

# THE DECLINE OF THE DORMANT COMMERCE CLAUSE

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## ABSTRACT

A profound transformation has been worked in the law of the dormant Commerce Clause. Much contemporary scholarship and many modern decisions of the Supreme Court present the essential structure and content of the doctrine in the form that it held through the middle decades of the 20th century (hereafter the “Traditional Framework”). But in truth the Court has dramatically eroded the dormant Commerce Clause since the mid-1980s, leaving it today a slender remnant of the traditional model. This Article tracks three dimensions of the doctrine’s precipitous decline. First, the Court has profoundly eroded the rule against discriminatory regulation, focusing almost exclusively on “intentional” protectionism. Second, the Court has virtually retired the practice of burden review, in which the balance between the commercial burden of a state measure and its social benefits is judicially scrutinized for reasonableness. Third, the Court has created and expanded exceptions to the reach of the doctrine with remarkable speed. The first and second of these dimensions accord closely with prescriptions offered by Donald Regan in a seminal 1986 article, but the third dimension marks a decisive step beyond even Regan’s prophetic vision. Today, the path ahead remains unclear. Justice Scalia was a powerful and influential critic of the dormant Commerce Clause, and much may turn on whether his successor continues his project of opposition to the doctrine. But whatever happens next, the Traditional Framework is now hopelessly out of date, and the dormant Commerce Clause is in remarkable decline.

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## I. INTRODUCTION

[T]he construction of [the Commerce Clause] has been so fully discussed at the bar, and in the opinions delivered by the court in former cases, that scarcely any thing can be suggested at this day calculated to throw much additional light upon the subject, or any argument offered which has not heretofore been considered, and commented on, and which may not be found in the reports of the decisions of this court.<sup>1</sup>

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1. *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 573 (1847).

Chief Justice Roger B. Taney

A profound transformation has been worked in the law of the dormant Commerce Clause. While courts and scholars still invoke a basic doctrinal model settled in the middle of the last century—a model that I will call the “Traditional Framework”—this model is now hopelessly out of date. Since the mid-1980s, it has crumbled under a barrage of criticism from the academy and the judiciary: criticism of its claim to the status of constitutional law, of its practicability, of its democratic legitimacy, and of its focus on economic effects. But despite the long tradition of distinguished and thoughtful commentary associated with the doctrine,<sup>2</sup> scholarly and judicial writing has yet to fully confront the change. This Article charts the remarkable decline of the dormant Commerce Clause, from the Traditional Framework to the modern reality.

In the following pages, we will see that since the mid-1980s the Court has: (1) significantly narrowed the prohibition on discriminatory state action to focus on “intentional” protectionism; (2) effectively retired the practice of “burden review” (in which a state measures adverse impact on trade is weighed against its political or social benefit); and (3) overseen the creation and expansion, with unprecedented speed, of a series of exceptions to the reach of the doctrine. There are powerful reasons to suspect that this transformation is regrettable,<sup>3</sup> but the primary concern of this Article will be to reveal, rather than criticize, what the Court has wrought in this area: to expose the astonishing decline<sup>4</sup> of the Traditional Framework.

The remainder of the Article is organized as follows. Part II summarizes the Traditional Framework. Part III charts that model’s decline under the Rehnquist and Roberts Courts. Part IV concludes.

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2. For a very small cross-section of the more influential contributions in recent years, see generally Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217 (1995); Edmund W. Kitch, *Regulation, The American Common Market and Public Choice*, 6 HARV. J.L. & PUB. POL’Y 119 (1982); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979); Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409 (2008); Amy M. Petragani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215 (1994).

3. See Daniel Francis, *The Phantom Case Against the Dormant Commerce Clause* (unpublished manuscript in preparation) (on file with author).

4. During the preparation of this article for publication I had the pleasure of coming across Charles Budd’s thoughtful piece in Volume 4 of *The State and Local Tax Lawyer*, with a title inspired, like mine, by Edward Gibbon. Charles Budd, *The Decline of the Dormant Foreign Commerce Clause Halted?: Deer Park v. Harris County Appraisal District*, 4 ST. & LOC. TAX LAW. 171 (1999). I have not thought it necessary to change my title as a result, but I gladly acknowledge Judge Budd’s work and his fine taste in article titles.

## II. THE TRADITIONAL FRAMEWORK

### A. Overview and Fundamentals

The phrase “dormant Commerce Clause” refers to the inference that the Interstate Commerce Clause of the U.S. Constitution (“The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States”) is not only a basis for affirmative federal lawmaking, but also precludes states from acting in certain ways that threaten trade among the states.<sup>5</sup> Under the Traditional Framework, the dormant Commerce Clause prohibits three types of conduct: *discrimination* against interstate or out-of-state interests; the imposition of *unreasonable burdens* upon interstate commerce; and (occasionally) *extraterritorial regulation*.<sup>6</sup> The doctrine also applies in a distinctive fashion to *taxation cases*.<sup>7</sup> We will consider the Traditional Framework’s treatment of each of these types of state conduct in turn.

The dormant Commerce Clause can be invoked by any entity—natural or legal—injured by, or facing injury from, a state measure that it forbids.<sup>8</sup> This includes, for example: a person directly addressed by the state measure;<sup>9</sup> another state that has suffered impairment of “specific tax revenues,”<sup>10</sup> suffered other “direct injury,”<sup>11</sup> or whose citizens face “substantial economic injury”<sup>12</sup> from the measure; a trade association,<sup>13</sup> or a state agency acting as a *de facto* trade association,<sup>14</sup> representing interests that are injured by the measure; or an entity otherwise suffering or facing damage from the measure.<sup>15</sup>

The doctrine may be invoked to challenge the conduct of states, their agents, and their subdivisions,<sup>16</sup> although probably not Native American tribes.<sup>17</sup> The Court has applied the dormant Commerce Clause

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5. BORIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.01–6.01[B] (2d rev. ed. 2012) (alteration in original).

6. *See id.* § 6.02[B].

7. *See id.* § 6.06[G].

8. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 468 (2005) (actual injury); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (impending injury).

9. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572–75 (1997) (taxed entity); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 388 (1994) (regulated entity); *Morgan v. Virginia*, 328 U.S. 373, 376–77 (1946) (criminal defendant).

10. *Wyoming v. Oklahoma*, 502 U.S. 437, 448–54 (1992).

11. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 562, 598 (1855).

12. *Maryland v. Louisiana*, 451 U.S. 725, 736–39 (1981); *see also Wheeling & Belmont Bridge Co.*, 262 U.S. (13 How.) at 591 (recognizing the right of a state to represent the interest of its citizens).

13. *See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343–44 (1977).

14. *See id.* at 344.

15. *See, e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

16. *See, e.g.*, *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 653 (1994).

17. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *see also Otoe-Missouria Tribe of Indians v. N.Y. State Dep’t of Fin. Servs.*, 769 F.3d 105, 117 n.9 (2d Cir. 2014).

to a wide variety of measures, including civil statutes,<sup>18</sup> criminal statutes,<sup>19</sup> municipal and local ordinances,<sup>20</sup> tax laws and tax exemptions,<sup>21</sup> administrative orders,<sup>22</sup> mayoral executive orders,<sup>23</sup> and even contracting practices<sup>24</sup> and policies adopted by state-owned businesses.<sup>25</sup> As far as I can tell, the Supreme Court has almost never entertained an effort to invoke the Commerce Clause against private entities (although there is one unusual case that arguably constitutes an exception<sup>26</sup>), even private entities exercising de facto regulatory authority or closely entangled in the regulatory process.

A person is not precluded from invoking the dormant Commerce Clause against that person's own state of citizenship or residence.<sup>27</sup> The argument that in-staters have an adequate remedy at the polls, and that they should accordingly be denied relief under the dormant Commerce Clause and confined to "political" remedies, has been quite properly rejected by the Court,<sup>28</sup> although in some other cases the Court has indicated a troubling willingness to entertain it.<sup>29</sup> It has also featured in much scholarly writing, where it is associated with the notion of "representation reinforce[ment]."<sup>30</sup> But the notion that access to dormant Commerce Clause litigation should be denied to anyone fairly represented in the political process has mostly been—and certainly deserves to be—rejected, on at least two grounds: (1) the burden of anticompetitive state regulation virtually *always* falls partly upon in-staters and partly upon out-of-staters; and (2) the legality of state law cannot reasonably be made

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(explaining that the Indian Commerce Clause does not contain a "dormant" dimension equivalent to that found in the Interstate Commerce Clause).

18. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 440–41 (1992).

19. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 323–24 (1979); *Morgan v. Virginia*, 328 U.S. 373, 374–77 (1946).

20. See, e.g., *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 336–37 (2007) (plurality opinion); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386–87 (1994).

21. See, e.g., *Dep't of Revenue v. Davis*, 553 U.S. 328, 331–32 (2008) (plurality opinion); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 281–82 (1997).

22. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 188, 190 (1994); *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 335, 337 (1982).

23. See, e.g., *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 205–06 (1983).

24. See, e.g., *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 84–86 (1984).

25. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 430, 432–33 (1980). *But see* discussion *infra* Sections III.D.1–2 (arguing recent Supreme Court decisions have expanded the category of state-owned enterprises that are excluded from the dormant Commerce Clause).

26. *In re Debs*, 158 U.S. 564, 566–67, 572–73, 599–600 (1895).

27. See, e.g., *Minnesota v. Barber*, 136 U.S. 313, 326 (1890).

28. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994); *see also* *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1797–98 (2015).

29. See, e.g., *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (plurality opinion); *Wunnicke*, 467 U.S. at 92; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).

30. Eule, *supra* note 2, at 441–43; *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 83–84 (1980).

to depend upon a court's armchair assessment of the political economy of regulation within a state.<sup>31</sup>

### B. Discrimination

Perhaps above all else, the dormant Commerce Clause prohibits discrimination by a state in favor of its own commercial actors, interests, or activities, to the detriment of interstate or out-of-state equivalents.<sup>32</sup> But a discriminatory measure is not automatically invalid. Rather, if the Court concludes that a challenged measure is discriminatory in the relevant sense, it will turn to the question of whether that discrimination is justified. The Court's justification analysis will be discussed in detail below, but, in summary, discrimination is typically unlawful unless it is justified by a "legitimate" regulatory objective and there is no reasonable, less discriminatory, alternative way to achieve that objective.<sup>33</sup> The party raising the dormant Commerce Clause challenge bears the burden of showing a *prima facie* violation of the doctrine; once this burden has been discharged, the burden then passes to the regulating state to establish a justification.<sup>34</sup>

In the language preferred by the Court, discrimination in the proscribed sense is "differential treatment of in-state and out-of-state [or interstate] economic interests that benefits the former and burdens the latter"<sup>35</sup> in such a way that affects a relationship of actual or potential economic competition between the in-state and out-of-state interests.<sup>36</sup> "Benefit" and "burden" are measured against a counterfactual world without the measure: thus, a measure can discriminate by singling out out-of-state or interstate interests for less favorable treatment,<sup>37</sup> or by

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31. See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1055 (3d ed. 2000) ("The concept of surrogate representation should be deployed with care, since its logic cannot easily be contained."); Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 313 n.101 (1999) ("I tend to be skeptical that the Court could ever really figure out whether the burdened state residents will suffice to represent out-of-state interests. After all, is there ever a case in which burdened out-of-state interests like nonresident prospective home buyers have no proxy—real estate brokers, home builders, lenders, and so on—for their interests?"); see also *W. Lynn Creamery*, 512 U.S. at 214–15 (Rehnquist, C.J., dissenting) ("Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.").

32. See, e.g., *Wynne*, 135 S. Ct. at 1794; *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987).

33. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338–39 (2008) (plurality opinion).

34. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); see also *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977).

35. *United Haulers Ass'n, v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (plurality opinion) (citations omitted); *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (citations omitted).

36. See, e.g., *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300, 303 (1997) (holding a competitive relationship is a prerequisite to a finding of discrimination); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 271 (1984); *Alaska v. Arctic Maid*, 366 U.S. 199, 204–05 (1961).

37. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 568, 574–76 (1997).

depriving them of a competitive advantage that they would otherwise have enjoyed.<sup>38</sup>

Accordingly, the concept of “discrimination” is a broad one. What we might call “partial” discrimination—discrimination in favor of a region of the regulating state, in favor of a few (or just one) in-stater(s), or against only some other states—is treated just like “complete” discrimination and is unlawful.<sup>39</sup> This makes perfect sense as an anti-evasion norm: absent such a rule, states could simply avoid the prohibition by favoring large in-state regions or large groups of in-state actors. Also caught is discrimination against states that fail (or refuse) to satisfy a requirement of reciprocity with the regulating state.<sup>40</sup>

In the Court’s jurisprudence, discrimination comes in two categories: (1) facial discrimination and (2) effect-based discrimination.

### 1. Facial Discrimination

When a measure *facially* or formally discriminates—that is, distinguishes on its face—against interstate or out-of-state commerce, entities, or activities, it is caught by the dormant Commerce Clause and must be justified as described below.<sup>41</sup> There is no *de minimis* exception to the rule against facial discrimination.<sup>42</sup>

The Court has applied this rule to a wide range of regulatory measures, including: bans or prohibitions on interstate transactions;<sup>43</sup> taxes and charges on interstate transactions or activities in excess of those applied to comparable internal ones;<sup>44</sup> less favorable tax treatment

38. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194–95 (1994); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986); *Hunt*, 432 U.S. at 350–51; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

39. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (one in-state actor favored); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353, 361 (1992) (preference for State subdivision impermissible); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957–58 (1982) (only certain States disfavored); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350, 354 (1951) (requirement to process milk within five miles of center of Madison); *Brimmer v. Rebman*, 138 U.S. 78, 82–83 (1891) (fee for inspection of meat of animals slaughtered more than 100 miles from place of sale).

40. See *Granholm*, 544 U.S. at 472–473; *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276 (1988); *Sporhase*, 458 U.S. at 957–58; see also *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976). But see *Cottrell*, 424 U.S. at 371–72, 376 (analyzing reciprocity criterion using *Pike* burden test).

41. *Camps Newfound/Owatonna*, 520 U.S. at 575–76; see also *Healy v. Beer Inst.*, 491 U.S. 324, 344 n.\* (1989) (Scalia, J., concurring in part and concurring in the judgment); Denning, *supra* note 2, at 495.

42. *Wyoming v. Oklahoma*, 502 U.S. 437, 455–56 (1992); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 269 (1984); see also *Beer Inst.*, 491 U.S. at 344 n.\*.

43. See, e.g., *Granholm*, 544 U.S. at 473; *Maine v. Taylor*, 477 U.S. 131, 137 (1986); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 84–86 (1984); *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 336–37 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978); *Edwards v. California*, 314 U.S. 160, 174 (1941).

44. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981); *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 332 (1977); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 70 (1963).

of products "because they are made in . . . other States";<sup>45</sup> application of special and burdensome licensing (or similar) requirements to products from out of state;<sup>46</sup> regulation of third parties forcing them to deal, entirely or partly, with an in-state entity;<sup>47</sup> regulation of third parties making it more expensive or burdensome for them to deal with out-of-state interests;<sup>48</sup> limitations on the types of transactions in which out-of-state parties can engage;<sup>49</sup> and procedural rules disfavoring out-of-state parties in litigation.<sup>50</sup>

## 2. Effect-Based Discrimination

When a measure discriminates in its effect—that is, in its distribution of actual benefits and burdens—against interstate or out-of-state interests, it must also be justified, just as if it were facially discriminatory.<sup>51</sup> But effect-based discrimination is an elusive and controversial concept.

Every commentator makes his or her own effort to capture the idea: here is mine. Effect-based discrimination occurs when—considering those bearing the burden of the regulation plus their competitors (whether or not the competitors are subject to the measure in question)—the burden created by a state measure correlates to or varies with out-of-stateness. The burden of a regulation can correlate to out-of-stateness either in its incidence (i.e., interstate or out-of-state regulatees are subject to the measure more often when undertaking an activity than in-state regulatees undertaking the same activity or an equivalent<sup>52</sup>) or in its burden when incident (i.e., interstate or out-of-state regulatees are subject to a heavier burden than in-state regulatees engaging in the same,

45. *Limbach*, 486 U.S. at 274; see also *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994); *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

46. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 394–95 (1952); *Welton v. Missouri*, 91 U.S. 275, 279 (1875).

47. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389–91 (1994); *Wyoming*, 502 U.S. at 455; *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 376–77 (1964); *Toomer v. Witsell*, 334 U.S. 385, 403–06 (1948).

48. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575–76 (1997) (tax exemption); *Or. Waste Sys.*, 511 U.S. at 99 (surcharge); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (fee).

49. See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37–39 (1980) (finding discrimination where a Florida statute prohibited ownership of local investment or trust businesses by certain types of out-of-state firms).

50. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 889 (1988) ("[T]he Ohio statute that suspends limitations protection for out-of-state entities is a violation of the Commerce Clause."); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 202 (1914).

51. *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940) ("The freedom of commerce . . . is not to be fettered by legislation, the actual effect of which is to discriminate in favor of interstate businesses, whatever may be the ostensible reach of the language." (footnote omitted)); *Nippert v. City of Richmond*, 327 U.S. 416, 429–32 (1946).

52. See, e.g., *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (tax favoring fruit wine and okolehao brandy); *Best & Co.*, 311 U.S. at 456–57 (tax on merchants using hotel rooms to secure retail orders); *Nippert*, 327 U.S. at 417–18, 431 (tax on itinerant solicitors).

or an equivalent, activity<sup>53</sup>). What matters here is the overall tendency of the measure, not its impact in idiosyncratic individual cases.<sup>54</sup> An effect-based rule of this kind only makes practical sense if it incorporates a *de minimis* exception: a trivial or momentary imbalance in competitive impact hardly warrants full-blown justification analysis.<sup>55</sup>

Note that my formulation does not reach, and is not intended to reach, all forms of unequal regulatory burden. In particular, a rule against effect-based discrimination, contoured as I have described it here, does not imply that a burden is discriminatory in the proscribed sense just because it applies mainly or even solely to out-of-state or interstate regulatees. I think this is a minority view: if I read them correctly, Brannon Denning, Norman Williams, and Michael Lawrence see such measures as discriminatory in the relevant sense; I do not.<sup>56</sup> Such a situation can arise, for example, when a state regulates an industry in which the activities or actors happen to be predominantly (or even exclusively) interstate in nature: in such a case the regulation may burden that industry, but among the set of regulatees and competitors no relative advantage is conferred on in-state interests. In such situations the Court tends—quite rightly in my view—not to find discrimination.<sup>57</sup> Consider, for example, a state that did not produce milk, or a state with no mining or pharmaceutical companies of its own. Could that state regulate milk, or mining, or pharmaceuticals, without immediately tripping over the dormant Commerce Clause and being forced to justify its regulatory scheme? I think the answer should be “of course.” So the question is not whether, in the set of burdened regulatees, there are more out-of-staters than in-staters; the question is whether in-staters tend to enjoy a better deal by comparison with out-of-state competitors (either because the in-staters face a lighter burden or because they are less frequently burdened).

The Supreme Court has found effect-based discrimination, for example, when regulatory measures favor or require the performance of some action in-state, or in or near to some specific region of the state (a requirement that, practically speaking, favors in-state entities, particular-

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53. See, e.g., *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 335, 353 (1977) (prohibition on displaying State apple quality markings which operated to the particular detriment of Washington apples).

54. See, e.g., *Nippert*, 327 U.S. at 432.

55. See, e.g., Regan, *supra* note 2, at 1136 (“Protectionist effect . . . cannot be made virtually *per se* illegal . . . There are just too many possible laws that are within the states’ power on any reasonable standard and that have some protectionist effect.”).

56. See Denning, *supra* note 2, at 514 (regarding such measures as discriminatory); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395, 423–424 (1998); Williams, *supra* note 2, at 412, 412 n.14.

57. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618–19 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125–26 (1978); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 177–79 (1923); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 258 (1922). *But see Exxon Corp.*, 437 U.S. at 135 (Blackmun, J., concurring in part and dissenting in part) (criticizing majority opinion for declining to find effect-based discrimination in such a case).

ly those already located in or near the relevant area);<sup>58</sup> favor some kind of product or service produced solely or primarily in-state, by comparison with out-of-state substitutes or competitors;<sup>59</sup> or favor incumbents in a state's internal market.<sup>60</sup>

### 3. Intentional Discrimination

Occasionally, one sees intentional or purposive discrimination listed as a distinct third category of discrimination, along with facial and effect-based discrimination.<sup>61</sup> But in truth, and setting aside a recent wave of innovations upon the Traditional Framework that will be discussed in detail below,<sup>62</sup> the Court's decisions generally do not focus on intention, nor suggest that intention alone can render a measure troubling under the dormant Commerce Clause.<sup>63</sup>

### 4. Justification of Discriminatory Regulation

The Court typically states that a discriminatory measure "will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."<sup>64</sup> The Court describes this test as one of the "strictest scrutiny,"<sup>65</sup> and the regulating state carries the burden of proof.<sup>66</sup> The justification analysis apparently includes a subjective component: in order to claim the benefit of a justification, the Court seems to require that the state show that the justi-

58. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391–92 (1994) (citing cases); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 84 (1984) (timber processing required to be performed in-state); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (Madison regulation that favored milk produced within five miles of Madison was unlawful discrimination); *Foster-Fountain Packaging Co. v. Haydel*, 278 U.S. 1, 13 (1928); *Minnesota v. Barber*, 136 U.S. 313, 326 (1890) (meat examination required to be performed in-state); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138, 146 (1970) (fruit packaging required to be performed in-state).

59. See, e.g., *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 271 (1984).

60. See, e.g., *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). But see *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 333 (1951) (upholding requirement to obtain license before competing with an incumbent).

61. See Regan, *supra* note 2, at 1092; see also Denning, *supra* note 2, at 502; Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295, 306 (2013); Bradford C. Mank, *Are Public Facilities Different from Private Ones? Adopting a New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157, 163–64 (2007); Will Sears, Note, *Full-Impact Regulations and the Dormant Commerce Clause*, 39 COLUM. J. ENVTL. L. 157, 163 (2014).

62. See *infra* Section III.B.2 (charting the increasing focus on intention in recent cases).

63. See *infra* Section III.B.1 (discussing traditional rejection of intention).

64. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (plurality opinion) (internal quotation marks omitted) (citations omitted); see also *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338–39 (2007) (plurality opinion); *Granholt v. Heald*, 544 U.S. 460, 489 (2005); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581–82 (1997); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100–01 (1994); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

65. *Camps Newfound/Owatonna*, 520 U.S. at 581 (citation omitted); *Or. Waste Sys.*, 511 U.S. at 101 (citation omitted).

66. *Granholt*, 544 U.S. at 492; *Taylor*, 477 U.S. at 138.

fication in question actually motivated the measure and is not an *ex post* rationalization.<sup>67</sup> The Supreme Court often stresses the toughness of the justification test by asserting that discriminatory measures are “virtually *per se* invalid.”<sup>68</sup>

As actually applied, however, the justification analysis for discriminatory regulation is more permissive. It is split into two stages. In the first stage, the state must identify a “legitimate purpose” for the discrimination, on a broad, permissive, and binary definition of “legitimate” (much like rational basis scrutiny),<sup>69</sup> and it must also show that the problem at which the regulation aims varies in some way with out-of-stateness.<sup>70</sup>

In the second stage, the state is required to show that its regulatory solution varies with out-of-stateness in approximately the same way that the problem does—that the skew of the measure broadly resembles the skew of the underlying policy problem. Thus, a problem that is simply “common to the several States” will not justify discrimination.<sup>71</sup> And it must be the problem itself, not the solution, that varies with out-of-stateness: the legislature cannot discriminate in order to address the in-state piece of an evenly distributed problem.<sup>72</sup> Such evenly distributed problems—the need for food safety,<sup>73</sup> the harms and losses from competition,<sup>74</sup> the scarcity of natural resources,<sup>75</sup> the noxiousness of pollution,<sup>76</sup> the burdens of caring for the indigent,<sup>77</sup> the risk of consumer confusion,<sup>78</sup> and so on—therefore cannot be solved with discriminatory regulation.<sup>79</sup> By contrast, if the relevant problem is asymmetrically distributed across

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67. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 457 (1992) (rejecting a proffered justification because, among other things, it “finds no support in the records made in this case”); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 680 (1981) (Brennan, J., concurring) (plurality opinion) (“The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State’s lawmakers, and not against those suggested after the fact by counsel.”).

68. See, e.g., *Davis*, 553 U.S. at 338 (citations omitted).

69. See, e.g., *Taylor*, 477 U.S. at 148; *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

70. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353, 367 (1992); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 345–46 (1992).

71. *Chem. Waste Mgmt.*, 504 U.S. at 339–40, 348; see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978).

72. For example, States have often discriminated against out-of-state interests simply because they want to support and protect local businesses, consumers, charities, and resources. But, the Court has recognized that to allow such “justifications” would be to trample the dormant Commerce Clause into the mud. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 272–73 (1984).

73. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353–55 (1951).

74. See, e.g., *W. Lynn Creamery*, 512 U.S. at 204–05; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531–33 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

75. See, e.g., *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 337–38 (1979).

76. See, e.g., *City of Philadelphia*, 437 U.S. at 629.

77. See, e.g., *Edwards v. California*, 314 U.S. 160, 174–75 (1941).

78. See, e.g., *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 353–54 (1977).

79. See, e.g., *H.P. Hood & Sons*, 336 U.S. at 538–39; *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928); *West v. Kan. Nat. Gas Co.*, 221 U.S. 229, 260 (1911).

states, a differentiated approach may be justified. By requiring the regulatory solution to fit the policy problem, the Court essentially invites the state to show that it is not in fact “discriminating” in the sense of treating similar things dissimilarly, but instead responding even-handedly to an asymmetric problem.<sup>80</sup>

### C. Burden Review

Discrimination, while of central importance, does not exhaust the concerns of the dormant Commerce Clause under the Traditional Framework. The doctrine has also long been understood to have an aspect that is concerned purely with burden upon commercial activity. This practice of burden review is currently known as the “*Pike*” doctrine after a case in which its current formulation was prominently articulated.<sup>81</sup> Under this approach, a measure is unlawful if its burdens are “clearly excessive in relation to the [measure’s] putative local benefits.”<sup>82</sup> Note the term “local” here: on at least two occasions the Court has indicated that only benefits accruing to the regulating state’s own citizens count as “benefits” in the relevant sense.<sup>83</sup> (There is accordingly something of a tension in dormant Commerce Clause law between the doctrine’s antagonism to state discrimination against out-of-staters, on the one hand, and its lack of receptivity to the notion that states might legitimately justify regulatory decisions, at least in part, by reference to the interests of out-of-staters, on the other.)

The Court approaches burden review with considerable deference, and generally confines its applications of this rule to clear cases.<sup>84</sup> For example, the Court invalidated non-discriminatory rules in *Kassel v.*

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80. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (“[The justification analysis] is perhaps just another way of saying that what may appear to be a ‘discriminatory’ provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so.”); *City of Philadelphia*, 437 U.S. at 626–27 (“[W]hatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”).

81. See generally *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Note that burden review emerged long before *Pike*. See *infra* Section III.C.1.

82. *Pike*, 397 U.S. at 142 (citation omitted); see also *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338–39 (2008) (plurality opinion); *United Haulers Ass’n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (plurality opinion); *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 99 (1994); *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 525–26 (1989); *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471–72 (1981); *City of Philadelphia*, 437 U.S. at 624.

83. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987); *Edgar*, 457 U.S. at 644.

84. See, e.g., *Breard v. City of Alexandria*, 341 U.S. 622, 640 (1951) (“When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana.”), *abrogated by Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980); *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 189–91 (1938) (emphasizing the importance of judicial deference in the absence of discrimination); see also Denning, *supra* note 2, at 422 & n.8 (noting that *Pike* calls for a “deferential balancing test”).

*Consolidated Freightways Corp. of Delaware*,<sup>85</sup> when Iowa was unable to muster any serious evidence that its exclusion of trucks beyond a certain length from its highways promoted safety;<sup>86</sup> in *Raymond Motor Transportation, Inc. v. Rice*,<sup>87</sup> when the “appellants produced a massive array of evidence to disprove the State’s assertion that the regulations make some contribution to highway safety,” while the State had “virtually defaulted in its defense of the regulations as a safety measure”;<sup>88</sup> and in *Bibb v. Navajo Freight Lines, Inc.*,<sup>89</sup> when Illinois’s requirement of the use of curved mudguards on its highways, rather than the straight guards required in most other states, created a burden on interstate commerce that was “rather massive” while it was “conclusively shown” that the curved guard conferred no advantages over the straight guard, and given significant evidence that it actually introduced new dangers.<sup>90</sup> Each of these was a clear case, leaving little room for a serious defense of the reasonableness of the measure in question.

#### D. Extraterritorial Regulation

A short but distinct line of cases applying the Traditional Framework prohibits states from directly regulating “commerce occurring wholly outside the boundaries of [the] State.”<sup>91</sup> The key idea here, in a hangover from an earlier version of dormant Commerce Clause doctrine,<sup>92</sup> is directness: “The Commerce Clause . . . permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited.”<sup>93</sup> Thus, a state measure purporting to affect activities wholly outside the state—regulating, incentivizing, or penalizing them—may be struck down.<sup>94</sup> Likewise, “a State may not adopt legislation that has the practical effect of establishing a ‘scale of prices for use in other states,’”<sup>95</sup> and a state may not force an out-of-state merchant “to seek regulatory approval in one State before undertaking a transaction in another.”<sup>96</sup> This is so even if the relevant out-of-state activity itself has ef-

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85. 450 U.S. 662, 671–74 (1981) (plurality opinion).

86. *Id.*

87. 434 U.S. 429 (1978).

88. *Id.* at 444.

89. 359 U.S. 520 (1959).

90. *Id.* at 525, 528.

91. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion) (“The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (“New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”).

92. *See infra* Section III.A.2 (describing the direct/indirect burden test).

93. *Edgar*, 457 U.S. at 640; *see also Healy*, 491 U.S. at 336.

94. *See Beer Inst.*, 491 U.S. at 337–38; *Baldwin*, 294 U.S. at 521; *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 498 (1888).

95. *Beer Inst.*, 491 U.S. at 336 (quoting *Baldwin*, 294 U.S. at 528); *see also id.* at 337; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986); *Baldwin*, 294 U.S. at 521; *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 575–77 (1886).

96. *Brown-Forman*, 476 U.S. at 582.

fects within the regulating state—as it often will.<sup>97</sup> The Court has never clearly explained whether such regulation is automatically invalid or whether it may be justified.<sup>98</sup>

It must be said that the extraterritoriality doctrine—presented here as part of the Traditional Framework, before the decision in *Pharmaceutical Research & Manufacturers of America v. Walsh*<sup>99</sup>—is a bit of an oddball component of dormant Commerce Clause law. In many ways it may be better thought of as a creature of the Due Process Clause, with which it has often been entangled.<sup>100</sup> It may be right, as Goldsmith and Sykes seem to suggest, that the “extraterritoriality” cases may be best assimilated to the dormant Commerce Clause doctrine, if at all, under the rubric of burden review.<sup>101</sup>

### E. Tax Cases

For many years, the Court has approached taxation cases under a specific doctrinal framework, rather different from that which applies to “regulation” cases. The modern approach is adequately summarized by the *Complete Auto Transit, Inc. v. Brady*<sup>102</sup> test requiring that a tax “[(1)] is applied to an activity with a substantial nexus with the taxing State, [(2)] is fairly apportioned, [(3)] does not discriminate against interstate commerce, and [(4)] is fairly related to the services provided by the State.”<sup>103</sup>

#### 1. Substantial Nexus

Both the Due Process and Commerce Clauses require a connection between a taxing state and—for an entity not domiciled in that state<sup>104</sup>—any interstate activity that it seeks to tax.<sup>105</sup> This is a minimal requirement, and it is established if the taxed entity “avails itself of the substantial privilege of carrying on business within the State,”<sup>106</sup> although the Court has held that an entity lacking a physical presence within a state

97. See, e.g., *Edgar*, 457 U.S. at 642–43.

98. See *Sears*, *supra* note 61, at 172.

99. 538 U.S. 644 (2003).

100. See Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 980–83 (2013); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884–85 (1987); Williams, *supra* note 2, at 411–12 (“[T]he Court . . . has never made clear the connection between the dormant Commerce Clause and that limitation on state action.”).

101. See Goldsmith & Sykes, *supra* note 2, at 804.

102. 430 U.S. 274 (1977).

103. *Id.* at 279; accord *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981).

104. An appropriate share of *all* the activities of an entity domiciled in a State is automatically within the State’s reach. See *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458, 464 (2000).

105. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165–66 (1983); see also *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995).

106. *Exxon Corp. v. Wis. Dep’t of Revenue*, 447 U.S. 207, 220 (1980) (internal quotation marks omitted).

but mailing goods into it from outside is *not* connected to the state by such a nexus.<sup>107</sup> A use tax may be levied on such shipped-in goods, but it “must be collected from . . . the [in-state] customer, not the out-of-state seller.”<sup>108</sup> Justice Kennedy has recently called for this rule to be revisited in an age of online retail.<sup>109</sup>

The most interesting manifestation of the nexus doctrine—perhaps not the very highest praise—concerns the ability of a state to reach the out-of-state activities of an entity that undertakes some, but not all, of its activities in-state. The basic rule is that a state can tax (an apportioned share of<sup>110</sup>) out-of-state activity *if* the entity is domiciled in the state *or*, for a nondomiciled entity, if the out-of-state activity is part of a “unitary business” with the activity in the taxing state.<sup>111</sup> Discrete business activities that are not part of a unitary business with the in-state operations of a nondomiciliary entity may not be taxed.<sup>112</sup>

## 2. Fair Apportionment

A state that has a substantial nexus to an activity may only tax a “fairly apportioned” share of the value of that activity.<sup>113</sup> This rule applies even, it seems, if the taxing state is the state of residence, although the Court’s precedents are not consistent on this point.<sup>114</sup> This requirement has two components: internal consistency and external consistency.

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107. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 311 (1992); *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753, 758 (1967), *overruled by* *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992); *see also* *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1127 (2015); *Norfolk & W. Ry. Co. v. Sims*, 191 U.S. 441, 450–51 (1903) (“[T]he fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exemption of the transaction from a rule which would otherwise declare the tax [unlawful].”).

108. *Direct Mktg. Ass’n*, 135 S. Ct. at 1134 (Kennedy, J., concurring).

109. *Id.* at 1135 (“There is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet. . . . The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.”); *see also* *Robbins v. Taxing Dist.*, 120 U.S. 489, 495 (1887) (“It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the state. Besides, why could not the state to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?”), *abrogated by* *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843 (1996).

110. *See infra* Section II.E.2 (describing the fair apportionment requirement).

111. *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 26 (2008); *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458, 460–61 (2000); *Allied-Signal, Inc. ex rel. Bendix Corp. v. Dir., Div. of Taxation*, 504 U.S. 768, 778 (1992).

112. *Hunt-Wesson*, 528 U.S. at 464.

113. *See, e.g.*, *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1795 (2015); *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434, 439–40 (1939); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 308–11, 314 (1938).

114. *Wynne*, 135 S. Ct. at 1798–99; *J.D. Adams Mfg. Co.*, 304 U.S. at 311–12, 314. *But see* *W. Publ’g Co. v. McColgan*, 328 U.S. 823 (1946) (per curiam), *aff’g* 166 P.2d 861, 864 (Cal. 1946); *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 299–300 (1944).

cy.<sup>115</sup> A formula is *internally* consistent if, supposing that it were adopted by every state in the Union, it would not result in interstate commerce being taxed more heavily than its intrastate equivalent.<sup>116</sup> A formula is *externally* consistent if the factors used in the formula “actually reflect a reasonable sense of how income is generated.”<sup>117</sup> This test asks “whether a State’s tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.”<sup>118</sup> If the tax satisfies the criteria of internal and external consistency, it is fairly apportioned—even if, in fact, there is a risk or reality of “double taxation.”<sup>119</sup>

### 3. Non-Discrimination

The dormant Commerce Clause prohibits tax discrimination against interstate or out-of-state actors or activities.<sup>120</sup> This includes, for example, the application of higher taxation rates for out-of-state or interstate activities,<sup>121</sup> tax breaks and exemptions that favor in-state businesses or interests,<sup>122</sup> and rules that allow in-state businesses to reduce their tax liability in ways that are denied to out-of-staters.<sup>123</sup> The internal consistency rule, described above in connection with apportionment, can also be understood to reflect a concern to avoid discriminatory taxation.<sup>124</sup> All the comments above regarding effect-based discrimination are fully applicable in this context: indeed, many of those cases are taxation cases.<sup>125</sup>

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115. *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (“[W]e have assessed any threat of malapportionment by asking whether the tax is internally consistent and, if so, whether it is externally consistent as well.” (internal quotation marks omitted) (citations omitted)).

116. *Id.*; see also *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 437 (2005); *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989), *abrogated by* *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787 (2015); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

117. *Container Corp.*, 463 U.S. at 169.

118. *Jefferson Lines*, 514 U.S. at 185; see also *Goldberg*, 488 U.S. at 262 (“The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.”).

119. *Wynne*, 135 S. Ct. at 1795, 1804; *Jefferson Lines*, 514 U.S. at 191–92; *Armco Inc. v. Hardesty*, 467 U.S. 638, 645–46 (1984); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278–79 (1978); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946), *overruled by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); see also *Shaffer v. Carter*, 252 U.S. 37, 58 (1920) (stating that double or other “unequal” taxation is not *per se* prohibited by the federal Constitution), *abrogated by* *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787 (2015).

120. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *Jefferson Lines*, 514 U.S. at 197; *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963).

121. See, e.g., *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (noting that a taxing rule is discriminatory if it “tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State” (quoting *Armco*, 467 U.S. at 642)).

122. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 587–88 (1997); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276 (1988); *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 125 (1908).

123. See, e.g., *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999).

124. See, e.g., *Wynne*, 135 S. Ct. at 1795, 1804; *Armco*, 467 U.S. at 644.

125. See *supra* Section II.B.2 (explaining effect-based discrimination).

This rule against discrimination is subject to an important caveat. The “compensatory tax” doctrine provides that a tax, even if facially discriminatory, may be sustained if its effect is to eliminate a distortion that would otherwise result from the uneven incidence of another tax enacted by the same state.<sup>126</sup> The effect must be “simply to make interstate commerce bear a burden already borne by intrastate commerce”;<sup>127</sup> that is, by “impos[ing] a tax on a substantially equivalent event,” it “assure[s] uniform treatment of goods and materials to be consumed in the State.”<sup>128</sup> A tax may survive on this ground if it: (1) is a compensation for a tax separately imposed on intrastate activity; (2) approximates, *but does not exceed*, the burden of that separate tax; and (3) taxes a “substantially equivalent” event that is sufficiently similar in substance, and mutually exclusive of, the event burdened by that separate tax.<sup>129</sup> A compensatory tax may not go *beyond* compensation and result in discrimination that favors in-state interests.<sup>130</sup> The compensatory tax doctrine is a form of justification: as such, the state bears the burden of proving applicability.<sup>131</sup>

#### 4. Fair Relation to Services Provided

Finally, “the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State.”<sup>132</sup> This is a minimal threshold, asking only that “the measure of the tax must be reasonably related to the extent of the contact” with the state.<sup>133</sup> The rule resembles, and should probably be understood as, a manifestation of the general framework for burden review described above.<sup>134</sup>

126. *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994); *accord* *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937). For an early parallel, see *Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 152–53 (1868).

127. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331–32 (1996); *accord* *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 331 (1977) (noting that the “common theme” is “[e]qual treatment of interstate commerce”).

128. *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981); *see also* *Henneford*, 300 U.S. at 584 (“The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.”).

129. *Fulton Corp.*, 516 U.S. at 332–33 (internal quotation marks omitted); *see also* *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 104 (1994) (“[R]espondents’ compensatory tax argument fails because the in-state and out-of-state levies are not imposed on substantially equivalent events.”); *Armco*, 467 U.S. at 643 (holding that “manufacturing and wholesaling are not ‘substantially equivalent events’” for the purposes of this analysis).

130. *See, e.g., Lohman*, 511 U.S. at 648–50.

131. *Fulton Corp.*, 516 U.S. at 344.

132. *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 199 (1995).

133. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (emphasis omitted); *see also* *Jefferson Lines*, 514 U.S. at 200 (“[The] fourth criterion asks only that the measure of the tax be reasonably related to the taxpayer’s presence or activities in the State.”); *Great N. Ry. Co. v. Washington*, 300 U.S. 154, 160–61, 168 (1937); *Standard Oil Co. v. Graves*, 249 U.S. 389, 395–97 (1919); *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 162 (1918); *D.E. Foote & Co. v. Stanley*, 232 U.S. 494, 506 (1914).

134. *See supra* Section II.C (explaining burden review).

### F. Congressional Override

Completing the picture is the proposition that the dormant Commerce Clause offers a rare example of judicial review without judicial supremacy: Congress may authorize what the Court has forbidden or would forbid,<sup>135</sup> by expressing such an intention “unambiguous[ly].”<sup>136</sup> Justice Scalia called this feature of the doctrine “utterly illogical,” and asked: “How could congressional consent lift a constitutional prohibition?”<sup>137</sup> Amy Petragani has raised the same criticism.<sup>138</sup> But this difficulty recedes if the provision for congressional override is understood as an element of the constitutional command, not an exception to it in the strict sense.<sup>139</sup> Of course, whether it can fairly be understood this way is a separate question.

### III. THE STRANGE DEATH OF THE DORMANT COMMERCE CLAUSE<sup>140</sup>

My central claim in this Article is that, since the mid-1980s, the Supreme Court has continued to pay lip service to the Traditional Framework while, in fact, dramatically eroding it. This argument has three components, each corresponding to a dimension of doctrinal change. First, while the Court’s rhetoric on discrimination broadly conforms to the Traditional Framework outlined above, in practice the Court’s willingness to respond to discrimination has dwindled dramatically, and today discriminatory regulation will only raise serious dormant Commerce Clause issues when it amounts to intentional protectionism. Second, the Court has effectively retired the practice of burden review. Third, exceptions to the doctrine—zones of complete immunity from the reach of the dormant Commerce Clause—are being created and expanded at an unprecedented rate.

This Part might well have been entitled “Regan’s Victory” to honor the fact that the first and second of these three dimensions of change closely resemble the doctrinal model that Donald Regan promoted in his

135. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 138–39 (1986); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87–88 (1984); *Grp. Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979); *Prudential Ins. v. Benjamin*, 328 U.S. 408, 425 (1946); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (13 How.) 421, 431 (1855).

136. E.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *Taylor*, 477 U.S. at 138–40; see also *Wunnicke*, 467 U.S. at 91; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982).

137. *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting); see also *Benjamin*, 328 U.S. at 426 (questioning the effectiveness of congressional consent); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 321 (1851) (doubting the effectiveness of congressional consent), *abrogated by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

138. Petragani, *supra* note 2, at 1245–46.

139. But see Denning, *supra* note 2, at 496 (describing congressional override as an exclusion or exception from the doctrine).

140. I allude here to GEORGE DANGERFIELD, *THE STRANGE DEATH OF LIBERAL ENGLAND* (1935).

1986 article *Making Sense of the Dormant Commerce Clause*.<sup>141</sup> That article made the descriptive claim that the Supreme Court had already adopted this doctrinal model: a claim that was surely premature at the time, although the law has aligned with Regan's prescription in the intervening years. But even Regan could not foresee the third dimension of the decline: the astonishing proliferation of exemptions and exceptions to the doctrine. My argument also falls in line with the prescient work of Amy Petragani, who spotted the emerging trend in 1994 and argued then that "the Court has . . . begun to realize the fallacy of the dormant Commerce Clause," leaving the doctrine on its "last leg."<sup>142</sup>

Many lower courts continue to articulate the Traditional Framework in its customary form: a rule against discrimination and a rule against unreasonable burden.<sup>143</sup> But this Part, picking up where Regan and Petragani left off, will demonstrate just how significantly the Supreme Court has undermined and weakened that model in its own adjudicative practice.

#### A. Background: Four Models of Dormant Commerce Clause Doctrine

It may be helpful to briefly recap, at least in very broad strokes, the evolution of the dormant Commerce Clause doctrine since it first raised its head in the famous trilogy of *Gibbons v. Ogden*,<sup>144</sup> *Brown v. Maryland*,<sup>145</sup> and *Willson v. Black-Bird Creek Marsh Co.*<sup>146</sup> The doctrine's roots are long, deep, and tangled: even a basic history of its evolution could occupy dozens of pages. Rather than undertake that exercise, this section will offer thumbnail sketches of the four basic doctrinal models that have—in very approximate sequence and with plenty of messy overlap between them in practice—dominated adjudication of the Commerce Clause's preclusive shadow. Doctrinal detail will be set aside in this section, as well as the wealth of social and political context that framed the doctrine's evolutionary progress, along with the entire question of original understanding.<sup>147</sup> In the interests of clarity of exposition the models

141. See Regan, *supra* note 2, at 1093.

142. Petragani, *supra* note 2, at 1216.

143. See, e.g., *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1042 (8th Cir. 2016) (describing the Traditional Framework); *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015); *Amerijet Int'l, Inc. v. Miami-Dade Cty.*, 627 F. App'x 744, 752 (11th Cir. 2015).

144. 22 U.S. (9 Wheat.) 1 (1824).

145. 25 U.S. (12 Wheat.) 419 (1827).

146. 27 U.S. (2 Pet.) 245 (1829).

147. The relevant literature on the history of the Commerce Clause in general and its dormant dimension in particular is voluminous, and it defies any attempt at curation. See, e.g., FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* 1 (1937); CURTIS P. NETTELS, *THE EMERGENCE OF A NATIONAL ECONOMY: 1775–1815*, at 98–101 (1962); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 432 (1941); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5–6 (2010); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387–88 (1987); Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1880–84 (2011); Grant S. Nelson & Robert J.

will be organized by reference to the approximate period of their ascendancy and prominence. In practice, of course, different models overlap with and shade into one another, and the language and logic of adjudication change gradually and messily. The following should be understood as nothing more than a gross simplification for heuristic purposes.

1. First Model: Interstate Commerce as Organizing Principle (c. 1820s–1890s)

From the 1820s onward, the Court grappled with the question of whether—and if so to what extent—the Commerce Clause cast an exclusionary shadow upon the regulatory powers of the states. Beginning with some initial, tentative ventures into the problem,<sup>148</sup> the Court arrived at the principle that states may not regulate or tax interstate commerce at all, but remained free to exercise their “police power” to regulate things other than “commerce,” and to regulate commerce that was not “interstate” in nature.<sup>149</sup> These two terms, of course, had not yet acquired their modern breadth.<sup>150</sup>

This approach placed a great deal of analytical strain on the notion that regulations of interstate commerce, on the one hand, and exercises of the local police power, on the other, could consistently be distinguished from one another. As we now recognize, “[l]ocal concern and infringement of national interest are not mutually exclusive categories.”<sup>151</sup> With the increasing modernization of the nation’s economy, the notion that states could not regulate or tax interstate commerce *at all*—and the rules created to define the boundary, such as the bizarre “original package” rule<sup>152</sup>—became unsustainable. A crucial moment arrived with the

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Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 7–13 (1999).

148. See, e.g., *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 214–19, 221–22 (1849); *The License Cases*, 46 U.S. (5 How.) 504, 522–24 (1847), *overruled in part by* *Leisy v. Hardin*, 135 U.S. 100 (1890), *superseded by statute*, 27 U.S.C. § 121 (1890), *as recognized in* *Granholm v. Heald*, 544 U.S. 460 (2005); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 157–59 (1837); *Willson*, 27 U.S. (2 Pet.) at 251–52; *Brown*, 25 U.S. (12 Wheat.) at 447–49; *Gibbons*, 22 U.S. (9 Wheat.) at 161–71.

149. See, e.g., *Robbins v. Taxing Dist.*, 120 U.S. 489, 497 (1887) (“Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.”), *abrogated by* *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843 (1996); *Reading R.R. Co. v. Pennsylvania* (*In re State Freight Tax*), 82 U.S. 232, 279 (1872) (“[I]f such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States.”), *abrogated by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 505 (1841) (McLean, J., concurring) (“[T]he commercial power, as it regards . . . commerce among the several states, has been decided . . . to be exclusively vested in congress.”).

150. See, e.g., Abel, *supra* note 147, at 481; Epstein, *supra* note 147, at 1393–95; Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 SAINT JOHN’S L. REV. 789, 805–06 (2006). *But see* Balkin, *supra* note 147, at 15–21 (defending a broad view of “commerce” as originally understood).

151. Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 7–8 (1940).

152. See, e.g., *Brown*, 25 U.S. (12 Wheat.) at 441–42 (applying the Import-Export Clause and holding that “when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive

Court's statement in the 1851 *Cooley v. Board of Wardens*<sup>153</sup> decision that the power to regulate interstate commerce was exclusively in the hands of Congress with respect to some matters, but shared with the states with respect to other matters.<sup>154</sup> The federal monopoly on the regulation of interstate commerce was broken, and a new analytical approach would be required.

## 2. Second Model: Directness and Discrimination as Organizing Principles (c. 1870s–1930s)

The analytical framework that emerged after *Cooley* proved influential and enduring. As the Court appreciated that the old test was a hopeless fit with an integrated economy,<sup>155</sup> the Court articulated one better suited to the Gilded Age. The new model turned not on whether interstate commerce was affected, but on the nature of the state measure. States could not—even through the police power—“directly” regulate, burden, or tax interstate commerce,<sup>156</sup> and could not discriminate against interstate commerce.<sup>157</sup> Conversely, state regulations that merely “indirectly” or “incidentally” burdened interstate commerce were lawful, as long as the indirect burden was not unreasonable.<sup>158</sup> This language endured long into the twentieth century, although the Court continued to apply a definition of “commerce” that fell far short of its modern breadth.<sup>159</sup>

## 3. Third Model: Discrimination and Reasonableness as Organizing Principles (c. 1930s–1980s)

All formalisms are born to die, and eventually the Court recognized that there was no workable way to distinguish between direct and indi-

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character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution”); see also *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 138–40 (1868) (overruling the original package rule as inapplicable to imports from another state).

153. 53 U.S. (12 How.) 299, 319–20 (1851).

154. *Id.*

155. Compare *Sherlock v. Alling*, 93 U.S. 99, 103 (1876) (acknowledging that local police-power regulation “might indirectly affect the commerce of the country,” but that it need not be automatically unlawful on that account), with *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 575 (1886) (emphasizing the converse proposition that even a regulation confined to the limits of a State may violate the Commerce Clause when it burdens “transportation which constitutes a part of commerce among the states”).

156. See, e.g., *Mo. Pac. Ry. Co. v. Kansas ex rel. Taylor*, 216 U.S. 262, 276 (1910); *Atl. Coast Line R.R. Co. v. Wharton*, 207 U.S. 328, 334 (1907); *Hall v. De Cuir*, 95 U.S. 485, 488 (1877).

157. See, e.g., *Guy v. Baltimore*, 100 U.S. 434, 439 (1879); *Welton v. Missouri*, 91 U.S. 275, 282 (1875); *Woodruff*, 75 U.S. (8 Wall.) at 140.

158. See, e.g., *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187–88 (1937); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925); *Barrett v. City of New York*, 232 U.S. 14, 31 (1914); *Savage v. Jones*, 225 U.S. 501, 525 (1912); *West v. Kan. Nat. Gas Co.*, 221 U.S. 229, 262 (1911).

159. E.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936) (holding that “the incidents leading up to and culminating in the mining of coal” are not “commerce”); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (differentiating “commerce” from “manufacture”).

rect (or incidental) regulation of commerce.<sup>160</sup> Eventually it was replaced with what I have called the Traditional Framework, rooted in a turn toward an effects-based, fact-sensitive analysis of the regulation's practical consequences.<sup>161</sup>

This third model emerged with the New Deal in the late 1930s and 1940s, while a broadly similar transformation was famously occurring in affirmative Commerce Clause jurisprudence.<sup>162</sup> In dormant Commerce Clause law, it was most clearly inaugurated in by Justice Stone in two cases. The first was *South Carolina State Highway Department v. Barnwell Bros.*<sup>163</sup> in 1938, in which Justice Stone emphasized that the Commerce Clause "prohibits discrimination against interstate commerce, whatever its form or method," heavily hinting that discrimination implied at least presumptive illegality, regardless of whether it was "direct."<sup>164</sup> The second was *Southern Pacific Co. v. Arizona ex rel. Sullivan*<sup>165</sup> in 1945, returning to the proposition (owing much to the practical logic of *Cooley*<sup>166</sup>) that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it," indicating that even state regulation of interstate commerce that was arguably "direct" could be lawful.<sup>167</sup> Completing the picture, the Court went on to explain that even for non-discriminatory rules, the analytical key was "the nature and extent of the burden which the state regulation . . . imposes on interstate commerce" and "the relative weights of the state and national interests involved."<sup>168</sup> The Traditional Framework—a rule against discrimination and a rule against unreasonable burden—was born.

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160. *E.g.*, *Breard v. City of Alexandria*, 341 U.S. 622, 635 n.19 (1951) ("'Incidental' as a test has not continued as a useful manner for determining the validity of local regulation of matters affecting interstate commerce."), *abrogated by* *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

161. *E.g.*, *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 259 (1938) ("Practical rather than logical distinctions must be sought.").

162. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 123–24 (1942); *United States v. Darby*, 312 U.S. 100, 119–22 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937). Note that the traditional "switch in time" narrative of the New Deal Supreme Court has been refined in recent years. *See, e.g.*, Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 636 (2007) ("[H]istorians have largely set to rest the 'switch-in-time-that-saved-nine' mythos . . . ." (footnote omitted)).

163. 303 U.S. 177 (1938).

164. *Id.* at 185–86.

165. 325 U.S. 761 (1945).

166. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851), *abrogated by* *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

167. *S. Pac. Co.*, 325 U.S. at 767.

168. *Id.* at 770–71 (emphasis added).

#### 4. Fourth Model: Intentional Discrimination as Organizing Principle (c. 1980s–Present)

In the fourth model, which I claim has emerged from the jurisprudence of the Rehnquist and Roberts Courts as a consequence of the collapse of the Traditional Framework, the zone of presumptive illegality has been narrowed to a rule against intentional protectionism, and burden review has decayed into minimal rational basis review at best. The migration from the third to the fourth phase will be the subject of the rest of Part III.

To summarize my account, this development begins in and around the 1980s. In what might be read as a reaction against the “age of balancing” that emerged in the years before, as well as a cousin of the “New Federalism” drive to revive state regulatory autonomy,<sup>169</sup> a remarkable outpouring of influential critical attacks on the Traditional Framework erupted at the end of the 1970s and through the 1980s.<sup>170</sup> Then came the changes of judicial personnel: 1986 saw both the accession to the Court of Justice Scalia (soon to be established as a prominent critic of the dormant Commerce Clause) and the elevation of Justice Rehnquist (an outspoken defender of state autonomy) to the position of Chief Justice. With the arrival in 1991 of Justice Thomas—today the leading critic of the doctrine—the stage was set for the doctrine’s remarkable decline.

We will consider in turn the three dimensions of the long fall of the dormant Commerce Clause: the retreat from the rule against discrimination; the retreat from burden review; and the proliferation of exceptions and immunities.

#### *B. The Decline of the Rule Against Discrimination*

##### 1. The Traditional Irrelevance of Intention

Throughout the life of the dormant Commerce Clause—up to and throughout the period in which the Traditional Framework emerged—the Court has overwhelmingly rejected subjective intention as a criterion of legality for a state law challenged under the Commerce Clause, and focused instead on the *effect* of the measure.<sup>171</sup> To be sure, there are several

169. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963–71 (1987) (charting the development and proliferation of balancing frameworks).

170. See *infra* notes 193–96 and accompanying text (noting academic criticism of the Traditional Framework in the late 1970s and early 1980s).

171. See *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 653 (1994); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 352–53 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 72 (1963); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353–54 (1951); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928); *Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927), *overruled on other grounds by California v. Thompson*, 313 U.S. 109, 114–15 (1941); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259 (1922); *Minnesota v. Barber*, 136 U.S. 313, 320 (1890); *Henderson v. Mayor of New York*, 92 U.S. 259, 268 (1875); *In re State Freight*

examples of dicta and occasional holdings to the contrary,<sup>172</sup> but subjective purpose, in the sense of what the state legislature or regulator actually thought or intended, has been rejected in the overwhelming majority of dormant Commerce Clause cases. I do not propose to say much more about this proposition, which I think generally uncontroversial. Even Donald Regan, who analyzes the Court's modern cases through the lens of subjective intentional protectionism, makes no claim that a concern with intentional protectionism motivated the Court's case law before 1935.<sup>173</sup> However, as this Section will show, the Court has abandoned this long-held position, and has come to embrace the kind of intent-based analysis that Regan himself proposed.

## 2. The Retreat from the Rule Against Discrimination

The first element of the retreat from the Traditional Framework was a profound softening and blunting of the rule that discriminatory measures—whatever their subjective purpose—presumptively violate the dormant Commerce Clause. Over a long arc of recent cases, the Court has repeatedly ignored effect-based discrimination—and even, in some cases, facial discrimination—in cases lacking evidence of some kind of undesirably “protectionist” frame of mind on the part of the relevant state actor.

The Court's 1977 decision in *Hunt v. Washington State Apple Advertising Commission*<sup>174</sup> exemplifies the treatment of discrimination under the Traditional Framework.<sup>175</sup> Washington's apples are—or were—so good that Washington had its very own system of quality grading.<sup>176</sup> But the North Carolina Board of Agriculture neutralized this advantage (at least in North Carolina) when it prohibited the use of any quality grade markings other than the USDA's: thenceforth, apples in North Carolina would have to bear the USDA's markings alone or none at all.<sup>177</sup> This rule, though not facially discriminatory, had the effect of depriving the Washington apples of the advantage of their own superior

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Tax, 82 U.S. 232, 276 (1872), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995); *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 140 (1868); *The License Cases*, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J., announcing the judgment of the Court), *overruled in part by* *Leisy v. Hardin*, 135 U.S. 100 (1890), *superseded by statute*, 27 U.S.C. § 121 (1890), *as recognized in* *Granholm v. Heald*, 544 U.S. 460 (2005); *see also* *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 366–67 (2007) (Alito, J., dissenting) (plurality opinion) (emphasizing that the doctrine is not focused on the legitimacy of a measure's goals).

172. *See, e.g.*, *McBurney v. Young*, 133 S. Ct. 1709, 1719–20 (2013); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531 (1949); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 425–27 (1936); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935); *Buck v. Kuykendall*, 267 U.S. 307, 315–16 (1925); *Sligh v. Kirkwood*, 237 U.S. 52, 60 (1915); *Engel v. O'Malley*, 219 U.S. 128, 139 (1911); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 727 (1865).

173. Regan, *supra* note 2, at 1094.

174. 432 U.S. 333 (1977).

175. *Id.*

176. *Id.* at 336.

177. *Id.* at 337.

quality (or, at least, their superior quality *markings*). Recognizing that this was effect-based discrimination, the Court condemned the measure.<sup>178</sup>

The Court in *Hunt* was assisted by more than a whiff of intentional protectionism—there was clear evidence that the measure was enacted, at least in significant part, in order to serve the commercial interests of the North Carolina apple industry. Consistent with the Traditional Framework, the Court denied that the finding of intention had independent legal significance, but was sure to point it out anyway:

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would 'want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed[']'. . . . However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand . . . even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.<sup>179</sup>

But a thin crack in the Traditional Framework could be discerned the following year when the Court decided *City of Philadelphia v. New Jersey*<sup>180</sup> in 1978. In that case, the Court confronted an example of facial discrimination—a New Jersey statute that prohibited the import of waste from out-of-state<sup>181</sup>—and condemned it as such under the dormant Commerce Clause.<sup>182</sup> The significant move here was not the Court's holding, but its language. Recall that the Traditional Framework involves two prohibitions (setting aside the rule against extraterritoriality): a rule against discrimination, which prohibits both facial and effect-based discrimination, and a rule against unreasonable burden. But in *City of Philadelphia* the Court commented that “where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*”<sup>183</sup> Notice the implicit move: no longer is burden review contrasted with a rule against discrimination; it is contrasted with a rule against some narrower category of “patent” discrimination.

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178. *Id.* at 350–51.

179. *Id.* at 352–53.

180. 437 U.S. 617 (1978).

181. *Id.* at 618.

182. *Id.* at 629.

183. *Id.* at 624 (citation omitted).

Doctrine was to follow where rhetoric led, and the next step came in 1981 with *Minnesota v. Clover Leaf Creamery Co.*<sup>184</sup> Minnesota had banned the sale of milk at retail in plastic nonreturnable, nonrefillable containers, but allowed the sale of milk at retail in *non-plastic* nonreturnable, nonrefillable containers, such as those made out of paperboard, relying on a series of studies of the ecological and environmental impact of plastic containers.<sup>185</sup>

In principle, such a measure seems unobjectionable. But in practice the measure's effects were massively discriminatory in favor of in-state business. The prohibited plastic containers were produced entirely out-of-state, while the pulpwood used for making the paperboard substitutes was a "major Minnesota product."<sup>186</sup> Yet the legislation was, apparently, "genuinely proposed for environmental reasons."<sup>187</sup> So the Court here was confronted with discriminatory effects but (supposedly) good intentions. Did it call out the effect-based discrimination, as it had in *Hunt*? Not at all. The Court emphasized repeatedly that the measure was non-discriminatory—that is, not that it was a justified example of discrimination, but actually non-discriminatory—and so applied deferential burden review instead.<sup>188</sup> The measure survived.

*Clover Leaf* thus suggested that the rule against discrimination might contain a penumbral region in which state conduct, while discriminatory, was not the kind of "patent" discrimination with which the dormant Commerce Clause was primarily concerned. Discriminatory conduct in this penumbra would be treated more leniently than the "patent" variety. But it remained unclear whether this approach was a passing aberration, or—if not—how the boundary between the core and the penumbra would be defined. Did "patent discrimination" mean facial discrimination, intentional discrimination, or something else?

A further hint came in 1984's *Bacchus Imports, Ltd. v. Dias*,<sup>189</sup> in which the Court demonstrated that it would strike down discrimination even if it was not facial so long as protectionist animus was obviously present. In that case, a Hawaii regulation that, while facially neutral, discriminated in favor of okolehao brandy and fruit wine (whether in-state or out-of-state) and against competing liquors (whether in-state or out-of-state)—a kind of facial neutrality that was fooling no-one about its true purpose.<sup>190</sup> The Court reaffirmed the orthodoxy that "discrimination" in the proscribed sense was present whenever the purpose or effect of the

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184. 449 U.S. 456 (1981).

185. *Id.* at 458–60.

186. *Id.* at 473.

187. *Id.* at 463 n.7.

188. *Id.* at 471–74.

189. 468 U.S. 263 (1984).

190. *Id.* at 265.

relevant measure was discriminatory.<sup>191</sup> But the Court's opinion nevertheless laid great emphasis on the purpose of the measure, rebutting at length the state's arguments that "there was no discriminatory intent" behind it.<sup>192</sup>

Meanwhile, momentum had been building for a change in the dormant Commerce Clause's doctrinal framework. The ground had been prepared for such a change by a series of vigorous academic attacks on what was perceived as the indeterminacy and illegitimacy of the Traditional Framework. Influential examples included Mark Tushnet's advocacy in 1979 of an approach that would have required the Court to intervene only when economic and political analysis indicated some dysfunction in the state legislative process;<sup>193</sup> Edmund Kitch's attack on the doctrine in 1981 as an idea of "absolutely no merit";<sup>194</sup> and Julian Eule's narrow account of the doctrine that built on Ely's "representation reinforcement" model.<sup>195</sup> In addition, the groundswell of New Federalism was rising, with increasing support for state regulatory autonomy.<sup>196</sup> After some changes to the Court's organization—the elevation of Justices Scalia and Thomas to the Court (in 1986 and 1991 respectively), and Justice Rehnquist's ascension to the Chief Justiceship (in 1986)—it would soon arrive in a string of well-known decisions that would inaugurate a new era in federalism jurisprudence.<sup>197</sup> The dormant Commerce Clause, likewise, seemed ripe for re-evaluation.

It was in this climate that Donald Regan published *Making Sense of the Dormant Commerce Clause* in 1986.<sup>198</sup> In this remarkably influential (and lengthy) article, Regan argued that the Supreme Court had *in fact* been concerned only with what he called purposeful economic protectionism in its previous decisions, and that it should *in principle* be doing just that. In his words, "[In] movement-of-goods cases . . . the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism,"<sup>199</sup> and that is "what the Court should do and is doing."<sup>200</sup> Regan argued that a "court should strike down a state law if and only if it finds by a preponderance of the evidence that protectionist purpose on the part of the legislators contributed substantially to

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191. *Id.* at 270.

192. *Id.* at 272–73.

193. Tushnet, *supra* note 2, at 125.

194. Kitch, *supra* note 2, at 123.

195. Eule, *supra* note 2, at 427–28.

196. The history of "New Federalism" is widely chronicled. See generally Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429–31 (2002); Paul D. Moreno, "So Long as Our System Shall Exist": *Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 711 (2005); Ryan, *supra* note 162, at 539–67.

197. See, e.g., *New York v. United States*, 505 U.S. 144, 188 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

198. Regan, *supra* note 2, at 1092–93.

199. *Id.* at 1092 (internal quotation marks omitted).

200. *Id.* at 1099.

the adoption of the law or any feature of the law.”<sup>201</sup> And “protectionism” was an “improvement (caused by the statute) in the competitive position of some class of local economic actors vis-à-vis their foreign competitors.”<sup>202</sup> In later work, he would double down on this subjectivist approach: “[W]hat we should be concerned with is ‘subjective’ intent. . . . It is a matter of what happens in the legislative halls in the generation of the law, not a matter of the consequences.”<sup>203</sup> Regan’s rule condemned measures motivated by protectionist purpose unless they were not “analogous in form to the traditional instruments of protectionism—the tariff, the quota, or the outright embargo,” a murky proviso which helped to accommodate deviations from his rule.<sup>204</sup>

Was Regan’s diagnosis premature? I think so. In 1986, although the Court was certainly giving signals that it was starting to move in this direction, the descriptive component of his claim was a real stretch. The Court had explicitly disclaimed any reliance on intention as recently as *Hunt*,<sup>205</sup> and even in *Bacchus Imports*—in which intention was prominent—the Court had stated that either “discriminatory purpose or discriminatory effect” would be enough to classify a measure as discriminatory, indicating that discriminatory purpose was not necessary.<sup>206</sup> More pointedly, the footnoted admission in *Clover Leaf* that legislators had won votes for the measure by emphasizing its “beneficial side effects on state industry”<sup>207</sup> (indicating protectionist purpose as the Court had defined it in *Bacchus Imports*<sup>208</sup>) would put it on the wrong side of the line that Regan himself seemed to be drawing: it certainly sounded like protectionist purposes had at least “contributed substantially to the adoption of the [discriminatory law in *Clover Leaf*].”<sup>209</sup>

Two decisions that shortly preceded Regan’s article gave further grounds to doubt his descriptive claim. In 1984’s *Edgar v. MITE Corp.*,<sup>210</sup> the Court had condemned a non-discriminatory anti-takeover

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201. *Id.* at 1148.

202. *Id.* at 1095.

203. Donald H. Regan, *Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing, Da Capo*, 99 MICH. L. REV. 1853, 1885 (2001).

204. Regan identifies the key features of such laws as their protectionist effect (their relative competitive promotion of local industry), their explicitness, and their protectionist purpose. Regan, *supra* note 2, at 1095, 1201–02 (identifying a wide range of rules as “obviously sufficiently analogous in form to tariffs, embargoes, or quotas” without explanation).

205. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 350–51 (1977).

206. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citation omitted).

207. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981).

208. *See Bacchus Imps.*, 468 U.S. at 273 (“[I]t is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers.”).

209. *Compare Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7, with Regan, *supra* note 2, at 1148 (“The question is whether legislators shared the protectionist purpose.”).

210. 457 U.S. 624 (1982).

statute that was marked by no indication of protectionist purpose.<sup>211</sup> Likewise, in 1982's decision in *Sporhase v. Nebraska ex rel. Douglas*,<sup>212</sup> the Court had analyzed a water-conservation measure that was facially discriminatory, and condemned it without any suggestion that the measure was motivated by improper protectionist purpose—or indeed by anything at all other than the “unquestionably legitimate and highly important” one of conserving resources for reasons unrelated to competitive preference.<sup>213</sup>

So in light of this background, and in light of the Court's long history of rejecting intention as a guide to legality under the dormant Commerce Clause,<sup>214</sup> Regan's descriptive claim was less than fully convincing. But his retrospective reclassification of earlier cases into an intentional-protectionism framework provided an intellectual model of enormous appeal to a Court that was ready to take the path he indicated. Regan's use of epicyclical devices, like the “analogous in form” proviso, and his exclusion of taxing and transportation cases, helped to explain deviations from the “true” path of intentional protectionism.

Regan's intervention found a receptive audience. Almost immediately, in 1987's *CTS Corp. v. Dynamics Corp. of America*,<sup>215</sup> the Court cited his work for the proposition that “[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.”<sup>216</sup> Justice Scalia, newly arrived on the Court, made a point of specifically endorsing his views in a concurring opinion.<sup>217</sup> Regan's work had made an immediate contribution to the fulfillment of its own prophecy.

And sure enough, after *CTS Corp.*, the Court moved more decidedly toward a subjective purpose standard. The next crucial development came the very next year, with 1988's *New Energy Co. of Indiana v. Limbach*,<sup>218</sup> in which the Court condemned a facially discriminatory tax—a tax exemption that applied only to ethanol produced in Ohio—in an opinion written by Justice Scalia which saw Regan's view clearly expressed in doctrinal form.<sup>219</sup> Justice Scalia was later to emerge as an aggressive critic of the dormant Commerce Clause doctrine,<sup>220</sup> but in his

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211. See *id.* at 630–31. Regan himself acknowledged that *Edgar* did not fit his theory, and declined to take it at face value. Regan, *supra* note 2, at 1279.

212. 458 U.S. 941 (1982).

213. *Id.* at 954–55, 960.

214. See *supra* note 171 (collecting cases).

215. 481 U.S. 69 (1987).

216. *Id.* at 87.

217. *Id.* at 95–96 (Scalia, J., concurring in part and concurring in the judgment).

218. 486 U.S. 269 (1988).

219. *Id.* at 271.

220. See, e.g., *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1807 (2015) (Scalia, J., dissenting) (describing the dormant Commerce Clause as “a judge-invented rule under which judges may set aside state laws that they think impose too much of a burden upon interstate commerce”); *Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 439 (2005) (Scalia, J., con-

*Limbach* opinion—invalidating a statute that was facially and intentionally discriminatory, an easy target for invalidation—he weakened the doctrine even while applying it.<sup>221</sup> In a crucial switch, he expressly identified the core function of the dormant Commerce Clause as prohibiting *intentional* protectionism, emphasizing that it “prohibits economic protectionism—that is, regulatory measures *designed to benefit* in-state economic interests by burdening out-of-state competitors.”<sup>222</sup> Here was a crisp articulation of the core of the “new” dormant Commerce Clause, in terms that closely echoed *Making Sense*. The *Limbach* formulation immediately stuck, and is frequently quoted.<sup>223</sup> Intention now occupied center stage.

Subsequent cases confirmed *Limbach*’s location of the doctrine’s new center. In 1994’s *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>224</sup> Justice Kennedy wrote for the Court that “[t]he *central rationale* for the rule against discrimination is to prohibit state or municipal laws whose *object* is local economic protectionism.”<sup>225</sup> The same year, in *West Lynn Creamery, Inc. v. Healy*<sup>226</sup>—a case that might have been analytically close, involving a subsidy to local dairy farmers (almost certainly lawful under the Supreme Court’s subsidy jurisprudence<sup>227</sup>) funded by a tax on all milk dealers (also almost certainly lawful because non-discriminatory)—the Court condemned the measure, emphasizing that protectionism was the “avowed purpose” of the law, and the “motive behind” it.<sup>228</sup>

Rhetorical seeds eventually bear decisional fruit, and it would not be long before the focus on intention began very clearly to dictate outcomes. The implications of the new approach became clear in 1997 when the Court examined a case of facial discrimination in *General Motors Corp. v. Tracy*.<sup>229</sup> In that case, Ohio had created a tax exemption for any entity that qualified as a “natural gas company”—but only local distribu-

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curing) (criticizing the Court’s “wardrobe of ever-changing negative Commerce Clause fashions”); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674–75 (2003) (Scalia, J., concurring) (“[A]s I have explained elsewhere, the negative Commerce Clause, having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated.”); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (“[T]he so-called ‘negative’ Commerce Clause is an unjustified judicial intervention not to be expanded beyond its existing domain.”).

221. *Limbach*, 486 U.S. at 273.

222. *Id.*

223. See, e.g., *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337–38 (2008) (plurality opinion); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

224. 511 U.S. 383 (1994).

225. *Id.* at 390 (emphasis added).

226. 512 U.S. 186 (1994).

227. See *infra* Section III.D.3.

228. *W. Lynn Creamery*, 512 U.S. at 194, 196.

229. 519 U.S. 278 (1997).

tors could qualify.<sup>230</sup> The Court noted that these local distributors competed with out-of-state companies for the business of one group of customers (the “noncaptive” market), but that they did not significantly compete with out-of-state suppliers for the business of another group of customers (the “captive” market).<sup>231</sup> So the tax exemption facially favored local distributors over out-of-state competitors.

But—stunningly—the Court refused to acknowledge the discrimination. Instead, the Court ascribed “controlling significance” to the existence of the “noncaptive market,” in which in-state and out-of-state providers did not compete, and on that basis concluded that the prohibition was non-discriminatory.<sup>232</sup> In language foreshadowing the Court’s subsequent approach to burden review, the Court also indicated reluctance to condemn the measure because “as a Court we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio’s tax scheme on the utilities’ capacity to serve this captive market.”<sup>233</sup> Indeed, the Court went on, “[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them.”<sup>234</sup>

The *Tracy* decision was remarkable. Disclaiming any ability to make economic and social judgments, the Court chose to innovate on its traditional doctrinal approach because of special characteristics of the market at issue—characteristics that were distinguished and identified presumably by reference to the very same political and economic factors the Court disclaimed any competence to identify.<sup>235</sup> The move was particularly perplexing given that the special characteristics in *Tracy* appeared to be (1) the fact that heating gas was important and (2) the fact that the state regulated the sector.<sup>236</sup> These factors are, of course, ubiquitous, and it is certainly not obvious that they necessitated tax discrimination as a solution.<sup>237</sup>

*Tracy* demonstrates just how far the rule against discrimination had receded in cases where the legislature was pursuing something other than

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230. *Id.* at 285. The limitation to local distributors arose from a decision of the Ohio Supreme Court interpreting the statute in question.

231. *Id.* at 302.

232. *Id.* at 303–04.

233. *Id.* at 304.

234. *Id.* at 308 (citation omitted).

235. *Id.* at 303–05.

236. *Id.*

237. The complexity of a system of regulation and taxation might, of course, suggest a need for caution and deference in the framing of a remedy. But for precisely these reasons, the Court has always allowed the State to take the lead in framing a remedy in taxing cases without any suggestion that the complexity of the tax code should make discrimination more acceptable in the tax code than elsewhere. *See Am. Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167, 176 (1990) (“When we have held state taxes unconstitutional in the past it has been our practice to abstain from deciding the remedial effects of such a holding. While the relief provided by the State must be in accord with federal constitutional requirements . . . we have entrusted state courts with the initial duty of determining appropriate relief.” (citations omitted)).

a special competitive advantage for its own business. The Court was evidently worried that local companies might not survive interstate competition, and that the security of gas supply might be endangered by judicial intervention.<sup>238</sup> But three objections present themselves. First, there is no suggestion in the opinion that the record before the Court supported the proposition that a discriminatory tax was actually necessary, either for the protection of the Ohio local gas companies, or for security of gas supply to Ohio customers. Second, that very same argument—the need to preserve local industry from the risks of ruinous interstate competition—had been rejected countless times by the Court as a defense to dormant Commerce Clause liability, on the ground that it is fundamentally inconsistent with the core of the doctrine.<sup>239</sup> Third, the Court's concerns, based on its own inability to investigate economic effects or interfere with delicate regulatory balances, seem misplaced in this case, for at least three reasons: (i) the Court had never previously required an investigation of economic effects when discrimination was facial, as it was here; (ii) if the Court felt unable to make reliable judgments about economic or political matters, the creation of ad hoc exceptions to settled doctrine—based on the Court's case-by-case assessment of those very same economic or political issues—seems to reproduce, rather than address, that difficulty; and (iii) there was no suggestion that the difficulties or complexities in *Tracy* were significantly greater than those presented by other cases in which the Court had applied its doctrinal framework. For these reasons, *Tracy* can be seen as a watershed dormant Commerce Clause decision.

If *Tracy* exemplified the Rehnquist Court's work to weaken the dormant Commerce Clause, worse was to come under the Roberts Court. In 2007's *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,<sup>240</sup> the Court considered a local ordinance that reserved waste disposal business to a single, publicly owned, local enterprise.<sup>241</sup> (The case is primarily of note for announcing a “public enterprise” or “public entity” exception—discussed below<sup>242</sup>—but we focus here on the discrimination analysis.) The Court stated the basic rule, as

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238. See *Tracy*, 519 U.S. at 308–10.

239. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994) (“If we were to accept these arguments, we would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.”); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 272–73 (1984) (“If we were to accept [the promotion of local industry as a] justification, we would have little occasion ever to find a statute unconstitutionally discriminatory.”); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 545 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (“Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity.”).

240. 550 U.S. 330 (2007).

241. *Id.* at 336–37.

242. See *infra* Section III.D.2.

was by then usual, in terms of discriminatory purpose.<sup>243</sup> But what followed was a remarkable sleight of hand.

A careful reader of the Court's dormant Commerce Clause jurisprudence up to 2007 would probably hold the view that state regulations motivated by protectionist purpose raise constitutional concerns because protectionist distortions of the internal free market are the problem at which the Commerce Clause is aimed. In other words, the *purpose* to distort competition is objectionable precisely because the *effect*—distortion of competition—is constitutionally proscribed. But the *United Haulers* Court turned this basic proposition around, stating that “when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate *because* the law is often the product of simple economic protectionism.”<sup>244</sup> In other words, the Court reasoned, protectionist effect triggers constitutional scrutiny because it suggests a protectionist purpose. The tail of purpose was now cheerfully wagging the dog of effects. And this idea carried the implicit corollary that if a protectionist purpose was not present, then even a clear protectionist effect would be no cause for alarm.

Sure enough, the next stage of the analysis followed straight from this topsy-turvy premise. The category of laws that the Court believed were at issue in *United Haulers*—“[l]aws favoring local government”—were untroubling because, “by contrast [with most protectionist regulation, they] *may be directed toward any number of legitimate goals* unrelated to protectionism.”<sup>245</sup> Thus, even if laws do have a protectionist *effect*, there is no dormant Commerce Clause concern when they might not have a protectionist *purpose*. Having deftly set the cart before the horse in this way, the Court did not miss a further opportunity to harvest the fruit of *Tracy* by locating yet another category of extra-special deference to state regulation in order to bolster its conclusion. Just as natural gas was special in *Tracy*, so too waste disposal would get special deference in *United Haulers* because it “is both typically and traditionally a local government function.”<sup>246</sup> The Court completed its analysis by pointing out that the harm from any lost competition fell on the politically empowered voters of the regulating state: an argument that applies to virtually every dormant Commerce Clause case.<sup>247</sup> Yet again the Court dis-

243. *United Haulers*, 550 U.S. at 338 (“Discriminatory laws motivated by ‘simple economic protectionism’ are subject to a ‘virtually *per se* rule of invalidity . . .’” (emphasis added) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))). The *City of Philadelphia* decision itself actually said “where simple economic protectionism is *effected* by state legislation, a virtually *per se* rule of invalidity has been erected,” which is hardly the same thing. *City of Philadelphia*, 437 U.S. at 624 (emphasis added).

244. *United Haulers*, 550 U.S. at 343 (emphasis added) (internal quotation marks omitted).

245. *Id.* (emphasis added).

246. *Id.* at 344 (internal quotation marks omitted) (citations omitted).

247. *Id.* at 343–45. Needless to say, *every* dormant Commerce Clause case—indeed, every constitutional challenge to a State measure—involves an attempt to secure a victory the challenger could not obtain through the political process. See *supra* note 30 and accompanying text; see also W.

claimed economic and political expertise while relying on its own economic and political analysis to justify special treatment in an individual case.

The *United Haulers* Court wrapped up, and drove home its emphasis on subjective purpose, with a truly remarkable account of burden review (i.e., the deferential scrutiny applicable to all measures, including non-discriminatory ones). The Court described this highly deferential standard of review as the appropriate metric—not just for measures that were non-discriminatory—but for laws that were “*directed to legitimate local concerns*, with effects upon interstate commerce that are only incidental.”<sup>248</sup> The strong rule against discrimination now seemed to be reserved only for those forms of discrimination that were not subjectively “*directed to legitimate local concerns*.”<sup>249</sup> A fine dissent written by Justice Alito, and joined by Justices Stevens and Kennedy, vigorously attacked the opinion, to no avail.<sup>250</sup>

*United Haulers* was no aberration. The Court went out of its way to reaffirm it in the very next landmark dormant Commerce Clause decision: *Department of Revenue v. Davis*<sup>251</sup> in 2008. In that case, the Court considered Kentucky’s decision to immunize income from its own bonds from taxation while denying such an exemption to bonds of *other* states.<sup>252</sup> A case of clear facial discrimination in favor of in-state interests, one would think. But the Court hammered home the now-familiar language of Justice Scalia’s *Limbach* formulation—“the dormant Commerce Clause is driven by concern about . . . regulatory measures *designed to benefit* in-state economic interests by burdening out-of-state competitors”<sup>253</sup>—and made a point of repeating the cart-before-horse move from *United Haulers*.<sup>254</sup> The Court concluded that the dormant Commerce Clause had not been offended, relying on yet another “special” exemption that we will discuss below.<sup>255</sup> Just as in *United Haulers*, and in *Tracy* before that, a clear example of facial discrimination was not even put to a test of justification.

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Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 215 (1994) (Rehnquist, C.J., dissenting) (“Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.”).

248. *United Haulers*, 550 U.S. at 343, 346 (emphasis added) (quoting *City of Philadelphia*, 437 U.S. at 624).

249. *Id.* (quoting *City of Philadelphia*, 437 U.S. at 624). Note that this holding at last assigned meaning to the comment in *City of Philadelphia* that burden review was the appropriate standard outside a core zone of “patent” discrimination. See *City of Philadelphia*, 437 U.S. at 624.

250. *United Haulers*, 550 U.S. at 357–66 (Alito, J., dissenting) (disagreeing with the majority’s application based on the distinction between public and private entities).

251. 553 U.S. 328 (2008) (plurality opinion).

252. *Id.* at 333–34.

253. *Id.* at 337–38 (emphasis added) (internal quotation marks omitted).

254. *Id.* at 341.

255. See *infra* Section III.D.1.

But the historic low in the discrimination jurisprudence of the Court was yet to come. It arrived in 2013 with the decision in *McBurney v. Young*,<sup>256</sup> which is at the time of writing the Court's most recent substantive statement on the doctrine in a non-tax case.<sup>257</sup> Virginia's FOIA statute provided access to public documents and records, materials that constitute a crucial competitive input for companies engaged in the business of obtaining such records and providing them to consumers.<sup>258</sup> But the statute limited access to such materials to Virginia citizens only.<sup>259</sup> The out-of-state proprietor of one such records company was denied access on the basis that he was not a Virginia citizen, and along with others, he challenged the limitation under the dormant Commerce Clause.<sup>260</sup>

This was not merely discrimination: it was facial discrimination placing out-of-staters at a significant competitive disadvantage. But there was obviously no "protectionist purpose" at work—of course, the Virginia FOIA statute was not drafted with the intention of imposing a competitive disadvantage on out-of-state suppliers in the public-records business. So by now the outcome should have been clear. The Court began by emphasizing that *intentional* discrimination was the root of Commerce Clause evil.<sup>261</sup> But rather than decide the case on that basis, the Court was to outdo itself: holding, remarkably, that Virginia's FOIA law was not suitable for review under the dormant Commerce Clause at all.<sup>262</sup> The law in question

neither "regulates" nor "burdens" interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all. . . . This case is thus most properly brought under the Privileges and Immunities Clause: It quite literally poses the question whether Virginia can deny out-of-state citizens a benefit that it has conferred on its own citizens.<sup>263</sup>

This is a staggering conclusion for two reasons. First, it is well established that an "overlap" between the dormant Commerce Clause claim and a potential Privileges and Immunities Clause claim is not remotely harmful to either claim. The Court has on more than one occasion applied both provisions to state regulation, using quite separate analytical frameworks, reflecting the fact that the two Clauses are fundamentally concerned with different things and subject to radically different limita-

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256. 133 S. Ct. 1709 (2013).

257. The "non-tax" caveat refers to *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787 (2015), which is not clearly a discrimination case but is discussed in the next subsection.

258. *McBurney*, 133 S. Ct. at 1713.

259. *See id.* at 1714.

260. *Id.*

261. *Id.* at 1719–20.

262. *See id.* at 1720.

263. *Id.*

tions of scope.<sup>264</sup> The dormant Commerce Clause is concerned with distortions of economic competition; the Privileges and Immunities Clause is concerned with denial of equal treatment to natural persons with respect to a set of “fundamental rights.” It is beyond dispute that a measure can come out one way under the dormant Commerce Clause and another under the Privileges and Immunities Clause,<sup>265</sup> the Equal Protection Clause,<sup>266</sup> or for that matter, the Due Process Clause.<sup>267</sup> Second, it is absurdly inconsistent on the facts of the case. The Court held in the very same opinion that the right to public records fell outside the Privileges and Immunities Clause.<sup>268</sup> The fact that it would be possible to frame a claim unsuccessfully under one provision of the Constitution hardly weakens, let alone invalidates, an otherwise meritorious constitutional claim under another provision.

The Court finally commented that, even if the dormant Commerce Clause were applied to the Virginia FOIA law, a special exception—the market participant doctrine—would apply: a conclusion discussed below.<sup>269</sup> The Court’s determination to save this “innocent” statute could hardly have been clearer.

Finally, the Court’s most recent dormant Commerce Clause decision—*Comptroller of Treasury v. Wynne*<sup>270</sup>—is worth brief comment.

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264. See *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221–22 (1984) (“Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents. But that same exercise of power . . . may be called to account under the Privileges and Immunities Clause.”); *id.* at 220 (“The two Clauses have different aims and set different standards for state conduct.”); see also *White v. Mass. Council of Constr. Emp’rs, Inc.*, 460 U.S. 204, 213–15 (1983) (reaching opposite result under the dormant Commerce Clause).

265. See, e.g., *United Bldg.*, 465 U.S. at 219–21 (declining to immunize under the Privileges and Immunities Clause a measure virtually identical to one authorized the previous year under the dormant Commerce Clause, on the ground that “[t]he two Clauses have different aims and set different standards for state conduct”).

266. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 345–46 (1996) (“While we continue to measure the equal protection of economic legislation by a rational basis test [under the Equal Protection Clause], we now understand the dormant Commerce Clause to require justifications for discriminatory restrictions on commerce [to] pass the strictest scrutiny. Hence, while cases like *Kidd* and *Darnell* [which uphold State taxing rules] may still be authorities under the Equal Protection Clause, they are no longer good law under the Commerce Clause.” (internal quotation marks omitted) (citations omitted)); *Metro. Life Ins. v. Ward*, 470 U.S. 869, 881 (1985) (holding measure unlawful under the Equal Protection Clause even though it was immunized from dormant Commerce Clause analysis and stating: “[T]he State’s view ignores the differences between Commerce Clause and equal protection analysis and the consequent different purposes those two constitutional provisions serve.”); cf. *W. & S. Life Ins. v. State Bd. of Equalization*, 451 U.S. 648, 656–57 (1981) (applying Equal Protection Clause to a measure that was immune from Commerce Clause challenge).

267. See, e.g., *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1798 (2015) (“[W]hile a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.” (quoting *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 305 (1992))); *Schollenberger v. Pennsylvania*, 171 U.S. 1, 15–16 (1898) (invalidating a statute under the Commerce Clause although the same statute had previously been held lawful under the Fourteenth Amendment).

268. *McBurney*, 133 S. Ct. at 1717–18.

269. See *infra* Section III.D.1.

270. 135 S. Ct. 1787 (2015).

Under Maryland's taxing rules, residents paid both a state income tax and a county income tax on all their income, while nonresidents paid the state income tax on income derived in Maryland plus a "special nonresident tax" as a substitute for the county tax.<sup>271</sup> For residents, taxable income included income that had been earned in other states, but, to the extent that such out-of-state income was also taxed by the other state in question, the taxpayer was allowed to deduct the tax paid to that other state from their liability to pay Maryland's *state* income tax.<sup>272</sup> This avoided "double taxation" of income earned outside the state. But the problem was that the *county* income tax included no such offset.<sup>273</sup> So a resident's liability to pay the county tax on any income earned in another state would be *additional* to all the tax, if any, charged on that income by the other state.<sup>274</sup>

The taxing rule in *Wynne* obviously failed the test of internal consistency: that is, the rule that a state tax must be such that, if the tax were universalized among the states, interstate commerce would not be more heavily taxed than intrastate commerce.<sup>275</sup> The Court's analysis rested firmly on this ground,<sup>276</sup> though the majority did not admit that the Court's precedents were murky on the issue of whether a state of residency or domicile was required to apportion income at all.<sup>277</sup> But there was no suggestion of protectionist purpose. To some extent, then, this decision looks at odds with the general narrative I am offering here.

Perhaps *Wynne* is a wobble on the course that I have described here, but, if it is, it is a small and likely irrelevant one. *Wynne* turned on a mechanical application of the internal consistency rule—a specific rule applied in taxation cases with no direct equivalent in non-tax cases. Tax cases are, doctrinally speaking, a little different, and much more specific: the analysis relies on peculiar heuristics like "fair apportionment" and "substantial nexus," rather than the more porous tests ("legitimate,"

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271. *Id.* at 1792 (internal quotation marks omitted).

272. *Id.* at 1798.

273. *Id.* at 1792.

274. *Id.*

275. To see why, consider the following. If every State taxed income earned by its residents in another State at rate X, without granting an offset for income tax paid to that other State, and also taxed in-State income from nonresidents at rate Y, income derived in-state by State residents would be subject to burden X, income derived in-state by nonresidents would be subject to burden X+Y, and income derived out-of-state by State residents would be subject to burden X+Y. The result would be that interstate commerce bore a heavier burden: the internal consistency test would be violated. See *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); see also *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 437 (2005); *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989), *abrogated by* *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787 (2015); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

276. *Wynne*, 135 S. Ct. at 1803–05.

277. See *id.* at 1798–99; *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311–14 (1938). But see *W. Publ'g Co. v. McColgan*, 328 U.S. 823, 823 (1946) (per curiam) (affirming the lower court's judgment allowing apportionment of income tax by a state of domicile and another state in which income is earned), *aff'g* 166 P.2d 861, 864 (Cal. 1946); *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 299–300 (1944).

“clearly excessive,” and so on) that characterize the non-tax cases.<sup>278</sup> And the hypothetical universalization analysis applied by the Court under the internal consistency test is not a true discrimination test: in discrimination cases the Court asks whether *this law before the Court*—not some hypothetical set of universalized rules—actually differentiates in form or effect. So I see *Wynne* as telling us little about the Court’s general attitude to discrimination: it is chiefly significant to the extent that it suggests that the “decline” may be confined to non-tax cases.

For these reasons, *Wynne* can be bracketed, at least for now. Stepping back a little to review the four horsemen of the dormant Commerce Clause apocalypse—*McBurney*, *Davis*, *United Haulers*, and *Tracy*—the disintegration of the rule against discrimination is clear. Under the Rehnquist and Roberts Courts, in cases without evidence of a subjective intention to distort competition, the rule against discrimination has collapsed.

### C. The Decline of Burden Review

In recent jurisprudence, the practice of “burden review” of even non-discriminatory regulation—commonly known since 1970 as the “Pike test,” and turning on whether the regulatory burden on interstate commerce is “unreasonable”—has dwindled dramatically. I want to start by showing how deeply and broadly the roots of burden review reach in the history of the dormant Commerce Clause, and then show how far the Rehnquist and Roberts Courts have gone in pulling them up.<sup>279</sup>

#### 1. The Tradition of Burden Review

Burden review dates from the early years of the dormant Commerce Clause doctrine. Non-discriminatory rules were at issue in a number of the key early cases, including *Willson*, *Cooley*, and others, with no indication from the Court that discrimination was the limit of the preclusive reach of the dormant Commerce Clause.<sup>280</sup> Indeed, *Willson* itself set the theme for much of what was to follow, with its gnomic indication that the legality of a state measure was to be analyzed in light of “all the cir-

278. Indeed, Regan himself left taxing cases outside the scope of his article and his claims. Regan, *supra* note 2, at 1099.

279. Arguably included in this category, but not discussed here, is what Brannon Denning has identified as the death of the rule against extraterritorial State regulation. Denning, *supra* note 100, at 1006 (“[Dormant Commerce Clause doctrine] extraterritoriality is, for all intents and purposes, dead.”).

280. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851), *abrogated by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). *But see* *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 140 (1868) (“There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, *therefore*, an attempt to fetter commerce among the States . . .” (emphasis added)).

cumstances of the case.”<sup>281</sup> And the Court actually struck down a non-discriminatory measure under the Commerce Clause at least as early as 1867: a five dollar port charge that applied to in-state and out-of-state entities and commerce alike in *Southern Steamship Co. of New Orleans v. Portwardens*.<sup>282</sup> It is also worth noting that the second “dormant Commerce Clause case” ever decided by the Court, *Brown*, concerned a discriminatory regulation that was treated by the Court as a non-discriminatory one, and in that case Chief Justice Marshall intimated that state laws could be constitutionally troubling if they “affect[ed] materially the purpose for which [the commerce] power was given” to the federal Congress.<sup>283</sup> He went on to emphasize that “[w]e cannot admit, that [State taxing power] may be used so as to obstruct or defeat the power to regulate commerce.”<sup>284</sup> That is the language of burden review, right at the birth of the dormant Commerce Clause doctrine. Moreover, it is far from an anomaly.

It is impossible not to read much of the Court’s analysis in a great many of its earlier cases as amounting to or motivated by burden review: that is, a concern with the overall reasonableness of the burden on commerce in light of the measure’s benefits. To be clear, I do not claim that the Court has a long history of aggressively or casually invalidating state laws based on a de novo review of their wisdom. Nor do I claim that the Court has been consistent or clear in its adjudicative practice, in this any more than in any other aspect of its dormant Commerce Clause (or indeed its constitutional) jurisprudence. My purpose is just to point out that burden review—or reasonableness review, if you prefer—has for a very long time been part of the dormant Commerce Clause toolkit, contrary to the views of those like Donald Regan and Louis Henkin who perceive balancing analysis as a recent development in dormant Commerce Clause jurisprudence.<sup>285</sup>

I think there are two good ways to develop this point. The first is to show that a rule against unreasonable burden is consistent with the language of the Court’s decisions; the second is to show that the logic of burden review helps to explain what would otherwise be puzzling outcomes in the Court’s adjudicative practice. In service of the first approach, I offer evidence of considerable support for burden review in the

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281. *Willson*, 27 U.S. (2 Pet.) at 252. Indeed, at least one judge familiar with the views of Chief Justice Marshall later understood the decision in *Willson* to have turned on the extent of the burden imposed by the State in that case. See *The Passenger Cases*, 48 U.S. (7 How.) 283, 398 (1849) (McLean, J.) (“The chief justice [in *Willson*] was speaking of a creek which falls into the Delaware, and admitted in the pleadings to be navigable, but of so limited an extent that it might well be doubted whether the general regulation of commerce could apply to it.” (emphasis added)).

282. 73 U.S. (6 Wall.) 31, 32 (1867).

283. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827).

284. *Id.* at 448.

285. See, e.g., Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1038 (1978) (arguing that the pre-1937 cases did not require balancing); Regan, *supra* note 2, at 1109.

Court's jurisprudence before *Pike* in the following footnote.<sup>286</sup> Again, I make no claim that this practice of burden review was con-

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286. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 448 (1960) (measure not "unduly burdensome"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959) (non-discriminatory measures may create an "unconstitutional burden"); *Buck v. California*, 343 U.S. 99, 103 (1952) (permit and fee requirement not an "unreasonable burden"); *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946) ("A State is . . . precluded from taking any [non-discriminatory] action which may fairly be deemed to have the effect of impeding the free flow of trade between States."); *overruled by Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (court must "balance . . . the exercise of the local police power and the need for national uniformity"); *Nippert v. City of Richmond*, 327 U.S. 416, 425 (1946) (States may not impose "undue or discriminatory" burdens); *California v. Thompson*, 313 U.S. 109, 113-14 (1941) (State measure lawful if it "neither discriminates against nor substantially obstructs" commerce); *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 352 (1939) (court must "weigh[] the nature of the respondent's activities, and the propriety of local regulation"); *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187-88 (1937) (standard is "actual undue burden"); *Mintz v. Baldwin*, 289 U.S. 346, 349-50 (1933) (measure does not "so unnecessarily burden[] interstate transportation as to contravene the commerce clause"); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) (State measures lawful where the "indirect burden imposed on interstate commerce is not unreasonable"); *Mich. Pub. Utils. Comm'n v. Duke*, 266 U.S. 570, 577 (1925) (State measures may not "pass beyond the bounds of what is reasonable and suitable"); *Corn Prods. Ref. Co. v. Eddy*, 249 U.S. 427, 435 (1919) (measure lawful when "reasonable and nondiscriminatory"); *Port Richmond & Bergen Point Ferry Co. v. Bd. of Chosen Freeholders*, 234 U.S. 317, 331 (1914) (distinguishing "burdensome exactions" from "reasonable charges"); *Atl. Coast Line R.R. Co. v. Georgia*, 234 U.S. 280, 291 (1914) (State measures "must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands"); *Barrett v. City of New York*, 232 U.S. 14, 31 (1914) (measure lawful absent "unreasonable demands" on business or applicable federal law); *id.* at 33 ("[W]hen the movement of interstate traffic is involved, [regulations] should be entirely reasonable and should not arbitrarily restrict the facilities upon which it must depend."); *Simpson v. Shepard (The Minnesota Rate Cases)*, 230 U.S. 352, 408, 410 (1913) ("[State legislation] may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands, and is not opposed to Federal legislation."); *Standard Stock Food Co. v. Wright*, 225 U.S. 540, 549 (1912) (measure was "not an unreasonable one"); *Savage v. Jones*, 225 U.S. 501, 525 (1912) (measure lawful when, among other things, it "has real relation to the suitable protection of the people of the state, and is reasonable in its requirements"); *West v. Kan. Nat. Gas Co.*, 221 U.S. 229, 262 (1911) (no State may "unreasonably burden" interstate commerce); *Engel v. O'Malley*, 219 U.S. 128, 138 (1911) (noting that the threshold of legality "is a question of more or less. . . . The question is whether the state law creates a direct burden upon what it is for Congress to control, and the facts of the specific case must be weighed"); *Mo. Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612, 622-24 (1909) ("In none of these cases [in which State regulations were upheld] was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce."); *Reid v. Colorado*, 187 U.S. 137, 152 (1902) (State measure did not "unduly burden[]" interstate commerce where "it does not appear otherwise than that the statute can be obeyed without serious embarrassment or unreasonable cost"); *Smith v. St. Louis & Sw. Ry. Co.*, 181 U.S. 248, 255 (1901) (test of legality is "whether the police power of the state has been exerted beyond its province . . . and to an extent beyond what is necessary" (emphasis omitted)); *id.* at 258 ("It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality."); *Schollenberger v. Pennsylvania*, 171 U.S. 1, 14-15 (1898) (measure unlawful where overbroad); *N.Y., New Haven & Hartford R.R. Co. v. New York*, 165 U.S. 628, 631 (1897) (States retained authority "to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people"); *id.* at 632-33 ("[A] state [may] make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective."); *Gladson v. Minnesota*, 166 U.S. 427, 431 (1897) (State measure lawful where burden involved a "few minutes" and a "trifling expense," as it was a "reasonable exercise of the police power of the state"); *W. Union Tel. Co. v. James*, 162 U.S. 650, 662 (1896) (measure lawful where "we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the state to enact"); *Pittsburg & S. Coal Co. v. Louisiana*, 156 U.S. 590, 598 (1895) ("[The challenged regulations] may in some cases in a slight degree affect commerce, but not in such an extent or sense as to be properly designated as regulations of commerce."); *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891) (State measure was not automatically

sistent: everyone knows that the Court's Commerce Clause cases are anything but that. And, of course, some cases clearly *reject* the language and the logic of burden review.<sup>287</sup> But it is impossible to read through the Court's innumerable dormant Commerce Clause adjudications without being struck by the length and clarity of burden review's lineage. I include the outrageous footnote in order to demolish the notion that burden review of non-discriminatory regulations is an innovation in the jurisprudence of the dormant Commerce Clause, or a creature of any particular Court, or any particular era.

Separately, I also claim that there are ample grounds on which to conclude that the logic of burden review explains knots of contradiction in the Court's application of the formalistic tests that characterized its earlier jurisprudence. (This resonates with the view of Justice Stone, architect of the Traditional Framework.<sup>288</sup>) One such knot of cases deals with local-service requirements for railroads: that is, state regulations providing that railroad companies engaged in interstate transportation must provide a certain level of service to towns and cities within the state's own territory. If read at face value, these cases are all over the map. If the distinction between legality and illegality is "directness" of burden, how could a law requiring that "a railroad company whose road is operated within the state shall cause three each way of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at any station, city, or village of 3,000 inhabitants for a time sufficient to receive and let off passengers" be lawful in 1899,<sup>289</sup> and a law that

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lawful "simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute"; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 217 (1885) ("Reasonable charges for the use of property, either on water or land, are not an interference [sic] with the freedom of transportation between the states, secured under the commercial power of congress."); *R.R. Co. v. Husen*, 95 U.S. 465, 472 (1877) ("[A State] may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce."); *id.* at 473 ("[Illinois] courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur."); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 428–29 (1870) (States may enact "reasonable regulations" for tax collection); *Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 151 (1868) ("[A] tax which so seriously affects the interchange of commodities between the States as to essentially impede or seriously interfere with it, is a regulation of commerce."); *Conway v. Taylor's Ex'r*, 66 U.S. (1 Black) 603, 634 (1861) ("[States] may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. The function is one of extreme delicacy, and only to be performed where the infraction is clear." (citation omitted)).

287. See, e.g., *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189 (1938); *Shafer v. Farmers' Grain Co. of Embden*, 268 U.S. 189, 202 (1925); *In re State Freight Tax*, 82 U.S. 232, 276 (1872), *abrogated by* *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); *Veazie v. Moor*, 55 U.S. (14 How.) 568, 574 (1852); *The Passenger Cases*, 48 U.S. (7 How.) 283, 404 (1849).

288. *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) (noting that earlier cases turned on "consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce"), *overruled on other grounds by* *California v. Thompson*, 313 U.S. 109, 114–15 (1941).

289. *Lake Shore & Mich. S. Ry. Co. v. Ohio ex rel. Lawrence*, 173 U.S. 285, 301 (1899).

“[e]very railroad corporation shall cause its passenger trains to stop upon . . . arrival at each station advertised . . . as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety” be unlawful in 1900?<sup>290</sup>

But the picture becomes clearer with the insight that burden analysis, reasonableness analysis, was doing much of the work in these cases. In *Lake Shore & Michigan Southern Railway Co. v. Ohio ex rel. Lawrence*,<sup>291</sup> the Court was perfectly clear about it: “*the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the state . . .*”<sup>292</sup> The Court concluded that the law, “so far from being unreasonable, will greatly subserve the public convenience.”<sup>293</sup> Likewise, in *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Illinois ex rel. Jett*,<sup>294</sup> the Court observed that “[s]everal acts *in pari materia* with the one under consideration have been before this court, and have been approved or disapproved *as they have seemed reasonable or unreasonable*, or bore more or less heavily upon the power of railways to regulate their trains in the respective and sometimes conflicting interests of local and through traffic.”<sup>295</sup> And that same principle was to drive the conclusion: “The demurrer to the answer admits that the railway company [already] *furnishes a sufficient number of regular passenger trains* (four each way a day), to accommodate all the local and through business along the line of the road, and that all of such trains stop at Hillsboro . . . and if compelled to stop at county seats the company will be compelled to abandon the train, to the great damage of the traveling public and to the railway company.”<sup>296</sup> And the very same approach was taken in *Houston & Texas Central Railroad Co. v. Mayes*,<sup>297</sup> in which the Court observed that “[t]he exact limit of lawful legislation upon this subject cannot, in the nature of things, be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these *whether, in the particular case, the rule be reasonable or otherwise*.”<sup>298</sup>

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290. *Cleveland, Cincinnati, Chi., & St. Louis Ry. Co. v. Illinois ex rel. Jett*, 177 U.S. 514, 515 (1900).

291. 173 U.S. 285 (1899).

292. *Id.* at 301 (emphasis added).

293. *Id.*

294. 177 U.S. 514 (1900).

295. *Id.* at 518 (emphasis added).

296. *Id.* at 521 (emphasis added).

297. 201 U.S. 321 (1906).

298. *Id.* at 328 (emphasis added).

I could, but will not, go on.<sup>299</sup> These cases strongly suggest that the logic of burden review motivated the outcome of these decisions. And a similar approach seems to unlock—at least to a significant extent—other knots of case law that make little sense on their formalist face. Let us take just two further examples, rather more briefly, to make the point. First, consider the “arrival requirements” cases: the apparently contradictory cases reviewing state regulations applicable to arriving vessels and their passengers. Why, for example, was New York forbidden to impose a \$1.50 capitation tax upon boat passengers in *Henderson v. Mayor of New York*,<sup>300</sup> and California forbidden to demand a bond for passengers’ good behavior in *Chy Lung v. Freeman*,<sup>301</sup> while New York was permitted to impose a \$75 penalty per passenger for failure to produce a manifest in *Mayor of New York v. Miln*?<sup>302</sup> Can it really have been that the imposition of a burden on each arriving passenger was a regulation of interstate commerce, “direct” or otherwise, in *Henderson* and *Chy Lung* but not in *Miln*? Of course not. The inconsistency recedes when we set the formalistic language of the opinions aside and recognize that a requirement to provide a list is simply a lighter and more reasonable measure in light of its minimal burden on the business in question and the available grounds of public interest; an automatic per-capita charge or an onerous bond requirement for carrying passengers is less so.<sup>303</sup>

Second, consider the long line of cases dealing with vehicle regulation: requirements and specifications pertaining to equipment, crews, dimensions, and so on. At first glance these cases seem hopelessly jumbled. A state may require trains to use a certain kind of headlight,<sup>304</sup> may require cabooses on trains,<sup>305</sup> and may forbid them from using a particular kind of furnace,<sup>306</sup> but may not require trucks to use a certain kind of mudguard.<sup>307</sup> A state may require that trains travel with a minimum complement of staff,<sup>308</sup> but it may not require that passengers be seated in segregated or unsegregated arrangements.<sup>309</sup> It may prohibit cars from

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299. See, e.g., *Atl. Coast Line R.R. Co. v. Wharton*, 207 U.S. 328, 334–35 (1907); *Miss. R.R. Comm’n v. Ill. Cent. R.R. Co.*, 203 U.S. 335, 346–47 (1906).

300. 92 U.S. 259, 263 (1875); see also *The Passenger Cases*, 48 U.S. (7 How.) 283, 572 (1849) (capitation tax unlawful).

301. 92 U.S. 275, 281 (1875).

302. 36 U.S. (11 Pet.) 102, 104–105, 107 (1837).

303. I lay no emphasis here on the language of these opinions, which are often highly formalistic. I am concerned solely with outcomes.

304. *Vandalia R.R. Co. v. Pub. Serv. Comm’n*, 242 U.S. 255, 259–60 (1916); *Atl. Coast Line R.R. Co. v. Georgia*, 234 U.S. 280, 293–94 (1914).

305. *Terminal R.R. Ass’n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 8–9 (1943).

306. *N.Y., New Haven & Hartford R.R. Co. v. New York*, 165 U.S. 628, 631 (1897).

307. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959).

308. *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 144 (1968); *Mo. Pac. R.R. Co. v. Norwood*, 283 U.S. 249, 256 (1931); *St. Louis, Iron Mountain & S. Ry. Co. v. Arkansas*, 240 U.S. 518, 520–21 (1916); *Chi., Rock Island & Pac. R.R. Co. v. Arkansas*, 219 U.S. 453, 466 (1911).

309. *Morgan v. Virginia*, 328 U.S. 373, 386 (1946); *Hall v. De Cuir*, 95 U.S. 485, 490 (1877). But see *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U.S. 388, 394–95 (1900); *Plessy v. Ferguson*,

being carried over transporter cabs,<sup>310</sup> but may not prohibit trucks or trains beyond a certain length.<sup>311</sup> Were the permitted rules really “indirect” regulations, but the proscribed ones “direct” regulations, in any meaningful sense?

Again, I think not. I see no sensible way to organize the outcomes in these cases that is not sensitive to burden, and specifically to the relationship between burden and benefit. In the mudguard case, for example, a serious burden was threatened:

[I]f a trailer is to be operated in both States, mudguards would have to be interchanged, causing a significant delay in an operation where prompt movement may be of the essence. It was found that from two to four hours of labor are required to install or remove a contour mudguard.<sup>312</sup>

Likewise, approving the headlamp law in *Atlantic Coast Line Railroad Co. v. Georgia*,<sup>313</sup> it emphasized that “[t]he requirements of a state . . . must not . . . pass beyond the limits of a fair judgment as to what the exigency demands . . . .”<sup>314</sup> Likewise, in *Morgan v. Virginia*,<sup>315</sup> reviewing a segregation law, the Court emphasized “the degree of state legislation’s interference with . . . commerce,”<sup>316</sup> and that the analysis was “a matter of balance between the exercise of the local police power and the need for national uniformity.”<sup>317</sup>

This approach, in one form or another, pervades the Court’s jurisprudence. Analysis of whether a subject “requires” a uniform national standard—a test inaugurated in *Cooley* and frequently invoked thereafter—often seems to be a euphemism for burden review, rooted in a practical economic assessment of the consequences of unilateral state regulation.<sup>318</sup> Language of “requirement” and “necessity” simply obscure what is going on: review for unreasonable burden.

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163 U.S. 537, 548 (1896) (sustaining segregation requirement for intrastate railroad travel), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Louisville, New Orleans & Tex. Ry. Co. v. Mississippi*, 133 U.S. 587, 591–92 (1890).

310. *Maurer v. Hamilton*, 309 U.S. 598, 617 (1940).

311. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 677–79 (1981) (plurality opinion); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783–84 (1945).

312. *Bibb*, 359 U.S. at 527.

313. 234 U.S. 280 (1914).

314. *Id.* at 291.

315. 328 U.S. 373 (1946).

316. *Id.* at 380.

317. *Id.* at 386.

318. *See* Denning, *supra* note 2, at 459 (“[E]vidence that burdens on interstate commerce clearly outweighed local benefits suggested that it was a national problem to be regulated by Congress, if at all.”). *But see* Aleinikoff, *supra* note 169, at 952 (“[S]ome might say that *Lochner* and many constitutional decisions of the nineteenth century were based on implicit, undisclosed balances. While this claim cannot be disproved, I think it is quite unlikely to be correct.”).

## 2. The Retreat from Burden Review

Having established the long history of burden review in the Court's body of precedent and practice, we now turn to its erosion under the Rehnquist and Roberts Courts. To be sure, burden review remains part of the Court's rhetorical toolkit, linked these days to the 1970 *Pike* decision,<sup>319</sup> and commentators often express the view that this test remains good law.<sup>320</sup> But the reality is different.

Burden review was still alive and well as recently as 1982, when it played a key role in *Edgar*.<sup>321</sup> The case concerned the Illinois Business Take-Over Act, which applied to any takeover tender offer for the shares of

[A] corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State.<sup>322</sup>

Upon such tender offers the Act imposed a twenty-day waiting period, during which the Illinois Secretary of State was empowered to block the offer if the offer was "inequitable or would work or tend to work a fraud or deceit upon the offerees."<sup>323</sup> This amounted to a veto on interstate takeovers: undertaking burden review, the Court held that it was unreasonable and invalidated it. The Court reaffirmed that "even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute."<sup>324</sup> Rejecting the state's public-purpose defense, and noting that the Act purported to give Illinois the power to block "nationwide" tender offers, the Court responded that Illinois could assert no interest in protecting citizens of other states from undesirable tender offers; moreover, the measure added little benefit in light of existing law.<sup>325</sup> As such, the balance between benefits and burdens was unreasonable and the law was invalidated.<sup>326</sup>

319. See, e.g., *Dep't of Revenue v. Davis*, 553 U.S. 328, 338–39 (2008) (plurality opinion); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (plurality opinion); *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

320. See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 167 (2010) ("The dormant Commerce Clause almost always prohibits states from . . . placing an undue burden on the interstate movement of goods and services.").

321. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion).

322. *Id.* at 627.

323. *Id.* (internal quotation marks omitted) (citation omitted).

324. *Id.* at 643 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

325. *Id.* at 644–46.

326. *Id.* at 646.

A similar, but more narrowly tailored, measure came before the Court just five years later: Indiana's anti-takeover statute, challenged in *CTS Corp.*<sup>327</sup> The Indiana statute was similar to Illinois's, but it applied only to corporations with a stronger link to the regulating state than Illinois had required in *Edgar*.<sup>328</sup> The Court emphasized—citing Donald Regan, whose *Making Sense* article had just been published—that the “principal objects” of the dormant Commerce Clause doctrine were discriminatory state regulations, unlike the non-discriminatory Indiana statute.<sup>329</sup> Then the Court turned to the central question of whether the Act's capacity to hinder tender offers—surely the essence of its burden on interstate commerce—raised a constitutional difficulty. The Court concluded that it did not. The Act made a significant contribution to protecting shareholders of Indiana corporations,<sup>330</sup> and its limitation to corporations with a strong Indiana link meant that its commercial burdens were less than those imposed by the law at issue in *Edgar*.<sup>331</sup> The Act survived.

The *CTS Corp.* Court also intimated that judicial abstention was particularly appropriate because “[t]he very commodity that is traded in the securities market is one whose characteristics are defined by state law”<sup>332</sup>; the state has a long-settled role as an “overseer of corporate governance”<sup>333</sup>; and “state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.”<sup>334</sup> We recognize here the kind of deferential special pleading that was to re-appear in *Tracy* in 1997, as discussed above.<sup>335</sup> Concurring, Justice Scalia made a point of commending the work of Donald Regan.<sup>336</sup> He wrote:

One commentator [Regan] has suggested that, at least much of the time, we do not in fact mean what we say when we declare that statutes which neither discriminate against commerce nor present a threat of multiple and inconsistent burdens might nonetheless be un-

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327. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 72–73 (1987).

328. *Compare id.* at 73 (noting that the act applies only to businesses incorporated in Indiana), with *Edgar*, 457 U.S. at 626–27 (noting that the act applies to any takeover offer for shares of a target company, which includes any corporation where any two of the three conditions are met: the principal executive office is in Illinois, it is incorporated in Illinois, or has at least 10% of its capital and paid-in surplus represented within Illinois).

329. *CTS Corp.*, 481 U.S. at 87.

330. *Id.* at 91.

331. *Id.* at 93–94.

332. *Id.* at 94.

333. *Id.* at 91.

334. *Id.* at 89.

335. *See supra* text accompanying notes 230–39 (discussing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997)).

336. *CTS Corp.*, 481 U.S. at 95 (Scalia, J., concurring).

constitutional under a “balancing” test. If he is not correct, he ought to be.<sup>337</sup>

*CTS Corp.* marked a sea change. In the almost thirty years since this decision, the Court has not struck down a single statute under the dormant Commerce Clause on grounds of burden.

But while burden review was to show no further teeth after *Edgar*, no serious effort was made to actually kill it until the advent of the Roberts Court. The occasion for the first decisive step was *United Haulers*, a case in which—as noted above—an ordinance enacted by two counties had completely reserved the local waste processing business to a company that was publicly owned: all other businesses were excluded from competition.<sup>338</sup> The counties effectively monopolized the market by ordinance and denied it to all competitors, foreign and domestic. The Court held, applying mysterious logic discussed below,<sup>339</sup> that the measure should be analyzed as a non-discriminatory regulation.

But our concern here is with the fact that the *United Haulers* Court made short work of burden review. The Court (somewhat uncritically) accepted the state’s view that the measure promoted revenue generation (because, as a publicly-owned monopolist, the public entity generated money for the state); it also “create[d] enhanced incentives for recycling and proper disposal of . . . waste” and “markedly increased [the counties’] ability to enforce recycling laws,” by reducing the number of sites at which recycling enforcement would be necessary.<sup>340</sup> The Court’s interrogation of this argument was, at best, cursory, amounting to rational basis review, and requiring the relationship between ends and means, rather than the substantive tradeoff, to be reasonable. And this minimal scrutiny assuredly reflected a careful and deliberate choice to eschew the traditional burden analysis. Consider its disdainful description of burden review:

[The haulers] maintain that the Counties’ laws cannot survive the more permissive *Pike* test, because of asserted burdens on commerce. There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45 . . . (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.<sup>341</sup>

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337. *Id.* (citation omitted).

338. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334–37 (2007) (plurality opinion).

339. See *infra* III.D.2 (discussing the public entity exception coined in *United Haulers*).

340. *United Haulers*, 550 U.S. at 346–47.

341. *Id.* at 347 (citation omitted).

If this brutal language inflicted a mortal wound on burden review, the Court finished it off the next year in *Davis*. In that case (described above<sup>342</sup>), the Court declined to even go through the motions of applying the test, on the ground that “the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden in this particular case.”<sup>343</sup> In particular, the Court explained that “weighing and quantifying [the alleged harms] for a cost-benefit analysis would be a very subtle exercise.”<sup>344</sup> The Court went on to disclaim any meaningful institutional capacity “for making whatever predictions and reaching whatever answers are possible at all,” and quoted from previous judgments emphasizing that the Court is poorly placed to “gather the facts upon which economic predictions can be made,” “professionally untrained to make [economic predictions],” and “poorly equipped to evaluate with precision the relative burdens of various methods of taxation.”<sup>345</sup>

This line of argument should be deeply familiar. Just like the reasons given in *CTS Corp.*, *Tracy*, and *United Haulers*, none of the reasons given for “specially” weakening the scrutiny of the dormant Commerce Clause are specific to the facts of *Davis*. They are fundamental attacks on the propriety of burden review for reasonableness *as such*. Only Justice Scalia, in his partial concurrence, squarely acknowledged that fact.<sup>346</sup>

Such is the state of burden review today. Dan Coenen argues that *Davis* might “pave the way” for the repudiation of burden review.<sup>347</sup> I think that *Davis* and its companion *United Haulers* are the repudiation of burden review. I say this because what is truly significant is not just the outcome in these cases, but the reasoning and the derisive tone in which burden review is treated. Courts govern not just by what they do, but by how they say that they are doing it. And the steady and sustained lowering of burden review into the rhetorical mire, culminating in the reference to *Lochner v. New York*<sup>348</sup> in *United Haulers* (not in an angry and polemical dissent from a known opponent of the dormant Commerce Clause but, rather, in an opinion of the Court written by the Chief Justice), and the flat-out refusal to apply it in *Davis*, are profoundly instructive. The most recent case to mention the doctrine of burden review—

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342. See *supra* text accompanying note 251 (discussing *Dep’t of Revenue v. Davis*, 553 U.S. 328, 333–34 (2008)).

343. *Davis*, 553 U.S. at 354–56.

344. *Id.* at 354.

345. *Id.* at 355–56 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 342 (1996)).

346. *Id.* at 360 (Scalia, J., concurring in part).

347. Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 627 (2010); see also Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1293 (1997) (“[T]he [*Pike*] balancing test in practice has become increasingly lax. . . . If [it] continues to be applied in this fashion, U.S. law may be evolving toward a purely discrimination-based test in domestic trade cases.”).

348. 198 U.S. 45 (1905).

*McBurney*<sup>349</sup>—refused to even acknowledge a burden at all, on the ground that the case was somehow inappropriate for Commerce Clause adjudication.<sup>350</sup>

#### D. A Proliferation of Exceptions

The third aspect of the modern erosion of the dormant Commerce Clause—marking a leap far beyond even what Donald Regan advocated in 1986—is the proliferation of special exceptions to the reach of the Clause. I will discuss four of them here: (1) the market participant exception; (2) the “public enterprise” or “public entity” exception; (3) the subsidy exception; and (4) the “traditional government function” exception.

##### 1. Market Participant

The market participant doctrine was introduced in two cases—*Hughes v. Alexandria Scrap Corp.*<sup>351</sup> in 1976 and *Reeves, Inc. v. Stake*<sup>352</sup> in 1980—to reflect the proposition that the dormant Commerce Clause does not limit a state’s power to buy and sell goods and services.<sup>353</sup> The doctrine is often explained in terms of a dichotomous split between a state’s action “in its proprietary capacity as a purchaser or seller,”<sup>354</sup> regarding which the dormant Commerce Clause has nothing to say, and its action in a regulatory capacity, which falls within the ambit of the doctrine. This distinction can be justified clearly enough on textual grounds: the existence of a partly exclusive federal power to *regulate* commerce does not, at least intuitively, furnish grounds to preclude a state from *engaging* in it.<sup>355</sup>

But the complications start very early. Oddly, *Alexandria Scrap* itself was not at all a clear case of buying or selling: at issue in that case was a statutory scheme that made bounty payments available to scrap processors for each car hulk that they processed.<sup>356</sup> But a true “core case” of market participation was presented by *Reeves*, which concerned the discriminatory sales policy of a state-owned cement factory.<sup>357</sup> The Court held that the dormant Commerce Clause did not constrain such a poli-

349. *McBurney v. Young*, 133 S. Ct. 1709, 1719–20 (2013).

350. See *supra* text accompanying notes 257–68 (discussing the conclusion in *McBurney*); see also discussion *infra* Section III.D.1 (discussing the application of the market participation doctrine in *McBurney*).

351. 426 U.S. 794 (1976).

352. 447 U.S. 429 (1980).

353. *Id.* at 435–39; *Alexandria Scrap*, 426 U.S. at 808–10.

354. *E.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592–93 (1997).

355. The Court has tended not to make this textual point, relying instead on originalist logic. See, e.g., *Reeves*, 447 U.S. at 437 (“There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” (citation omitted)); see also *Alexandria Scrap*, 426 U.S. at 810 (focusing on “the purposes animating the Commerce Clause”).

356. *Alexandria Scrap*, 426 U.S. at 798–800.

357. *Reeves*, 447 U.S. at 430–33.

cy.<sup>358</sup> *Reeves* followed *a fortiori* from *Alexandria Scrap*: if creating a statutory subsidy—hardly classic “private” activity—was enough to constitute market participation, selling cement on the open market from a factory *certainly* was enough.

Subsequent cases have generally affirmed the basic distinction between trading and regulating. For example, when Ohio argued in *Limbach* that a tax exemption for in-state ethanol should be thought of as a “purchase” of the ethanol and therefore market participation—a claim that, in fairness, is not a million miles from the logic of *Alexandria Scrap*—the Court knocked the argument back.<sup>359</sup> Likewise, the Court rejected an attempt to repackage a tax exemption as “purchasing” in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*.<sup>360</sup> A little oddly, the doctrine immunizes competitive distortions only in the market in which the state actor directly participates.<sup>361</sup>

So much for the basic doctrine. Symptoms of “decline” are found here not in the creation of the doctrine, which is unobjectionable enough and perfectly compatible with the Traditional Framework, but in the subsequent expansion of the “market participant exception.” The key cases are already familiar to us: *Davis* and *McBurney*.

*Davis* is a peculiar and fragmented decision, but the three-Justice plurality in that case sowed a remarkable seed in market participation jurisprudence. Recall that *Davis* concerned a tax exemption granted by Kentucky for income from its own bonds, denied to income from the bonds of other states.<sup>362</sup> The state rather speculatively raised a market participation defense, even though tax rules—as “primeval government activity”—had been repeatedly contrasted with market participation in countless earlier decisions. That a state should throw in a cheeky argu-

358. *Id.* at 440–41.

359. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277–78 (1988).

360. 520 U.S. 564, 593–94 (1997).

361. *See S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984). *Wunnicke* is not only odd on its face (because it has nothing to do with the regulation/participation distinction underlying the doctrine), but is also decidedly in tension with a case that was decided only the previous year. In *White v. Massachusetts Council of Construction Employers, Inc.*, the mayor of Boston issued an executive order requiring that city construction projects be carried out by a workforce of which at least 50% was composed of residents of Boston. 460 U.S. 204, 205–06 (1983). The Court concluded in that case that “[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such . . .” *Id.* at 214–15. But the city was not hiring laborers, it was hiring construction firms that hired laborers. *Id.* at 217. So *Wunnicke*’s same-market limitation seems flatly at odds with *White*, and simply overrules it on that point. A “same market” rule of this kind is, of course, a strange and formalistic limitation: buying and selling *invariably* has competitive consequences in upstream and downstream markets, and if the market participant doctrine rests on the fact that the conduct does not involve the exercise of the State’s distinctive regulatory powers with which the Commerce Clause is concerned, and given the usual indifference of Commerce Clause doctrine to any disparity between the point in the supply chain at which a measure is formally applied and the point at which it has allegedly anticompetitive effects, the *Wunnicke* conclusion is hard to justify. *But see Wunnicke*, 467 U.S. at 98–99 (attempting—rather unconvincingly—to justify the rule).

362. *Dep’t of Revenue v. Davis*, 553 U.S. 328, 333 (2008) (plurality opinion).

ment in a kitchen-sink effort to defend a facially discriminatory tax exemption is not surprising. But what *is* surprising is that three Justices of the Supreme Court accepted it:

[T]here is no ignoring the fact that imposing the differential tax scheme makes sense only because Kentucky is also a bond issuer. The Commonwealth has entered the market for debt securities, just as Maryland entered the market for automobile hulks, and South Dakota entered the cement market. It simply blinks this reality to disaggregate the Commonwealth's two roles and pretend that in exempting the income from its securities, Kentucky is independently regulating or regulating in the garden variety way that has made a State vulnerable to the dormant Commerce Clause. . . . [W]hen Kentucky exempts its bond interest, *it is competing in the market for limited investment dollars, alongside private bond issuers and its sister States, and its tax structure is one of the tools of competition.*<sup>363</sup>

For the plurality, as a result, the market participant doctrine should have applied in *Davis*.<sup>364</sup> In vain did Justice Kennedy cry out in dissent that “[t]his expansion of the market-participant exception, if it were unleashed by a majority of the Court, would be an open invitation to enact these kinds of discriminatory laws—laws that, until today, the Court has not upheld in even a single instance,” and that the Court had repeatedly held that “[t]axation is a quintessential act of regulation, not market participation.”<sup>365</sup> Justice Kennedy was quite right: the plurality was flatly at odds with strong language in *Camps Newfound/Owatonna*,<sup>366</sup> *Limbach*,<sup>367</sup> and *C & A Carbone*.<sup>368</sup>

The crack in the market participation doctrine was to be opened further in *McBurney* a few years later. In *McBurney* itself, recall that the Court considered a case of discriminatory regulation—access to Virginia public records under the state FOIA law—and failed to analyze it as such.<sup>369</sup> But what is interesting for our purposes now is what the Court went on to say. The Court stated that even if dormant Commerce Clause analysis were applied, it would fail because the public documents in question were created by Virginia. That fact was significant because “a

363. *Id.* at 344–45 (emphasis added) (footnote and citations omitted).

364. *Id.* at 348.

365. *Id.* at 375 (Kennedy, J., dissenting).

366. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 593 (1997) (“A tax exemption is not the sort of direct state involvement in the market that falls within the market-participation doctrine.”).

367. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277–78 (1988) (emphasizing that the “assessment and computation of taxes” was “a primeval governmental activity,” not market participation).

368. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (“[H]aving elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.”).

369. See *supra* text accompanying notes 256–69 (discussing analysis of discrimination in *McBurney v. Young*, 133 S. Ct. 1709 (2013)).

State does not violate the dormant Commerce Clause when, having created a market through a state program, it 'limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve,'" citing to—of all things—*Reeves*, the cement-factory case.<sup>370</sup>

This aspect of *McBurney* is on any view a pretty shocking misapplication of the market participant doctrine: Virginia was not buying nor selling anything. The statutory provision of a right of access to public records falls about as far from market participation as one could imagine. The "created by the State" doctrine in *McBurney*—a kind of mutated super-version of the market participant exception—is troubling in principle and as applied. In principle, it threatens to apply broadly: to anything that the state alone does or provides. Infrastructure, regulatory approvals, corporate charters, licenses to trade or carry on a profession, police and fire protection, and all the rest of it: these are things "which would not otherwise exist" without state action. But the doctrine is even worse as applied in *McBurney* itself, for it completely misses the point that the market in which the Court was distorting competition—the market for real estate information providers, perhaps—was *by no means* a market that had been created by the state.<sup>371</sup> Rather, the company was competing in an existing market against existing in-state companies, and in that market it was subject to facial discrimination that created a competitive disadvantage. To all this the Court averted its eyes.

The market participant doctrine thus stands extended in two directions. The plurality opinion in *Davis* lies about like the proverbial "loaded weapon,"<sup>372</sup> ready to be picked up by a later majority and used as support for the notion that "market participation" includes any exercise of the state's regulatory powers in connection with something in which the state has an economic or quasi-competitive interest. And, more troublingly still, the "created by the State" version offered by a majority of the Court in *McBurney* threatens application of the doctrine to a great swathe of state conduct. This exemption seems ready to burst its banks entirely.

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370. *McBurney*, 133 S. Ct. at 1720 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980)).

371. Compare *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976) ("[T]he commerce affected by the 1974 amendment appears to have been created, in whole or in substantial part, by the Maryland bounty scheme. We would hesitate to hold that the Commerce Clause forbids state action reducing or eliminating a flow of commerce dependent for its existence upon state subsidy instead of private market forces. Because the record contains no details of the hulk market prior to the bounty scheme, however, this issue is not clearly presented."), with *id.* at 815 (Stevens, J., concurring). See also *Reeves*, 447 U.S. at 446 n.18 (suggesting that the *Alexandria Scrap* Court could hardly have meant that the scrap processing market was created by the State).

372. See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

## 2. Public Enterprise / Public Entity

The Roberts Court has also created an entirely new exception, which was inaugurated in *United Haulers*, and confirmed and expanded in *Davis*. Under this exception, immunity attaches to: (1) a state's creation of state-owned enterprises that operate in the market; and also (2) to the conferral, through regulation, of competitive advantages—up to and including full regulatory monopoly—on such enterprises. I will call this a “public enterprise” or “public entity” exception.<sup>373</sup>

In *United Haulers*, the Court effectively held that the decision by a state, or a subdivision thereof, to “nationalize” an area of industrial activity, including by precluding or limiting private competition or by discriminating in favor of a public enterprise, is beyond the purview of the Clause: “The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.”<sup>374</sup> Thus, laws that “benefit a clearly public facility, while treating all private companies exactly the same. . . . *do not discriminate* against interstate commerce for purposes of the dormant Commerce Clause.”<sup>375</sup>

Notwithstanding the protestations of the *United Haulers* majority,<sup>376</sup> this holding is a clear retreat from the earlier decision in *C & A Carbone*, a case in which the Court held unlawful an attempt to discriminate in favor of what was at the *very* least a public-private partnership (more accurately a public entity under short-term private administration for funding purposes).<sup>377</sup> In *C & A Carbone* itself, the Court stated that “having elected to use the open market to earn revenues for its project [(a waste processing facility)], the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.”<sup>378</sup> In other words, the thrust of the holding in *C & A Carbone* was that a state, having decided to create a competitor, may not tip the table in favor of its own creation by exercising *regulatory* powers—the traditional province of the dormant Commerce Clause, unlike the essentially private conduct that the market participation exemption indulges<sup>379</sup>—in a discriminatory fashion. Earlier cases supported this outcome.<sup>380</sup>

373. Others have their own labels. See, e.g., Coenen, *supra* note 347, at 544 (“state-self-promotion” exception); Williams, *supra* note 2, at 455 (“sovereign protectionism”).

374. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (plurality opinion); see also *id.* at 344 (“It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services.”).

375. *Id.* at 342 (emphasis added).

376. *Id.* at 341 (“*Carbone* cannot be regarded as having decided the public-private question.”).

377. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387, 393–94 (1994).

378. *Id.* at 394.

379. See *supra* Section III.D.1 (discussing the logic of the market participant exception).

380. See *United Haulers*, 550 U.S. at 361–63 (Alito, J., dissenting).

But *United Haulers* (unconvincingly) distinguished *C & A Carbone* and reversed the rule for which it stood.<sup>381</sup> It is true that the Court held in *United Haulers* that such rules were still subject to *Pike* burden review, but it is hard to credit this as more than a token gesture, given the thorough beating that burden review has now taken,<sup>382</sup> and given the withering disdain for burden review shown in *United Haulers* itself.<sup>383</sup> And the *United Haulers* approach was affirmed recently by *Davis*, the Kentucky bond-income case,<sup>384</sup> in which the state tax rule clearly “operated as a de facto protective tariff.”<sup>385</sup> But “[t]here is no forbidden discrimination,” the Court concluded in *Davis*—not, on this point, a plurality, but a majority of the Court—“because Kentucky, as a public entity, does not have to treat itself as being substantially similar to the other bond issuers in the market.”<sup>386</sup>

So the rule is now clear: the state can use its regulatory and taxing powers to favor the competitive position of a public enterprise or other public entity without fear of the dormant Commerce Clause.<sup>387</sup> What is still prohibited by the doctrine, at least in principle, is conferral of a direct regulatory competitive advantage on *private* in-state actors.<sup>388</sup> Needless to say, this suggests an inability to “appreciate the extent to which government and private operations are and can be comingled,”<sup>389</sup> or that “there is just as much reason to believe that state or local governments are likely to act upon protectionist considerations when the benefited operation is owned by the government as when the benefited operation is privately held.”<sup>390</sup>

Moreover, read together, the public entity and market participant exceptions open the door to considerable discrimination in favor of private entities. For example, it is elementary that Arizona could not enact a statute (say, the Arizona Plumbing Preference Act) that provided that “only Arizona companies may supply plumbing services in Arizona”: that would constitute intentional, facial discrimination, and the dormant Commerce Clause prohibits that if it prohibits anything. But there would seem to be nothing to stop Arizona from creating the Arizona State Plumbing Corporation (immune under *United Haulers*’s public

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381. *Id.* at 342 (majority opinion).

382. *See supra* Section III.C.2 (discussing the retreat from burden review).

383. *See supra* text accompanying note 341.

384. *Dep’t of Revenue v. Davis*, 553 U.S. 328, 332–34 (2008) (plurality opinion).

385. Coenen, *supra* note 347, at 561; *see also* Williams, *supra* note 2, at 466 (“Kentucky’s tax on the interest on out-of-state municipal bonds [was] nothing more than a tariff . . .”).

386. *Davis*, 553 U.S. at 343 (emphasis added) (internal quotation marks omitted).

387. *Id.* at 341–43; *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342–43 (2007) (plurality opinion).

388. *United Haulers*, 550 U.S. at 343–44; *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994).

389. Norman R. Williams & Brannon P. Denning, *The “New Protectionism” and the American Common Market*, 85 NOTRE DAME L. REV. 247, 282 (2009).

390. Williams, *supra* note 2, at 459.

entity exception), legislating to prohibit other private businesses from engaging in plumbing in Arizona (also immune under *United Haulers*'s public entity exception), and then having the Arizona State Plumbing Corp. grant franchises only to Arizona businesses (immune under the market participant exception<sup>391</sup>). Compare it with the Arizona Plumbing Preference Act. The same outcome has been reached—all Arizona businesses are free to compete, and no out-of-state ones are—but the means are perfectly lawful.<sup>392</sup>

Accordingly, I do not share Chief Justice Roberts's view that there is a meaningful line to be drawn between the outcome in *United Haulers* and the creation of a state-owned hamburger stand combined with an ordinance requiring that all residents buy their hamburgers from the stand.<sup>393</sup> If there is a real difference between this and *United Haulers*, I simply do not see it, and the Chief Justice does not tell us what it is. I make no claim here about the desirability of this outcome, but if burden review—last seen alive not much more recently than Jimmy Hoffa and Lord Lucan—is the best hope for striking down a measure as obviously discriminatory and protectionist as my Arizona plumbing example, we can say at the very least that the dormant Commerce Clause is not quite what it used to be. Norman Williams and Brannon Denning describe this outcome as “public protectionism,”<sup>394</sup> to which I would add that the protectionism that it so obviously validates need not *in practice* be public, as my Arizona example shows.

In sum, state-owned enterprises now enjoy a remarkable quadruple exemption from the fundamental rules of American economic organization. The public entity doctrine exempts such enterprises from dormant Commerce Clause scrutiny with respect to their creation; the market participant exemption immunizes their trading conduct in the market; the public entity doctrine (again) immunizes any state regulation that skews the terms of competition in their favor; and the state action doctrine exempts them from antitrust control. *Noli me tangere*, says the state-owned enterprise, for Caesar's I am.<sup>395</sup>

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391. *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 214–15 (1983) (applying market participation to awards of contracts to provide public works). Note that the *Wunnicke* same-market exception would not apply because our notional ASPC would be active in the same market as its franchisees. See *supra* note 361 (discussing the *Wunnicke* limitation and its interaction with *White*).

392. Dan Coenen argues that a scheme of this kind would be unlawful because it fails to respect *United Haulers*'s mandate to “treat[] all private businesses the same.” Coenen, *supra* note 347, 611 (internal quotation marks omitted). But the same is true of all market participant cases, including *Alexandria Scrap* and *Reeves*: the unequal treatment is the very thing that the market participant exemption immunizes.

393. *United Haulers*, 550 U.S. at 345 n.7.

394. Williams & Denning, *supra* note 389, at 310.

395. Wyatt's full couplet makes the point unimprovably: “Noli me tangere for Cesars I ame, / And wylde for to hold though I seme tame.” Thomas Wyatt, *Whoso List to Hounte*, in *THE OXFORD BOOK OF ENGLISH VERSE* 28 (Christopher Ricks ed., 1999).

### 3. Subsidies

If there were ever a single example of the Court's unwillingness to let economic theory dictate doctrine, it is the proposition—heavily indicated by the Court's jurisprudence but never quite held outright<sup>396</sup>—that the provision of subsidies is immune from dormant Commerce Clause scrutiny. Thus, to tax in-state A one dollar and out-of-state B two dollars is an unlawful discriminatory tax; to tax them both two dollars and give A a one dollar rebate or tax exemption is an unlawful discriminatory tax exemption; but to tax them equally and give A a one dollar subsidy from the state's general treasury is a completely lawful subsidy. Make of that what you will.<sup>397</sup>

I will state the doctrinal case for the legality of subsidies very briefly, as it is essentially a mosaic of dicta. Like the other elements of the “decline” that we have charted here, the notion becomes prominent in the Court's case law from the mid-1980s onward.

- In *Limbach* (1988), the Court stated that “[d]irect subsidization of domestic industry does not ordinarily run afoul of [the dormant Commerce Clause].”<sup>398</sup>

- In *C & A Carbone* (1994), the Court actively *invited* subsidization: “Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility through general taxes or municipal bonds.”<sup>399</sup>

- In *West Lynn Creamery* (1994), the Court held that “[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business.”<sup>400</sup>

- In *Camps Newfound/Owatonna* (1997), the Court held: “Although tax exemptions and subsidies serve similar ends, they differ in important and relevant respects, and our cases have recognized these distinctions.”<sup>401</sup> The Court acknowledged that “[w]e have never squarely confronted the constitutionality of subsidies, and we need not address these questions today,”<sup>402</sup> but noted that the distinction between tax exemptions and subsidies “is supported by scholarly commentary as well as precedent, and we see no reason to depart from it.”<sup>403</sup> And it went on: “[a]ssuming, arguendo, that the Town is correct that a direct subsidy

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396. See, e.g., Coenen, *supra* note 2, at 968–69 (noting that the Court “still has not ruled” on the legality of subsidies).

397. Cf. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (“The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.”).

398. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

399. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994).

400. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994).

401. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589 (1997).

402. *Id.* (internal quotation marks omitted) (citation omitted).

403. *Id.* at 591 (citations omitted).

benefiting only those nonprofits serving principally Maine residents would be permissible, our cases do not sanction a tax exemption serving similar ends.”<sup>404</sup>

Similar support is found in a series of concurring and dissenting opinions.<sup>405</sup> To date, the case most thoroughly testing the limits of the Court’s position on subsidies remains *West Lynn Creamery*, a case involving a challenge to a subsidy paid to in-state upstream dairy farmers which was funded directly by a non-discriminatory tax on all downstream milk dealers.<sup>406</sup> Holding the measure unlawful, the Court drew a distinction between a so-called “pure” subsidy funded out of general revenue, which “ordinarily imposes no burden on interstate commerce, but merely assists local business,”<sup>407</sup> and one funded directly from a tax levied specifically upon the same industry. The closest the Court came to explaining the significance of this distinction for dormant Commerce Clause doctrine involved the suspicious notion of “representation reinforcement.”<sup>408</sup>

*West Lynn Creamery* is odd because, as Brannon Denning accurately points out, the tax in that case did not discriminate between in-state and out-of-state competitors.<sup>409</sup> But I think it is best understood as a case in which the discriminatory subsidy for in-state dairy farmers was the troubling element, to which the Court was unwilling to accord the usual subsidy exemption given its entanglement with a taxing measure.

In any event, the Court has since doubled down on its doctrinal distinction between a tax exemption and a subsidy. When Maine gave favorable tax treatment to businesses serving in-state customers in *Camps Newfound/Owatonna*, it argued that it was simply subsidizing the provision of services to in-staters. Not so, the Court replied: “[a]lthough tax exemptions and subsidies serve similar ends, they differ in important and relevant respects, and our cases have recognized these distinctions.”<sup>410</sup> Maine’s protest that “in economic reality,” given their economic equivalence, “since a discriminatory subsidy may be permissible, a discriminatory exemption must be, too,” was unavailing.<sup>411</sup> The Court noted that it had treated tax exemptions and subsidies differently under the First

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404. *Id.* at 589 (footnote omitted); see also *id.* at 589 n.22 (describing this more candidly as “[t]he distinction we have drawn for dormant Commerce Clause purposes”).

405. See *id.* at 597 (Scalia, J., dissenting); *W. Lynn Creamery*, 512 U.S. at 213 (Rehnquist, C.J., dissenting); *id.* at 211 (Scalia, J., dissenting); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting); *Metro. Life Ins. v. Ward*, 470 U.S. 869, 895 (1985) (O’Connor, J., dissenting); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring).

406. *W. Lynn Creamery*, 512 U.S. at 188.

407. *Id.* at 199.

408. *Id.* at 200–01; see also *supra* text accompanying note 30 (discussing representation reinforcement).

409. Denning, *supra* note 2, at 468.

410. *Camps Newfound/Owatonna*, 520 U.S. at 589.

411. *Id.*

Amendment,<sup>412</sup> as well as in its previous Commerce Clause cases, and declined to reconsider the distinction.<sup>413</sup>

I do not propose to say much more about this exception. The peculiar distinction between discriminatory subsidies and discriminatory burdens has some defenders,<sup>414</sup> but many critics.<sup>415</sup>

#### 4. Traditional Government Function

The final topic that we will consider here falls just short of being a clear-cut exemption. It is more like an animating concern: in the area of “traditional governmental functions,” the Court betrays particular reluctance to deploy the dormant Commerce Clause.

##### a. Background: The Short Life of *Usery*

As a general matter, the notion that states enjoy a special zone of constitutional protection in areas of “traditional” governmental functions had its time in the sun during the nine-year life of *National League of Cities v. Usery*.<sup>416</sup> The story is very well known but will bear a quick retelling. It presented the question of Congress’s power under the affirmative Commerce Clause to apply a statute regulating minimum wages, overtime pay, and the like to state government employees.<sup>417</sup> The federal law was challenged as an invasion of core areas of state sovereignty that were constitutionally protected from Congressional legislation.<sup>418</sup>

The Supreme Court sided with the states. Justice Rehnquist, writing for the Court, held that the Constitution—including but not limited to the Tenth Amendment<sup>419</sup>—extended a shield of constitutional protection over at least some quantum of state sovereignty.<sup>420</sup> The Court held that “insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions,” they fell outside the scope of the Commerce

412. *Id.* at 590 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970)).

413. *Id.* at 589–91.

414. See, e.g., Coenen, *supra* note 2, at 983; Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 102 (1988); Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 495 (1997); Lawrence, *supra* note 56, at 454.

415. See, e.g., Heinzerling, *supra* note 2, at 263; Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 34–35 (2002); see also Coenen, *supra* note 2, at 969, 1031–54 (proposing the invalidation of subsidies that “share[] the essential constitutional defects of a discriminatory tax break”).

416. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *superseded by statute*, Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787, 787 (codified at 29 U.S.C. § 207 (2012)).

417. *Id.* at 836.

418. *Id.* at 837.

419. *Id.* at 842–43.

420. *Id.* at 845.

Clause and were void.<sup>421</sup> Four members of the Court dissented, with Justice Brennan, in particular, criticizing the majority opinion as “a catastrophic judicial body blow at Congress’ power under the Commerce Clause.”<sup>422</sup>

The *Usery* holding survived for just under ten years, during which time federal and state courts struggled with the attempt to determine what was, and what was not, a “traditional governmental function.”<sup>423</sup> But in 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>424</sup> the Supreme Court finally gave up the fight. *Garcia* turned on whether San Antonio’s mass transit system was engaged in a “traditional governmental function.”<sup>425</sup> The Court conceded that even “this Court itself has made little headway in defining the scope of the governmental functions deemed protected under [*Usery*].”<sup>426</sup> Neither part of the “traditional governmental” diptych had turned out to be very robust: on the “traditional” side, the Court rejected the notion that actual historical tradition could be the Court’s guide to the immunity of state conduct from federal interference.<sup>427</sup> On the “governmental” side, there was barely any such thing as a uniquely or necessarily governmental function.<sup>428</sup> So *Usery* was overruled as “unsound in principle and unworkable in practice.”<sup>429</sup> In its place was set a straightforward admission that “with rare exceptions . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.”<sup>430</sup> It was the political process, framed by the Constitution, that would henceforth protect that sovereignty.<sup>431</sup>

#### b. Traditional Government Functions and the Dormant Commerce Clause

Back to the dormant Commerce Clause. As a matter of principle, does a “traditional government function” exemption, or zone of special

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421. *Id.* at 852.

422. *Id.* at 880 (Brennan, J., dissenting).

423. Compare *Molina-Estrada v. P.R. Highway Auth.*, 680 F.2d 841, 845 (1st Cir. 1982) (finding operating a highway authority to be a traditional government function), and *United States v. Best*, 573 F.2d 1095, 1102–03 (9th Cir. 1978) (finding licensing automobile drivers to be a traditional government function), with *Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir. 1977) (finding regulation of traffic on public roads not to be a traditional government function).

424. 469 U.S. 528 (1985), *superseded by statute*, Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2, 99 Stat. 787, 787 (codified at 29 U.S.C. § 207 (2012)).

425. *Id.* at 534 (internal quotation marks omitted).

426. *Id.* at 539.

427. *Id.* at 543–44.

428. *Id.* at 545.

429. *Id.* at 546.

430. *Id.* at 550.

431. *Id.* at 550–55. Of course, since *Garcia* the Court has demonstrated a willingness to intervene on other “federalism” grounds. See, e.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1335 (1997) (“Whether the Court will explicitly overrule *Garcia* is almost a moot question, because the Court already has decided to ignore its requirements and to exert full judicial review over questions involving state sovereignty and federalism.”).

deference, make any more sense under the dormant aspect of the Commerce Clause than on the affirmative side considered in *Usery* and *Garcia*?

One might see at least four reasons to say no. First, the *Usery* experience strongly suggests that there is no way to make such a category workable. No one knows what "traditional governmental activity" means, or what it should mean. Second, recall the logic of the market participant exemption. The premise of that exception is that the dormant Commerce Clause is with distinctively governmental action (regulation), not distinctively private action (trading). The point is obvious: it is bizarre to suggest that the doctrine is really concerned with distinctively governmental action *but also* should be particularly deferential to traditional governmental action. Third, there is a basic problem of constitutional interpretation here. "Traditional governmental actions" includes, at the very least, whatever state governments were getting up to in the late eighteenth century when the Commerce Clause was being drafted. So the very types of activity that the dormant Commerce Clause must have been intended to preclude—assuming that it was intended to target and preclude *some* types of state action—are precisely the same types of activity that a "traditional governmental function" exemption would tend to protect. Fourth, as a matter of precedent, the Court has repeatedly denied that there is any special constitutional preference for laws enacted in the exercise of "police power." The modern state police power is simply what is left over after the federal Constitution and any validly enacted federal laws have been applied, not a source of special immunity from federal law or federal action.<sup>432</sup> So the case for special deference for "traditional" governmental actions—above and beyond the deference normally applicable to democratically enacted legislation—is very weak indeed.

And yet the reemergence of the traditional governmental function exception in dormant Commerce Clause case law is clear. We have already seen that seeds of "special" deference were sown in *CTS Corp.* (particular deference to state regulation of corporations<sup>433</sup>) and in *Tracy*

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432. See, e.g., *Morgan v. Virginia*, 328 U.S. 373, 380–81 (1946); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 779–81 (1945); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *Kan. City S. Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 79 (1914); *Barrett v. City of New York*, 232 U.S. 14, 31 (1914); *Crenshaw v. Arkansas*, 227 U.S. 389, 399 (1913); *Savage v. Jones*, 225 U.S. 501, 524–25 (1912); *Reid v. Colorado*, 187 U.S. 137, 151 (1902); *Crutcher v. Kentucky*, 141 U.S. 47, 61–62 (1891); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 490–92 (1888); *Walling v. Michigan*, 116 U.S. 446, 460 (1886); *Henderson v. Mayor of New York*, 92 U.S. 259, 271–72 (1875); see also FRANKFURTER, *supra* note 147, at 47 (describing the proposition that "the existence of the states operated as an impalpable limitation upon national powers" as the "most insidious application" of "the general principle of strict construction").

433. See *supra* text accompanying notes 332–42 (discussing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987)).

(particular deference to state regulations of gas supply<sup>434</sup>). We have seen that the theme came back strongly in *United Haulers*, in which the Court deployed the notion as a ground for “hesitation,” explaining that special deference was appropriate because “waste disposal”—*waste disposal!*—was “both typically and traditionally a local government function.”<sup>435</sup> Justice Alito, in dissent, protested that “this Court has previously recognized that any standard ‘that turns on a judicial appraisal of whether a particular governmental function is “integral” or “traditional”’ is ‘unsound in principle and unworkable in practice.’”<sup>436</sup> And we find that this aspect of *United Haulers* was reloaded with a vengeance in *Davis*, with the language moving to “quintessentially public,” and its function moving from supportive dicta in *United Haulers* to the central basis for the holding in *Davis*:

It follows *a fortiori* from *United Haulers* that Kentucky must prevail [in *Davis*]. In *United Haulers*, we explained that a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors. [The] logic [of immunizing measures that are “likely motivated by legitimate objectives”] applies with even greater force to laws favoring a State’s municipal bonds, given that the issuance of debt securities to pay for public projects is a *quintessentially public function, with the venerable history we have already sketched*. . . . [T]he apprehension in *United Haulers* about “unprecedented . . . interference” with a traditional government function is just as warranted here . . . .<sup>437</sup>

It was left to Justice Kennedy to point out the concept that was really doing the work:

The Court defends the Kentucky law by explaining that it serves a traditional government function and concerns the “cardinal civic responsibilities” of protecting health, safety, and welfare. This is but a reformulation of the phrase “police power,” long abandoned as a mere tautology. It is difficult to identify any state law that has come before us that would not meet the Court’s description.<sup>438</sup>

Quite so.

Note the full circle here formed by the interaction of “traditional governmental function” with the other market participant and public entity exceptions. Any activity that is not totally novel since the Founding

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434. See *supra* text accompanying notes 229–39 (discussing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997)).

435. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344–45 (2007) (plurality opinion) (citations omitted).

436. *Id.* at 368–69 (Alito, J., dissenting).

437. *Dep’t of Revenue v. Davis*, 553 U.S. 328, 341–42 (2008) (plurality opinion) (emphasis added) (footnotes and citations omitted).

438. *Id.* at 365–66 (Kennedy, J., dissenting) (citation omitted).

was “traditionally” performed by someone: it was either traditionally private or traditionally public. If it was traditionally private but now performed by the state, it is likely to be covered by the market participation or public entity defenses. If it was traditionally public, it is likely to be a traditional governmental activity. Heads I win, tails you lose. We behold clearly, at last, the remarkable decline of the dormant Commerce Clause.

#### IV. CONCLUSION

My primary purpose in this contribution has been to expose, not to criticize, the doctrinal transformation wrought by the Court. Rather than recapitulate the preceding pages, I want to conclude by drawing out four central attacks that have been leveled repeatedly, from the bench and from the academy, at the Traditional Framework, and which I think have influenced and motivated the decline that I have chronicled above. I reserve for another occasion the task of developing and answering these four challenges to the Traditional Framework.<sup>439</sup>

The first is the elephant that awkwardly shares the room with a great deal of dormant Commerce Clause discussion: deep unease about the legitimacy of the doctrine’s claim to the status of constitutional law, given the absence of clear grounding in the text or early history of the Constitution. From the bench, Justice Scalia has called the doctrine “a judicial fraud,”<sup>440</sup> and Justice Thomas claims it has “no basis in the Constitution.”<sup>441</sup> From the academy, Redish and Nugent have called it “little more than a figment of the Supreme Court’s imagination,”<sup>442</sup> and Kitch has called it “an idea of absolutely no merit.”<sup>443</sup>

The second is the claim that burden review is analytically formless: a cipher for a naked policy choice. This is exemplified by Justice Scalia’s quip that burden review of state regulation is like asking “whether a particular line is longer than a particular rock is heavy.”<sup>444</sup> Brannon Denning makes a related point, noting that burden review re-

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439. See Francis, *supra* note 3, to which this Conclusion is heavily indebted and from which it borrows extensively.

440. *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) (“The negative Commerce Clause applied today has little in common with the negative Commerce Clause of the 19th century, except perhaps for incoherence.”); see also *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674–75 (2003) (Scalia, J., concurring) (“[A]s I have explained elsewhere, the negative Commerce Clause, having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated.”); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (“[T]he so-called ‘negative’ Commerce Clause is an unjustified judicial intervention not to be expanded beyond its existing domain.”).

441. *United Haulers*, 550 U.S. at 349 (Thomas, J., concurring).

442. Redish & Nugent, *supra* note 2, at 617.

443. Kitch, *supra* note 2, at 123.

444. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

quires weighing “things that are not readily reducible to a common metric.”<sup>445</sup>

The third is the claim that burden review, as a species of “judicial balancing,” is inherently illegitimate and undemocratic, that it is a remnant of discredited *Lochner*-ism that deserves to be forcibly retired.<sup>446</sup> Writing in this tradition, Lisa Heinzerling argues that

The Court’s concept of discrimination embodies a preference for markets over regulation, and its view of what counts as “regulation” rests on undefended assumptions--reminiscent of the *Lochner* period, when forced departures from the free market as shaped by common-law entitlements were constitutionally suspect but the common-law entitlements were not--about what counts as government action and what counts as inaction.<sup>447</sup>

From this perspective, burden review presents a particularly unpalatable form of the proverbial counter-majoritarian difficulty.<sup>448</sup>

The fourth is the claim that courts should concern themselves, wholly or in part, with the subjective intention or purpose of state regulators rather than economic effects. The high priest of this tradition is Donald Regan, who argued (as we have noted above) that “the court should strike down a state law if and only if it finds by a preponderance of the evidence that protectionist purpose on the part of the legislators contributed substantially to the adoption of the law or any feature of the law.”<sup>449</sup> But the church of subjectivism is a broad one with many members. Norman Williams, for example, has proposed that legality under the dormant commerce clause should turn on “deliberative equality,”<sup>450</sup> by which he means that state regulation of interstate commerce should be valid only if the state government in question “gives equal regard to similarly situated

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445. Denning, *supra* note 2, at 494.

446. See, e.g., *id.* at 459 (“At its worst, [antidiscrimination law] is a tool for the promotion of an economic ideology that smacks of Lochnerian economic substantive due process.”); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1111 (2008) (“The right to pursue a common calling on equal terms as others was an aspect of personal liberty that the *Lochner*-era courts revived as substantive due process, but which continues as a function of the dormant commerce clause.”); Williams, *supra* note 2, at 431 (“To suggest that the Constitution protects economic efficiency--much less that the courts should enforce such protection--seems at first glance to urge a reprisal of the *Lochner* era, when the federal courts aggressively policed state regulations in the name of a laissez faire capitalist ideology.”).

447. Heinzerling, *supra* note 2, at 222; see also *id.* at 268–69 (“Rather than promoting economic efficiency, representation reinforcement, and national unity, the Court’s concepts of discrimination and regulation suggest a return to *Lochner*-style assumptions about the natural and proper role of government. Thus, the nondiscrimination principle is doomed not only by its failure to achieve its stated objectives, but by its promotion of an unstated, outdated view about government’s appropriate boundaries.”).

448. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press, 2d ed. 1986).

449. Regan, *supra* note 2, at 1148.

450. Williams, *supra* note 2, at 414–16.

in-state and out-of-state interests.”<sup>451</sup> Other notable subjectivists, or those with subjectivist inclinations, include Mark Tushnet (who has described the invalidation of measures motivated by an impermissible purpose as “the most easily justifiable form of dormant commerce clause review”<sup>452</sup>) and Catherine O’Grady, who writes that “judicial motive review is particularly appropriate and unobjectionable in a dormant Commerce Clause analysis.”<sup>453</sup>

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Under this four-fold barrage of criticism, the dormant Commerce Clause has fallen an awfully long way since the 1970s. Today, the Traditional Framework receives only formal dues—and, increasingly, not even that—from the Court. But, in closing, I want to point out that the very fact that the Court continues to make rhetorical genuflections to the traditional model (as do the lower courts) is, itself, of great significance. It preserves the possibility that renewed life could be breathed into the doctrine, even into the Traditional Framework itself, before the profound decline charted above becomes irreversible. Much will depend upon the changing membership of the Court. The arrival of Justice Scalia in 1986, as an outspoken and tireless critic of the doctrine, marked the beginning in earnest of what I have described here as the decline of the dormant Commerce Clause. His passing, and the arrival of his successor, may turn out to mark a point of inflection in the story of this most protean of the creatures of the Constitution. Time will tell.

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451. *Id.* at 414.

452. Tushnet, *supra* note 2, at 130.

453. Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 596 (1997); *see also* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 953–55 (1978); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217–23 (1970); John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1156–61 (1978).