

NELCO
NELCO Legal Scholarship Repository

New York University Public Law and Legal Theory
Working Papers

New York University School of Law

1-1-2012

A COURSE UNBROKEN: THE CONSTITUTIONAL LEGITIMACY OF THE DORMANT COMMERCE CLAUSE

Barry Friedman
NYU School of Law, barry.friedman@nyu.edu

Daniel T. Deacon
Wilmer Cutler Pickering Hale and Dorr LLP

Follow this and additional works at: http://lsr.nellco.org/nyu_plltwp

 Part of the [Constitutional Law Commons](#), [Judges Commons](#), [Jurisdiction Commons](#), [Legal History, Theory and Process Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Friedman, Barry and Deacon, Daniel T., "A COURSE UNBROKEN: THE CONSTITUTIONAL LEGITIMACY OF THE DORMANT COMMERCE CLAUSE" (2012). *New York University Public Law and Legal Theory Working Papers*. Paper 318.
http://lsr.nellco.org/nyu_plltwp/318

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

A COURSE UNBROKEN: THE CONSTITUTIONAL LEGITIMACY OF THE DORMANT COMMERCE CLAUSE

*Barry Friedman and Daniel T. Deacon**

INTRODUCTION.....	1877
I. THE FOUNDERS' FEARS	1884
A. <i>The Threat</i>	1884
B. <i>Were the Framers Wrong? (Does It Matter?)</i>	1886
C. <i>A Constitution for the Future</i>	1894
II. THE REJECTION OF THE "NEGATIVE" AND THE ADOPTION OF JUDICIAL REVIEW	1896
III. THE JUSTICIABLE COMMERCE CLAUSE	1903
A. <i>The Argument for Commerce Clause Exclusivity</i>	1905
B. <i>Though Exclusive, States Retained the Police Power</i>	1914
1. <i>The State's Power of Police</i>	1917
2. <i>Shifting Lines</i>	1920
C. <i>The Longstanding Acceptance of the Dormant Commerce Power</i>	1928
1. <i>The Absence of Support for Full Concurrence</i>	1929
2. <i>Avoiding the Issue by Dissembling</i>	1932

INTRODUCTION

WHO is the better originalist, Justice Thomas or Justice Stevens? More attuned to constitutional history, Justice Scalia or Justice Brennan? In one area, at least, the answers may be surprising.

* Barry Friedman is the Jacob D. Fuchsberg Professor of Law at New York University School of Law; Daniel T. Deacon is a 2010 graduate of New York University School of Law and is currently employed at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP in Washington, D.C. The authors would like to thank Brannon Denning, Jonathan Ellis, Richard Epstein, Michael Greve, Roderick Hills, Daniel Hulsebosch, Martin Redish, Mark Tushnet, and Norman Williams for their helpful comments. Graham Lake provided excellent research assistance. Support for this project was provided by the Filomen D'Agostino and Max E. Greenberg Research Fund.

With typical bravado, the current Supreme Court's most originalist members have mounted a sustained attack on the dormant (or "negative") Commerce Clause. This is the doctrine on which courts rely to strike down state laws that interfere with interstate commerce.¹ Focusing on the Constitution's text, which grants to Congress the power to regulate "Commerce . . . among the several States,"² Justice Scalia has said that the Clause is "[o]n its face . . . a charter for Congress, not the courts."³ He insists that "[t]he historical record provides *no grounds* for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce."⁴ Justice Thomas is even more direct: "there is *no basis* in the Constitution," he wrote in a recent decision, to interpret "the Commerce Clause as a tool for courts to strike down state laws that it believes inhibit interstate commerce."⁵

In attacking the textual and historical bona fides of the dormant Commerce Clause, Justices Scalia and Thomas are hardly alone. There is a long tradition of dormant Commerce Clause skepticism, much of it based in the argument that the doctrine has no foundation in text or Founding-era history.⁶ The Skeptics include such no-

¹ See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338–39 (2007).

² U.S. Const. art. I, § 8, cl. 3.

³ *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part).

⁴ *Id.* at 263 (emphasis added).

⁵ *United Haulers Ass'n*, 550 U.S. at 349 (Thomas, J., concurring) (emphasis added); accord *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609–10 (1997) (Thomas, J., dissenting).

⁶ See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888*, at 230–34 (1985) (describing a seminal early dormant Commerce Clause case as "arbitrary, conclusory, and irreconcilable with the constitutional text"); Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* 13 (1937) (expressing that "[t]he conception that the mere grant of the commerce power to Congress dislodged state power finds no expression" in Founding-era history); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *Yale L.J.* 425, 430 (1982) ("The [C]ommerce [C]lause does not expressly prohibit the states from enacting protectionist economic legislation. It merely gives Congress the power to rectify such excesses by superseding enactments."); Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 *Cardozo L. Rev.* 1745, 1745 (1991) ("[T]he dormancy doctrine ought to be abandoned . . ."); Lisa Heinzerling, *The Commercial Constitution*, 1995 *Sup. Ct. Rev.* 217, 276 (concluding that the nondiscrimination principle enforced under the dormant Commerce Clause is a "*Lochner*-style incursion" on

tables as Chief Justice Taney and Justice Frankfurter, along with distinguished academics such as Professors David Currie and Martin Redish.⁷

The Skeptics' historical and textual critique is often paired with a series of policy concerns. Because "application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution," the Skeptics conclude that enforcement of the Clause violates principles of judicial restraint, with Justice Thomas stating, "this Court has no policy role in regulating interstate commerce."⁸ This argument travels hand-in-hand with a concern for state authority. Given that the Court is striking down state laws without sufficient constitutional foundation, the dormant Commerce Clause "undermines the delicate balance in what we have termed 'Our Federalism.'"⁹ In the view of the Skeptics, it is Con-

state legislatures); Amy M. Petragani, *The Dormant Commerce Clause: On Its Last Leg*, 57 *Alb. L. Rev.* 1215, 1216 (1994) ("Not only is the doctrine absolutely without support in the text of the Constitution or the intent of the Framers, but the doctrine also violates two principles upon which the constitutional democracy of our nation was built—separation of powers and the balance of federalism."); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 *Duke L.J.* 569, 571 ("[T]he simple fact is that there is no dormant [C]ommerce [C]ause to be found within the text or textual structure of the Constitution."). Prior to Justice Scalia's and Justice Thomas's critiques, other Justices had occasionally cast doubt on the doctrine. See *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 189 (1940) (Black, J., dissenting); *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283, 471 (1849) (Taney, C.J., dissenting) ("The grant of a general authority to regulate commerce is not, therefore, a prohibition to the States to make any regulations concerning it within their own territorial limits, not in conflict with the regulations of Congress."). Justice Thomas, however, is engaging in hyperbole—to say the least—when he writes that "every Member of the current Court and a goodly number of our predecessors have at least recognized these problems, if not been troubled by them." *Camps Newfound/Owatonna*, 520 U.S. at 611 (Thomas, J., dissenting).

⁷ See *The Passenger Cases*, 48 U.S. (7 How.) at 471 (Taney, C.J., dissenting); *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 579–80 (1847) (Taney, C.J., separate opinion); Currie, *supra* note 6, at 230–34; Frankfurter, *supra* note 6, at 13; Redish & Nugent, *supra* note 6, at 571.

⁸ *United Haulers Ass'n*, 550 U.S. at 349 (Thomas, J., concurring).

⁹ *Camps Newfound/Owatonna*, 520 U.S. at 612 (Thomas, J., dissenting) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)); see also Petragani, *supra* note 6, at 1216 (arguing that the dormant Commerce Clause violates both federalism and separation of powers principles); Redish & Nugent, *supra* note 6, at 573 (arguing that exercise of dormant commerce power violates constitutional design intended to encourage state action when Congress does not affirmatively pass contrary legislation).

gress, and Congress alone, which should patrol state laws alleged to interfere with interstate commerce.

On the other side, some modern Justices, including Justices Brennan and Stevens, have mounted a limited historical defense of the dormant Commerce Clause. Justice Brennan wrote in *Hughes v. Oklahoma* that the Commerce Clause:

reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that, in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.¹⁰

Justice Stevens, likewise, has argued that, as understood at the time of the Founding, the Commerce Clause “immediately effected a curtailment of state power” justiciable by courts.¹¹ He emphasized that “[o]ur decisions on this point reflect, ‘upon fullest consideration, the course of adjudication unbroken through the Nation’s history.’”¹² There is nothing subtle about this disagreement, on which stands the fate of numerous state and local laws each year.¹³ So, who is right?

To date, no single work has offered a comprehensive analysis of the textual and historical claims of dormant Commerce Clause Skeptics. Some scholarship has taken up the task of defending the dormant Commerce Clause, including against a few aspects of the Skeptics’ challenge.¹⁴ But even those sympathetic to the doctrine

¹⁰ 441 U.S. 322, 325–26 (1979).

¹¹ *Camps Newfound/Owatonna*, 520 U.S. at 571.

¹² *Id.* at 572 (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

¹³ See Norman R. Williams, *The Foundations of the American Common Market*, 84 *Notre Dame L. Rev.* 409, 411 (2008) (calling the dormant Commerce Clause “perhaps the most litigated aspect of the U.S. Constitution”).

¹⁴ Professor Brannon Denning has helpfully chronicled the pre-Convention history of interstate discrimination and sought to locate the constitutional core of the doctrine. See Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 *Ky. L.J.* 37, 39–40 (2005) [hereinafter Denning, *Discrimination*]; Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 *Wm. & Mary L. Rev.* 417, 423–24 (2008) [hereinafter Denning, *Reconstructing*]; see also Richard B. Collins, *Economic Union as a Constitutional Value*, 63 *N.Y.U. L. Rev.* 43, 44 (1988) (locating the doctrine in the Framers’ concern with economic union); *infra* note 20 and accompanying text (discussing historiography of the Confederation era). Mark Tushnet has

tend to approach its legitimacy as constitutional law with some sheepishness.¹⁵ The rise of originalism as the dominant mode of constitutional interpretation has seemingly left the dormant Commerce Clause with little more than intuitive appeal supported by precedent.

This Article takes up the challenge posed by the dormant Commerce Clause Skeptics and offers a full-throated defense of the fundamental legitimacy of the dormant commerce power, a defense that is textual, originalist, and historical. But it does more than that. As one of us has previously written: “[H]istory is essential to interpretation of the Constitution, but the relevant history is not just that of the Founding, it is that of *all* American constitutional history. Only by taking all of that history into account is it possible to arrive at an understanding of today’s constitutional commitments.”¹⁶

For all their claims of immersion in history, originalist claims like those of the Skeptics are ahistorical. They look only at the Founding and—with good reason—are left confounded as to how and why today’s doctrine makes any sense.

responded to the textual case against the dormant Commerce Clause. See Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 *Cardozo L. Rev.* 1717, 1718–20 (1991). Norman Williams has located the source of the doctrine in early cases. See Norman R. Williams, *Gibbons*, 79 *N.Y.U. L. Rev.* 1398, 1398–99 (2004) [hereinafter Williams, *Gibbons*]; Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 *UCLA L. Rev.* 1847, 1851–52 (2007) [hereinafter Williams, *Dual Federalism*]. Others, while not directly responding to the textual and historical attacks on the dormant Commerce Clause, have sought to provide functional justifications for it. See, e.g., Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 *Geo. Wash. L. Rev.* 47, 64–65 (1981); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 *Mich. L. Rev.* 1091, 1092–93 (1986); Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 *Wm. & Mary L. Rev.* 1, 11 (2003).

¹⁵ See, e.g., Brest et al., *Processes of Constitutional Decisionmaking* 730 (5th ed. 2006) (calling the dormant Commerce Clause “shaky” and a “textual embarrassment” but noting its “obvious structural need”); Henry P. Monaghan, *Forward: Constitutional Common Law*, 89 *Harv. L. Rev.* 1, 15–17 (1975) (noting that constitutional justifications for the Clause “leave much to be desired” and defending dormant commerce power as an aspect of “federal common law”); see also Heinzerling, *supra* note 6, at 218–19 (reporting that support for the dormant Commerce Clause “cannot be attributed to the clarity of the constitutional text, nor to the force of history” but rather from “the widespread perception that this rule is a very good idea”).

¹⁶ Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 *U. Pa. L. Rev.* 1, 5–6 (1998).

As this Article shows, when one reads Founding-era history on the Commerce Clause and understands it contextually in its time, then traces the course of its interpretation throughout history—as good constitutional interpreters should—there is a surprising logic and clear legitimacy to today’s dormant commerce doctrine. First, there is plain textualist and originalist support for the dormant Commerce Clause. The doctrine has firm roots in an understanding of the Constitution and its enumerated powers in which the commerce power belonged exclusively to Congress. Even Skeptics concede that if the commerce power is exclusive, the dormant Commerce Clause doctrine is legitimate.¹⁷ It is only because they are looking through presentist eyes that they neither understand nor accept the argument for exclusivity. Second, the doctrine has actually evolved to be more protective of the states over time. The original understanding of the Clause, which would have disabled the states from acting over interstate commerce at all, has been supplanted by other theories that allow greater room for the states and a correspondingly lesser role for the judiciary. Third, at no point in the nation’s history has a majority of the Supreme Court held the view that state power over interstate commerce is completely concurrent with that of the federal government; the dormant commerce power is in fact one of the most longstanding constitutional doctrines. Finally, even those who question the legitimacy of the dormant Commerce Clause would relocate much of the judicial power to strike down state laws in other parts of the Constitution or struggle to find a congressional law that supposedly preempts offending state measures. Thus, there is reason to doubt on policy grounds whether anyone believes this judicial power is dispensable.

This Article proceeds as follows. Part I returns us to the Framers’ world on the eve of the Constitutional Convention. This return establishes that many of the nation’s Founders felt the Convention was necessary precisely to deal with the problem of state laws that were interfering with the free flow of commerce so essential to the Union. This was so critical a problem that it had to be solved in the Constitution.

¹⁷ See *infra* note 119 and accompanying text (quoting Skeptics).

Part II explains that, in general, the Framers eschewed the solution to the problem of impermissible state laws advanced by the Skeptics—namely, congressional invalidation of state legislation—in favor of judicial review.

Part III takes on the heart of the Skeptics' attack. Although the Skeptics insist the Commerce Clause is, on its face, simply a grant of power to Congress, they concede that if that power were exclusive the dormant Commerce Clause doctrine would be legitimate.¹⁸ Section III.A demonstrates that what seems unfathomable to the Skeptics is nonetheless most likely true: there is good reason to believe that the Framers did intend, and the Constitution was understood, to vest the commerce power exclusively in Congress. Section III.B explains why this understanding of the constitutional text would not lead to the dire consequences predicted by the Skeptics. No one at the Founding doubted that state and local governments retained their "police" power to regulate, even if the "commerce" power was exclusive in Congress. What was necessary was for judges to draw lines between what was "commerce" and what was under the "police" power. This was a difficult task, no doubt, which is one of the reasons why the doctrine morphed over time, gradually yielding the structure we have today. Section III.B points out that the Skeptics fail to see that doctrinal change has made the dormant Commerce Clause jurisprudence both more workable and more respectful of state authority over time. Section III.C concludes by demonstrating that at no time during history has the Skeptics' view proven ascendant and that even judges who have doubted the legitimacy of dormant Commerce Clause jurisprudence nonetheless have dissembled in the face of protectionist state laws, finding other ways to strike down state laws that threaten to balkanize the Union.

Our point is not that the current dormant Commerce Clause doctrine is unassailable. There are legitimate questions, also raised at times by the Skeptics, about the workability of the current approach and the byzantine case law to which it has given birth. The legitimacy of judicial intervention in the area covered by the dormant Commerce Clause is our primary concern. And on that score, little doubt should remain.

¹⁸ See *infra* note 119 and accompanying text.

I. THE FOUNDERS' FEARS

This Part describes the lead-up to the Philadelphia Convention of 1787 and, in particular, the state measures that occasioned it. It is an examination of the milieu surrounding the Founding Era's calls for a new government, a government that was to exceed the old in its capacity for stability and prosperity. The story privileges the views of the Framers and their Federalist allies—after all, it was their concerns that motivated the drafting of the Constitution, and they prevailed—although it also takes account of the views of opponents. In any case, the events described here ought not be controversial.

What is abundantly clear is that the many people supportive of the new Constitution (and even some of its opponents) harbored deep fears regarding the consequences of protectionist state legislation prior to the Philadelphia Convention. The Convention, and the Constitution to which it gave birth, arose out of a desire to address these legislative acts that threatened the internal prosperity of the Union, jeopardized its standing abroad, and increasingly tore at the fabric of the young nation itself.

A. The Threat

In the spring of 1787, James Madison wrote his “Vices of the Political System of the United States.”¹⁹ The work was a stinging indictment of the current condition of American politics and especially of the laws of the several states. Madison was not alone in his alarm. By the mid-1780s many American politicians had come to see the proliferation of state laws under the Articles of Confederation as a threat both to the Union and to the grand experiment in republicanism with which it was intimately bound.²⁰ As early as

¹⁹ James Madison, Vices of the Political System of the United States, in James Madison: Writings 69, 70–71 (Jack N. Rakove ed., 1999) [hereinafter Madison, Writings].

²⁰ See, e.g., Gordon S. Wood, *The Creation of the American Republic 1776–1787*, at 405–06 (1969); see also Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 23–25 (2009) (describing disgust with various state laws prior to the Constitutional Convention); Cathy D. Matson & Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* 51 (1990) (“The common element in all these warnings was a pervasive suspicion about the potential misuse of state power, by old and new states alike. The reformers’ controversial conclusion was that the

1780, James Iredell called the laws of North Carolina, his home state, “the vilest collection of trash ever formed by a legislative body.”²¹ William Plumer—a prominent New Hampshire politician—was even more direct, writing, “Our liberties, our rights & property have become the sport of ignorant unprincipled State legislators!”²² A slew of specific state enactments, from various forms of debtor-relief legislation to paper-money laws, were roundly condemned for violating the spirit of the Union and for inhibiting the general welfare of the population.²³

Among the categories of laws Madison singled out for condemnation in the “Vices” were those involving “Trespases of the States on the rights of each other.”²⁴ In this category he placed state laws favoring home-state vessels, as well as paper-money and debtor-relief legislation.²⁵ Madison decried with special vigor “[t]he practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations.”²⁶ This last group of laws, Madison wrote, were “certainly adverse to the spirit of the Union, and tend[ed] to beget retaliating regulations, not less expensive & vexatious in themselves, than they [were] destructive of the general harmony.”²⁷ Writing in *The Federalist*, after the Constitutional Convention had completed its work, Madison’s collaborator, Alexander Hamilton, struck a similar chord. In Federalist 22, Hamilton wrote that:

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by

broad powers of the separate state republics under the Articles of Confederation constituted the chief threat to republican government in America.”); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 29–30 (1996) (detailing perceived infirmities of state politics under the Articles of Confederation).

²¹ Wood, *supra* note 20, at 406.

²² Friedman, *supra* note 20, at 24.

²³ Wood, *supra* note 20, at 404–06; see also Friedman, *supra* note 20, at 24; Rakove, *supra* note 20, at 29–30.

²⁴ Madison, *Writings*, *supra* note 19, at 70.

²⁵ *Id.*

²⁶ *Id.* at 71.

²⁷ *Id.*

a national control, would be multiplied and extended, till they become not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.²⁸

Madison and Hamilton were hardly alone in harboring such fears. An anonymous writer in 1785 proclaimed that if “each state is laying duties on the trade of its neighbours, our commerce cannot be reduced to a system, and our profits must be uncertain.”²⁹ Writing in the *Pennsylvania Gazette*, “Pro Bono Republicae” dug to the core of the matter, calling it “a very *ridiculous idea*, that every State should enjoy a power of regulating its trade, for every State has a *separate* interest to pursue, and thus different regulations will always clash.”³⁰ These critiques had particular force at a time when, as discussed below, the nation was facing economic hardship created by its trade difficulties.³¹

B. Were the Framers Wrong? (Does it Matter?)

Twentieth-century historians have debated whether men such as Hamilton and Madison were mistaken regarding their characterization of the Confederation period or, worse, were engaged in a deliberate exaggeration of the truth in order to perpetuate a nationalizing agenda.³² The Framers plainly had a basis for their fears,

²⁸ The Federalist No. 22, at 104 (Alexander Hamilton) (Buccaneer Books 1992).

²⁹ Matson & Onuf, *supra* note 20, at 77. The nation’s newspapers were replete with references to the nation’s commercial woes, including discord among the states. See *id.* at 76–77 (collecting examples).

³⁰ *Id.* at 76–77.

³¹ See *infra* notes 33–37 and accompanying text.

³² Reacting to the work of John Fiske, whom Charles Beard claimed wrote “without fear and without research,” Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781–1789*, at xii (1950), some contemporary historians have sought to minimize the extent of interstate conflict during the Confederation era. Fiske, writing in the 1880s, had painted a picture of the pre-Convention period as one of increasing state jealousies, culminating in a near dissolution of the Union. See John Fiske, *The Critical Period in American History: 1783–1789*, at 67 (Boston & New York, Houghton, Mifflin & Company 1888) (discussing the possibility of the Union disbanding). His characterization of the so-called “critical period” was subsequently picked up by courts and constitutional commentators. See Denning, *Discrimination*, *supra* note 14, at 40–41. Beginning in the mid-1950s, however, a group of historians strongly criticized the Fiske thesis. Merrill Jensen, the most prominent such “revisionist,” characterized the pre-Convention period as one of significant in-

however, demonstrated by the turbulent (if episodic) incidents of interstate retaliation and discrimination during the 1780s. Even if these episodes did not themselves pose an immediate threat to the existence of the Union, they served as ominous symbols of what a nation lacking a strong center might become. It was this realization that led many reformers to Philadelphia.

Certain facts are not in dispute. After the end of the war for independence, trade with Britain was quickly resumed.³³ Specie fled overseas to pay for a variety of imported goods, resulting in severely depressed prices at home.³⁴ At the same time, Britain restricted American merchants' ability to trade with Britain and with its colonies in the West Indies, making it even harder for Americans to pay for imported wares.³⁵ Given Congress's lack of power under the Articles of Confederation, the nation was unable to adopt a uniform response to the British measures. (Congress tried repeatedly, and failed, to gain state support for this power.)³⁶ The result, historians agree, was a substantially weakened American economy by the mid-1780s.³⁷

terstate cooperation, including on matters of trade. See Jensen, *supra*, at 343–44 (“The story of interstate relations during the Confederation is therefore not so much one of great difficulties, as a story of sincere and successful attempts at the solution of interstate problems.”). Likewise, William Zornow attempted to demonstrate that true discrimination against out-of-state goods was exceedingly rare prior to the Convention. See Denning, *Discrimination*, *supra* note 14, at 43 n.27. Although states routinely placed imposts on goods entering their borders, these laws typically exempted from taxation those goods manufactured or produced in sister states. Thus, the threat to the Union posed by such trade barriers, according to the revisionists, can only be described as minimal. As we will argue below, both critics and supporters of the dormant Commerce Clause misunderstand the importance of this debate. Whether or not interstate discrimination actually threatened, by itself, to tear apart the Union, the Framers, buttressed by foreign experiences, undoubtedly perceived it as a serious problem requiring redress.

³³ Curtis P. Nettels, *The Emergence of a National Economy, 1775–1815*, at 46 (1962).

³⁴ *Id.*

³⁵ *Id.* at 50.

³⁶ During the 1780s, the Articles of Confederation Congress several times “recommended” to the states that it be given power to respond to British trade restrictions, including by setting uniform impost duties. But the obstinacy of Rhode Island, as well as a general distrust among the states both of the national Congress and each other, each time prevented measures from passing. See Denning, *Discrimination*, *supra* note 14, at 50–52.

³⁷ *Id.* at 60–63; see also Matson & Onuf, *supra* note 20, at 44–45 (detailing British trade restrictions and resulting harm to the American economy).

With a national response unavailing, states adopted a variety of problematic measures. Paper-money laws, so reviled by some, were a direct response to the outflow of specie to Britain and abroad.³⁸ A number of states enacted imposts on imported goods and tonnage duties on out-of-state vessels.³⁹ Discriminatory tonnage duties as well as taxes on goods entering the state in foreign vessels invariably ended up hurting not only their British targets but, in many cases, also out-of-state American merchants.⁴⁰

As Professors Cathy Matson and Peter Onuf explained, it was during this period that “growing numbers of influential Americans became convinced that the very survival of the state republics hinged on thinking and acting continentally,” that is, by adopting a uniform trade policy.⁴¹ Particularly irksome to national-minded politicians was the practice of some states of establishing duty-free ports, where foreign vessels were free to trade without paying onerous duties. Free ports were most likely to be found in states with lesser ports.⁴² These states hoped to attract a greater volume of trade at the expense of states, such as New York, with high tariffs on foreign goods. The existence of free ports substantially undercut the revenue-related value of state imposts by diverting trade away from states in which they existed and hindered the ability of the Union to effectively respond to Britain’s discriminatory practices. It was during this time that many reformers began calling for the

³⁸ Nettels, *supra* note 33, at 60–61.

³⁹ Matson & Onuf, *supra* note 20, at 70–74; Nettels, *supra* note 33, at 69–74. Aside from retaliating against British trade restrictions, imposts protected domestic manufacturers and were an important source of revenue for the money-starved states. Albert Anthony Giesecke, *American Commercial Legislation Prior to 1789*, at 126–27 (1910).

⁴⁰ Nettels, *supra* note 33, at 72; Denning, *Discrimination*, *supra* note 14, at 75.

⁴¹ Matson & Onuf, *supra* note 20, at 49; see also Nettels, *supra* note 33, at 70 (describing how merchants recognized the need for uniform, national tariffs, especially since some merchants had begun selling goods in multiple states).

⁴² See Matson & Onuf, *supra* note 20, at 72 (describing how “[t]o a large extent, state policies were determined by the presence or absence of dominant regional ports”). As Matson and Onuf explain, “[l]egislators in New Jersey and Delaware,” which did not have dominant ports at the time, “established free ports and free-floating grain prices while they simultaneously discouraged the flow of raw materials to manufacturers in states which assessed heavy taxes on ‘foreign’—or out-of-state—commodities.” *Id.* at 72–73.

national government to be given the ability to set uniform imposts and otherwise regulate foreign commerce.⁴³

The result was increasing interstate discrimination and discord. Singularly alarming for the Framers was the conflict between New York and the neighboring states of Connecticut and New Jersey beginning in 1785.⁴⁴ Reacting to the British trade restrictions, New York had placed heavy imposts on British goods arriving at her ports.⁴⁵ New Jersey and Connecticut, eager to expand their foreign trade, established duty-free ports, substantially undercutting New York's tariff policy by diverting trade toward themselves.⁴⁶ Although New York law generally exempted goods produced in sister states from its impost duties, in 1785 the New York legislature passed an act stating that all foreign goods imported from the states of Connecticut and New Jersey, as well as those from Rhode Island and Pennsylvania, were subject to the same impost duties that were normally applied to goods arriving in British ships unless it was proven that the goods did not originally arrive in a British vessel.⁴⁷ In addition, "port fees and tonnage duties were imposed on vessels from Connecticut and New Jersey."⁴⁸ Directly in response, New Jersey began taxing the New York-owned lighthouse located at Sandy Hook.⁴⁹ Connecticut merchants resolved effectively to halt trade with New York and to ban New York ships from Connecticut ports for the period of one year, beginning in 1787.⁵⁰ Though there is some dispute about how much this trade war disrupted the American economy, it clearly weighed on the minds of the nation's leaders and stood as an ominous and extremely troubling development in postwar interstate relations.⁵¹ It

⁴³ Id. at 70 ("Nationalists . . . feared that Congress's failure to regulate and promote commerce would lead to a dramatic expansion of state power that would jeopardize republican liberty in the states as well as national prosperity.").

⁴⁴ Giesecke, *supra* note 39, at 135.

⁴⁵ Id.

⁴⁶ Id. at 134 n.46.

⁴⁷ Id. at 135.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ See *infra* notes 56–63 and accompanying text (describing how disputes came up numerous times during Convention debates and ratification as an example of the ills of the confederacy).

was hardly the only instance of interstate discrimination and retaliation.⁵²

The important point, however, is this: regardless of how many state laws actually discriminated against out-of-state commerce, many people in the period, including but not limited to some of the most influential Framers, believed interstate discrimination to be an extremely serious problem meriting a profound response.⁵³ The examples of discrimination and retaliation that are beyond doubt, such as the mid-decade kerfuffle between New York and New Jersey, were salient and highly alarming to those invested in the future of the Union. As two economic historians have explained:

“Continentially-minded” nationalists became convinced that jealousies between the states with strong ports and states with weak ports, or between northern and southern states, would negate hopes for self-sufficiency both within and among the states. By erecting their own retaliatory barriers to British commerce, the American states simply perpetuated conflicts among themselves and began to resemble the petty, warring kingdoms of Europe.⁵⁴

By the middle of the decade, reformist sentiment was sufficiently high that, in January 1786, the Virginia assembly proposed a resolution calling for an interstate conference to discuss, among other things, the Union’s commercial defects.⁵⁵ The meeting at Annapolis spurred consideration among the nation’s leaders regarding the defects of the union. Prior to Annapolis, James Madison wrote to Thomas Jefferson, then Minister to France, expressing particular concern about the practice of the states issuing paper money to pay their debts. “Among the numerous ills with which this practice is pregnant,” he wrote, “is that it is producing the same warfare & retaliation among the States as were produced by State regulations

⁵² Brannon Denning has chronicled the variety of discriminatory laws in operation prior to the Convention. See Denning, *Discrimination*, supra note 14, at 60–66.

⁵³ See *id.* at 76 (“Perhaps more important is what the Framers saw as the *perceived* threat to the union posed by the legislative activity of the states.”).

⁵⁴ Matson & Onuf, supra note 20, at 74.

⁵⁵ Rakove, supra note 20, at 32.

of commerce.”⁵⁶ Tench Coxe, writing to the Virginia Commissioners assembled at Annapolis, was more explicit about the ability of discriminatory state legislation to undermine the Union. He chronicled several ways in which the discriminatory behavior of the several states could be seen as “opposed to the great principles and Spirit of the Union.”⁵⁷ This behavior included discriminatory tonnage duties, as well as tariff laws aimed at out-of-state goods.⁵⁸ It was also in this period that Madison wrote his “Vices,” including its strong condemnation of state laws that interfered with the interests of sister states and of the Union itself.⁵⁹

Various statements made at the Philadelphia Convention in 1787 further support the view that the Framers were acutely concerned with state disharmony and discrimination in matters of trade. Gouverneur Morris, for example, pronounced there was “great weight in the argument[] that the exporting States will tax the produce of their uncommercial neighbors.”⁶⁰ Roger Sherman, similarly, worried about the “oppression of the uncommercial States,” but felt that the possibility was “guarded agst. by the power to regulate trade between the States.”⁶¹ A brief colloquy, on August 28, between Madison and fellow Virginian George Mason is illustrative of the Founders’ fears. Madison had moved for an absolute prohibition on state impost duties. Mason supported the proposal, observing that “particular States might wish to encourage by impost duties certain manufactures for which they enjoyed natural advantages.”⁶² Madison seized upon this comment, stating that “[t]he encouragement of Manufacture in that mode requires duties not only on imports directly from foreign Countries, but from the other States in the Union, which would revive all the mischiefs experienced from the want of a Genl. Government over commerce.”⁶³

⁵⁶ Letter from James Madison to Thomas Jefferson (Aug. 12, 1786), in 9 *The Papers of James Madison* 95 (Robert A. Rutland et al. eds., Univ. of Chi. Press 1975) [hereinafter *Madison Papers*].

⁵⁷ Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), in 9 *Madison Papers*, supra note 56, at 125.

⁵⁸ *Id.*

⁵⁹ Madison, *Writings*, supra note 19, at 70–71.

⁶⁰ 2 *The Records of the Federal Convention of 1787*, at 360 (Max Farrand ed., rev. ed. 1937) [hereinafter *Records*].

⁶¹ *Id.* at 308.

⁶² *Id.* at 441.

⁶³ *Id.*

Madison's proposal ultimately failed, but its discussion demonstrates the extent to which the Framers were willing to credit arguments based on the tendency of the states to engage in destructive commercial relations with one another.

At the state ratifying conventions, as well, attention was drawn to "oppressive" state regulations of commerce. Thomas Dawes explained to his fellow delegates at the Massachusetts convention:

As to *commerce*, it is well known that the different states now pursue different systems of duties in regard to each other. By this and for want of general laws of prohibition through the union, we have not secured even our own domestic traffic, that passes from state to state. This is contrary to the policy of every nation on earth.⁶⁴

Because of this, Dawes concluded, the states "are independent of each other, but we are slaves to Europe."⁶⁵ This concern over protecting American interests in Europe, and coming out from under the thumb of the British trade restrictions, animated many of the Founding-era statements on the issue of commerce. Indeed, the domestic aspect of the Commerce Clause was considered of markedly less importance than its foreign counterpart, which was viewed as necessary to securing American trade interests abroad.⁶⁶

Madison and Randolph, in their state conventions, sounded similar alarm over retaliatory state legislation. Speaking of the states of Maryland and Virginia, Randolph inquired rhetorically, "Is it not known to gentlemen that the states have been making reprisals on each other . . . ? Can we not see, from this circumstance, the jealousy, rivalry, and hatred that would subsist between them, in case this state was out of the Union?"⁶⁷ Madison, likewise, recounted the events which had transpired between New York and New Jersey regarding the former's discriminatory duties and

⁶⁴ 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 80–81 (Jonathan Elliot ed., Washington 1836) [hereinafter Elliot Debates].

⁶⁵ Id. at 81.

⁶⁶ For an exhaustive treatment of the international context of the American Constitution, see David Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010).

⁶⁷ 3 Elliot Debates, *supra* note 64, at 82.

warned of the “interfering regulations of different states,” regulations against which only a more robust union could defend.⁶⁸

The need to curtail the problems surrounding commerce was one of the main areas of apparent agreement between the proponents of the Constitution and its Anti-Federalist opponents. As Professor Saul Cornell has noted, rare was the prominent Anti-Federalist who was against any strengthening of the federal government as against the states.⁶⁹ In particular, the need for the commerce power was nearly universally acknowledged. Sam Adams, then an opponent of the Constitution, rose at the Massachusetts ratifying convention and defended its grant of commercial power to the federal government. “For want of this power in our national head,” he wrote, “our friends are grieved, and our enemies insult us.”⁷⁰ The anonymous “Federal Farmer,” likewise, wrote that the “powers of the union ought to be extended to commerce, the coin, and national objects.”⁷¹ Of course, the Anti-Federalists objected to

⁶⁸ Id. at 260. We have already seen, in part, that the Federalist Papers contain similar warnings regarding the potential for commercial warfare among the states. Similarly, in Federalist No. 11, Hamilton worried that, absent a more unified government, commercial intercourse among the states “would be fettered, interrupted and narrowed by a multiplicity of causes,” including, presumably, state restrictions on interstate commerce. The Federalist No. 11, *supra* note 28, at 54 (Alexander Hamilton). These fetters, Hamilton wrote, threatened American commercial prosperity and invited foreign machinations, as other countries sought to play the states against one another. Writing of the power to regulate domestic commerce, Madison noted in Federalist No. 42 that

[a] very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the markets of the latter, and the consumers of the former.

The Federalist No. 42, *supra* note 28, at 214 (James Madison). This practice, Madison concluded, “would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.” Id.

⁶⁹ See Saul Cornell, *Anti-Federalism and the Dissenting Tradition in America, 1788–1828*, at 63–64 (1999).

⁷⁰ 2 Elliot Debates, *supra* note 64, at 136.

⁷¹ Letters from the Federal Farmer No. 6 (Dec. 25, 1787), *reprinted in* Richard Henry Lee, *An Additional Number of Letters from the Federal Farmer to the Republican* 50 (Quadrangle Books, Inc. 1962) (1788). Particular support among Anti-Federalists seems to have surrounded the grant of power as a method for dealing with foreign trade restrictions, a concern that was tightly connected to the domestic aspect of the clause. See *The Address and Reasons of Dissent of the Minority of the Con-*

a great many things in the new Constitution, but nary a peep was heard against the view that the control over commerce in its foreign and interstate aspects should be centralized.⁷²

C. A Constitution for the Future

There is a final, critical point: the Framers' concerns regarding the future of the Union were anticipatory.⁷³ The Framers were not only practical politicians dealing with immediate problems; they were also political thinkers and students of history. They took the existing examples of retaliation among the states not only as troubling events in themselves, but also as confirming what reason would predict: that the existence of several states, without a sufficient coordinating mechanism, would tend toward disunion as each pursued its own self-interest. Interested in preserving the Union into perpetuity, the Framers saw the existing state of affairs as unsustainable.

Thus, Hamilton pointed to "examples" of interstate discrimination that might be "multiplied and extended" in the future if the states did not unite in a more enduring union.⁷⁴ Madison, in Federalist No. 42, spoke of state impost duties, writing that "[w]e may be assured by past experience, that such a practice would be introduced by future contrivances; and *both by that and a common knowledge of human affairs*, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility."⁷⁵ Madison's thoughts in Federalist No. 42

vention of Pennsylvania to Their Constituents (Dec. 12, 1787), in 2 The Documentary History of the Ratification of the Constitution 618, 619 (Merrill Jensen et al. eds., 1976) [hereinafter Documentary History] (describing the nation as "suffering from the restrictions of foreign nations, who had shackled our commerce"); Centinel VI, Pa. Packet (Dec. 25, 1787), reprinted in 15 The Documentary History of the Ratification of the Constitution 98, 99 (John P. Kaminski et al. eds., 1984) (describing "considerable benefit . . . [of] strengthening the hands of Congress, so as to . . . counteract the adverse restrictions of other nations").

⁷² See Albert S. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 443-44 (1941) ("Among the first things that strikes [sic] one on going through the mass of materials dealing with the formation and adoption of the constitution is the nearly universal agreement that the federal government should be given the power of regulating commerce.").

⁷³ Collins, supra note 14, at 58.

⁷⁴ The Federalist No. 22, supra note 28, at 104 (Alexander Hamilton).

⁷⁵ The Federalist No. 42, supra note 28, at 214 (James Madison) (emphasis added).

2011] *Legitimacy of Dormant Commerce Clause* 1895

were inevitably informed by his earlier discussion, in *Notes on Ancient and Modern Confederacies*, of the recurring problems felt by nations lacking a strong center.⁷⁶

Indeed, writing in the Federalist Papers, both Madison and Hamilton buttressed their argument with reference to the experience of foreign confederations. “The necessity of a superintending authority over the reciprocal trade of confederated States,” Madison wrote, “has been illustrated by other examples as well as our own.”⁷⁷ Pointing to such unions as existed in Switzerland, Germany, and the Netherlands, Madison observed that even those loose confederations prohibited discriminatory trade practices among their member states.⁷⁸ Although the German union formally prohibited the levying of imposts by its constituent units, Hamilton observed that in practice

[t]he commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandizes passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.⁷⁹

From this, Hamilton drew a somewhat equivocal lesson for the American states, writing:

Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.⁸⁰

James Madison, nearing the end of his life, wrote that the lack of a national power over commerce during the Confederation period had “led to an exercise of this power separately, by the States, wch

⁷⁶ James Madison, *Notes of Ancient and Modern Confederacies*, in 1 *Letters and Other Writings of James Madison* 293 (New York, R. Worthington 1884).

⁷⁷ The Federalist No. 42, *supra* note 28, at 214 (James Madison).

⁷⁸ *Id.*

⁷⁹ The Federalist No. 22, *supra* note 28, at 104 (Alexander Hamilton) (internal quotation marks omitted).

⁸⁰ *Id.*

not only proved abortive, but engendered rival, conflicting and angry regulations.”⁸¹ Madison concluded, after detailing several other infirmities under the Articles government: “Such were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter[,] the remedy that was provided.”⁸²

Against the backdrop of these concerns, the Constitution was seen as a “peace pact” between different states and regional factions whose common ties had begun to unravel during the postwar period.⁸³ The increasing factionalization of the former colonies threatened American interests abroad and had prevented the fledgling country from projecting a united front when dealing with European nations, a problem greatly compounded by the national government’s inability to enforce its treaty obligations against the states.⁸⁴ As Madison wrote in *Federalist No. 14*, the new federal Constitution was to serve

as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the Old World, and as the proper antidote for the disease of faction, which have proved fatal to other popular governments, and of which alarming symptoms have been betrayed by our own.⁸⁵

II. THE REJECTION OF THE “NEGATIVE” AND THE ADOPTION OF JUDICIAL REVIEW

The delegates in Philadelphia were plainly alarmed about state laws threatening the commercial well-being of the Union. But what was to be done about it?

⁸¹ James Madison, *Preface to Debate in the Convention of 1787*, in 3 *Records*, supra note 60, at 547.

⁸² *Id.* at 549.

⁸³ See David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* 7 (2003).

⁸⁴ For an exhaustive treatment of the international context of the American Constitution, see Golove & Hulsebosch, supra note 66.

⁸⁵ *The Federalist No. 14*, supra note 28, at 62 (James Madison).

Dormant Commerce Clause skeptics have a ready answer: Congress.⁸⁶ The Skeptics are critical of judicial intervention in an area they believe is committed to congressional supervision. As Justice Thomas explained, concurring in the Supreme Court's recent decision in *United Haulers Ass'n v. Washington Department of Revenue*: "Expanding on the interstate-commerce powers explicitly conferred on Congress, this Court has interpreted the Commerce Clause as a tool for courts to strike down state laws that it believes inhibit interstate commerce. But there is no basis in the Constitution for that interpretation."⁸⁷

Although the constitutional text does plainly grant to Congress the power "to regulate Commerce . . . among the several States,"⁸⁸ Justice Thomas is wrong when he asserts "there is no basis in the Constitution" for the "courts to strike down state laws that [the Supreme Court] believes inhibit interstate commerce."⁸⁹ The question posed in dormant Commerce Clause cases is whether, in the absence of congressional action, state laws that interfere with the free flow of commerce nonetheless stand. The next Part of this Article advances the argument that courts were (and are) empowered by the Constitution to strike down state laws that interfere with interstate commerce. This Part addresses a broader point—one of enormous centrality yet typically overlooked—the Framers' decision to use judicial power rather than congressional action to invalidate impermissible state legislation.

When faced with the choice, the delegates to the Philadelphia Convention specifically opted to have the courts, rather than Congress, police state measures interfering with national law. To be sure, the issue debated by the Philadelphia delegates transcended the issue of free trade; it was the broader question of the fidelity of

⁸⁶ See *Tyler Pipe Indus. v. Wash. Dep't of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) ("On its face, [the Clause] is a charter for Congress, not the courts, to ensure 'an area of trade free from interference by the States.'" (quoting *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 381, 328 (1977))); see also Petragani, *supra* note 6, at 1245 ("By exercising the dormant commerce power, the Court is . . . encroaching on the authority of Congress under the Commerce Clause . . ."); Redish & Nugent, *supra* note 6, at 586–87 ("[T]he [F]ramers were clearly aware of the dangers of interstate economic friction, and chose to deal with the problem *solely* by the vesting of a power in Congress . . .").

⁸⁷ 550 U.S. 330, 349 (2007) (Thomas, J., concurring).

⁸⁸ U.S. Const. art. I, § 8, cl. 3.

⁸⁹ *United Haulers Ass'n*, 550 U.S. at 349 (Thomas, J., concurring).

all state laws to national mandates (including the Constitution). But given the choice, the delegates rejected the notion that it was the business of Congress to patrol state laws. Rather, when those laws were challenged as inconsistent with national law, the judiciary was chosen as the actor to address those challenges.

The Convention considered three means of asserting control over state laws: the new national Congress could do so, before or after those laws went into effect, or the courts could do the job. After much debate, they opted for the last. As Madison put the matter many years later in a letter to Nicholas P. Trist:

The obvious necessity of a controul on the laws of the States, so far as they might violate the Constn. & laws of the U.S. left no option but as to the mode. The modes presenting themselves, were 1. a Veto on the passage of State laws[,] 2. a Congressional repeal of them, 3[,] a Judicial annulment of them. The first tho extensively favord, at the outset, was found on discussion, liable to insuperable objections The second was not free from such as gave a preference to the *third* as now provided by the Constitution.⁹⁰

As this letter indicates, the delegates to the Philadelphia Convention focused from the outset on the problem of how to ensure states did not adopt laws that were inconsistent with those of the national government.⁹¹ We have already seen how Madison enumerated specific examples of the problem such as “Encroachments by the States on the federal authority” and “Trespases of the States on the rights of each other.”⁹² James Wilson’s indictment was equally strong: “No sooner were the State Govts. formed than their jealousy & ambition began to display themselves. Each endeav-

⁹⁰ Letter from James Madison to N.P. Trist (Dec. 1831), *in* 3 Records, *supra* note 60, at 516.

⁹¹ See Rakove, *supra* note 20, at 32–34 (describing events leading up to the Convention and stating that “[w]hile the idea that the Union might devolve into regional confederacies still seemed incredible, events since 1783 called into question the very idea of national interest”).

⁹² Madison, Writings, *supra* note 19, at 69–70. “It is no longer doubted,” Madison concluded, “that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government, ought not be calculated on.” *Id.* at 72. Madison’s thinking in this period is described at length in Larry D. Kramer, *Madison’s Audience*, 112 Harv. L. Rev. 611, 623–36 (1999).

oured to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands.”⁹³ In an 1833 letter to John Tyler, Madison summed up the views of those present with perhaps only slight exaggeration: “The necessity of some constitutional and effective provision guarding the Constn. & laws of the Union, agst. violations of them by the laws of the States, was felt and taken for granted by all from the commencement, to the conclusion of the work performed by the Convention.”⁹⁴

The solution offered in the Virginia Plan was to permit Congress “to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.”⁹⁵ The idea for the negative was Madison’s—or rather he adopted it from the practice of Britain’s Privy Council in reviewing colonial enactments—and he was its fiercest proponent.⁹⁶ As he explained to the delegates, the “propensity of the States to pursue their particular interests in opposition to the general interest . . . will continue to disturb the system, unless effectually controuled. Nothing short of a negative on their laws will controul it.”⁹⁷

Although the negative had early support, the Convention ultimately rejected it for three reasons. First, it was believed to be unwarranted and thus too harsh a treatment of the state legislatures.⁹⁸ When Madison proposed the negative to Jefferson in a letter written prior to the Convention, Jefferson responded from Paris that he disliked the idea: “It fails in an essential character, that the hole and the patch should be commensurate; but this proposes to mend a small hole by covering the whole garment,” he replied, pointing out that “[n]ot more than 1 out of 100 State acts concern the Confederacy.”⁹⁹ Second, the delegates feared the measure would sink

⁹³ 1 Records, supra note 60, at 166 (Madison).

⁹⁴ Letter from James Madison to John Tyler (1833), in 3 Records, supra note 60, at 527.

⁹⁵ 1 Records, supra note 60, at 21.

⁹⁶ See Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 *Law & Hist. Rev.* 451, 464–72 (2010) (discussing Madison’s support). John Dickinson also expressed early support for the negative. See 1 Records, supra note 60, at 167.

⁹⁷ 2 Records, supra note 60, at 27.

⁹⁸ Kramer, supra note 92, at 651–52.

⁹⁹ Letter from Thomas Jefferson to James Madison (June 20, 1787), quoted in Charles Warren, *The Making of the Constitution* 168 (1929).

1900

Virginia Law Review

[Vol. 97:1877]

any hope for the adoption of the draft Constitution. As Gouverneur Morris, ordinarily Madison's staunch ally, explained at the Convention, he was "more & more opposed to the negative. The proposal of it would disgust all the States."¹⁰⁰

Most important for present purposes, the delegates simply found the idea impractical. How could Congress keep up? Virginia's George Mason asked: "Are all laws whatever to be brought up? Is no road nor bridge to be established without the Sanction of the General Legislature? Is this to sit constantly in order to receive & revise the State Laws?"¹⁰¹ New York's John Lansing argued that "there will on the most moderate calculation, be as many Acts sent up from the States as there are days in the year."¹⁰² Years later, Madison, too, conceded the difficulties, noting that the negative was "justly abandoned, as, apart from other objections, it was not practicable among so many States, increasing in number, and enacting, each of them, so many laws."¹⁰³

The alternative to a congressional negative was to rely on the judiciary to strike down laws inconsistent with federal mandates. In his letter to Madison sent from Paris, Jefferson suggested what was to become the Convention's solution: "Would not an appeal from the State Judicatures to a Federal Court, in all cases where the Act of Confederation controuled the question, be as effectual a remedy, and exactly commensurate to the defect?"¹⁰⁴ Those at the Convention said the same. Connecticut's Roger Sherman argued that the negative was unnecessary because "the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived."¹⁰⁵ Gouverneur Morris, while dismissing the negative, assured listeners that "[a] law that ought to be negatived will be set

¹⁰⁰ 2 Records, *supra* note 60, at 28; see also *id.* at 27–28 (chronicling various objections to the national negative); Kramer, *supra* note 92, at 651–52 (discussing opposition to negative).

¹⁰¹ 2 Records, *supra* note 60, at 390. Bedford raised this point earlier in the Convention. 1 Records, *supra* note 60, at 168 ("Is the National Legislature too to sit continually in order to revise the laws of the States?").

¹⁰² 1 Records, *supra* note 60, at 337.

¹⁰³ Madison, *supra* note 81, at 549.

¹⁰⁴ Letter from Thomas Jefferson to James Madison, *supra* note 99, at 168–69.

¹⁰⁵ 2 Records, *supra* note 60, at 27.

aside in the Judiciary department.”¹⁰⁶ Indeed, in his notes on a plan for ameliorating the concerns of the small states, Edmund Randolph relied on the negative but also suggested that “any State may appeal to the national Judiciary against a negative; and that such negative if adjudged to be contrary to the power granted by the articles of the Union, shall be void.”¹⁰⁷

The Convention, therefore, settled on judicial review. The Framers’ decision is reflected in the Supremacy Clause in Article VI of the Constitution.¹⁰⁸ Luther Martin, who had helped draft the New Jersey Plan, rose immediately after the failure of the negative to propose adoption of what became the Supremacy Clause.¹⁰⁹ Although the clause ultimately went through important modification, from that moment on judicial review was the primary safeguard against states wandering from the requirements of federal law.¹¹⁰

Underscoring the reliance on judicial review, Madison proposed on the very next day of the Convention what ultimately became the second half of what later generations would call “the key-stone of the arch”: review of state court decisions by the Supreme Court.¹¹¹ Madison was never happy about the failure of the negative, but he immediately understood that the success of the judicial solution required not just a mandate to state courts but also the enlistment of a federal judiciary. Thus, on July 18 he proposed “[t]hat the juris-

¹⁰⁶ Id. at 28.

¹⁰⁷ Edmund Randolph’s Suggestion for Conciliating the Small States, *reprinted in* 3 Records, *supra* note 60, at 56.

¹⁰⁸ U.S. Const. art. VI, cl. 2.

¹⁰⁹ William M. Meigs, *The Relation of the Judiciary to the Constitution* 137–38 (1919) (explaining how Luther Martin introduced the early version of the Supremacy Clause following defeat of the national negative on July 17).

¹¹⁰ This story has been told in many places. See, e.g., Larry Kramer, *The People Themselves* 74–78 (2004); Meigs, *supra* note 109, at 137–57; Rakove, *supra* note 20, at 171–76; Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *Geo. Wash. L. Rev.* 91, 105–09 (2003); Kramer, *supra* note 92, at 652–53; James S. Leibman & William F. Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 *Colum. L. Rev.* 696, 728–46 (1998); Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 *U. Chi. L. Rev.* 887, 945–49 (2003); Jack Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *Stan. L. Rev.* 1031, 1045–48 (1997).

¹¹¹ See Daniel Webster, *Address on the Senate Floor* (Jan. 26–27, 1830), *in* *The Webster-Hayne Debate on the Nature of the Union* 137 (Herman Belz ed., 2000) (“These two provisions, sir, cover the whole ground. They are, in truth, the key-stone of the arch. With these, it is a Constitution; without them, it is a Confederacy.”).

diction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.”¹¹² Although the proposal obtained unanimous consent when first introduced, subsequently a fight arose over just what the national judiciary would look like.¹¹³ Some delegates wanted trial and appellate courts to ensure all the business of the national government could take place in favorable tribunals; others insisted that cases begin in the first instance in the state courts. The single point on which no one disagreed, however, was that there should be a Supreme Court at the top of the pyramid. The Convention ultimately resolved the disagreement by creating a Supreme Court and left it to Congress to “ordain and establish” such lower federal courts as it saw fit.¹¹⁴

The Philadelphia delegates thus rejected the solution offered by dormant Commerce Clause skeptics, congressional *ex post* invalidation of a state law, in favor of judicial “repeal.” In later-life correspondence regarding the Convention’s means of supervising the states, Madison wrote: “Of the corrective modes, a repeal by the National Legislature was pregnant with inconveniences rendering it inadmissible.”¹¹⁵ Gouverneur Morris’s full statement against the negative made clear that legislative action would follow judicial, if necessary: “A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law.”¹¹⁶ Indeed, during the ratification debates, judicial action pursuant to the supremacy mandate was typically referred to as the “repeal” of state law.¹¹⁷

We see, then, that when it came to deciding which branch was to be given primary responsibility for ensuring state fidelity to federal

¹¹² 2 Records, *supra* note 60, at 39; see also Meigs, *supra* note 109, at 138 (explaining how the “proposal was unanimously adopted, apparently without debate”).

¹¹³ 2 Records, *supra* note 60, at 39.

¹¹⁴ On the debates over the shape of the state and national judiciary and ultimate compromise, see Friedman, *supra* note 20, 32–37; Leibman & Ryan, *supra* note 110, at 731–33; see also Richard H. Fallon, Jr., *Ideologies of Federal Courts Law*, 74 *Va. L. Rev.* 1141, 1143–45 (1988) (describing differences between “federalist” and “nationalist” models of judicial federalism and arguing that each has roots in early constitutional debates).

¹¹⁵ Letter from James Madison to John Tyler (1833), *in* 3 Records, *supra* note 60, at 527.

¹¹⁶ 2 Records, *supra* note 60, at 28.

¹¹⁷ See Caleb Nelson, *Preemption*, 86 *Va. L. Rev.* 225, 252–54 (2000).

law, the Convention opted ultimately for the judiciary. It is possible that the Convention had a different answer for state laws that, as Part I explained, were thought to threaten the very integrity of the Union. But in light of the point made in this Part, it would seem the Skeptics have some burden to establish why courts were preferred in this one critical instance but not in others.

III. THE JUSTICIABLE COMMERCE CLAUSE

The Skeptics make it appear as though the dormant Commerce Clause jurisprudence is bereft of any support. They argue that even if the Framers intended judicial review as the primary means to ensure states complied with federal mandates, there still must be some aspect of federal law with which a state law conflicts before the state law can be struck down by the courts.¹¹⁸ In their portrayal, the text does not support the dormant commerce jurisprudence, it is wrong as a matter of framing intentions, subsequent history disproves it, and policy speaks against it.

The Skeptics concede, however, that if “the grant of power to Congress to regulate interstate commerce were exclusive,” then the Court would have authority to strike down state acts that constituted regulations of interstate “commerce.”¹¹⁹ But they deny exclusivity as a textual matter and point to history to deny its possibility.¹²⁰ Further, they read precedent as precluding exclusivity: “It

¹¹⁸ See generally Laurence H. Tribe, *American Constitutional Law* § 6-28, at 1172–73 (3d ed. 2000) (describing basic framework of preempting state law).

¹¹⁹ *Tyler Pipe Indus. v. Wash. Dep’t of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part); see also Redish & Nugent, *supra* note 6, at 584 (conceding that, if exclusive, the “textual grant of power to Congress would simultaneously deprive the states of *any* power to regulate interstate commerce”). Indeed, as Judge Posner wrote in connection to the dormant Commerce Clause, “[i]f emphasis is placed on the first word—‘Congress shall have Power’—the clause implies that the states shall not have the power to regulate commerce.” *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665 (7th Cir. 2010).

¹²⁰ See *Tyler Pipe*, 483 U.S. at 261 (Scalia, J., concurring in part and dissenting in part) (asserting that “both the States and Congress assumed from the date of ratification that at least some state laws regulating commerce were valid”); Currie, *supra* note 6, at 173 (referring to the “great plausibility” in early arguments against reading the Commerce Clause as exclusive); Frankfurter, *supra* note 6, at 13 (“The conception that the mere grant of the commerce power to Congress dislodged state power finds no expression [in any of the conventions.]”); Redish & Nugent, *supra* note 6, at 588 (“[T]he view that the [F]ramers assumed the commerce power to be exclusive is undermined by the explicit prohibitions of [A]rticle I, [S]ection 10.”).

was seriously questioned even in early cases. And, in any event, the Court has long since ‘repudiated’ the notion that the Commerce Clause operates as an exclusive grant of power to Congress, and thereby forecloses state action respecting interstate commerce.”¹²¹

But what if the text and original conception of the Commerce Clause supported the view that the Clause granted an exclusive power to Congress? Section III.A makes that argument. Section III.B then explains why the Skeptics are misguided in their insistence that a broad and exclusive commerce power is untenable today.¹²² Their point is that if the commerce power were truly exclusive, then the domain of state authority now would be untenably narrow given how vast that power has become. As Section III.B makes clear, however, exclusivity always implied a role for state regulation. Although Congress had the exclusive “commerce” power, the states retained their traditional “police” powers. Of course, this understanding required drawing lines between what was an exercise of the “police” power and what was instead an impermissible regulation of “commerce,” a task the judges understandably found difficult. This is precisely why, as Section III.B details, the dormant Commerce Clause test gradually morphed into today’s doctrine. Also, as the Skeptics fail to understand, it has in fact morphed into a form that is much more respectful of state authority, and involves much less potential for judicial intervention, than the full exclusivity view would have called for.

Section III.C shows that the Skeptics have asked (and answered) the wrong question. They ask whether the Commerce Clause was intended to be exclusive. Blind to historical understandings, they cannot see how it could have been. The right question is not whether the Commerce Clause was ever understood as being fully exclusive but rather whether the power to regulate interstate commerce was ever understood as fully concurrent: could states regulate as they wished, subject only to congressional override?

Section III.C explains that it is the full concurrency view of the commerce power that is untenable, or at least that is the judgment

¹²¹ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 613 (1997) (Thomas, J., dissenting) (citation omitted).

¹²² *Id.* at 614 (Thomas, J., dissenting); *Tyler Pipe*, 483 U.S. at 261 (Scalia, J., concurring in part and dissenting in part) (“The exclusivity rationale is infinitely less attractive today than it was in 1847.”).

2011] *Legitimacy of Dormant Commerce Clause* 1905

of history. The Court has never so held, and rare are the judges who would let the states regulate as they wished unless and until Congress spoke otherwise. Rather, since the Founding, judges have engaged in the unavoidable exercise of drawing lines regarding which state exercises of power were consistent with the Commerce Clause and which were not. It is the skepticism about the dormant commerce power, not the power itself, that is the newer phenomenon.

A. The Argument for Commerce Clause Exclusivity

In 1824, the Supreme Court decided *Gibbons v. Ogden*, its first extended discussion of the dormant commerce power, and one that examined the question in terms of exclusivity.¹²³ Ultimately, John Marshall's opinion for the Court did not resolve the issue of whether individual states had the power to regulate commerce "among the several States," because he concluded there was a congressional statute that preempted New York's conveyance of a steamboat monopoly to Aaron Ogden, making resolution of the broader question unnecessary.¹²⁴ In dicta, however, he strongly implied that the commerce power was in fact exclusive.¹²⁵ And, in a separate opinion concurring in the judgment, Justice Johnson—who had learned his lesson about the possibilities of states disrupting commerce from his encounter with South Carolina's Negro Seamen Act—went further, explicitly holding that the grant of power to the federal government had disabled the states from acting over interstate commerce.¹²⁶

This Section makes the case that, as a matter of framing intentions, the *Gibbons* dictum was correct: the commerce power was meant to be exclusive. Given that today "the exclusivity rationale has moved from untenable to absurd," one must read with patient

¹²³ 22 U.S. (9 Wheat.) 1 (1824).

¹²⁴ *Id.* at 200 ("The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?").

¹²⁵ *Id.* at 197–210; see also Williams, *Gibbons*, *supra* note 14, at 1401–03 (proposing strategic theory for why Marshall did not find the Clause exclusive).

¹²⁶ *Gibbons*, 22 U.S. (9 Wheat.) at 227. One year earlier while riding circuit, Johnson had ruled that South Carolina's Negro Seamen Act, authorizing the detention of any free "person of colour" onboard a vessel for the duration of the ship's time in the harbor, violated the Commerce Clause. See *Elkison v. Deliesseline*, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366).

eyes, suspending judgment until the end of the entire Part.¹²⁷ Our world is not the world of the Founding, and what may seem “absurd” to us today may not have seemed so back then. First we have to try to understand what the Framers thought about congressional and state power. Only then can we make sense of that understanding in our own world.

There is in fact ample basis for believing that the Framers intended not just the commerce power, but all of Congress’s powers, to be exclusive. Several of the delegates who traveled to the Convention, including Hamilton, envisioned a complete elimination of the states in the new federal sovereign.¹²⁸ Although this vision never was close to becoming reality, the discussion at the Convention quickly turned to the necessity for national power in areas in which the individual states were incompetent.¹²⁹ Not surprisingly, this discussion often included a belief that the powers granted to the new national government were to be denied to the states. James Wilson, himself a prominent legal scholar and later Justice, was a leading proponent of the view that powers granted to the federal government were necessarily taken from the states. As he argued during the Convention debates: “The natl. Govt. is one & yt. of the states another—Commerce, War, Peace, Treaties, &c are peculiar to the former—certain inferior and local Qualities are the province of the Latter—there is a line of separation.”¹³⁰ Delegates more opposed to national consolidation spoke of their fears that the grant of power to the national government was “taking away the powers of the States.”¹³¹ Numerous incidental statements by other Framers concur in this view.¹³² These remarks, which describe

¹²⁷ *Camps Newfound/Owatonna*, 520 U.S. at 614.

¹²⁸ Abel, *supra* note 72, at 481–82.

¹²⁹ *Id.* at 438.

¹³⁰ 1 Records, *supra* note 60, at 416; see also Letter from Sherman and Ellsworth to the Governor of Connecticut (Sept. 26, 1787), *in* 3 Records, *supra* note 60, at 99 (“Some additional powers are vested in congress, which was a principal object that the states had in view in appointing the convention. Those powers extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty *in all other matters*.” (emphasis added)).

¹³¹ 1 Records, *supra* note 60, at 53. John Lansing, who never signed the Constitution, likewise thought the Randolph Plan “absorbs all power except what may be exercised in the little local matters of the states.” *Id.* at 249.

¹³² See Abel, *supra* note 72, at 487–88 (collecting examples). As Abel wrote, the significance of these statements “lies in the uniformity of their tendency, rather than in

the states as being “restrained” and their powers “absorbed,” “given up,” and “taken” by the Constitution, evince a consistent expectation among the Framers that the grant of authority to the federal government included a simultaneous denial to the states.¹³³

Regarding the powers granted to the new federal government, the Virginia Plan, which largely set the terms of debate at the Convention, expressly granted to Congress all those powers previously granted to the national legislature by the Articles of Confederation—powers which the Articles explicitly made exclusive.¹³⁴ One can argue that because the Constitution contains no similar exclusivity language, this weighs against the view that the powers granted were to be exclusive. But Albert Abel, author of a classic article on the commerce power in the Convention, concluded that it is “more probable” that, by “specifically directing the continuation” of the Confederation powers, the Framers intended to make the new powers granted similarly exclusive.¹³⁵ The primary alternative to the Virginia Plan, the Pinckney plan, made congressional powers exclusive.¹³⁶ It is difficult to imagine that Madison, the primary drafter of the Virginia Plan, intended to do less.

The notion of complete exclusivity finds strong support in the resolution that led to the enumeration of Congress’s Article I, Section 8 powers. The Committee of the Whole of the Convention did not draft the Article I, Section 8 enumeration; that task was left to the Committee of Detail, which worked from a far more general resolution of the Convention. That resolution, which received the support of the Convention on any number of occasions, provided that the legislative power of Congress shall extend to “all cases to

the intrinsic strength of any single expression. . . . Surrender, limitation, reduction of state powers[—]that is the common suggestion in all these snatches of language unguardedly employed without deliberate purpose of stating an argument.” *Id.* at 488.

¹³³ *Id.* at 487–88 (quoting delegates). Roger Sherman, for example, phrased the dispute over Congress’s power to be about defining the line between the powers of the national government and those “to be left with the states.” 2 Records, *supra* note 60, at 25.

¹³⁴ Articles of Confederation of 1781, art. IX, para. 1 (providing that Congress “shall have the sole and exclusive right and power” over subjects thereafter enumerated); Rakove, *supra* note 20, at 59 (explaining that the Virginia Plan set the tone); 1 Records, *supra* note 60, at 21 (“[T]he National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation . . .”).

¹³⁵ Abel, *supra* note 72, at 484–85.

¹³⁶ *Id.* at 492.

which the separate States are incompetent[] or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”¹³⁷ Scholars generally concur that, given the absence of subsequent debate, the specific list drafted by the Committee of Detail was but a specification of those powers thought to fall into those areas described by the Virginia Plan.¹³⁸ The language actually adopted by the Convention, speaking of states being “incompetent” or “interrupt[ing]” the “harmony of the United States,” is strongly suggestive of exclusivity.

Whatever the case with the other enumerated powers, though, there is particularly good reason to believe the Framers thought the commerce power exclusive. What discussion there was at the Convention of the domestic commerce power—and it was quite limited—supports exclusivity. Virtually all of it dealt with trade and in particular with the ability of the national government to prevent discriminatory state laws, such as those surveyed in Part I, that posed a continuing threat to the Union. No one approved of these laws.¹³⁹ The consistent view among the Framers appears to have been that the domestic aspect of the clause would serve a

¹³⁷ Rakove, *supra* note 20, at 177 (citing the Virginia Plan art. 6); Jack M. Balkin, *Commerce*, 109 *Mich. L. Rev.* 1, 8–9 (2010) (same).

¹³⁸ See, e.g., Rakove, *supra* note 20, at 178 (“Though it has been argued that [the specification of powers by the Committee of Detail] marked a crucial, even subversive shift in the deliberations, the fact that it went unchallenged suggests that the committee was only complying with the general expectations of the Convention.”); see also Akhil Amar, *America’s Constitution: A Biography* 108 (2005); Balkin, *supra* note 137, at 11 (“[T]here is no evidence that the convention rejected the structural principle stated in [the Virginia Plan] at any point during its proceedings. . . . [T]he purpose of enumeration was not to displace the principle but to enact it”); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 *Harv. L. Rev.* 1335, 1340 (1934). But see Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 155, 317–18 (2004) (asserting that enumeration of specific powers was a rejection of the language). As Balkin notes, Barnett does not provide evidence to back this “extraordinary assertion.” Balkin, *supra* note 137, at 10–11. Indeed, Wilson explained at the Pennsylvania Ratifying Convention that the enumeration of powers in Article I was but an enumeration of particular instances of the principles contained in the Convention’s Resolution. 2 *Elliot Debates*, *supra* note 64, at 424–25.

¹³⁹ Abel, *supra* note 72, at 446–59. Other studies have shown that mentions of interstate commerce at the Convention dealt almost exclusively with matters of trade. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. Chi. L. Rev.* 101, 114–15 (2001); Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 *St. John’s L. Rev.* 789, 794–95 (2006).

predominantly negative function—barring states from interfering with trade—an argument buttressed by later comments by Pinckney and Madison.¹⁴⁰ Numerous statements made throughout the Convention and Ratification debates indicate that “commerce” was one area in which the states were particularly likely to be incompetent or self-interested, suggesting implicitly or explicitly that they should be deprived of independent authority in the area.¹⁴¹ James Madison, at the close of the Convention, described himself as “more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.”¹⁴²

Two other pieces of evidence lend strong support for the exclusivity thesis. First, consider that the commerce power is part of a broader clause that includes both foreign commerce and commerce with the Indian tribes. As Professors David Golove and Daniel Hulsebosch have made clear, the Framers’ attention was distinctly on commerce with foreign nations.¹⁴³ Concerns about domestic

¹⁴⁰ See, e.g., 2 Records, supra note 60, at 308 (Sherman referring to the commerce power as guarding against the “oppression of the uncommercial States”); see also 36 Annals of Cong. 1318 (1820), reprinted in 3 Records, supra note 60, at 444 (then-Representative Pinckney arguing in a floor speech that the restrictions in Article I, Section 9, Clause 6 best represent the Founders’ contemporary understanding of the Commerce Clause); Letter from James Madison to J.C. Cabell (Feb. 13, 1829), reprinted in 3 Records, supra note 60, at 478 (“[The Commerce Clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government . . .”).

¹⁴¹ See, e.g., 2 Records, supra note 60, at 359–60 (Ellsworth arguing that the “power of regulating trade between the States will protect them agst each other”); id. at 441 (Madison referring to “all the mischiefs experienced from the want of a Genl. Government over commerce”). For a good summary of such views during and after the Convention, see Abel, supra note 72, at 492 & nn.271–73. For example, Robert R. Livingston, in addressing the New York Convention, argued that the commerce power “could never be trusted to the individual states, whose interests might, in many instances, clash with that of the Union.” 2 Elliot Debates, supra note 64, at 217. From this point, Livingston “inferred the necessity of a federal judiciary, to which he would have referred . . . the laws for regulating commerce.” Id. at 217; see also supra Section I.A.

¹⁴² 2 Records, supra note 60, at 625.

¹⁴³ Golove & Hulsebosch, supra note 66, at 991–94.

commerce played second fiddle.¹⁴⁴ The general consensus is that, with regard to foreign commerce and commerce with the Native American tribes, Congress's power was intended to be exclusive.¹⁴⁵ Yet, as John Marshall said in *Gibbons*, the different parts of the commerce power must be read to "carry the same meaning" absent some "plain intelligible cause which alters it."¹⁴⁶ Second, the scope of the domestic commerce power was likely narrow in the minds of the Framers, foretelling far less deprivation of state authority than might be the case today. Once this is realized it becomes far easier to envision the Framers intending an exclusively federal commerce power, particularly when—as the next Section explains—states

¹⁴⁴ See Abel, *supra* note 72, at 465–66 & nn.151–52 (inferring from statements from the Convention and Ratification debates that the Founders primarily focused on the international aspect of commercial regulation).

¹⁴⁵ The argument for federal exclusivity over foreign commerce is often subsumed in the argument that the Framers intended for all "foreign affairs" powers to be held exclusively by the federal government. See Bradford C. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1297 (1996); John Norton Moore, *Federalism and Foreign Relations*, 1965 Duke L.J. 248, 275–76. But see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1641–42 (1997) (calling basis for exclusive foreign affairs power "surprisingly uncertain"). Like the foreign commerce power, the Indian commerce power has long been considered exclusively federal. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (detailing history of Indian Commerce Clause and declaring that "the regulation of [relations with Native Americans], according to the settled principles of our constitution, are committed exclusively to the government of the union"); Abel, *supra* note 72, at 493 (explaining that Indian commerce power was derived from similar power held exclusively by federal government under the Articles of Confederation); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1174 (1993) (reporting that in early cases "no voice of dissent was ever raised against the proposition that the constitutional grant of Indian commerce power to Congress was exclusive and therefore necessarily excluded the states from any exercise of Indian affairs authority").

¹⁴⁶ *Gibbons*, 22 U.S. (9 Wheat.) at 194; see also Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1160 (2003) (arguing for uniform meaning based on presumption of intrasentence uniformity). There is a historical debate regarding whether the domestic commerce power was narrower than its foreign counterpart in that the latter clearly included the power to prohibit the importation of foreign commodities, whereas a like ability over interstate commerce would have had great trouble gaining support from the slave states. See David L. Lightner, *The Founders and the Interstate Slave Trade*, 22 J. Early Rep. 25, 28–31 (2002). There may well be sound arguments for why the power of "prohibition" differs with regard to interstate and foreign trade, but that is a separate issue from that of congressional "exclusivity."

were displaced only from adopting those acts that truly “regulate[d] Commerce . . . among the several States.”¹⁴⁷

Skeptics of the view that the commerce power was exclusive rely now, as they did in *Gibbons*, on textual argument. As the petitioners stated in *Gibbons*, the commerce power “is not granted, in exclusive terms, to Congress. It is not prohibited, generally, to the States.”¹⁴⁸ The argument rests foremost on the fact that the Constitution does identify one power as exclusive, granting Congress the power to “exercise exclusive Legislation” over the district chosen as the seat of government.¹⁴⁹ Moreover, the Constitution contains certain explicit prohibitions, at least one and most likely two of which are aimed at specific forms of commercial regulation: Article I, Section 10 prohibits states, without the consent of Congress, from “lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s [sic] inspection Laws” and from “lay[ing] any Duty of Tonnage.”¹⁵⁰ Critics assume a prohibition must be from something, so the existence of these prohibitions seems to imply (for them) a power in the states in the first instance.¹⁵¹

These textual arguments seem strong until one probes at them just the slightest bit, at which point they become inconclusive at best. The exclusivity argument regarding the District of Columbia is a pretty slim reed. There were special reasons for clarity with regard to the District of Columbia, given that the power to legislate was “in all Cases whatsoever,” a more comprehensive police-power-like

¹⁴⁷ U.S. Const. art. I, § 8, cl. 3.

¹⁴⁸ 22 U.S. (9 Wheat.) at 60; see also Redish & Nugent, *supra* note 6, at 571 (“[T]he dormant commerce clause finds no authorization in the constitutional text . . .”).

¹⁴⁹ U.S. Const. art. I, § 8, cl. 17. Scalia makes this argument in *Tyler Pipe Indus. v. Washington Dep’t of Revenue*, 483 U.S. 232, 261 (Scalia, J., concurring in part and dissenting in part) (“[U]nlike the District Clause . . . the language of the Commerce Clause gives no indication of exclusivity.”). See also *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 579–80 (1847) (Taney, C.J., separate opinion) (“The language in which the grant of power to the general government is made certainly furnishes no warrant for a different construction, and there is no prohibition to the States.”).

¹⁵⁰ U.S. Const. art. I, § 10, cls. 2–3.

¹⁵¹ See Redish & Nugent, *supra* note 6, at 588. This argument was considered and rejected in dicta by Marshall in *Gibbons*, 22 U.S. (9 Wheat.) at 200–03, who asserted that these were limits on the states’ taxing power.

authority than the remainder of the enumerated powers.¹⁵² The clause would make clear that states could not reach into the District with any of their powers, even those they retained. This reading is confirmed by the second part of the clause, which grants Congress “like Authority” over land sold by the states to the federal government for use as forts and other public buildings.¹⁵³ As David Golove has written, the exclusivity language “[p]resumably . . . was meant to emphasize that the states which ceded the district or sold the places would have no continuing legislative authority over them.”¹⁵⁴ Given that there was special reason to mark out the District of Columbia power as exclusive, it provides little interpretive evidence regarding the exclusivity—or not—of the other powers.

The argument regarding the District of Columbia power also proves too much. In its extreme form, the argument would hold that since one power is by its terms exclusive, all the other powers must be fully concurrent. But this argument falters on a careful reading of the Article I powers—some of which clearly leave no room for state regulation.¹⁵⁵ No one argues, for example, that the states have the power “[t]o borrow Money on the credit of the United States” or to “establish a uniform Rule of Naturalization,” for how could a single state even do so?¹⁵⁶ Once one admits, however, that some of the powers are “by their nature” exclusive, this simply invites the question of which are and which are not. And we are back again to deciding whether the commerce power is among those that are.¹⁵⁷

As to the second text-based argument, which proceeds from the specific limitations on state power contained in Article I, Section

¹⁵² Tushnet, *supra* note 14, at 1720.

¹⁵³ U.S. Const. art. I, § 8, cl. 17.

¹⁵⁴ David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. Rev. 1791, 1841 n.159 (1998).

¹⁵⁵ See, e.g., U.S. Const. art. I, § 8, cls. 2, 4.

¹⁵⁶ *Id.*

¹⁵⁷ In fact, textual exclusivity has played a remarkably small role in determining the scope of many other Article I, Section 8 powers. See *Seminole Tribe v. Florida*, 517 U.S. 44, 60 (1996) (“[T]he Indian Commerce Clause makes ‘Indian relations . . . the exclusive province of federal law.’”) (quoting *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985)); *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 448 (1979) (foreign commerce); *Goldstein v. California*, 412 U.S. 546, 555–60 (1973) (copyright power); *United States v. Arjona*, 120 U.S. 479, 487 (1887) (laws of war).

10, it is hardly an inexorable conclusion that the existence of a prohibition implies the existence of a corresponding power in the states, as those who attack the textual foundation of the dormant Commerce Clause suppose. The argument is plausible but no more so than its alternative. If it were a matter about which the Framers were particularly concerned, then—although intending to deny the power in the first instance—they may nonetheless have added the prohibition for extra emphasis.¹⁵⁸ As Justice McLean remarked in *The Passenger Cases*, “Doubts may exist as to the true construction of an instrument in the minds of its framers, and to obviate those doubts, additional, if not unnecessary, provisions may be inserted.”¹⁵⁹ Consider the familiar instance of a parent whose child is forbidden from driving the car without permission but who nonetheless says as she leaves town, “Don’t drive the car.” A fetish for textual coherence may not reflect what the Framers were actually doing.¹⁶⁰ Also, and of great importance, simply because a state lacks a certain power does not mean that it does not retain other powers which might allow it to act in an identical manner, as we will explain in much greater detail below.¹⁶¹ The Constitution was never thought to bar the states from exercising their traditional “police”—powers, powers that may have allowed the states to act in the ways specifically prohibited by the constitutional text.¹⁶² Thus, these prohibitions served a role even if the granting powers were thought to be exclusive.

¹⁵⁸ As Justice Thomas wrote in the statutory context, Congress may sometimes insert seemingly superfluous phrases in order to make its intent clear. See *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226–27 (2008); see also *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 646 (1990) (noting that Congress may sometimes include seemingly unnecessary examples “out of an abundance of caution”).

¹⁵⁹ 48 U.S. (7 How.) 283, 396 (1849) (McLean, J.).

¹⁶⁰ See Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 *Harv. L. Rev.* 730, 731 (2000) (arguing that assumption of the Constitution’s extreme textual coherence does not hold up under scrutiny). Hamilton rejected a hyper-technical reading of the Constitution’s various provisions in *Federalist No. 83*, arguing that “[e]ven if [certain legal] maxims had a precise technical sense, corresponding with the idea of those who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government.” *The Federalist No. 83*, supra note 28, at 422 (Alexander Hamilton).

¹⁶¹ See *infra* Part III.B; see also Tushnet, supra note 14, at 1721 (“[S]tates could exercise their police powers to act upon interstate commerce . . .”).

¹⁶² See *infra* notes 176–83 and accompanying text.

Skeptics of the dormant commerce power stake their case against exclusivity on the text of the Constitution and some slim evidence of the Framers' intentions. It is, admittedly, difficult to answer the question of original meanings conclusively, in part because—as Section III.B will explain—exclusivity did not mean then what it means today. But the case for exclusivity, understood in the Framers' terms, is much stronger than typically is supposed.

B. Though Exclusive, States Retained the Police Power

The Skeptics' argument about exclusivity is summed up by Justice Thomas's memorable quotation that, in light of Congress's expanded powers, "the exclusivity rationale has moved from untenable to absurd."¹⁶³ Although this is an odd argument coming from an originalist, it is nonetheless a fair objection and one that requires some response. What comprises commerce today is vast; Congress's field of potential regulation is enormous. Yet the states, of necessity, must regulate many things that Congress could not or does not. Interpreting the Commerce Clause as exclusive, critics rightfully insisted, would require the states frequently to seek congressional permission before engaging in necessary regulation.¹⁶⁴ "Now that we know interstate commerce embraces such activities as growing wheat for home consumption, and local loan sharking," wrote Justice Scalia in one dormant commerce clause case, "it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded."¹⁶⁵ This is a kind of *reductio ad absurdum* argument applied to original intent: if the Framers knew how much state action they would be prohibiting by making the commerce power exclusive, they could not possibly have meant to do so.

Skeptics often pair this objection with what must seem the most significant piece of historical evidence they can muster—Alexander Hamilton's description of congressional and state power in Feder-

¹⁶³ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614 (1997) (Thomas, J., dissenting).

¹⁶⁴ See Petragani, *supra* note 6, at 1247–48 (describing federalism concerns of framework whereby states must overcome congressional inertia).

¹⁶⁵ *Tyler Pipe Indus. v. Wash. Dep't of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part) (citation omitted); see also *Camps Newfound/Owatonna*, 520 U.S. at 614 (Thomas, J., dissenting).

alist No. 32. Hamilton's argument there plays prominently in both early and present-day arguments against exclusivity.¹⁶⁶ In Federalist No. 32, Hamilton maintained that a power may be deemed exclusively held by the federal government in only three ways:

[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*.¹⁶⁷

Hamilton's argument in Federalist No. 32 probably ought to be taken with a grain of salt. As we saw in Part I, as well as in Section III.A, there were plenty of others who expressed alarm about state regulation of commerce and suggested Congress's power in that regard would be exclusive. Thus, the evidence of "original meaning" is decidedly mixed. But more to the point, Hamilton's statement underscores a difficulty with a jurisprudence of original meaning that relies so heavily on statements made during the ratification fight. During the Convention, delegates spoke in candor, confident that their words would not be used against them; to some extent, at least, cheap talk and self-interest could be put aside in favor of the common good and workable solutions. Anyone familiar with Hamilton's views—decidedly nationalist, happy to see the states dissolved—understands full well that the argument in Federalist No. 32, as well as those advanced elsewhere by other Federalists, were made to quell criticism that the Constitution would overly encroach on the authority of the states.¹⁶⁸ Precisely how seriously we should take these statements as reflecting the true views of the Founders is open to question.

¹⁶⁶ See *Camps Newfound/Owatonna*, 520 U.S. at 612–13 (Thomas, J., dissenting) (arguing that "[t]he 'exclusivity' rationale was likely wrong from the outset" and quoting Federalist No. 32 for support); *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 606–07 (1847) (Catron, J.) (using Federalist No. 32 to argue against exclusivity); *Livingston v. Van Ingen*, 9 Johns. 507, 576 (N.Y. 1812) (applying Federalist No. 32 to find power concurrent).

¹⁶⁷ The Federalist No. 32, *supra* note 28, at 152 (Alexander Hamilton).

¹⁶⁸ For examples of similar statements made in the Virginia ratifying convention from "pro-constitution" voices, see Abel, *supra* note 72, at 489–91.

In truth, however, Federalist No. 32 points the way out of the dilemma seemingly posed by (on the one hand) the exclusivity view and (on the other) the potential vastness of congressional power, with its effect of severely limiting the powers held by the states. Importantly, Hamilton admits of the possibility that the exclusivity of a power need not be derived from an express constitutional provision that speaks in terms of exclusivity.¹⁶⁹ His third category allowed for exclusivity “where [the Constitution] granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.”¹⁷⁰ The rub was in deciding what this residual category entailed. In Federalist No. 32 Hamilton suggested such a case was unusual; in truth Hamilton undoubtedly believed it would prove more common.

But what Hamilton’s test in Federalist No. 32 underscores—and as the balance of this Section and the next confirms—is that under almost any interpretation of the commerce power there is unavoidably a line-drawing exercise for judges concerning what the states may or may not do. In an important way, the question of whether states retained concurrent authority over commerce was somewhat academic; this may explain why the Convention felt little need to resolve it explicitly, for no one at the Convention or thereafter has doubted that the states retained a wide range of powers and that they might exercise these powers in such a way that looked like a regulation of commerce.¹⁷¹

¹⁶⁹ See *id.* at 490 (“Even should their analysis be accepted and the statements opposed to it rejected, there remains the question whether ‘authority in the states’ to regulate commerce ‘would be absolutely and totally contradictory and repugnant’ to the grant of the commercial power to Congress.” (quoting The Federalist No. 32, *supra* note 28, at 152 (Alexander Hamilton))).

¹⁷⁰ The Federalist No. 32, *supra* note 28, at 152 (Alexander Hamilton).

¹⁷¹ See *Gibbons*, 22 U.S. (9 Wheat.) at 197–98 (Johnson, J., concurring) (noting agreement among parties that states retained all sovereign powers except those given up by the Constitution); *id.* at 239 (remarking that states could exercise their reserved powers to act over identical objects as the federal government when it acts under the commerce power); The Federalist No. 45, *supra* note 28, at 236 (James Madison) (describing powers “which are to remain in the State governments” as “numerous and indefinite” and “extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State”); Letter from Sherman and Ellsworth to the Governor of Connecticut, *in* 3 Records, *supra* note 60, at 99 (remarking that “states retain their sovereignty in all other matters” than those granted to the federal gov-

What the Skeptics forget is that, no matter what powers were given to Congress, the states retained their police powers. A state pilotage regulation, for example, may appear to be a regulation of commerce, but it also may be an exercise of a state's "police power" to protect the safety and welfare of those within its borders.¹⁷² These were precisely the sorts of arguments made by the Justices in early commerce decisions.¹⁷³ And under any view of this sort, there was necessarily a question for judges to answer, one authorized by a common understanding of text and one that turned out to be remarkably respectful of state authority.

1. *The State's Power of Police*

As it happens, the argument from absurdity regarding exclusivity surfaced early in the nation's history, long before Congress's commerce powers were viewed as expansive in any way. As early as *Livingstone v. Van Ingen*—the state court precursor to *Gibbons*—Chancellor Kent argued that taking the commerce power as exclusive "would go, in a great degree, to annihilate the legislative power of the states."¹⁷⁴ Kent went on to list the many New York laws that would be threatened by an exclusive reading of the commerce power:

Our turnpike roads, our toll-bridges, the exclusive grant to run stage waggons, our laws relating to paupers from other states, our Sunday laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licenses to retail spirituous liquors, the laws to restrain hawkers and pedlars; what are all these provisions but regulations of internal commerce, affecting as well

ernment by the Constitution); see also Abel, *supra* note 72, at 483–84 (describing views at the Convention).

¹⁷² See *Gibbons*, 22 U.S. (9 Wheat.) at 208 (Marshall, C.J.) ("The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to [pass pilotage laws], to a considerable extent.")

¹⁷³ See *id.* at 236 (Johnson, J., concurring) (discussing how inspection laws appear to combine municipal with commercial regulation); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837) (classifying the requirement that ship captains provide a passenger list not as commercial regulation but as a police measure).

¹⁷⁴ *Livingston v. Van Ingen*, 9 Johns. 507, 578 (N.Y. 1812) (Kent, C.J.). For more background, see Williams, *Gibbons*, *supra* note 14, at 1406–10.

the intercourse between the citizens of this and other states, as between our own citizens?¹⁷⁵

Chancellor Kent's point—difficult to ignore—was that congressional exclusivity over commerce would disable vast realms of necessary regulation.

When the case made it to the Supreme Court, however, John Marshall explained that, *pace* Kent, the fact of exclusivity did not imply state incapacity to act in ways affecting commerce, even interstate commerce. Rather, although the states were barred from regulating “commerce” within the meaning of the three constitutional grants, they could nonetheless regulate their own internal commerce under their universally accepted “police” powers. Marshall denied that if Congress has a power “the States may severally exercise the same power.”¹⁷⁶ For Marshall, however, this did not mean the state was disabled from acting altogether. Rather, the state was exercising its innate power to act:

So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.¹⁷⁷

This argument, juxtaposing the police power with the enumerated powers, was widely understood at the time; it formed the backbone of what we today think of as “dual federalism.”¹⁷⁸ It is the

¹⁷⁵ *Livingston*, 9 Johns. at 580.

¹⁷⁶ *Gibbons*, 22 U.S. (9 Wheat.) at 197–98.

¹⁷⁷ *Id.* at 204.

¹⁷⁸ See Edward S. Corwin, *Congress's Power To Prohibit Commerce: A Crucial Constitutional Issue*, 18 *Cornell L.Q.* 477, 482–83 (1933) (outlining the dual-federalism arguments presented by Madison and later by counsel in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841)); see also *Miln*, 36 U.S. (11 Pet.) at 139 (1837) (Barbour, J.) (“That all those powers which relate to merely municipal legislation, or what may perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is

same argument that Marshall's colleague (and Jefferson appointee) William Johnson made when arguing in his *Gibbons* concurrence that the commerce power was exclusive. "Wherever the powers of the respective governments are frankly exercised," he wrote, "they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct."¹⁷⁹ Take the power of taxation, arguably the most expansive in scope of the federal government's powers. Even that power is limited to taxing for the purpose of "the common Defence and general Welfare of the United States."¹⁸⁰ As Marshall recognized in *Gibbons*, holding the power to tax—understood as limited to federal purposes—to be exclusive would still leave the states free to tax for other purposes.¹⁸¹ Marshall's analysis of the Bankruptcy Clause in *Sturges v. Crowninshield* employs the same reasoning.¹⁸² Even if the bankruptcy power were exclusive, argued Marshall, a state could still pass "insolvent laws" that operate on the same subject.¹⁸³ Thus we see a remarkable convergence in the early cases of the view that, while exclusive, the powers granted to the federal government left wide latitude for state regulation.

The state's retained power was no phantom, as Marshall made clear in *Willson v. Black Bird Creek*, the first case to explicitly

complete, unqualified, and *exclusive*." (emphasis added)). The term "dual federalism" is of newer vintage than the theory itself; Corwin coined the term in his article. *Corwin*, *supra*, at 481; see Note, "Dual Federalism" Today, 38 *Colum. L. Rev.* 142, 142 n.1 (1938). Seventeen years later, Corwin lamented its doctrinal death. Edward S. Corwin, *The Passing of Dual Federalism*, 36 *Va. L. Rev.* 1, 2–4 (1950). But see Williams, *Dual Federalism*, *supra* note 14, at 1851 (arguing that the Court never embraced "a unitary, dual federalist interpretation of the Commerce Clause").

¹⁷⁹ *Gibbons*, 22 U.S. (9 Wheat.) at 239 (Johnson, J., concurring).

¹⁸⁰ U.S. Const. art. I, § 8, cl. 1; *Gibbons*, 22 U.S. (9 Wheat.) at 199 ("Congress is authorized to lay and collect taxes, &c to pay the debts, and provide for the common defence and general welfare . . . [but is] not empowered to tax for those purposes which are within the exclusive province of the States.").

¹⁸¹ *Gibbons*, 22 U.S. (9 Wheat.) at 199 (asserting that this understanding of exclusivity "does not interfere with the power of the States to tax for the support of their own governments").

¹⁸² See U.S. Const. art. I, § 8, cl. 4; *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 149 (1819).

¹⁸³ *Sturges*, 17 U.S. (4 Wheat.) at 194 ("[T]he subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws.").

1920

Virginia Law Review

[Vol. 97:1877]

speak of the “dormant” commerce power.¹⁸⁴ In that case Delaware had authorized a dam of a creek that passed through a marsh.¹⁸⁵ The act was challenged as unconstitutional on the ground that damming a navigable creek was an exercise of the “commerce” power and thus beyond the power of the state.¹⁸⁶ Marshall noted that if Congress had regulated in this area there would be no question but that a “state law coming in conflict with such act would be void.”¹⁸⁷ Here, however, Congress had not acted.¹⁸⁸ Marshall found that the state unquestionably had innate power to act:

The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states.¹⁸⁹

As Marshall explained, the Court was required to assess whether “under all the circumstances of the case” the law was “repugnant to the power to regulate commerce in its dormant state.”¹⁹⁰ Ultimately it concluded in the negative, leaving the state free to regulate under its police power.

2. *Shifting Lines*

We understand today just how malleable and unworkable the line between “commerce” and “police” is and how seemingly metaphysical (in the pejorative sense) is the distinction between powers based not on their operation in the world but on their “nature.”¹⁹¹ It is easy to make fun of it (tee-hee, wasn’t that old formal-

¹⁸⁴ *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829); *Redish & Nugent*, supra note 6, 576–77 (identifying *Willson* as the first instance of the Court’s recognition of dormant commerce clause).

¹⁸⁵ *Willson*, 27 U.S. (2 Pet.) at 250.

¹⁸⁶ *Id.* at 251–52.

¹⁸⁷ *Id.* at 252.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 251.

¹⁹⁰ *Id.* at 252.

¹⁹¹ See *Tyler Pipe Indus. v. Wash. Dep’t of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that to draw such distinctions is an impractical “metaphysical exercise”).

2011] *Legitimacy of Dormant Commerce Clause* 1921

ism quaint?), but our learned wisdom on this point today should not cast into doubt how real the line was to those who sought to employ it. The past often appears as an alien land, full of distinctions that appear fanciful to modern eyes. Eventually the Court would reject it too, of course: the struggle of our forebears with such lines is precisely what taught us they will not work. Still, there are lessons for us to take from the progression of the doctrinal line as those forebears worked to refine it.

The line between police and commerce was not an easy one for the Framers. Judges said so repeatedly.¹⁹² In *Sturges*, Justice Marshall stated that the “precise limitations which the several grants of power to Congress, contained in the constitution, may impose on the State Legislatures” presented a “delicate inquiry.”¹⁹³ Justice Johnson, who later found the commerce power exclusive in *Gibbons*, was more frank:

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other. In some points they meet and blend so as to scarcely admit of separation.¹⁹⁴

Justice Barbour, writing for the Court in a later case, upheld a New York law that required masters of ships to post bonds for incoming passengers because it was “not a regulation of commerce, but of police.”¹⁹⁵ At the same time, he admitted—quoting *Gibbons*—that “the means used in their execution may sometimes approach each other, so nearly as to be confounded.”¹⁹⁶ But such line

¹⁹² See *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837) (“We are aware, that it is at all times difficult to define any subject [as police or interstate commerce] with proper precision and accuracy”); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 453 (1827) (Thompson, J., dissenting) (“If such be the division of power between the general and State governments in relation to commerce, where is the line to be drawn between internal and external commerce? It appears to me, that no other sound and practical rule can be adopted”); *Gibbons*, 22 U.S. (9 Wheat.) at 204 (1824) (“All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers”).

¹⁹³ *Sturges*, 17 U.S. (4 Wheat.) at 196.

¹⁹⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 238 (Johnson, J., concurring).

¹⁹⁵ *Miln*, 36 U.S. (11 Pet.) at 132.

¹⁹⁶ *Id.* at 137 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 204).

drawing was recognized as required by their understanding of the constitutional text and structure. Nor was the inquiry impossible; *Gibbons* is famous precisely for its elaboration of what constituted “Commerce . . . among the several States” and what did not.¹⁹⁷

Chancellor Kent’s alternative to Commerce Clause exclusivity in *Livingston v. Van Ingen* only underscores that judicial line drawing, and its cousin—judicial power—was inevitably made no easier by reformulation.¹⁹⁸ In Kent’s approach, the states had power over both internal and external commerce. Congress could displace the regulation of the “external,” but the “internal” was “exclusively[] within the scope of the original sovereignty.”¹⁹⁹ What was required, therefore, was drawing a line between what is “internal” and what is “external”—a task we now understand to be little more promising than the line between “commerce” and “police.”²⁰⁰ And when lines are mutable, power rests in who is doing the drawing. Kent viewed the Hudson River as “the property of the people of this state,” explaining that the legislature could in its “sound discretion, regulate and control, enlarge or abridge the use of its waters.”²⁰¹ Not very plausible today.

In defining the line delineating permissible state authority, judges learned as they went. In the beginning the Justices were concerned for national power and saw the importance of a realm of federal exclusivity.²⁰² As time went on, and the somewhat limited

¹⁹⁷ *Gibbons*, 22 U.S. (9 Wheat.) at 193–95 (arguing that the commerce power extends to “those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government”).

¹⁹⁸ *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812).

¹⁹⁹ *Id.* at 578.

²⁰⁰ See *United States v. Darby*, 312 U.S. 100, 118 (1941) (“The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”).

²⁰¹ *Livingston*, 9 Johns. at 579 (Kent, C.J.).

²⁰² See *Gibbons*, 22 U.S. (9 Wheat.) at 223–26 (Johnson, J., concurring) (grounding argument in favor of federal exclusivity in pre-Convention history); *Sturges*, 17 U.S. (4 Wheat.) at 193 (“Whenever the terms in which a power is granted to Congress, or the

2011] *Legitimacy of Dormant Commerce Clause* 1923

role Congress was playing became clear, Kent's point moved to the fore: it became evident that the Constitution could not bar states from pursuing their busy regulatory agendas.²⁰³ The formality of labeling the exact same regulation as either implicating "commerce" or "police," on which the early cases depended, seemed increasingly implausible to the Justices of the Supreme Court, as was the notion of barring states completely from regulating "commerce."²⁰⁴

Along the way, ideology and politics influenced antebellum cases in none-too-subtle ways. The early Justices were Federalists, protective of national power; after Jefferson's ascendance, and particularly after Andrew Jackson's appointments to the Court, the states' rights forces found their voice.²⁰⁵ Slavery, too, was always lurking in the background, shading the way judges (and everyone else) saw cases that ostensibly had nothing to do with it.²⁰⁶ In *The Passenger Cases*, for example, Justice Taney suggested in his dissent that if the passenger fees were held unconstitutional by the dormant commerce power, then the "emancipated slaves of the West Indies have at this hour the absolute right to reside, hire

nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it."); see also 1 Charles Warren, *The Supreme Court in United States History, 1789–1835*, at 21 (2d ed. 1926) (characterizing the Marshall Court as pursuing a "strongly Nationalistic interpretation of the Constitution").

²⁰³ See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 320–21 (1852) (highlighting the importance of leaving certain types of regulation within states' power); *The Passenger Cases*, 48 U.S. (7 How.) at 563 (1849) (Woodbury, J., dissenting) (describing "[t]he catastrophe which would follow" from a strict exclusivity view).

²⁰⁴ See *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J., separate opinion) (arguing that the validity of a law "cannot . . . depend upon the motives that may be supposed to have influenced the legislature").

²⁰⁵ See R. Kent Newmyer, *Chief Justice Marshall in the Context of His Times*, 56 *Wash. & Lee L. Rev.* 841, 848 (1999) (remarking that "Jackson reconstituted the Court along states' rights lines," undermining Marshall's nationalizing agenda).

²⁰⁶ See Denning, *Reconstructing*, supra note 14, at 433 n.63 (describing the *Miln* distinction as "a vivid reminder that the question of congressional regulation of slavery and state regulation of free blacks within their territory lurked like Banquo's Ghost in the background"). See generally David L. Lightner, *Slavery and the Commerce Power: How the Struggle Against the Interstate Slave Trade Led to the Civil War* 65–89 (2006) (citing a number of early interstate commerce cases where concerns regarding slavery impacted the Court's rationale).

houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary.”²⁰⁷

Over time the doctrine shifted, as old categories became unstable and new doctrinal tests moved to the fore, such as the well-regarded approach of *Cooley v. Board of Wardens*.²⁰⁸ *Cooley* involved a Pennsylvania law requiring vessels to take on a pilot or pay a fee to benefit the Society for the Relief of Distressed and Decayed Pilots.²⁰⁹ The law was challenged as inconsistent with the commerce power. This being “navigation,” *Gibbons* had settled that the Commerce Clause applied in the affirmative sense.²¹⁰ But the Court held—unambiguously for the first time—that the commerce power was not fully exclusive.²¹¹ In so (cautiously) holding, however, the Court set out a test that defined the new line judges were to draw:

[T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule . . . and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local needs of navigation.²¹²

The Court’s test in *Cooley* effectively vindicated Hamilton’s view in Federalist No. 32 that some “concurrent” powers might nonetheless have an “exclusive” core.²¹³

In the 1890 case *Leisy v. Hardin*, one of the many cases involving the transportation and distribution of liquor that the Court was to face in the era, the Justices synthesized the work of both the Taney Court and the Marshall Court into yet a new doctrinal formula-

²⁰⁷ *The Passenger Cases*, 48 U.S. (7 How.) at 474 (Taney, C.J., dissenting).

²⁰⁸ 53 U.S. (12 How.) 299 (1852); 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) (suggesting that the *Cooley* rule “would perhaps be a wise rule to adopt” but arguing against it as a matter of interpretation).

²⁰⁹ *Cooley*, 53 U.S. (12 How.) at 313.

²¹⁰ *Gibbons*, 22 U.S. (9 Wheat.) at 193 (holding that commerce power extends to navigation).

²¹¹ *Cooley*, 53 U.S. (12 How.) at 320; Currie, *supra* note 6, at 231 (noting that Justice Curtis “correctly observ[ed] that prior cases had not decided whether the federal commerce power was exclusive”).

²¹² *Cooley*, 53 U.S. (12 How.) at 319.

²¹³ See *supra* notes 166–171 and accompanying text.

tion—one that shifted further away from the exclusivity justification.²¹⁴ The *Leisy* Court held that “where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation . . . the State can act until Congress interferes and supersedes its authority” but “where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States . . . Congress can alone act upon it.”²¹⁵

Leisy rested squarely on the much (and perhaps properly) maligned “congressional silence” rationale for the dormant commerce power, no doubt because something seemed necessary to explain the power in the absence of exclusivity.²¹⁶ The *Leisy* Court explained that congressional silence was taken as tantamount to a legislative determination that the field should be kept free of state regulation.²¹⁷ This justification for judges striking down state laws impinging on interstate commerce persisted until the emergence of the modern doctrine.²¹⁸ Today, however, it finds virtually no supporters; the modern test stands on its own justification.²¹⁹

One can certainly complain—as have the Skeptics—that the doctrinal movement of the dormant commerce power has not been steady or clear. Many of the old cases are an unfathomable mess of

²¹⁴ 135 U.S. 100, 119 (1890).

²¹⁵ *Id.*

²¹⁶ Earlier cases had also hinted at the silence rationale. See *Robbins v. Shelby Cnty. Taxing Dist.*, 120 U.S. 489, 493 (1887) (“[W]here the power of Congress to regulate is exclusive[,] the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions . . .”); *Welton v. Missouri*, 91 U.S. 275, 282 (1876) (calling congressional silence “equivalent to a declaration that inter-State commerce shall be free and untrammelled”).

²¹⁷ *Leisy*, 135 U.S. at 109–10 (“[S]o long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.”).

²¹⁸ See Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 *UCLA L. Rev.* 153, 187 (2005) (“The silence-equals-preemption rationale for the Dormant Commerce Clause lost its grip on the Court around the time of the New Deal.”).

²¹⁹ Denning, *Reconstructing*, *supra* note 14, at 478 n.357 (“No Court in recent memory has endorsed the preemption-by-silence rationale.”). The silence rationale is largely obsolete given the modern view that little can be taken from the mere fact of congressional silence. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting) (“To the extent that the “pre-emption-by-silence” rationale ever made sense, it, too, has long since been rejected by this Court in virtually every analogous area of law.”).

separate opinions running to the hundreds of pages.²²⁰ The tests veered this way and that. The *Leisy* approach would soon enough morph into another formalistic test—the direct/indirect rule that mirrored the Court’s affirmative commerce jurisprudence.²²¹ This test also was notoriously difficult to apply and created much consternation both for the Court and contemporary commentators.²²² It was not until the late 1970s that the Court settled on today’s “two-tiered standard” for scrutinizing state laws: strict scrutiny for those that “discriminate” against interstate commerce and validation of all others unless they pose an “undue burden” on commerce.²²³

But in criticizing the course of the doctrine, the Skeptics miss a fundamental point. Today’s doctrinal test is, at least on its face, far more permissive of state authority than where the line-drawing exercise began. It is true that under the early doctrine state laws rarely were struck down—itsself a testament to the judgment of the judges and the workability of the commerce/police distinction in its time. But the potential for wreaking havoc with state authority was there: it was very much in the Court’s power to strike down any state law touching on commercial matters as unconstitutional. Today, rather than ostensibly disabling state action over all interstate commerce, as strict exclusivity would have it, the doctrine calls for the invalidation of state laws in only the narrowest of circumstances.

Under the modern approach, state regulatory laws are struck down in only two circumstances: when those laws discriminate against interstate commerce and when they impose an “undue bur-

²²⁰ E.g., *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (nine Justices writing opinions totaling 180 pages); *The License Cases*, 46 U.S. (5 How.) 504 (1847) (six Justices writing nearly sixty pages).

²²¹ See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, 1113–16 (2000) (analyzing in tandem the Court’s affirmative and negative Commerce Clause jurisprudence and noting the relationship between the direct/indirect line and local/national line of *Cooley*); Denning, *Reconstructing*, supra note 14, at 437–40, 441–48 (discussing the direct/indirect test and the transition to modern doctrine).

²²² See Denning, *Reconstructing*, supra note 14, at 439 (“[T]he terms ‘direct’ and ‘indirect’ were employed ‘rather indiscriminately across a broad range of cases, causing no end of confusion and consternation among contemporary commentators.’” (quoting Cushman, supra note 221, at 1114)).

²²³ See id. at 448.

den” on it.²²⁴ The first line is easy to justify; it is perfectly consistent with framing-era concerns about economic balkanization, and no one at the Convention approved of these laws. The “undue burden” test, while much criticized, has hardly proven a license for widespread judicial intervention. In practice, state laws are struck down under this test when they effectively burden out-of-state interests far more than in-state interests—hence Professor Donald Regan’s influential argument that it is effectively discrimination all the way down—or when the laws impose such harsh and unjustifiable barriers to interstate movement that they are effectively facially discriminatory.²²⁵

This is not intended as a defense of the current doctrine (which certainly has its own quirks and difficulties) but rather as an *apologia* for judges deciding these cases. There are aspects of current doctrine that undoubtedly could benefit from refinement. Others have written on this subject and will continue to do so.²²⁶ But the Skeptics do not urge refinement; they call for banishment altogether. Their arguments are based on infidelity to the text and original meaning, judicial illegitimacy, and concerns for federalism.²²⁷ The foregoing sections are intended to show that, whatever one might say as a doctrinal matter, these complaints are without foundation. Judicial supervision of interstate commerce has a firm basis in the text, original understandings, and original intent, and

²²⁴ See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (facially discriminatory statutes raise “a virtually per se rule of invalidity,” while laws with “no patent discrimination” will be upheld “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits”) (internal quotation marks omitted).

²²⁵ See Regan, *supra* note 14, at 1092 (“[T]he Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism.”); see, e.g., *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 447 (1978) (invalidating a Wisconsin law that effectively banned fifty-five-foot trucks in common use in other states).

²²⁶ See, e.g., Collins, *supra* note 14, at 45–47 (advocating for employing the dormant commerce power to protect economic union and not personal rights); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 *Const. Comment.* 395, 396 (1986) (suggesting that courts only strike down intentionally discriminatory laws); Regan, *supra* note 14, at 1092 (arguing that courts should be concerned only with “purposeful economic protectionism,” and not balancing of interests, in dormant Commerce Clause cases).

²²⁷ See *supra* notes 2–9 and accompanying text (summarizing the Skeptics’ arguments).

1928

Virginia Law Review

[Vol. 97:1877]

the test that has evolved is far more protective of state autonomy than was the case in the beginning. Whatever complaints one may have about the current doctrine, its ultimate legitimacy is not one of them.

C. The Longstanding Acceptance of the Dormant Commerce Power

Original understandings are important, but they are not everything. Even originalists like Justice Scalia admit that when a doctrine is sufficiently longstanding, accepted by generations of lawyers and judges, it should be respected by the courts.²²⁸ *Stare decisis* reflects this concern for past practice, as does the due process inquiry into the “Nation’s history and tradition[s].”²²⁹ Both acknowledge that history—all of it and not just the Founding—matters.

This Section explains that judicial adherence to the dormant commerce power is as longstanding as almost anything in American constitutional history. First, at virtually no time has the Skeptics’ case for judicial abstention prevailed in the Court; the best argument to the contrary—and it is nothing but an argument—puts the heyday of dormant commerce skepticism at all of two muddled years in the early-to-mid-nineteenth century. Second, it turns out that even Skeptics are unwilling to deny the value of some sort of dormant commerce power. When confronted with the possibility of abandoning it, they dissemble, either by inventing congressional legislation that ostensibly conflicts with state action (thereby turning what really is a dormant commerce issue into a preemption issue) or by simply trying to move the power into a new place in the Constitution, like the Privileges and Immunities Clause or the prohibition on state imposts. Put simply, despite the occasional rhetoric of Skeptics, it is remarkably difficult to find Justices stalwart in their opposition to the dormant Commerce Clause.

In heated discussions of the dormant commerce power, a false choice between two extremes is offered, while reality sits squarely in the middle. One extreme would hold the commerce power fully

²²⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 861 (1989) (“[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis* . . .”).

²²⁹ Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

2011] *Legitimacy of Dormant Commerce Clause* 1929

exclusive. This would disable much state regulation—even when necessary in the absence of regulation by Congress—and still would require judges to decide what is “commerce” and what is left to the “police” power. The other extreme would hold the commerce power fully concurrent, allowing any state law of any character to prevail absent congressional action. Blatantly discriminatory legislation of the sort that plainly motivated the Constitutional Convention would remain on the books until Congress acted to remove it.

No one—not even supporters of the dormant Commerce Clause—believes in full exclusivity. The real issue for the Skeptics is whether they are prepared to defend full concurrency. In other words, may states really adopt any legislation they wish regulating interstate commerce? And are those laws entirely immune from judicial scrutiny, remaining on the books until Congress musters the legislative will to strike them down? Rare is the Justice who actually adheres to this view. But if not, then there inevitably is a role for judges. The middle ground is one of judicially-supervised concurrent federal and state power over commerce, with Congress holding the power of preemption. This is the option that has received the overwhelming support of the Justices of the Supreme Court for very many years.

1. The Absence of Support for Full Concurrence

In the Supreme Court’s history, there was but one fleeting moment when the full concurrency view—that is, the view that the states may regulate as they wish absent congressional action—prevailed. Or this, at least, is the best that can be argued.²³⁰ The moment came during the period of the Taney Court when judicial concern for states’ rights was at its high-water mark. Even as to this short period, however, the claim is likely wrong.

Chief Justice Taney is the exemplar for the strong line against the dormant commerce power. Although he joined the *Cooley* decision, which introduced the partial exclusivity test, he never invoked or signed onto any opinion that actually invalidated a state law under the dormant commerce power, and in his own opinions

²³⁰ See *infra* notes 234–41 and accompanying text.

1930

Virginia Law Review

[Vol. 97:1877]

he took the line of full concurrency.²³¹ Indeed, commentators have wondered why he joined *Cooley* at all.²³² Taney's personal view, stated in *The License Cases*, was that while Congress possessed supreme power over commerce, "the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and . . . territory; and such regulations are valid unless they come in conflict with a law of Congress."²³³

Some, including Chief Justice Taney himself, claim that for one brief instant there was a majority for his position, but in truth the full concurrence view never held a stable majority on the Court.²³⁴ In 1847 the Court decided *The License Cases*, and two years later they decided *The Passenger Cases*. Both decisions were by a sharply divided Court, and most of the Justices wrote separate opinions. The opinions go to the hundreds of pages, and they are—as many have noted—nearly incomprehensible.²³⁵ The claim is that between *The License Cases* and *The Passenger Cases*, decided two years apart by an identical Court, there was a majority of the Justices who supported full concurrency. In *The License Cases*, Jus-

²³¹ Frankfurter, *supra* note 6, at 55–57. In *Cooley* the Court upheld the pilotage laws as "local" in nature and thus non-violative of the dormant commerce power, a disposition that was consistent with Taney's full-concurrency position. 53 U.S. (12 How.) at 321; accord Frankfurter, *supra* note 6, at 56 (noting that "selective exclusiveness led to the same result"); Currie, *supra* note 6, at 232 ("*Cooley* did not conflict with the theory of fully concurrent authority . . .").

²³² See Frankfurter, *supra* note 6, at 57–58 (engaging in "unverifiable speculation" that Taney concurred in *Cooley* as a "barrier to the adoption of a more rigid formula"); 5 C. Swisher, *History of the Supreme Court of the United States* 406 (1974) (explaining the inconsistency as Taney's lack of interest in Curtis's "incidental remarks").

²³³ *The License Cases*, 46 U.S. (5 How.) at 579 (Taney, C.J.).

²³⁴ *The Passenger Cases*, 48 U.S. (7 How.) at 470 (Taney, C.J., dissenting) ("[F]ive of the justices [in *The License Cases*] . . . held that the grant of the power to Congress was not a prohibition to the States . . . unless they came in conflict with an act of Congress."); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 613 (1997) (Thomas, J., dissenting) ("[F]our, and arguably five, of the seven participating Justices contend[ed] that the Commerce Clause was not exclusive.").

²³⁵ See, e.g., Currie, *supra* note 6, at 230 (remarking that after "over one hundred pages . . . in *The License Cases* and nearly two hundred in *The Passenger Cases*" the Taney Court had provided no "meaningful guidance for future controversies"); Denning, *Reconstructing*, *supra* note 14, at 434 (describing the "trademark" of the Taney Court's dormant commerce opinions as "the unedifying airing of multiple points of view").

tices Taney, Catron, Woodbury, and Nelson all rejected reading the Commerce Clause as a fully exclusive grant to Congress—and Justice Daniel probably should be added to that list.²³⁶ On this evidence, Professor John Frank looks to be right that “for a fleeting and confused moment in American history the law of the United States was that the commerce clause was not exclusive.”²³⁷

What is wrong with this claim, however, is that commentators, and some Justices, conflate the question of non-exclusivity with that of full concurrency—and having done so fail to read Justice Woodbury’s views carefully. Although Justice Woodbury is understood to be a critical fifth vote for the Taney position, if one reads his long and thoughtful opinion in *The Passenger Cases* it is evident that Woodbury is not taking the full concurrency position but instead the middle way:

[S]o far as regards the uniformity of a regulation reaching to all the States, it must in these cases, of course, be exclusive; no State being able to prescribe rules for others as to bankruptcy . . . or for foreign commerce But there is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each *till the power is abused* or some course is taken by Congress conflicting with it. Such are the deposit of ballast in harbours This local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general government²³⁸

It is clear that Justice Woodbury’s position leaves broad space for state regulation, which was in keeping with his generally pro-

²³⁶ *The License Cases*, 46 U.S. (5 How.) at 579 (Taney, C.J.), *id.* at 608 (Catron, J.) (“[U]ntil such regulation is made by Congress, the States may exercise the power within their respective limits.”); *id.* at 618 (Nelson, J.) (concurring in the opinions of Catron and Taney); *id.* at 623–24 (Woodbury, J.) (rejecting the notion that the commerce power is exclusive in all instances, precluding even state laws not in conflict with “any thing ever likely to be done by Congress”); see also Currie, *supra* note 6, at 225–26 (summarizing the positions of each Justice).

²³⁷ John P. Frank, *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784–1860*, at 191 (1964).

²³⁸ *The License Cases*, 46 U.S. (5 How.) at 624 (Woodbury, J.) (emphasis added); accord at 625 (Woodbury, J.) (“Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce.”).

1932

Virginia Law Review

[Vol. 97:1877]

state views.²³⁹ It is also clear, however, that Justice Woodbury's position was much closer to the test settled upon in *Cooley* than that of total concurrency. That is the plain thrust of his comment that "so far as regards the uniformity of a regulation reaching to all the States, it must, in these cases, of course, be exclusive." Two years later, dissenting in *The Passenger Cases*, Justice Woodbury distilled his earlier views into a formulation strongly foreshadowing *Cooley*'s partial exclusivity theory:²⁴⁰

So far as reasons exist to make the exercise of the commercial power exclusive—as on matters of exterior, general, and uniform cognizance—the construction may be proper to render it exclusive, but no further, as the exclusiveness depends in this case wholly on the reasons (and not on any express prohibition) and hence cannot extend beyond the reasons themselves. Where they disappear, the exclusiveness should halt.²⁴¹

All told, properly accounting for the position of Justice Woodbury, there were five Justices against full exclusivity but only four in favor of full concurrency. And this was the closest the Court ever came to holding that the commerce power was fully concurrent in the states. In almost two hundred years of doctrine, full concurrency never got a majority, and even the contrary argument finds concurrency prevailing for only two years. The Justices have consistently accepted that they have the obligation to draw judicial lines—even in the absence of congressional action—between what is an acceptable state regulation of commerce and what is not.

2. *Avoiding the Issue by Dissembling*

In fact, extremely few are the Justices who would side with Chief Justice Taney and actually adhere to the full concurrency position when push comes to shove. It is easy to see why. Given the difficulty with congressional supervision of individual state laws, full

²³⁹ William D. Bader et al., *The Jurisprudence of Levi Woodbury*, 18 *Vt. L. Rev.* 261, 261 (1994) ("Woodbury's *raison d'être* on the Court was states' rights . . .").

²⁴⁰ See Swisher, *supra* note 232, at 375 (arguing that Woodbury "marked the course of the future"); Currie, *supra* note 6, at 228 n.220 (describing Woodbury as "anticipating the distinction later drawn . . . in the *Cooley* case."); accord Bader et. al., *supra* note 239, at 290, 296.

²⁴¹ *The Passenger Cases*, 48 U.S. (7 How.) at 559 (Woodbury, J., dissenting).

2011] *Legitimacy of Dormant Commerce Clause* 1933

concurrency effectively sanctions state protectionism and invites severe burdens on the free flow of commerce.

Whether full concurrency is really a problem depends on one's assessment of how easy it is, and how appropriate, for Congress to patrol state laws. The dormant Commerce Clause, properly understood, is a burden-shifting measure: either the states have to go to Congress for redress against the courts, or those who find state laws problematic must seek legislative redress.²⁴² Thus, one must confront the question of Congress's ability to patrol state laws. As Part II suggested, the Framers thought it neither advisable nor practical.²⁴³ And Congress, despite many years of opportunity, has never seen fit to alter the basic framework of the Court exercising the dormant commerce power in the first instance.²⁴⁴

²⁴² See Tushnet, *supra* note 14, at 1724 (noting that “[o]rdinarily . . . opponents of state legislation must assume the burden of getting Congress to . . . preempt the legislation they oppose” but that partially exclusive dormant commerce power “switches the burden, so that those who desire state legislation must” petition Congress). Under current doctrine, Congress may grant authority to states to regulate in ways that would otherwise violate the dormant Commerce Clause. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945) (“It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.”). Some dicta in early cases suggest that this ability to regrant authority is in conflict with the strict exclusivity approach. See *Cooley*, 53 U.S. (12 How.) at 318 (“If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain [that] this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power.”); *Gibbons*, 22 U.S. (9 Wheat.) at 207 (“Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject.”); see also Williams, *supra* note 218, at 153 (arguing against power to regrant). It is unclear why this is true. When Congress authorizes states to regulate despite a judicial decision that state regulation violates the dormant commerce power in the absence of congressional regulation, Congress is simply using its admitted power to delegate authority to the states. In any event, “[w]hatever its theoretical basis, redelegation is now a clearly established part of the [dormant Commerce Clause doctrine], and Congress has exercised its power.” Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 *Minn. L. Rev.* 384, 398 (2003) [hereinafter Denning, *Privileges and Immunities*].

²⁴³ See *supra* notes 90–103 and accompanying text.

²⁴⁴ Congress has, from time to time, decided to immunize otherwise discriminatory laws, a practice upheld by the Supreme Court. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421–40 (1946) (finding that the McCarran Act authorized a state statute that discriminated against out-of-state insurance companies); *In re Rahrer*, 140 U.S. 545, 564–65 (1891) (upholding conviction under otherwise violative state liquor

Although the answer to the question of Congress patrolling the states is a complicated empirical one, it is noteworthy that those who argue for full concurrence rarely make the case that Congress is able to do the job.²⁴⁵ Rather, they simply advance arguments about the normative desirability of Congress, rather than the courts, making these decisions.²⁴⁶ But that sort of argument is irrelevant if Congress cannot accomplish what they suggest it should.²⁴⁷

This is no doubt why, when confronted with extremely problematic state laws, even Skeptics find a way for courts to invalidate those laws—all the while purporting to avoid the dormant commerce power as a basis for doing so. These Justices effectively dissemble under pressure and conjure up some alternative means to strike down state laws interfering with commerce. Typically, these Justices dream up conflicts with existing congressional statutes in order to argue that offending state law is preempted.

Perhaps the first, and certainly the most notable, example of the Court creating a conflict with a congressional law where none apparently existed is *Gibbons v. Ogden*.²⁴⁸ Although *Gibbons* looks to rest on preemption, not dormant commerce grounds, it is far more

law for crime committed the day after Congress passed the Wilson Act). But Congress has not altered the structural arrangement despite calls for such action. See, e.g., Friedman, *supra* note 6, at 1746 (suggesting that Congress delegate authority to an agency to police protectionist state laws).

²⁴⁵ For a rare alternative, see Eule, *supra* note 6, at 429–32 (arguing that, irrespective of historical inadequacy, Congress no longer needs judicial help to monitor state laws and that the “Madisonian impasse model of a Congress deadlocked by competing geographic economic concerns is no longer reflected in reality”).

²⁴⁶ See *Tyler Pipe Indus. v. Wash. Dep’t of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part) (questioning the fitness of “judges rather than legislators” to apply rule of partial exclusivity); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 188–89 (1940) (Black, J., dissenting) (pointing out the “inherent limitations of the judicial process” which proceeds “by the hit-and-miss method of deciding single local controversies”); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 592 (1851) (Taney, J., dissenting) (arguing that Congress “has better means . . . of obtaining information”); Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 *Tex. L. Rev.* 71, 84 (1980) (“Congress has the superior institutional capability to gather the relevant economic information . . .”).

²⁴⁷ See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 *U. Chi. L. Rev.* 1, 22–23 (1985) (“Congress is far more likely not to act than to act with respect to any particular issue presented for its attention.”).

²⁴⁸ 22 U.S. (9 Wheat.) 1 (1824).

2011] *Legitimacy of Dormant Commerce Clause* 1935

plausibly understood as the latter. Marshall read the Coasting Act of 1793 to confer a right to participate in the coasting trade to vessels appropriately licensed under the Act, a right that came in “direct collision” with the New York-granted monopoly.²⁴⁹ But as noted by Professor Norman Williams, this construction of the statute is “quite a stretch.”²⁵⁰ Critics of Marshall’s construction of the statute point to evidence that Congress intended nothing more than to raise revenue and exclude foreign ships from the coastal trade.²⁵¹ Justice Johnson was of this view, arguing in his concurrence that the Act did not confer the “abstract right of commercial intercourse” but was part of a system to foster American shipping by, for example, exempting licensed vessels from “[a] higher rate of tonnage.”²⁵² And Marshall himself later backed away from his expansive reading of the Coasting Act in *Willson*.²⁵³ No doubt Marshall was just being Marshall in suggesting the commerce power was exclusive but then finding a less explosive way to resolve the case.

The Justices of the Taney Court who purported to favor full concurrence did the same when necessary. For example, Justice Nelson, who was a bona fide advocate of a strong-form concurrency, authored the Court’s opinion in *Sinnot v. Davenport*, striking down an Alabama law as conflicting with the same Coasting

²⁴⁹ *Gibbons*, 22 U.S. (9 Wheat.) at 211–14, 221. Another early example, similar to *Gibbons*, is provided by the Court’s inventive construction of congressional approval of an interstate compact in *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 565–66.

²⁵⁰ Williams, *Gibbons*, supra note 14, at 1399.

²⁵¹ See, e.g., *Ogden v. Gibbons*, 4 Johns. Ch. 150, 147 (N.Y. Ch. 1819) (“The act of congress referred to, never meant to determine the right of property, or the use or enjoyment of it, under the laws of the states.”); 1 James Kent, *Commentaries on American Law* 408 (New York, O. Halsted 1826) (stating that the purposes of the Act were “to exclude foreign vessels . . . and to provide that the coasting trade should be conducted with security to the revenue”); Thomas P. Campbell, Jr., Chancellor Kent, Chief Justice Marshall and *The Steamboat Cases*, 25 *Syracuse L. Rev.* 497, 525–26 & n.173 (1974) (arguing that the 1793 Coasting Act should be understood in light of the 1789 statute as a revenue measure).

²⁵² *Gibbons*, 22 U.S. (9 Wheat.) at 232, 233 (Johnson, J., concurring).

²⁵³ See Williams, *Gibbons*, supra note 14, at 1399 (noting tension between Marshall’s statutory constructions in *Willson* and *Gibbons*).

Act from *Gibbons*.²⁵⁴ The Alabama law mandated the registration of steamboats and imposed a fine for noncompliance.²⁵⁵ Nelson asserted in a conclusory fashion that “it can require no argument to show a direct conflict,” despite plausible constructions of the Coasting Act of 1793 that would not impute to Congress the intent to make the licensing and enrollment requirements preemptive of additional state mandates that did not unduly burden the licensee’s ability to engage in coastal trade.²⁵⁶ Similarly, Justice Catron provided the decisive vote in *The Passenger Cases*, joining with the pro-exclusivity Justices to strike down New York and Massachusetts laws imposing a per-passenger fee on incoming ship captains. A staunch advocate of full concurrence, he based his vote on the rationale that the state passenger fees conflicted with federal law.²⁵⁷ To do so, he stretched various federal statutes to find that Congress had occupied the field with regard to immigration.²⁵⁸

What has been true historically proves true at present as well. The Skeptics on today’s Court take a hard line on the dormant commerce power, questioning its legitimacy and utility. But this seemingly hard-line view is much softer than it appears. The Skeptics would simply house the role played by the judiciary in dormant Commerce Clause cases under a different clause of the Constitution. Justice Thomas would, perhaps correctly, overrule *Woodruff v. Parham*²⁵⁹ to find that the Import-Export Clause applies not only to foreign commerce but also to domestic commerce.²⁶⁰ Similarly, Justice Scalia in *Tyler Pipe Industries v. Washington State Department of Revenue* advocated enforcing an element of dormant commerce jurisprudence—namely, the anti-discrimination princi-

²⁵⁴ 63 U.S. (22 How.) 227, 240–44 (1859); see *The License Cases*, 46 U.S. (5 How.) at 618 (Nelson, J.) (concurring with Catron and Taney’s reading of the commerce power); supra note 236 and accompanying text.

²⁵⁵ *Sinnot*, 63 U.S. (22 How.) at 241.

²⁵⁶ *Id.* at 242.

²⁵⁷ *The Passenger Cases*, 48 U.S. (7 How.) at 439–44.

²⁵⁸ *Id.* at 442 (“Congress has covered, and has intended to cover, the whole field of legislation over this branch of commerce.”).

²⁵⁹ 75 U.S. (8 Wall.) 123, 128 (1868).

²⁶⁰ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621–37 (1997).

ple—under a different constitutional banner, the Privileges and Immunities Clause of Article IV, Section 2.²⁶¹

Whether the Import-Export Clause and the Privileges and Immunities Clause get Justices Thomas and Scalia where they need to go doctrinally is a difficult question. After all, the Import-Export Clause would cover only state “Imposts or Duties.”²⁶² And the Privileges and Immunities Clause does not protect corporations, one of the primary targets of state protectionism.²⁶³ Moreover, what of state laws that are not facially discriminatory but only in effect? If the Privileges and Immunities Clause is read to preclude such laws, then we essentially are back to judicial analysis of the state’s justifications for regulations under another guise.²⁶⁴

The real issue, though, is whether the doctrinal hat-shifting game is worth the candle. What the acrobatics of those like Justice Thomas—or Justice Scalia, who will not overrule years of dormant Commerce Clause precedent despite his derision of it—prove is that there is a role for the dormant commerce jurisprudence, a role no one apparently believes we can do without. Even Justice Thomas admits that Justices have adhered to the doctrine because “we believed it necessary to check state measures contrary to the perceived spirit, if not the actual letter, of the Constitution.”²⁶⁵ Just as the Court seems reluctant today to overrule *The Slaughterhouse Cases* despite real doubts about correctness, favoring doctrinal stability over constitutional housekeeping, one might wonder pre-

²⁶¹ 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that “rank discrimination against citizens of other States . . . is regulated not by the Commerce Clause but by the Privileges and Immunities Clause”). But see *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring) (describing that in his view a discriminatory state law may be invalid under the dormant Commerce Clause). See generally *Eule*, supra note 6 (advocating the same).

²⁶² See *Camps Newfound/Owatonna*, 520 U.S. at 637–40 (Thomas, J., dissenting) (describing how the Import-Export Clause would be applied).

²⁶³ See Denning, *Privileges and Immunities*, supra note 242, at 393–404 (detailing gaps under this schema); Tushnet, supra note 14, at 1718 & n.3 (noting “the well-established rule that corporations are not citizens within the meaning” of the Clause).

²⁶⁴ See Denning, *Privileges and Immunities*, supra note 242, at 409 (arguing that purposive enforcement of Article IV would undermine the “purported benefits” of switching away from the dormant Commerce Clause in the first place).

²⁶⁵ *Camps Newfound/Owatonna*, 520 U.S. at 617–18 (Thomas, J., dissenting).

1938

Virginia Law Review

[Vol. 97:1877]

cisely what is gained by moving the dormant commerce doctrine under a new roof.²⁶⁶

As should be clear by now, the Skeptics do not need to take this flight into supposed constitutional purity, for there is nothing illegitimate about the dormant commerce jurisprudence. It rests on sound textual arguments, strongly bolstered by original intentions and meanings. It developed from them in ways that are easy to perceive and understand. It has enjoyed a long history, untouched by Congress and persistently followed by judges. In our constitutional system, all this usually counts for something.

²⁶⁶ Cf. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3029–31 (2010) (refusing to overrule *The Slaughterhouse Cases* and incorporate the Second Amendment right through the Privileges or Immunities Clause instead of the Due Process Clause).