIE, *supra* note 43, at 31. See generally FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 7-8 (1937).

51. See *Child Labor Tax Case*, 259 U.S. 20, 39 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1, 17 (1895). Chief Justice Rutledge later lamented:

[T]he arc traveled by the negative pendulum has turned out not to be coextensive with that in which the affirmative one oscillates. The scope of the prohibition against state action is not correlative, in any of the basic implications, with the full reach of the positive power given to Congress. But this was not always realized . . .

WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 47 (1947).

52. Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 19-28 (1940); Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547, 558-60 (1947) [hereinafter Dowling, *Revised Version*]. The dramatic change in society by the early twentieth century had rendered the local/national distinction untenable, along with the formalistic dual federalism paradigm. And "[a]round the time of the New Deal, policy makers and courts began to surrender the idea of separate spheres and acknowledge overlapping authority, interaction, and cooperation." Garrick B. Pursley, *Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1371 (2011) (reviewing ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009)). Chief Justice Rutledge's 1946 majority opinion in *Benjamin*, for instance, reviewed the "judicial oscillation" surrounding the clause and suggested how coordinated federal-state action ought to replace an analysis focused on overlapping spheres. 328 U.S. at 408, 412-14, 418-24, 433-36.

53. 273 U.S. 34, 43 (1927) (Stone, J., dissenting).

54. 303 U.S. 177 (1938).

55. 325 U.S. 761 (1945).

56. SAMUEL J. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 63-64, 92-93 (1946). Konefsky observes that:

Stone would want the Court to be guided in its interpretation of that clause by an awareness of the problems of our society. Its responsibility is to "maintain the national interest and at the same time bring it into an effective harmony with local interests and the principles of local government."

whether the burdens imposed [by state programs] are too great, and may, by legislation designed to secure uniformity,” pass laws “to protect the national interest in the commerce, [and] curtail to some extent the state’s regulatory power.”⁵⁷ For Chief Justice Stone, the critical inquiry involved determining whether the law discriminated between in-state and out-of-state interests.⁵⁸ The inquiry also still required ensuring that the subject of the regulation was not one demanding national uniformity.⁵⁹ When defending the Court’s shift in DCC analysis, Chief Justice Rutledge observed that the narrowing of the Clause “has come on the whole to require substantial danger, real or actually threatening, of creating” a “balkanized America.”⁶⁰

In *Dean Milk Co. v. City of Madison*, for example, Madison, Wisconsin, required that all pasteurized milk available for sale in the city be processed and bottled in a facility within five miles of the city.⁶¹ The law undoubtedly discriminated against both interstate and other in-state sellers of pasteurized milk, with the city purportedly claiming that it needed to be able to inspect the processing and bottling facilities for health and safety reasons—ostensibly not being able to do so if those facilities were located beyond the five-mile radius.⁶² Applying a strict scrutiny analysis, the Court invalidated the ordinance, reasoning that other less discriminatory means were available to achieve the health and safety objective: either relying on other

Id. at 97 (quoting Harlan F. Stone, *Fifty Years Work of the United States Supreme Court*, 53 A.B.A. REP. 259, 264 (1928)); see also HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 114-21 (1961) (describing Chief Justice Stone’s approach to the Commerce Clause).

57. *Barnwell Bros.*, 303 U.S. at 189-90; see also *id.* at 190-91 (“When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision.”).

58. *Id.* at 185-86, 189-90.

59. *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 479 n.1 (1939) (“The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority.”). Professor Dowling notes that Chief Justice Stone’s analysis echoed aspects of *Cooley*. Dowling, *Revised Version*, *supra* note 52, at 551.

60. RUTLEDGE, *supra* note 51, at 72-73.

61. 340 U.S. 349, 350 (1951).

62. *Id.*

community inspection programs or sending inspectors to other areas and charging those facilities for the increased cost of the travel.⁶³

By 1970, Chief Justice Stone's caveat that even those nondiscriminatory measures that involved subjects demanding national uniformity might violate the DCC surfaced in Arizona's prohibition against the out-of-state shipment of cantaloupes unless packaged in state approved containers.⁶⁴ In *Pike v. Bruce Church, Inc.*, the Court issued only a sparse opinion and invalidated Arizona's program.⁶⁵ The Court recognized that the law served a legitimate interest, albeit twice referring to that interest as "tenuous" and "minimal."⁶⁶ The Court next acknowledged that it apparently had previously used a balancing test (referring to Chief Justice Stone's opinion in *Southern Pacific Co.*),⁶⁷ though "more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens."⁶⁸ The placement in the opinion of this acknowledgement, however, followed the *Pike* Court purportedly adopting a slightly different "general rule": if "the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."⁶⁹ For this general rule, now parroted as the *Pike* balancing test, the Court cited an inapposite case.⁷⁰

Therefore, the DCC analysis in vogue since the 1970s, modified somewhat by an additional 1980s appendage, contains three elements. First, statutes that discriminate against interstate commerce on their faces, in purpose, or by practical effect are subject to a strict scrutiny analysis that requires the state or local entity establish a legitimate state or local interest

63. *Id.* at 353-56.

64. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138 (1970).

65. *Id.* at 146.

66. *Id.* at 145-46.

67. *Id.* at 142 (citing *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945)).

68. *Id.*

69. *Id.*

70. *See id.* (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)). In *Portland Cement*, the Court upheld Detroit's smoke abatement ordinance to ships traveling in interstate commerce. 362 U.S. at 448. But *Portland Cement* did not articulate a balancing test. *See id.* at 443. Instead, the Court referred to a variety of "verbal generalizations," conflated federal preemption and DCC analysis, and, in the specific section of its opinion addressing the DCC challenge, framed the inquiry by stating that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Id.* at 444, 448.

and the means adopted be the least discriminatory options available.⁷¹ When such discriminatory laws are “motivated by ‘simple economic protectionism,’ [they] are subject to a ‘virtually *per se* rule of invalidity,’ which can only be overcome by a showing that there is no other means to advance a legitimate local purpose.”⁷² A recent well-publicized example of an impermissible effort at protectionism occurred in *Granholm v. Heald*, where the Court invalidated certain state efforts to favor local wineries and distributors.⁷³

Also, discrimination occurs when a party presents sufficient proof of disparate impact against out-of-state entities, though the cases in this area are not necessarily consistent. In *Hunt v. Washington State Apple Advertising Commission*, for instance, the Court treated an otherwise facially neutral law as it would a law that discriminated on its face.⁷⁴ In *Hunt*, North Carolina required that all closed containers of apples sold or shipped into the state bear only the federal grade or standard in lieu of simply noting that they were from the famed fields of Washington State.⁷⁵ The Court agreed with the lower court’s finding that the state program had the practical effect of both burdening interstate sales and discriminating

71. *Pike*, 397 U.S. at 142. Of course, the Court has suggested that the strict scrutiny analysis is somewhat artificial, indicating that the Court has “generally struck down the statute without further inquiry” when the statute either discriminated “directly” against interstate commerce or “favor[ed] in-state economic interests over out-of-state interests.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579; *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575, 582 (1997) (referencing earlier cases that held facially discriminatory laws “virtually *per se*” unconstitutional).

72. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007) (quoting *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978)).

73. 544 U.S. 460, 474 (2005). Recent state distinctions between interstate and intrastate shipments of wine to local consumers have prompted a number of lawsuits with arguably inconsistent results. *See, e.g., Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010) (finding statute differentiating permissible sale methods for small and large wineries unconstitutional when Massachusetts boundaries did not include any large wineries); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 433 (6th Cir. 2008) (invalidating requirement that direct shipment purchases of wine from small farm wineries be made in person); *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008) (upholding ban against direct shipment); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 39 (1st Cir. 2007) (upholding Maine statute). Favoring local over out-of-state workers also presented facial discrimination. *See Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 427-28 (3d Cir. 2011).

74. 432 U.S. 333, 353-54 (1977). *But cf. Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128-29 (1978) (upholding law that adversely affected out-of-state interests).

75. 432 U.S. at 335.

against them.⁷⁶ But it appears difficult to convince a court to apply a strict scrutiny test to statutes that may have a discriminatory impact where discriminatory animus is not readily apparent.⁷⁷

Second, a statute or local program that does not discriminate on its face, in purpose, or in effect is scrutinized under *Pike* balancing “whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the [putative] local benefits.”⁷⁸ In *Minnesota v. Clover Leaf Creamery Co.*, for example, the State prohibited the sale of milk in nonrecyclable plastic containers, which on its face was nondiscriminatory.⁷⁹ Yet, Minnesota had a substantial paper, rather than plastics, industry and the statute effectively favored the in-state paper industry over the more substantial out-of-state plastic industry.⁸⁰ Even though the trial court found that the State’s purpose was to favor local interests, the Court concluded that the statute regulated evenhandedly and applied the balancing test to uphold the law: “Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not ‘clearly excessive’ in light of the substantial state interest in promoting conservation of energy and other natural

76. *Id.* at 350-51.

77. *See Exxon*, 437 U.S. at 117 (upholding facially neutral law even with proof of discriminatory purpose); *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935 (11th Cir. 2013) (upholding law alleged to adversely affect only out-of-state entities); *Constr. Materials Recycling Ass’n Issues & Educ. Fund v. Burack*, 686 F. Supp. 2d 162, 173 (D.N.H. 2010) (prohibiting burning wood derived from construction and demolition debris at municipal combustors except for “incidental combustion” when most of debris were arguably from out of state); *Am. Petroleum Inst. v. Cooper*, 681 F. Supp. 2d 635, 637 (E.D.N.C. 2010) (affecting sale of ethanol-blended gasoline). An effect, moreover, may not be discriminatory if it results from natural conditions. *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1234 (9th Cir. 2010) (citing *Baldacci*, 505 F.3d at 37 n.7). Age verification statutes for the purchase of alcohol can also prompt DCC challenges. *E.g.*, *Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 460-61 (7th Cir. 2012) (favoring local wineries in effect).

78. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Some courts exhibit little interest in applying the balancing test absent disparate treatment between intrastate and interstate commerce. *E.g.*, *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551, 556 (7th Cir. 2007) (regarding an Illinois statute against slaughtering horses). Yet overlooking balancing could be troublesome on appeal. *See, e.g.*, *Nat’l Ass’n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 528 (9th Cir. 2009) (“[W]e remand to the district court to apply the *Pike* balancing test in the first instance.”).

79. 449 U.S. 456, 458 (1981).

80. *Id.* at 473.

resources and easing solid waste disposal problems”⁸¹ Unfortunately, the line between applying *Pike* balancing and applying strict scrutiny is not always evident: “We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach.”⁸²

Finally, if a state or local program operates extraterritorially, it too may offend the DCC.⁸³ During the 1980s, arguably with little appreciation for history, the Court ostensibly added to its DCC jurisprudence that a state program could not regulate conduct outside that state’s borders.⁸⁴ In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, for instance, the Court emphasized that New York’s lowest-price-affirmation provision in that state’s Alcoholic Beverage Control Law had the impermissible practical effect of influencing prices in other states.⁸⁵

Two defenses might shield an otherwise viable DCC claim. First, Congress can affirmatively permit a state or local community to discriminate against interstate commerce.⁸⁶ If Congress has legislated under a valid exercise of its Commerce Clause power, then the legislation may authorize state discrimination or a burden on interstate commerce.⁸⁷ One example is hunting and fishing licenses, which often cost more for purchase by out-of-state residents than by in-state residents.⁸⁸ Congress sanctioned such discrimination when it passed the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005.⁸⁹ Congress can also permit otherwise state protectionist measures when it approves interstate compacts, such as restrictions on the use of in-state water in

81. *Id.* When examining local benefits, a court might limit its inquiry into “putative” benefits, not whether those benefits actually will occur. *See Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005).

82. *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

83. *E.g., id.*; *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491 (4th Cir. 2007) (stating that the program cannot seize on in-state activities to reach out-of-state conduct).

84. *See supra* notes 78-82 and accompanying text.

85. 476 U.S. at 581-84. *See infra* notes 203-09 and accompanying text.

86. *See S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

87. *See id.* (“Congress has undoubted power to redefine the distribution of power over interstate commerce.”).

88. *See Pub. L. No. 109-13*, § 6036, 119 Stat. 231, 289 (2005).

89. *Id.*; *see Minnesota v. Hoeven*, 456 F.3d 826 (8th Cir. 2006); *Schutz v. Thorne*, 415 F.3d 1128, 1138 (10th Cir. 2005).

interstate markets.⁹⁰ Yet, before any congressional act will be treated as authorizing a regulation that otherwise would fail under a DCC analysis, the Court appears to demand that Congress express its intent in an unambiguous fashion.⁹¹ Accordingly,

An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny.⁹²

In *New England Power Co. v. New Hampshire*, the Court observed that “when Congress has not ‘expressly stated its intent and policy’ to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress ‘probably had in mind.’”⁹³ And it is incumbent on the proponent of an asserted congressional authorization to prove that Congress evinced its intent.⁹⁴

Second, a state or local government may favor its own residents when acting as a market participant by entering the economic marketplace rather

90. See *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1237 (10th Cir. 2011) (reviewing an Oklahoma-Texas compact), *cert. granted*, 133 S. Ct. 831 (2013).

91. *Maine v. Taylor*, 477 U.S. 131, 139 (1986).

92. *Id.*

93. 455 U.S. 331, 343 (1982) (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946)).

94. See *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992). The more likely scenario is that the defendant in such cases will argue that the potentially offensive measure has been preempted. In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, for example, the Court held that the district might not be able to use section 209 of the Clean Air Act (CAA) as authority for escaping preemption of local rules regarding fleet purchases. 541 U.S. 246, 259 (2004). Yet, in leaving open the possibility that some fleet purchase requirements might not be preempted by the CAA, the Court indicated quite possibly that those rules might then be tested under a variation of the market participant doctrine of the DCC, which is precisely what occurred after the Court's remand. See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1048 (9th Cir. 2007). Although preemption might obviate the need for a lower court to reach a DCC issue, this can become problematic if the appellate court similarly avoids addressing a DCC challenge after reversing the lower court's finding of preemption. See, e.g., *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 n.2 (9th Cir. 2010).

than remaining as merely a market regulator.⁹⁵ In *Hughes v. Alexandria Scrap Corp.*, for example, Maryland developed a program to purchase old, abandoned vehicles.⁹⁶ The program treated in-state residents and out-of-state residents differently, requiring considerably more documentation as evidence of title and ownership from nonresidents.⁹⁷ While such facial discrimination ostensibly would have required that the State overcome a strict scrutiny inquiry, the Court held that “[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”⁹⁸ The Court subsequently applied this market participant exception in *South-Central Timber Development, Inc. v. Wunnicke* involving Alaska’s requirement that all purchasers of state-owned timber had to process that timber in the state prior to it being exported.⁹⁹ But the *South-Central Timber* Court emphasized that the market participant exception extends only to the market the State enters and no further.¹⁰⁰ It does not sanction state efforts to effectively regulate a particular market.¹⁰¹ And the doctrine does not shield a state from a constitutional challenge under the Privileges and Immunities Clause.¹⁰²

Also, writing for the majority in *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, Chief Justice Roberts observed that the case involved the limited circumstance where the government regulation addressed a “traditional governmental activity”: the

95. See generally Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 443-44 (1989); Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469, 473 (2008).

96. 426 U.S. 794, 796 (1976).

97. *Id.* at 801-02.

98. *Id.* at 810 (footnotes omitted).

99. 467 U.S. 82, 84 (1984).

100. *Id.* at 97.

101. *Id.* at 95-96; see also *Reeves, Inc. v. Stake*, 447 U.S. 429, 430 (1980) (entering the cement business); *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618, 624-27 (5th Cir. 2010) (entering the healthcare market).

102. See U.S. CONST. art. IV, § 1, cl. 1; U.S. CONST. amend. XIV, § 1, cl. 2. Compare *White v. Mass. Council of Constr. Emp’rs*, 460 U.S. 204, 211-12 (1983) (upholding local hire preference under DCC for city-funded construction projects), with *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 211 (1984) (applying Privileges and Immunities Clause to local hire preference provision for city construction projects and remanding for additional factual determinations by the lower court).

management of solid waste.¹⁰³ He wrote that “[t]he [DCC] is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.”¹⁰⁴ When addressing whether the program prevented those who would be harmed by the flow control ordinance from protecting their interests through the political process, the Chief Justice noted that “the most palpable harm imposed by the ordinances—more expensive trash removal—is likely to fall upon the very people who voted for the laws.”¹⁰⁵ He therefore saw “no reason [to afford] local businesses a victory they could not obtain through the political process.”¹⁰⁶

III. Cabining Communities: Barriers to Innovation

This somewhat convoluted approach to the modern DCC now hampers state and local efforts to shape their communities and corresponding economies, as well as to respond incrementally to environmental threats that are both local and global. Although a consensus formed during the modern environmental movement’s early years that states would seek to attract businesses away from other states by imposing the least onerous environmental restrictions possible unless otherwise hindered by Congress,¹⁰⁷ that assumption has limits. California, for instance, began aggressively controlling air emissions before Congress responded with the Clean Air Act, and when Congress passed the Clean Air Act it included a particular ability for California to continue to set emission standards for automobiles moving forward.¹⁰⁸ In addition, Delaware adopted its own

103. 550 U.S. 330, 334 (2007).

104. *Id.* at 343.

105. *Id.* at 345.

106. *Id.* A majority further concluded that the ordinances survived the *Pike* balancing test because any incidental burden on interstate commerce was outweighed by the benefits conferred on the local community. *Id.* at 346-47. Indeed, the majority avoided examining any potential or actual burdens on interstate commerce, reasoning that the ordinances provided a legitimate and necessary financing mechanism for waste disposal services and, moreover, enhanced the local communities’ recycling efforts. *Id.*

107. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 535 (1997).

108. See 42 U.S.C. §§ 7543(b), 7545(c)(4)(B) (2006). In issuing its own emission standards for automobiles, California’s standards must be at least as protective of public health as the federal standards. *Id.* And other states may follow suit and mirror California’s standards in lieu of the federal standards. *Id.* § 7507. When Congress originally preempted

coastal zone management program before Congress passed the Coastal Zone Management Act.¹⁰⁹

For several decades, state and local communities have served as centers for innovation as Congress has become increasingly polarized and generally unable to pass legislation absent a crisis or widespread pressure. These subnational communities increasingly explore opportunities to shape their futures and, whether as a consequence of an overly expansive approach to preemption analysis or, when Congress has yet to act, on a DCC analysis, have experienced judicial roadblocks.¹¹⁰ When California required humane animal treatment by mandating euthanasia and prohibiting slaughtering of non-ambulatory animals, the Supreme Court held that federal law preempted its effort, even though the State was responding to abuses such as “workers at a slaughterhouse in California dragging, kicking, and electroshocking sick and disabled cows in an effort to move them.”¹¹¹ When New York City’s Mayor Bloomberg, in 2007, pushed to require that city taxicabs switch to hybrid cars by 2012, it too was preempted.¹¹² When Colorado became one of the first states to pass an aggressive renewable energy portfolio standard, conservative organizations opposing climate change programs challenged the law for allegedly violating the DCC.¹¹³ And North Dakota similarly claimed Minnesota’s Next Generation Energy

the states’ abilities to set emission standards for automobiles, it permitted California to continue to promulgate its own standards. 42 U.S.C. §§ 1857f-1(a), 1857f-6(a) (Supp. IV 1965-68).

109. Compare Coastal Zone Act, DEL. CODE ANN. tit. 7, § 7001 (1971), with Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972). See generally Kenneth T. Kristl, *Keeping the Coast Clear: Lessons About Protecting the Natural Environment by Controlling Industrial Development Under Delaware’s Coastal Zone Act*, 25 PACE ENVTL. L. REV. 37 (2008) (discussing what helped prompt the state statute).

110. For an insightful treatment of how current preemption cases limit innovation, see Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653 (2008). See, e.g., *Teltech Systems, Inc. v. Bryant*, 702 F.3d 232 (5th Cir. 2012). In *Teltech Systems*, the lower court invalidated Mississippi’s Caller ID Anti-Spoofing Act on DCC grounds and the appellate court avoided the issue by holding that the state law was preempted by the federal Truth in Caller ID Act of 2009. *Id.* at 233-34.

111. *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965, 969 (2012). California’s ban on the sale of foie gras produced by animal cruelty is currently being challenged under the DCC. See Appellants’ Opening Brief at 5, *Ass’n Des Éleveurs de Canards et d’Oies du Québec v. Harris*, No. 12-56822 (9th Cir. Nov. 16, 2012), 2012 WL 5915406.

112. *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 158 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1569 (2011).

113. *Am. Tradition Inst. v. Colorado*, 876 F. Supp. 2d 1222, 1227 (D. Colo. 2012).

Act, designed to limit CO₂ emissions, violated the DCC.¹¹⁴ It now appears almost obligatory, therefore, for scholars to include a DCC cautionary discussion in articles promoting renewable energy and climate change programs.¹¹⁵

The DCC stymied earlier state and local efforts to respond to emerging problems. Local efforts to control the flow of waste, for instance, present the classic example for how the DCC affects local land use decisions. Municipal entities often design flow control measures as tools to address both limited capacity at waste disposal sites and the need to ensure that such sites, if constructed, will have sufficient capacity and financial resources to withstand competitive pressures.¹¹⁶ But in *City of Philadelphia v. New Jersey*, the Court struck down New Jersey's attempt to prevent Philadelphia waste from coming into the state and burdening its landfills.¹¹⁷ The statute prohibited any person from bringing into the state "any solid or liquid waste which originated or was collected outside the territorial limits of the State," with certain caveats.¹¹⁸ Building on its *Philadelphia* decision, the Court, during the early 1990s, began to invalidate waste import restrictions that favored local operators of waste disposal facilities, as well as local generators of waste—at least without a valid justification for why the out-of-state waste imposed a greater cost than in-state waste.¹¹⁹ In one

114. *North Dakota v. Swanson*, No. 11-CV-03232, 2012 WL 4479246, at *1-2 (D. Minn. Sept. 30, 2012).

115. See, e.g., Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 792-96 (2010); Jim Rossi, *Moving Public Law Out of the Deference Trap in Regulated Industries*, 40 WAKE FOREST L. REV. 617, 636-48 (2005); Jim Rossi, *The Limits of a National Renewable Portfolio Standard*, 42 CONN. L. REV. 1425, 1448 (2010) ("[P]arochial state REC subsidies appear to raise serious Dormant Commerce Clause issues. . ."); Nathan E. Endrud, Note, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259, 270-79 (2008).

116. See generally Bradford C. Mank, *Are Public Facilities Different from Private Ones?: Adopting a New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157 (2007).

117. 437 U.S. 617, 629 (1978).

118. *Id.* at 618 (quoting N.J. STAT. ANN. § 13:11-2 (West Supp. 1978)).

119. See *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 108 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 346-48 (1992) (holding that Michigan could not prohibit landfills in a county accepting out-of-county waste, even though the statute operated similarly to those regulating out-of-state entities and in-state but out-of-county entities); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 346-48

case, for example, Oregon imposed a surcharge on imported wastes, reasoning that the extra surcharge offset the cost imposed on the state for having to dispose of another state's waste.¹²⁰ In that case, the Court held that the statute impermissibly discriminated against out-of-state waste (commerce).¹²¹

Then, in 1994, the Court further threatened to stifle local efforts to address increasing solid waste as landfill space decreased.¹²² In *C & A Carbone, Inc. v. Town of Clarkstown*, the Court invalidated, on DCC grounds, a local flow control ordinance that required all solid waste in the community to be shipped through a local transfer station.¹²³ Although recyclers could still receive waste, any recyclable materials first had to go to the transfer station for sorting, where a transfer fee would be charged.¹²⁴ The Court's majority concluded that this scheme discriminated by preventing the local businesses from shipping their already sorted recyclables directly out-of-state for processing, even though the law equally discriminated against out-of-town processors and in-state entities.¹²⁵

In the aftermath of the Court's controversial *Carbone* decision,¹²⁶ lower courts struggled with whether to apply the *Carbone* analysis to publically owned and operated transfer stations, with the Second and Sixth Circuits disagreeing.¹²⁷ The Supreme Court resolved the conflict by concluding that similar local measures protecting public facilities should be treated differently than measures that discriminate among private facilities.¹²⁸ Authoring the majority opinion, Chief Justice Roberts proclaimed that the DCC would not apply when state and local governments undertook a "traditional governmental activity," such as the management of solid

(1992) (holding that Alabama could not impose a tax on out-of-state hazardous waste facilities that was not also imposed on in-state facilities).

120. *Or. Waste Sys., Inc.*, 511 U.S. at 95.

121. *Id.* at 108.

122. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

123. *Id.* at 394-95.

124. *Id.* at 386.

125. *Id.* at 393.

126. *See generally* Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998); Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239 (1997).

127. *Compare Nat'l Solid Wastes Mgmt. Ass'n v. Daviess Cnty.*, 434 F.3d 898 (6th Cir. 2006) (striking down county ordinance), *vacated*, 550 U.S. 931 (2007), *with United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150 (2d Cir. 2006) (upholding county ordinances), *aff'd*, 550 U.S. 330 (2007).

128. *United Haulers Ass'n*, 550 U.S. at 347.

waste.¹²⁹ The DCC, he wrote, “is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.”¹³⁰

Challenges to flow control ordinances have not necessarily dissipated since *United Haulers Ass’n*. The voters of Kern County, California, for instance, adopted an ordinance that barred out-of-county entities from spreading treated sewage sludge on farmlands in the county, purportedly out of a concern that the application of biosolids might migrate and adversely affect water supplies and farmlands.¹³¹ The ordinance prevented the City of Los Angeles and other recyclers from using Kern County lands for waste.¹³² The district court sided with the City of Los Angeles, concluding that the county ordinance violated the DCC, as well as the California Waste Management Act.¹³³ On appeal, the Ninth Circuit deftly avoided the issue by concluding that the petitioners lacked prudential standing.¹³⁴ And the City of Dallas recently lost a challenge to its flow control ordinance, but under the Contracts Clause and state constitutional provisions rather than under the DCC.¹³⁵ But these restrictions against certain flow control programs ignore that “[f]orcing a community to accept

129. *Id.* at 334; see also *supra* notes 103-06 and accompanying text.

130. *United Haulers Ass’n*, 550 U.S. at 343.

131. *City of L.A. v. Cnty. of Kern*, 509 F. Supp. 2d 865, 869 (C.D. Cal. 2007), *vacated in part and appeal dismissed in part*, 581 F.3d 841 (9th Cir. 2009).

132. *Id.*

133. *Id.* at 888.

134. *City of L.A. v. Cnty. of Kern*, 581 F.3d at 849. In *DaimlerChrysler Corp. v. Cuno*, the Supreme Court invoked standing to prevent in-state residents from challenging, under the DCC, location subsidies granted to DaimlerChrysler for its Jeep plant. 547 U.S. 332, 347-49 (2006). The lower court held that the tax credit impermissibly discriminated against interstate commerce. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 745-46 (6th Cir. 2004), *vacated in part*, 547 U.S. 332; see also *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1240 (9th Cir. 2001); *Individuals for Responsible Gov’t, Inc. v. Washoe Cnty.*, 110 F.3d 699, 702 (9th Cir. 1997); cf. *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230 (11th Cir. 2012) (rejecting prudential standing challenge). For a critique of applying the zone of interest test to such DCC challenges, see Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the “Zone of Interests” Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23 (2006). In the challenge to Solano County’s bar on importing waste, the abstention doctrine became another avenue for avoiding the constitutional question. See *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 881-82 (9th Cir. 2011).

135. *National Solid Wastes Mgmt. Ass’n v. City of Dallas*, No. 3:11-cv-3200-O, 2012 WL 4893016, at *20 (N.D. Tex. Oct. 16, 2012).

waste imported from elsewhere . . . imposes real costs on the community: increased fear, a loss of autonomy, and a denial of equity.”¹³⁶

As with local flow control measures, state programs designed to protect local natural resources quite often prompt adversely affected parties to claim that such programs impede the free flow of interstate commerce. Prior to the New Deal, the Court often rejected challenges to state statutes arguably favoring protecting in-state natural resources.¹³⁷ For the most part, these cases employed the now defunct DCC approach expressed in cases such as *Cooley v. Board of Wardens*¹³⁸ and Chief Justice Marshall’s dictum in *Brown v. Maryland*.¹³⁹ In *Geer v. Connecticut*, for instance, the Court upheld a prohibition against the out-of-state shipment of woodcocks, ruffed grouse, and quail, reasoning that such wildlife was the property of the state until reduced to capture, and, as such, jurisdiction over this type of property reflected a valid aspect of a state’s police power.¹⁴⁰ Similarly, the Court upheld New Jersey’s prohibition against the out-of-state shipment of state

136. Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 237-38.

137. *See* *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900) (upholding oil and gas conservation statute under Fourteenth Amendment challenge); *Patapsco Guano Co. v. Bd. of Agric.*, 171 U.S. 345 (1898) (upholding requirement for inspection and labeling of fertilizer entering the state); *Lawton v. Steele*, 152 U.S. 133 (1894) (upholding game law under Fourteenth Amendment challenge); *Morgan v. Louisiana*, 93 U.S. 217 (1876) (upholding quarantine protection statute and tax). Morton Keller explains that “[t]he depletion of fish and game, timber, and other resources evoked increasing concern in the late nineteenth century.” MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 393 (1977). States also began to deploy common law injunctive powers to thwart cross-state shipment of waste. *See* WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 224-27 (1996). And Michigan Supreme Court Justice Thomas Cooley, quite possibly too expansively, boldly asserted that the states possessed unquestioned authority to regulate the use of navigable waters. *See* THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 728 (Alexis C. Angell ed., 6th ed. 1890) (1868). *But cf.* *Brimmer v. Rebman*, 138 U.S. 78 (1891) (striking down animal inspection requirement); *Minnesota v. Barber*, 136 U.S. 313 (1890) (striking down animal inspection requirement); *Hannibal & St. Joseph R.R. v. Husen*, 95 U.S. 465 (1877) (disallowing quarantine protection statute as too broad).

138. 53 U.S. (12 How.) 299 (1851), *abrogated by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995).

139. 25 U.S. (12 Wheat.) 419, 442 (1827) (applying original package doctrine that limited states’ abilities to tax an article of commerce to after it became part of the general mass of state property), *abrogated by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

140. 161 U.S. 519 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

waters in *Hudson County Water Co. v. McCarter*.¹⁴¹ In contrast, however, the Court refused to uphold Oklahoma's effort to embargo natural gas resources in the state¹⁴² and invalidated a variety of state programs affecting the exportation of in-state raised or harvested products.¹⁴³

Of course, the post-New Deal Court did not just abandon the early tests; it also overruled *Hudson County* and *Geer*, two of its early unique decisions, through its decision in *Hughes v. Oklahoma*.¹⁴⁴ In *Hughes*, the Court overturned an Oklahoma law prohibiting the transport of minnows caught in the state for sale outside the state.¹⁴⁵ A Texas minnow dealer purchased minnows from an Oklahoma minnow dealer and was arrested when he attempted to transport the minnows out of state.¹⁴⁶ The Court began its analysis by observing that *Geer* was decided early in the "evolutionary process" of the DCC and, as such, overruled the case.¹⁴⁷ The Court then applied the two-part modern DCC analysis from post-New Deal cases, including the balancing test from *Pike*, but suggested that it was affording "ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership."¹⁴⁸ The law's discrimination on its face prompted the need to explore whether the measure satisfied a legitimate local purpose and did so with the least discriminatory means.¹⁴⁹ While acknowledging the legitimacy of the State's purported purpose of ensuring "ecological balance in state waters," the Court nonetheless concluded that other less discriminatory

141. 209 U.S. 349, 356 (1908).

142. *West v. Kan. Natural Gas Co.*, 221 U.S. 229, 262 (1911); *see also* *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923) (defining the issue as "whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other"). The Court's differential treatment between natural gas and other natural resources prompted sarcastic comments by Professors Alexander Bickel and Benno Schmidt. *See* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921*, at 268-69 (1984).

143. *E.g.*, *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13-14 (1928) (shrimp exports); *Johnson v. Haydel*, 278 U.S. 16, 16 (1928) (oyster exports); *Minnesota v. Barber*, 136 U.S. 313, 329-30 (1890) (meat inspection).

144. 441 U.S. at 326.

145. *Id.* at 324, 338.

146. *Id.* at 324.

147. *Id.* at 326. The Court also discussed that *Geer*'s analysis already had been undermined by subsequent decisions under the Privileges and Immunities Clause. *Id.* at 333-35.

148. *Id.* at 335-36.

149. *Id.* at 336.

means were available, including simply a numerical limit on the amount of permissible exported minnows.¹⁵⁰

Yet, in the rare case when a State demonstrates that it is pursuing a legitimate *end* and the *means* chosen constitute the least discriminatory means available to achieve that end, a program may survive a DCC challenge, even under strict scrutiny.¹⁵¹ The most notable instance of this occurred when Maine restricted the importation of the golden shiner, a baitfish that the state worried might carry undetectable diseases that could infect native species.¹⁵² In *Maine v. Taylor*, the Court recognized that Maine restricted “interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State’s border.”¹⁵³ In upholding the law, the Court acknowledged the “strict requirements” of *Hughes v. Oklahoma*, but determined that those requirements were satisfied.¹⁵⁴ The trial court’s evidentiary hearing and findings of fact regarding the threat to Maine’s ecology, and testimony that it was virtually impossible to inspect inward shipments of comingled baitfish for the presence of parasites, influenced the Court’s decision.¹⁵⁵ The Court concluded that these findings were not clearly erroneous and, further, that the mere “abstract possibility” that some less discriminatory means might be available was insufficient to render the law unconstitutional—the State “is not required to develop new and unproven means of protection at an uncertain cost.”¹⁵⁶

The DCC also surfaced when the Court constrained Nebraska’s ability to block the export of its water resources. When Nebraska sought to restrict the out-of-state export of groundwater from wells within the state, the

150. *Id.* at 322, 337-38.

151. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 138, 151-52 (1986).

152. *Id.* at 132.

153. *Id.* at 137. The lower appellate court declared the law unconstitutional; the Court first determined that Maine had the ability to appeal as of right to the Supreme Court under 28 U.S.C. § 1254(2) (1986). *Taylor*, 477 U.S. at 133, 137.

154. *Taylor*, 477 U.S. at 138.

155. *Id.* at 140-42.

156. *Id.* at 147. In an arguably apparent departure from other DCC cases, the Court ended by noting that it did not believe that Maine had arbitrarily discriminated against interstate commerce. *Id.* at 151. But Justice Stevens responded, in dissent, that he believed that “[t]here is something fishy about this case,” and worried that the State had avoided providing sufficient evidence on the lack of other reasonable alternatives, particularly because Maine was the only state at the time that limited such importation of baitfish. *Id.* at 152-53 (Stevens, J., dissenting).

Court, in *Sporhase v. Nebraska*, held that the law violated the DCC.¹⁵⁷ Nebraska required a permit for exporting groundwater, and the State would issue a permit only if the proposed water withdrawal was reasonable and did not adversely affect the ecosystem or citizens of the state, and then only if the water was being exported to a state that reciprocated and allowed water to be imported into Nebraska.¹⁵⁸ The Court accepted the ability of the State to ensure against adverse environmental and other effects on the water transfer but treated the reciprocity provision as an impermissible discrimination against interstate commerce.¹⁵⁹ The Court emphasized that Nebraska had not shown that its measure was reasonably tailored to address a valid conservation concern.¹⁶⁰

But state and local communities are only on the cusp of perhaps more troubling applications of the DCC. First, other local land use decisions can provoke a DCC challenge.¹⁶¹ Local communities interested in favoring small, local businesses in lieu of the large “big box” retailers might inhibit the entry of large—in other words, interstate—retailers. Some residents of Chicago, for instance, attempted to limit large retailers, such as Wal-Mart, Target, and Home Depot, through a living wage ordinance.¹⁶² Often, these

157. 458 U.S. 941, 960 (1982).

158. *Id.* at 944.

159. *Id.* at 960.

160. *Id.* at 958 (“If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision.”). See generally Dean Baxstreser, Note, *Antiques Roadshow: The Common Law and the Coming Age of Groundwater Marketing*, 108 MICH. L. REV. 773, 788 (2010) (suggesting that the doctrine was not likely to inhibit marketing). For another case involving impermissible reciprocity requirements, see *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Professor Christine Klein recently analyzed *Sporhase*, suggesting that the Court asked the wrong question and intruded unwisely into the complexities of state water law. Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131, 137-39 (2011).

161. In *Island Silver & Spice, Inc. v. Islamorada*, for example, a local effort ostensibly to preserve the unique and natural character of the local community was invalidated on DCC grounds. 542 F.3d 844, 848 (11th Cir. 2008). Likewise, in *FranCarl Realty Corp. v. Town of East Hampton*, East Hampton’s effort to restrict vehicular traffic into the community through a ferry law prompted protracted DCC litigation. 375 F. App’x 145, 147 (2d Cir. 2010); *Town of Southhold v. Town of East Hampton*, 477 F.3d 38, 56 (2d Cir. 2007).

162. CLAYTON P. GILLETTE, *LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS* 1-3 (2011). The effort failed under pressure from the interstate retailers and the resulting opposition by then-Mayor Daley. *Id.*

efforts are motivated by local economic protectionism, as well as aesthetic and other concerns, and “invite scrutiny under the [DCC].”¹⁶³

Agricultural and food policy is another burgeoning area where innovation may be chilled by the DCC. Both rural communities and urban centers are exploring avenues for promoting locally grown foods.¹⁶⁴ This “locavore movement,” as it is now called, is gaining momentum and helps connect people to the place where they live.¹⁶⁵ Its potential is great: it could become a significant factor influencing how we look at our nearby environment, our desire to protect it, and how we approach food and agricultural policy moving forward.¹⁶⁶ And an emphasis on local food production, possibly coupled with the associated interest in organic agriculture, could potentially reduce our carbon footprint.¹⁶⁷ But, as states and communities seek to define “local” food, regulate what and where such food can be sold, and perhaps mandate that certain percentages of foods bought in schools or other establishments be local, the DCC presents an unfortunate challenge.¹⁶⁸

Similarly, state programs designed to shape states’ energy futures and quite possibly incrementally whittle away¹⁶⁹ at rising GHGs appear threatened by an ill-equipped use of the DCC.¹⁷⁰ During the past several

163. See generally Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907, 908 (2005).

164. See Sam Kalen, *Agriculture, Food, and Environmental Policy*, 26 NAT. RESOURCES & ENV’T 3 (2011).

165. *Id.* at 7.

166. *Id.* at 6-7.

167. See USDA, ECON. RESEARCH REPORT NO. 97, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES (May 2010), available at http://www.ers.usda.gov/media/122868/err97_1_.pdf. See generally Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593 (2010); Margaret Sova McCabe, *Foodshed Foundations: Law’s Role in Shaping our Food System’s Future*, 22 FORDHAM ENVTL. L. REV. 563 (2011). For the agricultural sector’s contribution toward greenhouse gas emissions, see EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2010, at 6-1 (Apr. 15, 2012), available at <http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2012-Main-Text.pdf>.

168. See Brannon P. Denning, Samantha Graff & Heather Wooten, *Laws to Require Purchase of Locally Grown Food and Constitutional Limits on State and Local Government: Suggestions for Policymakers and Advocates*, 1 J. AGRIC., FOOD SYS., & COMMUNITY DEV. 139 (2010).

169. See J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59 (2010).

170. See Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1965 (2007) (“[S]tate regulation of GHG emissions may

decades, the Court has circumscribed the states' abilities to distinguish between in-state and out-of-state fuels and power generation. In *New Energy Co. of Indiana v. Limbach*, for instance, the Court invalidated Ohio's ethanol motor vehicle fuel tax credit for ethanol produced either in the state or from a state that granted an equivalent tax credit for Ohio produced ethanol.¹⁷¹ Relying on *Sporhase* and *Great Atlantic & Pacific Tea Co. v. Cottrell*, the Court held that Ohio's reciprocity measure constituted discrimination and did not survive a strict scrutiny analysis into whether the ends were legitimate and the means were the least discriminatory alternatives available.¹⁷² And, when the New Hampshire public utility commission prohibited New England Power from selling in-state generated energy to out-of-state entities, even though the company had been selling into the interstate market inexpensive hydroelectric power generated in the state for over fifty-four years, the Court, in *New England Power Co. v. New Hampshire*, held that this prohibition offended the DCC.¹⁷³ Little doubt existed that the law served an economic protectionism purpose and the Court noted that "[o]ur cases consistently have held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom."¹⁷⁴

California's recent effort to reduce greenhouse gases by adopting a low carbon fuel standard is the latest example of how the DCC constrains state innovation.¹⁷⁵ The State required fuel providers to establish the "carbon intensity" of their fuels based on a life-cycle analysis, and where the fuel was produced affected the carbon intensity level.¹⁷⁶ Corn-based ethanol from the Midwest had a higher "carbon intensity" level, prompting the

face a variety of legal obstacles, including challenges . . . under the Dormant Commerce Clause . . .").

171. 486 U.S. 269, 271, 274-75 (1988).

172. *Id.* at 274-76 (utilizing the holdings from *Sporhase v. Nebraska*, 458 U.S. 941 (1982) and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976)).

173. 455 U.S. 331, 344 (1982). More recently, a district court invalidated Vermont's effort to require an in-state nuclear power generator to sell power to in-state utilities at below market rates. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 242-43 (D. Vt. 2012).

174. *New Eng. Power Co.*, 455 U.S. at 338; *see also* *Wyoming v. Oklahoma*, 502 U.S. 437, 461 (1992) (invalidating law that required Oklahoma coal-fired electric utilities to burn at least ten percent Oklahoma mined coal).

175. *See* *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1051-52 (E.D. Cal. 2011).

176. *Id.*

affected industries to challenge the program as violating the DCC.¹⁷⁷ The district court agreed, holding that the law impermissibly discriminated against the out-of-state fuel providers and also operated extraterritorially.¹⁷⁸ And the court further applied a strict scrutiny analysis to conclude that other reasonable, non-discriminatory means were available.¹⁷⁹

IV. Next Generation Analysis?

The DCC provokes diverse views and, quite possibly, strange bedfellows. The strict textualists on the Court express reservations about imputing a negative element into the affirmative grant. Justice Thomas, for instance, would simply “discard the Court’s negative Commerce Clause jurisprudence.”¹⁸⁰ Justice Scalia similarly questions the constitutional justification for the DCC, although he would adhere to *stare decisis* in instances (1) where the state law discriminates on its face against interstate commerce and (2) when the state law cannot be distinguished from a law previously invalidated by the Court.¹⁸¹ The other conservatives on the Court are less sanguine in their approach, with the Chief Justice not overtly expressing any reservations and Justices Alito and Kennedy, though troubled by the Court’s effort in *Carbone* to distinguish between private and public facilities, inclined to unquestioningly follow precedent.¹⁸²

177. *Id.* at 1052.

178. *Id.* at 1070.

179. *Id.* at 1058. As of May 2013, the Ninth Circuit has already entertained oral argument in this case but has not issued an opinion. United States Court of Appeals for the Ninth Circuit Calendar for San Francisco, California 2 (Oct. 10, 2012), available at http://cdn.ca9.uscourts.gov/datastore/calendaring/2012/10/11/sf10_12.pdf.

180. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment); see also *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 439 (2005) (Thomas, J., concurring in the judgment) (“[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute.” (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting))).

181. *United Haulers Ass’n*, 550 U.S. at 348 (Scalia, J., concurring in part); see also *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (Scalia, J., concurring in part and concurring in the judgment). See generally Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717 (1991).

182. See *United Haulers Ass’n*, 550 U.S. at 356 (Alito, J., dissenting). Chief Justice Roberts and Justices Alito and Kennedy emphasized that a state may discriminate in favor of local economic interests when acting as a market participant, but not when acting as a

Former Justice Souter questioned the Court's ability to employ the *Pike* balancing test,¹⁸³ prompting Justice Scalia to agree.¹⁸⁴ But the Court's decision in *Department of Revenue of Kentucky v. Davis* signals that a majority of the Court appears reluctant to abandon or modify the DCC.¹⁸⁵

Yet, increasing scholarly commentary continues to undermine aspects of the DCC, suggesting that this dynamic doctrine has not yet reached stasis. Beginning in the 1980s, mounting scholarship, including one of my articles,¹⁸⁶ began to question the Court's neatly organized approach to DCC cases.¹⁸⁷ That criticism continues today, including by two of the leading contemporary scholars on the DCC. Professor Brannon Denning proffers

market regulator—even for otherwise legitimate reasons—when other nondiscriminatory means are available. *Id.* at 364-65. For a discussion of *United Haulers Ass'n*, see Bradford Mank, *The Supreme Court's New Public-Private Distinction Under the Dormant Commerce Clause: Avoiding the Traditional Versus Nontraditional Classification Trap*, 37 HASTINGS CONST. L.Q. 1 (2009).

183. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353-56 (2008).

184. *Id.* at 359-61 (Scalia, J., concurring in part); see also *United Haulers Ass'n*, 550 U.S. at 348-49 (Scalia, J., concurring in part).

185. 553 U.S. at 341. Kentucky exempted interest on bonds that it or its political subdivisions issued from state income tax but did not exempt those from other states or other states' political subdivisions. *Id.* at 333. In a majority opinion authored by Justice Souter, the Court held that *United Haulers Ass'n* controlled and the program was constitutional. *Id.* at 341. The Court treated the issuance of bonds as a traditional governmental activity, designed to enhance the health, safety, and welfare of its citizens by financing over time public infrastructure development. *Id.* Justice Stevens's concurrence added that the "state action that motivates the State's taxpayers to lend money to the State is simply not the sort of 'burden' on interstate commerce that is implicated by our dormant Commerce Clause jurisprudence." *Id.* at 359 (Stevens, J., concurring).

186. Kalen, *supra* note 23.

187. See generally Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 CARDOZO L. REV. 1745 (1991); Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409 (1992); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981). But see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988) (defending the DCC).

that the Court's current analysis is unsound and likely to change once again.¹⁸⁸ And Professor Norman Williams nevertheless questions the dominant theories justifying continued allegiance to the restriction against certain state and local programs.¹⁸⁹ The fundamental question he and others ask is: which constitutionally grounded theory supports modern DCC doctrine?¹⁹⁰

Two principal theories generally animate the Court's support for the DCC. The historic rationale for enforcing the DCC is to protect against having "one state in its dealings with another . . . place itself in a position of economic isolation," contrary to the underlying theory of the Constitution "that the peoples of the several states must sink or swim together."¹⁹¹ In *H. P. Hood & Sons, Inc. v. Du Mond*, therefore, the Court characterized the DCC doctrine as ensuring that economic interests would "have free access to every market in the Nation."¹⁹² Justices Kennedy and Alito recently articulated this understanding when they dissented in *Department of Revenue of Kentucky v. Davis*, observing that free and unobstructed national trade is a primary objective of the Constitution.¹⁹³ This, of course, explains why the Constitution includes the Commerce Clause, not necessarily why a corollary negative is necessary. But the Court also proffers that the DCC reflects a political process objective, by protecting unrepresented voices from being disadvantaged through parochial state or local political processes. Chief Justice Stone promoted this justification in his two principal DCC cases.¹⁹⁴ More recently, Chief Justice Roberts acknowledged

188. Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 516 (2008).

189. Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 414 (2008).

190. *Id.*

191. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523, 527 (1935).

192. 336 U.S. 525, 539 (1949).

193. 553 U.S. 328, 362-376 (2008) (Kennedy & Alito, JJ., dissenting). In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, the Court again emphasized that the purpose of the DCC is to avoid economic balkanization. 520 U.S. 564, 577-78 (1997).

194. *See S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945) ("[I]t is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."); *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938) ("Underlying the stated rule . . . [is that such discriminatory 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."); *see also McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940). Chief Justice Stone also authored the now famous footnote 4 in *United States v. Carolene Products Co.*,

that the Court examines whether “the burden of state regulation falls on interests outside the state, [and thus the burden] is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”¹⁹⁵

Neither of these theories appears all that persuasive today. Professor Denning, for instance, criticizes the Court’s “failure to articulate an adequate constitutional operative proposition for the [DCC].”¹⁹⁶ To begin with, a national free market paradigm of avoiding economic balkanization is overly simplistic in today’s global economy. The movement of people, capital, products, and information is quicker, easier, and more transparent than ever from the local level to the international one. A transaction can occur just as easily over the Internet with a neighbor as it can with a company in a nearby state or a vendor across the ocean. To suggest that the judiciary is capable of appreciating the modern economic marketplace in cases involving selective adversarial parties is overly optimistic. It also suggests implicitly (because to state it overtly is to undermine it) that there is a “constitutional right” to have a nationally free market—except to the extent Congress directs otherwise or to the extent that the Court finds the right is not overly burdened.¹⁹⁷ But the notion of a “constitutional” right to engage in interstate commerce has long since passed. To the extent, then, that it has any modern resonance, it must be that, abstractly, the framers intended for the Constitution to embody some aspect of then-prevalent free market principles and assign to Congress the exclusive ability to adjust those principles. And, if so, the courts must confront delimiting the amorphous contours of this principle.¹⁹⁸ Not surprisingly, therefore, the

inaugurating the political process justification for judicial scrutiny. 304 U.S. 144, 152 n.4 (1938).

195. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (quoting *S. Pac. Co.*, 325 U.S. at 767 n.2). Justice Stevens invoked this rationale in *West Lynn Creamery, Inc. v. Healy*. 512 U.S. 186, 191-92, 200 (1994).

196. Denning, *supra* note 188, at 424.

197. If it is not an individual right, then it is a constitutionally abstract principle because, otherwise, it must be a right entrusted to Congress, with the judiciary then protecting Congress’s “right” to decide when or to what extent the free market may be impeded.

198. In examining how this principle plays out by protecting against economic protectionism, Professor Lisa Heinzerling concludes that “[t]he Court’s nondiscrimination principle does not promote economic efficiency in individual cases (or if it does, it does so only sporadically and fortuitously), because the Court does not even attempt a serious accounting of the benefits and costs of laws that discriminate against interstate commerce.” Heinzerling, *supra* note 136, at 220.

political process rationale arguably furnishes an easier theory and correlates better with the anti-discrimination emphasis in the cases.¹⁹⁹

In lieu of current rationales for the DCC, scholars continue to proffer alternative theories. Professor Denning posits that the Constitution embodies a “union-protecting theory” as necessary to avoid state “predation.”²⁰⁰ Professor Williams, conversely, suggests that the historical understanding of the Commerce Clause does not support either existing theory, and instead offers a theory premised upon “deliberative equality.”²⁰¹ He suggests that the DCC should restrain states from acting parochially: “[S]tates need not actually accord *equal treatment* to out-of-state interests, but rather only give *equal regard* to such out-of-state interests as they give to similarly situated in-state interests.”²⁰² This emphasis on theory by Professors Denning and Williams unfortunately overshadows how any theory translates into *tests* capable of being administered by the judiciary. During each of the prior generations of DCC cases, it was the *tests* that became unworkable. And it is once again the *tests* that are cabining innovation and again are unwieldy. And it is these tests that warrant critical examination.

At the very least, the Court’s unnatural extraterritorial appendage to its DCC analysis needs excising. In the 1980s, the Court ostensibly added this element to its DCC analysis, suggesting that state attempts to reach conduct beyond their borders are per se unconstitutional. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the Supreme Court held that New York’s price-affirmation statute for the sale of liquor into the state violated the DCC.²⁰³ New York’s law attempted to ensure that the price paid for liquor in that state was no lower than the price paid by consumers in other states.²⁰⁴ In addition, New York prohibited distillers selling into the New York market from paying promotional allowances to

199. See, e.g., Sedler, *supra* note 187, at 998.

200. Denning, *supra* note 188, at 477, 484-85.

201. Williams, *supra* note 189, at 414.

202. *Id.* at 416. He adds:

[I]t does not disable states entirely from regulating commerce—but it does require that state and local policymaking bodies give equal regard to similarly situated out-of-state and in-state interests adversely affected or burdened by such measures. States may not treat the concerns of out-of-state interests worse than those of like in-state interests simply because of their state residence.

Id.

203. 476 U.S. 573, 585 (1986).

204. *Id.* at 576.

wholesalers—a practice allowed in other states.²⁰⁵ In *Brown-Forman*, the plaintiff conceded that the State had a legitimate interest and that the law operated evenhandedly, but the plaintiff argued that the law amounted to an impermissible *direct* regulation of interstate commerce.²⁰⁶ The Court framed the question anachronistically, asking whether the state law “regulates commerce in other States,” and began with an examination of instances where the Court had “examined the extraterritorial effects” of a statute.²⁰⁷ When examining the “practical effect[s]” of the New York scheme, the Court concluded that it regulated out-of-state transactions because: “Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month.”²⁰⁸ This, the Court held, was a *direct* regulation of interstate commerce, with the State projecting its legislative reach into other states.²⁰⁹ Two years later, the Court invalidated, on similar grounds, Connecticut’s price-affirmation statute regulating the sale of beer.²¹⁰ In doing so, the Court again examined the practical effect of the law and articulated three elements for the extraterritorial inquiry: first, states are prohibited from applying their laws to activities outside of their borders; second, states are prohibited from “directly control[ing] commerce occurring wholly outside” their borders; and third, a court must examine the practical effect of the state’s program on other state programs.²¹¹

205. *Id.*

206. *Id.* at 579-80. The Court upheld an earlier version of the New York law in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52 (1966), *abrogated by* *Healy v. The Beer Inst.*, 491 U.S. 324, 343 (1989).

207. *Brown-Forman*, 476 U.S. at 580-81. The Court primarily relied upon a lower court decision in *U.S. Brewers Ass’n v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff’d*, 464 U.S. 909 (1983), and on the Supreme Court’s prior decision in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935). *See Brown-Forman*, 476 U.S. at 582-83. In *Brown-Forman*, the Court barely noted its prior decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion). *See Brown-Forman*, 476 U.S. at 578-79. However, the Court later invoked *Edgar* as support for invalidating extraterritorial laws. *See Healy v. The Beer Inst.*, 491 U.S. 324, 333 n.9, 336 n.13 (1989).

208. *Brown-Forman*, 476 U.S. at 582-83.

209. *Id.* at 582.

210. *The Beer Inst.*, 491 U.S. at 343. The Connecticut law “require[d] out-of-state shippers to affirm that their posted prices [were] no higher than prices in the border States only at the time of the Connecticut posting” and made it illegal “to sell beer in Connecticut at a price higher than the price at which beer is or would be sold in any bordering State during the month covered by the posting.” *Id.* at 328-29.

211. *Id.* at 336-37. The Court added:

[T]he practical effect of the statute must be evaluated not only by considering

This type of extraterritorial inquiry effectively mirrors the now defunct DCC analysis the Court abandoned during the New Deal.²¹² *Edgar v. MITE Corp.* was one of the first instances of this type of inquiry to surface in the post-New Deal era, though the case was only a plurality opinion.²¹³ The case involved an Illinois Blue Sky law regulating tender offers to corporations (1) with principal executive offices in the state, (2) organized under Illinois law, or (3) with “at least 10% of . . . stated capital and paid-in surplus represented in Illinois.”²¹⁴ Justice White’s opinion indicated that the law both regulated transactions that took place over the channels of interstate commerce (mails or other means) and produced results—transactions—in other states.²¹⁵ Justice White suggested that the DCC “permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited.”²¹⁶ And Justice White concluded that Illinois’s law directly restrained interstate commerce, with a “sweeping extraterritorial effect,” and therefore was unconstitutional.²¹⁷

Justice White’s approach in *Edgar*, followed by its progeny in *Brown-Forman*, *Healy*, and *CTS Corp.*, overlooks how the DCC changed in the post-New Deal era; moreover, Justice White’s *Edgar* opinion mistakenly relies on *Southern Pacific* and a pre-New Deal case for its analysis.²¹⁸ *Southern Pacific* involved the constitutionality of Arizona’s Train Limit Law, which limited the number of passenger and freight cars in trains in the

the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

Id. The Court subsequently described *Brown-Forman* as simply a modern example of the DCC being applied when commercial activities might be subjected to inconsistent state regulations, as was the case in *Southern Pacific*. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987).

212. See *supra* notes 47-60 and accompanying text.

213. See 457 U.S. 624, 626 (1982) (plurality opinion).

214. *Id.* at 642.

215. *Id.* at 640.

216. *Id.*

217. *Id.* at 642; see also *id.* at 643 (“Because the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the State, it must be held invalid . . .”).

218. See *id.* at 641-43. Oddly, Justice White separately held that the law failed under the traditional *Pike* balancing test, suggesting little need for his foray into antiquated tests. See *id.* at 643.

state.²¹⁹ Chief Justice Stone applied the *Pike* balancing test, concluded that the law burdened interstate commerce too much—it created confusion among conflicting state policies—and, as such, required uniform regulation.²²⁰ But Chief Justice Stone’s apparent reference to the Court’s prior DCC cases does not suggest any overt effort to modify its *ex ante* DCC analysis. At one point, for instance, Chief Justice Stone wrote that “[w]hen the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.”²²¹ And he cited cases spanning the entire nineteenth and early twentieth centuries.²²² He also, in concluding that the burden on interstate commerce was too great, added that: “The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains”²²³ But, in making this observation, nothing suggests that Chief Justice Stone intended to create an independent “extraterritorial” element to the DCC.

Justice White’s reliance in *Edgar* on *Shafer v. Farmers’ Grain Co. of Embden*²²⁴ is even more troubling. *Shafer*, a short 1925 opinion by the conservative Justice Van Devanter, pre-dated the Court’s shift in its DCC analysis.²²⁵ The decision invalidated the North Dakota Grain Grading Act, which imposed licensing and inspection requirements for buyers of grain in the state.²²⁶ The law did not discriminate between in-state and out-of-state grain purchasers, but most of the buyers in the state were shipping their

219. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763 (1945).

220. *Id.* at 773-74.

221. *Id.* at 767. The Chief Justice, therefore, unintentionally intimated that the local/national tests still had some resonance when he opined:

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

Id. at 770.

222. *See id.* at 767-70.

223. *Id.* at 775.

224. 268 U.S. 189 (1925).

225. *See id.*

226. *Id.* at 194-98.

grain to out-of-state terminals.²²⁷ The Act worked in tandem with the United States Grain Standards Act, omitting the requirement for grading and certain inspections if these actions were already performed by a federally licensed inspector.²²⁸ Justice Van Devanter's opinion reflected the Court's then-concern that state programs *directly* interfering with the movement of goods in interstate commerce were beyond the State's power.²²⁹ "The right to buy [and ship goods] in interstate commerce," he wrote, "is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states."²³⁰ Nothing about this now-abandoned "directly" burdens interstate commerce inquiry supports an independent extraterritoriality test.

Not only is any modern justification and application of precedent for an extraterritorial inquiry non-existent,²³¹ such use of precedent

227. *Id.* at 192.

228. *Id.* at 192-93.

229. *See id.* at 199-200 (stating that a state law is unconstitutional when it directly interferes with or burdens interstate commerce); *see also id.* at 201 ("We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no State can do consistently with the commerce clause.").

230. *Id.* at 198-99.

231. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935), is an oft-cited case in support of an extraterritorial inquiry. *E.g.*, *Healy v. The Beer Inst.* 491 U.S. 324, 334-35 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986). In *Seelig*, Justice Cardozo addressed whether New York could apply its milk control law to "a dealer who has acquired title to the milk as the result of a transaction in interstate commerce." 294 U.S. at 518. Justice Cardozo's opinion, although arguably somewhat flawed, equated the law to an impost or duty on goods entering the state and, thus, a barrier to interstate commerce. *See id.* at 522. And he observed that "[n]ice distinctions have been made . . . between direct and indirect burdens," but such distinctions served no purpose because the law by its terms directly obstructed the flow of commerce into the state. *Id.* The State argued that the law was a valid exercise of its police power, a soon-to-be fading argument, and, to that, Justice Cardozo implicitly rejected the old police power versus commerce power distinction and added that "states must sink or swim together." *Id.* at 523. He offered considerations influencing the line between permissible and impermissible state regulation, but warned that "[t]he line . . . between direct and indirect restraints of commerce [is one of] degree." *Id.* at 525. Arguably the more fascinating aspect of his opinion is the discussion about the "original package doctrine," where he suggested that the historic doctrine, *see Kalen, supra* note 23, at 464-65, made little sense and ought to have been folded into the general DCC analysis. *Seelig*, 294 U.S. at 526-28. Presciently, Justice Cardozo indicated that states could impose restrictions on the sale of packaged goods from "unsanitary sweat-shops." *Id.* at 528; *see also Whitfield v. Ohio*, 297 U.S. 431, 439-41

inappropriately injects into the DCC analysis a bankrupt jurisprudence. Today, the Court acknowledges that “[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.”²³² The lower court opinions, therefore, often struggle with how to differentiate when a program reaches conduct beyond a state’s borders and when it merely influences conduct in other states.²³³ Some courts resort to the now defunct direct/indirect test under the rubric of examining the extraterritorial question.²³⁴ Others occasionally invoke “extraterritoriality,” seemingly as a

(1936) (prohibiting the sale of convict-made goods). Judge Sutton of the Sixth Circuit recently questioned the continued vitality of the extraterritoriality doctrine. *Am. Beverage Ass’n v. Snyder*, 700 F.3d 796, 810 (6th Cir. 2012) (Sutton, J., concurring).

232. *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).

233. *Compare Am. Beverage Ass’n*, 700 F.3d at 809-10 (holding that Michigan’s “Bottle Bill” violated DCC’s extraterritorial doctrine), *and Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 66 (2d Cir. 2010) (finding no price gridlock for tobacco master settlement between companies and the state), *with Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 n.11, 218 (2d Cir. 2004) (noting that the extraterritorial analysis did not require examining discrimination). In *Freedom Holdings, Inc. v. Spitzer*, the court intimated the problem with an extraterritorial inquiry, noting that many programs had impacts on out-of-state upstream prices and it was only when the out-of-state interests wanted to conduct activities in the state that that the law operated. 357 F.3d at 220-21; *see also Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 372-73 (3d Cir. 2012) (applying balancing test because the law did not directly regulate the commercial transactions occurring in other states); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 647-48 (6th Cir. 2010) (rejecting argument that milk-labeling law had extraterritorial effect); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008) (rejecting extraterritorial argument related to Kansas statute that allegedly affected conduct on computers in Missouri); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007) (upholding consumer protection law regulating the sale of gift cards in the state); *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. 2006) (applying the *Pike* balancing test and finding that the DCC was not violated by Pennsylvania’s milk pricing laws). The Second Circuit, in *American Booksellers Foundation v. Dean*, for instance, collapsed all the tests when examining the burden on interstate commerce. 342 F.3d 96, 102 (2d Cir. 2003). Indeed, invoking *Cooley v. Board of Wardens*, the court indicated that regulation of conduct occurring over the Internet, which affected activities out of the state, was extraterritorial and demanded uniform regulation. *Id.* at 104 (citing *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851)).

234. One court described the inquiry as asking whether the program “involved regulating the prices charged in the home state and those charged in other states in order to benefit the buyers and sellers in the home state, resulting in a *direct burden* on the buyers and sellers in the other states.” *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 81 (1st Cir. 2001) (emphasis added), *aff’d sub nom. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). In *NCAA v. Miller*, another court applied the extraterritoriality inquiry to Nevada’s establishment of procedural rules for NCAA enforcement proceedings and

shorthand description for the other aspects of the DCC.²³⁵ As an independent inquiry, however, the analysis is circular.

Assume, for example, that state *A* informs all sellers of widgets into state *A*'s markets that those sellers must sell their widgets in state *A* for no more than those widgets are sold for in the bordering states. The law, on its face, is non-discriminatory. Yet widgets are only produced in one of the surrounding states. It therefore undoubtedly influences the conduct of the sellers of widgets in the neighboring state. But does it *directly* regulate those sellers? It does only if those sellers send their widgets into the state *A* market, and, once they choose to send their product into state *A*, the law is operating within state *A*, not extraterritorially. Those sellers may be forced to alter the price for widgets being sold in other states, but again it is only because they first decided to take advantage of state *A*'s market. And so it influences and perhaps, in effect, burdens—arguably even impermissibly burdens—interstate commerce. But it is not because the law either can or does *regulate* extraterritorially.

The notion of an extraterritorial inquiry, moreover, is an abandoned nineteenth-century relic. The extraterritorial concept emerged during the second half of the nineteenth century as a reflection of the Court's embrace of dual federalism and the principle of territorial sovereignty.²³⁶ The Court became overly enamored with a spheres-of-jurisdiction paradigm.²³⁷ This translated into protecting states' territorial integrity, as well as in distinguishing between the state police power and a federal commercial power.²³⁸ A critical aspect of this arguably simple, yet utterly elusive, paradigm was that states undeniably could exercise jurisdiction over

indicated that states could not regulate interstate commerce *directly*. 10 F.3d 633, 638-40 (9th Cir. 1993).

235. See *Freedom Holdings*, 624 F.3d at 64 n.18; see also *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 746 (9th Cir. 2001) ("The Commerce Clause seeks to prevent extraterritorial economic 'effects,' not purposes."). In *National Electrical Manufacturers Ass'n v. Sorrell*, the court rejected a challenge to Vermont's labeling law that requires manufacturers disclose to consumers that products such as fluorescent light bulbs contain mercury and should be treated as hazardous. 272 F.3d 104, 107 (2d Cir. 2001). Responding to the DCC argument, the court considered the extraterritorial inquiry as a component of the *Pike* disparate impact analysis. *Id.* at 109-12.

236. See Kalen, *supra* note 23, at 452.

237. *Id.* at 452-57. A spheres-of-jurisdiction paradigm based upon subject matter, rather than geography, arguably reflects an aspect of the federalism model envisioned by the framers. This distinction is partly at the center of a dispute between Professors Gordon Wood and Alison L. LaCroix. See Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733 (2011).

238. Kalen, *supra* note 23, at 450-84.

persons and property within their geographic borders, but not outside.²³⁹ International law and conflict of laws offered support for this principle.²⁴⁰ And the Court articulated the principle in *Pennoyer v. Neff*,²⁴¹ the classic personal jurisdiction case. Because an exercise of federal power necessarily intruded into a state's geographic sovereign zone,²⁴² the Court employed similar non-geographic spheres that attempted to separate state power from federal power.²⁴³ The Court accomplished this, in part, by examining whether a state law operated directly on persons or conduct beyond its borders, and, if so, by suggesting that the matter fell within the federal

239. *Id.* at 452-62, 467-71.

240. Justice Story's treatise on conflict of laws underscores the geographical emphasis of a spheres paradigm:

[E]very nation possesses an *exclusive sovereignty* and *jurisdiction* within its own territory. The direct consequence of this rule is, that the laws of every state affect, and *bind directly all property*, whether real or personal, within its territory; *and all persons*, who are resident within it, whether natural born subjects, or aliens

[N]o State or nation can, by its laws, *directly affect, or bind property* out of its own territory, *or persons* not resident therein

Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 260 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21 (1834)).

241. 95 U.S. 714, 722 (1878) (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”), *overruled in part* by *Shaffer v. Heitner*, 433 U.S. 186 (1977); see James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 189-95, 205-06 (2004) (discussing reigning paradigm of territorial sovereignty).

242. See *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1870) (“[State and federal governments] exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”), *overruled in part* by *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939).

243. The Court's post-Civil War cases on intergovernmental immunity are apt examples of how the Court conducted this inquiry. See Kalen, *supra* note 23, at 454-55. In almost inimitable prose, the Court observed, “There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement.” *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 406 (1871). George Bancroft also referred to two separate spheres of jurisdiction. 1 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (1882). And Bancroft has been described as the most popular and representative historian of his era. Dorothy Ross, *Historical Consciousness in Nineteenth-Century America*, 89 AM. HIST. REV. 909, 915 (1984). Professor G. Edward White portrays how common jurisprudential assumptions, such as spheres, transcended different areas—a process he calls doctrinal radiation. G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 226 (2000).

commercial sphere.²⁴⁴ This style of reasoning and mode of analysis was what the Court ultimately rejected during the first half of the twentieth century. The Court, therefore, should clarify that it never intended to resurrect this late nineteenth-century paradigm, and abandon all pretense that courts can examine whether a law reaches conduct extraterritorially, particularly as a separate DCC inquiry.

Next, along with interring any pretense of examining the extraterritorial effects of state and local programs, the Court should scale back the ill-fated effects analysis in the other tiers of the DCC test. An effects analysis surfaces when examining whether a state or local program, *in effect*, discriminates against interstate commerce, as well as during any *Pike* balancing. To begin with, examining possible “undue” effects on interstate commerce and balancing those effects against a putative local interest is troublesome. The balancing test, after all, emerged with little or no discussion or analysis.²⁴⁵ And it effectively asks a court to render a subjective judgment about the economic marketplace, based solely on the information and parties before it, and determine whether the subject demands uniformity—that is, the local/national test long since abandoned but now disguised behind the mask of *Pike*.²⁴⁶ It is little wonder that few programs fail such a difficult inquiry; Professor Denning aptly suggests that the balancing test has been effectively repudiated “*sub silentio*” because it fails to invalidate laws.²⁴⁷ Abandoning *Pike*, therefore, would have the salutary effect of conserving judicial resources and focusing attention on

244. See Kalen, *supra* note 23, at 457-84. In *Henderson v. Mayor of New York*, for example, the Court invalidated a law that forced carriers to collect fees from passengers before those passengers entered the state. 92 U.S. 259, 273 (1875).

245. See *supra* notes 64-70 and accompanying text.

246. Courts, for instance, are not particularly well suited to assess “complex factual inquiries about such issues as elasticity of demand for the product and alternative sources of supply.” *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 n.8 (1981).

247. Denning, *supra* note 188, at 493. The Eleventh Circuit, however, recently employed the *Pike* balancing test to invalidate the *application* of a Miami stevedore permit program. *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1261-62 (11th Cir. 2012). The case demonstrates the difficulty with the test; the court emphasized that the application of the program illustrated a protectionist motive favoring existing permit holders over new entrants—an ostensible discriminatory rather than balancing case. *Id.* at 1235 And yet the discrimination apparently had little to do with in-state versus out-of-state entrants—existing permittees were favored over other applicants. *Id.* The administration of the program, according to the court, undoubtedly violated the local ordinance, may have been arbitrary and capricious, and quite possibly was applied unequally to similarly situated individuals (by unfairly only awarding permits to incumbents). *Id.* at 1240. But little suggests that it should have been resolved on DCC grounds.

more significant issues, with minimal risk. To be sure, if state or local problems encroach into domains demanding national uniformity, Congress remains capable of legislating and avoiding perceived economic balkanization.

The discriminatory effects analysis triggers a slightly different concern. Professor Denning correctly observes: “Constitutional law relies on effects tests in part to smoke out illegitimate or unconstitutional purposes that may have contributed to the passage of the law.”²⁴⁸ The pernicious effects of insidious or disguised discrimination can be destructive to our society when individual liberties and freedoms are threatened. While the Court during the *Lochner* era ascribed an individual constitutional right to engage in interstate commerce,²⁴⁹ no such individual right persists today. The need, therefore, to tease out of otherwise nondiscriminatory programs hidden discrimination against interstate commerce is somewhat illusory. It perpetuates the era when the Court actively scrutinized state programs masquerading as police power measures but arguably extending into a protected commercial power sphere.²⁵⁰

Finally, although facial or purposeful discrimination should continue to be considered in any DCC analysis, it might be worth exploring whether the Court needs to apply a stricter standard of scrutiny. Strict scrutiny makes sense when individual rights and liberties are threatened and ensures against unnecessary over-reaching. The DCC is different, particularly because Congress may permit what the DCC otherwise prohibits. It is the concept of an “unbalkanized” country that is being protected under the DCC. And a

248. Denning, *supra* note 188, at 502.

249. See Kalen, *supra* note 23, at 452-56.

250. See *supra* notes 40-50 and accompanying text. The “effect” of a statute, the Court reasoned, reflected its “purpose.” See *Reid v. Colorado*, 187 U.S. 137, 150-51 (1902). Justice Samuel F. Miller echoed the prevailing sentiment that examining effects protected against intrusion into protected spheres:

In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose.

Morgan’s S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 462 (1886). In *Minnesota v. Barber*, for instance, the Court invalidated an animal inspection statute that arguably prevented Chicago slaughterhouses from selling beef into the Minnesota market. 136 U.S. 313, 329-330 (1890); see also *Collins v. New Hampshire*, 171 U.S. 30, 34 (1898) (invalidating oleomargarine inspection statute); *Chy Lung v. Freeman*, 92 U.S. 275, 281 (1875) (invalidating California statute requiring bond for certain passengers entering state); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273-74 (1875) (invalidating bond requirement for passengers entering state).

lesser standard of scrutiny might permit experimentation that discriminates for reasons other than merely bald economic protectionism.²⁵¹ For instance, in *New Energy Co. of Indiana v. Limbach*, the Court invalidated Ohio's attempt to promote local corn-based ethanol production in the state by offering a tax credit for in-state producers.²⁵² The law undoubtedly discriminated against out-of-state ethanol producers and, under the Court's almost per se invalidity test, violated the DCC. But it's not altogether clear why a state may not decide how best to shape its own land uses, based on infrastructure, economics, topography, geography, culture, demographics, and climate, and why each state shouldn't be able to make that decision for itself. If, therefore, one state provides a tax subsidy for an industry it wants to promote in the state and the DCC forces that state to apply the tax subsidy to out-of-state entities, it effectively promotes an industry and accompanying land use in another state whose infrastructure, economics, topography, geography, culture, demographics, and climate could be entirely different.²⁵³ And it affects that other state's ability to shape its own future. To the extent that states become concerned over balkanization, congressional action remains available.

Conclusion

As state and local communities explore innovative solutions for addressing many of society's modern challenges, it is reasonably likely that the DCC will function either as a potential obstacle or a chilling effect on laudable efforts. The DCC historically "has been one of very considerable judicial oscillation,"²⁵⁴ and, yet, the fundamental structure for DCC analysis has not changed for quite some time. True, our society and the issues we

251. Discrimination, after all, occurs when government "fail[s] to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1108 (2011) (quoting *BLACK'S LAW DICTIONARY* 534 (9th ed. 2009)). What qualifies as a "reasonable distinction" is normative, particularly in the DCC context, because favoring in-state entities is often reasonable; it's just that the DCC *ex ante* assumes that it is unreasonable and requires not just a legitimate justification, but also no other plausible alternative means.

252. 486 U.S. 269, 274 (1988).

253. Because this is often the purpose of tax subsidies, drawing the line between permissible and impermissible programs is problematic. Professors Hellerstein and Coenen comprehensively analyzed this issue, explaining how the line differentiating the two is "ill-defined" and that "discriminatory subsidies, unlike discriminatory tax breaks, are almost always constitutional." Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 *CORNELL L. REV.* 789, 792 (1996).

254. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 420 (1946).

face today are quite different than what our predecessors confronted when the DCC analysis became crystallized. But so far, neither time nor the changing society has prompted the necessary critical re-evaluation of the tests under the DCC. It is apparent that the time has come: the changing world economic paradigm, coupled with emerging local efforts to assert greater control over local communities and environmental issues, will test the contours and, potentially, the efficacy of the current DCC analysis. And when that happens, the Court should permit experimental programs except in the extreme cases where their sole purposes are economic protectionism.