WHY CONGRESS MAY NOT "OVERRULE" THE DORMANT COMMERCE CLAUSE

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For over a century, the Supreme Court has acknowledged and upheld Congress's power to overrule the Court's Dormant Commerce Clause decisions. In this Article, Professor Williams challenges the constitutionality of that practice, arguing that there is no more reason to allow Congress to overrule the Court's Dormant Commerce Clause decisions than its Equal Protection or First Amendment decisions. The Dormant Commerce Clause is not based on a statutory presumption of Congress's regulatory intent to leave certain fields free of state regulation, nor is it a limitation that exists merely for Congress's benefit, which therefore may be waived by Congress. Rather, the Dormant Commerce Clause is a constitutional limitation on state power that protects the ability of individuals to engage in commerce free of unduly burdensome or protectionist state regulation. At the same time, although Congress may not license state action that would otherwise violate the Dormant Commerce Clause, it still may cooperate with the states in ways such as incorporating otherwise valid state laws into federal regulatory programs.

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INTRODUCTION

One of the few undeniable constitutional truths is that neither the federal government nor the states may violate the Constitution. Indeed, since *Marbury v. Madison*,[1] no one has contested the principle that the Constitution is the ultimate law, limiting both state and federal power.[2] From this unremarkable principle springs a corollary: Congress may not authorize the states to violate the Constitution.[3] Even where the Constitution authorizes Congress to legislate with regard to constitutional norms, such as Section 5 of the Fourteenth Amendment, the Court has expressly held that Congress's legislative power is a one-way ratchet, allowing it to expand constitutional liberties but not to contract those liberties by restoring state authority to act in otherwise unconstitutional ways.[4] Thus, for example, Congress may not authorize the states to create racially segregated schools.[5]

1. 5 U.S. (1 Cranch) 137 (1803).

2. PAUL W. KAHN, THE REIGN OF LAW: *MARBURY* V. *MADISON* AND THE CONSTRUCTION OF AMERICA 4, 19–21 (1997). That is not to say that everyone agrees that the *judiciary*'s interpretation of the Constitution is supreme. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (rejecting judicial supremacy); Norman R. Williams, *The People's Constitution*, 57 STAN. L. REV. 257, 285–89 (2004) (reviewing KRAMER, *supra*, and arguing for a nonsupreme, but privileged interpretive position for the judiciary).

3. Saenz v. Roe, 526 U.S. 489, 507 (1999); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732–33 (1982); Townsend v. Swank, 404 U.S. 282, 291 (1971); Shapiro v. Thompson, 394 U.S. 618, 641 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

4. *Hogan*, 458 U.S. at 732–33; *Morgan*, 384 U.S. at 651 n.10.

5. *Shapiro*, 394 U.S. at 641 (rejecting the suggestion that Congress could authorize states to construct racially segregated schools as violative of the Equal Protection Clause).

There is, however, a glaring exception to this rule: the "Dormant" Commerce Clause, which is a judicially fashioned restriction on state authority drawn from the Commerce Clause.[6] As defined by the modern Court, the Dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[7] Despite the constitutional foundation for this restriction on state authority, the Court repeatedly has declared that Congress may authorize the states to engage in conduct that would otherwise violate the Dormant Commerce Clause.[8] Indeed, the Court recently reaffirmed that Congress "certainly has the power to authorize state regulations that burden or discriminate against interstate commerce."[9]

Not surprisingly, given this open-ended invitation, Congress has done precisely that. Congress has authorized states to regulate and even ban the importation of alcoholic beverages manufactured in other states or nations;[10] to regulate insurance companies in ways that favor in-state insurers;[11] and to limit out-of-state bank holding companies from acquiring in-state banks.[12] These are only a few examples.[13]

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6. U.S. CONST. art. I, § 8, cl. 3 (empowering Congress to regulate "[c]ommerce with foreign Nations, and among the several States").

7. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994) (citing Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) and Welton v. Missouri, 91 U.S. 275 (1875)).

8. *E.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 572 & n.8 (1997); Maine v. Taylor, 477 U.S. 131, 138 (1986); S-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87–88 (1984); Sporhase v. Nebraska, 458 U.S. 941, 960 (1982); New England Power Co. v. New Hampshire, 455 U.S. 331, 339–40 (1982); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 542–43 (1949); S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945); Hooven & Allison Co. v. Evatt, 324 U.S. 652, 679 (1945), *overruled by* Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984).

9. Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003). In the Supreme Court's most recent Dormant Commerce Clause case, *Granholm v. Heald*, 125 S. Ct. 1885 (2005), all nine Justices agreed in principle that Congress could overrule the Dormant Commerce Clause; they simply disagreed whether the particular federal statute was intended to salvage the challenged state wine shipment laws, which discriminated against out-of-state wineries. *Compare id.* at 1900–01 (construing the Webb-Kenyon Act to empower states to regulate importation of liquor so long as states act in a nondiscriminatory fashion), *with id.* at 1910–13 (Thomas, J., dissenting) (construing the Webb-Kenyon Act to empower states to regulate importation of liquor even in a discriminatory fashion). *See also id.* at 1907 (Stevens, J., dissenting) (expressly noting Congress's power to overrule the Dormant Commerce Clause).

10. Wilson Act, 27 U.S.C. § 121 (2000).

11. McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2000).

12. Bank Holding Company Act of 1956, ch. 240, § 3(d), 70 Stat. 133, 135, *repealed by* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328 § 101(a), 108 Stat. 2338; *see also* Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 174–75 (1985) (upholding a discriminatory state banking regulation under the Banking Holding Company Act).

13. *See* White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 213 (1983) (upholding a discriminatory city ordinance requiring contractors to employ city residents on federally

Nor is there any sign that, with the increasing integration of the national economy in the late twentieth and early twenty-first century, Congress's willingness to authorize and nourish state protectionism is abating. Just last year, a congressional committee approved a bill authorizing states to ban the importation of solid waste from other states or nations.[14] The manifest purpose of the bill was to overrule the Supreme Court's 1994 Dormant Commerce Clause decision in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,[15] in which the Court held that states may not ban or disfavor municipal waste generated outside the state.[16] Although the bill failed to become law before Congress adjourned in late 2004, similar bills were introduced when the 109th Congress convened in January 2005.[17] Moreover, its sponsors are confident that the new Congress will enact the legislation[18]—and, if history is any guide, Congress will. In 1994, the House of Representatives overwhelmingly passed a virtually identical bill that authorized the states to refuse shipments of out-of-state municipal waste.[19]

The Court's willingness to allow Congress to overrule the Dormant Commerce Clause's limitation on state authority is fundamentally inconsistent with the Court's declared view that Congress may not authorize the states to violate the Constitution. That is bad enough, but, even worse, the Court has failed to provide a cogent explanation for this anomalous exception.[20]

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funded construction projects because the restriction was authorized by federal regulations); Int'l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945) (upholding a state unemployment insurance tax on interstate commerce because Congress authorized the tax as part of the Social Security Act); Standard Dredging Corp. v. Murphy, 319 U.S. 306, 308 (1943) (same); Perkins v. Pennsylvania, 314 U.S. 586, 586 (1942) (per curiam) (same). *Cf.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 155–156 (1982) (upholding a tribal severance tax because Congress authorized such taxes on approval by the Secretary of Interior).

14. H.R. 4940, 108th Cong. § 2 (2004). The House Committee on Energy and Commerce Subcommittee on Environment and Hazardous Materials approved the bill by a vote of twelve to four.

15. 511 U.S. 93 (1994).

16. *Id.* at 107 (invalidating a discriminatory state tax on municipal waste generated out of state); *see also* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 361 (1992) (invalidating a state law authorizing counties to ban importation of solid waste generated outside the county for deposit in county landfills); Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 348–49 (1992) (invalidating a discriminatory state tax on hazardous waste generated out of state).

17. H.R. 70, 109th Cong. § 2 (2005); H.R. 274, 109th Cong. § 2 (2005).

18. *See* 73 U.S.L.W. 2198 (2004) (quoting Rep. Paul Gillmor's statement that the bill "lays the foundation for future action" in the next Congress).

19. H.R. 4779, 103d Cong. (1994); *see also* 103 CONG. REC. 26,288 (1994) (approving the bill by a vote of 368 to 55).

20. *See* Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547, 554 (1947) (noting that "no satisfactory exposition of the underlying theory has ever come from the Court").

Initially, the Court defended this unprecedented power to overrule a constitutional limitation on the ground that the Dormant Commerce Clause was just a statutory inference drawn from Congress's regulatory silence. According to this theory, Congress's failure to regulate a particular matter demonstrates its intent to preclude state regulation too, which can be negated by Congress breaking its silence and authorizing state regulation.[21] Of course, the notion that Congress's silence indicates an actual intent to preempt state authority is fanciful, and, even were there is some semblance of truth to that supposition, it is utterly inconsistent with the Supremacy Clause—which presumes the existence of state authority in the absence of congressional action.

Perhaps because of these weaknesses, the Court eventually crafted a different explanation for Congress's power to overrule the Dormant Commerce Clause. This time, the Court reasoned, such power was constitutionally acceptable because the Dormant Commerce Clause does not restrict the "coordinated action" of the federal government and the states in regulating interstate commerce.[22] Though an improvement over the first explanation, this theory too has fundamental flaws. As a theoretical matter, the Court failed to provide any explanation why the presence of "coordinated action" by Congress and the states is of constitutional (as opposed to rhetorical) significance. Such "coordination" would not allow Congress to overrule the Equal Protection Clause's restrictions on state authority, and one therefore would think that the same result should apply with respect to the Dormant Commerce Clause's limitations on state power. Furthermore, as a practical matter, such a view invites the same centrifugal dangers that adoption of the Constitution in general and the Commerce Clause in particular was meant to forestall. Worse, it does so in a way that undermines the ability of the electorate to determine which governmental entity—Congress or the state—is responsible for policies adopted pursuant to such congressional authorization, thereby weakening the democratic accountability on which our system of government constitutionally depends. Indeed, this last feature, which has been overlooked by the Court and

21. *In re* Rahrer, 140 U.S. 545, 555 (1891) ("[T]he failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States."); Leisy v. Hardin, 135 U.S. 100, 109–10 (1890) (observing that "so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammelled"), *superseded by statute*, Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2000)).

22. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946); *see also* BORIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 9.04, at 9-15 to 9-16 (1999) (endorsing the Court's "coordinated action" approach).

commentators alike, is of particular concern because the blurring of democratic accountability erodes the political safeguard on which all defenders of this power rely—namely, that Congress can be trusted to police the states' use of their approved power.

Although the Court's proffered justifications for this extraordinary power fail to pass muster, several commentators have defended Congress's right to overrule the Court's Dormant Commerce Clause decisions on yet a different ground. These commentators characterize the Dormant Commerce Clause's limitation on state authority as "weak" or only provisional, not strong or absolute like the First Amendment or the Equal Protection Clause. Thus, William Cohen has theorized that all federalism-based limitations on state authority—not just the Dormant Commerce Clause—are subject to congressional waiver.[23] More modestly, Mark Tushnet has argued that Congress's commerce power is only "weakly exclusive," thereby permitting Congress to determine legislatively what commercial matters states have the power to regulate.[24] Likewise, Laurence Tribe has contended that the Dormant Commerce Clause applies to state actions that are only "presumptively incompatible with the constitutional plan" and that Congress's commerce power includes the authority to validate such actions because Congress's action "tames" or "domesticates" the otherwise unconstitutional state law.[25]

Depicting the Dormant Commerce Clause as only a weak or presumptive limit on state authority cannot be squared, however, with the constitutional text or structure. Either the Dormant Commerce Clause is a constitutional limit on the states or it is not; there is no middle ground available for treating it as a constitutional limitation on state power, but one that is abrogable or waivable by Congress. Indeed, the Dormant Commerce Clause is no different in this respect from the Contract Clause or the Privileges and Immunities Clause of Article IV, neither of which Congress may abrogate or waive.[26]

As a final possibility, one might defend Congress's power to overrule the Dormant Commerce Clause on the ground that Congress may delegate

23. William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983).

24. Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1724 (1991).

25. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, at 1039 (3d ed. 2000); *see also* Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 221 (1957) (characterizing dormant commerce clause jurisprudence as merely a "tentative" allocation of authority "subject to reallocation by Congress").

26. Saenz v. Roe, 526 U.S. 489 (1999); White v. Hart, 80 U.S. (13 Wall.) 646 (1872).

to the states its commerce power, which is not subject to the Dormant Commerce Clause. As I explain, however, the Court has refused to go down that analytical path,[27] and the Constitution itself precludes Congress from delegating its legislative authority to state officials.

In short, the Dormant Commerce Clause may not be overridden by Congress. Though that is a fairly straightforward proposition, defending it requires both time and effort given the breadth and depth of support for the contrary view. Part I outlines the theoretical debate surrounding the Dormant Commerce Clause, demonstrating why doubts about its validity do not justify carving an exception to *Marbury* and allowing Congress to restore state authority that it believes the Court to have divested erroneously. Part II examines the first justification that the Court offered for such power—that Congress is merely restoring legislative authority divested by its own legislative silence—and shows that this silence-equals-preemption theory is inconsistent with the Supremacy Clause and our federal system of government. Part III critiques the modern justification offered by the Court—that the Dormant Commerce Clause permits congressional consent to state laws because the Commerce Clause itself allows Congress to regulate commerce by acting in concert with the states—and demonstrates that this conception of Congress's commerce power is premised on a flawed understanding. Part IV assesses the claim that the Dormant Commerce Clause may be overruled because it is merely a "weak" constitutional constraint. It shows that there is nothing in either the Constitution generally or the Dormant Commerce Clause in particular that would justify treating it differently from, and weaker in force than, other constitutional limitations on the states, which Congress cannot waive. Part V turns to the claim that Congress may delegate its own power over commerce to the states and shows that the nondelegation doctrine forbids such a transfer of legislative power. Finally, Part VI addresses several objections to my proposed interpretation of the Dormant Commerce Clause and demonstrates that, although Congress may not regulate interstate commerce indirectly by empowering the states to regulate it, Congress may continue to incorporate state law into federal statutory requirements. This part then applies my analytical approach to the solid waste management statute currently under Congressional consideration, demonstrating that the proposed statute, as currently written, is unconstitutional.

As this last point should denote, there is much that Congress and the states can accomplish through a cooperative effort to address pressing economic

27. *See, e.g.*, *Benjamin*, 328 U.S. at 438 & n.51; *In re* Rahrer, 140 U.S. 545, 560 (1891).

and social problems. What Congress may not do, however, is validate state laws that otherwise would run afoul of the Dormant Commerce Clause or other constitutional limitations on state authority.

I. THE DORMANT COMMERCE CLAUSE, *MARBURY*, AND THE CORRECTION OF JUDICIAL ERROR

The Dormant Commerce Clause is a controversial restriction on state authority. Its critics, including several current Justices of the Supreme Court, question both its legitimacy and its doctrinal scope. Part I.A briefly summarizes the critics' claims. Part I.B then addresses whether Congress, to the extent that it shares these criticisms, is justified in overruling the Court's Dormant Commerce Clause decisions. As this subpart shows, the Court's conception of its interpretive status denies Congress the power to restore state authority that, in Congress's view, the Court has deprived erroneously.

A. The Dormant Commerce Clause: A Brief Introduction to a Constitutional Firestorm

On its face, the Commerce Clause is nothing more than an affirmative grant of power to Congress to enact legislation regarding interstate and foreign commerce. Nevertheless, the Supreme Court has long acknowledged the existence of a "dormant" or "negative" aspect to the Commerce Clause that limits the power of the states to regulate interstate commercial activities.[28] As understood by the modern Court, the Dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[29] This brief formulation synthesizes two separate analytical frameworks for evaluating the constitutionality of state regulations of commercial activity. State actions that "discriminate against" interstate commerce, such as restrictions on the importation of goods from other states or the exportation of in-state goods,[30]

28. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (upholding a local ordinance but suggesting that the Commerce Clause forbids states from regulating those commercial matters that "are in their nature national, or admit only of one uniform system"), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995); The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (invalidating state passenger statutes as violative of the Commerce Clause); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (suggesting that a New York steamboat monopoly violated the Commerce Clause).

29. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994) (citing Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) and Welton v. Missouri, 91 U.S. 275 (1875)).

30. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 336–37 (1979) (holding that a statute barring exportation of minnows caught in-state is discriminatory); City of Philadelphia v. New

are subject to rigorous scrutiny that amounts to a rule of virtual per se invalidity. The state must demonstrate that its discriminatory regulation serves a legitimate, nonprotectionist purpose and that there are no equally effective, nondiscriminatory alternatives available to serve such a goal.[31] In contrast, state regulations of commercial activities that do not discriminate against interstate commerce are subject to the more lenient balancing test announced in *Pike v. Bruce Church, Inc.*,[32] which requires only that the state regulation serve a "legitimate local public interest" and that the burden imposed on interstate commerce not be "clearly excessive in relation to the putative local benefits."[33]

Though the Dormant Commerce Clause has a long pedigree, the Court has not always been consistent in explaining the theoretical foundation for the doctrine. The early decisions rested on the notion that Congress's commerce power was necessarily exclusive, thereby divesting the states of the power to regulate interstate commerce but allowing them to regulate domestic matters as part of their retained police powers.[34] Later in the nineteenth century, following the ascendancy of laissez faire capitalism, the Court grounded the Dormant Commerce Clause on the notion that Congress's failure to regulate a particular matter indicated Congress's desire to preempt state regulation and leave that matter to the unrestricted influence of the market.[35]

Though the Court never expressly eschewed these early justifications for the doctrine, in the mid-twentieth century it began to speak more earnestly about the danger of state economic protectionism and expressly linked the Dormant Commerce Clause to this danger.[36] In one of the most cited

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Jersey, 437 U.S. 617, 628 (1978) (holding that a statute barring importation of solid or liquid waste generated outside of the state is discriminatory). Discrimination against interstate commerce need not be this blatant, and the Court often struggles to determine whether a particular state statute or regulation in fact discriminates against interstate commerce. *See, e.g.*, Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669–70 (2003) (holding that a requirement that companies refusing to enter into a rebate agreement with the state must pre-clear their drugs for use in a Medicaid program does not discriminate against interstate commerce).

31. Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 359 (1992); *Hughes*, 441 U.S. at 337. In only one case, *Maine v. Taylor*, 477 U.S. 131 (1986), has the Court concluded that a state has made the requisite showing.

32. 397 U.S. 137 (1970).

33. *Id.* at 142.

34. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318–19 (1851), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824).

35. Welton v. Missouri, 91 U.S. 275, 282 (1876) (noting that Congress's "inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State [sic] commerce shall be free and untrammelled").

36. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949).

defenses of the Dormant Commerce Clause, Justice Jackson pointed explicitly to the protectionist legislation of the post–Revolutionary Confederation period as the motivation for the adoption of the Commerce Clause:

> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. [E]ach State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. This came to threaten at once the peace and safety of the Union.[37]

It was as a result of this internecine economic warfare, Jackson continued, that the Framers empowered Congress to regulate interstate and foreign commerce.[38] Indeed, with just a bit of hyperbole, Justice Jackson declared of the commerce power that "[n]o other federal power was so universally assumed to be necessary, no other state power was so readily relinquished."[39]

In addition to these theoretically robust justifications for the Dormant Commerce Clause, there have been more pragmatic defenses offered on its behalf. In the 1950s, Ernest Brown of the Harvard Law School argued that, although Congress could preempt nefarious state or local commercial regulations, the Dormant Commerce Clause spared Congress the need to police each and every state and local commercial regulation.[40] Brown doubted that Congress was even capable of protecting interstate commerce through ordinary legislation and that, therefore, there was a need for a judicially enforceable Dormant Commerce Clause:

> [T]he very mechanisms of our government, or perhaps the lack of them, would have multiplied frictions and strains which we have been spared. These mechanisms do not give to Congress any regularized opportunity or duty of reviewing, to test for compatibility with the federal system, state statutes even in their skeletal form as enacted,

37. *Id.* (ellipsis and internal quotation marks omitted) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 259, 260 (5th ed. 1905)).

38. *H.P. Hood*, 336 U.S. at 533–34; *see also* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994) ("The Framers granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979)); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 493 (1941) (defending the Dormant Commerce Clause as consistent with the Framers' intent).

39. *H.P. Hood*, 336 U.S. at 534; *see also* Abel, *supra* note 38, at 443–45 (noting the lack of opposition to the vesting of commerce power in Congress).

40. Brown, *supra* note 25, at 222.

> much less as fleshed by application, interpretation and administration. Nor has Congress been so idle that such matters could be assured a place on its agenda without competition from other business which might often be deemed more pressing; in Justice Jackson's phrase, the inertia of government would be heavily on the side of the centrifugal forces of localism.[41]

Other, more materialistic proponents of the Dormant Commerce Clause have praised the doctrine as helping to promote the economic development of the United States by effectively creating a free trade zone within the country.[42]

To be sure, these proffered justifications have not persuaded everyone. Justices Scalia and Thomas have been among the most strident critics of the Dormant Commerce Clause, questioning its very legitimacy. Both Justices have rejected the Court's proffered exclusivity theory, contending that the text of Article I does not suggest the commerce power to be exclusive and that, even if it were possible to read the text in such a fashion, an exclusive commerce power cannot be reconciled with the expansion of Congress's commerce power during the New Deal.[43] As Justice Scalia has written:

> The exclusivity rationale is infinitely less attractive today than it was in 1847. Now that we know interstate commerce embraces such activities as growing wheat for home consumption and local loan sharking, it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded.[44]

Likewise, both Justices have lampooned the notion that the Dormant Commerce Clause rests on a preemptive inference from Congress's legislative silence.[45] As Justice Scalia has brusquely noted, "Congress's silence is

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41. *Id.* (citation omitted).

42. *See* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 64 (1988); *see also H.P. Hood*, 336 U.S. at 539; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

43. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 612–14 (1997) (Thomas, J., dissenting); Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 260–62 (1987) (Scalia, J., concurring in part and dissenting in part); *see also* Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895, 896 (1990); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 428 (1982); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 223.

44. *Tyler Pipe*, 483 U.S. at 261 (Scalia, J., concurring in part and dissenting in part) (citations omitted); *see also Camps Newfound/Owatonna*, 520 U.S. at 614 (Thomas, J., dissenting) ("[A]s this Court's definition of the scope of congressional authority under the positive Commerce Clause has expanded, the exclusivity rationale has moved from untenable to absurd.").

45. *Camps Newfound/Owatonna*, 520 U.S. at 614–17 (Thomas, J., dissenting); *Tyler Pipe*, 483 U.S. at 262 (Scalia, J., concurring in part and dissenting in part) ("There is no conceivable reason why congressional inaction under the Commerce Clause should be deemed to have the same pre-emptive effect elsewhere accorded only to congressional action.").

just that—silence."[46] To be sure, Justices Scalia and Thomas believe that the Constitution protects against state economic protectionism, but they locate that constitutional limitation on state authority in other provisions, such as Article IV's Privileges and Immunities Clause or Article I's Import-Export Clause, rather than the Commerce Clause.[47]

In addition to this foundational criticism of the Dormant Commerce Clause, there are those who believe that the Court has misinterpreted the scope of the Dormant Commerce Clause, inserting the judiciary into policy disputes better left to the legislative process. The Court's continued use of the *Pike* balancing test has drawn particular fire, with Justice Scalia leading the charge in favor of jettisoning the test.[48]

Whatever their merit, these criticisms have left little mark on the Court's jurisprudence. Apart from Justices Scalia and Thomas, the other Justices continue to view the Commerce Clause as imposing a judicially enforceable constitutional limitation on state authority.[49] Nevertheless, for present purposes, the Court's reaction (or lack of it) to these criticisms is somewhat beside the point. These criticisms have found a receptive audience, at least in part, in Congress. Indeed, at various times throughout our history, Congress has overruled particular Supreme Court Dormant Commerce Clause decisions and restored state authority.[50] The critical question is thus whether Congress, believing that the Court has gone awry

46. *Tyler Pipe*, 483 U.S. at 262 (Scalia, J., concurring in part and dissenting in part) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987)).

47. *See, e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting) (advocating the use of the Import-Export Clause of Article I, Section 10 to check discriminatory state taxation); *Tyler Pipe*, 483 U.S. at 265 (Scalia, J., concurring in part and dissenting in part) (advocating the use of the Privileges and Immunities Clause of Article IV to guard against "rank discrimination"); *see also* Eule, *supra* note 43, at 446–55 (advocating the use of the Privileges and Immunities Clause of Article IV). Indeed, Justice Thomas supports reinterpreting the proffered substitute provisions in a more expansive fashion so as to replicate much of the current scope of the Dormant Commerce Clause. *See, e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 610, 621–37 (Thomas, J., dissenting) (advocating an expansive reinterpretation of the Import-Export Clause of Article I, Section 10 to apply to interstate, not just foreign, imposts and duties); *see also* Eule, *supra* note 43, at 449–54 (advocating an expansive reinterpretation of the Privileges and Immunities Clause of Article IV to protect corporations, not just individuals, from interstate discrimination). As Brannon Denning has pointed out, however, the replication is not complete. *See* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003).

48. *See* Bendix Autolite Corp. v. Midwesco Enterps., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring); *see also Camps Newfound/Owatonna*, 520 U.S. at 619 (Thomas, J., dissenting); Eule, *supra* note 43, at 427–28; Heinzerling, *supra* note 43, at 250–51.

49. *See, e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 581–83 (invalidating as violative of the Dormant Commerce Clause a discriminatory state property tax provision, despite Justice Thomas's call for abandonment of the doctrine).

50. *See supra* text accompanying notes 10–13.

in enforcing the Dormant Commerce Clause, possesses the constitutional power to restore state authority that it believes has been deprived erroneously by the Court.

B. Congress and Judicial Error

The idea that Congress may overrule the Supreme Court's, or any federal court's, interpretation of the Constitution is sure to strike many as farfetched. After all, didn't *Marbury v. Madison* establish that the Supreme Court has the final say on the meaning of the Constitution? Surprisingly, the answer to that question is more complicated than one might initially suspect. *Marbury* established that the federal judiciary has the power, not only to declare what the Constitution means,[51] but also to set aside federal legislation inconsistent with the judiciary's interpretation of the Constitution.[52] *Marbury*, however, dealt with a federal statute that expanded *federal* power beyond that allowed by the Constitution.[53] As a consequence, *Marbury* did not, strictly speaking, establish that the Constitution forbids Congress from overruling a constitutional limitation on *state* authority.

It was not until the twentieth century that the Court clarified exactly what *Marbury* had established with regard to Congress's authority to recalibrate constitutional limitations on state power. The Court's answer came in a series of analytical steps over a period of four decades. The Court first established that *state* officials were bound by the Supreme Court's interpretation of the Constitution. That announcement came in 1958 in *Cooper v. Aaron*,[54] in which the Court rebuffed an attempt by Arkansas Governor Orval Faubus to ignore the Supreme Court's decree in *Brown v. Board of Education*[55] to desegregate the public schools in Little Rock, Arkansas.[56] The Court bluntly declared that *Marbury* established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[57] "It follows," the Court continued, "that the interpretation

51. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

52. *Id.* at 178–80.

53. *Id.* at 174–76 (invalidating section 13 of the Judiciary Act of 1789 because it conferred original jurisdiction on the Supreme Court beyond that allowed by Article III).

54. 358 U.S. 1 (1958).

55. 347 U.S. 483 (1954).

56. *Cooper*, 358 U.S. at 17.

57. *Id.* at 18.

of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"[58]

Cooper assuredly was on safe ground in asserting that state officials were bound by the Supreme Court's interpretation of the Constitution—the violent Southern resistance to school desegregation necessitated a stern rebuke[59]—but the correctness of the result in the *Cooper* case could not conceal the weakness in the Court's logic. The Court's analysis rested on the simple premise that *Marbury* had established that the judiciary's interpretation of the Constitution was the supreme law of the land. If that were true, the Court would be right that the Supremacy and Oath Clauses made the Court's interpretation binding on state officials. As others have noted, however, the problem was that *Marbury* had not actually said that the *judiciary's interpretation* of the Constitution was "supreme," only that the Constitution itself was supreme.[60] Not only did Chief Justice Marshall's opinion make that point abundantly clear, the aftermath of the *Marbury* decision reaffirmed the circumscribed nature of the Court's holding: Neither the Jefferson Administration nor commentators at the time understood *Marbury* to obligate them to accede to the judiciary's interpretation of the law.[61]

Nevertheless, even if *Marbury* did not provide the predicate for the Court's assertion of interpretive supremacy over state officials, there were other reasons for believing that to be the case. The uniformity of federal law, and perhaps even the Union itself, would be imperiled if officials in each state could decide for themselves what the Constitution means. Indeed, the *Cooper* Court's subsequent ruminations about the threat to the Union if Governor Faubus were allowed to disregard *Brown* suggests that it was this more structural concern, rather than *Marbury* itself, that led the Court to its conclusion.

Cooper's misreading of *Marbury* may not have affected the soundness of the result in that case, but it had profound implications for the interpretive

58. *Id.*

59. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 8 (1999); Williams, *supra* note 2, at 270.

60. *See, e.g.*, KRAMER, *supra* note 2, at 221; WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 59 (Peter Hoffer & N.E.H. Hall eds., 2000); Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 81 (1995); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 306–07 (1994); L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 674–75 (2003) (book review).

61. Williams, *supra* note 2, at 274–75.

position of Congress and the President. Although *Cooper* held only that state officials were bound by the judiciary's decisions, its statement that *Marbury* made the judiciary's interpretation the supreme law of the land would apply equally to federal officials as well. Indeed, the oath to support the Constitution specified by Article VI—in which the *Cooper* Court located the obligation of state officials to obey the Supreme Court's interpretation of federal law—also is required of Congressmen and all federal executive officials.[62] Thus, were the Court right about *Marbury*'s embrace of judicial supremacy, many accepted federal legislative and executive practices would be called into question,[63] such as presidential vetoes on constitutional grounds of legislation whose constitutionality has been upheld by the Court.[64]

Perhaps sensing the danger of its approach, the Court almost immediately retreated from its assertion of interpretative supremacy and acknowledged a limited power held by Congress and the President to disagree with the Supreme Court's interpretation of the Constitution. In *Katzenbach v. Morgan*,[65] the Supreme Court upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965, which prohibited states from enforcing literacy tests against certain individuals educated in Puerto Rico.[66] The Court previously had upheld the constitutionality of literacy tests,[67] so the pertinent question was whether Congress had the power to expand the constitutional liberty of individuals beyond that recognized by the Court. Focusing

62. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). The Presidential oath is similar:

> Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will . . . to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Id. art. II, § 1, cl. 8.

63. *See* Paulsen, *supra* note 60, at 285 (noting that if *Cooper*'s understanding of the Supreme Court's interpretive position were correct, "the President must follow judicial precedents as binding law even with respect to exercise of the pardon and veto powers").

64. A prominent example is President Andrew Jackson's veto of the bill reauthorizing the Bank of the United States, which he did partly on constitutional grounds. Although the Court previously had upheld the bank's constitutionality, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819), President Jackson asserted the power to exercise his own independent judgment regarding the Constitution in performing his presidential duties. *See* 8 REG. DEB. pt. 3, app. 76 (1832) (recording a message of President Andrew Jackson returning the bank bill to the Senate with his objections).

65. 384 U.S. 641 (1966).

66. Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (1965) (codified at 42 U.S.C. § 1973b(e) (2000)).

67. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51–53 (1959).

on Section 5 of the Fourteenth Amendment, which empowers Congress to enforce the Amendment's provisions, the Court concluded that Congress could so legislate.[68]

Somewhat surprisingly, the Court's opinion did not mention *Marbury*, nor did it expressly reconcile its holding with its recent claim of interpretive supremacy in *Cooper*. The majority's silence on the matter, however, did not prevent Justice Harlan in dissent from charging that the Court's approach transformed the roles of Congress and the Court in enforcing the Constitution.[69] The question of whether literacy tests violate the Equal Protection Clause was, according to Justice Harlan, "one for the judicial branch ultimately to determine."[70] "Were the rule otherwise," he charged, "Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause."[71] Lest anyone mistake exactly what that meant, Harlan continued:

> In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.[72]

Harlan appeared to be questioning why, if the Court were acknowledging an exception to *Marbury* for when Congress sought to expand constitutional

68. The Court expressly rejected the notion that Congress's enforcement power is coterminous with the judicially prescribed contours of Section 1:

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.

Morgan, 384 U.S. at 648–49 (footnote omitted).

69. *Id.* at 667–68 (Harlan, J., dissenting).

70. *Id.* at 667.

71. *Id.* at 667–68.

72. *Id.* at 668 (emphasis omitted).

liberties, there was not similarly an exception to *Marbury* for when Congress sought to contract those liberties. Moreover, if Congress could legislatively define equal protection, why could it not also define the Court's original jurisdiction or the scope of other constitutional provisions? Taken at face value, *Morgan* seemed to be the counter-*Marbury*, acknowledging the power of Congress to disagree with the Court's constitutional rulings.

Justice Harlan's expressed concerns were too much for the Court majority in *Morgan* to stomach, and so the Court simply dispatched his worries with a footnote:

> Contrary to the suggestion of the dissent, § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.[73]

In short, Congress's authority under Section 5 of the Fourteenth Amendment acted as a one-way ratchet: Congress could expand but not contract constitutional liberties via normal legislation.

As even proponents of the so-called "*Morgan* power" acknowledged, however, this was hardly a compelling response to Justice Harlan's concerns.[74] The textual requirement that Congress "enforce" the Amendment did not, strictly speaking, indicate any limitation on which direction—above or below the judicially defined constitutional threshold—Congress could go in "enforcing" the constitutional guarantees of the Fourteenth Amendment. Even more problematically, if Congress possessed the power to redefine constitutional rights generally—as the Court seemed to suggest by analogizing the *Morgan* power to the necessary and proper power of Article I, Section 8—the one-way ratchet applicable to the *Morgan* power would not apply to Congress when it was acting pursuant to other constitutional grants of power that lacked the key textual limitation "enforce," such as (notably) the Commerce Clause.[75] Indeed, though no one suggested as much at the time, the *Morgan* Court's willingness to allow Congress to reshape the constitutional landscape

73. *Id.* at 651 n.10 (citation omitted) (majority opinion).

74. *See, e.g.*, 1 TRIBE, *supra* note 25, § 5-16, at 942–46; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1231–32 (1978).

75. Sager, *supra* note 74, at 1232.

in the exercise of its enumerated powers seemed to provide a conclusive justification for Congress's authority to overrule the Dormant Commerce Clause pursuant to its commerce power.

Of course, reading *Morgan* in this fashion would truly make it the counter-*Marbury*, and, whatever the weakness of the Court's analysis, the Court certainly was not prepared to relinquish its interpretive authority in the wholesale fashion that Justice Harlan feared. The one-way ratchet of the Court's creation ensured that the judiciary would still play the major, if not the exclusive, role in defining the scope of the constitutional rights protected by the Fourteenth Amendment. Yet even that proved too much of a loss of interpretive position for the Court to tolerate. In the years following *Morgan*, the Court began to cut back on Congress's enforcement power under the Reconstruction Amendments.[76]

The coup de grace came in 1997 in *City of Boerne v. Flores*,[77] which invalidated the Religious Freedom Restoration Act of 1993 (RFRA).[78] Congress had enacted RFRA to overturn the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*,[79] in which the Court held that strict scrutiny did not apply to laws of general applicability that burden religious conduct.[80] RFRA instead mandated that strict scrutiny apply to such laws, both federal and state.[81] Notably, the Court reaffirmed *Morgan*'s holding that Section 5 empowered Congress to regulate state action that the Court itself was not prepared to hold unconstitutional.[82] But while *Morgan* had analogized Congress's Section 5 enforcement power to the necessary and proper power of Article I—applying a deferential standard of review—the Court in *City of Boerne* cabined Congress's power to enacting "remedial"

76. *See* Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (opinion of Black, J.) (invalidating a federal law lowering the voting age from twenty-one to eighteen in state and local elections), *superseded by* U.S. CONST. amend. XXVI; *id.* at 154 (opinion of Harlan, J.); *id.* at 294 (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.).

77. 521 U.S. 507 (1997).

78. Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb (2000)).

79. 494 U.S. 872 (1990).

80. *Id.* at 885.

81. 42 U.S.C. § 2000bb-1 (prohibiting both federal and state governments from "substantially burden[ing]" an individual's exercise of religion even if the burden results from a rule of general applicability, unless the government can demonstrate that the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest").

82. *City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (quoting Fitzpatrick v. Bitzer, 427 U.S. 445 (1976))).

legislation, which the Court then defined as legislation bearing "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[83]

Much ink has been spilled assessing the Court's "congruence and proportionality" test,[84] but that feature of the opinion is less important than the Court's reassertion of its interpretive supremacy. Though the Court did not quote *Cooper*, the emanations of that case certainly permeated the decision: Congress could only enact "remedial" legislation, a choice of terminology that reinforced the noninterpretive task left to Congress. Moreover, the Court repeatedly referred to its "primary" role in defining the constitutional contours.[85] "The power to interpret the Constitution," the Court bluntly declared, "remains in the Judiciary."[86] Indeed, as it had in *Cooper*, the Court invoked *Marbury* for this arrogation of judicial interpretive authority, stating that, absent judicial interpretative primacy, "no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[87] Rather, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[88]

Admittedly, the Court acknowledged that Congress still possessed some interpretive authority. "When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[89] Indeed, the Court invoked James Madison, who as a member of the First Congress had embraced the coordinate responsibility of each branch to interpret the Constitution for itself.[90] And, as if to underscore the point, the Court again reassured everyone that "[o]ur national experience teaches that the Constitution is preserved best when *each part of the Government*"—including the judiciary—"respects both the Constitution and the proper actions and determinations of the other branches."[91]

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83. *Id.* at 520.

84. *See, e.g.*, David P. Currie, *RFRA*, 39 WM. & MARY L. REV. 637, 640 (1998); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 770–71 (1998); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 166–67 (1997); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11–14 (2003).

85. *City of Boerne*, 521 U.S. at 524.

86. *Id.*

87. *Id.* at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

88. *Id.*

89. *Id.* at 535.

90. *Id.*

91. *Id.* at 535–36 (emphasis added).

These blandishments were purely window dressing, however, and not well-constructed at that. James Madison's departmentalist conception of interpretative authority differed dramatically from the judicial supremacist approach embraced by *Cooper* and by *City of Boerne*.[92] More importantly, the Court acknowledged congressional interpretive authority only when Congress was acting "within its sphere of power and responsibilities." The key question was whose judgment—Congress's or the Court's—was determinative as to whether Congress was acting "within its sphere of power and responsibilities." Not surprisingly, the Court left no doubt that it was to be the judiciary's judgment that counted. Quoting *Marbury*'s declaration of the judiciary's power to say what the law is, the Court concluded:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[93]

That the "contrary expectations" were those of Congress and the President was inconsequential.

Despite its concluding protestation to the contrary, *City of Boerne* marked a new high point in the Court's self-conception. Its arrogation of primary, even exclusive, interpretive authority with regard to the Constitution bore far more similarity to *Cooper* than *Marbury*, upon which the Court labored to hang its decision, or *Morgan*, which it claimed to honor. But, while *Cooper* had asserted such judicial supremacy only over state officials, *City of Boerne* expanded it to include Congress and the President.

Any doubts about the Court's views were quickly dispatched in *United States v. Morrison*,[94] in which the Court held that Congress had exceeded its legislative authority under Section 5 and the Commerce Clause in enacting the Violence Against Women Act.[95] Congress had undertaken a laborious

92. *See* KRAMER, *supra* note 2, at 105–07 (discussing the departmentalist views of James Madison).

93. *City of Boerne*, 521 U.S. at 536. Somewhat surprisingly, even Justice O'Connor, who otherwise dissented from the Court's judgment, agreed with this conception of the relative roles of the Court, Congress, and the President with regard to interpreting the Constitution. *See id.* at 545–46 (O'Connor, J., dissenting). Only Justice Breyer, who refused to join that portion of Justice O'Connor's dissent, seemed troubled by the Court's arrogation of interpretive supremacy, but he did not explain his views in detail. *Id.* at 566 (Breyer, J., dissenting).

94. 529 U.S. 598 (2000).

95. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941 (codified at 42 U.S.C. § 13981 (2000)).

study regarding its constitutional authority to enact the bill,[96] and, given the extent of Congress's efforts, one might think that, if ever Congress's constitutional judgment was entitled to the deference promised by the Court, this was it. Such was not the case, however. The Court acknowledged that Congress and the President "have a role in interpreting and applying the Constitution,"[97] but whatever that "role" was, it was secondary to the Court's. Indeed, the Court was blunt; echoing *Cooper*, it declared that "ever since *Marbury* this Court has remained the *ultimate* expositor of the constitutional text."[98]

Morrison was followed one month later by *Dickerson v. United States*,[99] in which the Court invalidated section 701(a) of the Omnibus Crime Control and Safe Streets Act of 1968.[100] Section 701(a) was a patent attempt by Congress to overturn the Supreme Court's decision in *Miranda v. Arizona*.[101] As known by every American with a penchant for cop shows, *Miranda* requires police officers to advise arrested individuals of specified rights, including the right to remain silent; a failure to give such warnings potentially renders any inculpatory statement inadmissible as a violation of the Fifth Amendment's Self-Incrimination Clause.[102] Believing *Miranda* to be wrongly decided and such warnings unnecessary,[103] Congress enacted section 701(a), which authorized the admission of inculpatory statements so long as the statements were "voluntarily given."[104]

As was the case with RFRA, section 701(a) was the product of Congress's considered judgment that the Court had misinterpreted the Constitution. In light of what the Court had said in *City of Boerne* and *Morrison*, it should come as no surprise that the Court rejected Congress's authority to overrule the Court's constitutional decision. Indeed, the Court thought the point so self-evident that it dispatched the issue in one categorical sentence: "Congress

96. *See Morrison*, 529 U.S. at 614 (discussing legislative findings that the Violence Against Women Act (VAWA) was within Congress's commerce authority); *see also id.* at 619–20 (noting the "voluminous congressional record" detailing the basis for use of Section 5 authority).

97. *Id.* at 617 n.7.

98. *Id.* (emphasis added).

99. 530 U.S. 428 (2000).

100. Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (1968) (codified at 18 U.S.C. § 3501 (2000)).

101. 384 U.S. 436 (1966).

102. *Id.* at 479. There are several exceptions to the exclusionary rule, but they are not relevant here.

103. *See* Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*, 85 CORNELL L. REV. 883, 887–909 (2000) (canvassing the legislative history of the Act as a response to *Miranda*).

104. The Act identified several factors for the trial judge to consider, including whether the defendant was advised of his right to remain silent. However, the absence of such a warning was not, as it was under *Miranda*, dispositive of the admissibility of the confession. 18 U.S.C. § 3501(b).

may not legislatively supersede our decisions interpreting and applying the Constitution."[105] Moreover, on this point, the Court was unanimous; the issue that split the Justices was whether *Miranda* announced a constitutional rule or merely a nonconstitutional, prophylactic remedy that Congress could legislatively supersede.[106]

In several respects overlooked by commentators, the Court actually expanded its claim to judicial supremacy in *Morrison* and *Dickerson*. Strictly speaking, *Cooper* had established only that state officials were bound by the Supreme Court's interpretation of the law, and *City of Boerne*'s claim of judicial supremacy over federal officials had been made only in the context of Congress's Section 5 authority. Those decisions left open the possibility that Congress, acting pursuant to some other legislative grant of authority, would be entitled to enact statutes reflecting a different view of the Constitution from that of the Court. *Morrison* and *Dickerson*, however, foreclosed that possibility. *Morrison* asserted the Court's interpretative supremacy when Congress acts pursuant to the Commerce Clause, while *Dickerson* did the same with regard to Congress's necessary and proper authority.[107] In short, those decisions indicate that, at least in the Court's view, its interpretative supremacy is global. Its interpretation of the Constitution trumps those of the political branches, regardless of what constitutional authority those branches are exercising.

Moreover, the result in *Dickerson* hints at one final point about the extent of the Supreme Court's claim to interpretative supremacy. *Morgan*, *City of Boerne*, and *Morrison* all dealt with federal statutes that, in one way or another, contracted state authority, either by directly regulating state conduct or by displacing state control over private conduct. None of those cases presented the question whether Congress could legislate in ways that *expanded* state authority. The Court in *Morgan* had opined that Congress could not restore state authority in ways that diluted constitutional liberties,[108] but *Dickerson* transformed that observation into a holding of the Court. To be sure, the statute involved in *Dickerson* only sought to expand federal authority; section 701(a) did not attempt to overrule *Miranda* as applied to

105. Dickerson v. United States, 530 U.S. 428, 437.

106. *Compare id.* at 437–41 (concluding that *Miranda* was constitutionally based), *with id.* at 447–56 (Scalia, J., dissenting) (concluding that *Miranda* did not announce a constitutional rule but only a prophylactic rule adopted pursuant to the Court's supervisory powers). Justices Scalia and Thomas agreed that, if *Miranda* were constitutionally based, Congress could not overrule it. *Id.* at 445–46 (observing that the decision invalidating § 3501 would be correct if *Miranda* announced a constitutional rule).

107. In *Dickerson*, the Court did not discuss what fount of power Congress used in enacting section 701, but the necessary and proper authority seems the most pertinent.

108. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

state prosecutions.[109] Yet, the Court's categorical rejection of Congress's power to correct perceived judicial errors involving the Constitution through normal legislation transcended the exclusively federal scope of section 701(a). The Court was not simply concerned about Congress expanding its own legislative powers, but also was troubled by Congress's arrogation to itself of a power to countermand the Court's interpretation of the Constitution.[110] Indeed, it is inconceivable that the result in *Dickerson* would have been different had Congress sought to overturn *Miranda* only with respect to state prosecutions. Rather, *Dickerson* establishes that Congress may not supersede the Court's interpretation of the Constitution regardless of whether Congress is attempting to expand federal or state authority beyond that approved by the Court.

It is true that some commentators support the Court's claim to interpretative supremacy and agree that *Marbury*, properly understood, requires the result in these cases.[111] Alternatively, there are those who openly challenge the Court on this point and contest its reading of *Marbury*.[112] For present purposes, it is unnecessary to resolve whether the Court is right about its supreme interpretative status. The critical point is that, rightly or wrongly, the Court has declared its interpretative supremacy over both state officials and the coordinate branches of the federal government. According to the Court, no matter how erroneous Congress believes the Court's view of the Constitution to be, Congress is powerless to overturn that interpretation via normal legislative processes.

Obviously, this conception of the Court's role has serious implications for the Court's willingness to allow Congress to overrule Dormant Commerce Clause-based limitations on state authority. Congress has disagreed with individual Supreme Court Dormant Commerce Clause decisions and legislatively restored state authority held unconstitutional by the Court, and it

109. 18 U.S.C. § 3501(a) (limiting the applicability of the Act to "any criminal prosecution brought by the United States or by the District of Columbia"). *But cf. Dickerson*, 530 U.S. at 456 (Scalia, J., dissenting) ("Congress's attempt to set aside *Miranda*, since it represents an assertion that violation of *Miranda* is not a violation of the Constitution, also represents an assertion that the Court has no power to impose *Miranda* on the States.").

110. *Dickerson*, 530 U.S. at 437 (majority opinion).

111. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1067 (2004).

112. *See, e.g.*, KRAMER, *supra* note 2, at 249–53 (rejecting the Court's self-proclaimed supreme interpretive status); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 890–91 (2003); Paulsen, *supra* note 60, at 225; Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994).

will no doubt do so again in the future.[113] Moreover, some Congressmen may share Justices Scalia's and Thomas's criticism of the Dormant Commerce Clause and believe that the whole doctrine is an unwarranted judicial fabrication. But, as understood by the Supreme Court, *Marbury* forecloses the power of Congress to overrule the Supreme Court's constitutional decisions by mere legislation. Thus, for example, one would think that no matter how erroneous Congress believes the Supreme Court's Dormant Commerce Clause decision in *Oregon Waste Systems* to be, Congress may no more overturn that decision and authorize states to exclude solid waste from out of state than it may overturn the Supreme Court's decisions in *Smith* or *Miranda*. If the Court is to be believed, Congress's considered judgment regarding the meaning of the Constitution cannot trump that of the Court.

None of this is sufficient by itself to demonstrate the error in the Court's willingness to allow Congress to overrule its Dormant Commerce Clause decisions. It is theoretically possible that there is something special about the Dormant Commerce Clause that distinguishes it from every other constitutional provision and exempts it from the *Marbury* regime, but that is where the inquiry must focus. The Court's acceptance of congressional authority to countermand the Dormant Commerce Clause certainly does not follow from *Marbury*, but is directly at odds with it. Moreover, because this pattern of decisions is inconsistent with *Marbury*, it is incumbent upon defenders of this congressional power to identify the distinguishing characteristic of the Dormant Commerce Clause that renders inapplicable the Court's categorical rule that Congress may not legislatively supersede the Court's constitutional decisions. The burden of persuasion is on proponents of this exception, and, if they cannot discharge that burden, it would seem impossible to avoid the conclusion that the Court's willingness to allow Congress to overrule its Dormant Commerce Clause decisions is an erroneous anomaly that should be corrected post-haste.

II. CONGRESS'S POWER TO OVERRIDE THE DORMANT COMMERCE CLAUSE: THE MEANING OF SILENCE

Given the Court's commitment to its interpretive supremacy, it is surprising that the Court has acknowledged the power of Congress to override Dormant Commerce Clause-based limitations on state authority. Yet, it has done so for over a century. Even in the past few decades, as the Court's own conception of its interpretive status has ballooned, it has reaffirmed Congress's

113. *See supra* text accompanying notes 14–19.

authority to overrule the Court's Dormant Commerce Clause decisions.[114] Perhaps even more surprising, the Court has not appreciated the incongruence of these doctrines and has made no effort to reconcile the otherwise mutually exclusive views.[115]

The Court's silence notwithstanding, we can assess whether there is some basis for reading the Dormant Commerce Clause as an exception to the *Marbury* regime. To do so, we must first understand the theoretical justifications proffered by the Court for this congressional power. We can then evaluate whether any of those justifications provide a cogent basis for treating the Court's Dormant Commerce Clause decisions differently from its other constitutional decisions, like *Smith* or *Miranda*.

As it turns out, the Court has offered two entirely distinct and incompatible justifications for Congress's power to restore state authority divested by the Dormant Commerce Clause. The first, discussed in this part, is that Congress may overrule the Dormant Commerce Clause because the Dormant Commerce Clause is not a constitutional limitation but merely an inference of Congress's intent drawn from its legislative silence. The second justification, discussed in Part III, is that Congress may join in a "coordinated effort" with the states to regulate interstate commerce, even if that means authorizing the states to act in ways that they could not act alone.

To fully understand the Court's first proffered justification for allowing Congress to overrule the Court's Dormant Commerce Clause decisions, one must first have a grasp of the theoretical foundation for the Dormant Commerce Clause itself. As noted above,[116] the Court's explanation has changed over time, but for present purposes, we need only examine the Court's views in the nineteenth and early twentieth centuries when the Court first recognized this extraordinary power.

The Court first acknowledged the possibility of a Dormant Commerce Clause in *Gibbons v. Ogden*.[117] Although the Court did not rest its decision in that case on the Dormant Commerce Clause,[118] Chief Justice Marshall expressed the Court's sympathy for the notion that the Commerce Clause vested the power to regulate interstate commerce exclusively in Congress, thereby divesting the states of any legislative authority over interstate

114. Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2005).

115. The lone exception on the current Court is Justice Scalia, who has acknowledged the incongruity. *See* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 263 n.4 (1987) (Scalia, J., concurring in part and dissenting in part).

116. *See supra* text accompanying notes 34–39.

117. 22 U.S. (9 Wheat.) 1, 209 (1824).

118. For an explanation of the *Gibbons* Court's reluctance to rely on the Dormant Commerce Clause, see Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398 (2004).

commerce.[119] This exclusivity rationale was formally embraced by the Court in later years and formed the early foundation for Dormant Commerce Clause jurisprudence.[120]

The exclusivity rationale was and is incompatible with the idea that Congress may restore state authority divested by the Dormant Commerce Clause. Chief Justice Marshall suggested as much in *Gibbons*,[121] and *Cooley* expressly repudiated the notion that Congress could regrant its commerce power to the states.[122] If the Constitution vested the commerce power exclusively in Congress, Congress could not transform the exclusive nature of that power and make its commerce power merely concurrent. Indeed, Congress could no more undo the Constitution's allocation of legislative authority over interstate commerce than it could vote all its legislative powers to the states.[123] For this reason, it is hardly surprising that for most of the nineteenth century, a period during which the exclusivity theory remained the ascendant explanation for the Dormant Commerce Clause, the Court never once hinted that Congress could overrule its Dormant Commerce Clause decisions.

The idea that Congress possessed such a power arose toward the end of the nineteenth century, when the exclusivity theory lost its influence. After the Civil War, although the Court did not repudiate the exclusivity theory, it offered an alternative explanation for the Dormant Commerce Clause. According to the Court, the fact that Congress failed to regulate a particular facet of interstate commerce itself demonstrated Congress's intent that such commerce be left free from state regulation.[124] So conceived, the Dormant Commerce Clause was not a constitutional limitation on state authority but merely a species of statutory preemption—albeit a strange form of such preemption, resting as it did upon the absence rather than presence of a federal statute.

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119. *Gibbons*, 22 U.S. at 209.

120. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1852) ("Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995); The Passenger Cases, 48 U.S. (7 How.) 283, 408 (1849) (opinion of McLean, J.) ("That the [commerce] power is exclusive seems to be as fully established as any other power under the Constitution which has been controverted.").

121. *Gibbons*, 22 U.S. at 207 (observing that "Congress cannot enable a State to legislate").

122. *Cooley*, 53 U.S. at 318 ("If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power.").

123. *Cf.* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.").

124. *See, e.g.*, Welton v. Missouri, 91 U.S. 275, 282 (1876) ("[Congress's] inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State [sic] commerce shall be free and untrammelled.").

As should be immediately apparent, this shift in the theoretical foundation for the Dormant Commerce Clause raised the possibility that Congress could reinvest state authority divested by the Dormant Commerce Clause. If Congress's statutory silence denoted its intent to preempt state authority, Congress could indicate its contrary intent by declaring via statute that, while it did not intend to regulate a particular matter, it did not object to state regulation of that matter. In breaking its statutory silence in this fashion, Congress would thereby restore state regulatory authority over the specific subject matter that had been divested by its statutory silence. Moreover, on this account, congressional authorization of such state action would not pose any threat to *Marbury* and the Court's interpretive status. Because the Dormant Commerce Clause, so viewed, was not a constitutional limitation on state authority but merely an inference regarding Congress's legislative intent, Congress's restoration of state authority would not overrule any constitutional decision of the Court. Restoring state authority would be no more a challenge to the Court's interpretative authority than that posed by any run-of-the-mill congressional statute that overruled the Court's interpretation of a statute. In contrast to the exclusivity theory, which condemned Congress's ability to remove the Dormant Commerce Clause-based limitations on state authority, this preemption-based explanation for the Dormant Commerce Clause sanctioned and implicitly courted it.

Not surprisingly, it did not take long for Congress to apprehend the significance of the Court's shift in Dormant Commerce Clause theory. In *Bowman v. Chicago & Northwestern Railway Co.*,[125] the Court held that the Dormant Commerce Clause prohibited states from banning the importation of liquor from other states,[126] and the Court extended the *Bowman* ruling two years later in *Leisy v. Hardin*,[127] holding that the Dormant Commerce Clause also forbade states from prohibiting the sale of liquor manufactured in another state.[128] In both cases, the Court defended its decision on the ground that Congress's failure to regulate the interstate liquor trade indicated its intent that such commerce remain free of all regulation, both federal and state.[129] Moreover, in *Leisy*, the Court all but expressly invited Congress to

125. 125 U.S. 465 (1888).

126. *Id.* at 498 (holding that an Iowa statute is "a regulation of that character which constitutes an unauthorized interference with the power given to [C]ongress over [commerce]").

127. 135 U.S. 100 (1890), *superseded by statute*, Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2000)).

128. *Id.* at 124–25.

129. The Court stated:

> The question, therefore, may be still considered in each case as it arises, whether the fact that [C]ongress has failed in the particular instance to provide by law a regulation of

overrule its decision by noting that it was only "in the absence of congressional permission to do so" that the state was powerless under the Dormant Commerce Clause to bar the importation of liquor from other states.[130]

Within months, Congress reacted to the *Leisy* decision and passed the Wilson Act,[131] which expressly provided that all intoxicating liquors transported into a state shall "be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory."[132] By denying liquors produced in other states their interstate character, the statute brought such liquors within the states' uncontested authority to regulate purely intrastate commerce. In short, the statute overruled the Court's Dormant Commerce Clause decision in *Leisy*.

Almost immediately, the constitutionality of the Wilson Act came before the Court in *In re Rahrer*.[133] The Court's opinion was hardly a model of clarity, but its result was clear: The Wilson Act was constitutional. The Court first paid lip service to the exclusivity theory, which it conjoined with the preemption rationale.[134] This marriage of theories, however, was untenable. If Congress's commerce power was exclusive, it could not be shared in any fashion with the states. Indeed, citing *Cooley*, the Court reaffirmed that Congress could not delegate its powers to a state, "nor sanction a state law in violation of the Constitution."[135] The only way to extract itself from this logical dilemma was to jettison the exclusivity theory, which it did in a backhanded fashion. Explaining the significance of the Wilson Act, the Court declared:

> Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws . . . created by the absence of a specific utterance on its part. It imparted no power

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commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states.

Bowman, 125 U.S. at 483; *id.* at 498 ("If not in contravention of any positive legislation by [C]ongress, [the Iowa statute] is nevertheless a breach and interruption of that liberty of trade which [C]ongress ordains as the national policy, by willing that it shall be free from restrictive regulations."); *Leisy*, 135 U.S. at 109–10 (noting that "so long as Congress does not pass any law to regulate [interstate commerce], or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled").

130. *Leisy*, 135 U.S. at 124.

131. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121).

132. *Id.*

133. 140 U.S. 545 (1891).

134. *Id.* at 555 (noting that "it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States").

135. *Id.* at 560.

> to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.[136]

Stated differently, the Wilson Act did not transfer federal authority to the states (which *Cooley* condemned); rather, it merely negated the presumption that Congress's regulatory silence denoted its intent to preempt state authority, too.[137]

Of course, in upholding the Wilson Act on the broad ground that the Dormant Commerce Clause was not a constitutional limitation upon state authority but merely a presumption of legislative intent arising from Congress's silence, the Court opened the door to other statutes purporting, as the Court put it, to "remove an impediment"[138] to the enforcement of the state laws. After liquor manufacturers began to exploit a loophole in the Wilson Act, which only authorized states to prohibit the sale but not the importation of interstate liquors,[139] Congress enacted the Webb-Kenyon Act.[140] Effectively overturning *Bowman*, the act forbade the interstate transportation of liquor into a state in which the possession of liquor was illegal.[141] Although there were several

136. *Id.* at 564.

137. Justices Harlan, Gray, and Brewer concurred in the judgment but not the reasoning of the Court. *Id.* at 565. Although it was not stated in the opinion, their reservation almost certainly was not about the Court's ruling regarding the authority of Congress to authorize state action that otherwise would violate the Dormant Commerce Clause; they believed that there was no need for such authorization in the first place because the state prohibition on the sale of imported liquor did not violate the Dormant Commerce Clause. Indeed, those three Justices had dissented in *Leisy*. Leisy v. Hardin, 135 U.S. 100, 125 (1890) (Gray, J., dissenting), *superseded by statute*, Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2000)).

138. *In re Rahrer*, 140 U.S. at 564.

139. Rosenberger v. Pac. Express Co., 241 U.S. 48, 50–51 (1916); Rhodes v. Iowa, 170 U.S. 412, 423–25 (1898).

140. Intoxicating Liquors, Transportation (Webb-Kenyon) Act, ch. 90, 37 Stat. 699 (1913), *amended by* Liquor Law Repeal and Enforcement Act, ch. 740, § 202(b), 49 Stat. 872, 877 (1935) *and* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 2004(a), 114 Stat. 1464, 1546–48. The scope of the Webb-Kenyon Act was the central issue in the Supreme Court's recent decision in *Granholm v. Heald*, 125 S. Ct. 1885 (2005). While the five-Justice majority interpreted the Webb-Kenyon Act only to immunize nondiscriminatory state importation regulations, *id.* at 1904–07, Justice Thomas, joined in dissent by three other Justices, read the Act to immunize all state importation regulations, including facially discriminatory ones. *Id.* at 1910–19.

141. Webb-Kenyon Act, 37 Stat. at 699–700 prohibits

> the shipment or transportation, in any manner or by any means whatsoever, of any . . . liquor of any kind, from one State . . . into any other State . . . which . . . is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State.

Id. Interestingly, Attorney General George Wickersham thought that the Act unconstitutionally delegated Congress's commerce power to the states. *See* Constitutionality of Proposed Legislation Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases, 30 Op. Att'y Gen. 88, 111 (1913). Acting on this advice, President Taft vetoed the Act, *see* Veto Message of the President, 49 CONG. REC. 4291 (1913), but Congress overrode the President's veto. *See also Granholm*, 125 S. Ct. at 1900–01 (discussing the history of the Webb-Kenyon Act).

potentially significant differences in form between the Wilson Act and the Webb-Kenyon Act,[142] the Court upheld the latter on the same ground as the Wilson Act.[143] Citing *Leisy*, the Court declared that "the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions" because "the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose *only from the absence of congressional regulation, and would endure only until Congress had otherwise provided.*"[144]

Likewise, after several state courts struck down state statutes regulating the sale of convict-made goods as violative of the Dormant Commerce Clause,[145] Congress enacted the Hawes-Cooper Act.[146] That act provided that convict-made goods transported into any state shall "be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory."[147] As was immediately apparent from its text, the Hawes-Cooper Act was modeled upon the Wilson Act, and consequently the Court upheld its constitutionality on the same ground.[148]

Despite the Court's evident satisfaction with this course of events, however, the Court's approach was and is fundamentally flawed. Under the

142. *See infra* text accompanying notes 404–406.

143. James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 328, 330 (1917); *see also* Adams Express Co. v. Kentucky, 238 U.S. 190, 198–202 (1915) (reaffirming the congressional power to authorize state burdens on interstate commerce).

144. *Clark Distilling Co.*, 242 U.S. at 328 (emphasis added).

145. *See, e.g.*, People v. Hawkins, 51 N.E. 257, 261–62 (N.Y. 1898) (invalidating a nondiscriminatory state labeling requirement for convict-made goods); Arnold v. Yanders, 47 N.E. 50, 50–51 (Ohio 1897) (invalidating a discriminatory state licensing requirement for convict-made goods). The issue did not come before the U.S. Supreme Court until 1934, when the State of Alabama—one of the largest producers of convict-made goods—sued Arizona and four other states, alleging that those states' prohibition on the importation of convict-made goods from other states violated the Dormant Commerce Clause. Alabama v. Arizona, 291 U.S. 286, 288 (1934). The Court refused to rule on the merits of Alabama's complaint, dismissing it on a pleading technicality. *Id.* at 292 (dismissing the bill because the "facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury").

146. Act of Jan. 19, 1929 (Hawes-Cooper Act), ch. 79, 45 Stat. 1084 (codified as amended at 18 U.S.C. § 1761 (2000)).

147. *Id.*

148. Whitfield v. Ohio, 297 U.S. 431, 440 (1936) (holding that the Hawes-Cooper Act is constitutional "for reasons akin to those which moved this court to sustain the validity of the Wilson Act"). The Court also hinted that the underlying foundation of *Bowman* and *Leisy*—the so-called "original package" doctrine, which forbade state regulation of interstate or foreign goods while they were in their original package—was erroneous. *Id.* In addition, the Court categorically rejected the suggestion that the Hawes-Cooper Act constituted a delegation of congressional power to the states. *Id.*

Court's silence-equals-preemption theory, congressional legislation to restore state authority divested by the Dormant Commerce Clause is legitimate only because, as the Court viewed it, the Dormant Commerce Clause is merely a presumption arising from Congress's regulatory silence. But that conception of the Dormant Commerce Clause is implausible both factually and legally. As a factual matter, Congress's silence does not necessarily indicate that it wishes the matter to be left unregulated by the states;[149] rather, it equally could mean that Congress does not wish to regulate it itself, that Congress could not come to an agreement regarding the form of regulation, or, most plausibly, that Congress has not considered the matter at all.[150] There is simply no way to know for certain which of these reasons has produced Congress's regulatory silence. As Justice Scalia has observed accurately, "Congress's silence is just that—silence."[151]

Given this uncertainty about Congress's intent when it does not act, the Court must choose some default rule regarding the meaning of legislative silence. The Court's selection of the silence-equals-preemption rule, however, is the least tenable as a legal matter. The Supremacy Clause, which is the constitutional foundation for the preemption of state authority, only makes the Constitution, federal treaties, and the "Laws of the United States which shall be made in Pursuance thereof" the supreme law of the land.[152] It assuredly would be strange to speak of Congress's legislative silence as a "law of the United States," much less one "made in Pursuance" of the Constitution. Rather, since the early days of the Republic, the Court has equated "laws of the United States" meriting preemptive status with actual statutes passed by Congress.[153]

Even apart from the Supremacy Clause, the whole notion that states may legislate only by leave of Congress truly would be incongruous with a "federal" system of government, which presumes the independent legislative

149. Savage v. Jones, 225 U.S. 501, 533 (1912) (declaring that "the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact the Congress has seen fit to circumscribe its regulation and to occupy a limited field").

150. *Cf.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting Congress's failure to resolve legal questions could be the result of several different phenomena).

151. Tyler Pipe Indus. v. Wash. State Dep't of Rev., 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987)).

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

153. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (observing that it is the "act of Congress" that is entitled to preemptive status under Supremacy Clause). There is a related but distinct issue that I do not address here regarding the extent to which executive action preempts state law. *See, e.g.*, United States v. Pink, 315 U.S. 203, 230–31 (1942) (holding that executive agreements with foreign nations preempt state law pursuant to the Supremacy Clause). The key point is that actual action, not inaction, serves to preempt state authority.

sovereignty of the national and state governments.[154] Such a conception would treat states as nothing more than subdivisions of the national government, in much the same way that cities or counties are treated as subdivisions of states.[155] Like cities and counties, which must obtain legislative authority either directly from the state constitution or from the state legislature,[156] states would be required to lobby Congress for authority to enact commercial measures. Whether or not that would be a sound rule from a policy perspective, it would hardly be congruent with "Our Federalism" and its recognition of the states as sovereign entities with their own independent fount of legislative authority.[157]

This latter point with its constitutional overtones is sure to prompt some misgivings by individuals who will point out that, as a practical matter, Congress does shape state legislative authority all the time by preempting state law and, moreover, that no one doubts Congress's constitutional authority to do so. To put this objection in its strongest form: Either we can presume that all state commercial authority is preempted until Congress says otherwise (the silence-equals-preemption regime), or we can presume that all state regulation is valid until Congress says otherwise (the modern preemption regime more or less). Either way, the result is the same. The Constitution, however, is not neutral with respect to state authority in the way that this objection presupposes. It is not the case that state legislative authority would be the same under each regime for the simple reason that the Constitution limits the legislative process in a countermajoritarian fashion. As the text indicates and the Supreme Court has reaffirmed, a bill must pass both houses of Congress and be presented for approval by the President (or his veto overridden by a two-thirds majority of each house) to qualify as law.[158] This constitutionally ordained legislative process is heavily tilted in favor of the status quo, making it difficult for popular majorities, even congressional majorities, to obtain legislative rewards.[159]

154. The Constitution does specify several areas in which the state may act only with the consent of Congress, see, for example, U.S. CONST. art. I, § 10, cls. 2 & 3. Outside those narrowly and expressly defined areas, however, it has never been suggested that the states may legislate only by leave of Congress.

155. *See, e.g.*, CAL. CONST. art. XI, § 1(a) ("The State is divided into counties which are legal subdivisions of the State.").

156. City of Lockhart v. United States, 460 U.S. 125, 127 (1983) (defining general law and "home rule" cities).

157. Younger v. Harris, 401 U.S. 37, 44 (1971); *see, e.g.*, *Gibbons*, 22 U.S. at 198–99, 208 (acknowledging that states obtained taxation and police powers by virtue of the devolution of sovereignty from the United Kingdom after the Revolution).

158. U.S. CONST. art. I, § 7, cl. 2; INS v. Chadha, 462 U.S. 919, 959 (1983).

159. William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 532 (1992).

Under the silence-equals-preemption regime, the implication for state authority is significant. What Congress would permit the states to do is not the converse of what Congress would preempt under the modern rule; it is probably far less. To see why, consider the recently lapsed federal ban on the sale of assault weapons.[160] Under the silence-equals-preemption presumption, Congress's regulatory silence would disable the states from regulating the sale of such weapons unless and until Congress approved state regulation.[161] To block such congressional approval and thereby maintain a free market for such weapons, the gun lobby would only have to persuade one half of one house (or, alternatively, the President and one third of one house) to block a bill authorizing state regulation of assault weapons. In contrast, under the alternative regime in which state regulatory authority remains intact until Congress affirmatively acts to preempt it, the gun lobby would have to persuade a majority of both houses and the President (or two-thirds of each house if the President is not on board) to enact a bill preempting state authority regarding the sale of assault weapons. Obviously, the latter will be much more difficult for the gun lobby to achieve. Thus, as a practical matter, the silence-equals-preemption rule would operate to constrain state authority and—here's the rub—would do so even in instances in which popular or legislative majorities exist that favor state regulation.

Consequently, even apart from the Supremacy Clause, a due regard for state regulatory authority makes it preferable to require Congress to *act* to preempt state legislative authority rather than simply to presume such intention from Congress's legislative silence. And that is precisely what modern preemption doctrines require. Even with regard to statutes with provisions expressly preempting state and local laws—the least controversial of the preemption doctrines—the Court is sensitive to the need to protect state authority.[162] Although there are circumstances under which the Court will conclude that state authority is impliedly preempted, it has narrowly defined those instances and linked them to circumstances in which Congress's desire

160. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110105(2), 108 Stat. 1796, 2000 (codified as amended at 15 U.S.C. §§ 1–7 (2000)) (providing that the assault weapons ban will lapse ten years after the effective date, which was Sept. 13, 2004).

161. *Cf.* Arnold v. City of Cleveland, 616 N.E.2d 163, 175 (Ohio 1993) (upholding a municipal ban on assault weapons against a preemption challenge).

162. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (noting that "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (same); *see also* Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (observing that "[e]ven when an express pre-emption provision has been enacted by Congress, we have narrowly defined the area to be pre-empted").

to preempt state law is fairly clear from some congressional statute.[163] The Court has repeatedly emphasized that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case."[164] With respect to field preemption—the most controversial of the Court's implied preemption doctrines and the one most analogous to the silence-equals-preemption presumption—the Court has been downright hostile. Thus, it rarely has acknowledged, outside the context of foreign affairs, labor, and immigration, Congressional intent to occupy an entire regulatory field.[165]

Given this sensitivity to state regulatory authority, Justice Thomas is surely right that the silence-equals-preemption rationale for the Dormant Commerce Clause is utterly inconsistent with the respect accorded state legislative authority by the modern Court.[166] Even if the silence-equals-preemption theory were consistent with the Supreme Court's conception of the federal-state relationship at a prior time in our nation's history—which is doubtful[167]—it is no longer. When Congress enacts a federal regulatory program, the modern Court parses the federal statute in a careful fashion with an

163. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (plurality opinion). The Court stated:

> Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. (citations omitted).

164. *Medtronic*, 518 U.S. at 485 (quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)); *Cipollone*, 505 U.S. at 516.

165. *See, e.g.*, Allen-Bradley Local No. 1111 v. Wis. Empl. Rel. Bd., 315 U.S. 740, 749 (1942) ("We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."); Hines v. Davidowitz, 312 U.S. 52, 68 n.22 (1941) ("[W]here the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not.").

166. *Camps Newfound/Owatonna*, 520 U.S. at 615–17 (Thomas, J., dissenting).

167. *See, e.g.*, Napier v. Atl. Coast Line R.R., 272 U.S. 605, 611 (1926) (declaring that the Court would not lightly infer congressional intent to displace state law); Reid v. Colorado, 187 U.S. 137, 148 (1902) (same); *see also* Chi., Rock Island, & P. Ry. v. Hardwick Farmers Elevator Co., 226 U.S. 426 (1913). The Court noted:

> [I]n a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power.

Id. at 435.

eye to saving state regulatory authority.[168] Yet, according to the silence-equals-preemption rationale, when Congress is silent and there is no claim of statutory preemption, such silence by itself divests states of regulatory authority. There is absolutely no plausible way to reconcile these two views and explain why the Court should possess greater solicitude for state prerogatives when Congress actually does act than when it does not act at all.

As should be obvious, these fatal defects in the silence-equals-preemption theory condemn the power of Congress to overrule the Court's Dormant Commerce Clause decisions. After all, the latter power is predicated on the former theory; if the theory is invalid, so too is the power. Moreover, once one rejects the notion that the Dormant Commerce Clause is merely a statutory presumption regarding congressional intent—that is, once one again accepts that the Dormant Commerce Clause is a constitutional restriction on state authority—the *Marbury* dilemma returns.

One final historical point: The silence-equals-preemption rationale for the Dormant Commerce Clause lost its grip on the Court around the time of the New Deal. Although it did not expressly repudiate this rationale, the Court conspicuously made no mention of the "silence of Congress" in defending the invalidation of state commercial regulations during the New Deal era.[169] This was a welcome development even at the time. Presaging Justice Scalia's critique, John Sholley, in an influential commentary published during the New Deal, declared the silence-equals-preemption premise "basically unsound."[170] Yet, even

168. *See, e.g.*, *Cipollone*, 505 U.S. at 518–20 (holding that a federal statute providing that "[n]o *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes" did not preempt state common law requirements but only state labeling requirements imposed by statute or regulation).

169. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527–28 (1935) (invalidating a New York milk price stabilization scheme not because Congress had not regulated milk prices but because New York, in applying the Act to milk purchased outside the state, was attempting to protect the domestic milk industry from competition); *see also* Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 17 (1940) ("There is no recognition here, or in other decisions of the Court since the *Barnwell* case on the validity of state regulatory action affecting commerce, of any effect attributable to the silent will of Congress in the matter.").

170. John B. Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 587 (1936). "The 'psychoanalysis' of Congress is a perilous venture when that body speaks and a hopeless task when it is silent. It would seem that the only sensible course is to hold that when Congress says nothing it means what it says." *Id.* at 588. That criticism of the silence-equals-preemption rationale on this ground began during the New Deal is hardly surprising. The explosion in federal regulatory programs during the 1930s rendered implausible the notion that Congress's silence regarding a specific matter indicated a laissez faire intent that the matter be left to the unrestricted vagaries of the market. The New Deal Congresses were not committed to laissez faire capitalism in the way that *Bowman* and *Leisy* presumed; to the contrary, they saw the need for, and possibilities of, a regulated economy. *See, e.g.*, National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196 (1933) (authorizing the President to adopt codes of fair competition for American industry).

though it no longer mentioned the "silence of Congress" as the foundation of the Dormant Commerce Clause, the Court did not seem to appreciate what that meant for Congress's power to restore state authority. The Court referred to Congress's "undoubted power to redefine the distribution of power over interstate commerce."[171] Moreover, and somewhat surprisingly, some commentators continued to defend Congress's power to overrule the Dormant Commerce Clause, although they did so for reasons entirely different than the Court's.[172]

Thus, on the eve of World War II, there was a growing anomaly in the Supreme Court's Dormant Commerce Clause jurisprudence. The Court continued to endorse the power of Congress to overrule the Court's Dormant Commerce Clause decisions, but it no longer believed in the theory that justified that extraordinary power. Writing in 1945, one author correctly forecast that a new theoretical approach was needed to restore coherence to the Court's doctrine and that "the ultimate resolution of the issue . . . must depend upon a reexamination and reevaluation of our federal system."[173]

III. A NEW BEGINNING: "ALL THE POWER OF GOVERNMENT RESIDING IN OUR SCHEME"

In the wake of World War II, the Court was again confronted with the question of whether the Constitution allows Congress to authorize state action that would otherwise violate the Dormant Commerce Clause. Rather than fall back upon the silence-equals-preemption rationale of *Rahrer*, the Court took a new approach in defending this power, focusing on the allegedly curative effect of the presence of "coordinated effort" by Congress and the states in regulating commerce. Though more theoretically elaborate than the preceding theory it eclipsed, this approach likewise falls short of justifying Congress's power to overrule the Dormant Commerce Clause.

171. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945) ("*It is no longer debatable* that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.") (emphasis added).

172. *See* Henry W. Biklé, *The Silence of Congress*, 41 HARV. L. REV. 200, 222 (1927) (endorsing *Rahrer* power on the ground that it allows the "public to have choice of methods in dealing with specific problems."); Dowling, *supra* note 169, at 23 (endorsing *Rahrer* power on the ground that it provides "flexibility in the adjustment and accommodation of national and state interests, at the same time preserving the judicial and amplifying the legislative function"). Ironically, the foremost critic of the "silence of Congress" theory embraced Congress's power on the ground that Congress was a "far more suitable body" than the judiciary for deciding what state regulations were detrimental to interstate commerce. Sholley, *supra* note 170, at 595.

173. Note, *Congressional Consent to Discriminatory State Legislation*, 45 COLUM. L. REV. 927, 952 (1945).

A. *Benjamin* and the Theory of "Coordinated Effort"

In a series of nineteenth-century cases, the Court had upheld discriminatory state taxes and regulations imposed on the insurance industry on the ground that insurance was not commerce and was therefore beyond the scope of the Dormant Commerce Clause.[174] By the 1940s, however, that formalistic fiction had lost whatever support it originally possessed, and, in *United States v. South-Eastern Underwriters Ass'n*,[175] the Court held that insurance was commerce.[176] Although *South-Eastern Underwriters* technically dealt only with the applicability of the Sherman Antitrust Act[177] to the business of insurance, its holding that insurance was commerce threatened to eliminate the immunity from Dormant Commerce Clause challenges enjoyed by discriminatory state insurance laws.

Before the Court could apply the logic of *South-Eastern Underwriters* to Dormant Commerce Clause challenges to state insurance taxes and regulations, Congress enacted the McCarran-Ferguson Act.[178] Not only did the act effectively overturn *South-Eastern Underwriters* by specifying that the Sherman Act did not apply to the business of insurance,[179] Congress also expressly immunized state insurance taxes and regulations from Dormant Commerce Clause challenges.[180] The Act was sweeping, immunizing all state laws regarding "the regulation or taxation of such business."[181]

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174. *E.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868), *superseded by statute*, Act of Mar. 9, 1995 (McCarran-Ferguson Act), ch. 20, 59 Stat. 33 (codified as amended at 15 U.S.C. §§ 1011–1015 (2000)); *see also* N.Y. Life Ins. Co. v. Deer Lodge County, 231 U.S. 495, 510–11 (1913) (reaffirming *Paul* and collecting cases).

175. 322 U.S. 533 (1944), *superseded by statute*, Act of Mar. 9, 1995 (McCarran-Ferguson Act), ch. 20, 59 Stat. 33 (codified as amended at 15 U.S.C. §§ 1011–1015).

176. *Id.* at 552–53.

177. Act of July 2, 1890 (Sherman Act), ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7).

178. Act of Mar. 9, 1995 (McCarran-Ferguson Act), ch. 20, 59 Stat. 33 (codified as amended at 15 U.S.C. §§ 1011–1015).

179. 15 U.S.C. § 1012(b). As the Supreme Court later made clear, the Sherman Act applies to those activities of insurance companies that do not constitute the business of insurance. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211, 214 (1979) (applying the Sherman Act to insurers' agreements for purchase of pharmaceuticals).

180. Congress's "primary" purpose in enacting the McCarran-Ferguson Act was to shield state laws from constitutional challenge, not to insulate the insurance industry from federal regulation. *Group Life & Health*, 440 U.S. at 218 n.18; *see also* H.R. REP. NO. 79-143, at 3 (1945).

181. 15 U.S.C. § 1012(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."). 15 U.S.C. § 1011 provides:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the

Within months of its enactment, the validity of the McCarran-Ferguson Act came before the Court in *Prudential Insurance Co. v. Benjamin*.[182] The case presented the question of Congress's power to override the Dormant Commerce Clause in its most disturbing form. South Carolina had imposed a 3 percent tax on all insurance premiums collected by insurance companies but had expressly exempted South Carolina insurance companies from the tax.[183] It was abundantly clear that this nakedly discriminatory and protectionist tax violated the Dormant Commerce Clause, and the Court had invalidated similar discriminatory taxes on out-of-state businesses in a number of cases stretching back to the nineteenth century.[184] The only plausible ground on which to sustain South Carolina's tax was to argue, as South Carolina did, that Congress had authorized the states under the McCarran-Ferguson Act to impose such taxes and that such power was constitutional.

The Court wasted little time or effort in concluding that Congress intended the McCarran-Ferguson Act to validate discriminatory insurance taxes, such as South Carolina's. As the Court explained, such taxes existed at the time Congress considered the legislation, and, therefore, Congress must have intended to validate them.[185] That conclusion then presented the ultimate question of whether the Constitution allowed Congress to validate state laws that otherwise would violate the Dormant Commerce Clause.[186] The Court answered that it did, but the Court took a theoretical approach far different from that used in *Rahrer* and its progeny.

The Court confessed that the process of reconciling federal and state authority over interstate commerce was "at times perplexing."[187] Further, it acknowledged that some of its prior Dormant Commerce Clause decisions had "produc[ed] some anomaly of logic."[188] The Court made equally clear that it was unprepared to overrule *Rahrer*, however, noting that "[n]ot yet has this Court held such a [congressional] disclaimer invalid or that state action supported by it could not stand."[189]

Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Id.

182. 328 U.S. 408 (1946).
183. *Id.* at 410–11 & nn.1, 2 (describing ANN. REGS. S.C. CODE §§ 7948–49 (1942)).
184. *See, e.g.*, Welton v. Missouri, 91 U.S. 275, 282–83 (1875).
185. *Benjamin*, 328 U.S. at 430–31.
186. *Id.* at 412.
187. *Id.* at 413; *see also id.* at 413 n.7.
188. *Id.* at 413.
189. *Id.* at 424.

Having laid down its marker that Congress could overrule Dormant Commerce Clause limitations on state authority, the Court confronted the daunting responsibility of providing a theory to justify the doctrine. It made passing mention of the *Bowman/Leisy* silence-equals-preemption premise, which it now relegated to a footnote, but it immediately dispelled the suggestion that Congressional power to overrule the Dormant Commerce Clause rested on the ground that Congress could restore state authority by breaking its legislative silence.[190] Rather, the Court seized on a theory proposed a few years earlier by historian Louis Koenig.[191] Noting the expansive scope of congressional power over interstate commerce, the Court concluded that Congress's commerce power included the authority to regulate such commerce in concert with the states:

> This broad authority [over interstate commerce] Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective.[192]

Thus, the Court ruled that since Congress and South Carolina had endorsed the discriminatory taxation of interstate insurance "in complete coordination,"[193] that policy was "therefore reinforced by the exercise of all the power of government residing in our scheme."[194]

The Court did not discuss *Marbury*, but it is fairly easy to see how this "coordinated action" theory reconciles Congress's power to overrule the

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190. *Id.* at 425–26. The Court stated:

> Such explanations, however, hardly go to the root of the matter. For the fact remains that, in these instances, the sustaining of Congress' overriding action has involved something beyond correction of erroneous factual judgment in deference to Congress' presumably better-informed view of the facts, and also beyond giving due deference to its conception of the scope of its powers, when it repudiates, just as when its silence is thought to support, the inference that it has forbidden state action.

Id.

191. *Id.* at 433 & n.43. Koenig had argued that

> [i]nstead of regarding our two governmental centers as independent agencies, each jealous of any encroachment by the other, we may regard them as mutually supplementary agencies, best performing their tasks through coordinated effort. Thus, through the concurrent exercise of their respective powers, the federal and state governments broaden the sum total of legislative power applicable to a given problem and call into action their combined administrative agencies and facilities.

Louis W. Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752, 755 (1938); *see also id.* at 759–61 (endorsing the constitutionality of "supplementary legislation").

192. *Benjamin*, 328 U.S. at 434–35.

193. *Id.* at 435–36.

194. *Id.*

Dormant Commerce Clause with that case. In contrast to *Rahrer*, which upheld Congress's power by characterizing the Dormant Commerce Clause as a form of statutory preemption,[195] *Benjamin* viewed the Dormant Commerce Clause as a constitutional constraint, but of a unique sort. Generally, we are accustomed to thinking of constitutional constraints as absolute limitations whose existence and scope are independent of Congressional action. For example, whether the Fourteenth Amendment's Equal Protection Clause prohibits a certain state action does not depend on the presence or absence of Congress's consent to the state action but whether the state action violates equal protection.[196] That is not how *Benjamin* conceives of the Dormant Commerce Clause, however.

In *Benjamin*'s view, the Dormant Commerce Clause limits state authority only in the absence of congressional consent to state action. Stated differently, Congress's power to authorize state action is internal to the Dormant Commerce Clause; the exception is built into the constitutional limitation in exactly the same way that the Constitution limits the power of states to wage war or impose tonnage duties only in the absence of Congress's consent.[197] Consequently, when Congress gives its consent to state conduct that would otherwise violate the Dormant Commerce Clause, it is not overruling the Court's interpretation of the Constitution (as *City of Boerne* would condemn).

Before turning to the question whether the Court's view of the Dormant Commerce Clause and the "coordinated action" theory on which it rests are correct, it is critical to note the importance of this question for contemporary doctrine. *Benjamin* remains the foundational case for the modern Court's endorsement of Congress's power to overrule the Dormant Commerce Clause. The Court regularly cites *Benjamin* with approval when mentioning Congress's power to authorize state violations of the Dormant Commerce Clause.[198] Indeed, the Court has dispensed with any reference to the existence of "coordinated action" and instead simply declares that Congress has the power to "authorize" state action[199] or "exempt" the states from the restrictions of the Dormant Commerce Clause.[200] As the Court has stated (in a case with several

195. *See supra* text accompanying notes 133–137.

196. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (concluding that, even if Congress consented to state law imposing a one-year waiting period on welfare benefits, Congress's action is immaterial since Congress may not consent to state laws that violate equal protection), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

197. *See* U.S. CONST. art. I, § 10, cls. 2 & 3.

198. *See, e.g.*, Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003); Northeast Bancorp v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 179 (1985) (O'Connor, J., concurring).

199. *See, e.g.*, *Hillside Dairy*, 539 U.S. at 66; *Northeast Bancorp*, 472 U.S. at 174 (majority opinion).

200. Metro. Life Ins. v. Ward, 470 U.S. 869, 880 (1985).

citations to *Benjamin*), "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."[201] Thus, the contemporary, doctrinal validity of Congress's power to overrule the Dormant Commerce Clause rests upon the validity of *Benjamin*'s "coordinated action" theory.

B. A Beguiling but Mistaken Approach: The Waivable Dormant Commerce Clause

Benjamin's defense of congressional power to overrule the Dormant Commerce Clause rests on the claim that, when Congress undertakes "coordinated action" with the states, "limitations imposed for the preservation of their powers"—evidently meaning the Dormant Commerce Clause—"become inoperative."[202] As a factual matter, treating the congressional statutes authorizing such state action as examples of "coordinated" regulatory policy is fanciful. In enacting the McCarran-Ferguson Act, for example, Congress was not coordinating its regulation of the business of insurance with the states; it was abdicating it. Indeed, the Court acknowledged as much.[203]

More importantly, as a constitutional matter, the Court's appealing (though false) characterization of Congress's action as one of "coordination" with the states is largely beside the point. Describing Congress's statutory authorization of otherwise unconstitutional state action in this attractive terminology still leaves unresolved the difficult theoretical conundrum why Congress, in pursuing such "coordination," may license otherwise unconstitutional behavior by the states. Invoking the fiction of "coordinated action" does not by itself resolve the matter; no one, for example, would suggest that the presence of "coordinated action" by Congress and the states would allow states to resegregate their schools in violation of the Equal Protection Clause.[204] If the result is different under the Dormant Commerce Clause, it must be because the Dormant Commerce Clause differs from the Equal Protection Clause in some respect in which the presence of "coordinated action" matters. In short, the Court's invocation of "coordinated action" is nothing more than

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201. W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652–53 (1981).

202. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

203. *Id.* at 431 & n.39 (noting that the McCarran-Ferguson Act reflected Congress's view that the business of insurance did not require a uniform federal policy); *see also* BITTKER & DENNING, *supra* note 22, § 9.04, at 9-15 (noting that "coordinated action" is "a misnomer unless used loosely").

204. *See* Shapiro v. Thompson, 394 U.S. 618, 641 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

an empty rhetorical ploy obscuring the real issue why the presence of congressional consent should be understood to lift the limitation on state authority imposed by the Dormant Commerce Clause.

Focusing on this central question, one is astounded at how barren the Court's analysis is. The Court's answer is that, in the presence of congressional consent to state laws, "limitations imposed for the preservation of their powers become inoperative."[205] Although the Court did not say as much, its point seems to be that Congress can "waive" constitutional protections that exist for its sake. As a theoretical matter, there is nothing constitutionally troublesome with the notion of waiver; for instance, the Court has acknowledged the propriety of Congress or states waiving constitutional protections that exist for their benefit.[206] The problem is the Court's assumption—and assumption it is—that the Dormant Commerce Clause is one such limitation that exists solely for Congress's benefit, which therefore can be waived by it.

The Court's implicit characterization of the Dormant Commerce Clause as a limitation imposed for Congress's benefit is a novel one. When it first appeared, there was no basis for describing the Dormant Commerce Clause in these terms. Prior to *Benjamin*, the Court had never justified the Dormant Commerce Clause as necessary for Congress's sake. *Gibbons* and *Cooley* spoke of an exclusive commerce power, which necessarily divested the states of like authority over certain commercial matters, while *Bowman* and *Leisy* viewed the Dormant Commerce Clause as the manifestation of Congress's will as expressed by its silence. Perhaps it is for this reason that *Benjamin* made no effort to attribute its view of the Dormant Commerce Clause to a prior decision of the Court.

Whatever its accuracy at the time, however, this view of the Dormant Commerce Clause has been thoroughly repudiated by the Court in subsequent decisions. Just a few years after *Benjamin*, the Court described the Dormant Commerce Clause as a constitutional restriction on state authority designed to protect interstate commerce from state economic protectionism.[207] The modern, post–World War II doctrine is preoccupied with rooting out state economic protectionism, not with identifying state regulatory measures that somehow threaten congressional authority.[208] Moreover, *Benjamin*'s claim that the Dormant Commerce Clause exists for Congress's

205. *Benjamin*, 328 U.S. at 434.

206. *See, e.g.*, Lapides v. Bd. of Regents, 535 U.S. 613, 618 (2002) (acknowledging the power of states to waive Eleventh Amendment sovereign immunity).

207. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533–34 (1949).

208. *See* Norman R. Williams, *The Dormant Commerce Clause: Why* Gibbons v. Ogden *Should Be Restored to the Canon*, 49 ST. LOUIS. U. L.J. 817 (2005).

sake was rejected by the Court in *Dennis v. Higgins*.[209] In that case, the Court held that the Dormant Commerce Clause creates rights for the benefit of and enforceable by individuals pursuant to 42 U.S.C. § 1983.[210] As the Court declared, the Dormant Commerce Clause creates "a 'right' to engage in interstate trade free from restrictive state regulation,"[211] and, furthermore, that "right" is held by individuals who "are engaged in interstate commerce."[212] It is difficult to reconcile this view with that of *Benjamin*, which would call into question the ability of individuals to sue to enforce the Dormant Commerce Clause.[213]

Most importantly, it makes no sense from a theoretical perspective to view the Dormant Commerce Clause as existing for the benefit of, and therefore waivable by, Congress. State commercial regulations pose no threat to Congress's commerce power. If and when Congress wishes to regulate some facet of interstate commerce, all it must do is pass the desired legislation. Once it does, the Supremacy Clause operates to displace any conflicting state regulations.[214] Concurrent state regulation may undermine the vitality of federal commercial regulations in some peripheral fashion, but that problem is completely and adequately addressed through existing implied preemption doctrines.[215] The Dormant Commerce Clause adds nothing, and, its current focus on discriminatory, protectionist state regulations belies any connection to the need to protect congressional authority over interstate commerce.

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209. 498 U.S. 439, 440 (1991).

210. *Id.* at 446 (holding that the Dormant Commerce Clause creates rights enforceable by individuals pursuant to 42 U.S.C. § 1983 (2000)).

211. *Id.* at 448.

212. *Id.* at 449. Even the two dissenting Justices eschewed the notion that the Dormant Commerce Clause exists for Congress's sake. While they disagreed that the Clause creates a personal right held by individuals, they would have held that the Clause exists to promote the economic union of the nation as a whole. *Id.* at 453–54 (Kennedy, J., dissenting).

213. *See also* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 321 n.3 (1977) (holding that individuals have standing to commence Dormant Commerce Clause challenges to state laws).

214. U.S. CONST. art. VI, cl. 2. The Court stated in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824):

> The appropriate application of that part of the [Supremacy C]lause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Id. at 211; *see also id.* at 221 (holding that the Federal Navigation Act of 1793 preempts New York statutes creating a steamboat monopoly).

215. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 866 (2000) (conflict preemption); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98–99 (1992) (plurality opinion) (same); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (same); Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (field preemption).

C. The Regulation of Commerce: Congress's "Need" to Overrule the Dormant Commerce Clause

Perhaps the Court's point in *Benjamin* is not that the Dormant Commerce Clause exists for Congress's sake (which is indefensible), but that Congress's own power over commerce only can be made fully effective by allowing Congress to deputize the states to regulate commerce in ways that would run afoul of the Dormant Commerce Clause. Though the Court in *Benjamin* did not make this point in such terms, that seems to be thrust of its observation that Congress has "broad" authority to regulate commerce either by itself or in conjunction with the states.[216] Though this claim too is novel—the Court has never suggested, other than in *Benjamin*, that Congress must be able to deputize the states in order to be able to regulate commerce effectively—there is some surface appeal to this view from a functional standpoint. After all, because Congress's commerce power is not subject to the limitations of the Dormant Commerce Clause, Congress can enact commercial restrictions that the states would be constitutionally disabled from doing, such as taxing the income from insurance companies from out of state at a higher level than South Carolina-based insurance companies. And, if that is true, what is the big deal in allowing Congress to authorize the states to enact such measures, as Congress did with respect to South Carolina's discriminatory insurance tax? Either way, the outcome is the same (insurance companies from other states pay higher taxes than South Carolina insurers). In light of this, some commentators defend the Court's "coordinated action" approach and argue that it is permissible to read the Commerce Clause as neutral with respect to which route Congress selects—that it allows Congress to decide whether to regulate commerce directly itself or indirectly via the states.[217]

Despite its surface appeal, however, this view of the Commerce Clause is fraught with dangers. We must first ask whether it is true, as *Benjamin* seemed to believe, that Congress's commerce power can be made fully effective only by allowing Congress to deputize the states. Obviously, the appeal of allowing Congress to act in concert with the states lies in the fact, or at least the hope, that there will be greater likelihood of success when both the power of the federal government and that of the states are brought to bear on a particular social or economic problem.[218] While that may be true

216. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

217. BITTKER & DENNING, *supra* note 22, § 9.04, at 9-16.

218. *See, e.g.*, Biklé, *supra* note 172, at 223 (praising "coordination" because "more methods of dealing with concrete problems would be available than would be the case" if there was no

as a general matter, it is hard to see how that is true with respect to the types of actions barred by the Dormant Commerce Clause, particularly protectionist state measures that discriminate against interstate commerce. Most discriminatory measures serve absolutely no plausible public purpose other than gross protectionism.[219] And, if Justice Jackson is to be believed, not only is state protectionism illegitimate, it was precisely to prevent such protectionism that the Commerce Clause was adopted in the first place.[220] How anomalous it would be to say, then, that Congress's commerce power can be made effective only by allowing Congress to authorize the very type of conduct that the Commerce Clause was meant to prevent.

Moreover, it is no answer to point out that there may be discriminatory measures that serve a legitimate public purpose unrelated to gross protectionism.[221] Even if true, it is beside the point. The Dormant Commerce Clause does not condemn such measures.[222] Because states may constitutionally adopt such measures without congressional authorization, there is no constitutional problem with, or need for, congressional authorization. Rather, defenders of Congress's power must confront the question of the power's validity in the form in which such power poses a constitutional problem—namely, in the context of state measures that violate the Dormant Commerce Clause, not in the sympathetic context in which the state measure is admittedly constitutional.

So what practical benefit is obtained by allowing Congress to permit the states to adopt protectionist measures? There is certainly no need for such power. Congress itself may directly impose whatever regulatory burdens it wishes, regardless of their discriminatory or burdensome character.[223] If, for example, Congress wishes to ban the interstate shipment of solid wastes, it simply can do so. In terms of policy efficacy, there is no apparent need for Congress to authorize the states to impose such discriminatory import bans.

While there is no benefit in allowing Congress to restore state authority divested by the Dormant Commerce Clause, there are real dangers in yielding this power to Congress. First, by licensing state actions that discriminate or unduly burden interstate commerce, Congress invites the same centrifugal dangers that the adoption of the Constitution (and the Commerce Clause

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Rahrer power); Koenig, *supra* note 191, at 755 (contending that the federal government may "secure the assistance of the several states, so that it may deal even with problems hitherto deemed beyond its sphere of authority").

219. *See* Metro Life Ins. v. Ward, 470 U.S. 869, 883 (1985) (holding that Alabama's discriminatory insurance tax served no legitimate public purpose).

220. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533–34 (1949).

221. *See* Maine v. Taylor, 477 U.S. 131, 148 (1986).

222. *Id.*

223. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

in particular) was meant to forestall.[224] True, Congress is only permitting such conduct, not mandating it. Yet, it is virtually certain that states will seize the opportunity to act in a protectionist fashion. As the Supreme Court and others have long noted, one of the pernicious features of discriminatory taxes and regulations is that the benefits of the discrimination accrue to in-state citizens while the burdens are cast upon residents of other states, who lack political influence in the discriminating state.[225] Admittedly, every discriminatory tax or regulation imposes some in-state burdens, such as higher prices for consumers of the embargoed product,[226] but that is largely immaterial.[227] So long as the in-state costs are small and borne by a diffuse group of individuals (for example, a small increase in insurance premiums for many policyholders) and the in-state benefits are large and concentrated (for example, higher profits for the few in-state insurance companies), no change in state policy likely will result.[228] The former are unlikely to mobilize to defeat the tax or regulation, while the latter will tenaciously defend it.[229] In short, once authorized, state protectionism is likely to ensue.

We cannot put too much emphasis on this point. Congress, too, can adopt protectionist measures, and one might doubt whether there is some special or additional danger posed by allowing Congress to authorize the states to act in a protectionist fashion. Nevertheless, given our constitutional aversion to state economic protectionism, surely it counts as an argument against such power to note that, in so doing, Congress is encouraging the very evil that the Constitution was adopted to prevent.

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224. *H.P. Hood*, 336 U.S. at 533–34.

225. *See, e.g.*, S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984); S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938); Dowling, *supra* note 169, at 15; Heinzerling, *supra* note 43, at 252.

226. Heinzerling, *supra* note 43, at 253.

227. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) (arguing that discrete and insular minorities may be better situated than the general public in overcoming free rider and other organizational difficulties).

228. Elhauge writes:

> Finally, for any given level of per capita benefit to group members from a legal change, a larger group will likely face a smaller opposition that is more motivated because it suffers greater per capita costs. Hence, large groups are not just less effective in their own right; they also generally face more effective opposition than small groups.

Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 39 (1991); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 892 (1987) (noting that "political activity should be dominated by small groups of individuals seeking to benefit themselves, usually at the public expense").

229. This is also true for nondiscriminatory state taxes or regulations whose costs are spread among many individuals but whose benefits accrue to a select few stakeholders.

Second and more important, allowing Congress to authorize state protectionism makes such protectionism more likely than if Congress were limited to enacting such protectionist measures itself. To understand why, we need to consider how such power affects democratic accountability. As the Supreme Court observed in *New York v. United States*,[230] a blurring of the roles of the federal government and the states undermines the ability of citizens to determine the source of particular policies and hold the appropriate government agent accountable.[231] In fact, in *New York*, which involved a federal statute compelling a state legislature to adopt a federally mandated regulatory program, the Court viewed the danger arising from federal compulsion of state legislative processes as constitutionally impermissible.[232] Admittedly, Congress's power to authorize state conduct that would violate the Dormant Commerce Clause does not present a *New York* problem because Congress does not mandate that states use the authority that Congress confers. However, the impact on democratic accountability is no less real than in the *New York* context.

To see why, consider the hypothetical case of a citizen who has been adversely impacted by a discriminatory state tax adopted pursuant to a congressional authorization, such as a consumer in South Carolina who must pay a higher premium for a life insurance policy because her insurer is located out of state. Our disgruntled citizen may find it difficult to ascertain who is truly to blame for the tax: Congress or the South Carolina legislature. When confronted by an angry constituent, neither will "own up" to the tax. Her Congressman will declare (quite truthfully) that Congress only authorized state regulation and taxation of insurance in general, not the particularly noxious tax that South Carolina adopted. Meanwhile, her state legislator will respond that, although the state did adopt the tax, it did so at the behest of Congress, which (as this legislator will be sure to emphasize) encouraged the states to adopt such measures. After all, as this legislator will ask rhetorically, why would Congress grant such authority if it did not think the states should use it. Indeed, when our valiant but disgruntled citizen points

230. 505 U.S. 144 (1992).

231. *Id.* at 169. The Court stated:

> But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id.

232. *Id.* at 176.

out that such discriminatory taxes are bad for the country and consumers, the state legislator can quite truthfully respond that Congress has disagreed with that judgment in enacting the McCarran-Ferguson Act.[233] In short, both Congress and the state will point to the other as the true champion of the challenged tax. A well-schooled constitutional lawyer may be able to see through this charade, but the vast majority of citizens will almost certainly be confused as to who is really to blame for the tax. Thus, the very "coordination" that the *Benjamin* Court trumpeted serves to diffuse responsibility for the policy choices made pursuant to such congressional authority and, in so doing, blurs the lines of accountability in ways that foster rather than retard state economic protectionism.

Defenders of Congress's power immediately will respond that, unlike at the framing, the nation is not currently in danger of disunion. That is, we can stomach a little protectionism now, and in any event, Congress can supervise the states, modifying its statutory license as necessary to prevent particularly abusive conduct by the states.[234] As one commentator puts it, "Congress is unlikely to give away the store."[235]

This confidence in Congress's watchman abilities, however, is neither deserved nor warranted. As an initial matter, Congress does not always demonstrate a keen desire to guard the national interest against self-serving claims by the states for a restoration of their sovereign authority. To the contrary, Congress often succumbs to political pressure to return legislative power to the states for no particular reason other than a desire to augment state authority and appease state officials. The McCarran-Ferguson Act's wholesale abdication of legislative authority over the business of insurance is one potent example.

More importantly, Congress lacks both the political incentives and the institutional capability to police the states' use of their authority. The blurring of accountability for "coordinated" policy choices serves to immunize those policies, no matter how bad or improvident, from political correction by Congress. So long as Congress has a plausible basis for diverting blame to the states—and, as noted above,[236] it does—there will be little pressure on Congress to change the authorizing statute. Indeed, the fact that Congress has not

233. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430–31 & nn.39, 40 (1946).

234. Biklé, *supra* note 172, at 224; Dowling, *supra* note 169, at 23.

235. Cohen, *supra* note 23, at 408; *see also* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 543 (1949) ("It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.").

236. *See supra* text accompanying note 233.

modified or limited the scope of the McCarran-Ferguson Act's authorization of state regulation and taxation of insurance testifies, at least in part, to the political insulation Congress enjoys. Moreover, even if political pressure builds in Congress to limit or retract the states' authority, its ability to do so is severely circumscribed by constitutional limitations on Congress's lawmaking powers.[237] It would take only a bare majority of one house (or the President, plus one-third of one house) to block any legislation contracting state authority. The institutional inertia built into the legislative process, then, would favor protectionism.[238]

Lastly, even if one continues to believe that the Constitution is indifferent to whether Congress itself enacts a discriminatory commercial regulation or income tax, or instead authorizes the states to do so, it is clear that the Constitution is not neutral with respect to discriminatory excise taxes. Unlike the federal income tax,[239] the Constitution requires that indirect taxes, such as duties, imposts, and excise taxes, "shall be uniform throughout the United States."[240] As the Supreme Court has explained, this uniformity requirement prevents Congress from using its taxation power in a discriminatory fashion that favors some states over others.[241] Thus, Congress cannot levy a discriminatory tax itself, such as an excise tax that imposes a higher rate on insurance policies issued by insurers located in New Jersey

237. *See* INS v. Chadha, 462 U.S. 919, 948–49 (1983) (holding that Congress may make a new law only by satisfying the presentment and bicamerality requirements of Article I, Section 7).

238. *Cf.* Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) ("I differ basically with my brethren as to whether the inertia of government shall be on the side of restraint of commerce or on the side of freedom of commerce.").

239. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

240. *Id.* art. I, § 8, cl. 1. There are several constitutional limits on federal direct taxes, such as property taxes. *See id.* § 2, cl. 3 ("[D]irect Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."); *id.* § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census . . . ."). The Constitution also prohibits federal taxes on exports, *see id.* at cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."), but the Supreme Court has interpreted this restriction to apply only to exports to foreign nations, not to interstate exports. *See* Dooley v. United States, 183 U.S. 151, 153–54 (1901).

241. United States v. Ptasynski, 462 U.S. 74, 81 (1983) (noting that at the Constitutional Convention, "[t]here was concern that the national government would use its power over commerce to the disadvantage of particular States. The Uniformity Clause was proposed as one of several measures designed to limit the exercise of that power"); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 957 (Boston, Hilliard, Gray & Co. 1833) ("[The purpose of the uniformity requirement] was to cut off all undue preferences of one state over another in the regulation of subjects affecting their common interests.").

than in South Carolina.[242] Given that fact, it seems indefensible to allow Congress to authorize the states to impose discriminatory excise taxes. The revenue may not go into the federal treasury,[243] but the same danger of congressional preference for particular states still exists. Indeed, because Congress's responsibility for such preferential treatment could be obscured by the intervening action of the favored states for the reasons discussed above, there may be even greater danger in allowing Congress to do indirectly what it cannot do directly.

In sum, Congress's power over interstate commerce is indeed broad, but it need not and does not include the ability to authorize state action that otherwise would violate the Dormant Commerce Clause in contravention of *Marbury*. Congress's power to regulate interstate commerce is fully effective without adding to it the authority to approve unconstitutional state conduct. *Benjamin*'s defense of the contrary view is little more than constitutional smoke and mirrors. While the invocation of a "coordinated effort" between the federal government and the states is a rhetorically appealing one, the benefits of such "coordination" are few, if any, and the potential costs are great. Indeed, given the historical fears that animated the adoption of the Commerce Clause in the first place, one is surely on safer ground in adhering to the otherwise universal rule drawn from *Marbury* that Congress may not overrule the Supreme Court's interpretation of the Constitution, including that of the Dormant Commerce Clause.

IV. THE DORMANT COMMERCE CLAUSE AS A "WEAK" CONSTITUTIONAL CONSTRAINT

Despite the Court's failure to justify Congress's authority to overrule the Dormant Commerce Clause, its efforts do not exhaust all of the possible, theoretical justifications for this extraordinary power. In contrast to the Court, which has characterized the Dormant Commerce Clause as a restriction on state authority that serves to protect federal power, one could instead argue that the force of the constitutional restriction imposed by the Dormant Commerce Clause is somehow less than that of the First Amendment

242. *Ptasynski*, 462 U.S. at 84 (ruling that "the Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found"); *see also id.* at 85–86 (holding that a federal windfall profit tax exemption for Alaskan crude oil did not violate the Uniformity Clause because there was no evidence that the geographically defined exemption was adopted to give preference to Alaskan oil over other states').

243. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 438 (1946) (rejecting a Uniformity Clause challenge to the McCarran-Ferguson Act on this ground).

or other constitutional provisions, which are "strong" constitutional constraints that Congress may not authorize the states to override. That is, one could say that the Dormant Commerce Clause's limitations on state authority are "weak" or "provisional" in some sense. So characterized, the Dormant Commerce Clause can be overridden not because it is waivable by Congress, as with *Benjamin*'s "coordinated action" theory, but because congressional abrogation of the Dormant Commerce Clause is somehow implicit either in the constitutional scheme or the Dormant Commerce Clause itself.

Though the notion of "weak" constitutional constraints may strike many as anomalous, several constitutional commentators have been attracted to this defense. For example, William Cohen contends that, under our constitutional structure, all federalism-based restrictions on state authority, including but not limited to the Dormant Commerce Clause, are subject to congressional abrogation.[244] This view, assessed in Part IV.A, treats the Dormant Commerce Clause as simply one among many weak constitutional limitations on state authority. Alternatively, Mark Tushnet and Laurence Tribe take the more limited view that the Dormant Commerce Clause is special.[245] According to this view, evaluated in Part IV.B, the Dormant Commerce Clause is unique in limiting state power only in the absence of congressional permission. As I show in this part, neither view is persuasive.

A. A General Authority to Allow Violations of Federalism-Based Restrictions on State Authority

William Cohen is truly a revolutionary. According to Cohen, Congress may not only authorize the states to engage in conduct that would otherwise violate the Dormant Commerce Clause, it may also license state action that would run afoul of other federalism-based restrictions on state authority, including the Equal Protection Clause, the Due Process Clause, the Contract Clause, and the Privileges and Immunities Clause of Article IV.[246] Cohen's proposed rule—which he labels the "consent principle"—is breathtaking in its scope: "Congress can consent to state laws where constitutional restrictions bind the states but not Congress."[247]

Where, one might ask, does Cohen find support for such an extraordinary view? The answer is the Court's decision in *Benjamin*—specifically, its embrace of the notion that "coordinated action" by the federal government and the

244. Cohen, *supra* note 23, at 388.
245. 1 TRIBE, *supra* note 25, § 6-2, at 1039; Tushnet, *supra* note 24, at 1724.
246. Cohen, *supra* note 23, at 388.
247. *Id.* at 406.

states is immune from Dormant Commerce Clause restrictions.[248] Yet, the resemblance of Cohen's theory to the Court's is superficial only. *Benjamin* limited its focus to the Dormant Commerce Clause and derived Congress's authority to overrule the Clause from its affirmative commerce power; in contrast, Cohen views the constitutionally liberating effect of the "coordinated exercise" of federal and state power as drawn from a more global view of the nature of the Constitution's restrictions on governmental authority.[249] Specifically, Cohen distinguishes between those constitutional limitations that equally bind both the federal government and the states (provisions protecting individual liberty) and those limitations that apply only to the states. The latter are subject to the consent principle because they do not reduce the residuum of sovereignty possessed by the United States but merely allocate it among the federal government and the states. Moreover—and this is where Cohen gets radical—the Constitution's allocation of power is merely tentative and subject to congressional revision.[250] As Cohen puts it, "The proposition that the constitutional allocation of power to Congress, and the concomitant denial of power to the states, cannot be altered by ordinary legislation is a canard."[251] For this reason, Cohen concludes that the Constitution—not just the Dormant Commerce Clause—"does not restrict 'the coordinated exercise' of federal and state authority."[252]

There is an elegant simplicity to this view. The determination whether Congress has the power to authorize purportedly unconstitutional conduct by the states collapses into the inquiry whether such action, if undertaken by Congress, is constitutional.[253] Thus, according to Cohen, because Congress may not discriminate on the basis of gender, neither may it authorize the states to do so.[254] But, because Congress may tax commercial transactions anywhere in the United States, there is no constitutional problem with Congress authorizing the states to tax out-of-state transactions despite the Due Process-based limitation on extraterritorial state legislation.[255]

Its simplicity and elegance notwithstanding, there are several flaws in Cohen's approach. As a descriptive matter, Cohen's view is at odds with the Supreme Court's understanding of the Constitution. Outside of the Dormant Commerce Clause context, the Court has never recognized the power of

248. *Benjamin*, 328 U.S. at 434–35.
249. Cohen, *supra* note 23, at 399–400.
250. *Id.* at 406.
251. *Id.*
252. *Id.* at 400 (quoting *Benjamin*, 328 U.S. at 438).
253. *Id.* at 411–12.
254. *Id.* at 400–01.
255. *Id.* at 401.

Congress to waive federalism-based limitations on state authority. For example, the Contract Clause of Article I, Section 10 prohibits the states, but not Congress, from making any law "impairing the Obligation of Contracts."[256] Under Cohen's view of the Constitution, there is no problem with Congress authorizing state impairments of preexisting contractual obligations.[257]

Not so, said the Supreme Court in *White v. Hart*,[258] a decision that Cohen does not address. Decided in the wake of the Civil War, *White* involved the tricky issue of the enforceability of prewar contracts for slaves. Prior to the war, William White had sold a slave to John Hart, who gave a promissory note for the purchase price. Hart subsequently defaulted on the note, and, after the end of the war, White sued to recover on the note. While the suit was pending, Georgia adopted a new constitution that expressly denied state courts jurisdiction to hear suits involving debts arising from the purchase and sale of slaves.[259] The practical effect of this provision was to make prewar contracts regarding slaves legally unenforceable,[260] and, under then-prevailing

256. U.S. CONST. art. I, § 10, cl. 1. The debt relief laws enacted by the states in the wake of the Revolutionary War had triggered great apprehension among creditors that debtors would use their political power in state legislatures to obtain statutory relief. The Contracts Clause was presumably included in the Constitution to address these fears. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.3.1, at 605–06 (2d ed. 2002); Richard A. Epstein, *Toward a Revitalization of the Contracts Clause*, 51 U. CHI. L. REV. 703, 706–07 (1984). Because there was no similar concern that debtors could capture the congressional legislative process, the Constitution imposed no similar restriction on Congress. *Id.* at 715–16.

257. Cohen, *supra* note 23, at 388. Cohen later suggests that the Due Process Clause may protect contractual obligations from congressional interference by limiting Congress's power to act retroactively. *Id.* at 411 & n.112. Whatever the exact scope of the Due Process Clause's limitation on retroactive legislation, there can be no question that Congress may impair contractual obligations in ways that the Contract Clause forbids the states to do. *See* U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to regulate bankruptcies).

258. 80 U.S. (13 Wall.) 646 (1871).

259. GA. CONST. of 1868, art. V, § 17 ("No Court or officer shall have, nor shall the general assembly give, jurisdiction or authority to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof."). Georgia's purpose in enacting the provision was not to eradicate the last vestiges of slavery and the state's involvement in it; rather, it was prompted by a pro-debtor conviction that it was unfair to require slave-owning debtors to repay creditors for the purchase of slaves that had since been emancipated. *See* CONG. GLOBE, 40th Cong., 2d Sess. 2999 (1868) (statement for Sen. Williams) (discussing Georgia's motivation in enacting the provision).

260. Technically, the provision did not render unenforceable all debts arising from the sale of slaves. The provision only denied state court jurisdiction, but did not invalidate the underlying debt, thereby leaving open the possibility that suit could be maintained in federal court on the basis of diversity of citizenship. The then-applicable $500 amount-in-controversy requirement for diversity jurisdiction presumably would not have hindered many such suits; debts arising from the purchase of slaves often exceeded that amount. *See, e.g.*, *White*, 80 U.S. at 647 (noting that the debt sued upon was $1230). Nevertheless, federal jurisdiction was unavailable for nondiverse parties, such as White and Hart who were both Georgia citizens.

doctrine, there was no question that Georgia's action violated the Contract Clause by eliminating all legal remedies for violation of a contractual covenant.[261]

To support the constitutionality of the jurisdiction-stripping provision, and thereby evade having to pay for the now-emancipated slave that he had purchased, Hart argued that the Contract Clause did not apply because Congress had expressly approved the provision in readmitting Georgia into the Union. There was no dispute that Congress in fact had approved the provision. The statute conditionally approving Georgia's readmission into the Union expressly approved the existence of the jurisdiction-stripping provision,[262] and the legislative debates clearly confirmed Congress's endorsement of the provision.[263] The critical question was whether Congress's approval of the provision had the legal effect of immunizing it from challenge under the Contract Clause. The Georgia Supreme Court had ruled that it did, declaring tersely that because of Congress's action, any impairment of the contractual obligation was "done by Congress and not by the State."[264]

The United States Supreme Court took a different view. At first, the Court appeared to try to avoid the issue whether Congress could license violations of the Contract Clause by suggesting that Georgia had drafted its Constitution with its jurisdiction-stripping provision and had submitted it to Congress "as a voluntary and valid offering."[265] The Court was trying to minimize, if not eliminate entirely, Congress's role in approving the jurisdiction-stripping provision. That tack, however, was belied by the actual legislative history of the provision. Although the Georgia Supreme Court was wrong in holding that the jurisdiction-stripping provision was adopted by Congress and forced upon an unwilling state, the U.S. Supreme Court was also wrong in attempting to attribute the provision exclusively to Georgia. Not only had Congress conditioned Georgia's readmission on the submission of a new constitution acceptable to Congress,[266] Congress had used that authority to require Georgia to accept congressional modifications to certain provisions in the proposed constitution. In fact, in the same act that endorsed the

261. Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 552 (1867); Bronson v. Kinzie, 42 U.S. (1 How.) 311, 317 (1843); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 84 (1823).

262. Act of June 25, 1868, ch. 70, § 1, 15 Stat. 73, 73.

263. *See* CONG. GLOBE, 40th Cong., 2d Sess. 3005 (1868) (statement of Sen. Morton). *See generally* CONG. GLOBE, 40th Cong., 2d Sess. 2968–70, 2998–3008 (1868) (debating and rejecting a proposed amendment to approve in part and disapprove in part the Georgia constitution's debt provision).

264. Shorter v. Cobb, 39 Ga. 285, 305 (1869); *see also* White v. Hart, 39 Ga. 306 (1869) (affirming dismissal of suit for reasons stated in *Shorter*), *reversed by* White v. Hart, 80 (13 Wall.) U.S. 646 (1871).

265. *White*, 80 U.S. at 649.

266. Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429 (requiring, inter alia, rebel states to have "submitted to Congress for examination and approval" new state constitutions before resuming congressional representation).

elimination of jurisdiction for slave debts, Congress had rejected a more general provision stripping the Georgia courts of jurisdiction over debts incurred during the Civil War.[267] Moreover, Congress did so because, in its view, such a provision would violate the Contract Clause![268] Thus, Congress's fingerprints on the slave debt provision were patent and unmistakable. While it was unfair to attribute the slave debt provision solely to Congress, it was equally unfair to attribute it solely to Georgia. The Court could not avoid addressing whether Congress's approval of the provision immunized it from Contract Clause challenge.

Sensing the inadequacy of its first rejoinder to the Georgia Supreme Court, the Supreme Court confronted the effect of Congress's approval. The Court was both bold and direct: "We may add, that if Congress had expressly dictated and expressly approved the proviso in question, such dictation and approval would be without effect. Congress has no power to supersede the National Constitution."[269] The Court's meaning was perfectly clear: Even though Congress was not constrained by the Contract Clause, Congress could not authorize any of the states to violate that provision. So much for the constitutionally liberating effect of "coordinated action" between the federal government and the states.

Take also the Privileges and Immunities Clause of the Fourteenth Amendment, which prohibits the states from abridging the privileges and immunities of national citizenship.[270] Because that clause limits only the powers of the states and not of Congress,[271] Cohen's consent principle would presumably permit Congress to authorize state action that otherwise would

267. Act of June 25, 1868, § 1, 15 Stat. at 73 (conditioning Georgia's congressional representation on the removal of a provision in the Georgia constitution stripping state constitutions of jurisdiction over debts incurred during the Civil War).

268. *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 3001 (1868) (statement of Sen. Conkling) (denouncing the general jurisdiction-stripping provision as violative of the Contract Clause). The elimination of jurisdiction for slave debts, however, did not similarly violate the Contract Clause because, as one senator reassured his colleagues, such action rests on "higher law." *Id.* at 2999 (statement of Sen. Edmunds). *See also id.* at 3005 (statement of Sen. Morton) (arguing that repudiation of slave debt stood on a different moral footing than repudiation of other types of debts). While undoubtedly true, neither Congress nor the Court considered the possibility that Congress had the power under the Thirteenth and the Fourteenth Amendments to abrogate the Contract Clause with respect to slavery-based debts. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress has power under the Reconstruction Amendments to abrogate the Eleventh Amendment).

269. *White*, 80 U.S. at 649.

270. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

271. *See, e.g.*, *In re* Storer, 58 F.3d 1125, 1128 (6th Cir. 1995).

violate this provision. Not so, said the Supreme Court in *Saenz v. Roe*.[272] In that case, the Court held that California's statutory provision limiting welfare benefits to individuals who recently had migrated to California from other states violated the Privileges and Immunities Clause of the Fourteenth Amendment.[273] California defended its statute on the ground that Congress had expressly authorized the states to adopt such limits, but the Court was blunt: "Congress may not authorize the States to violate the Fourteenth Amendment."[274]

In addition, the Court's decision in *Saenz* almost certainly precludes Cohen's suggestion that Congress may authorize the states to take action that would violate the Privilege and Immunities Clause of Article IV, which prohibits the states from abridging the privileges and immunities of state citizenship.[275] In *Saenz*, the Court recognized three components to the so-called "right to travel": the right to enter and leave a state; the right, when temporarily visiting a state, to be treated as a welcome visitor; and, the right, when moving permanently to a new state, to be treated equally with other citizens of the state.[276] While the Court did not link the first component to any particular provision in the constitutional text, it expressly attributed the second component to the Privileges and Immunities Clause of Article IV and the third component to the Privileges and Immunities Clauses of both Article IV and the Fourteenth Amendment.[277] Strictly speaking, linking the right to equal treatment to the Fourteenth Amendment obviated the need for the Court to address whether Congress could authorize violations of the Privilege and Immunities Clause of Article IV. Yet, as Laurence Tribe has observed, it would be incongruous for the Court to hold that Congress may not authorize the states to treat new permanent residents unequally with other citizens, but that it may license the states to treat temporary visitors in a hostile fashion.[278] Indeed, it would be more than incongruous; it would be unprincipled, because neither Privileges and Immunities Clause applies to Congress. Hence, if Congress may not authorize the violation of the Privileges

272. 526 U.S. 489 (1999).
273. *Id.* at 511.
274. *Id.* at 507.
275. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). *But see* Cohen, *supra* note 23, at 388, 413–14.
276. *Saenz*, 526 U.S. at 500.
277. *Id.* at 501–03.
278. 1 TRIBE, *supra* note 25, § 6-35, at 1243 n.35.

and Immunities Clause of the Fourteenth Amendment, consistency demands a similar treatment for the Privileges and Immunities Clause of Article IV.[279]

Given the Court's refusal to accept congressional power to authorize state violations of constitutional provisions applicable solely to the states, it is clear that Cohen has overread *Benjamin* and its significance to our constitutional structure. Of course, as noted above, the Court in *Benjamin* spoke exclusively of the Dormant Commerce Clause and did not suggest that the decision or its reasoning applied more globally to other constitutional limitations on state authority.[280] While Cohen viewed *Benjamin*'s proffered justification for congressional abrogation of the Dormant Commerce Clause as applying outside that context, the Court has not understood *Benjamin* as staking out such an expansive conception of congressional power.

But we cannot be too quick here. Even if Cohen's theory is descriptively inaccurate, it may nevertheless be normatively justified. Perhaps Cohen is right about *Benjamin*, and it is the Court, not Cohen, that has misread *Benjamin* and failed to appreciate its significance for other constitutional provisions.

Even as a normative matter, however, Cohen's theory is unpersuasive. Like *Benjamin*, on which it is based in part, Cohen's consent principle invites the same centrifugal forces that the Constitution's allocation of powers was meant to forestall and undermines the principles of accountability underlying our political system.[281] Indeed, because Cohen would apply his consent principle to other constitutional provisions, these dangers are magnified.

There is an additional problem with Cohen's consent principle. Central to Cohen's argument is the claim that the Constitution's allocation of powers is merely tentative—that Congress may reallocate those powers, reinvesting the states with legislative authority that the Constitution had denied them.[282] This assertion is flawed. Contrary to Cohen's assertion, the Constitution does not allocate the governmental powers between the federal government and states, conferring some powers on Congress and denying others to the states, only to have Congress redo that allocation at will. For example, Congress cannot reinvest the states with their preexisting power to coin their own money or engage in their own foreign relations by sending and accepting ambassadors.[283] Moreover, were Cohen correct, Congress simply could repeal

279. *See also* Piper v. Supreme Court of New Hampshire, 723 F.2d 110, 113 (1st Cir. 1983) (en banc) (declaring that Congress does not have the power to authorize state violations of the Privileges and Immunities Clause of Article IV).

280. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

281. *See supra* text accompanying notes 224–238.

282. Cohen, *supra* note 23, at 406.

283. *See* U.S. CONST. art. I, § 10, cl. 1.

all existing federal regulatory statutes, announce that it would no longer exercise legislative authority under the Constitution, void all federalism-based restrictions on state authority, and vote itself out of existence, at least until the next scheduled congressional election. No one, of course, would accept that such action would be permissible under the Constitution.[284] This would be little more than a congressional suspension of the Constitution en toto—something that the Constitution conspicuously does not permit.[285]

The inconsistency between Cohen's consent principle and our constitutional structure can be seen in another way. For Cohen, the consent principle is a constitutional one-way street, allowing Congress to void constitutional limitations on state action imposed for the benefit of Congress. But why should the consent principle not work in the opposite direction, too, empowering states to void constitutional limitations on congressional action that were imposed for their benefit? If the Constitution's allocation of power between the two sovereigns is merely tentative, there is no reason in principle why the states may not reallocate some of their powers to Congress by consenting to congressional legislation that otherwise would be beyond Congress's authority to enact.

That suggestion, of course, is truly heretical and at odds with the constitutional design. As the Supreme Court has repeatedly instructed, the federal government is one of enumerated powers.[286] The Tenth Amendment confirms this central feature of our constitutional structure. Moreover, as the Court has expressly noted, the Constitution's allocation of powers and the limit on federal authority implicit in such allocation do not exist simply for their own sake or even for the benefit of the states as such, but as a key safeguard of individual liberty.[287] It is for this reason that states may not consent to congressional overreaching. Thus, Congress may not regulate

284. *Cf.* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.").

285. There is no "suspension" clause empowering Congress to set aside or ignore the Constitution. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650–51 (1952) (Jackson, J., concurring) (rejecting the claim that an emergency justifies the President in ignoring constitutional procedures for making policy). Indeed, negating the existence of any such general authority, the Constitution contemplates the suspension of a constitutional provision in only one, limited circumstance. U.S. CONST. art. I, § 9, cl. 2 (providing for suspension of writ of habeas corpus in times of rebellion or invasion when the public safety requires it).

286. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 (2000); City of Boerne v. Flores, 521 U.S. 507, 516 (1997); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

287. *Morrison*, 529 U.S. at 616 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of Government so that *the people's rights* would be secured by the division of power.") (emphasis added).

the possession of firearms near schools, even if particular states consent to such legislation being enforced within their borders.[288]

In short, Cohen's consent principle is inconsistent with our constitutional scheme. There is no *general* power held by Congress to license the states to violate federalism-based limitations on their authority, such as that imposed by the Dormant Commerce Clause. Rather, where the Constitution allocates authority to the federal government over a particular area of national life and divests the states of authority over such an area, the federal government may not reinvest the states with their preexisting sovereign authority.

B. The Dormant Commerce Clause: A Weakly Exclusive Power?

Even if Congress does not have some general authority to waive constitutional limitations on state power, perhaps it has the power to lift the particular restriction on state authority imposed by the Dormant Commerce Clause. Although the Court's efforts have been unsuccessful, one might take the view that the Dormant Commerce Clause's restriction on state authority is only provisional and that, therefore, Congress does no violence to the Dormant Commerce Clause in authorizing state action at odds with it. Mark Tushnet has proposed an argument along these lines.[289]

Tushnet is sympathetic to the original justification for a Dormant Commerce Clause—namely, that Congress's commerce power is exclusive and therefore necessarily divests the states of regulatory authority over interstate commerce.[290] But Tushnet is uncomfortable with the notion that the states have no authority to regulate those matters that Congress may regulate—a fact with dramatic consequences for state authority given the expansive extent of Congress's modern commerce power.[291] Consequently, Tushnet posits that "Congress's power might not be fully exclusive, in the sense that the mere existence of the power necessarily invalidates all state regulations of interstate commerce. But, it might be 'almost exclusive' or

288. United States v. Lopez, 514 U.S. 549, 567–68 (1995) (invalidating the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104. Stat. 4789, 4844 (prior to 1996 amendment)). Indeed, the Court struck down the Act, despite the fact that such conduct was unlawful under Texas state law, that the state had initially begun to prosecute Mr. Lopez, and that the state had voiced no objection to the federal prosecution. *See id.* at 551.

289. *See* Tushnet, *supra* note 24, at 1720–23.

290. *Id.* at 1720; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824).

291. Tushnet, *supra* note 24, at 1722–23.

'sort of exclusive,' in an appropriate sense."[292] Tushnet thus characterizes Congress's commerce power as a "weakly exclusive power."[293]

But what does Tushnet mean by a "weakly exclusive power"? Tushnet answers that, although ordinarily Congress must act to preempt state authority, the weakly exclusive nature of the Commerce Clause "switches the burden" to proponents of state regulatory authority, requiring them to obtain congressional permission for state legislation.[294] Thus, Congress may authorize the states to regulate interstate commerce because the Commerce Clause "only shifts the ordinary assumption that states have plenary power to a presumption that states lack power to regulate interstate commerce, which can be overcome by congressional action."[295] So viewed, the Dormant Commerce Clause is not an absolute restriction on state authority; rather, it is a limitation on state action only in the absence of congressional authorization.

The similarity of Tushnet's theory to the Court's silence-equals-preemption rationale is striking and unmistakable. Although he does not couch the Dormant Commerce Clause as a restriction flowing from an inference of Congress's preemptive intent, in practice the two theories are identical. The only difference is that the Court actually believed that Congress's silence indicated a real preemptive intent on Congress's part, but Tushnet acknowledges that his is merely a "presumption" about Congress's intent drawn from the Constitution's quasi-exclusive vesting of the commerce power in Congress. Moreover, while Tushnet locates his restriction on state authority in the Constitution itself, he avoids the *Marbury* dilemma because, by his theory, Congress's authorization of state action that violates the Dormant Commerce Clause is not inconsistent with the Clause, which is merely a rebuttable "presumption."

Tushnet's theory of a "weakly exclusive" commerce power is an imaginative reformulation, but the critical question is whether it avoids the fatal flaws that are present in the Court's silence-equals-preemption rationale that it so closely mirrors. Tushnet's theory is unconcerned with Congress's actual legislative intent, and so he avoids the first problem with the silence-equals-preemption rationale, which was the severe doubt that, as a factual matter, Congress's silence represented an actual desire to preempt state authority. But Tushnet runs straight into the second problem: The Constitution—most notably the Supremacy Clause—does not condition state power on the presence of congressional authorization, but rather presumes the existence of

292. *Id.* at 1724.
293. *Id.*
294. *Id.*
295. *Id.* at 1724 n.35.

such legislative authority unless and until Congress acts. As noted above, the Constitution does not require states to seek leave from Congress to legislate.[296]

Tushnet attempts to circumvent the second problem by arguing that, while that is true generally, it does not apply with respect to the Commerce Clause, which is a "weakly exclusive" grant to Congress that reverses the normal constitutional presumption regarding state authority. Yet, this view of the Commerce Clause is hardly a self-evident one. Certainly, the constitutional text does not characterize the commerce power as "weakly exclusive."[297] And, as Tushnet recognizes, the framers' discussions of the Commerce Clause's impact on state authority were few and unilluminating, at least with respect to this question.[298]

Nor would it be desirable to treat the commerce power as "weakly exclusive." Such a view legitimizes Congress's power to overrule the Dormant Commerce Clause, but it does so in a way that transforms our traditional understanding of state authority under the Clause. As currently understood, the scope of the Clause differs from and is narrower than that of the "affirmative" Commerce Clause—Congress may take actions, such as regulating the consumption of homegrown wheat that, if they were undertaken by the states, would pose no problem under the Dormant Commerce Clause.[299] Stated differently, the commerce power is "selectively exclusive." Tushnet's "weakly exclusive" conception of the commerce power, however, does not limit the scope of the Dormant Commerce Clause in this fashion but rather equates the scope of the Dormant Commerce Clause with that of the "affirmative" Commerce Clause. All Tushnet does is lessen the force of this exclusivity, hence the term "weakly exclusive." Stated differently, under Tushnet's theory, the Dormant Commerce Clause is broader in scope but potentially weaker in force than under the prevailing understanding of the Clause.

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296. *See supra* text accompanying notes 152–157.

297. Of course, neither does it say that the power is "exclusive." Seizing upon this textual silence, Justice Scalia concludes that the power necessarily must be concurrent with the states, because the Constitution expressly describes other congressional powers as exclusive, such as Congress's power to "exercise exclusive Legislation" over the District of Columbia. *See* Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part).

298. Tushnet, *supra* note 24, at 1723 (discussing the limited significance of James Madison's statement at the Constitutional Convention that Congress's power to regulate interstate commerce "seem[s] to exclude the power of the States" (citing *Tyler*, 483 U.S. at 263 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (Max Farrand ed., 1937)))).

299. *Compare* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that commerce power authorizes Congress to regulate intrastate activities that have "substantial economic effect" on interstate commerce), *with* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87–89 (1986) (holding that the Dormant Commerce Clause prevents states from adopting regulations that discriminate against or impermissibly burden interstate commerce).

This transformation of the Dormant Commerce Clause would have significant implications for state authority in several ways. It would severely limit state authority by rendering presumptively unconstitutional all state commercial regulations; anything that Congress could do under its regulatory power, such as regulate the intrastate possession of narcotics,[300] would be prohibited to the states in the absence of congressional permission. That would hardly be attractive.[301] Yet, at the same time, Tushnet's "weakly exclusive" conception of the commerce power would expand state authority by making all matters within the scope of the Dormant Commerce Clause subject to congressional overruling. Though the Court has never acknowledged a limit on Congress's overruling authority,[302] Laurence Tribe has argued persuasively that there must be some inherent restriction on Congress's power—that there are some state actions condemned by the Dormant Commerce Clause that Congress cannot properly validate. The example Tribe uses is a hypothetical federal statute imbuing Massachusetts with the power to regulate commercial air traffic throughout the nation.[303] Surely, Tribe argues, such a statute would be unconstitutional.[304] Thus, Tushnet's "weakly exclusive" conception of the commerce power both understates state authority and overstates federal authority in unappealing ways.

As a last line of defense, Tushnet suggests that his theory best explains and accounts for the Supreme Court's Dormant Commerce Clause decisions over the past century and a half.[305] Of course, the Court has never said that the commerce power was "weakly exclusive," and, for the reasons just discussed, it is not plausible to argue that such a theory best explains the *results* of the Court's decisions. More fundamentally, however, this defense assumes the correctness of the very decisions, *Rahrer* and *Benjamin*, whose correctness is in question. Hence, this justification is irredeemably circular.

Apprehending these problems with Tushnet's approach, Tribe has offered a slightly more modest defense of Congress's power to overrule the Dormant Commerce Clause. Unlike Tushnet, Tribe acknowledges that there is a body of state commercial regulations, such as health inspections statutes, over which Congress's power is not exclusive at all and which the states may undertake without Congressional authorization.[306] Likewise, as noted above, he also

300. Gonzales v. Raich, 125 S. Ct. 2195 (2005).
301. 1 TRIBE, *supra* note 25, § 6-2, at 1038.
302. *See infra* text accompanying note 310.
303. 1 TRIBE, *supra* note 25, § 6-2, at 1038.
304. *Id.* at 1039
305. *See* Tushnet, *supra* note 24, at 1719.
306. 1 TRIBE, *supra* note 25, § 6-2, at 1039.

contends that there is a body of state commercial measures, such as the regulation of extraterritorial transactions, over which Congress's power is fully exclusive and which Congress may not authorize the states to undertake.[307] Between these two categories of state actions, however, Tribe posits the existence of a third camp consisting of measures that, "while not constituting regulations of interstate or foreign commerce as such (and thus not falling within the second category), are *presumptively incompatible* with the constitutional plan in which Congress, and Congress alone, is entrusted to regulate interstate and foreign commerce."[308] For Tribe, it is this middle category—and only this middle category—that is subject to congressional authorization.[309] Thus, unlike Tushnet, Tribe defends Congress's power to overrule the Dormant Commerce Clause only with respect to certain state actions within the Dormant Commerce Clause's compass.

Before turning to the more fundamental question why Congress should be allowed to authorize states to enact measures that are "presumptively incompatible" with the constitutional plan, it is first important to note that, unlike Tushnet, Tribe does not offer his theory as an account of the Supreme Court's Dormant Commerce Clause doctrine. Tribe limits Congress's power to authorize state action to only certain measures that violate the Dormant Commerce Clause—namely, those that are "presumptively incompatible" but not "inherently incompatible" with the constitutional scheme. As noted above, however, the Court has not announced such a limitation on Congress's power, and it has even acted in ways inconsistent with Tribe's approach, upholding congressional statutes that seem to approve of state action that would fall into Tribe's "inherently incompatible" category of state actions.[310] Thus, Tribe's theory is not a positive one that attempts to explain what the Court has done, but rather a normative one that argues what the Court should do.[311]

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307. *Id.*

308. *Id.*

309. *Id.*

310. *See, e.g.*, N.E. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 174 (1985) (rejecting a Dormant Commerce Clause challenge to a Massachusetts reciprocal bank regulation because Congress authorized such a statute); W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655, 668 (1981) (rejecting a Dormant Commerce Clause challenge to California's insurance reciprocity tax because Congress authorized such a tax by enacting the McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2000)) despite the fact that the purpose of the state law was to encourage changes in other states' legal regimes).

311. Of course, there may be practical difficulties with implementing Tribe's proposed approach. Tribe does little to illuminate how to determine what type of commercial regulation is "inherently incompatible" with the constitutional plan versus one that is only "presumptively incompatible" with such plan. Tribe tells us that it is the Court's job to determine the matter, 1 TRIBE, *supra* note 25, § 6-2, at 1039, but that simply identifies *who* will perform the difficult

Like the Court in *Benjamin*, Tribe derives Congress's power to authorize the states to act in ways that would otherwise violate the Dormant Commerce Clause from Congress's affirmative commerce power. As Tribe puts it, the Commerce Clause empowers Congress to regulate commerce either directly by establishing a set of rules for corporations and individuals to follow, or indirectly, "by establishing a *regulatory framework* that sets parameters and boundaries within which other governmental entities . . . are directed . . . to promulgate primary rules of conduct governing commerce."[312] These "other governmental entities" to whom Congress can entrust such regulatory authority include not only federal administrative agencies, but also the states themselves.[313] For Tribe, there is no constitutional difference whether Congress relies on a federal administrative agency or the states to carry out its regulatory policy. In either form, congressional authorization of state conduct that would otherwise run afoul of the Dormant Commerce Clause is simply a species of congressional regulation of interstate commerce itself.

As an initial matter, Tribe wrongly assumes that there is no difference whether Congress relies on a federal agency or the states to implement federal regulatory policy. Federal agencies occupy a markedly different constitutional position than that of the states. When Congress relies on federal agencies to implement its policy choices, it does so by delegating federal regulatory authority to such agencies; federal agencies possess no fount of regulatory authority independent of that conferred on them by Congress.[314] Moreover, it is precisely because the agency is acting pursuant to a congressional delegation of federal authority that its actions are immune from the Dormant Commerce Clause. States, in contrast, possess their own regulatory authority independent of the federal government's: That is precisely what is meant by calling states "sovereigns." Yet the states' regulatory authority is constrained by the Constitution, including the Dormant Commerce Clause, and thus Congress cannot treat the two entities as constitutionally equivalent. Ultimately, one's authority is subject to the strictures of the Dormant Commerce Clause, and the other's is not.

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categorization task; it does not tell us *how* the Court will discriminate between "inherently incompatible" measures, which Congress may not authorize, and "presumptively incompatible" measures, which Congress may authorize. At the very least, the Court's approach is simple—Congress may validate any state action that violates the Dormant Commerce Clause. Tribe's theory, with its distinction between state regulations that are inherently versus presumptively incompatible with the Constitution, seems hopelessly complex at first blush.

312. *Id.* at 1040.

313. *Id.*

314. Whitman v. Am. Trucking Ass'ns, Inc, 531 U.S. 457, 472–73 (2001) (noting that Congress, not the agency, must determine the scope of the agency's powers).

More fundamentally, it is not apparent how the plenariness of Congress's commerce power is relevant to the validity of Congress's power to overrule the Dormant Commerce Clause. One could take the position that Congress may delegate its commerce power, which is unconstrained by the Dormant Commerce Clause, to the states. Whether the Constitution permits such delegation is the question addressed in the next Part. Tribe, however, does not go down that path. Nor, despite the similarity of their approaches, does Tribe embrace the notion on which *Benjamin* is based that the presence of "coordinated action" by Congress and the states somehow moots the Dormant Commerce Clause's limitation on state authority. Rather, Tribe conceptualizes Congress's use of its commerce authority as somehow transforming the constitutional status of state law within its ambit. As he puts it, employing a metaphor drawn from nuclear physics:

> Congress does not transmute the constitutional valence of the state law at issue from negative to positive, in apparent violation of *Marbury v. Madison*. No such constitutional alchemy need be posited. Rather, the congressional enactment into which the state law fits should be understood to *transform the state law itself*—changing not what its words say, of course, but what it *means* and how it *operates* once it has been transplanted from a context in which its very existence threatens to provoke retaliation by other states and to fragment the Union, to a context in which its threatening sting has been removed by the congressionally established grid into which it fits. In essence, the entry of Congress onto the legal landscape serves to tame, in a sense to domesticate, a state law that, before Congress entered the picture, represented a paradigmatic instance of what the Commerce Clause was designed to prevent.[315]

Thus, Congress does not empower the states with federal regulatory authority; rather, it validates their use of preexisting state authority by "domesticating" such authority.

This is a wonderfully picturesque depiction of Congress's action. Congress is not authorizing gross protectionism, but "taming" or "domesticating" state law in ways that render it consistent with the constitutional design. As was the case with the Court's effort to depict Congress's action as one of "coordination," this colorful characterization does not answer the question of how Congress's entry onto the field serves to "tame" or "domesticate" otherwise unconstitutional state conduct. How, for example, does the fact that Congress authorized the states to impose discriminatory taxes on insurance

315. 1 TRIBE, *supra* note 25, § 6-2, at 1041.

companies (as it did in the McCarran-Ferguson Act) make South Carolina's protectionist insurance premium tax any less noxious?

Perhaps Tribe's point is that the mere presence of a congressional framework validates or "tames" the state action taken pursuant to such a framework. But that argument proves too much. As Tribe concedes, there are some state regulatory actions that are "inherently incompatible" with the constitutional plan; only Congress may undertake such actions.[316] Yet, if the presence of a congressional framework "domesticates" any state action taken pursuant to it, it is hard to see why Congress could not authorize states to undertake actions that are not just "presumptively incompatible" with the constitutional plan but "inherently incompatible" with it. Thus, far from providing a justification for a limited congressional power, Tribe's argument would point to an unlimited power to validate any state law that would otherwise violate the Dormant Commerce Clause.

It does not stop there. As with Cohen, there is no apparent reason to limit Tribe's "domestication" theory solely to the Dormant Commerce Clause. Why could it not equally be said that the presence of a congressional regulatory framework "tames" state laws that violate the Contract Clause, the Due Process Clause, or the Privileges and Immunities Clause of Article IV? That cannot be right, and it has been expressly rejected by the Court in a number of contexts.[317] In other words, the mere presence of congressional authorization cannot be said either factually or legally to tame or domesticate otherwise unconstitutional state law.

Perhaps Tribe's point is that there is some value in having Congress and the states cooperate in regulating interstate commerce, and that the Constitution should encourage such cooperation, not restrict it. That sounds eerily reminiscent of *Benjamin*'s "coordinated action" theory, and it suffers from the same defects. Whatever the value of federal-state cooperation generally, there certainly is no *need* for Congress to validate putatively unconstitutional conduct by the states.[318] Conversely, allowing such action will only encourage protectionist state action and do so in ways that undermine democratic accountability by blurring the responsibility for such action between Congress and the states.[319]

316. *Id.* at 1039.

317. *See supra* text accompanying notes 258–279.

318. *Cf.* Printz v. United States, 521 U.S. 898, 924 (1997) (concluding that Congress may not mandate state participation in federal regulatory ends, but can regulate directly); *id.* at 959 (Stevens, J., dissenting) (noting that barring enlistment of state executive officials only encourages development of federal bureaucracy).

319. *See supra* text accompanying notes 224–238.

As a final point, Tribe, echoing Cohen, attempts to minimize this centrifugal danger, pointing out that Congress serves a "national constituency" that will ensure that Congress acts in a responsible, nonparochial, nation-regarding fashion.[320] But this rejoinder is no more effective when made by Tribe than it was when made by Cohen. Congress does sometimes "give away the store," as it did in the McCarran-Ferguson Act,[321] and the fact that Congress may not be as parochial as, say, Vermont hardly provides a compelling case for treating the Dormant Commerce Clause as waivable by Congress.[322] The fact that Congress serves a "national constituency" does not justify Congress in authorizing the states to violate the First Amendment, the Equal Protection Clause, or the Privileges and Immunities Clause. Neither should it justify Congress in empowering the states to infringe the Dormant Commerce Clause.

At the end of the day, there is simply no coherent and attractive way in which to lessen the *force* of the constitutional restriction on state authority imposed by the Dormant Commerce Clause. Its limitation on state authority is no more provisional than that imposed by the Privileges and Immunities Clause of Article IV, the Contract Clause, or the Equal Protection Clause. Thus, whether Congress's action is characterized as one of "consent," use of a "weakly exclusive" power, or "domestication" of state law, the end result is the same: Congress can no more overrule the Dormant Commerce Clause than it can these other "strong" constitutional constraints on state authority.

V. DELEGATION AND DISTRUST

That the Congress may not lift the constitutional limit on state authority does not address the final theoretical possibility: that Congress has the authority to transfer or delegate its *own* power over interstate commerce to the states. This explanation seizes on the fact that Congress's power over interstate commerce is not subject to the Dormant Commerce Clause. For example, there is no doubt that, as a constitutional matter, Congress may ban the interstate shipment of agricultural products from Ohio to Indiana.[323] Thus, there

320. 1 TRIBE, *supra* note 25, § 6-2, at 1040.

321. *Id.* § 6-1, at 1022–23 n.5.

322. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230–31 (1995) (noting that Congress, even though it may be less inclined than the states to harbor racial animus, is subject to the same judicial scrutiny as states in adopting affirmative action plans).

323. *See* United States v. Darby, 312 U.S. 100, 123 (1941) (holding that Congress may prohibit the interstate shipment of goods made in violation of federal statute); Champion v. Ames, 188 U.S. 321, 354 (1903) (holding that Congress may regulate the interstate shipment of

is no problem in Congress authorizing Indiana to ban Ohio farm products. All Congress has done is delegate its authority over interstate commerce to Indiana, which (so the argument goes) it may retract at any time. This is a beguilingly simple justification, but the linchpin for the claim is that Congress may delegate its legislative authority over interstate commerce to the states.

The first point to note about this justification is that the Court has rejected it as a foundation for Congress's power to overrule the Dormant Commerce Clause.[324] In *Gibbons v. Ogden*, the first case to discuss Congress's commerce authority and the Dormant Commerce Clause, Chief Justice Marshall expressly declared that "Congress cannot enable a State to legislate."[325] This point was subsequently reaffirmed in *Cooley*, which stated that "[i]f the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the states that power."[326] Moreover, even when the Court subsequently endorsed Congress's power to overrule the Dormant Commerce Clause, the Court bluntly declared that "[C]ongress can neither delegate its own powers, nor enlarge those of a state."[327]

Significantly, the Court has never retracted these statements or expressly held that Congress may delegate its power to the states. Nevertheless, the Court occasionally has seemed to rely on a delegation-based theory to explain its willingness to allow Congress to authorize otherwise unconstitutional conduct by the states.[328] Moreover, as others have noted,[329] Congress routinely enlists states, tribes, and even private individuals in implementing federal

lottery tickets); *see also* Currin v. Wallace, 306 U.S. 1, 14 (1939) ("There is no requirement of uniformity in connection with the commerce power . . . ." (citing U.S. CONST. art. 1, § 8, cl. 3)).

324. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 438 n.51 & 439–40 (1946); *In re* Rahrer, 140 U.S. 545, 560 (1891).

325. *Gibbons*, 22 U.S. at 207. For a comprehensive examination of *Gibbons* and its treatment of the Dormant Commerce Clause, see generally Williams, *supra* note 118.

326. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318 (1852), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 174 (1995).

327. *Rahrer*, 140 U.S. at 560.

328. *See, e.g.*, W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981) (noting that Congress "may confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy") (internal quotation marks and alteration in original omitted); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980) (noting that Congress may exercise its commerce power indirectly "by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy").

329. *See, e.g.*, 1 TRIBE, *supra* note 25, § 5-19, at 991–93 (noting instances of delegation of authority and the skepticism they are treated with); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 382–86 (1998) (discussing congressional delegation of authority to the Red Cross and the First and Second Banks of the United States); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 80–93 (1990) (discussing several instances of congressional delegation to private individuals, such as provision for private attorney general suits).

regulatory programs, thereby suggesting that the modern constitutional order permits the sharing of federal legislative authority. One must be careful, however, before drawing too definitive or categorical a conclusion. The Court's use of delegation-sounding terminology may be thoughtless and therefore misleading. Likewise, Congress's pursuit of a cooperative, regulatory federalism may not involve the delegation of federal authority at all but simply the enlistment of the states' voluntary use of their own residual state authority in aid of federal regulatory goals.[330] Nevertheless, before condemning the propriety of Congress's power to overrule the Dormant Commerce Clause, we should assess whether Congress can delegate its own power to the states.

As an initial matter, it is important to note how little this theory differs in practice from those that we have already considered and rejected. Although conceptually different from *Benjamin*'s coordination theory, Cohen's consent principle, and Tribe's domestication theory, a delegation-based approach entails the same threat to economic union and democratic accountability discussed above. The packaging may be different, but it is the same defective product inside. Though that may not be sufficient to reject the delegation-based approach if the Constitution clearly permits such delegation, it certainly should preclude reading the Constitution to allow such delegation in the absence of clarity.

As it turns out, the Constitution does not clearly authorize Congress to delegate any of its powers to the states and, in fact, appears hostile to the notion. Article I, Section 1's Vesting Clause, which specifies that "all legislative Powers" granted by the Constitution are vested in Congress, limits Congress's authority to delegate its legislative powers, including the commerce power, to other entities.[331] This is the classic nondelegation doctrine, and it has had

330. *See, e.g.*, Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 758–71 (1982) (upholding the Public Utility Regulatory Polices Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15 and 16 U.S.C.), which require state public utility agencies to consider certain regulatory policies during rate hearings); Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 64–66, 87 (1975) (discussing without commenting on the constitutionality of the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, §§ 108–110, 84 Stat. 1676, 1678–83 (codified as amended at 42 U.S.C. §§ 7401–7402, 7407–7410 (2000)), which empower the EPA to promulgate national air quality standards but allow states to adopt implementation plans, subject to federal approval, to achieve federal air standards); *see also* Printz v. United States, 521 U.S. 898, 926 (1997) (observing that prior federal statutes involving state enforcement of federal regulatory programs merely made such cooperation "a precondition to continued state regulation of an otherwise pre-empted field").

331. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."). There are other constitutional provisions that potentially limit the ability of Congress to delegate authority to the states or tribal authorities. Most notably, the Appointments Clause empowers the President to appoint, with the advice and consent of the U.S. Senate, "[o]fficers of the United States." *Id.* art. II, § 2, cl. 2. Commentators disagree whether

a rough journey in American constitutional law. When Congress has delegated rulemaking power to federal agencies, the Court has been exceptionally permissive: With the exception of two infamous cases in 1935,[332] the Court has upheld every such delegation. As the Court has made clear, Congress need only provide an "intelligible principle" to guide a federal agency's use of delegated authority to satisfy constitutional requirements.[333] Moreover, virtually any instruction or limitation on the use of the delegated authority satisfies this minimal requirement.[334] Thus, only a couple of years ago, the Court unanimously rejected a nondelegation challenge to the Clean Air Act's authorization for the U.S. Environmental Protection Agency to develop national air quality standards.[335] Although Congress gave no more guidance than that such standards must be "requisite to protect the public health," the Court declared in *Whitman v. American Trucking Associations, Inc.*[336] that the statute "fits comfortably within the scope of discretion permitted by our precedent."[337]

Whitman involved a delegation of rulemaking authority to a federal agency. The Court, however, has been far less permissive of the delegation of rulemaking power to nonfederal entities. The high-water mark of the Court's hostility to delegation of rulemaking power to nonfederal entities came early in the New Deal in *Carter v. Carter Coal Co.*,[338] in which the Court invalidated a section of the Bituminous Coal Conservation Act of 1935 on nondelegation grounds. The relevant section of the Act empowered a group of coal producers

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this clause has a negative component restricting the ability of Congress to entrust federal *executive* functions to nonfederal officials. *Compare* Kinkopf, *supra* note 329, at 371–74 (arguing that the Appointments Clause does not restrict delegation of executive power to nonfederal officers), *with* Krent, *supra* note 329, at 72–77 (arguing that delegation to nonfederal officials violates separation of powers principles, including those derived from the Appointments Clause). Because the focus of my analysis is upon the delegability of federal legislative power, not executive power, I do not address the applicability and meaning of the Appointments Clause.

332. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (holding that a federal law permitting trade associations to promulgate rules of competition was an impermissible delegation because it did not prescribe rules of conduct for those associations); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (holding that a federal law permitting the President to determine policy as to the transportation of excess petroleum is unconstitutional because it did not articulate limits, standards, or underlying policies on the exercise of that authority).

333. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

334. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding delegation to FCC of authority to license broadcasters in the "public interest"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (upholding delegation to the Interstate Commerce Commission to authorize a common carrier to acquire control over another when it serves the "public interest").

335. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 475–76 (2001) (upholding 42 U.S.C. § 7409(b)(1) (2000)).

336. *Id.* at 457.

337. *Id.* at 476.

338. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

and coal miners to set the minimum wage for all coal miners in particular production districts. Writing for the Court, Justice Sutherland declared that "[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[339] In fact, Justice Sutherland was categorical: "[O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor."[340] This categorical proclamation was something of an overstatement even at the time,[341] but Congress acceded to the Court's views and limited private involvement in subsequent statutes to a secondary or purely advisory role.[342] Critically, since *Carter Coal*, Congress has never given private individuals the unrestricted power to adopt federal regulatory measures free from supervision by federal officials.

The central question, then, is whether delegation to state officials of federal legislative authority is subject to the permissive regime applicable to delegations to federal agencies or the restrictive regime applicable to delegations to private parties. Admittedly, Justice Sutherland's outrage was directed at a delegation of regulatory authority to private entities. Nevertheless, the reason Justice Sutherland was angered by the private delegation was the danger that private individuals would use delegated authority for self-serving,

339. *Id.* at 311.

340. *Id.* Curiously, the Court concluded that such private delegations were a violation of the Due Process Clause of the Fifth Amendment. *Id.* Locating the nondelegation doctrine in the Due Process Clause, rather than Article I, is immaterial to the constitutionality of federal delegations, but use of the Due Process Clause as embodying a nondelegation doctrine calls into question state delegations of regulatory authority to private entities.

341. *See* 1 TRIBE, *supra* note 25, § 5-19, at 992 (noting that the pronouncement "was an exaggeration even in 1935 and was flatly false by 1975").

342. *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (upholding the Bituminous Coal Act of 1937, ch. 127, §§ 2, 4, 50 Stat. 72, 72–75, 76–81 (repealed 1966), which empowered boards composed of private individuals to propose minimum prices for the sale of coal for adoption by National Bituminous Coal Commission); United States v. Rock Royal Co-op., Inc., 307 U.S. 533, 577–78 (1939) (upholding the Agricultural Marketing Agreement Act of 1937, which empowered the Secretary of Agriculture to promulgate agricultural commodity pricing orders with the approval of two-thirds of the affected producers, as certified by Secretary and President); Currin v. Wallace, 306 U.S. 1, 15–18 (1939) (upholding the Tobacco Inspection Act of 1935, Pub. L. No. 74-314, § 5, 49 Stat. 731, 735 (codified as amended at 7 U.S.C. § 511(d) (2000)), which prohibited the Secretary of Agriculture from designating tobacco markets as subject to the Act unless two-thirds of tobacco growers within the markets vote in favor of such designation in a prescribed referendum); *see also* Pub. L. No. 75-137, § 1, 50 Stat. 246, 246 (codified as amended at 7 U.S.C. § 608c(9)(8)(i)); 1 TRIBE, *supra* note 25, § 5-19, at 993 (noting that judicial hostility to private lawmaking pursuant to federal or state delegations of regulatory authority "represents a persistent theme in American constitutional law").

rather than public-regarding, ends. This same concern exists, albeit in a different way, with respect to delegations to state officials.[343]

Defenders of state political processes are sure to interject that state legislators are unlike private individuals in a critical way: They are elected by the people to serve the public interest. While some may doubt that legislators act with the public's interest in mind,[344] it seems safe to concede that state legislators do not use their authority for purely private purposes any more than do members of Congress. Corruption and abuse of the public trust are rare.

Yet, the political accountability of state legislators is insufficient to insulate state government entirely from a different problem: factional politics. Like decisionmaking by private groups, state political processes are particularly susceptible to the ravages of rent-seeking behavior by special interest groups. Indeed, James Madison made precisely this point in his seminal essay, *The Federalist No. 10*.[345] As Madison explained, the likelihood of such factional rule was greatest in the states, in which the limited size of the populace made the formation of majority factions more likely.[346] Indeed, Madison bluntly declared that "[t]he influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States."[347] For Madison, it was the state legislatures and local councils—not the federal Congress—that were the most susceptible to factional politics.

Of course, one should be careful here not unduly to trumpet Congress and disparage the state legislatures. The federal legislative process is far from perfect; indeed, identifying specific examples of private-regarding legislation is a favorite sport for public choice scholars.[348] Conversely, no state's lawmaking process is utterly beholden to special interest groups, and several state legislators employ procedural devices, such as "three-reading rules" and "single subject

343. *See, e.g.*, George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 660 (1975) (arguing that delegations to private parties are more troublesome than delegations to public officials because the former lack oversight and other checks).

344. *See* ALAN ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE LEGISLATURES 2 (1998) (reporting the results of a poll that found that 36 percent of respondents disagreed with the statement that "legislators generally have the public's interest in mind when they are conducting business").

345. THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961).

346. *Id.* at 83.

347. *Id.* at 84.

348. *See, e.g.*, Farber & Frickey, *supra* note 228, at 883–90 (discussing the development of political science scholarship and case studies on the role of special interest groups); Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 368 (2004) (criticizing the addition of a last-minute rider to the Fiscal Year 2003 omnibus spending bill benefiting a contributor to the campaign of the rider's sponsor).

rules," to curtail the influence of such groups.[349] Thus, one cannot go so far as to say that state legislation necessarily will be contrary to the public interest or solely the product of factional politics. Rather, the key point is that, as a *comparative* matter, the federal government's lawmaking process is less susceptible to factional abuse than state lawmaking processes.[350]

This susceptibility to factional politics tends to generate state-centric, parochial legislation. The federal Constitution and federal statutory requirements operate to ensure that federal lawmaking, whether done by Congress or federal agencies, takes into account the public interest of the nation as a whole. In contrast, state constitutional and statutory provisions not only fail to require a similar concern for the nation at large, they actively encourage provincial attitudes focused solely on the interests of the people of the particular state. Indeed, for some state legislators, engaging in such provincialism is the paragon of their representative duty.[351]

Such provincialism might be tolerable and perhaps even desirable when a state is exercising its own legislative authority, but when it comes to the states exercising delegated federal authority over interstate commerce, such parochial attitudes pose a special constitutional danger. Were Congress to delegate portions of its commerce power to the states, there is no doubt that the states would quickly use such power to implement myriad protectionist measures, as they have done pursuant to the McCarran-Ferguson Act's authorization of state insurance regulation.[352] And of course, the use of such delegated authority in a protectionist fashion by one state would almost certainly trigger retaliatory,

349. *See* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 17.01, at 1 (5th ed. 2000) (noting that as of 1982, forty-one states had a single subject requirement for legislation); *id.* § 10.3, at 636–37 (discussing various state constitutional requirements for multiple reading of bills by legislative prior to passage); *see also* Farber & Frickey, *supra* note 228, at 922 (noting that state constitutions often contained detailed provisions governing legislative process).

350. *See* ROSENTHAL, *supra* note 344, at 201 (noting that potentially one-third to one-half of all bills considered by state legislature are "special interest" legislation designed to benefit a particular group). For a contrary view based on public choice theory, see Farber & Frickey, *supra* note 228, at 920–24 (arguing that state legislative processes may be more adept at controlling the influence of public interest groups because of procedural regularity in the lawmaking process and state courts' willingness to police such regularity).

351. *See also* ROSENTHAL, *supra* note 344, at 22 (noting that state legislators "recognize their responsibility to their state as well as to their districts").

352. *See also* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 871, 882–83 (1985) (invalidating under the Equal Protection Clause an Alabama statute that imposed a higher tax rate on out-of-state insurers than domestic insurers); W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655, 672 (1981) (upholding a California statute imposing a retaliatory tax on insurance companies from states that imposed high taxes on California-based insurers).

protectionist responses by other states. Indeed, any doubt about the likelihood of such a trade war among the states is dispelled by American history.[353]

Lastly, even if Congress protected against such parochialism by forbidding states from using the delegated power in a particularly abusive fashion, there would still be a danger in delegating federal legislative authority to the states. In using congressionally delegated authority, federal agencies are subject to a variety of statutory restrictions designed to ensure that the agencies use that authority in public-regarding ways.[354] For example, the federal Administrative Procedure Act requires agencies to provide the public with notice of proposed rulemaking and the opportunity to comment on the proposed rule.[355] Moreover, agencies must take any comments they receive into account and must respond formally to the public's input.[356] Similarly, Congress has provided significant transparency for agency decisionmaking by requiring agencies to open their proceedings and records to public scrutiny.[357] Lastly in this regard, the resulting agency rules are subject to review by the President's Office of Management and Budget[358] and to exacting judicial review by the federal courts.[359]

In stark contrast, not only are state legislatures exempt from these federal statutory and executive restrictions, most state legislatures are not subject to any corresponding requirements. They need not invite much less listen to public comment,[360] nor need they provide any explanation regarding the need for and objectives of the resulting legislation.[361] Conversely, they may close their

353. *See* STORY, *supra* note 241, § 126, at 99–100 (recounting the history of commercial warfare among states in the aftermath of the Revolution); *see also* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) (noting such history).

354. *See* Krent, *supra* note 329, at 76 n.38 (listing several statutory requirements for federal agencies).

355. 5 U.S.C. § 553(b)–(c) (2000).

356. 5 U.S.C. § 553(c) (requiring federal agencies to provide a "concise general statement" of the rule's basis and purpose); United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (holding that the Act's "concise general statement" requirement compels the agency to respond to all comments of "cogent materiality").

357. 5 U.S.C. §§ 552(a), 552b; 5 U.S.C. app. 2, § 10.

358. Exec. Order No. 12,866 (1993), 3 C.F.R. 638, *amended by* Exec. Order No. 13,258, 67 Fed. Reg. 9385 (Feb. 28, 2002), *reprinted as amended in* 5 U.S.C. § 601.

359. 5 U.S.C. § 706(2)(A) (providing for judicial review of agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (holding that, to satisfy the Act's arbitrary and capricious review standard, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) (internal quotation marks and citation omitted))).

360. *See* Townsend v. Yeomans, 301 U.S. 441, 451 (1937) (noting that the federal Constitution does not require state legislatures to hold hearings).

361. *Cf.* United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (1977) (noting that the legislatures possess the "prerogative of obscurantism" regarding purposes of legislation); *see also*

proceedings and refuse to make public significant portions of the legislative proceedings, such as behind-closed-doors conferences among key legislators.[362] The President has absolutely no authority to review proposed state legislation or block such legislation that, in his opinion, is undesirable. And of course, the resulting legislation is subject to extremely deferential judicial review limited solely to ascertaining whether the legislation is "rational"—a requirement virtually without teeth.[363]

In addition, the use of delegated federal authority by state *administrative* officials poses even greater dangers. Although state legislators are elected, many state administrators are appointed and responsible only to the governor or some other official. Reports of state agencies being captured by or beholden to local interests are legion.[364] And, although such agencies may be subject to state administrative requirements in promulgating rules pursuant to delegated federal authority,[365] the requirements are not necessarily as comprehensive as the federal administrative statutes. Nor are state officials subject to the moderating supervision and control of the President that the Supreme Court found to be constitutionally required in some instances.[366] Thus, delegations of federal power to state administrative officials carry with them a special risk that the delegated power will be used for self-interested, parochial, or inexpedient reasons.

Once again, defenders of Congress's power to overrule the Dormant Commerce Clause point to Congress's ability to cabin and police the states' use of the delegated authority to ensure that it is not abused.[367] Just like federal

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Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 226 (1976) (noting that legislators need not explain the purpose of proposed legislation).

362. *But see* IDAHO CONST. art. III, § 12 (requiring an open meeting requirement prohibiting any secret proceedings); IOWA CONST. art. III, § 13 (decreeing an open door requirement, except when secrecy is required).

363. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 491 (1955) (upholding as rational a state law prohibiting opticians from fitting optical lens).

364. *See, e.g.*, Thomas N. Lippe & Kathy Bailey, *Regulation of Logging on Private Land in California Under Governor Gray Davis*, 31 GOLDEN GATE U. L. REV. 351, 369 (2001) (discussing the timber industry's influence on the California Board of Forestry).

365. *See, e.g.*, OR. REV. STAT. ANN. §§ 183.325–.410 (West 2003) (requiring state agencies to follow procedures before promulgating rules akin to those found in the Administrative Procedure Act, 5 U.S.C. § 553 (2000)).

366. *See* Printz v. United States, 521 U.S. 898, 922–23 (1997) (holding that the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–924 (2000)), which required that state law enforcement officials enforce a federal gun law, violated the separation of powers doctrine because it eliminated the President's ability to coordinate federal law enforcement).

367. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984) ("[W]hen Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others."); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525,

agencies, states are constrained by the scope of Congress's delegation.[368] That is not a wholly impotent limitation,[369] but its sufficiency as a safeguard is doubtful for the same reasons discussed above.[370] Moreover, once power is delegated, Congress's ability to police its usage by the states is limited both by constitutional and practical considerations.[371]

In short, the delegation of federal legislative authority to the states is unlike the delegation of such authority to federal administrative agencies, which act in the national interest and which are subject to a host of procedural restrictions designed to ensure that the resulting regulatory product reflects the public interest of the nation. Rather, delegation of such authority to the states poses a similar potential for abuse as delegations to private entities. Hence, the Court's declared view that Congress may not delegate its commerce authority to the states so as to authorize conduct that would otherwise violate the Dormant Commerce Clause is heartily justified. For that reason, the Court's willingness to allow Congress to authorize the states to violate the Dormant

543 (1949) ("It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.").

368. W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652–53 (1981) (noting that state regulations "within the scope of the congressional authorization" are invulnerable to a Dormant Commerce Clause challenge). In one curious case, however, the Court upheld a discriminatory local order that had not been authorized by Congress but by the U.S. Department of Housing and Urban Development. White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 213–15 & n.11 (1983). The Court did not appear to appreciate the difference.

369. *See, e.g.*, Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003) (holding that a California milk regulation was not within the scope of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 144, 110 Stat. 888, 917 (codified at 7 U.S.C. § 7254 (2000))); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 49 (1980) (holding that a Florida banking regulation was not within the scope of the federal Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. § 1842 (2000)); *H.P. Hood*, 336 U.S. at 545 (holding that a New York milk export regulation was not within the scope of the federal Agricultural Marketing Act).

370. *See supra* text accompanying notes 224–238; *see also* N.E. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 173–74 (1985) (upholding a discriminatory state banking regulation as within the scope of the federal Bank Holding Company Act of 1956, ch. 240, § 2, 70 Stat. 133, 133, which allows states to regulate interstate bank acquisitions subject only to the requirement that such acquisitions be "specifically authorized" by state law). *Id.* at § 3(d), 70 Stat. at 135.

371. Given Congress's several responsibilities, it is doubtful that it would be capable, much less willing, continually and perpetually to review how each of the fifty states used the power delegated to it. Regardless, even were Congress willing to engage in the task, Congress's options for correcting the states' misuse of delegated authority are severely limited. Congress may not reserve for itself a veto over the use of delegated authority. INS v. Chadha, 462 U.S. 919, 956–58 (1983) (invalidating one House legislative veto for failure to comply with the bicamerality and presentment requirements of Article I, Section 7).

Commerce Clause cannot be defended on the ground that Congress may delegate its legislative power over interstate commerce to the states.

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The Constitution, rightly understood, does not permit Congress to overrule the Dormant Commerce Clause, which serves to protect the nation from parochial, self-serving state commercial regulations. Its restriction on state authority is not subject to congressional waiver either on the ground that the Dormant Commerce Clause is merely a statutory presumption regarding Congress's intent, or on the ground that its limitation on state authority evaporates in the presence of "coordinated action" by the federal government and states. Nor can such congressional power be salvaged by ingenious theories that treat the Clause as only a weak, conditional constraint on state power, unlike other constitutional limits on such authority, or that characterize Congress's commerce power as delegable to the states. The Dormant Commerce Clause thus is no different from the Privileges and Immunities Clause of Article IV or the Contract Clause; its prohibitions are not subject to congressional abrogation.

VI. OUR FEDERALISM: FEDERAL-STATE COOPERATION REVISITED

Concluding that Congress lacks the constitutional authority to validate state laws that otherwise would violate the Dormant Commerce Clause is sure to trouble many people. The sheer longevity of the Court's doctrine coats it with the patina of legitimacy. Moreover, the notion that Congress may not "share" its commerce power with the states may prompt fears about Congress's continued ability to partner with the states in addressing pressing social and economic problems. Such fears are overblown, however, and it is worth explaining why that is so.

A. Validation and Incorporation: Not the Same Thing

The principal objection to my conception of the Commerce Clause—which draws a clear line between congressional action that directly regulates interstate commerce and action that indirectly regulates such commerce by involving the states in that task—is that it is too formalistic. Proponents of this view argue that there is no principled line between the two types of regulation, and, as proof, they point to the fact that Congress may incorporate state law

into federal regulatory regimes.[372] There is no functional difference, they argue, between Congress validating state law and incorporating state law into a federal statute. If the latter is constitutional, so too is the former.

The key piece of evidence for these critics is the Supreme Court's decision in *United States v. Sharpnack*,[373] which dealt with the federal Assimilative Crimes Act. The Constitution expressly empowers Congress to make rules for federal territory and property, such as military bases.[374] Early on, Congress decided that, rather than adopt a whole code of criminal law for such properties, it would enumerate a few federal offenses; then, to supplement that list, it would adopt the state law from the state in which the federal property was located.[375] Hence, individuals on federal military bases in North Carolina would be subject to North Carolina law and individuals in Alabama to Alabama law, and so on. Moreover, in keeping with the Court's statement in *Cooley* that Congress may not adopt state law prospectively (out of a fear that such action was tantamount to the delegation of federal power),[376] Congress periodically reenacted the assimilative crimes laws to keep federal criminal law for these enclaves updated with subsequent changes in state criminal law.[377] Eventually Congress grew tired of this process and adopted the current form of the Assimilative Crimes Act, which incorporates the state law "in force at the time of such [individual's] act or omission."[378]

372. *See, e.g.*, Cohen, *supra* note 23, at 404; Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 250 (1997).

373. 355 U.S. 286 (1958).

374. *See* U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.

375. Act of Mar. 3, 1825, ch. 65, § 3, 4 Stat. 115, 115.

376. In *Cooley*, the Court ruled that Congress could adopt state law as it existed at the time of the enactment of the federal statute, but that it could not prospectively adopt state laws enacted after the federal statute. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 317–18 (1851), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995). As the Court explained, the latter would constitute an impermissible delegation of power to the states:

> If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner re-convey to the states that power.

Id. at 318; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 207 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject."). Notably, several states continue to follow the *Cooley* rule as a matter of state constitutional law. *See, e.g.*, Hillman v. N. Wasco County People's Util. Dist., 323 P.2d 664, 672–73 (Or. 1958).

377. *See* Act of June 6, 1940, Pub. L. No. 76-548, 54 Stat. 234; Act of June 20, 1933, ch. 284, 49 Stat. 394 (1935); Act of June 15, 1933, Pub. L. No. 73-62, 48 Stat. 152; Act of Mar. 4, 1909, Pub. L. No. 60-350, § 289, 35 Stat. 1088, 1145; Act of July 7, 1898, ch. 576, 30 Stat. 717; Act of Dec. 1, 1873, ch. 1, § 5391, 18 Stat. 1, 1045; Act of Apr. 5, 1866, ch. 24, § 2, 14 Stat. 12, 13.

378. Assimilative Crimes Act of 1948, Pub. L. No. 80-772, § 13, 62 Stat. 683, 686 (codified as amended at 18 U.S.C. § 13 (2000)).

In *Sharpnack*, the defendant challenged the constitutionality of the ACA's prospective adoption of state law, contending that it amounted to an unconstitutional delegation of federal legislative power to the states. The Court rejected the claim, but, critically, it did not do so on the ground that Congress could delegate its legislative power to the states or that the incorporation of state law was indistinguishable from the delegation of federal authority. Noting the long history of Congress readopting the Assimilative Crimes Act to keep it current with state law,[379] the Court concluded that the "basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress."[380] Viewing the federal act in that light obviated any delegation problem because, as the Court expressly declared, "[r]ather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such unpreempted offenses and punishments as shall have been already put in effect by the respective states for their own government."[381]

Contrary to the critics' claim, *Sharpnack* does not equate the incorporation of state law with the delegation of federal power. To begin with, *Sharpnack* does not address the Commerce Clause, but involved a federal statute enacted pursuant to Congress's federal enclave power.[382] That difference is of constitutional significance because Congress's power to incorporate state law is much greater under the latter. For example, there is no question that Congress could adopt a state law prohibiting the possession of a gun near a school as applicable to federal enclaves;[383] yet, Congress may not adopt such a law pursuant to its commerce power.[384] Thus, even if *Sharpnack* could be read to endorse the delegation of federal power under the two federal enclaves clauses, that would have no bearing on the separate question of whether Congress's commerce power can be delegated back to the states.

Moreover, even if *Sharpnack*'s validation of the prospective incorporation of state law were applicable to Congress's commerce power, that would not demonstrate that the distinction between the adoption of state law and the delegation of federal power to the states is an illusory one.[385] The Court in

379. United States v. Sharpnack, 355 U.S. 286, 291–92 (1958).
380. *Id.* at 293.
381. *Id.* at 294.
382. U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.
383. *Cf.* United States v. Butler, 541 F.2d 730, 737 (8th Cir. 1976) (holding that the Assimilative Crimes Act (ACA) does not assimilate a state gun possession statute only because there is a comparable federal statute regulating gun possession).
384. *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995).
385. *See* Cohen, *supra* note 23, at 404.

Sharpnack expressly contrasted the Assimilative Crimes Act to a delegation of legislative authority, and that was not simply wishful thinking on the Court's part. Rather, the two types of action carry with them different implications for the validity of the state law. While the delegation of federal authority empowers the states to adopt any law that Congress could so adopt, the incorporation of state law by Congress does not validate the underlying state enactment; in incorporating state law, Congress assimilates state law only to the extent that the state enactment is within the state's authority to enact. Thus, in *Sharpnack*, the Court expressly noted that Congress had only incorporated "unpreempted offenses," meaning those state crimes that did not conflict with federal statutory policy.[386] In fact, the Court also expressly disclaimed the notion that the Assimilative Crimes Act incorporates state laws that conflict with "a federal policy"[387]—a reference broad enough to include constitutional limitations on state authority, such as the Dormant Commerce Clause. Indeed, these limitations on the scope of the Assimilative Crimes Act would be meaningless if incorporation and delegation were merely flip sides of the same coin.

The conceptual error in linking incorporation and delegation together can be illuminated by considering a hypothetical statute: State A makes it a crime for an out-of-state person to engage in commercial fishing in State A's waters. Such a law is clearly discriminatory and would be unconstitutional as applied to fishermen on state-owned waters.[388] Now, is such a law valid as applied to federal enclaves by the Assimilative Crimes Act? If Congress's incorporation of state law is equivalent to the delegation of federal law to the states, the answer would be yes: It is valid because Congress is not constrained by the Dormant Commerce Clause or the Privileges and Immunities Clause of Article IV. Yet, *Sharpnack* implicitly rejected that suggestion, adverting to the notion that only those state laws that are independently valid are assimilated.[389] That limitation, ultimately, only makes sense if one treats incorporation and delegation as two separate phenomena with different constitutional implications.

386. *Sharpnack*, 355 U.S. at 294.

387. *Id.* at 293 n.9.

388. *Cf.* Toomer v. Witsell, 334 U.S. 385, 402–03 (1948) (holding that a state law imposing a higher tax on commercial fisherman from outside the state violated the Privileges and Immunities Clause of Article IV).

389. *Sharpnack*, 355 U.S. at 293 n.9, 294; *see also* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 103–04 (1940) ("But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.") (citations omitted); Blackburn v. United States, 100 F.3d 1426, 1435 (9th Cir. 1996) (holding that the ACA does not assimilate state law that would violate the Supremacy Clause by subjecting the federal government to state regulation).

Finally, and most importantly, whatever rule *Sharpnack* establishes for federal enclaves, this distinction between the delegation of federal authority and the incorporation of state law has been applied by the Court in the Dormant Commerce Clause context. The Lacey Act incorporates state law in making it unlawful for any person "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State."[390] The Court confronted the Act's significance for state laws in *Maine v. Taylor*,[391] a case involving a federal prosecution for the importation of 158,000 live baitfish from outside the state in violation of Maine law.[392] Notably, the relevant state law was a classic, discriminatory embargo of the sort previously condemned under the Dormant Commerce Clause.[393] One of the questions before the Court thus was whether the Lacey Act validated the discriminatory state statute, immunizing it from Dormant Commerce Clause challenge. Significantly, the Court viewed the Act as merely incorporating state law. It declared that the Lacey Act "clearly provide[s] for federal enforcement of valid state and foreign wildlife laws, but Maine identifies nothing in the text or legislative history of the [Act] that suggests that Congress wished to validate state laws that would be unconstitutional without federal approval."[394] Thus, the court ruled, the Maine statute must pass constitutional scrutiny under the Dormant Commerce Clause.[395]

Maine v. Taylor demonstrates in bright fashion the difference between Congress's power to validate unconstitutional state law and the incorporation of state law into federal regulatory programs. While the former validates the state enactments, the latter leaves open the question whether the state law is within the power of the state to enact. Moreover, as *Taylor* makes clear, the constitutional validity of the state law is tested independently of the federal

390. Lacey Act Amendments of 1981, Pub. L. No. 97-79, § 3(a)(2), 95 Stat. 1073, 1074 (codified at 16 U.S.C. § 3372(a)(2) (2000)). The original Lacey Act was enacted in 1900. Act of May 25, 1900, ch. 553, 31 Stat. 187. The 1981 Amendments, however, repealed the pertinent portions of the original Lacey Act and replaced them with the current version. *See* Lacey Act Amendments, § 9(b)(2), 95 Stat. at 1079 (codified at 16 U.S.C. § 3378(b)(2)).

391. 477 U.S. 131 (1986).

392. *Id.* at 132; *see* ME. REV. STAT. ANN. tit. 12, § 7613 (current version at ME. REV. STAT. ANN. tit. 12, § 12556 (2005)).

393. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (invalidating as violative of the Dormant Commerce Clause a New Jersey statute banning importation of solid or liquid waste generated outside of state).

394. *Taylor*, 477 U.S. at 139.

395. *Id.* at 140. Interestingly, the Court held that the Maine statute, which was intended to preserve Maine waters from the invasion of foreign parasites, satisfied the strict scrutiny applicable to discriminatory state statutes. *Id.* at 151–52. To date, this is the sole instance in which the Court has upheld such a statute under modern Dormant Commerce Clause doctrine.

law. Thus, the "functionalist" criticism that there is no material difference between the delegation of federal authority and the incorporation of state law into federal statutes lacks substance. As the Court has recognized, there is quite a difference.

Lastly, there may be some concern that, given the longevity of the Court's acceptance of Congress's power to overrule the Dormant Commerce Clause, it is simply too late in the day to overrule it—that too many federal statutes would be swept aside.[396] Overruling *Rahrer* and *Benjamin* necessarily would call into question several congressional statutes, specifically those that validate state laws regulating certain aspects of interstate commerce. Examples include the McCarran-Ferguson Act,[397] the Hawes-Cooper Act,[398] the Renovated Butter Act,[399] and the False Stamped Gold Act.[400] The decisions upholding several of these acts—*Benjamin*[401] and *Whitfield*[402]—were wrongly decided and should be overruled.

As may be apparent from the foregoing discussion, however, barring Congress from validating unconstitutional state laws does not require the invalidation of federal laws that merely incorporate state law. Surprisingly, many of the statutes that have been viewed as examples of Congress's power to overrule the Dormant Commerce Clause are better viewed as simply incorporating state law. Examples include the Lacey Act discussed above, the Webb-Kenyon Act,[403] and the original Ashurst-Sumners

396. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (noting that stare decisis requires Court to ascertain, inter alia, "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation").

397. 15 U.S.C. § 1011 (2000).

398. Hawes-Cooper Act, ch. 79, § 1, 45 Stat. 1084, 1084 (1929).

399. Act of May 9, 1902, Pub. L. No. 57-110, § 1, 32 Stat. 193, 193–94 (codified at 21 U.S.C. § 25 (2000)). In *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 161 (1942), the Court in dicta suggested that the Act, because it mirrored the Wilson Act, was constitutional. However, it acknowledged that it need not address the matter.

400. Act of June 13, 1906, Pub. L. No. 59-226, § 7, 34 Stat. 260, 262 (codified at 15 U.S.C. § 300).

401. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 439–40 (1946) (upholding the McCarran-Ferguson Act's validation of state laws inconsistent with the Dormant Commerce Clause).

402. Whitfield v. Ohio, 297 U.S. 431, 440 (1936) (upholding the Hawes-Cooper Act's validation of state laws inconsistent with the Dormant Commerce Clause).

403. The Act of Mar. 1, 1913, Pub. L. No. 62-398, 37 Stat. 699, 669–700 (codified at 27 U.S.C. § 122 (2000)) prohibits

> the shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . [which] . . . is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State.

Id.

Act.[404] The early decisions upholding these statutes misapprehended the significance of the difference in language between these statutes and those like the Wilson Act that simply purport to validate state law.[405] In the wake of *Maine v. Taylor*, though, the significance of the difference in statutory drafting and its implications for the validity of the state enactment are clear. As *Maine* demonstrates, whenever Congress merely incorporates state law into a federal regulatory requirement, the constitutional validity of the state law always remains an open question to be decided independently of the federal statute.[406]

B. A Modern Application: The Proposed Solid Waste Interstate Transportation Act of 2005

The distinction between the validation and the incorporation of state law may seem too flimsy to some, but it is critical and has contemporary relevance.

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404. Act of July 24, 1935, Pub. L. No. 74-215, § 1, 49 Stat. 494, 494 (current version at 18 U.S.C. § 1761 (2000) but amended in significant part by Act of June 25, 1948, ch. 645, 62 Stat. 785). The Act prohibits any person

> knowingly to transport or cause to be transported in any manner or by any means whatsoever . . . any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners . . . from one State . . . into any State . . . where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State . . . .

Id.

405. In upholding the Webb-Kenyon Act, the Court expressly equated that Act to the Wilson Act, declaring that the two statutes were "essentially identical." James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 330 (1917). Twenty years later, the Court was more equivocal. Upholding the Ashurst-Sumners Act, the Court treated the Act as no different from the Webb-Kenyon Act, but it also implied that federal statutes barring the interstate shipment of goods in violation of state law did not actually immunize the state law from constitutional limitations. The Court noted:

> The pertinent point is that where the subject of commerce is one as to which *the power of the state may constitutionally be exerted* by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.

Ky. Whip & Collar Co. v. Ill. Cent. R.R. Co., 299 U.S. 334, 351 (1937) (emphasis added).

406. For this reason, it does not follow that every decision upholding a state law challenged on the ground that Congress had validated the statute must be overturned. As in *Maine*, the state law may pass constitutional muster independently of the federal statute. Indeed, despite the invalidity of the Hawes-Cooper Act, the actual result in *Whitfield* remains correct. The Ohio statute forbidding the sale of convict-made goods produced in other states was matched by a different Ohio statute forbidding the sale of convict-made goods produced in Ohio:

> As interpreted by the court below, the laws of Ohio passed in pursuance of the State Constitution prohibit the sale in the open market of goods made in Ohio by convict labor. The statutory provision here challenged enforces, without discrimination, the same rule as to the convict made goods of other states when they are brought into Ohio.

Whitfield v. Ohio, 297 U.S. 431, 437 (1936).

Indeed, perhaps the best way to illuminate both this distinction and the danger posed by allowing Congress to validate otherwise unconstitutional state action is to return to where we began: the proposed legislation that Congress is considering to allow state and local governments to ban the importation of solid wastes from other states.[407] In its current form, the proposed statute provides in pertinent part that "[n]o landfill or incinerator may receive any out-of-State municipal solid waste for disposal or incineration unless the waste is received pursuant to . . . a host community agreement . . . ."[408] Such agreements are "written, legally binding agreement[s], lawfully entered into between an owner or operator of a landfill or incinerator and an affected local government that specifically authorizes the landfill or incinerator to receive out-of-State municipal solid waste."[409]

There is no doubt that Congress itself may ban the receipt of out-of-state solid waste,[410] nor is there any doubt that Congress may prohibit the receipt of out-of-state waste in violation of state or even local law (which would be analogous to the Lacey Act). In the former case, the discrimination would be mandated by Congress, and in the latter case, the incorporation of state law would be enforceable so long as the underlying incorporated state or local law passed constitutional muster—as in *Maine*. But that is not what this bill purports to do. Instead, it conditions the receipt of out-of-state waste solely on the individualized approval of the local government as manifested in a "host community agreement." No matter how repugnant or discriminatory the local government's reasons for refusing to enter into such an agreement, this bill allows the local government to nourish those protectionist motives. Indeed, that is the purpose of the bill. Moreover, even with respect to those local governments that agree to accept out-of-state waste, there is nothing in the bill that regulates the content of such agreement and would thereby prevent the local government from imposing a discriminatory fee on such waste as part of the "host community agreement." In fact, a companion bill expressly authorizes states to impose discriminatory taxes on out-of-state waste.[411]

What are the affected landfill operators and, more importantly, out-of-state municipalities to do? Under current doctrine, the federal courts will be closed to the Dormant Commerce Clause challenge; no judicial relief

407. *See supra* notes 16–18 and accompanying text.

408. H.R. 274, 109th Cong. § 2 (2005); *see also* H.R. 4940, 108th Cong. § 2 (2004) (proposing a similar amendment to subtitle D of the Solid Waste Disposal Act, 42 U.S.C. § 6941 (2000)).

409. H.R. 274, § 2.

410. United States v. Darby, 312 U.S. 100, 114–15 (1941).

411. H.R. 70, 109th Cong. § 2 (2005).

will be available.[412] Nor will the political process offer any real hope. When the affected out-of-state municipalities protest the matter to the particular local government, no doubt the local government will point the finger at Congress, quite truthfully declaring that Congress banned the receipt of such wastes absent a "host community agreement." Meanwhile, Congress will attempt to deflect the blame for this situation by declaring that it never intended to authorize such an abusive and nakedly protectionist act as adopted by *that* local government. And, even if that were true and not merely a diversionary tactic, Congress's ability to respond to this situation is severely limited by constitutional and legislative constraints.[413]

In contrast, let us ask what would happen were the Court to acknowledge, as argued here, that Congress may not authorize the states or local governments to take action that would violate the Dormant Commerce Clause. This bill in its current form, like the Wilson Act or the McCarran-Ferguson Act, would be struck down as unconstitutional. Would that be so bad? Local governments could adopt limitations on the amount of materials filling their local landfills, but those limitations would have to be nondiscriminatory. They could not favor in-state waste over out-of-state waste. The only municipalities adversely affected would be those that wished to act in protectionist ways, and that is cause for little concern from a constitutional perspective.

Admittedly, Congress could respond to this bill's invalidation by adopting its own policy of interstate protectionism with regard to municipal solid waste, but to do so Congress would have to take sides in the dispute between localities with landfills (for example, small New Jersey townships) and the out-of-state municipalities that fill them (for example, New York City). Congress could not engage in the politically expedient act of foisting on local governments the political responsibility for the decision by empowering them to make the call. And, because of that fact, it is more likely that the ultimate resolution of the landfill issue would accommodate the needs of small municipalities without empowering and validating naked protectionism. In short, a sensible policy fully in accord with constitutional norms would result, which, lest the point be missed, is exactly what the framers hoped and envisioned in assigning the commerce power to Congress and not the states.

412. *See* H.R. 4940, § 2 (proposing 42 U.S.C. § 4011(f), which would immunize certain actions from Dormant Commerce Clause challenges).

413. *See supra* text accompanying notes 158–159.

CONCLUSION

Congress's power over interstate commerce is plenary; it may promote, prohibit, or discriminate against such commerce as it chooses. But the Constitution's commitment to economic union and democratic accountability precludes Congress from validating state laws that would otherwise violate the Dormant Commerce Clause. If Congress wishes to foster state protectionism, it must do so directly. In only that way can we rest assured that the responsibility for such action will be laid at Congress's door. Such accountability is important in its own right, but it also has the practical benefit of discouraging such protectionism. Likely, few Congressmen will wish to stand publicly in favor of state protectionism.

Conversely, that Congress may not validate unconstitutional state laws does not mean that the states are powerless to regulate commercial activities. They may do so, but within the strictures of the Dormant Commerce Clause. That is a significant limitation on state authority, but we should hardly be troubled by it in the grand scheme of things. Rather, we should rejoice both that the limitation exists and that Congress may not override it by mere legislation.