Dormancy Versus Innovation: A New Generation
Dormant Commerce Clause

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DORMANCY VERSUS INOVATION:
A NEXT GENERATION DORMANT COMMERCE CLAUSE

By
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Over the last half-century, countries have clung tenaciously to the concept of nation states, while economies throughout the globe became inextricably linked. National markets morphed into international markets, with consumers and not just industries unfettered by political boundaries. The nature of environmental threats too changed from easily perceived and immediate harms to subtle and yet insidious harms whose manifestation is not readily perceptible by the average public. Instead of the infamous Cayuga river fire, mercury-infested fish floating in the Great Lakes, or smoke stakes emitting enough particulate matter to envelop a city, we now have multi-faceted, multi-layered international problems, ranging from increased ozone depleting substances, diminishing and stressed ocean resources, rising populations and changing eating habits and land use patterns, and then of course rising greenhouse gas (GHG) emissions and the resulting global consequences. That we now live in Thomas L. Friedman’s *Hot, Flat & Crowded* world is uncontestable, and yet constitutional dogma still dictates that we have a national market protected from some parochial state and local regulation. The negative or dormant aspect of the Commerce Clause (DCC) presumes that certain national issues are reserved exclusively to Congress, and state and local governments are prohibited from intruding into those areas absent congressional assent.

This is becoming increasingly problematic, as consequences are being felt locally, yet the issues are as much global as national. The national arena has become eclipsed by the polar local and international stages. The present political paradigm only exacerbates this duality. Today’s Congress lacks the congeniality that existed 50 years ago, and any suggestion that its members can achieve consensus through rational, interest group pluralism appears dominated instead by public choice theory. In lieu of gamesmanship we now have gridlock. And it seems unlikely to change anytime soon. But people continue to live, eat, shop and recreate at a local level—indeed, one that is now primarily urban. Expectedly, therefore, we are witnessing an escalating emphasis on *place* and the rise of *localism*, prompting local communities to assert control over their own economic and environmental destiny. This, of course, parallels the emergence of the urban center, which has become the economic engine for states and indirectly the nation. Today, as Richard Schragger explains, “when one speaks about the free trade constitution, one is mostly speaking about inter- and intra-metropolitan trade; to talk about the national economy is to talk

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1 Associate Professor, University of Wyoming College of Law. I am grateful to [___] for their helpful comments and insights.
3 Professor Pursley suggests that we should view the DCC as a conceptual element in what he labels a “State Preclusion Thesis.” Garrick B. Pursley, Dormancy, 100 GEO. L.J. 497, 529 (2012).
mostly about urban-based development and urban-based trade flows. And urban centers will continue to explore opportunities for asserting greater influence over their surroundings, affecting the flow of capital, the type of industries that will be permitted, and under what conditions those industries will be allowed to operate.

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

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8 With the emphasis on reduced fossil fuel dependence and the need for local communities to secure new energy resources, the likelihood of an ever growing movement toward distributed energy is poised to have local communities become energy islands, marginally tied to an interstate grid. See JEFFREY RUSSELL AND STEVEN WEISSMAN, CALIFORNIA’S TRANSITION TO LOCAL RENEWABLE ENERGY: 12,000 MEGAWATTS BY 2020: A REPORT ON THE GOVERNOR’S CONFERENCE ON LOCAL RENEWABLE ENERGY: PUBLIC DRAFT (Feb. 27, 2012). But with such a future, sub-national level communities are likely to protect themselves through some trade barrier restrictions, only to implicate DCC concerns. See KRISTEN H. ENGEL, The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation, 26 ECOLOGY L.Q. 243 (1999).
12 See ERWIN CHERMINSKY, BRIGHAM DANIELS, BREITNY HARDY, TIM PROFETA, CHRISTOPHER H. SCHROEDER, NEIL S. SIEGEL, California, Climate Change, and the Constitution, 25 ENVTL. L. FORUM 50 (July/August 2008).
recently prompted a district court to invalidate the State’s low carbon fuel standard. Stiffling these and similarly laudable local efforts is problematic, and more importantly unnecessary.

Nothing about the DCC necessitates deploying the judicially constructed doctrine in the same manner that exists today. As our society and constitutional doctrines have changed since the early republic, so too has the approach to the DCC. It has witnessed four different generations of analysis, with each new generation struggling to match the needs of society at the time with the policy animating the DCC. And nothing about the latest generation of tests under the DCC warrants strict adherence to stare decisis. After all, different generations have produced different tests for measuring the constitutionality of state and local programs allegedly violating the negative prohibition. Part I, therefore, reviews the first three generations, illustrating how the emerging dual federalism paradigm influenced the Court’s DCC cases prior to the New Deal. Part II then examines the changing and now modern DCC, demonstrating that the Court intended to narrow the scope of the clause. It was during this period that the Court crafted tests, particularly a balancing test, with minimal analysis or thought. But the modern DCC tests have not necessarily reduced the clause’s impact, as expected by the New Deal Court, and Part III examines how the DCC has cabined state and local programs. Part IV, therefore, unmasks the inherent problem with the tests now being deployed and offers an alternative approach to the DCC.

I. Growth of the Dormant Commerce Clause

The development of the DCC reflects a fluid process for distinguishing (1) those instances when states may exercise exclusive jurisdiction, (2) those circumstances where States and Congress may exercise concurrent jurisdiction, and finally (3) those subjects reserved exclusively to Congress—unless Congress affirmatively chooses to permit state regulation. Undoubtedly, the framers of the Constitution feared state regulation of foreign commerce, and to some degree further internecine trade wars among the former colonies. But little in that history

15 See Calvin H. Johnson, The Panda’s Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause, 13 WM & MARY BILL OF RIGHTS J. 1 (2004) (“All of the concrete programs intended to be forwarded by giving Congress the power to regulate commerce were restrictions on international trade . . .”). For an excellent account of the practices prior to the Constitution, see Brannan P. Denning, Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause, 94 KY. L. J. 37 (2006). See also Barry Friedman, Daniel T. Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 VA. L. REV. 1877 (2011). That the framers recognized the possible need for uniform commercial intercourse seems apparent. See JONATHAN ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, VOL. V 115 (2nd Ed. 1836) (ELLIO’’S DEBATES) (“to consider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony”). But such sentiments obscure whether the power is exclusive or concurrent, and often the sentiments were linked to foreign commerce. James Madison explained:
suggests anything more than the framers recognized the need to vest Congress with the power to regulate trade, both locally and internationally. It does not, for instance, begin to illuminate what subjects might fall into which of the three categories. In Federalist No. 32, Alexander Hamilton presaged the third circumstance, describing three instances when the United States would need to exercise exclusive authority:

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

Hamilton’s example suggests that he omitted the regulation of commerce as one reserved exclusively to Congress.\textsuperscript{17} Invoking the power to tax in article I, section 8 clause 1, Hamilton suggested that Congress’ power to levy and collect taxes and duties on imports and exports precluded similar state regulation, reasoning that state regulation was barred because of the corollary clause in article I, section 10, which restricted the states’ ability to impose any imposts or duties on imports or exports. He explained that “[t]his restriction implies an admission that if it were not inserted the States would possess the power it excludes, [and it further implies that in all other respects the states’ power is] undiminished.”\textsuperscript{18} When responding to the concern that states might need to defray the costs of inspection before exporting products, James Madison suggested that states could explore ways of doing so, and the check against any abuse “was the right in the general government to regulate trade between state and state.”\textsuperscript{19} When a measure for state duties on tonnage was presented by Mr. M’Henry and Mr. Carroll, Madison apparently “was more and more concerned that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority.”\textsuperscript{20} Mr. Sherman responded “The power of the United States to regulate trade, being supreme, can control interferences of the state regulations, when

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\textsuperscript{17} The word “commerce” itself is not necessarily clear, whether it includes simply mercantile trade or something else. Others note the issue, further underscoring the limited utility resorting to the framers’ “actual” intent. See Johnson, supra note __; Robert G. Natelson and David Kopel, Commerce in the Commerce Clause: A Response to Jack Balkin, 109 Mich. L. Rev. First Impressions 55 (2010). Occasionally, at least, the colonists used “commerce” in lieu of the word “trade,” such as when referring to treaties of commerce. See Elliott’s Debates Vol. V, supra note __, at (May 6).

\textsuperscript{18} Id. at 199.

\textsuperscript{19} Id. at 539.

\textsuperscript{20} Id. at 548. It was later when James Madison suggested that regulating “commerce” was entrusted exclusively to the federal domain, and it was Madison’s subsequent letters that led Albert Abel to infer that view on the delegates during the convention. Albert S. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 493 (1941).
such interferences happen; so that there is no danger to be apprehended from concurrent jurisdiction.  

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

The Court held that the state monopoly conflicted with the federal Coasting License Act of 1793, putting an end to a generally regarded onerous monopoly. But Chief Justice John Marshall’s opinion for the Court suggested that Congress exercises an expansive power under the commerce clause that reaches every species of commercial intercourse, including navigation. This power, quite naturally, did not end at jurisdictional lines but rather operated “within the territorial jurisdiction of the several states.” Marshall further distinguished between two spheres of jurisdiction, the commercial power delegated to the federal government and that reserved to the states under the Constitution. States retained their power to regulate police or public activities that affected commerce, but Congress had the power to regulate commerce itself. The Court was well aware of the potential impact of these retaliatory statutes on commerce. See New York v. Miln, 36 U.S. (11 Pet.) 102, 159-60 (1837) (Story, J., dissenting).

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21 Elliott’s Debates Vol. V, supra note __, at 548.
24 In 1812, the Court for the Correction of Errors of New York upheld several of the statutes granting the monopoly. Livingston v. Van Ingen, 9 Johns. 507 (N.Y. 1812).
26 New York Chancellor James Kent, from whose state the case arose, was quite dismayed at this use of the Coasting License Act. He observed that when Congress passed the Act, "it never occurred to any one" that the Act was a regulation of commerce and prohibitory of any such state grants; instead, Kent indicated that the Act was designed "to exclude foreign vessels from commerce between the states, in order to cherish the growth of our own marine, and to provide that the coasting trade should be conducted with security to the revenue." I James Kent, Kent’s Commentaries 435 (Lacy ed. 1889). Norman Williams convincingly argues that Marshall deftly navigated between the need to articulate a theory of the commerce clause and a desire to avoid having the Court seen as an opponent of state legislation. Norman R. Williams, *Gibbons,* 79 N.Y. U. L. Rev. 1398 (2004). Historian Charles McCurdy makes this point as well. Charles McCurdy, American Law and the Marketing Structure of the Large Corporations, 1875-1890, 38 J. Econ. Hist. 631, 635 (1978).
28 22 U.S. at 196.
trade "which does not extend to or affect other States," and which is completely within a state.\textsuperscript{29} The power of taxation is one example. Responding to the specter of state quarantine and inspection laws thereby becoming unconstitutional, Marshall admitted that, while such laws affect interstate commerce, states may exercise "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government."\textsuperscript{30} If, according to Marshall, the state law’s object is permissible, then the means chosen would be acceptable, even if those means mirrored what might be employed by the federal government under the commercial power.\textsuperscript{31}

Until mid-Century, the challenge of outlining the boundaries of exclusive federal versus concurrent state power became obscured by a changing Court, slavery, temperance, and deciding whether internal improvements were federal or state concerns.\textsuperscript{32} No clear consensus emerged for resolving whether a regulatory object was one reserved exclusively to Congress, or subject to either exclusive or concurrent state jurisdiction.\textsuperscript{33} Then, in \textit{Cooley v. Board of Wardens},\textsuperscript{34} the Court employed a somewhat talismanic test: the inquiry is whether the particular subject matter was national or local in scope, with the former reserved exclusively to Congress. This belief that issues could be categorized as either national or local permeated much of the Court’s nineteenth century jurisprudence. It served as the basis for Justice Story’s opinion in \textit{Swift v. Tyson},\textsuperscript{35} where he distinguished between “local” law and the general commercial law, requiring uniformity and governed by the law of nations.\textsuperscript{36} And if the object of the regulation required uniform, national legislation, then the subject would be reserved exclusively to Congress.\textsuperscript{37} In \textit{Mobile v. Kimball},\textsuperscript{38} for instance, Alabama’s program for dredging a channel and constructing an artificial harbor survived a constitutional challenge, with the Court concluding that the program merely “aided” commerce and admitted of local rather than uniform regulation:

The subjects . . . upon which Congress can act under this power are of infinite variety . . . Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids of commerce, and can only be properly regulated by provisions adopted to their special circumstances and localities.\textsuperscript{39}

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\item[29] Id. at 198-99.
\item[30] Id. at 203.
\item[31] Justice William Johnson concurred, emphasizing that the state law conflicted with Congress’ exclusive jurisdiction over interstate commerce. Gibbons, 22 U.S. (9 Weat.) at 222 (Johnson, J., concurring).
\item[32] See Kalen, supra note __, at 429-38.
\item[33] Id.
\item[34] 53 U.S. 299 (1851).
\item[35] 41 U.S. (16 Pet.) 1 (1842).
\item[37] 53 U.S. at 318. Yet, “[i]t was not until after the Civil War,” David Currie explains, “that the commerce clause had been unambiguously employed to strike down state legislation, but in the remaining years of the Court’s first century it had been wielded with increasing frequency to protect commerce against state interference.” DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 31 (1990).
\item[38] 102 U.S. 691 (1881).
\item[39] Id. at 697.
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This all fit neatly into the prevailing dual federalism framework for allocating spheres of jurisdiction. And it further suggested another talismanic test: any direct regulation of interstate commerce necessarily intruded into the sphere reserved to Congress, in the first instance.

II. Fourth Generation DCC

During the New Deal era, however, the Court abandoned its talismanic tests from the nineteenth century and began to develop another paradigm. Justice Holmes foreshadowed the Court’s ultimate rejection of the nineteenth century tests, when he introduced the “current of commerce” theory expanding the scope of Congress’ Commerce Clause power. Holmes’ opinion mirrored the emerging scholarly criticism on both the affirmative aspect of the Commerce Clause as well as its negative component, the latter stymieing modern state regulation. Progressives favoring state or national regulation attacked the Court’s prior tests as too restrictive. After all, during the Court’s first century, the clause had been marshalled with increasing frequency to shield economic activity from state interference. And it equally limited the reach of progressive federal legislation that intruded into the states’ domain. Scholars such

40 See infra notes __ and accompanying text.
41 See, e.g., Harman v. Chicago, 147 U.S. 396 (1893) (license fee directly burdened interstate commerce); McCall v. California, 136 U.S. 104 (1890). In Hall v. De Cuir, 95 U.S. 485 (1877), the Court invalidated Louisiana’s Equal Accommodation Act, prohibiting racial discrimination against passengers on interstate carriers. The statute, according to the Court, operated directly upon interstate commerce. Similarly, in Wabash, St. Louis & Pacific Railway Co. v. Illinois, 118 U.S. 557 (1886), the Court held that Illinois’ regulation of rates for carriers engaged in interstate traffic constituted an impermissible direct burden on commerce. See also Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (railroad speed check unconstitutional); Houston & Tex. Cen. R.R. v. Mayes, 201 U.S. 321 (1906) (held unconstitutional railroad requirement for furnishing cars); Cleveland, Cin., Chi. & St. L. Ry. v. Illinois, 177 U.S. 514 (1900) (invalidating railroad stop statute); Illinois Cen. R. R. v. Illinois, 163 U.S. 142 (1896) (requiring interstate traffic to make certain stops an impermissible direct burden on commerce). To the extent the Court concluded that a statute only indirectly burdened interstate commerce, it survived. “The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to the public maintenance.” New York, L.E. & W.R.R. v. Pennsylvania, 158 U.S. 431, 439 (1896). See also Missouri, Kan. & Tex. Ry. v. Haber, 169 U.S. 613 (1898); Hennington v. Georgia, 163 U.S. 299 (1896); Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895); Budd v. New York, 143 U.S. 517 (1892); Sherlock v. Alling, 93 U.S. 99 (1876).

42 Swift & Co. v. United States, 196 U.S. 375, 399 (1905). The growth of the vertically integrated national market and the ability of states to levy gross receipt taxes on businesses likely shaped the Court’s evolving skepticism about prior DCC tests. See Gwin, White & Prince, Inc. v. Heneford, 305 U.S. 434 (1939) (Justice Stone examining the DCC and imposition of gross receipts); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 271, 324-33 (1938) (Black, J., dissenting) (reviewing the DCC and gross receipt taxes and suggesting laws should be measured at an unfair and unjust standard). In a license tax case involving insurance, Justice Rutledge reviewed the DCC generally and observed, “its implied negative operation on state power has been uneven, at times highly variable” and “slippery.” Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 418 (1946). See generally Allison Dunham, Gross Receipts Taxes on Interstate Transactions, 47 COLUM. L. REV. 211 (1947).


44 CURRIE, supra note __, at 31; see also FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937).

as Professor Noel T. Dowling, therefore, detailed the bankruptcy of these formalistic tests and encouraged charting a new direction.\textsuperscript{46} Echoing his dissent in DiSanta v. Pennsylvania,\textsuperscript{47} Chief Justice Stone, first in South Carolina State Highway Dept. v. Barnwell Brothers, Inc.,\textsuperscript{48} and later in Southern Pac. Co. v. Arizona,\textsuperscript{49} implicitly offered another approach for resolving DCC issues. Stone, favoring legislature policy judgments,\textsuperscript{50} noted that Congress “may determine whether the burdens imposed” by state programs “are too great, and may, by legislation designed to secure uniformity” pass laws “to protect the national interest in the commerce, [and] curtail to some extent the state’s regulatory power.”\textsuperscript{51} For Stone, the critical inquiry involved determining whether the law discriminated between in-state and out-of-state interests.\textsuperscript{52} The inquiry also still required ensuring that the subject of the regulation was not one demanding national uniformity.\textsuperscript{53} When defending the Court’s shift in DCC analysis, Justice Rutledge observed that the narrowing of the clause “has come on the whole to require substantial danger, real or actually threatening, of creating” a “balkanized America.”\textsuperscript{54}

In Dean Milk Co. v. Madison, for example, Madison, Wisconsin, required that all pasteurized milk available for sale in the city be processed and bottled in a facility within 5 miles of the city.\textsuperscript{55} The law undoubtedly discriminated against both interstate and other in-state sellers

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\item[\textsuperscript{47}] 273 U.S. 34 (1927) (invalidating state bonding requirement for selling oversees passenger tickets to avoid fraud).
\item[\textsuperscript{48}] 303 U.S. 177 (1938).
\item[\textsuperscript{49}] 325 U.S. 761 (1945).
\item[\textsuperscript{50}] SAMUEL J. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 63-64, 92-93 (1945). Konefsky observes that Stone “would want the Court to be guided in its interpretation of that clause by an awareness of the problem of our society. Its responsibility to ‘maintain the national interest and at the same time bring it into an effective harmony with local interests and the principles of local government.’” Id. at 97 (quoting Stone). See also HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 114-21 (1961) (describing Justice Stone’s approach to the Commerce Clause).
\item[\textsuperscript{51}] South Carolina Highway Dept. v. Barnwell, 303 U.S. at 189-90. See also id. at 190-91 (“When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision.”).
\item[\textsuperscript{52}] 303 U.S. at 185-86, 190.
\item[\textsuperscript{53}] “The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority.” Graves v. People of State of New York ex rel. O’Keefe, 306 U.S. 466, 480 n.1 (1939). Professor Dowling notes that Stone’s analysis echoed aspects of Cooley. Dowling, supra note __, at 551 [1947].
\item[\textsuperscript{54}] RUTLEDGE, supra note __, at 72-73.
\item[\textsuperscript{55}] Dean Milk Co. v. Madison, 340 U.S. 349 (1951).
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of pasteurized milk, with the city purportedly claiming that for health and safety reasons, it needed to be able to inspect the processing and bottling facilities—ostensibly not being able to do so if those facilities were located beyond the 5-mile radius. Applying a strict scrutiny analysis, the Court invalidated the ordinance, reasoning that other less discriminatory means were available to achieve the health and safety objective: either relying on other community inspection programs or sending inspectors to other areas and charging those facilities for the increased cost of the travel.

By 1970, Chief Justice Stone’s caveat that even those non-discriminatory measures that involve subjects demanding national uniformity might violate the DCC surfaced in Arizona’s prohibition against the out-of-state shipment of cantaloupes, unless packaged in state approved containers. In *Pike v. Bruce Church, Inc.*, the Court’s sparse opinion invalidated Arizona’s program. The Court recognized that the law served a legitimate interest, albeit twice referring to that interest as “tenuous” and “minimal” with respect to the company challenging the law. The Court next acknowledged that the Court apparently had used a balancing test (referring to Stone’s opinion in *Southern Pac. Co.*), although “more frequently it has spoken in terms of ‘direct’ and ‘indirect’ effects and burdens.” This, however, was after the Court purportedly adopted a slightly different “general rule”: “whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the [putative] local benefits.” For this general rule, now parroted as the *Pike v. Bruce* balancing test, the Court cited an inapposite case.

The DCC analysis in vogue since the 1970s, therefore, modified somewhat by an additional 1980’s appendage, contains three elements. First, statutes that discriminate against interstate commerce on their face, in purpose, or by practical effect are subject to a strict scrutiny analysis, which requires that the state or local entity establish a legitimate state or local interest and that the means adopted are the least discriminatory options available. When such discriminatory laws are motivated by “simple economic protectionism,” they are “subject to a ‘virtually per se rule of invalidity,’ which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.”

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57 Id. at 145-146.
58 Id. at 142.
59 Id. at 142.
60 Id. The Court cited Huron Portland Cement Co. v. City of Detroit, 362 U.S. 400 (1960), which upheld applying Detroit’s smoke abatement ordinance to ships travelling in interstate commerce. The *Portland Cement* Court did not articulate any such test, however. In fact, the Court referred to a variety of “verbal generalizations,” id. at 444, it conflated federal preemption and DCC analysis, and in the specific section of its opinion addressing the DCC challenge, framed the inquiry by stating that “[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.” Id. at 448.
61 Of course, the Court has suggested that the strict scrutiny analysis is somewhat artificial, indicating that the Court has “generally shrugged down the statute without further inquiry” when the statute either discriminates “directly” against interstate commerce or “favor[s] in-state economic interests over out-of-state interests.” Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). See also Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575, 582 (1997) (quoting earlier cases that facially discriminatory laws are “virtually per se” unconstitutional).
62 Id. at 331 (quoting City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978)).
impermissible effort at protectionism occurred in *Granholm v. Heald*, where the Court invalidated certain state efforts to favor local wineries and distributors.\(^{63}\)

Also, discrimination occurs when a party presents sufficient proof of disparate impact against out-of-state entities, although the cases in this area are not necessarily consistent. In *Hunt v. Washington State Apple Advertising Commission*, for instance, the Court treated an otherwise facially neutral law as it would a law that discriminated on its face.\(^{64}\) In *Hunt*, North Carolina required that all closed containers of apples sold or shipped into the state bear only the U.S. grade or standard, in lieu of simply noting that they were from the famed fields of Washington State. The Court agreed with the lower court’s finding that the state program had the practical effect of burdening interstate sales as well as of discriminating against them.\(^{65}\) But it appears difficult to convince a court to apply a strict scrutiny test to statutes that may have a discriminatory impact where discriminatory animus is not readily apparent.\(^{66}\)

Second, statutes or local programs that do not discriminate on their face, in purpose, or effect are scrutinized under *Pike v. Bruce Church, Inc.*,\(^{67}\) balancing “whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the [putative] local benefits.”\(^{68}\) In *Minnesota v. Clover Leaf Creamery Co.*,\(^{69}\) for example, the State prohibited the sale of milk in non-recyclable plastic containers, which on its face was nondiscriminatory. Yet Minnesota had a substantial paper rather than plastics industry, and the statute effectively favored the in-state paper industry over the more substantial out-of-state plastic industry. Even

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\(^{63}\) Granholm v. Heald, 544 U.S. 460 (2005). Recent state distinctions between interstate and intrastate shipment of wine to local consumers have prompted a number of lawsuits with arguably inconsistent results. Siesta Vill. Mkt. v. Steen, 595 F.3d 249 (5th Cir. 2010) (upheld); Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010) (unconstitutional); Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008) (ban against direct shipment upheld); Cherry Hill Vineyards v. Lilly, 553 F.3d 423 (6th Cir. 2008) (invalidated requirement that direct shipment purchases of wine from small farm wineries be made in person); Cherry Hill Vineyard v. Baldacci, 505 F.3d 28 (1st Cir. 2007) (upheld Maine statute). Favoring local over out of state workers also presents facial discrimination. E.g., Tri-M Group, LLC v. Sharp, 638 F.3d 406 (3d Cir. 2011).


\(^{65}\) *Id.* at 350–51.


\(^{68}\) *Id.* at 142. Some courts exhibit little interest in applying the balancing test absent disparate treatment between intrastate and interstate commerce. E.g., Cavel Intern, Inc. Madigan, 500 F.3d 551 (7th Cir. 2007) (Illinois statute against slaughtering horses). Yet overlooking balancing could be troublesome on appeal. See, e.g., Nat’l Ass’n of Optometrists & Opticians LensCrafters v. Brown, 567 F.3d 521 (9th Cir. 2009) (remanded for balancing test, with burden on plaintiffs, because lower court addressed only discrimination and, finding it present, failed to address *Pike*).


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though the trial court found that the State’s purpose was to favor local interests, the Court concluded that the statute regulated evenhandedly and applied the balancing test to uphold the law:

Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not “clearly excessive” in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems. . . .

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

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

Two defenses might shield an otherwise viable DCC claim. To begin with, Congress can affirmatively permit a state or local community to discriminate against interstate commerce. If Congress has legislated under a valid exercise of its Commerce Clause power, then the legislation may authorize state discrimination or a burden on interstate commerce. One example is hunting and fishing licenses, which often cost more for out-of-state than in-state residents. Congress sanctioned such discrimination when it passed the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005. Also, when it approves interstate compacts, Congress can permit otherwise state protectionist measures, such as restrictions on the use of instate water in interstate markets. Yet, before any congressional act will be treated as authorizing a regulation that otherwise would fail under a DCC analysis, the Court appears to demand that Congress express its intent in an unambiguous fashion. “An unambiguous indication of congressional intent,” therefore, “is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported

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70 Id. at 473. When examining local benefits, a court might limit its inquiry into “putative” benefits, not whether those benefits actually will occur. See Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 313 (1st Cir. 2005).
72 E.g., id.; Edgar v. MITE Corp., 457 U.S. 624 (1982); Carolina Trucks & Equip. v. Volvo Trucks of N. Am., 492 F.3d 484 (4th Cir. 2007) (cannot seize on in-state activities to reach out-of-state conduct).
73 See infra notes __ to __ and accompanying text.
74 Brown-Forman Distillers, 476 U.S. at 581–84. See infra notes __ to __ and accompanying text.
75 “Congress has undoubted power to redline the distribution of power over interstate commerce.” Southern Pac. Co. v. Arizona, 525 U.S. 761, 769 (1945).
76 P.L. 109–52, § 6036; see Hoeven v. Minnesota, 456 F.3d 826 (8th Cir. 2006); Schutz v. Thome, 415 F.3d 1128 (10th Cir. 2005).
77 See Tarrant Regional Water Dist. v. Hermann, 656 F.3d 1222 (10th Cir. 2011) (reviewing an Oklahoma-Texas compact).
authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny. In New England Power Co. v. New Hampshire, the Court observed that “when Congress has not ‘expressly stated its intent and policy’ to sustain state legislation from attack under the Commerce Clause, . . . we have no authority to rewrite its legislation based on mere speculation as to what Congress ‘probably had in mind.’” And it is incumbent on the proponent of an asserted congressional authorization to prove that Congress evinced its intent.

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

Also, writing for the majority in United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority, Chief Justice Roberts observed that this case involved the limited

80 Id. at 340–43.
81 See Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992). The more likely scenario is that the defendant in such cases will argue that the potentially offensive measure has been preempted. In Engine Manufacturers Ass’n v. South Coast Air Quality Management District, 541 U.S. 246 (2004), for example, the Court held that the district might not be able to use § 209 of the Clean Air Act (CAA) as authority for escaping preemption of local rules regarding fleet purchases. Yet, in leaving open the possibility that some fleet purchase requirements might not be preempted by the CAA, the Court indicated that quite possibly those rules might then be tested under a variation of the market participant doctrine of the DCC, which is precisely what occurred after the Court’s remand. Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031 (9th Cir. 2007). Although preemption might obviate the need for a lower court to reach a DCC issue, this can become problematic if the appellate court similarly avoids addressing a DCC challenge after reversing the lower court’s finding of preemption. E.g., Nat’l Meat Ass’n v. Brown, 599 F.3d 1093, 1097 n.2 (9th Cir. 2010).
84 Id. at 810.
86 See also Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (state entering the cement business); United Healthcare Ins. Co. v. Davis, 602 F.3d 618, 624–27 (5th Cir. 2010).
circumstance where the government was addressing a “traditional governmental activity”: the management of solid waste. He wrote that the DCC “is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.”

When addressing whether the program prevented those who would be harmed by the flow control ordinance from protecting their interest through the political process, the Chief Justice noted that “the most palpable harm imposed by the ordinances. . .—more expensive trash removal—[is] likely to fall upon the very people who voted for the laws . . .”; he therefore saw “no reason” to afford “local business a victory they could not obtain through the political process.”

III. Cabining Communities: Barriers to Innovation

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

For several decades now, state and local communities have served as centers for innovation, as Congress has become increasingly polarized and generally unable to pass legislation absent a crisis or widespread pressure. These sub-national communities are increasingly exploring opportunities to shape their future and, whether as a consequence of an overly expansive approach to preemption analysis or, when Congress has yet to act, on a DCC analysis, have experienced roadblocks. When the State of California required humane animal treatment by mandating euthanasia of non-ambulatory animals and prohibiting them from being slaughtered, the Supreme Court held that federal law preempted its effort, even though the State was responding to abuses such as “workers at a slaughterhouse in California dragging, kicking and electroshocking sick and disabled cows in an effort to move them.”

88 Id. at 343.
89 Id. at 332. A majority further concluded that the ordinances survived the Pike balancing test, because any incidental burden on interstate commerce was outweighed by the benefits conferred on the local community. Indeed, the majority avoided examining any potential or actual burdens on interstate commerce, reasoning that the ordinances provided a legitimate and necessary financing mechanism for waste disposal services and, moreover, enhanced the local communities’ recycling efforts.
91 See 42 U.S.C. §§ 7543(b), 7545(c)(4)(B).
City’s Mayor Blumberg, in 2007, pushed to require that city taxicabs switch to hybrid cars by 2012 that too was preempted.\textsuperscript{95} When Colorado became one of the first states to pass an aggressive renewable energy portfolio standard, conservative organizations opposed to climate change programs challenged the law for allegedly violating the DCC.\textsuperscript{96} And North Dakota similarly claims Minnesota’s Next Generation Energy Act, designed to limit CO\textsubscript{2} emissions, violates the DCC.\textsuperscript{97} It now appears almost obligatory, therefore, for scholars to include a DCC cautionary discussion in articles promoting renewable energy and climate change programs.\textsuperscript{98}

The DCC stymied earlier state and local efforts to respond to emerging problems. Local efforts to control the flow of waste, for instance, present the classic example for how the DCC affects local land use decisions. Municipal entities often design flow control measures as tools to address limited capacity at waste disposal sites and the need to ensure that such sites, if constructed, will have sufficient capacity and financial resources to withstand competitive pressures.\textsuperscript{99} But in \textit{City of Philadelphia v. New Jersey},\textsuperscript{100} the Court struck down New Jersey’s attempt to prevent Philadelphia’s waste from coming into the state and burdening its landfills. The statute prohibited any person from bringing into the state “any solid or liquid waste which originated or was collected outside the territorial limits of the State,” with certain caveats.\textsuperscript{101} Building on its \textit{Philadelphia} decision, the Court during the early 1990s began to invalidate waste import restrictions that favored local operators of waste disposal facilities, as well as local generators of waste—at least without a valid justification for why the out-of-state waste imposed a greater cost than in-state waste.\textsuperscript{102} In one case, for example, Oregon imposed a surcharge on imported wastes, reasoning that the extra surcharge offset the cost imposed on the state for having to dispose of another state’s waste. In \textit{Oregon Waste Systems v. Department of Environmental Quality},\textsuperscript{103} the Court held that this statute impermissibly discriminated against out-of-state waste (commerce).

Then, in 1994, the Court further threatened to stifle local efforts to address increasing solid waste as landfill space decreased. In \textit{C&A Carbone v. Town of Clarkson},\textsuperscript{104} the Court invalidated, on DCC grounds, a local flow control ordinance that required all solid waste in the

\textsuperscript{95} Metropolitan Taxicab Bd. of Trade v. City of New York, 615 F.3d 152 (2\textsuperscript{nd} Cir. 2010).
\textsuperscript{96} American Tradition Institute v. Colorado, 11-cv-00859-WJM-KJM (D. Co. Filed April 4, 2011).
\textsuperscript{97} North Dakota v. Swanson, No. 11-CV-3232 (D. Minn. filed Nov. 2, 2011).
\textsuperscript{100} City of Phil. v. New Jersey, 437 U.S. 617 (1978).
\textsuperscript{101} Id. at 618.
local community to be shipped through a local transfer station. Although recyclers could still receive waste, any recyclable materials first had to go to the transfer station for sorting, where a transfer fee would be charged. The Court’s majority concluded that this scheme discriminated by preventing the local businesses from shipping their already sorted recyclables directly out of state for processing, even though the law equally discriminated against out-of-town processors as well as out-of-state entities.

In the aftermath of the Court’s controversial Carbone decision,105 lower courts struggled with whether to apply the Carbone analysis to publicly owned and operated transfer stations, with the Sixth and Second Circuits disagreeing.106 The Supreme Court resolved the conflict by concluding that similar local measures protecting public facilities should be treated differently than measures that discriminate among private facilities.107 Authoring the majority opinion, Chief Justice Roberts held in United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority that the DCC would not apply when the government was undertaking a “traditional governmental activity,” such as the management of solid waste.108 The DCC, he wrote, “is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.”109

Challenges to flow control ordinances have not necessarily dissipated since United Haulers. The voters of Kern County, California, for instance, adopted an ordinance that barred out-of-county entities from spreading treated sewage sludge on farmlands in the county, purportedly out of a concern that the application of biosolids might migrate and adversely affect water supplies and farmlands. The ordinance prevented the city of Los Angeles and other recyclers from using Kern County lands for waste. While the district court sided with the City of Los Angeles, concluding that the county ordinance violated the DCC, as well as the California Waste Management Act.110 On appeal, the Ninth Circuit deftly avoided the issue by concluding that the petitioners lacked prudential standing.111 But these restrictions against certain flow

106 Nat’l Solid Waste Mgmt. Ass’n v. Daviess County, 434 F.3d 898 (6th Cir. 2006); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 438 F.3d 150 (2d Cir. 2006).
107 United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).
108 Id. at 343. See also supra note __ and accompanying text.
109 Id.
111 City of L.A. v. Kern County Water Agency, 581 F.3d 841 (9th Cir. 2009), cert. denied, 130 S. Ct. 3355 (2010). In Daimler-Chrysler Corp. v. Cuno, 547 U.S. 332 (2006), the Court precluded on standing grounds in-state residents from challenging under the DCC location subsidies granted to Daimler-Chrysler for its Jeep plant. The lower court held that the tax credit impermissibly discriminated against interstate commerce. Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 745–46 (6th Cir. 2004). See also On the Green Apts. v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001); Individuals for Responsible Gov’t v. Washoe County, 110 F.3d 699 (9th Cir. 1997). For a critique of applying the zone of interest test to such DCC challenges, see Bradford C. Mank, Prudential Standing and the Dormant Commerce Clause: Why the “Zone of Interest” Test Should Not Apply to Constitutional Cases, 48 ARIZ. L. REV. 23 (2006). In the challenge to Solano County’s bar on importing waste, the abstention doctrine became another avenue for avoiding the constitutional question. Potero Hills Landfill, Inc. v. County of Solano, 657 F.3d 876 (9th Cir. 2011).
control programs ignore that “[f]orced a community to accept waste imported from elsewhere . . . imposes real costs on the community: increased fear, a loss of autonomy, and a denial of equity.”\textsuperscript{112}

So too, state programs designed to protect local natural resources, as with local flow control measures, quite often facilitate claims that such programs impede the free flow of interstate commerce. Prior to the New Deal, the Court rejected a number of challenges to state statutes that favored protecting in-state natural resources. For the most part, these cases employ the now defunct DCC approach expressed in cases such as \textit{Cooley} and Chief Justice Marshall’s dictum in \textit{Brown v. Maryland}.\textsuperscript{113} In \textit{Geer v. Connecticut}, for instance, the Court upheld a prohibition against the out-of-state shipment of woodcocks, ruffled grouse, or quail, reasoning that such wildlife is the property of the state until reduced to capture, and, as such, jurisdiction over this type of property reflects a valid aspect of a state’s police power.\textsuperscript{114} Similarly, the Court upheld New Jersey’s prohibition against the out-of-state shipment of state waters, in \textit{Hudson County Water Co. v. McCarter}.\textsuperscript{115} By contrast, however, the Court refused to uphold Oklahoma’s effort to embargo natural gas resources in the state,\textsuperscript{116} and it invalidated a variety of state programs affecting the exportation of in-state raised or harvested products.\textsuperscript{117}

Of course, along with the post–New Deal Court’s abandonment of the early tests, \textit{Hudson County} and \textit{Geer}, in particular, have since been overruled by \textit{Hughes v. Oklahoma}.\textsuperscript{118} In \textit{Hughes}, the Court overturned an Oklahoma law prohibiting the transport of minnows caught in the state for sale outside the state. A Texas minnow dealer purchased minnows from an Oklahoma minnow dealer and was arrested when he attempted to transport the minnows out of state. The Court began its analysis by observing that \textit{Geer} was decided early in the evolutionary process of the DCC and, as such, overruled the case.\textsuperscript{119} The Court then applied the two-part modern DCC analysis from post–New Deal cases, including the balancing test from \textit{Pike}, but suggested that it was affording “ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership.”\textsuperscript{120} The law’s discrimination on its face prompted the need to explore whether the measure satisfied a legitimate local purpose and did so

\textsuperscript{113} Brown v. Maryland, 25 U.S. 419, 442 (1827) (commenting on state taxation of goods from other states when still in their original containers).
\textsuperscript{115} Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).
\textsuperscript{116} Oklahoma v. Kan. Natural Gas Co., 221 U.S. 229 (1911); see also Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923) (“[W]hether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other.”). The Court’s differential treatment between natural gas and other natural resources prompted sarcastic comments by Professor Alexander Bickel and Benno Schmidt. ALEXANDER M. BICKEL, BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921 VOL. IX THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 268-69 (1984).
\textsuperscript{117} E.g., Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (shrimp exports); Johnson v. Haydel, 278 U.S. 16 (1928) (oyster exports); Minnesota v. Barber, 136 U.S. 313 (1890) (meat inspection).
\textsuperscript{118} Hughes v. Oklahoma, 441 U.S. 322 (1979).
\textsuperscript{119} The Court also discussed how \textit{Geer}’s analysis already had been undermined by subsequent decisions under the Privileges and Immunities Clause. See Douglas v. Seacoast Prods., 431 U.S. 265 (1977); Toomer v. Witsell, 334 U.S. 385 (1948).
\textsuperscript{120} Hughes, 441 U.S. at 335–36.
with the least discriminatory means. While acknowledging the legitimacy of the state’s purported purpose of ensuring ecological balance in state waters, the Court nonetheless concluded that other less discriminatory means were available, including simply a numerical limit on the amount of permissible exported minnows.

Yet in the rare case when a state demonstrates that it is pursuing a legitimate end and the means chosen constitute the least discriminatory means available to achieve that end, a program may survive a DCC challenge, even under strict scrutiny. The most notable instance of this occurred when Maine restricted the importation of the golden shiner, a baitfish that the state worried might carry undetectable diseases that could infect native species. In Maine v. Taylor, the Court recognized that Maine restricted “interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State’s border.”121 In upholding the law, the Court acknowledged the “strict requirements” of Hughes v. Oklahoma,122 but it determined that that those requirements were satisfied: It was influenced by the trial court’s evidentiary hearing and findings of fact regarding the threat to Maine’s ecology, and testimony that it was virtually impossible to inspect inward shipments of comingled baitfish for the presence of parasites. The Court concluded that these findings were not clearly erroneous, and further that the mere “abstract possibility” exists that some less discriminatory means might be available was insufficient to render the law unconstitutional—the State “is not required to develop new and unproven means of protection at an uncertain cost.”123

The DCC also has been invoked in more recent circumstances to constrain a state’s ability to block the export of other resources, such as water. When Nebraska sought to restrict the out-of-state export of groundwater from wells within the state, the Court, in Sporhase v. Nebraska, held that the law violated the DCC.124 Nebraska required a permit for exporting groundwater, and the state would issue a permit only if the proposed water withdrawal was reasonable and did not adversely affect the ecosystem or citizens of the state, and then only if the water was being exported to a state that reciprocated and allowed water to be imported into Nebraska. The Court accepted the ability of the state to ensure against adverse environmental and other effects on the water transfer, but it treated the reciprocity provision as an impermissible discrimination against interstate commerce. The Court emphasized that Nebraska had not shown that its measure was reasonably tailored to address a valid conservation concern.125

121 Maine v. Taylor, 477 U.S. 131, 137 (1986). The lower appellate court declared the law unconstitutional, and the Court first determined that Maine had the ability to appeal as of right to the Supreme Court under 28 U.S.C. § 1254(2) (1986).
123 Id. at 147. In an arguably apparent departure from other DCC cases, the Court ended by noting that it did not believe that Maine had arbitrarily discriminated against interstate commerce. Id. at 151. But Justice Stevens responded, in dissent, that he believed that “[t]here is something fishy about this case,” worried that the state had avoided providing sufficient evidence on the lack of other reasonable alternatives, particularly because Maine was the only state at the time that limited such importation of bait fish. Id. at 152–53.
125 Id. at 958 (“If it could be shown that the state as a whole suffers a water shortage, that the intrastate transportation of water from those areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining states would roughly compensate for any exportation to those states, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision.”). See generally Dean Baxstresser, Antiques Roadshow: The Common Law and the Coming Age of Groundwater Marketing, 108
But state and local communities are only on the cusp of perhaps more troubling applications of the DCC. To begin with, other local land use decisions can provoke a DCC challenge. Local communities interested in favoring small, local businesses in lieu of the large “big box” retailers might inhibit the entry of large—in other words interstate—retailers. Some residents of Chicago, for instance, attempted to limit large retailers, such as Wal-Mart, Target, and Home Depot, through a living wage ordinance. Often these efforts are motivated by local economic protectionism, as well as aesthetic and other concerns, and “invite scrutiny under” the DCC. Agricultural and food policy is another burgeoning area where innovation may be chilled by the DCC. Both rural communities and urban centers are exploring avenues for promoting locally grown foods. This locavore movement, as it is now called, is gaining momentum and helps connect people to the place where they live. It’s potential is great: It could become a significant factor influencing how we look at our nearby environment, our desire to protect it, and how we approach food and agricultural policy moving forward. And it reduces our carbon footprint. But as states and communities seek to define “local” food, regulate what and where such food can be sold, and perhaps possibly mandate purchasing percentages of local foods bought in schools or other establishments, the DCC presents an unfortunate challenge.

Similarly, state programs designed to shape their energy future and quite possibly incrementally whittle away at rising GHGs appear threatened by an ill-equipped use of the DCC. During the past several decades, the Court has circumscribed the states’ ability to distinguish between in-state and out-of-state fuels and power generation. In New Energy Co. of Indiana v. Limbach, for instance, the Court invalidated Ohio’s ethanol motor vehicle fuel tax credit for ethanol produced either in the state or from a state that granted an equivalent tax credit for Ohio produced ethanol. Relying on Sporhase and Great Atlantic & Pacific Tea Co. v. Cottrell, the Court held that Ohio’s reciprocity measure constituted discrimination and did not survive a strict scrutiny analysis into whether the ends were legitimate and the means the least discriminatory alternatives available. And, when the New Hampshire public utility commission prohibited New England Power from selling in-state generated energy to out-of-state entities, the harm might become a significant factor influencing how we look at our nearby environment, our desire to protect it, and how we approach food and agricultural policy moving forward. And it reduces our carbon footprint. But as states and communities seek to define “local” food, regulate what and where such food can be sold, and perhaps possibly mandate purchasing percentages of local foods bought in schools or other establishments, the DCC presents an unfortunate challenge.

Mich. L. Rev. 773, 788 (2010) (suggesting that the doctrine not likely to inhibit marketing). For another case involving impermissible reciprocity requirements, see Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976). In Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844 (11th Cir. 2008), for example, a local effort ostensibly to preserve the unique and natural character of the local community was invalidated on DCC grounds. And East Hampton’s effort to restrict vehicular traffic into the community through a Ferry Law prompted protracted DCC litigation. Francarl Realty Corp. v. Town of East Hampton, 375 Fed.Appx. 145 (2d Cir. 2010) (unpublished); Town of Southold v. Town of East Hampton, 477 F.3d 38 (2d Cir. 2007).

Clayton P. Gillette, Local Redistribution and Local Democracy: Interest Groups and the Courts 1-3 (2011). The effort failed under pressure from the interstate retailers and the resulting opposition by then Mayor Daley. Id.


Id.


even though the company had been selling into the interstate market inexpensive hydroelectric power generated in the state for over fifty-four years, the Court in New England Power Co. v. New Hampshire held that this prohibition offended the DCC.\textsuperscript{135} Little doubt existed that the law served an economic protectionism purpose, and the Court noted that “[o]ur cases consistently have held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.”\textsuperscript{136}

California’s recent effort to reduce greenhouse gases by adopting a Low Carbon Fuel Standard (LCFS) is the latest example of how the DCC constrains state innovation. The state required fuel providers to establish the “carbon intensity” of their fuels based on a life-cycle analysis, and where the fuel was produced affected the carbon intensity level. Corn-based ethanol from the Midwest had a higher “carbon intensity” level, prompting the affected industries to challenge the program as violating the DCC. The district court agreed, holding that the law impermissibly discriminated against the out-of-state fuel providers and also operated extraterritorially.\textsuperscript{137} And the court further applied a strict scrutiny analysis to conclude that other reasonable non-discriminatory means were available.\textsuperscript{138}

IV. Next Generation Analysis?

The DCC provokes diverse views and quite possibly strange bedfellows. The strict textualists on the Court express reservations about imputing a negative element into the affirmative grant. Justice Thomas, for instance, would simply “discard the Court’s negative Commerce Clause jurisprudence.”\textsuperscript{139} Justice Scalia similarly questions the constitutional justification for the DCC, although he would adhere to \textit{stare decisis} only in instances (1) where the state law discriminates on its face against interstate commerce, and (2) when the state law cannot be distinguished from a law previously invalidated by the Court.\textsuperscript{140} The other conservatives are less sanguine in their approach, with the Chief Justice not overtly expressing any reservations; and Justices Alito and Kennedy, although troubled by the Court’s effort in \textit{Carbone} to distinguish between private and public facilities, inclined to unquestioningly follow precedent.\textsuperscript{141}

Former Justice Souter had questioned the Court’s ability to employ the \textit{Pike

\textsuperscript{136} See also Wyoming v. Oklahoma, 502 U.S. 437 (1992) (requiring Oklahoma coal-fired electric utilities to burn at least 10 percent Oklahoma mined coal).
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 349. See also Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n, 545 U.S. 429, 439 (2005) (Thomas, J., concurring) (“[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense and has proved virtually unworkable in application,’ and, consequently, cannot serve as a basis for striking down a state statute.”).
\textsuperscript{141} Id. at 355–56. This trio of Justices emphasized that a state may discriminate in favor of local economic interests when acting as a market participant, but not when acting as a market regulator—even for otherwise legitimate
balancing test, prompting Justice Scalia to agree. But the Court’s decision in Department of Revenue of Kentucky v. Davis signals that a majority of the Court appears reluctant to abandon or modify the DCC.  

Yet, increasing scholarly commentary continues to undermine aspects of the DCC, suggesting that this dynamic doctrine has not yet reached stasis. Beginning in the 1980s, mounting scholarship, including one of my articles, began to question the Court’s neatly organized approach to DCC cases. That criticism continues today, including by two of the contemporary leading scholars on the DCC. Brannon Denning proffers that the Court’s current analysis is unsound and likely to change once again. And Normal Williams nevertheless questions the dominant theories justifying continued allegiance to the restriction against certain state and local programs. The fundamental question he and others ask is what constitutionally grounded theory supports modern DCC doctrine?

Two principal theories generally animate the Court’s support for the DCC. The historic rationale for enforcing the DCC is to protect against having “one state in its dealings with another . . . place itself in a position of economic isolation,” contrary to the underlying theory of the Constitution that “the peoples of the several states must sink or swim together . . .” In H. P. Hood & Sons v. Du Mond, therefore, the Court characterized the DCC doctrine as ensuring that economic interests would “have free access to every market in the Nation . . .” Justices

reasons—when other nondiscriminatory means are available. For a discussion of United Haulers, see Bradford Mank, The Supreme Court’s New Public-Private Distinction under the Dormant Commerce Clause: Avoiding the Traditional versus Nontraditional Classification Trap, 37 HASTINGS CONST. L.Q. 1 (2009).

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

Kalen, supra note __.


Kennedy and Alito recently articulated this understanding when they dissented in *Department of Revenue of Kentucky v. Davis*, observing that free and unobstructed national trade is a primary objective of the Constitution. This, of course, explains why the Constitution includes the Commerce Clause, not necessarily why a corollary negative is necessary. But the Court also proffers that the DCC reflects a political process objective, by protecting unrepresented voices from being disadvantaged through parochial state or local political processes. Chief Justice Stone promoted this justification in his two principal DCC cases. More recently, Chief Justice Roberts acknowledged that the Court examines whether “the burden of state regulation falls on interests outside the state, [and] it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”

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

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151 See *South Carolina State Highway Dept. v. Barnwell*, 303 U.S. 177, 184 n.2 (1938) (“Underlying the general rule . . . [is that such discriminatory legislative action] not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests with the state.”); *South. Pac. Co. v. Arizona*, 325 U.S. 701, 767 n. 2 (1945) (“unlikely to be alleviated by the operation of those political restraints normally exerted when interests in the state are affected.”). See also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940). Justice Stone also authored the now famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), inaugurating the political process justification for judicial scrutiny.


153 Denning, supra note __ at 424 [W&M].

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

155 In examining how this principle plays out by protecting against economic protectionism, Liza Heinzerling concludes that “[t]he Court’s nondiscrimination principle does not promote economic efficiency in individual cases (or if it does, it does so only sporadically and fortuitously), because the Court does not even attempt a serious accounting of the benefits and costs of laws that discriminate against interstate commerce.” Liza Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 220.
therefore, the political process rationale arguably furnishes an easier theory and correlates better with the anti-discrimination emphasis in the cases. 156

In lieu of current rationales for the DCC, scholars continue to proffer alternative theories. Professor Denning posits that the Constitution embodies a “union-protecting theory” as necessary to avoid state “predation.” 157 Norman Williams, conversely, suggests that the historical understanding of the Commerce Clause does not support either existing theory, and he offers instead a theory premised upon “deliberative equality.” 158 He suggests that the DCC should restrain states from acting parochially, “states need not actually accord equal treatment to out-of-state interests, but rather only give equal regard to such out-of-state interests as they give to similarly situated in-state interests.” 159 This emphasis on theory by Denning and Williams unfortunately overshadows how any theory translates into tests capable of being administered by the judiciary. During each of the prior generations of DCC cases, it is the tests that became unwieldy. And it is one again the tests that are cabining innovation and again are unwieldy. And it is these tests that warrant critical examination.

At the very least, the Court’s unnatural extraterritorial appendage to its DCC analysis needs excising. In the 1980’s, the Court ostensibly added this element to its DCC analysis, suggesting that state attempts to reach conduct beyond their borders are per se unconstitutional. In Brown-Forman Distillers Corp. v. New York State Liquor Authority, 160 the Supreme Court held that New York’s price-affirmation statute for the sale of liquor into the state violated the DCC. New York’s law attempted to ensure that the price paid for liquor in that state was no lower than the price paid for consumers in other states, and New York prohibited distillers selling into the New York market from paying promotional allowances to wholesalers—a practiced allowed in other states. The plaintiff conceded that the State had a legitimate interest and that the law operated evenhandedly, but the plaintiff argued the law amounted to an impermissible direct regulation of interstate commerce. 161 The Court framed the question anachronistically, asking whether the state law “regulates commerce in other States,” beginning with an examination of instances where the Court has “examined the extraterritorial effects” of a statute. 162 And when examining the “practical effects” of the New York scheme, the Court concluded that it regulated out-of-state transactions because “[o]nce a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant

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156 See, e.g., Sedler, supra note __, at 998.
157 Denning, supra note __, at 477, 484-5 [W&M].
158 Williams, supra note __, at 414 [ND].
159 Id. at 416. He adds that “it does not disable states from entirely from regulatory commerce—but it does require that state and local policymaking bodies give equal regard to similarly situated out-of-state and in-state interests adversely affected or burdened by such measures. States may not treat the concerns of out-of-state interests worse than those of like in-state interests simply because of their state residence.” Id.
This, the Court held, was a direct regulation of interstate commerce, with the state projecting its legislative reach into other states. Two years later, the Court invalidated on similar grounds Connecticut’s price affirmation statute regulating the sale of beer. In doing so, the Court again examined the practical effect and articulated three elements for the extraterritorial inquiry: First, states are prohibited from applying their laws to activities outside of their borders; second, states are prohibited from “directly control[ling] commerce occurring wholly outside” their borders; and third, a court must examine the practical effect of the state’s program on other state programs.

This type of extraterritorial inquiry effectively mirrors the now defunct DCC analysis the Court abandoned during the New Deal. Edgar v. MITE Corp. was one of the first instances for this type of inquiry to surface in the post New Deal era, although the case was only a plurality opinion, not garnering a majority. The case involved an Illinois Blue Sky law regulating tender offers to corporations with principal executive offices in the state, organized under Illinois law, or “has at least 10% of its stated capital and paid-in surplus in Illinois,” and Justice White’s opinion indicated that the law regulated transactions that took place over the channels of interstate commerce (mails or other means) and that it produced results—transactions—in other states. White suggested that the DCC “permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited.” And White concluded that Illinois’ law directly restrained interstate commerce, with a “sweeping extraterritorial effect,” and therefore was unconstitutional.

Justice White’s approach in Edgar, followed by the Court progenies in Brown-Forman, Healy, and CTS Corp., overlooks how the DCC changed in the post-New Deal era, and White’s Edgar opinion mistakenly relies on Southern Pac. Co. v. Arizona and a pre-New Deal case for

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163 476 U.S. at 582-83.
164 Id. at 583 (quoting Baldwin v. G.A.F. Seelig, 294 U.S. at 521).
165 Healy v. Beer Institute, 491 U.S. 324 (1989). The Connecticut law “require[d] out of state shippers to affirm that their posted prices are no higher than prices in the border States only at the time of the Connecticut posting,” and made it illegal to “sell beer in Connecticut at a price higher than the price at which beer is or would be sold in any bordering State during the month covered by the posting.” Id. at 328-29.
166 491 U.S. at 336-37. The Court added: “The practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulation regime into the jurisdiction of another State.” Id. at 336-37. The Court subsequently described Brown-Forman as simply a modern example of the DCC being applied when commercial activities might be subjected to inconsistent state regulations, as was the case in Southern Pacific Co., 325 U.S. 761. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88 (1987).
167 See supra notes and accompanying text.
169 CTS Corp. v. Dynamics Corp. of America, 481 U.S. at 81 (“As the plurality opinion in MITE did not represent the views of a majority of the Court”).
170 457 U.S. 642.
171 457 U.S. at 640.
172 Id. at 642. See also id. at 643 (“Because the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the State, it must be held invalid”).
173 325 U.S. 761 (1945).
its analysis. Southern Pac. Co. involved the constitutionality of Arizona’s Train Limit Law, which limited the number of passenger and freight cars on trains in the State. Chief Justice Stone applied the *Pike* balancing test and held that the law burdened interstate commerce too much—it created confusion among conflicting state policies and as such required uniform regulation. But Stone unfortunately attempted to synthesize the Court’s DCC cases, without ever suggesting that the Court had shifted its analysis. And at one point, for instance, Stone wrote that “regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within the state authority.” And he cited cases spanning the entire nineteenth and early twentieth century. He also, in concluding that the burden on interstate commerce was too great, added that “[t]he practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long terms,” but in making this observation nothing suggests that Stone intended to create an independent “extraterritorial” element to the DCC.

Justice White’s reliance in *Edgar* on *Shafer v. Farmers’ Grain Co. of Embden* is even more troubling. *Shafer*, a short 1925 opinion by the conservative Justice Van Devanter, pre-dated the Court’s shift in its DCC analysis. The decision invalidated North Dakota’s Grain Grading Act, which imposed licensing and inspection requirements for buyers of grain in the state. The law did not discriminate between in-state and out-of-state grain purchasers, but most of the buyers in the state were shipping their grain to out of state terminals. The act worked in tandem with the United States Grain Standards Act, omitting the requirement for certain inspections and grading when having been performed by a federally licensed inspector. Justice Van Devanter’s opinion reflects the Court’s then concern that state programs directly interfering with the movement of goods in interstate commerce were beyond the state’s power. “The right to buy” and ship goods “in interstate commerce,” he wrote, “is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states. . .” Nothing about this now-abandoned “directly” burdens interstate commerce inquiry supports an independent extraterritoriality test.

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174 Oddly, Justice White separately held that the law failed under the traditional *Pike v. Bruce Church* balancing test, suggesting little need for his foray into antiquated tests. 457 U.S. at 643.
175 325 U.S. at 773-774.
176 Id. at 767. The Chief Justice, therefore, unintentionally intimated that the local/national tests still had some resonance when he opined “[t]here has thus been left to the states wide scope of the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.” Id. at 770.
177 Id. at 767-70.
178 268 U.S. 189 (1925).
179 Id. at 199-200 (a state law is unconstitutional when through its operation it directly interferes with or burdens interstate commerce); see also id. at 201 (“We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause.”).
180 Id. at 199.
Not only is modern precedent for an extraterritorial inquiry non-existent, it inappropriately injects into the DCC analysis a bankrupt jurisprudence. Today, the Court acknowledges that “[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.” The lower court opinions, therefore, often struggle with how to differentiate when a program reaches conduct beyond a state’s borders and when it merely influences conduct in other states. Some courts resort to the now defunct direct/indirect test, under the rubric of examining the extraterritorial question. Others occasionally invoke “extraterritoriality” seemingly as a shorthand description for the other aspects of the DCC. But as an independent

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181 Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935), is an oft-cited case in support of an extraterritorial inquiry. E.g., Brown-Forman Distillers, 476 U.S. at 582; Healy, 491 U.S. at 334-35. In Seelig, Justice Cardozo addressed whether New York could apply its Milk Control Law to “a dealer who has acquired title to the milk as a result of a transaction in interstate commerce.” Id. at 518. Cardozo’s opinion, although arguably somewhat flawed, equated the Control Law to an impost or duty on goods entering the state, and thus a barrier to interstate commerce. And he observed that “[n]ice distinctions have been made . . . between direct and indirect burdens,” but such distinctions serve no purpose here because the law by its terms directly obstructed the flow of commerce into the state. Id. at 522. The state argued that the law was a valid exercise of its police power, a soon-to-be fading argument, and that Cardozo implicitly rejected the old police power versus commerce power distinction, and added “states must sink or swim together.” Id. at 523. He offered considerations influencing the line between permissible and impermissible state regulation, but warned that the line between direct and indirect restraints on commerce is one of “degree.” Id. at 524-25. Arguably the more fascinating aspect of his opinion is the discussion about the “original package doctrine,” where he suggested that the historic doctrine, see Kalen, supra note __ at 464-65, made little sense and ought to be folded into the general DCC analysis. 294 U.S. at 526-28. Presciently, Cardozo indicated that states could impose on packaged goods restrictions on the sale of products from “unsanitary sweatshops.” Id. at 528. See Whitfield v. Ohio, 297 U.S. 431 (1936) (prohibiting the sale of convict-made goods).


183 Compare Freedom Holdings, Inc. v. Cumo, 624 F.3d 38 (2nd Cir. 2010) (finding no price gridlock for tobacco master settlement between companies and the state), with Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 216 n.11, 218 (2nd Cir. 2004) (NY contraband statute, and noting that the extraterritorial analysis requires examining discrimination) (court also just examined whether disparate impact generally, and if none, then law would not present a problem under either the first tier inquiry or the Pike balancing test). In Spitzer, the court intimated the problem with an extraterritorial inquiry, noting that many programs have impacts on out-of-state upstream prices, and it is only when the out-of-state interests want to conduct activities in the state that that the law operates. 357 F.3d at 220-21. See also American Exp. Travel Related Services, Inc. v. Siadom-Eristoff, 2012 WL 19382 (3rd Cir. 2012) (plaintiff argued extraterritoriality and court applied balancing test, because the law did not directly regulate the commercial transactions occurring in other states); International Dairy Foods Ass’n v. Boggs, 622 F.3d 628 (6th Cir. 2010) (rejecting argument that milk labeling law had extraterritorial effect); Quick Payday, Inc. v. Stork, 549 F.3d 1302, 1308 (10th Cir. 2008) (rejecting extraterritorial argument related to Kansas statute that allegedly affected conduct on computers in Missouri); SPGGC, LLC v. Blumenthal, 505 F.3d 183, 192 (2nd Cir. 2007) (consumer protection law upheld, regulating the sale of gift cards in the state); Cloverland-Green Spring Dairies v. PA Milk Market, 462 F.3d 249 (3rd Cir. 2006). The Second Circuit, in American Booksellers Foundation v. Dean, 342 F.3d 96, 102 (2nd Cir. 2003), for instance, collapsed all the tests when examining the burden on interstate commerce. Indeed, invoking Cooley v. Board of Wardens, the court indicated that regulation of conduct occurring over the Internet, which affects activities out of the state, was extraterritorial and demands uniform regulation. 342 F.3d at 104.

184 One court described the inquiry as asking whether the program “involved regulating the prices charged in the home state and those charged in other states in order to benefit the buyers and sellers in the home state, resulting in a direct burden on the buyers and sellers in the other states.” Pharm. Research & Mfrs. of Amer. v. Concannon, 249 F.3d 66, 81 (1st Cir. 2001) (emphasis added).

185 See Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38, 64 n.18 (3rd Cir. 2010); see also Gerling Global Reinsurance Corp. of America v. Low, 240 F.3d 739, 746 (9th Cir. 2001) (“The Commerce Clause seeks to prevent extraterritorial economic ‘effects,’ not purposes.”).
inquiry the analysis is circular. Assume, for example, that state A informs all sellers of widgets into state A’s markets that those sellers must sell their widgets in state A for no more than those widgets are sold in the bordering states. The law, on its face, is non-discriminatory. But widgets are only produced in one of the surrounding states. It therefore undoubtedly influences the conduct of the sellers of widgets in the neighboring state. But does it directly regulate those sellers? It does only if those sellers send their widgets into the state A market, and once they choose to send their product into state A the law is operating within state A not extraterritorially. Those sellers may be forced to alter the price for widgets being sold in other states, but again it is only because they first decided to take advantage of state A’s market. And so it influences and perhaps, in effect, burdens—arguably even impermissibly—interstate commerce, but it is not because the law either can or does regulate extraterritorially.

The notion of an extraterritorial inquiry, moreover, is an abandoned nineteenth century relic. The extraterritorial concept emerged during the second half of the nineteenth century as a reflection of the Court’s embrace of dual federalism and the principle of territorial sovereignty. The Court became overly enamored with a spheres of jurisdiction paradigm. This translated into protecting states’ territorial integrity, as well as in distinguishing between the state police power and a federal commercial power. A critical aspect of this arguably simple yet utterly elusive paradigm is that states undeniably could exercise jurisdiction over persons and property within their geographic borders but not outside. International law and conflict of laws offered support for this principle. And the Court articulated the principle in Pennoyer v. Neff, the classic personal jurisdiction case. Because an exercise of federal power necessarily intruded into a state’s geographic sovereign zone, the Court employed similar non-geographic spheres that attempted to separate state from federal power. The Court accomplished this, in

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186 See Kalen, supra note __, at 452.
187 Justice Story’s treatise on conflict of laws underscores the geographical emphasis of a spheres paradigm:

   every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory, and all persons, who are resident within it, whether natural born subjects, or aliens . . . . [N]o State or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein.


189 See Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1871) (state and federal governments “exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres”).

190 The Court’s post Civil War cases on intergovernmental immunity are apt examples of how the Court conducted this inquiry. See Kalen, supra note __, at 454-55. In almost inimitable prose, the Court observed:

   There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement.

Tarbles’ Case, 80 U.S. (13 Wall.) 397, 406 (1872). George Bancroft also referred to two separate spheres of jurisdiction. GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE UNITED STATES 332 (1882). And Bancroft has been described as the most popular and representative historian of his era. Dorothy Ross, Historical Consciousness in Nineteenth-Century America, 89 AM. HIST. REV. 909,915 (1984). G. Edward White portrays how

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part, by examining whether a state law operated directly on persons or conduct beyond its borders, and if so suggested that the matter fell within the federal commercial sphere. This style of reasoning and mode of analysis is what the Court ultimately rejected during the first half of the twentieth century. The Court, therefore, should clarify that it never intended to resurrect this late nineteenth century paradigm, and abandon all pretense that courts can examine whether a law reaches conduct extraterritorially, particularly as a separate DCC inquiry.

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

The discriminatory effects analysis triggers a slightly different concern. Professor Denning correctly observes, “Constitutional law relies on effects tests in part to smoke out illegitimate or unconstitutional purposes that may have contributed to the passage of the law.” The pernicious effects of insidious or disguised discrimination can be destructive to our society when individual liberties and freedoms are threatened. While the Court during the Lochner era ascribed an individual constitutional right to engage in interstate commerce, no such individual right persists today. The need, therefore, to tease out of otherwise non-discriminatory programs hidden discrimination against interstate commerce is somewhat illusory. It perpetuates

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191 See Kalen, supra note __, at 458-84. In Henderson v. Mayor of New York, 92 U.S. 259 (1876), for example, the Court invalidated a law that forced carriers to collect fees from passengers before those passengers entered the state.  
192 See supra notes ___ and accompanying text.  
193 Courts, for instance, are not particularly well suited to assess “complex factual inquiries about such issues as elasticity of demand for the product and alternative sources of supply.” Commonwealth Edison Co. v. Montana, 345 U.S. 609, 619 n.8 (1981).  
194 Denning, supra note __, at 493 [W&M].  
195 Id. at 502.  
196 See Kalen, supra note __, at __.
the era when the Court actively scrutinized state programs masquerading as police power measures but arguably extending into a protected commercial power sphere.197

Finally, although facial or purposeful discrimination should continue to be considered in any DCC analysis, it might worth exploring whether the Court needs to apply the stricter standard of scrutiny. Strict scrutiny makes sense when individual rights and liberties are threatened, and it ensures against unnecessary over-reaching. The DCC is different, particularly because Congress may permit what the DCC otherwise prohibits. It is the concept of an “unbalkanized” country that is being protected under the DCC. And a lesser standard of scrutiny might permit experimentation that discriminates for reasons other than merely bald economic protectionism.198 For instance, in New Energy Co. of Ind. v. Limbach,199 the Court invalidated Ohio’s attempt to promote local corn-based ethanol production in the state, by offering a tax credit for in-state producers. The law undoubtedly discriminated against out-of-state ethanol producers. And under the Court’s almost per se invalidity test, violated the DCC. But it’s not altogether clear why a state may not decide how best to shape its own land uses, based on infrastructure, economics, topography, geography, culture, demographics and climate, and why each state shouldn’t be able to make that decision for itself. If, therefore, one state provides a tax subsidy for an industry it wants to promote in the state, and the DCC forces that state to apply the tax subsidy to out-of-state entities, that effectively promotes an industry and accompanying land use in another state whose infrastructure, economics, topography, geography, culture, demographics and climate could be entirely different.200 And it affects that other state’s ability to shape it’s future. To the extent that states become concerned over balkanization, congressional action remains available.

Conclusion

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

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

Morgan’s Steamship Co. v. Louisiana Board of Health, 118 U.S. 455, 462 (1886). In Minnesota v. Barber, 136 U.S. 313 (1890), for instance, the Court invalidated an animal inspection statute that arguably prevented the Chicago slaughterhouses from selling beef into the Minnesota market. See also Collins v. New Hampshire, 171 U.S. 30 (1898) (invalidating oleomargarine inspection statute); Chy Lung v. Freeman, 92 U.S. 275 (1876) (invalidating California statute requiring bond for certain passengers entering state); Henderson v. Mayor of New York, 92 U.S. 259 (1875) (invalidating bond requirement for passengers entering state).

198 Discrimination, after all, is when government fails “to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” CSX Transportation, Inc. v. Alabama Dept. of Revenue, 131 S. Ct. 1101, 1108 (2011) (citing Black’s Law Dictionary and Webster’s Third New International Dictionary). What is a “reasonable distinction” is normative, particularly in the DCC context, because often favoring in-state entities is reasonable, it’s just that the DCC ex ante assumes that it is unreasonable and requires not just a legitimate justification but also no other plausible alternative means.


200 Because often this is the purpose of tax subsidies, drawing the line between permissible and impermissible programs is problematic. Professors Hellerstein and Coenen comprehensively analyzed this issue, and explain how the line differentiating the two is “ill-defined” and could that “discriminatory subsidies, unlike discriminatory tax breaks, are almost always constitutional.” Walter Hellerstein & Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 CORNELL L. REV. 789, 792 (1996).
As state and local communities explore innovative solutions for addressing many of society’s modern challenges, it is reasonably likely that the DCC will function either as a potential obstacle or a chilling effect on laudable efforts. The DCC historically “has been one of very considerable judicial oscillation,”201 and yet the fundamental structure for DCC analysis has not changed for quite some time. True, our society and the issues we face today are quite different than what our predecessors confronted when the DCC analysis became crystalized. But so far neither time nor the changing society has prompted the necessary critical re-evaluation of the tests under the DCC. It is apparent that the time has come: The changing world economic paradigm, coupled with emerging local efforts to assert greater control over local communities and environmental issues, will test the contours and potentially the efficacy of the current DCC analysis. And when that happens, the Court should permit experimental programs except in the extreme cases where the sole purpose is economic protectionism.

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