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Reawakening the Dormant Commerce Clause in Its First Century

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I. INTRODUCTION

The dormant commerce clause, as it has come to be known, prohibits state interference with interstate commerce—that is, individual states may not impede the flow of commerce from one state to another. Otherwise, states might block the channels of free trade and impair the now developed national market. Regardless of the framers' intent in drafting the commerce clause,[1] when the marketing structure of our economy changed from a locally oriented to a nationally- and vertically-integrated market during the latter half of the nineteenth century, the Supreme Court responded to a perceived economic need by protecting the new marketing structure from hostile state legislation. The Court justified its action by declaring that the commerce clause impliedly forbids certain kinds of state regulations.

Today, the Court continues to invalidate state legislation upon commerce-clause grounds. During the last two decades, moreover, the Court has invoked the dormant commerce clause with increasing frequency to strike down state statutes. Modern-day dormant-commerce-clause opinions suggest that state regulatory statutes be tested in light of a two-tiered analysis. Statutes that discriminate against interstate commerce on their face, in purpose, or in practical effect are subject to a strict-scrutiny analysis, which requires that the state establish a legit-

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* Associate, Van Ness, Feldman, Sutcliffe & Curtis. B.A., Clark University (1980); J.D., Washington University (1984).

1. In article 1, the United States Constitution provides that Congress shall have the power "[t]o regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Little evidence suggests that the framers of the Constitution intended the commerce clause to serve as a prohibition on the exercise of state power. The absence of such a federal commerce power under the Articles of Confederation was a principal defect in that governmental structure. *See generally* F. MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973); C. NETTLES, THE EMERGENCE OF A NATIONAL ECONOMY 1775-1815 (1962). However, the debates in 1787 on this clause are not extensive. *Cf.* 1 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 114 (2d ed. 1836) (debate over commerce under the Articles of Confederation). The reason may well be explained by the comment in *The Federalist No. 45* that "[t]he regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained." THE FEDERALIST NO. 45, at 293 (J. Madison) (Rossiter ed. 1961). *See generally* 1 C. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 17–323 (1953); McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631, 633 (1978).

imate state interest and that the means adopted are the least discriminatory options available.[2] Otherwise, statutes are purportedly tested under what has come to be known as the *Pike-Bruce* balancing test: "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the [putative] local benefits."[3] In recent years, these principles have supported the Court in striking down a variety of laws, such as a state reciprocity requirement for the export of ground water,[4] a state restriction on the export of hydroelectric power,[5] a state franchise-tax credit for domestic, international-sales corporations,[6] a state wholesale gross-receipts tax that exempted local manufacturers,[7] a state liquor tax that excluded certain locally produced alcoholic beverages,[8] a state law requiring that timber taken from state lands be processed within the state prior to export,[9] a state lower-price affirmation law for certain alcoholic beverages,[10] and a state marker fee and axle tax discriminatorily imposed on out-of-state trucks.[11] Meanwhile, the Court also has indicated that the commerce

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2. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986); Hughes v. Oklahoma, 441 U.S. 322, 331, 338 (1979).

3. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). Along with the issue of discrimination against interstate commerce, challenges to the exercise of a state's taxing power occassionally raise three additional concerns: (1) whether the tax is applied to an activity with a substantial nexus to the taxing state, (2) whether the tax is fairly apportioned, and (3) whether the tax is fairly related to the services provided by the state. *See* D.H. Holmes Co. v. McNamara, 108 S. Ct. 1619, 1623 (1988); Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 8 (1986); ARMCO, Inc. v. Hardesty, 467 U.S. 638, 641 (1984); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). In American Trucking Associations v. Scheiner, 107 S. Ct. 2829 (1987), Justice John Paul Stevens noted that "[a]lthough we have described our own decisions in this area as a 'quagmire' of judicial responses to specific state tax measures, we have steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of free trade free from interference by the States.' " *Id.* at 2838 (citations omitted). *See generally* Symposium, *The Constitution and Taxation: A Bicentennial Observance*, 41 TAX LAW. 1 (1987); Tatarowicz & Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986).

4. Sporhase v. Nebraska, 458 U.S. 941 (1982).

5. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982).

6. Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984).

7. ARMCO, Inc. v. Hardesty, 467 U.S. 638 (1984).

8. Bacchus Imports, Ltd. v. DTAS, 468 U.S. 263 (1984).

9. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984).

10. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986).

11. American Trucking Ass'ns v. Scheiner, 107 S. Ct. 2829 (1987). Other state statutes, such as the Pennsylvania law at issue in *Scheiner*, might suffer the same fate. *See, e.g.*, American Trucking Ass'n, v. Gray, 108 S. Ct. 2 (1987) (Blackmun, J., granting injunction) (highway use equlization tax).

Some of the other more recent Supreme Court dormant-commerce-clause cases are Kassell v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1976); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). *See also* Continental Ill. Corp. v. Lewis, 827 F.2d 1517 (11th Cir. 1987) (statute banning out-of-state bank holding companies from operating industrial savings bank in the state held unconstitu-

clause does not impose a restriction on state power when the state acts as a "market-participant" rather than as a market regulator.[12]

However, there appears to be a new willingness on the part of some of the Justices to reexamine the dormant aspect of the commerce clause. In *CTS Corp. v. Dynamics Corp. of America*,[13] Justice Scalia indicated in a concurring opinion that the *Pike-Bruce* balancing test "is ill suited to the judicial function and should be undertaken rarely if at all."[14] He repeated this theme in his subsequent opinion in *Tyler Pipe Industries v. Washington Department of Revenue*.[15] There, Scalia, joined by Chief Justice Rehnquist, observed that the Court's prior dormant-commerce-clause analysis lacks any theoretical underpinning in the Constitution. In what is perhaps the most critical remark on the dormant commerce clause to date by a sitting Justice, and in what may prove to be the prelude to a new jurisprudence, Justice Scalia opined that

> [t]he fact is that the 114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court, and in the 50 years prior to that in which it was alluded to in various dicta by the Court, our applications of the doctrine have, not to put too fine a point on the matter, made no sense.[16]

Scalia indicated that the Court should analyze arguably discriminatory state statutes under the privileges and immunities clause of article IV.

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tional); JDS Realty Corp. v. Government of V.I., 824 F.2d 256 (3rd Cir. 1987) (excise tax held unconstitutional), *vacated*, 108 S. Ct. 687 (1988); Norfolk S. Corp. v. Oberly, 822 F.2d 388, 400 n.18 (3rd Cir. 1987) (statute banning product transfers within coastal zone upheld with court noting that strict scrutiny analysis only applied to facially-neutral statute when discriminatory effect is supported with evidence of legislative intent of discriminatory purpose); Direct Automobile Imports Ass'n v. Townsley, 804 F.2d 1408 (5th Cir. 1986) (upheld statute regulating sale of gray market automobile); Burlington N.R.R. v. Nebraska, 802 F.2d 994 (8th Cir. 1986) (case remanded for weighing constituionality of manned-caboose law).

12. *See, e.g.*, United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984); White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 208 (1983); Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976). *See generally* Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S. ILL. U.L.J. 73; Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 U. VA. L. REV. 1073 (1980).

13. 481 U.S. 69 (1987).

14. *Id.* at 94 (Scalia, J., concurring). In *CTS Corp.*, the Court upheld Indiana's Control Share Acquisition Act. *Compare* Edgar v. MITE Corp., 457 U.S. 624 (1982) (holding unconstitutional Illinois Business Takeover Law); *compare also* Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837 (1st Cir. 1988) (Massachusetts takeover statute). *See generally* Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96 (1987).

15. 107 S. Ct. 2810 (1987).

16. *Id.* at 2828 (citations omitted).

Justice Scalia's comments coincide with those views now being expressed in the legal periodicals. One author appropriately notes that we are experiencing "a reawakening of academic interest in this area."[17] This renewed interest may soon parallel that experienced much earlier in this century, and the outgrowth of this trend may result in a better understanding of the commerce clause and its role in structuring federal-state relations. Donald Regan, for example, argues persuasively that the dormant commerce clause should essentially provide an umbrella of coverage only against state economic protectionism; he further suggests that the Court has in effect employed such an approach even though purporting to apply a balancing test.[18] A similar conclusion is expressed by Robert Sedler, who writes that the only conceptual justification for the dormant commerce clause is to protect against discriminatory state regulation or taxation.[19] And yet another author hints that we should lay the dormant commerce clause to rest.[20] In lieu of the dormant commerce clause, Jonathan Varat has offered an insightful treatment of both the commerce clause and the article IV privileges and immunities clause, a perspective that is conceptually and perhaps historically and constitutionally based and that focuses on equality of citizenship.[21] The last time that the legal journals served as a forum for such a lively debate on the commerce clause, the Supreme Court charted a different course and adopted a new, modern approach.

Starting after the turn of the century and reaching a peak during the acceptance of New Deal legislation, the Court cast aside the nineteenth-century intellectual construct, or paradigm, through which the Justices viewed the constitutionality of state and federal statutes. The

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17. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 887 n.4 (1985); *see also* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE (A. Tarlock ed. 1981); Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 ORE. L. REV. 395 (1982); Schwartz, *Commerce, the States and the Burger Court*, 74 NW. U.L. REV. 409 (1979); Smith, *State Discrimination Against Interstate Commerce*, 74 CALIF. L. REV. 1203 (1986); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979); *cf.* Epstein, *The Proper Scope of the Commerce Power*, 73 U. VA. L. REV. 1387 (1987).

18. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). For a response to Regan's article, see Hellerstein, *Commerce Clause Restraints on State Taxation: Purposeful Economic Protectionism and Beyond*, 85 MICH. L. REV. 758 (1987). For a more recent essay by Regan, see Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987).

19. Sedler, *supra* note 17, at 998.

20. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446 (1982) (suggesting that state statutes should be scrutinized under the privileges and immunities clause of article IV).

21. Varat, *State Citizenship and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

old paradigm, tied to nineteenth-century notions of dual federalism and preservation of territorial sovereignty, was apparently deemed no longer acceptable in an age of interstate holding companies, trusts, a national market, and a heightened mobility of both goods and people accompanying the expanse of the railroad industry and the advent of the automobile. An early event that presaged the collapse of the nineteenth-century foundation was Justice Oliver Wendell Holmes' introduction of the "current of commerce" theory, expanding the scope of interstate commerce.[22] Thereafter, scholarly criticism on the subject began to surmount.[23] Those who favored national or state regulation assertedly designed to protect the public interest realized that such regulations might not be sustained under the existing analysis. Thus, the "tests" developed by the Court were attacked as wholly unsatisfactory. Many, such as Professor Noel T. Dowling, urged the Court to abandon the old foundations that had placed the Court in a quandary.[24] The Court finally responded by adopting an expansive reading of the commerce clause and what in effect was a balancing test for considering the constitutionality of state statutes.[25] The old foundations had fallen.

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22. Swift & Co. v. United States, 196 U.S. 375, 399 (1905).

23. *See, e.g.* Beck, *Nullification by Indirection*, 23 HARV. L. REV. 441 (1910); Biklé, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927); Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289 (1919); Gordon, *The Child Labor Law Case*, 32 HARV. L. REV. 45 (1918); Needham, *The Commerce Clause as a Limitation on State Legislative Power*, 11 COLUM. L. REV. 251 (1911); Shenton, *Interstate Commerce During the Silence of Congress*, 23 DICK. L. REV. 78 (1918); *see also* Dowling, *Interstate Commerce and State Police Power*, 29 VA. L. REV. 1 (1940); Dowling, *Interstate Commerce and State Power—Revisited Version*, 47 COLUM. L. REV. 546 (1947).

24. Dowling, *Interstate Commerce and State Police Power*, *supra* note 23.

25. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); South Carolina State Highway Dep't. v. Barnwell Bros., 303 U.S. 177 (1938). *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 11.6, at 592 (1986); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 451–60 (1951).

Several considerations call into question the efficacy of continued reliance on the dormant commerce clause. One consideration is that statutes challenged under the commerce clause are equally susceptible to being challenged under other, perhaps more appropriate, constitutional provisions. For instance, since the adoption of the fourteenth amendment and the inclusion of corporations within the protections afforded "persons," *see* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886), the equal-protection clause is one alternative to reliance on the dormant commerce clause. For example, in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), the dormant commerce clause was not available as a basis for decision, under the provisions of the McCarran-Ferguson Act; instead, the Court invalidated the tax under the equal-protection clause. *Id.* at 874–93; *see also* Williams v. Vermont, 472 U.S. 14 (1985). The dissenters in *Metropolitan Life Insurance*, however, indicated that it is a legitimate state interest to promote domestic business by, in effect, discriminating against out-of-state insurance companies. Three of these same Justices had rejected a similar argument advanced in Zobel v. Williams, 457 U.S. 55 (1982), that discrimination in favor of those who have contributed to the state is a legitimate state end. Indeed, Justice Sandra Day O'Connor wrote in *Metropolitan Life Insurance* that "the Court has held in the dormant commerce clause context that a state may provide subsidies or rebates to domestic

Before yet another set of pillars gives way to the pressure of the moment, we should examine the development of the implied prohibition. This article attempts such an examination, all in an effort to cement "constitutional development" against the inroads of "constitutional change." Such an inquiry into the evolution of the dormant commerce clause tells us much about the perceived failure of the Constitution to address the scope of the states' reserved police power. It also might prevent those intent on formulating any new jurisprudence from either repeating past mistakes or unnecessarily developing new doctrines. One example may be what appears as a newly-emerging concern over the extraterritorial effect of state regulations, discussed in such cases as *CTS Corp.* and *Brown-Forman Distillers v. New York State Liquor Authority*.[26] This is by far not a new concern. Yet, the constitutional theory supporting this treatment in the nineteenth century has long since been eroded. Additionally, an understanding of dormant-commerce-clause jurisprudence provides fertile ground for those who question the continuing efficacy of the prohibition. Although not the subject of this article, the concerns prompting the development of the implied prohibition arguably no longer apply in this era of post-New Deal jurisprudence, especially with the protections secured by the privileges and immunities Clause of article IV and the fourteenth amendment.

Part I of this article traces how the Court in the nineteenth century purported to resolve dormant-commerce-clause issues, and coupled with part II serves as a compendium of the Court's opinions. It illustrates that not until the second half of the century did the Court begin to articulate "tests" for reviewing the constitutionality of state statutes. The debate up until that time had focused on whether or not Congress exercises exclusive power over interstate commerce, a question embroiled in the political battles between Federalists and Anti-Federalists, and then Whigs and Democrats, over such issues as slavery, temperance, and internal improvements. Beginning around the middle of the

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but not foreign enterprises if it rationally believes that the former contribute to the State's welfare in way, that the latter do not." 470 U.S. at 895 (O'Connor, J., dissenting). Of course, *Zobel* was decided under the equal-protection clause, 457 U.S. at 55, but its reasoning is highly questionable. *See, e.g.*, Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 919–20 (1986) (O'Connor, J., dissenting). *See generally* Comment, *Durational Residency Requirements and the Equal Protection Clause:* Zobel v. Williams, 25 WASH. U.J. URB. & CONTEMP. LAW 329 (1983).

Yet, oddly enough, where the Court has held that the equal-protection clause did not preclude the state action in question, such as in G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982), it has suggested and the lower courts have agreed that the commerce clause might preclude the challenged regulation. *Cf.* Cohn v. G.D. Searle & Co., 784 F.2d 460 (3rd Cir.), *cert. denied*, 479 U.S. 883 (1986).

26. 476 U.S. 573, 579 (1986).

century, the Court began invoking tests, such as whether a state was regulating a matter of "local" concern or a matter that required uniformity across the nation, or whether the challenged statute "directly" or "indirectly" burdened interstate commerce.

When referring to the development of the dormant commerce clause, it is now commonplace to divide the subject into categories based upon these tests.[27] Such tests unfortunately reflect conclusory labels, obscuring our perception of how the Court resolved disputes concerning interstate commerce. The resulting cursory gloss now given to the development of the dormant commerce clause has left a significant gap in our understanding of constitutional law in the nineteenth century. A closer examination of the decisions in the nineteenth century suggests much more than a Court flip-flopping on what "test" to use.

Part II of this article proffers that the Court's opinions illustrate a fairly consistent paradigm for structuring federal and state relations. This paradigm permitted the development of the national market while at the same time preserving considerable, indeed often overlooked, power in the states to exercise jurisdiction over activity within their borders. By the late nineteenth century, the doctrine of an implied prohibition developed as a means for ensuring that one's right to engage in interstate commerce would be respected in each of the several states. This "right" served as a necessary component of the nation's evolution into an integrated economic unit. Regardless of which particular one of

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27. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 403–08 (1988). Current references to the dormant commerce clause merely accept these categories to explain the development of the dormant commerce clause. *E.g.*, Blasi, *Constitutional Limitations on the Power of States to Regulate the Movement of Goods in Interstate Commerce*, in 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 174 (T. Sandalow & E. Stein eds. 1982). Little effort has been devoted, in recent years, to examining in detail the development of the commerce clause. The best sources are still Charles Warren's history of the Court and the Oliver Wendel Holmes Devise series on the Court. *See generally* C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926 ed.); C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–1864 (1974); C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–1888 (1971).

Invaluable studies on the development of constitutional doctrine and the changing nature of the national economy and role of corporations are those by Charles McCurdy and Harry Scheiber. McCurdy, *supra* note 1; McCurdy, *The* Knight Sugar *Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979); Scheiber, *State Law and "Industrial Policy" in American Development, 1790–1987*, 75 CALIF. L. REV. 415 (1987); Scheiber, *Federalism, the Southern Regional Economy, and Public Policy Since 1865*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 69 (D. Bodenhamer & J. Ely eds. 1984); Scheiber, *Federalism and The American Economic Order, 1789–1910*, 10 LAW & SOC. REV. 57 (1975–1976). Another more recent and detailed study is that by David Currie, although the arrangement of the book makes it difficult to flesh out the development of discrete doctrines. D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888 (1985); *see also* Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910*, 52 U. CHI. L. REV. 324, 357–69 (1985).

the various "tests" was articulated, the decisions illustrate that the restriction on the states' police power was narrowly tailored to prevent the states from exercising jurisdiction over interstate commerce. This treatment follows from the Court's acceptance of the notion of "dual federalism," protecting both state territorial sovereignty and federal sovereignty.

Dual federalism, and its ancillary theory of territorial sovereignty, had a twofold impact. On one level, it served as a paradigm of constitutional thought suggesting that states may exercise their police power while reserving the commercial power to the federal government. On a less abstract level, the theory of territorial sovereignty served to define the scope of that power reserved to the states. States could exercise jurisdiction only over those subjects within their territorial bounds. If a state attempted to regulate conduct beyond its borders, the Court treated such a regulation as one of interstate commerce. Toward the end of the nineteenth century, the Court supplemented its analysis for determining whether a regulation was one of interstate commerce. An exercise of state power had to be reasonable—that is, it could not discriminate against interstate commerce. If a law failed to satisfy these two criteria, the Court held that the matter was vested exclusively within the jurisdiction of Congress, and invalidated the law.

II. TRADITIONAL ANALYSIS

A. Framework

Throughout the nineteenth century, the Supreme Court's decisions on the commerce clause fall into one of three categories for addressing the constitutionality of state or federal regulations that implicate the commerce clause. In *Covington Bridge Co. v. Kentucky*,[28] Justice Henry B. Brown summarized these three classes as involving subjects over which: (1) states exercise exclusive jurisdiction; (2) Congress and the states exercise concurrent jurisdiction, with the states' power subject to federal preemption; and (3) Congress exercises exclusive jurisdiction.[29] This framework, in effect, defined the scope of the states' reserved power to provide for the health, welfare, and safety of its citizens. The task of charting the realm of this, the states' police power, proved troublesome for the Justices during the nineteenth century.[30]

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28. 154 U.S. 204 (1894).

29. *Id.* at 209–13.

30. In Patterson v. Kentucky, 97 U.S. 501 (1879), for example, Justice John Marshall Harlan considered whether states could pass inspection laws covering the sale of luminous fluids. Upholding the exercise of the state's police power over such subjects, Justice Harlan commented that "it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of

Yet, they were eventually assisted by the publication of a few prominent treatises on the police power.[31]

Rarely did the Court acknowledge that a particular "mass of legislation" lay solely within the realm of state power. In dicta, however, the Court routinely observed that "a State has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal commerce."[32] Occasionally the Court limited congressional regulations that encroached upon the states' police power.[33]

The significant controversies usually focused on attempts to distinguish between Justice Brown's second and third categories. When Congress remained silent, where did the Court draw the line between *exclusive jurisdiction* in Congress and *concurrent jurisdiction* in both Congress and the states subject to federal preemption? Congressional silence indicated either that Congress wanted the subject to remain unregulated (a legal fiction, of course) or that the states could pass regulations—albeit possibly subject to federal statutory preemption.[34]

In *The Federalist No. 32*, Alexander Hamilton provided a framework for distinguishing between concurrent federal/state jurisdiction

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such a power in the States has been uniformly recognized in this court." *Id.* at 503.

31. *See, e.g.*, T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (1868); E. FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); A. RUSSELL, THE POLICE POWER OF THE STATE (1900); C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886).

32. Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 493 (1888) (dictum).

33. *See, e.g., In re* Heff, 197 U.S. 488 (1905) (commerce clause does not reach sale of liquor within state to an Indian living on federally-granted land), *overruled in* United States v. Nice, 241 U.S. 591 (1916); United States v. E.C. Knight, 156 U.S. 1 (1895) (Sherman Act does not reach monopoly of manufacturing); The Trade-Mark Cases, 100 U.S. 82 (1879) (dicta) (commerce clause does not reach trademarks); United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870) (Congress cannot prohibit intrastate trade of luminous oils); The Belfast, 74 U.S. (7 Wall.) 624, 640–41 (1869) (Congress cannot reach admiralty under commerce clause).

For what Congress *can* do, see *In re* Debs, 158 U.S. 564 (1895) (prescribe penalties for obstruction of interstate commerce); Miller v. Mayor of New York, 109 U.S. 385 (1883) (authorize construction of bridge); Lord v. Steamship Co., 102 U.S. 541 (1881) (regulate liability on the high seas); United States v. Marigold, 50 U.S. (9 Wall.) 560 (1850) (prohibit the counterfeiting of coins); United States v. Coombs, 37 U.S. (12 Pet.) 72 (1838) (prescribe penalties for the obstruction of commerce). Congress also has the power to authorize or create a corporation that will construct facilities in interstate commerce. *See, e.g.*, Luxton v. North River, 153 U.S. 525 (1894) (bridge across navigable waterway); California v. Central Pac. R.R., 127 U.S. 1, 39 (1888) (railroad corporation).

34. An alternate thesis is that the commerce clause operates by its own force. The dominant view, however, is that congressional silence indicates the intent that a subject be unregulated. Of course, this fiction is just that, a fiction. Justice Wiley B. Rutledge, for example, agreed with Frederick Ribble's comment that "[t]he silence of Congress was accordingly ambiguous. It might mean prohibition or ratification of state laws." W. RUTLEDGE, A DECLARATION OF LEGAL FAITH 56 n. 9 (1947) (discussing F. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937)); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 742 (1949).

and exclusive federal jurisdiction. He explained that states would retain their elements of sovereignty, except to the extent that such power was transferred to the United States. He continued by observing that such a transfer would occur in one of three instances:

> [W]here the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.[35]

This last class, he added, did not include those occasions where concurrent jurisdiction might result in a clash of policies.[36] Under Hamilton's analysis, if the regulation of interstate commerce is exclusive, it is because state jurisdiction "would be absolutely and totally *contradictory* and *repugnant*."

Hamilton's example, however, suggests that regulation of commerce is not of this type. He used the power of taxing articles as an illustration. Article I, section 8, clause 1 gives Congress the power to lay and collect taxes and duties on imports and exports, provided that it exercises its power uniformly throughout the country. Hamilton observed that while nothing in this clause granted the federal government exclusive jurisdiction, another clause—article 1, section 10, clause 2—restricts the states' ability to impose any imposts or duties on imports or exports. He then opined that "[t]his restriction implies an admission that if it were not inserted the States would posses the power it excludes, [and it further implies that in all other respects the states' power is] undiminished."[37] A similar granting clause with respect to regulation of commerce among the states, and the absence of any other constitutional restriction, suggests that Hamilton would conclude that the states' power was undiminished, except, of course, when preempted by federal law. Yet, as we shall see, *The Federalist No. 32* played only a backstage role in the development of the dormant commerce clause.

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35. THE FEDERALIST NO. 32, at 198 (A. Hamilton) (Rossiter ed. 1961).

36. *Id.*

37. *Id.* at 199. Hamilton also suggested that Congress' naturalization power would be an example of the third class of exclusive jurisdiction. Although his reason is not well expressed, he briefly notes that "[t]his must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE," which is required in the naturalization clause. *Id.* The uniformity clause also applied to bankruptcy; however, arguably contrary to Hamilton's analysis, the Court later held that states could pass bankruptcy measures. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 327 (1827).

B. The First Fifty Years and the Debate over "Exclusiveness"

Not until 1824 was the scope of the commerce clause first addressed by the Supreme Court, succeeding a debate that already had been flourishing in the other two branches of government.[38] Early in the nineteenth century, Presidents and Congressmen debated whether the federal government or the states should finance and oversee the development of the two principal means of transportation, canals and roads.[39] Following the War of 1812, for example, President James Madison proposed that Congress should exercise its existing powers for developing internal improvements and, if necessary, should consider amending the Constitution to authorize Congress to assist in the development of a comprehensive transportation system. Yet, when Representative John C. Calhoun of South Carolina introduced what was called a "Bonus Bill" for funding internal improvements, President Madison vetoed the bill on constitutional grounds. In 1818, the House of Representatives decided that it had appropriations power but lacked jurisdiction over internal improvements.[40] And, while President James Monroe indicated upon his inauguration that the matter of internal improvements was of national importance, he nevertheless considered the subject an issue for the states. Monroe, therefore, refused to sign the Cumberland Road Bill of 1822, indicating that Congress could appropriate money only for the general, national benefit and not for the benefit of a state or local concern.[41] Led by Senator Henry Clay of Kentucky,[42]

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38. The political factions debated the need for federal control of economic development, a disagreement often characterized by sectional interests. A good survey of economic development during this period is D. FEHRENBACHER, THE ERA OF EXPANSION, 1800–1848 (1969). Generally, the Whig philosophy embraced a nationally-cohesive economic unit supervised by Congress, with a program characterized by a national bank, tariffs, and internal improvements; such expansive congressional power, however, was rejected by the Whigs' opponents, the Democrats, who attacked various forms of privileges and favored less centralized control over economic development. For example, Horace Greeley, a prominent Whig, explained that the Whig party favored government spending for internal improvements when the effect would benefit the "whole People." *See* J. SILBEY, THE TRANSFORMATION OF AMERICAN POLITICS, 1840–1860, at 37 (1967). *See generally* D.W. HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS (1979); M. MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF (1960).

39. For a general survey of congressional appropriations for internal improvements associated with the construction of roads, canals, and then railroads, see P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 341 (1968). For an example of one canal company's efforts to secure funds, see R. GRAY, THE NATIONAL WATERWAY: A HISTORY OF THE CHESAPEAKE AND DELAWARE CANAL, 1769–1965, at 10–42 (1967). *See generally* C. GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANAL, AND RAILROADS, 1800–1890 (1960); G. TAYLOR, THE TRANSPORTATION REVOLUTION, 1815–1860 (1951).

40. Forest McDonald suggests that the framers of the Constitution may not have intended that Congress would be able to appropriate money for internal improvements. F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 264–65 (1985).

41. *See* G. DANGERFIELD, THE AWAKENING OF AMERICAN NATIONALISM: 1815–1828, at 199 (1965).

Congress passed the General Survey Bill in 1824, which was designed to facilitate the development of roads and canals. Monroe, having changed his attitude somewhat after failed attempts to have the Constitution amended, signed the measure.[43]

In the same year that Congress passed the General Survey Bill, the Supreme Court decided its first case on the commerce clause, *Gibbons v. Ogden*,[44] which quite appropriately involved transportation on canals. The New York State Legislature had granted an exclusive right to operate steamboats over the state's navigable waters to Robert Livingston and Robert Fulton.[45] Other states began granting similar exclusive rights or passing retaliatory measures.[46] The case arose when Livingston and Fulton assigned their monopoly rights to Aaron Ogden—after Livingston had obtained a injunction against Ogden for operating a steamboat in violation of the monopoly—and Ogden brought a test case against his former partner, Thomas Gibbons, who sought to operate his boats on New York waters. In his defense, Gibbons established that his boats were licensed under the laws of the United States and duly enrolled at Perth Amboy, New Jersey. Some of the best lawyers of the day, led by Senator Daniel Webster of Massachusetts, appeared before the Court to argue the case.[47]

The Court held that the state monopoly conflicted with the federal Coasting License Act of 1793,[48] putting to an end what was generally

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42. Clay had supported the 1818 House of Representatives resolution declaring that Congress has the authority to appropriate money for internal improvements. He also is well known for "The American System," a comprehensive program for the country, "[t]he leading values of which," according to Howe, "such as order, harmony, purposefulness, and improvement, found expression in the form of an economic program." D.W. HOWE, *supra* note 38, at 137.

43. For a discussion of these and other events, see C. SWISHER, *supra* note 27, at 396–404; M. PETERSEN, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 78–83 (1987).

44. 22 U.S. (9 Wheat.) 1 (1824).

45. In 1812, the Court for the Correction of Errors of New York upheld several of the statutes granting the monopoly. Livingston v. Van Ingen, 9 Johns. 507 (N.Y. 1812).

46. *See generally* 1 C. WARREN, *supra* note 27, at 598. Kent Newmyer notes that "[s]uch practices threatened to fractionalize national commerce and retard the use of new transportation—the steamboat in 1824, perhaps the railroad six years later." K. NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 49–50 (1968). The Court was well aware of these retaliatory statutes and their potential effect on commerce. New York v. Miln, 36 U.S. (11 Pet.) 102, 159–60 (1837) (Story, J., dissenting).

47. *See* 1 C. WARREN, *supra* note 27, at 599. Webster apparently briefed the case on twenty-four hours notice. M. PETERSON, *supra* note 43, at 103. For background and discussion of the case and the advocates, see 4 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 397–450 (1919).

48. New York Chancellor James Kent, from whose state the case arose, was quite dismayed at this use of the Coasting License Act. He observed that when Congress passed the Act, "it never occurred to any one" that the Act was a regulation of commerce and prohibitory of any such state grants; instead, Kent indicated that the Act was designed "to exclude foreign vessels from commerce between the states, in order to cherish the growth of our own marine, and to provide that the coasting trade should be conducted with security to the revenue." 1 J. KENT, KENT'S COMMEN-

regarded as an onerous monopoly.[49] The opinion, written by Chief Justice John Marshall, suggested that Congress exercises an expansive power under the commerce clause that reaches every species of commercial intercourse, including navigation. This power, quite naturally, did not end at jurisdictional lines but rather operated "within the territorial jurisdiction of the several States."[50] Marshall further distinguished between two spheres of jurisdiction, the commercial power delegated to the federal government and that reserved to the states under the Constitution. States retained their power to regulate police or trade "which does not extend to or affect other States," and which is completely within a state.[51] The power of taxation is one example.[52] Responding to the spectre of state quarantine and inspection laws thereby becoming unconstitutional, Marshall admitted that, while such laws affect interstate commerce, states may exercise "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government."[53] If the *object* of the state law is permissible, Marshall indicated, then the means chosen would be acceptable even if resembling those that could be employed by the federal government under the commercial power.[54]

For approximately the next fifty years after Marshall's opinion in *Gibbons*, the changing composition of the Court, coupled with the growing focus on such issues as slavery, temperance, internal improvements, and the general scope of the states' police power, dampened the Court's efforts to establish a meaningful "general principle" for the implied prohibition in the commerce clause. It appeared as if the tenets of

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TARIES 435 (Lacy ed. 1889).

49. *See generally* 1 C. WARREN, *supra* note 27, at 612–28. Warren speculated that Justice Story may have written part of the opinion; Marshall had injured his shoulder and apparently could not write near to the time when the Court issued its decision. *Id.* at 608. Authorship by another Justice is a possibility. *Cf.* White, *The Working Life of the Marshall Court, 1815–1835*, 70 U. VA. L. REV. 1, 14–15, 19–20, 20 n.72 (1984) (discussing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)).

50. *Gibbons*, 22 U.S. (9 Wheat.) at 196.

51. *Id.* at 198–99.

52. *Id.* at 199.

53. *Id.* at 203. Chief Justice Marshall indicated that there was "great force" to the argument that Congress' authority over interstate commerce is exclusive; however, he did not resolve the question, opting instead to decide that the state law was preempted. Charles McCurdy writes that Marshall "deftly avoided a direct confrontation with the question . . . 'whether this [commercial] power . . . is surrendered by the mere grant to Congress, or is retained [by the states] until Congress shall exercise the power.'" McCurdy, *supra* note 1, at 635. This, of course, is the question that generated so much of the uncertainty in commerce-clause analysis until the second half of the nineteenth century. Justice Story later suggested that Marshall adhered to the view that the federal government exercises exclusive power over commerce.

54. Justice William Johnson concurred in the opinion, suggesting that the state law conflicted with Congress' exclusive jurisdiction over interstate commerce. *Gibbons*, 22 U.S. (9 Wheat.) at 222 (Johnson, J., concurring).

Jacksonian democracy had affected the Court's treatment of the commerce clause; the Court's subsequent opinions suggested a retreat from Marshall's theory of distinct spheres of jurisdiction.[55] Internal improvements, along with quarantine and inspection laws, were held to be matters best left to state regulation.[56] Futhermore, the mounting tension created by state statutes affecting the slave trade and temperance no doubt chilled the Court's treatment of the commerce clause.

Attention shifted away from issues involving internal-improvement measures and, instead, focused on statutes such as those affecting personal mobility. For instance, the seamen acts in the South authorized the imprisonment and, in some cases, the sale of black sailors arriving at port, while in the North the increasing number of immigrants

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55. Chief Justice John Marshall himself added to the problem when, in his only other opinion on the commerce clause (with the exception of dicta in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827)), he wrote for the Court upholding a Delaware statute incorporating the Black Bird Creek Marsh Company. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). The statute at issue in *Willson* authorized the Company to build a dam across a small, but navigable, waterway. After a boat hit and damaged the dam, the Company brought suit. *Id.* at 245–46. The defendant argued, inter alia, that the dam illegally obstructed a public and common navigable creek. The eminent counsel for the Company, former Attorney General William Wirt, responded that this creek

> is one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes; and can it be asserted, that a law authorizing the erection of a dam, and the formation of banks which will draw off the pestilence, and give to those who have before suffered from disease, health and vigour is unconstitutional?

Id. at 251 (Wirt, Counsel for Respondent, oral argument). Chief Justice Marshall agreed, holding that "[m]easures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States." *Id.* at 251. Indeed, this same type of language appeared in Marshall's opinion in *Gibbons*, where he indicated that states could pass laws affecting the health, safety, and welfare of their citizens. 22 U.S. (9 Wheat.) at 186.

In *Willson*, after holding that public health measures were proper state enactments, Marshall then suggested that absent congressional action preempting the area of regulation, the state validly exercised its police power even though a small navigable creek might be obstructed. 27 U.S. (2 Pet.) at 251.

56. Justice Peter V. Daniel, appointed by President Martin Van Buren in 1837, asserted that "neither Congress nor the federal government in the exercise of all or any of its powers or attributes possesses the power to construct roads, nor any other description of what have been called internal improvements, within the limits of the States." Searight v. Stokes, 44 U.S. (3 How.) 151, 180 (1845) (Daniel, J., dissenting). Justice Story, on the other hand, wrote in his treatise on the Constitution that Congress could appropriate money for internal improvements if the object would be of benefit to all the states. He also indicated that Congress could "undertake and carry on a system of internal improvements for the general welfare." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 150 (1833). For example, Congress, in aid of one of its enumerated powers, can authorize the construction of canals, roads, light-houses, and buoys. Story added that the state would still retain its territorial sovereignty over such areas when, for instance, it is enforcing its criminal laws, but the state could not obstruct the exercise of the federal power. *Id.* at 150.

prompted state regulation at ports of entry.[57] In *Mayor of New York v. Miln*,[58] a case held over from the Marshall Court, the City of New York brought an action in debt against a ship captain for violationn of an ordinance requiring captains of vessels docking at the City to make certain reports concerning the number and status of immigrants on board and give security in case such immigrants should become a public charge of the state.[59] Arguing before the Supreme Court, Mr. Blount, co-counsel for the Mayor, argued that some 60,500 immigrants annually landed in New York harbor and that "[i]t was obvious that laws were needed to regulate such a migration; and the Atlantic States generally have passed such laws."[60] Although claiming that the statute was not a regulation of commerce, Blount further argued that, assuming that it was a regulation of commerce, the states may exercise concurrent jurisdiction along with the federal government. This conclusion, he opined, is necessary because otherwise, "all State laws affecting or regulating commerce are necessarily void, even where no conflict exists" with a federal statute.[61] He referred to other more politically-sensitive laws that the Court would have to strike down, such as laws regulating the importation of convicts, poor laws directing that paupers be sent back to their place of settlement, and laws in the South regulating the traffic and importation of slaves.[62] Co-counsel David. B. Ogden added that the Act in question served the same purpose as "[a]n Act for the relief and settlement of the poor." If the Act was invalid, he argued, it was "because the power to pass it is taken away by necessary implication."[63] Such an implication is unnecessary unless or until Con-

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57. Carl Swisher describes these developments in C. SWISHER, *supra* note 27; *see also* 1 C. WARREN, *supra* note 27, at 622–28. Justice Johnson on circuit had indicated that the South Carolina Seamen Act was unconstitutional. Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366) (Johnson, J.). Shortly after the Court decided *Gibbons*, then-Attorney General William Wirt issued an opinion reaching the same conclusion. 1 Op. Att'y Gen. 659 (1824) (Wirt, Att'y Gen.). John M. Berrien, Attorney General under President Andrew Jackson, however, disagreed and thought that the Act was constitutional. 2 Op. Att'y Gen. 426 (1831) (Berrien, Att'y Gen.). When Roger B. Taney, later Chief Justice, succeeded Berrien as Jackson's Attorney General, he issued an opinion that a northern-state statute that freed slaves did not violate any treaty, as claimed by Great Britain, and he further indicated that he disagreed with the conclusion of Justice Johnson. *See* D. FEHRENBACHER, SLAVERY, LAW, & POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 38 (1981); H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 101 (1982).

58. 36 U.S. (11 Pet.) 102 (1837).

59. *Id.* at 106–07.

60. *Id.* at 106.

61. *Id.* at 109.

62. *Id.* Blount cited to a number of state quarantine laws, passenger laws, pilot laws, wreck laws, laws relating to blacks and seamen, laws on destroying vessels and other harbor regulations. *Id.* at 114–15.

63. *Id.* at 125.

gress intervenes with legislation.

When the case was originally argued before the Court, Chief Justice Marshall—according to Justice Joseph Story—thought that the Act was unconstitutional. On reargument, however, Justices Story and Smith Thompson were the only pre-Jacksonian Justices remaining on the bench, and Thompson already had indicated, while sitting as a circuit judge, that he thought the law was constitutional. Thompson is considered to have drafted the initial opinion for the Court, which treated the law as a valid exercise of the state's police power. The other Justices apparently found unacceptable his added discussion about the extent of that power, and adopted instead an opinion by Justice Philip P. Barbour as that of the Court.

Holding that the law was a valid police-power measure, Justice Barbour avoided the issue of whether the states may exercise concurrent jurisdiction over commerce.[64] Barbour relied upon the language in *Gibbons* that the states may pass "that immense mass of legislation" not surrendered to the federal government, such as inspection laws, quarantine laws, health laws, and laws affecting internal commerce.[65] The principal question, therefore, was whether the act was not one of commerce but one of police power. In this case, Barbour noted that the law operated solely within the jurisdiction of New York, affected only persons within the state, and benefitted the people of New York. Since the state was

> acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end . . . subject only, say the court, to this limitation, that in the event of collision, the law of the State must yield to the law of Congress.[66]

Barbour added in dicta that even if the Act were treated as a commercial regulation, it would be upheld unless it conflicted with a federal act. He nevertheless rested his opinion upon firmer ground: "that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where

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64. *Id.* at 102. In dicta, Justice Philip P. Barbour suggested that "commerce" does not include the transportation of people. *Id.* at 132 (dicta). The story goes that the other Justices overlooked this last statement until it was too late, and Justice James M. Wayne later wrote an opinion purporting to explain the circumstances surrounding Barbour's opinion. *See* The Passenger Cases, 48 U.S. (7 How.) 283, 429–32 (1849). This issue should have been settled in *Gibbons*, where passengers were being carried by the steamships. 22 U.S. (9 Wheat.) at 5. It may well be that the lack of formal circulation and editing of draft opinions led to this result. *See* White, *supra* note 49, at 39 n.144 ("Contemporary evidence demonstrates that there was little circulation and editing of Supreme Court manuscript opinions.").

65. *Miln*, 36 U.S. (11 Pet.) at 133 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824)).

66. *Id.* at 137.

that jurisdiction is not surrendered or restrained by the Constitution of the United States."[67] An aspect of the states' sovereign power preserved by the Constitution was that of providing for the general welfare, safety, and happiness of the people and in these respects the state power is "complete, unqualified and exclusive."

Justice Story dissented, indicating that while he agreed that states may exercise their police power in passing health and quarantine laws, and even adopt poor laws that would exclude paupers, states could not regulate commerce.[68] Story suggested that he would go even farther and "admit that in the exercise of their legitimate authority over any particular subject, the States may generally use the same means that are used by Congress, if these means are suitable to the end."[69] States, however, could not regulate commerce to achieve an otherwise permissible end under the police power. He opined that states did not have the "authority to enact laws which act upon subjects beyond their territorial limits, or within those limits, and which trench upon the authority of Congress in its power to regulate commerce."[70] Story treated Congress as exercising exclusive jurisdiction over commerce and, contrary to Barbour's assertion, illustrated why the transportation of passengers is an object governed by the commerce clause. Since the act imposed a restraint upon the right of transportation and introduction of passengers into the state, it was unconstitutional.

Only a few years later, Blount's warning that the Court would not be able to distinguish New York's law from those of various southern statutes echoed before the Justices as they heard argument in *Groves v. Slaughter*.[71] Slaughter, a non-resident of Mississippi, entered into a contract for the sale of slaves in Mississippi, and received in return two promissory notes. After the buyer failed to pay on the notes, Slaughter brought suit in federal district court and then appealed to the Supreme Court. The case attracted some of the best advocates of the day, such as Henry D. Gilpin, Robert J. Walker, and Senators Clay and Webster. Gilpin, counsel for the buyer, urged the Court to hold that the contract was void because Mississippi, on October 26, 1832, had adopted a constitutional amendment prohibiting the importation and sale of slaves.[72] He vigorously contended that the language and actions

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67. *Id.* at 139.

68. *Id.* at 153 (Story, J., dissenting). *See generally* K. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 222–24 (1985).

69. *Miln*, 36 U.S. (11 Pet.) at 156 (Story, J., dissenting).

70. *Id.* (Story, J., dissenting).

71. 40 U.S. (15 Pet.) 449 (1841). *See generally* P. FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 266–71 (1981).

72. *Groves*, 40 U.S. (15 Pet.) at 451. *See generally* C. SWISHER, *supra* note 27, at 365–70 (indicating that *Groves* involved a number of mixed issues, including slavery, the payment of debts

leading to the constitutional amendment indicated that the prohibition operated *prio vigore*. Gilpin further bolstered his argument with general principles of interpretation and lower Mississippi state court pronouncements. Anticipating the argument that the constitutional amendment, as so construed, would conflict with the commerce clause, he claimed that the law was a local law, did not affect other states and concerned a matter depending solely on the state of Mississippi. It was no different, he argued, than laws prohibiting the importation of lottery tickets or New York's law forbidding detention and sale of slaves in that state. Gilpin premised his argument on three grounds. First, he argued that states could determine what objects were "commercial property" and subject to interstate commerce; and, by prohibiting the sale of slaves, Mississippi had declared that slaves would not be commercial property. Second, he proffered that the state's police power encompasses such subjects. Third, he argued in the alternative that the state exercises concurrent power with the federal government.[73]

In response, Senator Webster, assisted by other counsel, cautioned that "[i]f the right in States recognizing slavery exists to prohibit trading in them, it will allow non-intercourse between the States of the Union by the legislative enactments of the States, and will authorize retaliation."[74] Such retaliation was not only a possibility, but rather a distinct and growing problem in a variety of areas.

The Court avoided the constitutional issues by holding that the Mississippi constitutional amendment did not operate without some action by the state legislature to implement the amendment.[75] Concurring, Justice John McLean opined that slaves were not articles of commerce and thus such state laws were valid.[76] He referred to Ohio's

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by Mississippi residents to out-of-state residents, and the value of slaves in Mississippi); 2 C. WARREN, *supra* note 27, at 67–73 (noting that prohibition on importation of slaves for sale was due to the depressed Mississippi economy).

73. *Groves*, 40 U.S. (15 Pet.) at 464 (Gilpin, Counsel for Plaintiffs in Error, Oral Argument).

74. *Id.* at 495 (Webster, Counsel for Defendant in Error, Oral Argument).

75. *Id.* at 500. Justice Smith Thompson authored the majority opinion. *See id.* at 496. Justice John Catron did not participate because of illness, and Justice Barbour died before the Court issued its decision. *See* 2 C. WARREN, *supra* note 27, at 71 n.1.

76. *Groves*, 40 U.S. (15 Pet.) at 506–08 (McLean, J., concurring in result). Justice McLean, however, was personally opposed to slavery. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 243–49 (1975). Interestingly, in the same term as the *Groves* decision, the Court decided United States v. Libellants of the Schooner Amistad, 40 U.S. (15 Pet.) 518 (1841), in which the parties argued whether slaves were property. In *Amistad*, a number of Cuban slaves slaves had taken control of their transport ship and ordered the survivors of the crew to take them to Africa; instead, the helmsman took the ship to Long Island Sound, where the slaves were arrested. The Spanish Minister sought return of the slaves; his claim, opposed in the Supreme Court by former President John Quincy Adams, was eventually denied, and the slaves freed. *See* J.Q. ADAMS, THE DIARY OF JOHN QUINCY ADAMS, 1794–1845, at 516–19 & n.2

constitutional provision prohibiting slavery, and argued that if such a prohibition was lawful then so too must be the type of amendment adopted in Mississippi.[77] McLean's concurrence prompted Chief Justice Roger B. Taney to express his opinion that "this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits from another State . . . ."[78] Justice Henry Baldwin, on the other hand, suggested that states could validly adopt such laws when public morality or safety was involved.[79] Dissenting without writing a full opinion, Justices Story and John McKinley also agreed that the Mississippi prohibition did not offend the commerce clause; they nevertheless would have treated the notes as void because the constitutional amendment operated *pro vigore*.[80]

The issue of slavery and the constitutionality of southern statutes surfaced once again in the *Passenger Cases*,[81] where the Court a second time was confronted with northern state statutes affecting immigration.[82] Laws in New York and Massachusetts levied fees on ship

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(A. Nevins ed. 1929).

77. *Groves*, 40 U.S. (15 Pet.) at 507–08 (McLean, J., concurring in result). Charles Warren observes that "McLean's dictum was equally satisfactory to the slavery party and to the South, who regarded it as a confirmation of their contention that they had exclusive power to regulate all questions affecting slavery within their borders" and that "[this dictum was] regarded as assuring the validity of the laws of South Carolina, Georgia, and Louisiana, forbidding the entrance of free negroes." 2 C. WARREN, *supra* note 27, at 72.

78. *Groves*, 40 U.S. (15 Pet.) at 508 (McLean, J., concurring in result).

79. *Id.* at 516 (Baldwin, J., dissenting).

80. *See* C. SWISHER, *supra* note 27, at 367–70 (letter from Justice Story to Robert J. Walker, an attorney in the case). This conclusion was later supported by the Mississippi Supreme Court in Barnard v. Planter's Bank, 5 Miss. 98 (1839), but the United States Supreme Court refused to give the opinion retroactive effect. *See* Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847).

81. 48 U.S. (7 How.) 283 (1849).

82. Events since the *Miln* decision had intensified the issue. Northern states began to enforce their own laws on southern citizens who sought redress in northern courts, and they refused to extradite persons for violating southern laws on slavery. Some southern states responded with retaliatory legislation. The problem became so apparent that one newspaper cautioned:

> These attempts of the State to usurp authority belonging to the Government of the United States are becoming more and more frequent. The success of such an attempt in New York lately brought us to the verge of a war with a foreign power, as the attempt itself on the part of another State did with the same power, three years ago; and now two or three States are about having a war of commercial interdicts among themselves, which, unless ended by judicial interposition, may be attended with consequences ever to be lamented.

National Intelligencer, Feb. 17, 1842, *quoted in* 2 C. WARREN, *supra* note 27, at 170–71. *See generally* P. FINKELMAN, *supra* note 71; C. SWISHER, *supra* note 27, at 382–95. It should be noted that in 1842 the Court upheld the Fugutive Slave Act of 1793, overturning a state conviction under a law prohibiting the capture of a runaway slave. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). In *Prigg*, Justice Story indicated that states "possess full jurisdiction to arrest

captains for each immigrant arriving at a port within the state.[83]

This case also attracted such luminaries of the bar as Webster, Ogden, Rufus Choate, John Davis, and John Van Buren, the son of Martin Van Buren. Webster, however, lamented that the constitutional arguments would be lost on this Court, although he considered the case one of his most important; in fact, it proved to be one of his last.[84]

Following three oral arguments, the Court issued eight separate opinions. Although the Justices failed to agree on a majority opinion, the laws were held unconstitutional. The voluminous pages of opinions merely illustrated that Justices had not yet settled on how to resolve commerce-clause issues. And it is generally acknowledged that "[t]he opinions, whether majority or minority, were so diverse that attempts to summarize could only confuse."[85] Five Justices, McLean, James M. Wayne, John Catron, McKinley, and Robert C. Grier, thought that the laws regulated commerce and conflicted with federal statutes and treaties.[86] Justices McLean, McKinley, and Wayne indicated that they viewed Congress' power over commerce as exclusive,[87] while the other two Justices did not clearly reach that issue.[88] The Court's decision evoked considerable comment, and many observers began to wonder whether the decision meant that such southern statutes as those prohibiting or regulating the introduction of free blacks would be struck

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and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers." *Id.* at 625. *See generally* W. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY 1830–1900, 54–55 (1982); Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5 (1979).

83. *The Passenger Cases*, 48 U.S. (7 How.) at 283–89.

84. C. SWISHER, *supra* note 27, at 384; 2 C. WARREN, *supra* note 27, at 178. Webster suggested that, "[i]n the days of Marshall and Story, [the Massachusetts law would] not have stood one moment." *See* 2 C. WARREN, *supra* note 27, at 176. Nevertheless, he predicted that the laws would be invalidated. *See id.* at 177.

85. C. SWISHER, *supra* note 27, at 388.

86. *The Passenger Cases*, 48 U.S. (7 How.) at 392 (McLean, J., concurring in result); *id.* at 410 (Wayne, J., concurring in result); *id.* at 437 (Catron, J., concurring in result); *id.* at 452 (McKinley, J., concurring in result); *id.* at 455 (Grier, J., concurring in result).

87. *Id.* at 392 (McLean, J., concurring in result); *id.* at 410 (Wayne, J., concurring in result); *id.* at at 452 (McKinley, J., concurring in result).

88. Chief Justice Taney, and Justices Daniel, Samuel Nelson, and Levi Woodbury dissented. The Chief Justice and Justice Woodbury attempted to illustrate that the laws were pauperism measures adopted under the police power. *See, e.g. id.* at 465 (Taney, C.J., dissenting). Justice Woodbury's dissent is interesting because he also argues that the laws represent valid "municipal" legislation under the law of nations and as an incident of sovereignty were not surrendered by the states. *Id.* at 520 (Woodbury, J., dissenting). Justice Robert C. Grier, on the other hand, cogently pointed out that the two port states would be able to collect revenues from all immigrants landing even though many of them would then be transported out of the state. *Id.* at 455 (Grier, J., concurring in result).

down.[89]

The ambiguity surrounding the Court's decision in the *Passenger Cases* was foreshadowed by the Court's resolution of the *License Cases*,[90] initially argued along with the *Passenger Cases*, but decided two years earlier. In the *License Cases*, Massachusetts, Rhode Island, and New Hampshire had attempted to curb the growing problem of intemperance. The first two states required that a minimum quantity of liquor be sold at one time and also that the seller obtain a license before making sales. These restrictions applied to liquor imported from foreign countries as well as from other states. The New Hampshire law, however, differed somewhat in that no minimum quantity was required. Arguing against the Massachusetts statute, Webster and Choate noted that the state indirectly had attempted to put an end to traffic in liquor, because in the county of over 100,000 where the seller had been arrested, no license had been issued for the last eight years.[91] When the cases were reargued, three new Justices were on the Court: Samuel Nelson, Levi Woodbury, and Grier. McKinley was out on circuit and did not participate, and Justice Wayne's vote is not recorded. The Court, without a dissent, upheld all three statutes, but with six of the Justices writing separate opinions, there was no majority opinion.

Chief Justice Taney purportedly followed Marshall's opinion in *Brown v. Maryland*[92] in voting to uphold the Massachusetts and Rhode Island statutes. In *Brown*, Marshall had construed article 1, section 10, clause 2, of the Constitution to hold that states could not tax or require a license to sell an article of commerce which was both authorized by Congress to be imported and still in its original package. Not until the subject became a part of the general mass of state property could it be taxed. Marshall indicated that this same reasoning would apply under the commerce clause.[93] In the *License Cases*, since the laws of Massachusetts and Rhode Island at issue only affected liquor that had ceased to be in its original package and, therefore, had become a part of the general mass of state property, the states were free to pass such laws even though they might result in denying a market to the importer. The New Hampshire law, on the other hand, operated on liquor that had

89. 2 C. WARREN, *supra* note 27, at 181.

90. 46 U.S. (5 How.) 504 (1847), *overruled in* Leisy v. Hardin, 135 U.S. 100 (1890).

91. Webster and Choate questioned the sincerity of the state's motive in passing the law, explaining that Massachussets did not prohibit domestic distillation. They also referred the Court to a federal law that allowed the importation of brandy in 15-gallon casks. *See generally* L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 223 (1957). For an excellent study of state economic regulation during this period, see L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860 (1948).

92. 25 U.S. (12 Wheat.) 419 (1827) (discussed *infra* note 257).

been shipped from another state and was still in its original package. Although Chief Justice Taney treated the law as a regulation of commerce, he nevertheless considered the law valid until Congress would provide otherwise.[94]

The other Justices presented different reasons for upholding the law. Justice Peter V. Daniel, for instance, agreed with Taney's view on exclusiveness but rejected *Brown* as being both arbitrary and illogical.[95] Justice Catron similarly indicated that Congress' power was not exclusive, but he was not willing to let the state define the scope of lawful objects of commerce and rejected the rationale that the laws were a valid exercise of the police power.[96] Justice Woodbury, on the other hand, treated the laws as a constitutional exercise of the police power. As an incident to sovereignty, he noted, states necessarily retained the power to regulate those articles within their territory that affected the health, safety, and welfare of their citizens.[97] Justice McLean generally agreed with Justice Woodbury, observing that the measures were local regulations concerning the internal police of the state and a necessary power for self-preservation.[98] Justice Grier's opinion also treated the statutes as if they were appropriate health measures under the police power.[99]

C. The Apparent Adoption of a New Standard: Selective Exclusiveness and the Local-National Distinction

Only a few years later, the Court appeared to adopt a novel solution to the problem of exclusiveness that plagued its commerce-clause analysis. In *Cooley v. Board of Wardens*,[100] Justice Benjamin R. Curtis, having recently replaced the deceased Justice Woodbury on the Court, introduced what has become known as the concept of "selective exclusiveness." A Pennsylvania law required that vessels weighing over seventy-five tons that entered any port not within the Delaware River pay a pilotage fee unless a pilot was on board. The statute exempted the coal trade, and the revenue collected was distributed for the relief of pilots and their families. Counsel for the state referred the Court to "[n]umerous laws of this kind" throughout the commercial states and countries. Although Curtis held that the state pilotage statute regu-

94. *License Cases*, 46 U.S. (5 How.) at 573 (Taney, C.J., concurring in result).
95. *Id.* at 611 (Daniel, J., concurring in result).
96. *Id.* at 597, 609 (Catron, J., concurring in result).
97. *Id.* at 618 (Woodbury, J., concurring in result).
98. *Id.* at 586, 593, 596 (McLean, J., concurring in result).
99. *Id.* at 631 (Grier, J., concurring in result).
100. 53 U.S. (12 How.) 299 (1851).

lated commerce,[101] he then proceeded to uphold the law, reasoning that Congress' power was not exclusive over subjects local in character; rather, only when regulation demands national uniformity is Congress' power exclusive.

Curtis reasoned that because pilotage laws are a valid subject for congressional action, and a matter upon which Congress had, in fact, legislated, such laws must be regulations of commerce. He could have avoided this conclusion if he had distinguished between legislative means and legitimate ends. Nevertheless, he proceeded to question whether a congressional enactment of 1789 approving state pilotage laws would apply to the Pennsylvania law passed afterwards, in 1803. Curtis then presumed that if one accepted the argument that Congress' power over commerce is exclusive, Congress could not reconvey that power to the states by authorizing future state legislation. This presumption, although perhaps unwarranted, is critical to Curtis' opinion. Such reasoning caught Curtis in the intellectual box that he had created: either the power is not exclusive or Congress could not authorize states to legislate on such local matters. The latter conclusion would have required invalidating the 1789 federal enactment.

Instead, Curtis concluded that it was necessary to examine the nature of the power, which he treated as synonymous with the subject being regulated. "If they are excluded," he wrote, "it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States."[102] Here, Curtis's reasoning follows that expressed much earlier by Hamilton in *The Federalist No. 32*, which Curtis cited in his opinion.[103] Only when a uniform, nationwide rule is required would the nature of the power demand that it be within the exclusive domain of Congress:

> 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. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative descretion of the several States should deem ap-

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101. *Id.* at 316–17. Elsewhere in the opinion, Justice Curtis suggested that such laws "rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them." *Id.* at 312.

102. *Id.* at 318.

103. *Id.* at 318 (citing THE FEDERALIST NO. 32, *supra* note 35).

plicable to the local pecularities of the ports within their limits.[104]

This reasoning, according to Curtis, justified giving the 1789 enactment "an appropriate and important signification."[105] The enactment illustrated that the matter was susceptible to local rather than uniform regulation. Moreover, Congress' intention in the enactment of leaving the matter to the states would thus be validated. And, before concluding his opinion, Curtis indicated that, if the state did not have the power to pass such laws, great mischief would follow in trying to collect all the improper fees paid during the past sixty years—Congress perhaps being unable to pass a law retroactively approving the state regulation.[106]

Language in many of the Court's subsequent opinions followed Curtis's reasoning in *Cooley*.[107] These opinions suggested that the critical factor for assessing state or federal regulations was whether the character of the regulated object was local or national.[108] When the subject was national in character and required uniform regulation throughout the country, then Congress would exercise exclusive jurisdiction over the subject. The Court treated some subjects, such as navigation on the high seas, as necessarily national in character.[109] Con-

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104. *Id.*

105. *Id.* at 319.

106. *Id.* at 320–21. Justices McLean and Wayne dissented, with McLean taking the position that Congress' power is exclusive. *Id.* at 324–25 (McLean, J., dissenting). Justice Daniel concurred, treating the law as matter inherent in state sovereignty and not a commercial regulation. *Id.* at 326 (Daniel, J., concurring). Justice John McKinley was ill and did not participate.

107. In Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866), Justice Noah H. Swayne adopted the *Cooley* rationale. *Gilman* involved the construction of a bridge over a navigable river. The bridge threatened to interfere with the navigation of vessels over a certain size that travelled under the arches. *Id.* at 721–22. For a divided Court, Justice Swayne observed that municipalities must consider the convenience of their citizens and the passage from one state to another across the river. He then declared that states exercise concurrent jurisdiction over commerce local in character, while the federal commercial power extends only to those subjects calling for uniform rules and national legislation. *Id.* at 726–27, 729–30; *see also Ex Parte* McNiel, 80 U.S. (13 Wall.) 236 (1872) (upholding state pilotage law even though a regulation of commerce); Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1865); The Albany Bridge Case, 69 U.S. (2 Wall.) 403 (1865) (4–4 split) (considering the constitutional right of a state to pass a law authorizing the erection of bridges over navigable rivers).

108. *See, e.g.*, Western Union Tel. Co. v. James, 162 U.S. 650 (1896); Pittsburg & S. Coal Co. v. Bates, 156 U.S. 577, 587 (1895); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 (1894); Miller v. Ammon, 145 U.S. 421 (1892); Leisy v. Hardin, 135 U.S. 100 (1890); Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888); Hamilton v. Vicksburg, S. & Pac. R.R., 119 U.S. 280 (1886); Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886); Webber v. Virginia, 103 U.S. 344 (1881); Lord v. Steamship Co., 102 U.S. 541 (1881); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 279–80 (1873).

109. Lord v. Steamship Co., 102 U.S. 541 (1880). In *Lord*, Chief Justice Morrison Waite held that Congress has authority to regulate liability on the high seas even though the transportation of goods is between ports in the same state. Distinguishing the Trademark Cases, 100 U.S. 82 (1879), the Chief Justice declared that the Pacific Ocean was common property of all United States citizens, but the high seas is national in character. *Lord*, 102

versely, the Court permitted states to regulate dams[110] and bridges,[111] and, to a certain extent, to charge tolls for ferries traveling between two states.[112] Additionally, the Court held that licensing,[113] quarantine,[114] pilotage,[115] and harbor[116] statutes are all a valid part of local regulation.[117]

In *Mobile v. Kimball*,[118] for example, the Court upheld a state harbor improvement statute, declaring that the subject admitted of local rather than national regulation. An Alabama Act of February 16, 1867, created a Board of Commissioners for the improvement of the Bay area of Mobile. Proceeds from the sale of bonds would be used to dredge, widen, and deepen the channel and could also be used for construction of an artificial harbor. The law clearly did not *interfere* with interstate commerce; nevertheless, apparently seeking to avoid payment to the contractors after the work was completed, the county itself argued that the law was unconstitutional.[119] Justice Stephen J. Field's opinion for the Court acknowledged that *Congress' power* over interstate commerce "is indeed without limitation."[120] He then added that

> [t]he subjects . . . upon which *Congress* can act under this power are of infinite variety . . . Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids of commerce, and can only be properly

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U.S. at 544.

110. *See, e.g.*, Huse v. Glover, 119 U.S. 543 (1886); Pound v. Turck, 95 U.S. 459 (1877).

111. *See, e.g.*, Hamilton v. Vicksburg, S. & Pac. R.R., 119 U.S. 280 (1886); Cardwell v. American Bridge Co., 113 U.S. 205, 208 (1885); Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678 (1883); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). Congress can exercise concurrent jurisdiction over the subject. *See, e.g.*, Newport & Cincinnati Bridge Co. v. United States, 105 U.S. 470 (1882).

112. *See* Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 217 (1885); Parkersburg & Ohio River Transp. Co. v. City of Parkersburg, 107 U.S. 691, 701–35 (1883).

113. *See, e.g.*, Miller v. Ammon, 145 U.S. 421 (1892) (upholding ordinance requiring license for sale of liquor).

114. *See* Kimmish v. Ball, 129 U.S. 217 (1889); Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886).

115. *See Cooley*, 53 U.S. (45 How.) at 320; *see also* Wilson v. McNamee, 102 U.S. 572 (1881) (although part of general commercial law, upholding state pilotage law because of congressional affirmance).

116. *See, e.g.*, Packet Co. v. Catlettsburg, 105 U.S. 559 (1882) (municipality may erect wharves and forbid landing elsewhere); Wisconsin v. City of Duluth, 96 U.S. 379 (1878) (Congress may regulate harbor improvements and preempt state laws, but it does not exercise exclusive power over the subject).

117. *See also* The Brig James Gray v. The Ship John Fraser, 62 U.S. (21 How.) 184 (1858) (states may regulate ships lying in the harbor).

118. 102 U.S. 691 (1881).

119. *See id.* at 702.

120. *Id.* at 696.

> regulated by provisions adopted to their special circumstances and localities.[121]

At this point, Field focused on subjects of a local character, such as pilotage laws, and suggested that states could best regulate these matters.[122] He noted that the Court had upheld similar regulations in the absence of federal legislation.[123] While such regulations were doubtless within Congress' commercial power, he reasoned that regulating such "aids to commerce" is neither exclusive in Congress nor a commercial regulation when enacted by a state.[124] A state could surely provide buoys and beacons as "aids to commerce" to ensure safe navigation. An unwarranted situation would result if the state could not act: requiring congressional action would impede, rather than facilitate, interstate commerce, as the safety of those traveling in interstate commerce would be threatened, pending congressional response.[125] According to Field, therefore, harbor-improvement legislation is not strictly of a commercial nature—states may exercise their *police power* over local subjects because such regulation, in the absence of federal legislation, would not interfere with Congress' commercial power.[126]

The *Case of the State Freight Tax*,[127] however, illustrates how the local-national distinction often appeared unnecessary to the Court's analysis. Writing for the majority, Justice William Strong held that a tax upon freight carried between states was national in character and unconstitutional.[128] The format of his opinion, however, brings to the fore the often secondary role of the local-national distinction. Initially, Strong determined that the state had levied the tax on the freight itself.[129] Then he considered whether the tax operated as a regulation of commerce.[130] "If, then, this is a tax upon freight carried between

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121. *Id.* at 697 (emphasis added).

122. *Id.* Justice Stephen J. Field wrote that "[i]t has been found by experience that skill and efficiency on the part of local pilots is best secured by leaving this subject principally to the control of the States." *Id.*

123. *Id.* at 697–98.

124. Justice Field treated such regulations as "aids" to commerce and furthering the public convenience. Yet, he recognized that the distinction between "aids" to commerce and commercial regulations is not clear: "Perhaps some of the divergence of views upon this question among former judges," observed Field, "may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement." *Id.* at 702. This "aid" to commerce concept was invoked to justify other measures, such as inspection statutes. *See* C. TIEDEMAN, *supra* note 31, at 615.

125. *Mobile*, 102 U.S. at 698.

126. *Id.* at 699.

127. 82 U.S. (15 Wall.) 232 (1873).

128. *Id.* at 279–80.

129. *Id.* at 272–73.

130. *Id.* at 275.

States, and a tax because of its transportation," Strong reasoned, "and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States."[131] Justice Strong added that Congress exercises exclusive jurisdiction over the commercial power, and noted that in those cases where the Court had sustained state legislation, the statutes were not strictly commercial in character. Only after concluding that the tax operated as a commercial regulation did Strong discuss the local-national distinction. The purpose of this—seemingly limited—discussion was to determine whether Congress exercises exclusive power over the subject or whether the state could regulate the subject until preempted by Congress.[132] But, of course, Justice Strong already had answered that question.

D. Yet Another Test: Direct and Indirect Burdens on Commerce

Along with this local-national distinction, the Court developed yet another purported "test" for determining the constitutionality of state regulations potentially in conflict with the commerce clause.[133] According to Gerald Gunther, "for some years a distinction between 'direct' and 'indirect' burdens on commerce was in vogue—a doctrine which coexisted with other cases emphasizing the purpose of the State regulation and with still others which focused on the practical impact of state laws."[134] Gunther posits correctly that the Court often indicated that the constitutionality of a statute might be measured by its purpose and practical effect. The effect rather than the purpose apparently played the more significant role,[135] and the Court occasionally noted that the purpose of a statute was "determined by its natural and reasonable effect."[136] For example, in *Minnesota v. Barber*,[137] the Court examined

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131. *Id.* at 279.

132. *Id.* at 279–80.

133. These tests were not necessarily mutually exclusive. Justice Field, for example, an ardent champion of the local-national distinction, also invoked the direct-indirect classification. *See* Sherlock v. Alling, 93 U.S. 99 (1876) (not operating directly upon commerce); Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 506 (1888) (Field, J., concurring) (local-national distinction); Hamilton v. Vicksburg, S. & Pac. R.R., 119 U.S. 280, 281 (1886) (local-national); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 204 (1885); Cardwell v. American Bridge Co., 113 U.S. 205, 210 (1885); Webber v. Virginia, 103 U.S. 344, 351 (1880); County of Mobile v. Kimball, 102 U.S. 691, 699 (1881).

134. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 270 (10th ed. 1980).

135. *See* Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 276 (1873).

136. Reid v. Colorado, 187 U.S. 137, 150–51 (1902). In Morgan's Steamship Co. v. Louisiana Board of Health, 118 U.S. 455 (1886), Justice Samuel F. Miller observed:

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

the effect of an animal-inspection statute in holding the statute unconstitutional.[138] The Appellee was convicted of unlawfully selling in Minnesota beef from an animal slaughtered in Illinois that had not been not inspected and certificated under the laws of Minnesota requiring inspection twenty-four hours before the animal was slaughtered. The defendant-appellee brought a writ of habeas corpus, alleging that the statute violated the commerce clause. Justice John Marshall Harlan agreed, concluding that the statute necessarily resulted in a virtual prohibition on the sale of meat not slaughtered in Minnesota. "This must be so," Harlan observed, "because the time, expense, and labor of sending animals from points outside of Minnesota to points in that state, to be there inspected," and of then sending the animals back to the state of origination to be slaughtered within twenty-four hours, would be highly impractical.[139] The Minnesota statute threatened the interstate transportation of meat and the revenues of Chicago slaughterhouses and railroads transporting the meat, even though the animal meats might be "entirely free from disease."[140]

In many other instances, the Court similarly examined the practical effect of a purported state health measure. Writing for the majority in *Collins v. New Hampshire*,[141] Justice Rufus W. Peckham invalidated an oleomargarine-inspection statute becuase of its effect.[142] The state's requirement that importers of the butter substitute color their product pink would, according to the Court, severely limit the product's marketability.[143] Similarly, both Justices Samuel F. Miller[144] and Joseph P. Bradley[145] examined the effect of state statutes in holding them

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Id. at 462; *see also* Collins v. New Hampshire, 171 U.S. 30, 32–34 (1898); Minnesota v. Barber, 136 U.S. 313, 320, 323 (1890); Home Ins. Co. v. New York, 134 U.S. 594, 599 (1890); Henderson v. Mayor of New York, 92 U.S. 259, 268 (1876); Chy Lung v. Freeman, 92 U.S. 275, 279 (1876).

137. 136 U.S. 313 (1890).

138. The importance of this case, along with the underlying economic conflict between the "Big Four" meatpackers and the Butcher's Protective Association, which developed the model statute adopted by Minnesota and a few other states, is described in McCurdy, *supra* note 1, at 643–48.

139. 136 U.S. at 322–23.

140. *Id.* at 321.

141. 171 U.S. 30 (1898).

142. *Id.* at 34.

143. *Id.* at 31.

144. Chy Lung v. Freeman, 92 U.S. 275 (1876). California passed a statute requiring a bond for each passenger arriving from a foreign port whom the state determined might become a public charge. California applied this statute to "lewd women" arriving from China. *See id.* at 276; *see also* Henderson v. Mayor of New York, 92 U.S. 259 (1875) (requiring bond for passengers). After these decisions, Congress passed one of the "first general" immigration laws. 2 C. WARREN, *supra* note 27, at 628.

145. Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); *see also infra* notes 220–25 and accompanying text.

unconstitutional.

When examining the purpose or effect of a statute, the Court often distinguished between "direct" and "indirect" burdens and invalidated state regulations directly burdening interstate commerce. For example, a state could neither impose conditions upon nor exact a license fee for engaging in interstate commerce within its territory.[146] When an agent for the Western Union Telegraph Company of New York refused to pay a five-dollar license fee to a municipal corporation in Alabama, the municipal corporation brought suit.[147] Speaking for the Court, Justice Bradley struck down the statute as a direct burden on commerce. Bradley found strong support for his position from the language in a prior case that "regulations . . . directly affecting interstate commerce . . . would be an unauthorized interference with the power given to Congress."[148] Generally, the Court held that taxing the means or occupation of interstate commerce amounted to a direct burden on commerce.[149]

This direct-indirect distinction also surfaced in a number of opinions involving interstate transportation. In *Hall v. De Cuir*,[150] for instance, Chief Justice Morrison Waite spoke for the Court when he invalidated Louisiana's Equal Accommodation Act, which prohibited racial discrimination against passengers on interstate carriers.[151] Passed by Radical Republicans who had control of the state legislature, the Act prohibited common carriers from discriminating on the basis of race and authorized the imposition of civil penalties for violations.[152] The captain of a steamship was sued by Mrs. DeCuir when she was denied a seat in the ladies' cabin for her trip between two points within Louisiana.[153] When the case came before the state supreme court after a verdict against the captain, that court almost summarily dismissed a commerce-clause challenge and instead focused on the captain's liberty and property interests that he claimed were being denied under the fourteenth amendment.[154] The state court rebuffed these challenges,

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146. *See, e.g.*, Harman v. Chicago, 147 U.S. 396 (1893); McCall v. California, 136 U.S. 104 (1890).

147. Leloup v. Port of Mobile, 127 U.S. 640 (1888).

148. *Robbins*, 120 U.S. at 494, *quoted in Leloup*, 127 U.S. at 646, 648.

149. *Leloup*, 127 U.S. at 648; *see also infra* notes 292–331 and accompanying text.

150. 95 U.S. 485 (1877); *see also infra* notes 223–24 and accompanying text.

151. 95 U.S. at 490.

152. *Id.* at 486.

153. *Id.*; *see also* C. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 128–33 (1987).

154. *Hall*, 95 U.S. at 488–91; *see also* C. LOFGREN, *supra* note 153, at 129–30. Lofgren cogently observes that by sidestepping the commerce-clause issue, the state court made it easier for the United States Supreme Court to hold that the law regulated interstate commerce. Mrs. DeCuir's ticket was only for intrastate travel and the state court could have held that the law

reasoning that the common law already prohibited arbitrary discrimination by common carriers.[155] The case then went to the United States Supreme Court, where Chief Justice Waite held that the statute operated directly upon interstate commerce and, therefore, encroached upon the exclusive power of Congress to regulate commerce.[156] He noted that if the carrier required separate accommodations for black and white passengers, then when the carrier entered the state's jurisdiction a certain amount of reshuffling of passengers would have to occur.[157]

The Court also found a direct burden on interstate commerce in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*.[158] There, Illinois set rates for railroad transportation between points in Illinois and points under continuous service contracts in other states.[159] Chief Justice Waite's earlier opinions in the *Granger Cases*[160] had upheld state rate regulation for businesses affected with the public interest, even though apparently engaged in interstate commerce. Writing for the majority in *Wabash*, Justice Miller disposed of the *Granger Cases* by concluding that they did not adequately consider the question of regulating rates for interstate transportation.[161] In *Wabash*, a case that undoubtedly involved interstate commerce, Miller held that the statute was a "direct" burden on such commerce and was, therefore, unconstitutional.[162] Chief Justice Waite, who had authored the opinions Miller criticized, joined along with Justice Horace Gray in a dissenting opinion authored by Justice Bradley.[163]

This "direct-burden" language in *Wabash* became the basis for striking down other railroad regulations. The Court later invalidated a

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applied only to internal commerce. By not making such a determination, the Supreme Court examined the statute with reference to the entire voyage which was in interstate commerce.

155. *Hall*, 95 U.S. at 486–87.

156. *Id.* at 497. Justice Nathan Clifford's concurring opinion, however, focused on the local-national distinction. Clifford concluded that the statute operated as a regulation of commerce and because it was so burdensome it "must of necessity be national in character." *Id.* (Clifford, J., concurring).

157. *Id.* at 490; *cf.* New York, N.H. & H.R.R. v. New York, 165 U.S. 628, 633 (1897) (upholding statute requiring companies to heat railway cars a particular way because "[i]nconveniences of this character [(safety] cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public).

158. 118 U.S. 557 (1886). *Wabash* is often considered as the classic case for establishing the direct-indirect burden test.

159. *Id.*

160. 94 U.S. 155 (1877). The *Granger Cases* received adverse treatment in the legal journals and were decided during the ongoing debate over whether Congress should regulate interstate railroad transportation. *See generally* 2 C. WARREN, *supra* note 27, at 632–37.

161. *Wabash*, 118 U.S. at 567 (distinguishing *Granger Cases*).

162. *Id.* at 576–77.

163. *Id.* at 577 (Bradley, J., dissenting).

state statute requiring fast mail trains also carrying interstate passengers to redirect their routes to stop at county seats.[164] The statute imposed a direct burden upon interstate commerce by unnecessarily hindering and obstructing commerce and the delivery of United States mail, especially where "other and ample accommodations" were furnished.[165]

These same concerns surfaced in cases involving state attempts to restrict the importation or sale of products from other states. In *Bowman v. Chicago & Northwestern Railway Co.*,[166] for example, the Court held that a state liquor statute imposed an unconstitutional and direct interference with interstate commerce. Iowa prohibited bringing liquor into the state without first obtaining a certificate that indicated that the receiver within the state was an authorized seller. Although Iowa denied the plaintiff a certificate, the plaintiff bought five thousand barrels of beer in Chicago and tendered the merchandise to a railroad company for shipment from Chicago to a county in Iowa. The company refused to ship the beer, and the plaintiff brought suit claiming that the common law imposed a duty on common carriers to ship all goods entrusted to them. The railroad company relied upon the Iowa statute for its defense.[167] Writing for the majority, Justice Stanley Matthews held that the statute was "a regulation directly affecting interstate commerce in an essential and vital point."[168] Justice Matthews quoted from *Hall* that regulations directly burdening commerce are unconstitutional.[169] Concurring, Chief Justice Field emphasized that liquor was an object of commerce, national in character and susceptible only to congressional regulation.[170] In dissent, Justice Harlan, joined by Chief Justice Waite and Justice Gray, claimed that the state had properly

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164. Illinois Cen. R.R. v. Illinois, 163 U.S. 142 (1896).

165. *Id.* at 153; *see also* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (speed check causing six-hour increase in train trip held unconstitutional burden on interstate commerce); Houston & Tex. Cen. R.R. v. Mayes, 201 U.S. 321 (1906) (statute requiring railroads engaged in interstate commerce to furnish railroad cars within a certain time if ordered by shippers held unconstitutional); Cleveland, Cin., Chi. & St. L. Ry. v. Illinois, 177 U.S. 514, 521 (1900) (statute regulating railroad stop held unconstitutional because too destructive on interstate commerce). *But see* Erb v. Morasch, 177 U.S. 584 (1900) (holding constitutional regulation of train speed within city limits); Wisconsin, Minn. & Pac. R.R. v. Jacobson, 179 U.S. 287 (1900) (upholding statute requiring truck connections and interchange facilites); Lake Shore & Mich. S. Ry. v. Ohio, 173 U.S. 285 (1899) (railroad stop law held constitutional); Hennington v. Georgia, 163 U.S. 299 (1896) (upholding statute regulating Sunday operation of interstate trains).

166. 125 U.S. 465 (1887).

167. *Id.* at 495, 509.

168. *Id.* at 498.

169. *Id.* at 486 (quoting *Hall*, 95 U.S. at 488 ("[W]e think it may safely be said that state legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.")).

170. *Id.* at 501-02 (Field, J., concurring).

exercised its police power[171] and did not discriminate against out-of-state residents.[172]

Conversely, the Court uniformly acknowledged that statutes indirectly or incidentally affecting interstate commerce are not per se unconstitutional. For the most part, all the Justices agreed with the broad principle that before considering a commerce-clause objection, "[t]he interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."[173] Recognizing that many state statutes invariably affect commerce in some fashion, the Court repeatedly reaffirmed the principle that states could indirectly affect commerce when validly exercising their police power. For example, Justice Strong observed that personal property taxes no doubt affect interstate commerce; but surely, he added, not all such taxes would amount to violations of the commerce clause.[174] And in *Postal Telegraph Cable Co. v. Adams*,[175] Chief Justice Melville W. Fuller held that a state may tax property of a corporation engaged in interstate commerce even though the tax might indirectly affect the corporation's operation.[176] Fuller sustained the tax, distinguishing other decisions that did "not [involve] the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."[177]

In *Hennington v. Georgia*,[178] Justice Harlan held that a statute regulating the running of trains on Sundays fell within the states' police power. The defendant had argued that the statute unconstitutionally burdened commerce. Harlan exhibited little concern for this argument when he noted that an exercise of the police power that "does not go beyond the necessities of the case" would be valid until displaced by congressional action.[179] Because the statute was a reasonable exercise

171. *Id.* at 510–17 (Harlan, J., dissenting).

172. *Id.* at 520 (Harlan, J., dissenting). Justice Harlan most likely considered the statute to have only an indirect affect on commerce, since, in a number of other cases, he invalidated regulations directly burdening commerce. *See, e.g.*, Brimmer v. Rebman, 138 U.S. 78, 82 (1891).

173. New York, L.E. & W.R.R. v. Pennsylvania, 158 U.S. 431, 439 (1895) (upholding a tax implosed on railway tolls paid by companies engaged in interstate transportation of merchandise).

174. State Tax on Ry. Gross Receipts, 82 U.S. (15 Wall.) 284, 293 (1873). Justice Miller, Joined by Justices Ward Hunt and Field, dissented, disagreeing with Justice William Strong's view of what the state was attempting to tax. *Id.* at 298 (Miller, J., dissenting). Justice Miller's view prevailed in a later case. *See* Philadelphia & S.S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887).

175. 155 U.S. 688 (1895).

176. *Id.* at 700.

177. *Id.* at 698.

178. 163 U.S. 299 (1896).

179. *Id.* at 308.

of the police power, Harlan concluded that it should be respected in all courts of the Union until superseded by congressional action.[180] Only incidentally did Harlan then note that the statute, although affecting commerce, was not directed at commerce.[181]

In *Budd v. New York*,[182] Justice Samuel Blatchford's opinion illustrates a twist to the direct-indirect distinction. In *Budd*, a New York law provided for the maximum charge for elevating, receiving, weighing, and discharging grain, generally from waterbound transportation. J. Talman Budd, Edward Aman, and Francis E. Pinto had each been charged with violating the statute, and, after a jury found Budd guilty, the court imposed a $250 fine or imprisonment for a period not exceeding one day for each dollar of the fine. Counsel for the defendants principally contended that the statute contravened the fourteenth amendment, but they also raised a commerce-clause objection. Reaffirming the principle established in *Munn v. Illinois*,[183] Justice Blatchford concluded that states could indirectly affect commerce when regulating businesses affected with a public interest.[184]

Budd reflects the Court's willingness to allow states to affect interstate commerce when validly exercising their police power. States could reach a variety of activities under their police power if the particular regulation was not aimed at interstate commerce. In *Sherlock v. Al-*

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180. *Id.* at 317.

181. *Id.* at 318. Justice Harlan ended his analysis by declaring that "such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well being and to promote the general welfare of the people . . . ." *Id.* In dissent, Chief Justice Fuller and Justice Edward D. White argued that the statute amounted to a regulation of commerce and as such was unconstitutional. *Id.* at 318, 319 (Fuller, C.J., dissenting).

182. 143 U.S. 517 (1892).

183. 94 U.S. 113 (1877) (upholding an Illinois statute regulating the maximum charge for grain warehousemen on the basis of public interest in such business). Justice Samuel Blatchford, writing for the majority in *Munn*, also relied upon numerous state cases. *See id.* at 130–36. This reasoning prompted Justice Field, joined by Justice Strong, to warn in a later dissent that "the doctrine advanced in *Munn v. Illinois* has been applied to all railroad companies and their business, and they are thus practically placed at the mercy of the legislature of every State." Chicago, B. & Q.R.R. v. Iowa, 94 U.S. 155, 185 (1877) (Field, J., dissenting). To the extent that the *Munn* rationale applied to interstate commerce, it was overruled by Wabash, St. L. & Pac. Ry. v. Illinois, 118 U.S. 557 (1886); *cf.* Brass v. North Dakota, 153 U.S. 391 (1894) (Shiras, J.) (citing *Munn* and *Budd* in upholding regulation of grain warehouses).

184. *Budd*, 143 U.S. at 536–37, 545. Justice Blatchford, writing for the majority in *Budd*, emphasized that the statute operated only within the state's jurisdiction. *Id.* at 545. Interestingly, Justice David J. Brewer, joined by Justices Field and Henry B. Brown, invoked the thought that such a destruction of property rights might make Edward Bellamy's *Looking Backward* more than a dream. *Id.* at 551 (Brewer, J., dissenting) (discussing E. BELLAMY, LOOKING BACKWARD (1888)).

ling,[185] for example, Justice Field's opinion upheld a statute establishing liability for marine torts. Field declared that the statute did not operate directly upon commerce; rather, the regulation was a part of that general mass of legislation relating to rights, duties, and liabilities that only indirectly affects commerce.[186] Locomotive engineers, for instance, could be required to undergo a physical examination and become licensed before plying their trade in a state.[187] Until Congress preempts the area, Justice Matthews observed, states are free to pass regulations designed to protect the safety and welfare of their citizens.[188] He offered three reasons for rejecting a commerce-clause objection. First, such statutes would not be considered as regulations of interstate commerce. Second, states are permitted to define the correlative rights and duties of their citizens. And, third, such an exercise of the police power only indirectly, incidentally and remotely affects interstate commerce and does not impede such commerce.[189] The Court also upheld statutes indirectly affecting commerce where the state sought to protect the health or public morals of its citizens,[190] or to guard against their deception.[191] The breadth of this power even extended to permitting a state to forbid the importation of game in the off-season.[192]

III. THE INADEQUACY OF "TESTS"

Unfortunately, the utility of such classifications as local- national and direct-indirect has always been highly suspect.[193] Indeed, such

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185. 93 U.S. 99 (1876).

186. *Id.* at 103–04. This principle had been sustained earlier in American Steamboat v. Chase, 83 U.S. (10 Wall.) 522 (1873), where the Court upheld a state statute providing a new cause of action for a marine tort not cognizable under admiralty jurisdiction. However, in *American Steamboat*, no commerce-clause challenge was raised.

187. Smith v. Alabama, 124 U.S. 465 (1888).

188. *Id.* at 480.

189. *Id.* at 482.

190. *See, e.g.*, Missouri, Kan. & Tex. Ry. v. Haber, 169 U.S. 613, 637 (1898) (states may impose liability upon the transportation of diseased cattle into the state); Hennington v. Georgia, 163 U.S. 299, 318 (1896) (states may legislate to protect public morals by regulating the running of trains on Sundays).

191. States, for example, may regulate the sale of food to protect against deception or fraud in the sale. *See* Plumley v. Massachusetts, 155 U.S. 461 (1894) (coloring of oleomargarine to make it look like butter). They also could require conditions such as certificates to practice medicine in order to protect their citizens "against the consequences of ignorance and incapacity as well as of deception and fraud." Dent v. West Virginia, 129 U.S. 114, 122 (1889).

192. New York *ex rel.* Silz v. Hesterberg, 211 U.S. 31, 43 (1908) (Day, J.) (noting that the statute was not directed at commerce).

193. A number of authors recognize that such terms are merely legal conclusions—some might say "masks." *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 325–26 (1978); Shenton, *supra* note 23. Although Gerald Gunther organizes his casebook around these two linguistic classifications, he includes Justice Harlan Fiske Stone's remark that the distinction be-

classifications serve as distractions rather than as helpful guides towards understanding the Court's treatment of the commerce clause during the second half of the nineteenth century. Instead, the reasoning—albeit perhaps not the language—of the opinions suggests that the controlling question was whether the statute operated as a regulation of commerce. Invocation of one or another of the classifications merely begged the question. For example, when deciding whether a subject remained local in character and admitted of state regulation until displaced by appropriate federal legislation, the Court was merely marking the extent of the states' police and taxing powers in a roundabout fashion. If a subject fell within the ambit of the states' police or taxing powers, then the Court often called the regulation "local" in character. The "local" tag explained the outcome but not the process of arriving at the conclusion. Occasionally, even, a Justice concluded that because a statute was a police rather than a commercial regulation, it was unnecessary to inquire further whether Congress exercised exclusive jurisdiction over the subject.[194] One might as well construct a circular flow chart illustrating either the rhetoric or logic employed by the Justices. The Court's conclusion that something was local amounted to a declaration that the regulation was not one of interstate commerce and thus valid unless it affected commerce *and* was displaced by congressional authorization.

Apart from this circular reasoning of what constitutes a regulation of commerce, the substantive question still remains. In short, when did the Court consider a subject to be beyond the jurisdiction of a state and an encroachment upon the commercial power of Congress? No doubt when Congress affirmatively governed a subject, the supremacy clause mandated that the Court declare inconsistent state legislation to be unconstitutional. Yet, the question still remains: In the absence of congressional regulation, when could a state exercise jurisdiction over subjects somewhat connected with interstate commerce?

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tween direct and indirect burdens "is . . . too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result." G. GUNTHER, *supra* note 134, at 272–73. Similarly, quoting from Ribble's monograph on the commerce clause, Justice Wiley B. Rutledge observed that this classification is subject to criticism: "But in many cases [after *Cooley*] the term 'a regulation of interstate commerce' was used as a 'conclusion of law, and amounted to a statement of invalidity.' " W. RUTLEDGE, *supra* note 34, at 51 n.3 (quoting F. RIBBLE, *supra* note 34).

194. *See* Railroad Co. v. Fuller, 84 U.S. (17 Wall.) 560 (1873). The Court in *Fuller* upheld an Iowa law requiring railroad companies to fix their rates annually in September and to post them at all stations and depots. After holding that the law was an exercise of the police power, the Court declined to address additional questions because, as the Court was "unanimously of the opinion that they [the statutes] are merely police regulations, it is unnecessary to pursue the subject." *Id.* at 570.

A. *Dual Federalism and Territorial Sovereignty*

The answer lies in understanding how Marshall's origin-of-power or sphere-of-jurisdiction approach found acceptance in the cases after *Cooley*. The frequency of such cases grew as the nation underwent its transformation to an economically integrated national market. This may have forced the Court to use talismanic tests, such as local/national or direct/indirect, but the dominant theme of "dual federalism" gave credence to a continued reliance on Marshall's separation of the federal commercial power from states' police and taxing powers. The Court permitted the states to exercise jurisdiction over subjects somewhat connected with interstate commerce when *validly* exercising their police power. Two factors essentially served as measures for determining whether a state statute was a *reasonable* exercise of the state's police power or a regulation of interstate commerce. First, both before and after *Cooley*, the cases illustrate that the state had to possess territorial sovereignty over subjects being affected by the law. The subject had to be within both the physical boundary and the jurisdictional net of the state. Second, the state statute had to achieve an end that was within the state's power, and the means chosen could not discriminate against interstate commerce. This factor coupled traditional analysis of police-power measures with the federalization of constitutional rights facilitated by the fourteenth amendment. By the end of the nineteenth century, due-process analysis had worked its way into commerce-clause opinions and had established a federal right to engage in interstate commerce.

The first factor merely reflects the overall jurisprudence governing the Court's treatment of federal and state relations. During this era, the concept of "dual federalism" cast a distinct imprint on the Court's opinions.[195] "The major characteristic of this . . . period," writes one observer, "is its division of basic legal notions into 'powers absolute within their spheres.' "[196] This observer illustrates the point by quoting the archetypal passage from *Tarbles' Case*:[197]

> There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and

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195. Clarence Shenton wrote that "[i]n *Hall v. DeCuir*, calling the regulation one of police—as it certainly could have been called with reason and propriety—would have involved serious difficulty in the light of the theory of dual sovereignties, but all embarrassment was avoided by terming the law a regulation of commerce." Shenton, *supra* note 23, at 132. *See generally* Corwin, *The Power of Congress to Prohibit Commerce*, 18 CORNELL L.Q. 477 (1933).

196. Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383, 427 (1979) (quoting D. Kennedy, The Rise and Fall of Classical Legal Thought, 1850–1940, ch. 2 (1976) (unpublished manuscript)).

197. 80 U.S. (13 Wall.) 397 (1872).

> supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any intrusion therein by its judicial officers with the action of the other.[198]

Constructing an imaginary line between these two spheres proved a difficult task; but, as Justice Field reaffirmed in *Welton v. Missouri*[199] when adopting the prosaic language of Chief Justice Marshall, the domestic and the commercial powers,

> though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the vision in making the distinction between them; but that, as the distinction exists, it must be marked as the cases arise.[200]

This general framework, depicting two spheres, one for the commercial power and one for the police and taxing powers, serves as a format for organizing and understanding many of the commerce-clause opinions during the second half of the nineteenth century.

The Court established that a state exercises undeniable jurisdiction over persons and property within its territory but not beyond.[201] This principle follows directly from the concept of territorial sovereignty governing both international law and conflict of laws.[202] Justice Story's treatise on conflict of laws, for example, illustrates the nature of territorial sovereignty:

> [E]very nation possesses an *exclusive sovereignty* and *jurisdiction* within its own territory. The direct consequence of this rule is, that the laws of every state affect, and *bind directly all property*, whether real or personal, within its territory; *and all persons*, who are resident within it, whether natural born subjects, or aliens . . . . [N]o *State* or nation can, by its laws, *directly affect, or bind property* out of its own territory, *or persons* not resident therein . . . .[203]

Justice Field recognized this principle in the classic case on personal

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198. *Id.* at 406, *quoted in* Katz, *supra* note 196.

199. 91 U.S. 275 (1876) (discussed *infra* note 325).

200. *Id.* at 281–82.

201. Charles McCurdy suggests that a major concern during the Taney era was "maintaining the territorial integrity of the States." McCurdy, *supra* note 1, at 642. Indeed, this concern served as an important element in the prevailing conception of federal and state relations throughout the nineteenth century. *Id.* at 642–49.

202. *See generally* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

203. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21 (1834), *quoted in* Hazard, *supra* note 202, at 260.

jurisdiction, *Pennoyer v. Neff*,[204] where he noted that "[e]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and, conversely, that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[205] This suggests that states could regulate or tax those things over which they possess territorial sovereignty. During the nineteenth century, this fairly simple principle transcended the Court's treatment of the implied limitation that the commerce clause posed to the states' police and taxing powers.

The Court carved out a necessary exception to this principle, an exception consistent with the concept of dual federalism and one that embraced the regulation of interstate commerce. States were prohibited from exercising jurisdiction over subjects within their territory that operated as "a means or instrumentality employed for carrying into effect some of the legitimate powers of the [federal government]."[206] The federal government must, a priori, exist within the territorial limits of the state;[207] yet, since *McCulloch v. Maryland*,[208] the Court recognized that states could regulate neither the federal government nor its instrumentalities.[209] In *Dobbins v. Commissioners of Erie*,[210] for example, the Court "decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States."[211] This same principle restrained the federal government from regulating the instrumentalities of a state government.[212] In

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204. 95 U.S. 714 (1878).

205. *Id.* at 722.

206. Collector v. Day, 78 U.S. (11 Wall.) 113, 122 (1871).

207. In Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1 (1878), Chief Justice Waite wrote that "[t]he government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed [sic] by State lines." *Id.* at 10.

208. 17 U.S. (4 Wheat.) 316 (1819).

209. *Id.* at 436–37.

210. 41 U.S. (16 Pet.) 435 (1842), *overruled in* Graves v. New York, 306 U.S. 466 (1939).

211. *Collector*, 78 U.S. at 122 (discussing *Dobbins*). In *Dobbins*, Justice Wayne discussed the dual system of government, and he invoked the commerce clause as a parallel consideration along with taxing federal officials and concluded that an otherwise valid exercise of state authority would have to yield

> when the exercise of the right by a state conflicts with the perfect execution of another sovereign power, delegated to the United States. That occurs when taxation by a state acts upon the instruments, emoluments, and persons, which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution are in Congress. Taxation is a sovereign power in a state; but the collection of revenue by imposts upon imported goods, and the regulation of commerce, are also sovereign powers in the United States.

41 U.S. at 447.

212. *E.g.*, United States v. Baltimore & Ohio Railroad Co., 84 U.S. (17 Wall.) 322 (1873);

a subsequent case, Justice Nelson explained that the need for recognizing intergovernmental immunity stemmed from the fact that both the state and federal governments "exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."[213] Thus, the federal government and its instrumentalities remained free from state interference. Subjects such as United States bonds, for example, the Court considered to be beyond the reach of state law.[214]

A parallel can be drawn between the Court's treatment of such subjects and its treatment of interstate commerce. The commerce-clause opinions follow a similar line of reasoning to these intergovernmental-immunity opinions.[215] The principle of intergovernmental immunity prohibits states from regulating the operations of agents or instruments of the federal government.[216] Otherwise, states might hinder the exercise of a power entrusted to the national government. The

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Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). *But cf.* Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) (Congress could tax state bank notes).

213. *Collector*, 78 U.S. at 124.

214. *See, e.g.*, Banks v. Mayor, 74 U.S. (7 Wall.) 16 (1869) (states may not tax certificates of indebtedness); Bank v. Supervisors, 74 U.S. (7 Wall.) 26 (1869) (states may not levy ad valorem tax on federal securities); Bank Tax Case, 69 U.S. (2 Wall.) 200 (1864) (same); Weston v. Charleston, 27 U.S. (2 Pet.) 449 (1829) (states may not tax United States stock).

215. This similarity occurred in the style of reasoning. Justice Owen J. Roberts wrote of the state power over federal instrumentalities that "[i]t is not seen how there can be any difference, in principle or in result, between taxing for local purposes the property of the United States and that of one of its instrumentalities, yet the distinction has been observed until recently." O. ROBERTS, THE COURT AND THE CONSTITUTION 20 (1951). This same distinction, for example, governed commerce-clause cases. The phrases that surfaced in commerce-clause cases, such as direct and indirect, also appeared in cases involving intergovernmental immunity. *See id.* at 32. *But cf.* Dowling, Cheathan & Hale, *Mr. Justice Stone and the Constitution*, 36 COLUM. L. REV. 351, 359 (1936) (suggesting that the similarity in the two areas is of a twentieth-century vintage that fails to look beyond the "tests" in commerce-clause cases). The parallel between the two doctrines is implicit in Samuel Konefsky's discussion of Chief Justice Stone's rejection of the nineteenth century paradigm. S. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 1–97 (1945).

216. *See, e.g.*, Railroad Co. v. Peniston, 85 U.S. (18 Wall.) 5, 30, 35 (1873); Thomson v. Pacific R.R., 76 U.S. (9 Wall.) 579, 591 (1869). In *Thomson*, Chief Justice Chase wrote that states could not tax the "means employed" by the federal government in the exercise of its powers. Although the power to tax all within their limits has never been surrendered, "[i]t cannot be so used, indeed, as to defeat or hinder the operations of the national government." *Id.* at 591.

In National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869), the Court limited the immunity of the federal government, holding that instrumentalities of the federal government are not wholly withdrawn from state legislation. *Id.* at 361–62. In the twentieth century, Justice Oliver Wendell Holmes struck down a sales tax on a government transaction—the sale of gasoline to the United States—along this same line of reasoning, holding that "[w]hile Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes." Panhandle Oil Co. v. Knox, 277 U.S. 218, 221 (1928); *see also* Indian Territory Ill. Oil Co. v. Oklahoma, 240 U.S. 522, 530 (1916) (Holmes, J.) (adopting a similar rationale).

Court treated interstate commerce or the instrumentalities thereof as just another form of the exercise of federal power: beyond the reach of state jurisdiction. Just as the states lacked jurisdiction over the means chosen by Congress when it affirmatively exercised its powers, as in the establishment of the national bank, so too the states lacked jurisdiction over the means or instrumentalities for effectuating interstate commerce because Congress' silence, in effect, conferred a federal right to engage in such commerce.

Ohio v. Thomas[217] is illustrative. The State of Ohio sought to enforce a statute regulating the sale and use of oleomargarine against an employee in the House of Disabled Volunteer Soldiers, a federal enclave. The Court held the officer exempt from state jurisdiction "in regard to those very matters of administration which are thus approved by Federal authority."[218] In short, Ohio was prohibited from exercising jurisdiction over the Home *as a federally-regulated* activity.

Applying an identical reasoning to commerce-clause cases, the Court invalidated state attempts to regulate the operations of agents engaged or instruments employed in interstate commerce. These instrumentalities of commerce also engaged in a federally-regulated activity and, in the late nineteenth century, a federally-guaranteed right: interstate commerce. This exercise of federal authority applied even when Congress remained silent. The Court treated congressional silence as it would an affirmative exercise of federal authority that commerce shall remain free. Justice Peckham summarized the import of this principle when he referred to "the *right* of Citizens of other States arising under the commerce clause."[219] States, however, still could enforce criminal laws against agents or other instrumentalities engaged in interstate commerce, just as states remained free to enforce such laws against federal employees. In such circumstances, the state would not be encroaching upon the federal domain because the Court considered criminal activity to be unrelated to the exercise of federal authority.

This similarity in the two types of cases extends to the Court's treatment of state jurisdiction over property. The Court in *Thomas* recognized a difference between jurisdiction over the property of the Home and jurisdiction over the exercise of congressional authority. On the one hand, states may exercise jurisdiction over property owned by agents or instrumentalities of the federal government, such as subjecting a federally-chartered corporation to state taxation.[220] On the other

217. 173 U.S. 277 (1898).

218. *Id.* at 283.

219. Schollenberger v. Pennsylvania, 171 U.S. 1, 16 (1898) (emphasis added).

220. *Id.* In Railroad Co. v. Penniston, 85 U.S. (18 Wall.) 5 (1873), the Court declared that "[i]t may, therefore, be considered as settled that no constitutional implications prohibit a State

hand, states may not exercise jurisdiction over property of the federal government.[221] The Court used identical language when deciding a dormant-commerce-clause question. States were prohibited from exercising power over the property of interstate commerce—that is, the subjects of commerce. Yet, they were allowed to exercise jurisdiction over property owned by agents or instrumentalities engaged in interstate commerce.

B. Considering the Extraterritorial Effect

The principle of territorial sovereignty defined the scope of interstate commerce and precluded states from reaching conduct or property beyond their territory and jurisdiction. This concept served as an important restriction on a state's exercise of its police and taxing powers. State statutes that attempted to reach conduct or property beyond the state's jurisdiction were unconstitutional. In their operation, such measures necessarily regulated interstate commerce. If, for example, a state passed a law forbidding the sale of a particular type of food, the Court would have sustained the law as applied to such products originating within the state but invalidated it as to such articles coming into the state.[222] By applying the statute to non-residents, the state would be attempting to regulate the conduct of business—that is, the shipment of articles of commerce—in another state. A state, however, could pass a reasonable inspection statute that affected the incoming articles of food, under the court-developed fiction that such products only became articles of commerce after being inspected. If the property was not clothed with the protection accorded articles of commerce, then such property was not exempt from the state's jurisdiction over property within its territorial bounds.

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tax upon the property of an agent of the government merely because it is property of such an agent." *Id.* This same distinction had surfaced in *McCulloch*, where the Court treated the tax as laid upon the exercise of congressional authority rather than on the property. *Id.* at 17–18; *see also* Central R.R. v. California, 162 U.S. 125 (1896).

221. States could not tax property of the federal government. *See, e.g.*, Van Brocklin v. Tennessee, 117 U.S. 151 (1886); McGoon v. Scales, 76 U.S. (9 Wall.) 23 (1869). The Court in *Van Brocklin* illustrated this implicit connection between property of the federal government and articles of commerce by quoting the following passage from a commerce-clause case:

> We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in use of the government of the United States.

117 U.S. at 179 (quoting Coe v. Errol, 116 U.S. 517, 524 (1886)).

222. In Shollenberger v. Pennsylvania, 171 U.S. 1 (1898), Justice Peckham explained that a state could ensure the quality of incoming products, but it could not exclude the importation of a lawful article of commerce. *Id.* at 12; *see also* Vance v. W.A. Vandercook Co., 170 U.S. 438, 452–53 (1898).

The state's attempt to reach conduct outside of its territory underlies Chief Justice Waite's opinion in *Hall v. De Cuir*[223] invalidating Louisiana's Equal Accommodation statute for interstate carriers. There, according to Waite, the state had attempted to affect the conduct of the carrier in the state where the passengers boarded the steamship.

> It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.[224]

Similarly, in *Henderson v. Mayor of New York*,[225] Justice Miller opined that a statute requiring carriers to post either a bond or a fixed sum for each passenger landing in the state was an unconstitutional attempt to reach conduct outside the state.[226] The statute, in effect,

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223. 95 U.S. 485 (1877) (discussed *supra* notes 150–53 and accompanying text). In his biography of Chief Justice Waite, Peter Magrath explains that around the mid-1880s there was an increasing tendency to limit state regulation to within the states' boundaries. He adds, however, that Waite opposed this trend. P. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 217 (1963). Not surprisingly, Waite wrote few of the opinions in this area. In fact, some of his opinions casually reject commerce-clause challenges, reasoning that states have considerable latitude to regulate matters affected with a public interest. *See* Peik v. Chicago & Nw. R.R., 94 U.S. 164 (1877); Chicago, B. & Q.R.R. v. Iowa, 94 U.S. 155 (1877). Yet, Waite did write the opinion in *Hall* which appears contrary to Magrath's conclusion. Nevertheless, Professor (later Justice) Felix Frankfurter expressed a similar opinion to that of Magrath, writing that "Waite went beyond recognition of state authority over transactions physically intrastate, although argumentatively they had economic repercussions beyond local boundaries." F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 99 (1937) (explaining that Waite's perspective was followed in *Munn* and other cases, but rejected in *Wabash*). Waite, of course, dissented in *Wabash*. *See Wabash*, 118 U.S. at 557 (Waite, C.J., dissenting).

224. *Hall*, 95 U.S. at 489. Twenty-three years after the Court decided *Hall*, it upheld a Kentucky statute requiring separate coaches for black and white passengers. Chesapeake & O.R.R. v. Kentucky, 197 U.S. 388 (1900). The Court in *Chesapeake*, with Justice Brown writing the opinion, sustained the law as applied to passengers boarding and departing at points within the state. *Id.* at 394. Of course, Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled in* Brown v. Board of Education, 347 U.S. 483 (1954), sanctioned a similar statute that had been challenged on grounds other than the commerce clause. *See Plessy*, 163 U.S. at 542. The Court had applied this same reasoning to uphold a Mississippi law requiring separate but equal facilities in Louisville, New Orleans & Texas R.R. v. Mississippi, 133 U.S. 587 (1890). The Court in *Louisville* held that the statute operated solely within the state, emphasizing that the Mississippi Supreme Court had construed that statute such that it applied only to intrastate commerce. No obstruction or burden on commerce was perceived where the company could merely add a separate car when it crossed into the state, although perhaps at some expense to the company. *Id.* at 591. Justice Harlan dissented on the basis that the railroad line served a continuous route between states and any company that did not have separate facilities would be subject to a fine. *Id.* at 592–93 (Harlan, J., dissenting). *See generally* C. LOFGREN, *supra* note 126, at 33–34.

225. 92 U.S. 259 (1876).

226. *Id.* at 274.

required carriers to collect additional fees from their passengers before beginning the journey. The captain of the vessel would have to collect these fees in another jurisdiction.[227] When Pennsylvania attempted to tax property beyond its jurisdiction, the Court, in an opinion by Justice Harlan, held that the state statute "assumes to do what the State has no authority to do, to compel a foreign corporation to act, in the State of its creation" rather than in Pennsylvania.[228] This principle spanned a variety of other circumstances, ranging from state control of liquor to state regulation of telegraph messages.[229]

In *Western Union Telegraph Co. v. James*,[230] for example, Justice Peckham upheld the application of a Georgia statute requiring telegraph companies with lines outside the state to deliver messages with

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227. *Id.* at 274.

228. New York, L.E. & W.R.R. v. Pennsylvania, 153 U.S. 628, 645 (1894).

229. When the Court sustained the Wilson Act, 28 Stat. 313 (1890), it noted that its prior decision in Leisy v. Hardin, 135 U.S. 100 (1890), which limited the states' ability to prohibit the sale of liquor imported from another state, merely restricted the operation of state law to "property strictly within the jurisdiction of the State." *In re* Rahrer, 140 U.S. 545, 562–63 (1891) (construing *Leisy*).

Similarly, in Rhodes v. Iowa, 170 U.S. 412 (1898), the Court observed that the federal law did not authorize states to give extraterritorial effect to their laws. In *Rhodes*, Iowa seized and destroyed a box of liquor travelling through Iowa en route from Illinois to Dallas. The state law was virtually identical to the one held unconstitutional in Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465, 500 (1888). The Court in *Rhodes*, therefore, had to decide whether the federal law authorized state regulation of liquor while still in interstate commerce. Justice White, writing for the majority, held that the federal act did not sanction the operation of state law on property that has not yet come to rest within the state. Otherwise, the state would be able to give extraterritorial effect to its laws, a result not permitted in *Bowman* and not authorized by Congress. *Id.* at 422. White quoted at length from *Bowman* to the effect that the state law sought to influence conduct beyond its borders. *Id.* at 424 (discussing *Bowman*, 125 U.S. at 486–87). The dissent treated the Wilson Act as authorizing state regulation at the point at which the liquor arrived within the states' territory. *See id.* at 435 (Gray, J., dissenting). The following passage from *Bowman* indicates the *Rhodes* majority's underlying concern:

> But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of those things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the power of the State beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent.

Bowman, 125 U.S. at 499. For other cases involving state regulation of liquor, see South Carolina v. United States, 199 U.S. 437 (1905), *overruled in* New York v. United States, 326 U.S. 572 (1946); American Express Co. v. Iowa, 196 U.S. 133 (1905); Reymann Brewing Co. v. Brister, 179 U.S. 445 (1900); Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898).

230. 162 U.S. 650 (1896).

due diligence.[231] A Georgia cotton merchant sent a telegram offering to sell cotton to a buyer in Alabama. The terms of the offer required a response within one day. Although the buyer replied promptly, the telegraph office in Georgia waited a day before delivering the buyer's acceptance, which was therefore past the deadline. The seller brought an action against the company under the Georgia law.[232] Although such laws surely facilitated interstate commercial transactions, the telegraph company argued that the law unconstitutionally interfered with its right to engage in interstate commerce.[233] The statute was defended as a permissible exercise of the state's police power to promote the health, morals, safety, and welfare of the people within the state.[234] Writing for the majority, Justice Peckham acknowledged that while the scope of the police power is hard to define, it nevertheless "cannot encroach upon the powers of the Federal Government in regards to the rights granted or secured by the federal constitution."[235] He then stated the general proposition that congressional silence indicates that a subject that is national in character and demands uniformity should remain free from state interference, while state statutes concerning local subjects that incidentally affect interstate commerce, such as "aids" to commerce, are not necessarily impermissible regulations of commerce.[236] The latter category, he noted, includes "laws for the regulation of pilots, for quarantine and inspection, for policing harbors, improving navigable channels, regulating wharves, piers, and docks, constructing dams and bridges across navigable waters of a state, and also laws for the establishment of ferries."[237]

This traditional rendition of the "tests" must be supplemented by how Justice Peckham then reasoned that the Georgia statute fell within the latter class of regulations. He began by principally examining two cases, *Hall* and *Western Union Telegraph Co. v. Pendleton*.[238] The former case Peckham distinguished because in *Hall* the Court held the state statute void because it regulated the conduct of carriers "outside

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231. The Court already had held that telegraph messages were a part of commerce. In Western Union Telegraph Co. v. Alabama, 132 U.S. 472 (1889), for example, the Court held that "[m]essages, from points within the State to points without or from points without the State to points within . . . are elements of commerce between the States and not subject to legislative control . . . ." *Id.* at 473; *see also* Telegraph Co. v. Texas, 105 U.S. 460 (1882); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 9 (1877) (equating telegraph messages with instruments of commerce such as railroads, steamships, post roads, and stagecoaches).

232. *Henderson*, 162 U.S. at 651.

233. *Id.* at 652.

234. *Id.* at 653.

235. *Id.* at 653–54.

236. *Id.* at 655–56.

237. 162 U.S. at 655.

238. 122 U.S. 347 (1887).

and beyond the limits of the state enacting the law."[239] The latter case was similarly distinguished: in *Pendleton*, according to Peckham, the Court struck down Indiana's attempt to regulate the delivery of messages in another state "in so far as it attempts to regulate the delivery of such dispatches to places situated in other states."[240] However, in *James*, the case before him, Peckham emphasized that the Georgia law did not affect conduct outside the state. He concluded that "the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states."[241]

In a number of other instances, such as transportation safety measures, the Court upheld laws by applying a similar analysis when the regulation operated only on conduct within a state's "territorial jurisdiction."[242] In one such case, Justice Field wrote an opinion upholding a statute that established liability for marine torts. Field emphasized that the states' regulation of rights, duties, and liabilities had obligatory force only within its jurisdiction.[243] This same reasoning led the

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239. 162 U.S. at 658 (distinguishing *Hall*).

240. *Id.* at 658–59 (distinguishing *Pendleton*).

241. *Id.* at 660. Justice Peckham added that the regulation surely did not obstruct the company's activity of delivering messages. The common law imposed the duty on the company, and the statute reaffirmed that duty by enforcing the obligation. *Id.* at 660. Following this dicussion, he indicated that the Georgia law was a valid exercise of the police power over a local matter and it was not "so unreasonable as to be outside of and beyond the jurisdiction of the state." *Id.* at 662. Justice Shiras, joined by Justice White, dissented, believing that *Pendleton* governed. *Id.* at 663 (Shiras, J., dissenting).

242. *See supra* notes 165, 178, 185 and accompanying text. For example, in Lake Shore & M.S.R.R. v. Ohio, 173 U.S. 285 (1899), Ohio required that a specified number of trains stop on given days at towns with over 3,000 inhabitants. Writing for the majority, Justice Harlan distinguished *Hall*, *Wabash*, and *Illinois Central*, reasoning that Ohio's law operates only on actions within the state. *Id.* at 303–07. Harlan then sustained the statute as a reasonable exercise of Ohio's police power. *See also* New York & N.E.R.R. v. Bristol, 151 U.S. 556 (1894) (grade crossing statute upheld). Additionally, states could establish rates for transportation within their borders even though affecting interstate commerce. Such laws operate only on conduct within the state. *See* Chicago Ry. v. Wellman, 143 U.S. 339 (1892) (upholding Michigan statute).

Christopher Tiedeman wrote in his treatise on the limitations of the police power that the states' exercise of their police power over interstate commerce was limited "to those local regulations which, while they interfere with commerce more or less materially, may be enforced without giving to the State authorities an extra-territorial power of control over the commerce of the country." C. TIEDEMAN, *supra* note 31, at 15. Then, referring to both state and lower federal court cases, he added that such a rationale, perhaps coupled with other reasons, has led courts to hold unconstitutional state attempts to regulate rates for interstate traffic. *Id.* The same year as these words went to print, the Court decided *Wabash*. *See supra* notes 158–63 and accompanying text.

243. Sherlock v. Alling, 93 U.S. 99, 104 (1876); *see also* Pennsylvania R.R. v. Hughes, 191 U.S. 477 (1903) (upholding statute establishing liability for carriers engaged in interstate commerce); Missouri, Kan. & Tex. Ry. v. McCann & Smizer, 174 U.S. 580 (1899) (state may impose liability on railroad company issuing bills of lading for shipment of property through adopting rules of contract law); Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96 (1899) (states may impose liability on railroads for failing to prevent the escape of fire); Richmond & A.R.R. v. R.A.

Court in *Budd v. New York*[244] to stress that the statute regulating the receiving of grain operated "only within the limits of that State."[245]

C. *Articles of Commerce Beyond a State's Jurisdiction*

Just as a state could not regulate conduct beyond its borders, because to do so would be encroaching upon the federal domain over interstate commerce, the constitutional structure of dual federalism and the creation of a federal right to engage in interstate commerce dictated that a state could not exercise jurisdiction over articles of commerce even within its borders. Until objects lost their status as articles of commerce, they fell outside the territorial sovereignty of a state. They were treated as instruments of interstate commerce, no different than instrumentalities employed in the exercise of a federal power, and thus exempt from state regulation. The Court, therefore, was often confronted with the problem of defining an article of commerce. This analysis lends itself to being separated into two questions. First, what subjects did the Court consider as *articles* of commerce? Second, how did the Court define *interstate commerce*?

1. Subjects of Commerce

The Court's opinions established that Congress exercises exclusive jurisdiction to determine which subjects should be treated as articles of commerce.[246] When Pennsylvania attempted to bar the sale of pure oleomargarine, the Court examined federal policy and the usages of the

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Patterson Tobacco Co., 169 U.S. 311 (1898) (states may impose an obligation of safe carriage on common carriers under the states' police power to establish rules for contract law); Chicago, M. & St. P.R.R. v. Solan, 169 U.S. 133 (1898) (upholding statute nullifying disclaimers of liability of injuries within the state and with a contract for interstate transportation); Minneapolis Ry. v. Emmons, 149 U.S. 364 (1893) (states may impose penalties on railroads for failing to build a fence); Minneapolis Railroad Co. v. Beckwith, 129 U.S. 26 (1889) (sustaining against an equal protection challenge the imposition of double liability for killing stock along a railway line); Missouri Pac. R.R. v. Mackey, 127 U.S. 205 (1888) (against an equal-protection and due-process challenge, sustaining a state statute—albeit against a corporation of its own creation—abrogating the fellow-servant rule for any company doing business in the state); Missouri Pac. Railroad Co. v. Humes, 115 U.S. 512 (1885) (state may impose double liability for killing stock when the railroad company fails to build a fence).

Occasionally, the Court almost summarily upheld railroad regulations obviously operating solely within the state. *See, e.g.*, Wisconsin, Minn. & Pac. R.R. v. Jacobson, 179 U.S. 287 (1900) (sustaining law requiring companies to furnish transfer facilities); Gladson v. Minnesota, 166 U.S. 427 (1897) (state may require trains to stop at county seats when the company is a creation of the state and operates the line solely within the state); *see also supra* note 165.

244. 143 U.S. 517 (1892) (discussed *supra* notes 182–84 and accompanying text).

245. *Id.* at 545; *see also* Louisville & N.R.R. v. Kentucky, 161 U.S. 677, 695 (1896) (state antitrust statute upheld as a valid exercise of the police power to protect the public interest, even though the law affected interstate commerce).

246. *See, e.g.*, Austin v. Tennessee, 179 U.S. 343, 372 (1900) (Brewer, J., dissenting); *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 489–90 (1888); Turner v. Maryland, 107 U.S. 38, 56 (1883).

commercial world to determine that oleomargarine is a proper subject of commerce.[247] Although the Court did not acknowledge Congress' authority in either *Geer v. Connecticut*[248] or *Kidd v. Pearson*,[249] the same rationale might have been applied. In those two cases, the Court rejected arguments that an article of commerce only came into existence through affirmative state action.[250] However, Field's concurrence in *Bowman v. Chicago & Northwestern Railway Co.*[251] is perhaps the best discussion of when subjects would be treated as articles of commerce. In *Bowman*, Iowa had attempted to prohibit the importation of liquor, premised upon the state's conclusion that liquor, like other noxious products, should not be treated as an article of commerce. Field indicated that the usages of the commercial world rather than a declaration by a state determined whether a subject was an article of commerce. States could enact reasonable police-power measures regulating the use, sale and possession of property, but lacked the power to proscribe the use or sale of commercial articles traveling in interstate commerce.[252] Consequently, absent a congressional declaration otherwise, the Court viewed all subjects commonly traded as falling within the purview of the commerce clause.[253]

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247. Schollenberger v. Pennsylvania, 171 U.S. 1 (1898).

248. 161 U.S. 519 (1896), *overruled in* Hughes v. Oklahoma, 441 U.S. 322 (1979).

249. 128 U.S. 1 (1888).

250. In *Geer*, counsel argued that the "State has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of State commerce, as a resulting necessity such property has become the subject of interstate commerce . . . ." 161 U.S. at 530 (summarizing argument). Aside from the question of whether the state could establish when possession of property res nullius vests, the Court concluded that "it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the United States." *Id.* at 530–31. In dissent, Justice Field argued that when wild animals are reduced to possession they become articles of commerce. *Id.* at 541 (Field, J., dissenting). Field, of course, misunderstood the thrust of the majority opinion, that possession vests only under certain circumstances. The majority essentially declared that possession vests when game—the property of the state—is killed according to state law:

> The power of the state to control the killing of and ownership in game being admitted, the commerce in game, which the State law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was part of it.

Id. at 532. This same argument surfaced and was rejected in *Kidd*. 128 U.S. at 18.

251. 125 U.S. 465 (1888).

252. *Id.* at 501.

253. The Court, with occasional departures, had generally treated people as a constituent part of commerce. *See, e.g.*, People v. Compagnie Général Transatlantique, 107 U.S. 59 (1883) (states may not impose tax on every alien under the guise of an inspection statute for "idiots"); Henderson v. Mayor of New York, 92 U.S. 259 (1876); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). Interestingly, Justice Miller implicitly accepted the view that the commerce clause governs the transportation of people, even though he found no commerce-clause objection to Nevada's tax on people travelling into and outside the state by rail or stagecoach. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). He rejected the commerce-clause challenge because he consid-

Some property, however, either was excluded from the definition or would cease to be treated as an article of commerce at a particular point in its journey across state lines. The Court treated dangerous, noxious, and harmful subjects as not merchantable and, therefore, not articles of commerce.[254] States also could exclude convicts, paupers, and infectious-disease carriers.[255] The Court, moreover, developed the fiction that articles requiring, but awaiting, inspection had yet to become articles of commerce. Inspection laws prepared such subjects for commerce:

> They are confined to such particulars as, in the estimation of the legislature and according to the customs of the trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and that quality, which makes it merchantable and fit for use or inspection.[256]

Once an item became mingled with the general mass of property in the state, it lost its protection as an article of interstate commerce under both the "original package" doctrine and the definition of commerce—each a product of judicial craftsmanship.

The Court developed the "original package" doctrine for distinguishing between property subject to state regulation and articles of commerce.[257] This doctrine served as a convenient tool for thwarting

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ered the law a matter of local concern, governed by *Cooley*. Instead, he held the law unconstitutional without ascribing any particular ground, although suggesting that the state tax impaired a federal right to interstate travel. *See generally* C. FAIRMAN, *supra* note 27, at 12.

254. *See, e.g.*, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); *Bowman*, 125 U.S. at 489, 504.

255. *See, e.g.*, Compagnie Francaise de Navigation A. Vapeur v. Louisiana State Bd. of Health, 186 U.S. 379 (1902) (quarantine law). *See generally* Berger, *Residence Requirements for Welfare & Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853, 856–58 (1981).

256. *Bowman*, 125 U.S. at 488. This language originates from Chief Justice Marshall's opinion in *Gibbons*. 22 U.S. at 203.

257. Chief Justice Marshall developed the "original package doctrine" in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827). In the following passage, he announced the scope of the doctrine:

> This indictment is against . . . selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant pedlar [sic]. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them.

Id. at 443. Marshall, however, discussed the doctrine when examining the scope of article I, § 10, clause 2, which provides that "[n]o State shall, without the Consent of Congress, lay any Imposts

discrimination against articles of commerce because of their foreign origin. The protection covered the right to sell an article in its original package in the place where importation terminates.[258] Justice Edward D. White explained that the "right to send merchandise from one State to another carries with it as an incident the power of the one by whom they are received to sell them in the original package, even though so doing may be contrary to a State law."[259] Not until a product became a part of the common mass of state property could a state exercise its regulatory power. The Court occasionally had to examine the size of the package to limit the "original package" doctrine where a clever importer sought to circumvent all regulation.[260]

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or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." Marshall held that this clause refers to foreign and not domestic goods, but in dicta he suggested that the doctrine might also apply to domestic products. *Id.* at 453.

Future opinions nevertheless upheld taxes levied on products from other states and still in their original package. *See* Hinson v. Lott, 75 U.S. (8 Wall.) 148 (1869); Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869); *License Cases*, 46 U.S. (5 How.) at 594–95. In *Woodruff*, Justice Miller examined the constitutional history surrounding "imports," "exports," and "imposts," and concluded that the principle of Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (discussed *supra* note 257), did not apply to state taxation of domestic goods in interstate commerce. 75 U.S. (8 Wall.) at 123. Any other conclusion, he observed, would permit wholesalers to escape all state taxation. The state could tax goods still in their original package, providing that the package came to rest within the state. *Id.* at 138.

For an interesting twist on the original-package doctrine, see Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923) (Brandeis, J., dissenting) (unpublished opinion), *reprinted in* A. BICKEL, THE UNPUBLISHED OPINIONS OF JUSTICE BRANDEIS 100 (1957); *see also* Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) (examination of imports and duties on imports, and upholding nondiscriminatory ad valorem property tax on an import); Whitfield v. Ohio, 297 U.S. 431 (1936) (critical of doctrine, while upholding state law prohibiting the sale of convict-made goods although still in their original package). The "original package doctrine" has had a tortured history, and some of the Justices in the nineteenth century refused to endorse the approach. A critical distinction after *Woodruff* was whether the state was taxing the articles while in original packages or regulating the sale. *Cf.* Leisy v. Hardin, 135 U.S. 100 (1890) (state may not exercise jurisdiction over liquor shipped in interstate commerce and still in its original package).

258. *See* Lyng v. Michigan, 135 U.S. 161, 166 (1890).

259. Vance v. W.A. Vandercook Co., 170 U.S. 438, 446–47 (1898). In Waring v. Mayor, 75 U.S. (8 Wall.) 110 (1869), however, the Court had held that states could tax the shippers or cosignors of the products, although they could not tax the importers. *Id.* at 122.

260. *See, e.g.*, Austin v. Tennessee, 179 U.S. 343 (1900) (cigarettes); May v. New Orleans, 178 U.S. 496, 503 (1900) (jewelry). In *Austin*, a Tennessee law prohibited importing cigarettes. The tobacco companies responded by shipping the cigarettes in packages of ten, arguing that under the original package doctrine the sale could not be prohibited. The Tennessee high court upheld the law upon the ground that cigarettes were inherently bad, served no beneficial purpose and, therefore, were not articles of commerce. The United States Supreme Court Justices, however, treated cigarettes as legitimate articles of commerce, but were split four to four over whether the cigarettes were in "original packages." *Compare Austin*, 179 U.S. at 354 (Brown, J., plurality) *with id.* at 380 (Brewer, J., dissenting). In a concurring opinion, Justice White indicated that he did not think these were original packages. *Id.* at 364 (White, J., concurring). *See generally* W. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1890–1900, at 240–41 (1950).

2. Traveling in Commerce

The Court also had to resolve a corollary issue: If state territorial sovereignty did not extend to regulating interstate commerce, then the scope of the term "commerce" must be defined. The Court's opinions illustrate a penchant for accepting a rather practical understanding of commerce. Commerce embraces the actual physical movement of articles for the purpose of selling, trading, or exchanging. In *Gibbons v. Ogden*,[261] Chief Justice Marshall delivered the Court's first and lasting definition of commerce. After acknowledging that commerce includes the interchange of commodities—or commercial intercourse, through trafficking, buying, and selling, Marshall added that commerce also includes navigation.[262] Chief Justice Fuller later wrote that "[t]his [definition] is no more than expansion of its simplest signification, that of an exchange of goods, the bringing of them from the seller to the buyer, however vast the range now comprehended by the term in the progress of society."[263] The crux of the definition, as borne out by the cases, is that of "the bringing of the goods";[264] in short, the articles of trade must be en route to or from another state. This actual "transportation of articles of trade from one State to another," wrote Justice Strong, "was the prominent idea in the minds of the framers of the Constitution."[265] Justice Field recognized this view when he wrote that "whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."[266] Thus, in *Coe v. Errol*,[267] the Court held that the mere intent to export an article of trade was not sufficient to trigger the commerce clause. Instead, commerce only begins once the articles "commence their final movement for transportation from the State of their origin to that of their destination."[268]

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261. 22 U.S. (9 Wheat.) 1 (1824).

262. *Id.* at 189–90.

263. Lehigh Valley R.R. v. Pennsylvania, 145 U.S. 192, 200 (1892).

264. Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 275 (1873).

265. *Id.*

266. The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1870). Dissenting in *Geer*, Field discussed this relationship between commerce and "movement":

> By the Constitution of the United States it has been adjudged that commerce between the States is under the absolute regulation of Congress, and that whenever an article of property begins to move from one State to another, commerce between the States has commenced, and that with its control or regulation no State can interfere.

161 U.S. at 542 (Field, J., dissenting); *see also* L. TRIBE, *supra* note 193, at 62.

267. 116 U.S. 517 (1886).

268. *Id.* at 525. The Court illustrated its point with an example of gathering farm or forest products from a surrounding region. The gathering and transportation to the regional center is not where interstate commerce begins, "such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for trans-

On the other hand, interstate commerce ends when articles cease to be in transit and become part of the general mass of state property. While in transit, property remains free "from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities."[269] In *Brown v. Houston*,[270] for example, Justice Bradley wrote the opinion of the Court upholding a Louisiana state tax upon coal that had "come to its place of rest [in Louisiana] for final disposal or use."[271] The plaintiff argued that the coal had been taxed in Pennsylvania, and that Louisiana was attempting to tax the coal while it was still under the care of the plaintiff's agents and in its original condition. Justice Bradley rejected the argument, reasoning that the coal was not taxed while in transit but rather that it "had become a part of the general mass of property in the State."[272] Otherwise, such products might escape taxation indefinitely. Thus, states could not tax foreign products while still in their original packages and they could not tax domestic goods from other states that were still in transit.

3. State Control over the Internal Market

This definition of interstate commerce and the state's right of territorial sovereignty is implicit in the Court's distinction between regulation of commerce and control of manufacturing; the Court routinely acknowledged that states could prohibit manufacturing within their jurisdiction. Indeed, when Congress attempted to regulate combinations in restraint of trade in activities that included manufacturing, a majority of the Court, speaking through Justice Fuller, held that Congress' action exceeded its authority under the commerce clause. In *United States v. E.C. Knight Co.*,[273] Fuller explained that the states, and not the federal government, exercise jurisdiction over subjects within the realm of the states' police power. States had traditionally protected against unlawful restraints upon commerce within their borders; the

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portation out of the State to the State of their destination or have started on their ultimate passage to that State." *Id.*; *see also* B. GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION (1932); Corwin, *supra* note 195. Bernard Gavit explains that the Court viewed commerce as a factual matter consisting of movement or transportation. B. GAVIT, *supra*, at 108–09.

269. Kelley v. Rhoads, 188 U.S. 1, 5 (1903) (taxing livestock brought into state for grazing).

270. 114 U.S. 622 (1885).

271. *Id.* at 632.

272. *Id.* at 633.

Court's opinion was premised upon preserving that role.[274] Yet, the Court had to draw a distinction between commerce and manufacturing; otherwise, states would be barred from controlling the organization and operation of both domestic-chartered corporations doing business in other jurisdictions and foreign-chartered corporations because, according to Fuller, only Congress could exercise jurisdiction over interstate commerce. And, while state regulation would not affect conduct beyond the state for wholly-domestic corporations, similar regulation for foreign-chartered companies might be considered to have an impermissible extraterritorial effect. Foreign corporations, therefore, would be able to engage in activities within the state that might be illegal for domestic corporations.[275]

The Court's opinion in *E.C. Knight Co.* is consistent with its prior cases. The Court already had held that states could prohibit or regulate the manufacturing and sale of products that otherwise might become articles of commerce. In *Mugler v. Kansas*,[276] the Court held that a state could prohibit or restrict the manufacture and sale of intoxicating liquors.[277] The Court reaffirmed that conclusion in *Kidd v. Pearson*,[278] when it upheld an Iowa statute restricting the manufacture and sale of liquor destined for exportation and sale outside the state. In *Kidd*, Justice Lucius Q.C. Lamar acknowledged that the federal government exercises exclusive power to regulate commerce. He added, however, that such power "does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State."[279] He resorted to the "parade of horribles" argument common during the late nineteenth century to illustrate why any other result would be disastrous. Congress, he warned, would be overburdened and unable to legislate on such matters governed by peculiarly local effects throughout the nation. The net result would be the absence of any regulation, leading to an unfettered market.[280]

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274. *See generally* McCurdy, *supra* note 27.

275. The inability to exercise control over the conduct of an out-of-state corporation was at the heart of Justice Field's dissent in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1, 14 (1878) (Field, J., dissenting), and his majority opinion in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), *overruled in* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). *See generally* McCurdy, *supra* note 27, at 314–23. This same concern was expressed much earlier in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

276. 123 U.S. 623 (1887).

277. *Id.* at 629.

278. 128 U.S. 1 (1888).

279. *Id.* at 17.

280. In another case decided under the privileges and immunities clause, the Court did not perceive any commerce-clause issue when it upheld a state's prohibition on out-of-state residents from running oysters in waters within the state. McCready v. Virginia, 94 U.S. 391 (1877); *see*

The breadth of a state's power over activity occurring solely within its borders is illustrated by the butter industry's battle with the manufacturers of oleomargarine.[281] The discovery of oleomargarine posed a significant threat to the dairy industry. Not surprisingly, therefore, the predecessor to the National Dairy Union urged that states adopt legislation regulating the manufacturing and sale of oleomargarine. By 1890, a number of states had passed such regulations. Members of Congress nevertheless were told that state legislatures were powerless to act given the growth of the industry. Democratic Representative Lewis Beach of New York explained that state laws were inadequate to deal with manufacturing that occurred outside the state for a product distributed throughout the country.[282] His warning, however, may have been overstated because, as we have seen, states exercised considerable power to control intrastate commerce, and even to prohibit the manufacture and sale of oleomargarine produced within the state.[283] Justice Peckham wrote that

> [t]he right of a state to enact laws in relation to the administration of its internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another, and a totally different, thing. Legislation which has its effect wholly within the state, and upon products manufactured and sold therein, might be held valid as not in violation of any provision of the federal constitution, when at the same time legislation directed towards prohibiting the importation within the state of the same article manufactured outside of its limits might be regarded as illegal because in violation of the *rights of citizens of other states arising under the commerce clause* of that instrument.[284]

States were even permitted to prohibit the sale of oleomargarine manufactured outside the state, if the product was colored so as to possibly

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also Manchester v. Massachusetts, 139 U.S. 240 (1891); Smith v. Maryland, 18 How. 71 (1855). The Court later held that such prohibitions violated the privileges and immunities clause of article IV. *See* Toomer v. Witsell, 334 U.S. 385 (1948).

281. This conflict is discussed in A. LEE, A HISTORY OF REGULATORY TAXATION 12–27 (1973); *see also* M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 413 (1977).

282. He no doubt was concerned with those states that lacked a significant dairy industry and had legislatures that would not regulate the production and sale of oleomargarine. In 1886, Congress passed a law imposing a tax on oleomargarine. Justice Horace Gray later thought that this law sanctioned state prohibition of imported oleomargarine. Schollenberger v. Pennsylvania, 171 U.S. 1, 28–30 (1898) (Gray, J., dissenting).

283. Powell v. Pennsylvania, 127 U.S. 992 (1888). The fourteenth amendment posed the more significant, albeit not dispositive, constitutional challenge to such state prohibitions. *See generally* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887–1895, at 29–35 (1960).

284. *Schollenberger*, 171 U.S. at 16 (emphasis added).

deceive buyers into believing that the product was butter.[285] They could not, however, directly ban all importation of oleomargarine[286] or indirectly preclude importation by requiring that the product be colored in such a ridiculous manner as to be unmarketable.[287]

Logically, the Court's decision that insurance companies do not engage in interstate commerce also follows from its perception of "commerce."[288] The justification for this exclusion is that contracts do not constitute articles of commerce. When upholding a tax upon emigrant agents, the Court explained that the role of a contract is connected only remotely with eventual transportation.[289] In *Hooper v. California*,[290] for example, California regulated the entry of a foreign insurance company. The defendant was charged and convicted of procuring marine insurance for a New York insurance adjuster and broker who had failed to file the necessary bond. Justice White's opinion upholding the law reaffirmed the principle that insurance contracts are not objects of commerce: they lack the element of being something that one would barter or trade. White acknowledged that a contract might lead to interstate commerce but he cautioned against calling such contracts commerce because to do so "would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature."[291] State regulation of contracts, therefore, fell outside of the definition of commerce, and such regulations also satisfied the requirement that a law may not affect conduct outside a state's jurisdiction.

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285. Plumley v. Massachusetts, 155 U.S. 461 (1894). The Court required that such legislation apply equally to all colored oleomargarine.

286. *Schollenberger*, 171 U.S. at 18.

287. Collins v. New Hampshire, 171 U.S. 30 (1898).

288. *See e.g.*, Liverpool Ins. Co. v. Oliver, 77 U.S. (10 Wall.) 566 (1871); *see also* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869). Just prior to the Court's decision in *Paul*, Congress had been unsuccessfully urged to adopt a national insurance bureau. *See* C. FAIRMAN, *supra* note 27, at 1396–99. Furthermore, many western and southern states, in particular, were hostile toward eastern insurance companies, which were draining local capital, and treated them with varying degrees of regulation. *See generally* Freyer, *The Federal Courts, Localism, and the National Economy, 1865–1900*, 53 BUS. HIST. REV. 343, 349 (1979). In 1944, the Court overturned *Paul*. *See* United States v. South-Eastern Underwriters Ass'n, 332 U.S. 533 (1944).

289. Williams v. Fears, 179 U.S. 270, 276–77 (1900).

290. 155 U.S. 648 (1895).

291. *Id.* at 655. Justice Harlan, joined by Justices Brewer and Howell E. Jackson, dissented, arguing that the state law infringed an individual's constitutional right to liberty and engaging in an occupation. *Id.* at 661–64 (Harlan, J., dissenting).

4. State Taxation of Property Within Its Borders versus Privilege Taxes

State jurisdiction encompassed all property having a situs within its territory and not classified as an article or instrument of interstate commerce. Once a state attempted to exercise jurisdiction over activities, articles, or instruments of interstate commerce because of their unique character as such, the state would no longer be exercising jurisdiction over matters within its power. The variety of cases establishing the limits of state taxation conform to this precept. A state could tax all tangible personal property under its jurisdiction and with a situs in the state, regardless of the owner's residency or whether the property was employed in interstate commerce.[292] If the tax did not operate as a privilege tax, and only served as a tax on the value of property situated within the state, Justice Fuller observed, then the crucial question is whether the state was taxing "property not within its territorial limits."[293] In *Ficklin v. Shelby County Taxing District*,[294] he summarized this general principle, which had surfaced in earlier cases:

> It is well settled that a State has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the State.[295]

This approach led the Court to uphold state statutes imposing a tax on the *value* of *all property* with a situs in a state's territory.[296]

The outcome of many cases turned on whether the Court classified the tax as one imposed upon the value of the property or upon the business itself. The former was freely taxable while the latter was prohibited. Quite often the dissent and the majority disagreed over whether the state had taxed the value of a business's property or whether the state had taxed the operations of the business. Exhibiting little deference toward a state's own classification, the Court independently examined the operation of the tax to determine whether the

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292. *See, e.g.*, Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897).

293. *Id.* at 218.

294. 145 U.S. 1 (1892).

295. *Id.* at 22.

296. Gloucester v. Ferry Co. v. Pennsylvania, 114 U.S. 196, 206 (1885) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 429). Although holding that the tax was on the transportation of persons and property, Justice Field added that states could tax property with a situs in the state and ferries could only be taxed at the home port. *Id.* at 210. For authority that ferries could only be taxed at their home port, see Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365 (1882); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1872); St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1870); Hays v. Pacific Mail S.S. Co., 58 U.S. (17 How.) 596 (1855).

state was imposing the tax on the business of interstate commerce.[297] In *Cook v. Pennsylvania*,[298] for instance, the government argued that a tax on an auctioneer was actually one upon the privilege of auctioneering and not one upon goods brought from without the state and still in their original packages.[299] The Court rejected this argument, concluding that the state had imposed the tax on the privilege of selling foreign goods.[300]

Nevertheless, states could constitutionally tax the value of all property, and the Court recognized that the privilege of corporate existence carried with it a taxable property value.[301] This principle applied to franchises engaged in interstate commerce:

> But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchise within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, . . . and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.[302]

Echoing Justice Field's opinion in *Horn Silver Mining Co. v. New*

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297. *See, e.g.*, Ashley v. Ryan, 153 U.S. 436, 440 (1894).

298. 97 U.S. 566 (1878).

299. *Id.* at 570.

300. *Id.* at 571.

301. *See, e.g.*, Henderson Bridge Co. v. Kentucky, 166 U.S. (1897) (state may tax franchise of its own creation and operating within the state); *Ficklen*, 145 U.S. 1 (1892); Maine v. Grand Trunk R.R., 142 U.S. 217 (1891); Pacific Express Co. v. Seibert, 142 U.S. 339, 350 (1892) (state may tax the value of a franchise by measuring the receipts derived from intrastate business); Massachusetts v. Western Union Tel. Co., 141 U.S. 40 (1891) (state may tax the value of a franchise within its territory); Home Ins. Co. v. New York, 134 U.S. 594 (1890); Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888) (state may tax the value of a franchise doing business within the state); California v. Pacific R.R., 127 U.S. 1, 40 (1888) (state may not tax United States' franchises, but states may tax "outside visible property of the company situated within the State"); Western Union Tel. Co. v. Massachusetts, 125 U.S. 530 (1888) (state may tax United States franchise because of federal acquiesence); Philadelphia & S.S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887) (states may not tax the franchise of engaging in interstate commerce); Fargo v. Michigan, 121 U.S. 230, 244 (1887) (dicta that states may tax their own franchises but cannot grant franchise which is engaged in interstate commerce and then tax it); State Tax on Ry. Gross Receipts, 82 U.S. (15 Wall.) 284, 296 (1872) (dicta that state may tax franchise it created).

302. Postal Tel. Cable Co. v. Adams, 155 U.S. 688, 696 (1895). In *Postal Telegraph Cable Co.*, Massachusetts levied a tax upon the value of a franchise operating within its territory. Writing for a divided Court, Chief Justice Fuller sustained the tax because it was proportionate to the value of property within the state. *Id.* at 700. In dissent, Justice Brewer, joined by Justice Harlan, argued that the tax was levied on the privilege of engaging in interstate commerce. *Id.* at 701 (Brewer, J., dissenting).

York,[303] Justice Fuller declared that "the right of a State to tax the franchise or privilege of being a corporation, as personal property, has been repeatedly recognized by this court, and this whether the corporation be a domestic, or a foreign corporation doing business by its permission within the State."[304] Moreover, states were free to tax certain occupations if the tax did not amount to a tax upon the privilege of engaging in interstate commerce. Frequently, therefore, the constitutionality of a state regulation depended upon whether it operated as a tax upon the proportion of the property value of a franchise within a state or as a tax upon the privilege of engaging in interstate commerce.

States could tax certain businesses and occupations, unless the tax served as a condition imposed on the exercise of the federal right[305] to engage in interstate commerce. Chief Justice Fuller explained that taxing certain trades and businesses does not necessarily offend the commerce clause merely because the business "chances to consist" of negotiating for interstate transactions.[306] Yet, states were precluded from taxing the business of interstate commerce as a separate or distinct activity. During the late nineteenth century, for instance, the Court reviewed a number of state statutes or municipal ordinances imposing an occupation fee for certain trades and businesses.[307] A number of states after the Civil War began to impose these taxes on traveling salesmen

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303. 143 U.S. 305 (1892).

304. *Postal Tel. Cable Co.*, 155 U.S. at 696.

305. The language throughout the opinions strongly suggests that individuals and companies have a federal right to engage in interstate commerce. In Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898), for instance, the majority opinion repeatedly referred to the constitutional "right to engage in interstate commerce, a federal right which sprung from the Constitution and could not be unlawfully restrained by the states." At least one author has recognized the significance of this language. Professor McCurdy suggests that the counsel to Singer Manufacturing Company "prompted the Court to deduce from the commerce clause a new, fundamentally important constitutional right: the right of American business . . . to engage in interstate transactions on terms of equality with local merchants and manufacturers." McCurdy, *supra* note 1, at 643.

306. *Ficklen*, 145 U.S. at 21 ("[W]here a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.").

307. For a review of some of the cases, see *infra* note 325. Morton Keller explains that while states relied upon taxes as a major source of revenue, during the late nineteenth century the types of property changed character and affected state income. Wealth became measured by intangible forms of property rather than by real property. He also notes that many of "the less visible forms of property massively evaded taxation." Not surprisingly, therefore, states attempted to tax occupations.

> License and occupation taxes produced in sum only about $750,000 in the late 1880s. But they were to highly diverse—and specific—in character. Thus Tennessee in 1893 levied a (privilege tax) on dozens of specific occupations, ranging from artists and architects to feather renovators and tombstone dealers.

M. Keller, *supra* note 281, at 323–25.

drumming up business for an out-of-state manufacturer.[308] Southern and western states generally defended these laws as essential measures for curbing economic domination from out-of-state manufacturers, mostly located in the northeast. Although by the late 1860s the weight of authority supported such laws, Charles McCurdy explains that the large manufacturers set a litigation course and succeeded in convincing the Court that these laws were being imposed on the business of interstate commerce—thus threatening the newly emerging economic structure of vertically-integrated companies sending their products throughout the country.[309] In a number of cases, the Court declared these statutes unconstitutional because either the fee served as a condition for engaging in interstate commerce or the fee was imposed because the trade or business was interstate commerce.[310] "No State," wrote Justice Fuller in *Lyng v. Michigan*,[311] "has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on . . . ."[312] This same reasoning led the Court to hold that states could not impose other types of conditions upon the right of a foreign corporation to engage in interstate commerce within the state.[313]

If, however, the Court classified the tax as a condition imposed upon a foreign corporation for doing local business in a state, the tax passed constitutional muster. During the late nineteenth century, the Court held that states could impose conditions on foreign corporations

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308. *See generally* Hollander, *Nineteenth Century Anti-Drummer Legislation in the United States*, 38 BUS. HIST. REV. 456 (1964); McCurdy, *supra* note 1; McCurdy, *supra* note 27; Scheiber *Federalism, the Southern Regional Economy, and Public Policy Since 1865, supra* note 27, at 82.

309. McCurdy, *supra* note 1; McCurdy, *supra* note 27. A similar course had been taken earlier by transportation companies refusing to comply with certain tax measures. *E.g.*, J. BAUGHMAN, CHARLES MORGAN AND THE DEVELOPMENT OF SOUTHERN TRANSPORTATION 140–42 (1968).

310. *See infra* notes 322–25 and accompanying text.

311. 135 U.S. 161 (1890).

312. *Id.* at 166; *see also* Leloup v. Port of Mobile, 127 U.S. 640, 645 (1888) ("the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing business is surely a tax on the business").

313. *See, e.g.*, Fritts v. Palmer, 132 U.S. 282, 288 (1889); Cooper Mfg. Co. v. Ferguson, 113 U.S. 727 (1885). *See generally* J. BEALE, FOREIGN CORPORATIONS (1904); G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW: A CONTRIBUTION TO THE HISTORY AND THEORY OF JURISTIC PERSONS IN ANGLO-AMERICAN LAW (1918); *Hale, Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Merril, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929); Oppenheim, *Unconstitutional Conditions and State Power*, 26 MICH. L. REV. 176 (1927).

doing intrastate business within their territory.[314] In *Osborne v. Mobile*,[315] for example, the City of Mobile passed an ordinance requiring express and railroad companies doing business in Mobile but whose operations extended beyond the state to pay an annual license fee. Chief Justice Salmon P. Chase, delivering the Court's opinion, began by noting "[t]he difficulty of drawing the line between constitutional and unconstitutional taxation by the state."[316] After recognizing such a line, Chase wrote that "[i]t is important to leave the rightful powers of the state in respect to taxation unimpaired as to maintain the powers of the Federal Government in their integrity."[317] He then concluded that the city's ordinance fell within the state's power.[318]

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314. The doctrine allowing states to impose conditions upon the admission of foreign corporations constantly changed during the nineteenth century, and it was eventually abandoned. Indeed, the decisions are not uniform and many turn on whether the state was imposing what otherwise would be an unconstitutional condition on the foreign corporation. One author explains the justification for sustaining such regulations:

> [C]orporations are not citizens within the meaning of the [fourteenth amendment]. Having no legal existence beyond the limits of the State which created it, a corporation cannot enter other states or claim the aid of their laws in the enforcement of its contracts, except upon the comity of those States. Having the absolute power of excluding the foreign corporation, a State may impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient.

T. CALVERT, REGULATION OF COMMERCE UNDER THE FEDERAL CONSTITUTION 249–50 (1907).

In Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888), for example, a Colorado company doing business in Pennsylvania was subject to a state law requiring a license of a foreign corporation that opens an office but does not invest capital in the state. Writing for the Court, Justice Field held that the tax was imposed neither on the franchise nor on the property or business outside the state; instead, he concluded that the license was a valid condition for keeping an office in the state. Furthermore, Field acknowledged the doctrine's limitation that it would not apply to companies engaged in interstate commerce. *Id.* at 184–86; *see also* Waters-Pierce Oil Co. v. Texas, 177 U.S. 28 (1900) (state may exclude corporation doing business within the state in violation of state antitrust law); Southern Pac. Co. v. Denton, 146 U.S. 202 (1892) (state may not condition exercise of federal right); Horn Silver Mining Co. v. New York, 143 U.S. 305 (1892) (state may tax entire capital of foreign corporation even though only a small portion is derived from within the state if the state taxes the entire capital of its own corporations); Dahl v. Montana Copper Co., 132 U.S. 264 (1889) (state may set strict pleading requirement for a foreign corporation challenging a doing business statute); Barrron v. Burnside, 121 U.S. 186 (1887) (state may not condition exercise of federal privilege); Ducat v. Chicago, 77 U.S. (10 Wall.) 410, 415 (1871) ("The power of the State to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, is clearly established"). Consequently, foreign corporations could only challenge "doing business" statutes if they could show that they were engaged in interstate commerce or exercising another federal right. T. COOLEY, *supra* note 31, at 179–81 (7th ed. 1903).

315. 83 U.S. (16 Wall.) 479 (1873), *overruled in* Leloup v. Port of Mobile, 127 U.S. 640 (1888).

316. *Osborne*, 83 U.S. at 481.

317. *Id.*

318. *Id.* at 482. The Supreme Court later overruled *Osborne* in Leloup v. Port of Mobile, 127 U.S. 640 (1888). In *Leloup*, however, the Court analyzed the tax differently than it had in *Mobile* and concluded that the tax operated as a tax on the privilege of engaging in interstate commerce. *Id.* at 145–48.

Foreign corporations did succeed in establishing some restrictions on a state's exercise of its power over them.[319] After affirming that a state could place conditions upon the admission of a foreign corporation, Justice Lamar cautioned that "a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce."[320] Justice Bradley explained that this limit on state power followed from a lack of state jurisdiction over businesses engaged in interstate commerce:

> If the subject was one which appertained to the jurisdiction of the State legislature, it may be that the requirements and conditions of doing business within the State would be promotion of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in [interstate commerce] . . .; and that is a subject which belongs to the jurisdiction of the national and not the State legislature.[321]

Although States could impose conditions upon foreign corporations, they could not impose the condition upon the exercise of a federal right—engaging in interstate commerce.

Quite often the Court invoked *Robbins v. Shelby County Taxing District*[322] as the seminal case establishing that the business of interstate commerce could not be taxed.[323] In *Robbins*, Tennessee had required that drummers obtain a license before plying their trade. The firm of Rose, Robbins & Co. sold stationery in Ohio, but generated sales by soliciting orders through exhibiting samples of its product—the business of drumming. The Court, through Justice Bradley, held that the license fee effectively imposed a tax on the business of "making negotiations in the conduct of interstate commerce."[324] While the state could tax some businesses as privileges, it could not tax the drummer in this case because such a tax amounted to one upon the privilege of engaging in interstate commerce.[325]

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319. *See generally* Hale, *supra* note 313.

320. Norfolk & W.R.R. v. Pennsylvania, 136 U.S. 114, 118 (1890) (tax on an out-of-state corporation establishing an office in the state).

321. Crutcher v. Kentucky, 141 U.S. 47, 56–57 (1891).

322. 120 U.S. 489 (1887) (state statute imposing tax on sellers not licensed in particular county).

323. *See, e.g.*, Caldwell v. North Carolina, 187 U.S. 622 (1903) (license fee imposed on agent selling picture frames); Stoutenburgh v. Hennick, 129 U.S. 141 (1889) (drummer legislation in the District of Columbia held unconstitutional); Asher v. Texas, 128 U.S. 129, 131 (1888) (occupation tax on drummer of rubber stamps and stencils); Leloup v. Port of Mobile, 127 U.S. 640, 646 (1888); Corson v. Maryland, 120 U.S. 502 (1887) (license required for drummer). The same principle prevented a state from requiring a license for an out-of-state manufacturer sending its products into a state "C.O.D." *See* Norfolk & W.R.R. v. Sims, 191 U.S. 441, 449–50 (1903).

324. 120 U.S. at 496.

325. In the post-Civil War period, the Court's treatment of legislation directed at agents,

Nor could states regulate or tax the implied federal right of inter-

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drummers, and peddlers of companies engaged in interstate commerce conformed to economic realities. Charles McCurdy explains that "[a]ll measures tending to impede the introduction of foreign merchandise on a bargaining parity with domestic products, even if non-discriminatory on their face, had been prohibited." McCurdy, *supra* note 27, at 312–13. For an informative discussion on the role of Singer Manufacturing Company and Armour Company in persuading the Court that these types of state legislation discriminated against interstate commerce because of a new marketing structure, see McCurdy, *supra* note 1.

In Welton v. Missouri, 91 U.S. 275 (1876), the Court took the initial step in protecting the new marketing structure. *See* McCurdy, *supra* note 27, at 311. In *Welton*, the Court held that a license tax imposed on the selling of sewing machines manufactured outside of the state amounted to a tax on the foreign goods themselves, and such goods could only be taxed after they became part of the general mass of property in the state. 91 U.S. at 281. Justice Field declared that "[i]t is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character." *Id.* at 282; *see also* Weber v. Virginia, 103 U.S. 344, 350 (1881) (state tax on Singer agent held unconstitutional because a clear discrimination in favor of residents).

The Court struck down other statutes that discriminate against out-of-state products, generally reasoning that the tax was effectively levied upon the goods themselves as articles of commerce. Marshall had introduced this reasoning in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 444 (1827); *see also* Almy v. California, 65 U.S. (24 How.) 169 (1861) (Taney Court held that a stamp tax on bills of lading actually a tax upon exports—gold and silver—and repugnant to the impost and duty clause of the Constitution). And, as we have seen, states lacked jurisdiction over articles of commerce. Asher v. Texas, 128 U.S. 129 (1888) (discriminatory occupation tax for drummer unconstitutional); Corson v. Maryland, 120 U.S. 502 (1887) (holding unconstitutional a statute that discriminated against sellers who are not manufacturers of their product); Walling v. Michigan, 116 U.S. 446 (1886) (occupation tax upon selling liquor for non-resident parties held unconstitutional); Tiernan v. Rinker, 102 U.S. 123, 127 (1880) (dictum) ("A tax cannot be enacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when a home manufacture."); *see also* Brennan v. Titusville, 153 U.S. 289 (1894); Crutcher v. Kentucky, 141 U.S. 47 (1891); McCall v. California, 136 U.S. 104 (1890); Leloup v. Port of Mobile, 127 U.S. 640 (1888); Guy v. Baltimore, 100 U.S. 434, 439 (1879) ("no state can . . . impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory"); Cook v. Pennsylvania, 97 U.S. 566 (1878).

In *McCall*, for instance, Justice Lucius Q.C. Lamar remarked that a statute imposing a license fee upon an agent soliciting passenger traffic for outside the state was a "tax upon a means or an occupation of carrying on interstate commerce." 136 U.S. at 109. *But cf.* New York v. Roberts, 171 U.S. 658 (1898) (although discriminating against out-of-state manufacturers not manufacturing within the state, a New York law was sustained because the tax was levied upon all companies not manufacturing wholly within the state); Emert v. Missouri, 156 U.S. 296 (1895) (upheld license for peddlers of Singer sewing machines, reasoning that the law protected against cheats and frauds); Machine Co. v. Gage, 100 U.S. 676, 679 (1879) (tax on peddlers of sewing machines upheld on the ground that tax did not discriminate in favor of residents).

In *Ficklen*, Justice Fuller upheld a tax upon an agent soliciting orders for an out-of-state firm. 145 U.S. at 24. Fuller distinguished this case from others, concluding that the tax was not imposed "on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business." *Id.* at 22. Fuller then held that the tax was "not on the goods, or on the proceeds of the goods, nor is it on non-resident merchants." *Id.* at 24. In short, the tax was levied appropriately upon property within the state. Justice Harlan, however, dissented, noting that the commissions taxed were derived solely from interstate commerce. *Id.* at 28 (Harlan, J., dissenting). The *Ficklen* holding, Harlan opined, appeared contrary to the Court's opinions in Norfolk & Western Railroad Co. v. Pennsylvania, 136 U.S. 114 (1890); Stoutenburgh

state transportation, a constituent—perhaps vital—part of interstate commerce. In *Wiggins Ferry Co. v. East St. Louis*,[326] *Morgan v. New Orleans*,[327] and *Harmon v. Chicago*,[328] for instance, the Court considered state and municipal fees imposed on transportation over navigable waters.[329] In *Wiggins Ferry Co.*, the opinion by Justice William B. Woods upheld the fee as a tax on property rather than as a regulation of commerce. The City of East St. Louis brought suit against the Wiggins Ferry Company to recover certain license fees. In 1819, Illinois granted the predecessor to the ferry company a charter to operate a ferry across the Mississippi River between East St. Louis, Illinois, and St. Louis, Missouri. Apparently responding to the effects of competition that had developed over the years, the Company opted to quit paying certain license fees that in the aggregate were not being paid by its competitors.[330] Justice Woods almost summarily disposed of the Company's argument that the license fee was an unconstitutional intrusion on Congress' power to regulate commerce. The state, he wrote, unquestionably has the right to tax property having a situs within the state,

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v. Hennick, 129 U.S. 141 (1889); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887) (discussed *supra* notes 145–49 and accompanying text); Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887), *Leloup*, *Asher*, *McCall*, and *Crutcher*. *See Ficklen*, 145 U.S. at 25–27 (Harlan, J., dissenting).

Chief Justice Fuller had dissented in a number of the cases Harlan cited. *E.g.*, *Crutcher*, 141 U.S. at 62 (Fuller, C.J., dissenting); *McCall*, 136 U.S. at 114 (Fuller, C.J., dissenting); *Norfolk & W.R.R.*, 136 U.S. at 121 (Fuller, C.J., dissenting). Nevertheless, the principles relied upon by the majority in each instance remained the same. *Robbins*, *Leloup*, *Norfolk & Western Railroad*, and *McCall* all involved license fees for the privilege of engaging in interstate commerce within the state. Justice Brewer, who joined in Fuller's dissents in *Norfolk & Western Railroad* and *McCall*, acknowledged that "[i]t has been again and again said by this court that while no State could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce." Cleveland R.R. v. Backus, 154 U.S. 439 (1894). In Philadelphia & Southern Steamship Co. v. Pennyslvania, 122 U.S. 326 (1887) (discussed *infra* notes 348, 352–56 and accompanying text), the Court confronted the constitutionality of a tax levied upon gross receipts derived from interstate transportation. Justice Bradley declared that the state unconstitutionally levied the tax on the transportation and not on the property. *Id.* at 342. The author of a number of key decisions, Justice Bradley wrote the majority opinions in Asher v. Texas, 128 U.S. 129 (1888) (striking down an occupation tax for a drummer), and Crutcher v. Kentucky, 141 U.S. 47 (1891) (invalidating license statute for a foreign express company). Thus, Fuller's opinion in *Ficklen* illustrates how the Justices operated within a similar framework but often held competing conceptions of the economic arena.

326. 107 U.S. 365 (1883).

327. 112 U.S. 69 (1884).

328. 147 U.S. 396 (1893).

329. Federal jurisdiction applied to transportation over navigable waters. *See, e.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

330. Not only were two other ferry companies engaged in active competition with Wiggins, but also a bridge joined East St. Louis with St. Louis. This competition might have prompted one railroad company that had an exclusive contract with Wiggins to breach its contract and shift its business elsewhere. Chicago & A.R. Co. v. Wiggins Ferry Co., 108 U.S. 18 (1883).

"although their boats ply between landings lying in two different states."[331]

In *Morgan*, however, Justice Matthews rejected the argument that a license tax on a tugboat operator engaged in traveling between the Gulf of Mexico and New Orleans was a property tax. His opinion indicates that the tax operated as an unconstitutional charge for the privilege of interstate navigation.[332] And, in *Harmon*, Justice Field adopted a similar rationale in striking down a city ordinance that exacted a license fee from tugboat operators validly licensed and enrolled pursuant to federal law. Field declared that the ordinance was "plainly and palpably in conflict with the exclusive power of Congress to regulate commerce" because the ordinance imposed a fee on the privilege of companies engaged in interstate transportation to navigate the Chicago River and its branches.[333]

The Court applied a similar rationale to invalidate privilege taxes imposed on the operation of railroad sleeping cars, holding that imposing a tax on the privilege of running a railroad sleeping car within a state amounted to a tax on the transportation itself. For example, when Tennessee levied a privilege tax on every sleeping car or coach used on Tennessee rails and not owned by the railroad company on whose rails the cars were run, Justice Blatchford wrote an opinion holding the law unconstitutional.[334] Initially, Blatchford rejected the state's classification of the tax as a property tax, pointing out that the tax was not based on value but rather represented an arbitrary charge.[335] Next, he held that the tax operated as a condition precedent for doing business in the state.[336] Because the business being taxed was transportation in and out of Tennessee, the tax effectively was being levied upon the right to engage in interstate transportation[337] and, therefore, was unconstitutional. In a similar case, Justice William R. Day acknowledged that "[a]ny occupation, business, employment, or the like, affecting the

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331. Wiggins Ferry Co., 107 U.S. at 374.

332. 112 U.S. at 74. Since the tugboat was duly enrolled under federal law, such a privilege tax was in direct conflict with the "license granted under the authority of Congress." *Id.* at 75.

333. 147 U.S. at 407 (citing Sinnot v. Davenport, 63 U.S. (22 How.) 227 (1859); Foster v. Davenport, 63 U.S. (22 How.) 244 (1859)). The two cases cited in *Harmon* also played a principal role in Justice Matthews' opinion in *Moran*. *See Moran*, 112 U.S. at 71–72. The *Sinnot* Court struck down a City of Mobile ordinance establishing conditions for the privilege of engaging in the coasting trade. Writing for the Court, Justice Nelson held that congressional action had preempted the exercise of the state's police power. *Sinnot*, 63 U.S. (22 How.) at 243.

334. Pickard v. Pullman S. Car Co., 117 U.S. 34 (1886); *see also* Tennessee v. Pullman S. Car Co., 117 U.S. 51 (1886).

335. 117 U.S. at 43.

336. *Id.* at 44.

337. *Id.* at 46.

public, may be classed and taxed as a privilege";[338] and surely, he added, running sleeping cars not owned by a railroad company was a privilege.[339] Yet, for sleeping cars running on both intra- and interstate railway lines, the tax amounted to an unconstitutional attempt to tax the privilege of engaging in interstate transportation.

This did not prevent states from taxing the value of movable property within their borders. For example, in *Marye v. Baltimore & Ohio Railroad Co.*,[340] Virginia applied its tax to a Maryland corporation's rolling stock that was being used on lines leased by the corporation within Virginia. Writing for the Court, Justice Matthews indicated that Virginia's tax was directed at property in continuous use within the state's "territorial limits."[341] According to Matthews, the tax did not become invalid merely because the company employed its property "as vehicles of transportation in the interchange of interstate commerce."[342] Indeed, he observed that "it would certainly be competent and legitimate for the State to impose upon such property . . . its fair share of the burdens of taxation imposed upon other similar property used in the like by its own citizens."[343] Matthews nevertheless held that the statute under which the tax was imposed was not intended to be applied to such an out-of-state company.[344]

The principle that states could tax property owned by businesses engaged in interstate commerce applied to corporations not owning tangible property in the state. When Lawrence Maxwell, Clarence Seward, James Carter, and Frank Platt represented the Adams Express Company before the Supreme Court, they argued that states could tax only tangible personal property in the state.[345] Justice Fuller's majority opinion in *Adams Express Co. v. Ohio State Auditor*,[346] however, held that a state could tax a company's intangible property and develop a

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338. Allen v. Pullman's Palace Car Co., 191 U.S. 171 (1903).

339. *Id.* at 178.

340. 127 U.S. 117 (1888).

341. *Id.* at 123.

342. *Id.* at 124.

343. *Id.* at 123; *see also* Pittsburgh Ry. v. Backus, 154 U.S. 421 (1894). In *Backus*, Justice Brewer acknowledged a state's power to tax the value of rolling stock. 154 U.S. at 427. Justice Harlan, joined by Justice Brown, dissented upon the grounds that "[u]nder the mode of assessment pursued, property was taxed in Indiana that had no situs there, which was used in interstate commerce outside of Indiana, and could not properly be included in the Company's railroad track and rolling stock in that State." *Id.* at 437 (Harlan, J., dissenting). Such an imposition by the state, the dissent argued, would constitute an unconstitutional burden on interstate commerce. *Id.* at 437–38 (Harlan, J., dissenting).

344. *Marye*, 122 U.S. at 124.

345. Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897) (petition for rehearing); *see also* Adams Express Co. v. Kentucky, 166 U.S. 171 (1897); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897).

346. 166 U.S. 185 (1897).

reasonable method of valuation based on property situated outside the state.[347] Consequently, a state could tax the value of either tangible or intangible property within its territory.

States devised various methods for reasonably valuing intangible property within their borders. They commonly measured the value of intangible property, such as the property value of a franchise, by establishing a percentage of the company's gross receipts derived from intra- and interstate business. This percentage usually equaled the ratio of the amount of business done in the state over the total amount of business. In *State Tax on Railway Gross Receipts*,[348] for example, a state imposed a tax on a percent of gross receipts of a railroad company, even though the gross receipts consisted of money obtained from freights received for transportation of merchandise in interstate commerce. Justice Strong upheld the tax for a divided Court, reasoning that the tax was levied "upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised."[349] In a companion case, however, Strong invalidated a Pennsylvania statute imposing a fixed-rate tax per ton on all freight shipped by either an intra- or interstate carrier.[350] Justice Bradley later commented that Strong's opinion indicated that the tax was not being imposed upon the franchise or property of the company but rather was being levied "upon the freight carried, because of its carriage."[351]

Thus, a number of the Court's commerce-clause opinions invariably turn on whether the state was taxing the franchise through a particular method of valuation or whether the tax was levied on the busi-

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347. *Id.* at 218–24. Justice Fuller held that the situs of the principal office is not dispositive, nor is it relevant whether the corporation is a creation of the state, thus rejecting other opinions suggesting that the franchise had to be a creation of the state. *Id.* at 223; *see also* Philadelphia & S.S.S. Co. v. Pennsylvania, 122 U.S. 326, 345 (1887). Of course, this type of tax is different than an unapportioned tax on gross receipts where such taxes, in effect, attempt to reach property outside the state. *See Philadelphia & S.S.S. Co.*, 122 U.S. at 332. Additionally, taxing the value of a corporation (franchise) within a state is acceptable, but states may not tax the receipts of a franchise itself when the franchise is engaged in interstate commerce. *Id.* at 334. Repeating the language from another decision, the Court in *Philadelphia & Southern Steamship Co.* affirmed that

> [w]hile it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce . . . is invalid.

Id. at 344 (quoting Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 211 (1985)). This approach is the constructive equivalent of preventing discrimination against interstate commerce.

348. 82 U.S. (15 Wall.) 284 (1873).

349. *Id.* at 294.

350. Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873). *See supra* notes 127–32 and accompanying text.

351. *Philadelphia & S.S.S. Co.*, 122 U.S. at 339.

ness or articles of interstate commerce.[352] In *Philadelphia & Southern Steamship Co. v. Pennsylvania*,[353] for example, the question posed was "whether a State can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different States, and to and from foreign countries."[354] Justice Bradley wrote that the tax "certainly could not have been intended as a tax on the corporate franchise,"[355] but was instead "a tax on transportation only" and, therefore, unconstitutional.[356] Conversely, in *Massachusetts v. Western Union Telegraph Co.*,[357] Justice Gray upheld Massachusetts' franchise tax. The state had levied the tax at the valuation of a company's aggregate worth, taking a percentage measured by the ratio of the length of the telegraph line within the state, but deducting the amount of real estate and personal property also subject to taxation in the state. Writing for the Court, Gray observed that the effect of the statute was to tax every telegraph company owning a line in Massachusetts, with the tax determined by a percentage of the whole value of the capital stock as the length of the Massachusetts line bears to the whole length of the line, but with special deductions.[358] The Court concluded that the tax was a valid excise upon the capital of the corporation because it attempted to determine a just amount through a particular method of valuation.[359] Similarly, the Court in *Erie Railroad Co. v. Pennsylvania*[360] upheld a tax imposed on a percent of gross receipts derived from tolls and transportation of passengers and coal. After affirming the principle that states could tax the

352. These methods of valuation signaled a new trend in state taxation. By taxing a percentage of gross receipts or capital of a corporation, the state essentially was levying a progressive tax. Undoubtedly, states under this system could prevent corporations from escaping all taxation, thereby increasing the states' revenue. *See* M. KELLER, *supra* note 281, at 326–27. For some of the cases involving this question, see Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897); New York, L.E. & Wis. R.R. v. Pennyslvania, 158 U.S. 431 (1895); Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895); Northern Pac. R.R. v. Clark, 153 U.S. 252 (1894); Lehigh Valley R.R. v. Pennsylvania, 145 U.S. 192 (1892); *Ficklen*, 145 U.S. 1 (1892); Maine v. Grand Truck Ry., 142 U.S. 217 (1891); Pacific Express Co. v. Seibert, 142 U.S. 339 (1892); Western Union Tel. Co. v. Alabama, 132 U.S. 472, 475 (1889); Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888); *Philadelphia & S.S.S. Co.*, 122 U.S. 326 (1887); Fargo v. Michigan, 121 U.S. 230 (1887); *see also supra* note 301–02 and accompanying text (arguing that a franchise has a property value).

353. 122 U.S. 326 (1887).

354. *Id.* (Bradley, J., Statement of the Case).

355. *Id.* at 342.

356. *Id.* at 345.

357. 141 U.S. 40 (1891).

358. *Id.* at 43–44.

359. *Id.* at 45.

360. 158 U.S. 431 (1895).

gross receipts for carriage of freight and passengers,[361] the Court through Justice George Shiras determined that the tax was "laid upon the corporation on account of its property in a railroad," and was "measured by a reference to the tolls received."[362]

No constitutional objection existed when the state separated intra- and interstate business and only taxed the former. In *Ratterman v. Western Union Telegraph Co.*,[363] Ohio taxed a percentage of receipts earned by Western Union, a New York corporation. The parties argued the case as if the state had imposed the tax only on the intrastate business, separating out that portion of the interstate business.[364] The Court upheld that portion of the tax derived from intrastate business.[365] Following the reasoning in *Ratterman*, Justice Fuller acknowledged in a subsequent case that if a state could separate intrastate commerce from interstate commerce, "the distinction will be acted upon by the Courts, and the State permitted to collect that arising" from internal commerce."[366]

5. Service Charges

The Court also allowed states to charge for the value of their services or the use of their property, even if the charge was laid upon a person or business engaged in interstate commerce. Any other rule would have chilled states from entering the market as benevolent overseers. A state most likely could maintain services, such as operating a lock and dam, only if it could charge for such common benefits. In one such instance, *Huse v. Glover*,[367] the Court upheld Illinois's tolls for the use of its lock and dam along the Illinois River, commenting that

> [t]he exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. . . . For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.[368]

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361. *Id.* at 437.

362. *Id.* at 439.

363. 127 U.S. 411 (1888).

364. *Id.* at 429.

365. *Id.* at 428 (Miller, J.) (citing Telegraph Co. v. Texas, 105 U.S. 460 (1882) (Waite, C.J.) (occupation tax invalid only insofar as it relates to interstate business)).

366. Lehigh Valley R.R. v. Pennsylvania, 145 U.S. 193, 200–01 (1892); *see also* Postal Tel. Cable Co. v. Charleston, 153 U.S. 692 (1894) (city ordinance imposing tax upheld because levied solely upon intrastate business even though company engaged in interstate commerce); Pacific Express Co. v. Seibert, 142 U.S. 339, 350 (1892) (states may impose tax receipts derived solely from intrastate business).

367. 119 U.S. 543 (1886).

368. *Id.* at 548.

In the absence of congressional regulation, Justice Field determined, Illinois could provide for the convenience of its citizens.[369] Justice David J. Brewer arguably extended this principle to its furthest bounds in *Atlantic & Pacific Telegraph Co. v. Philadelphia.*[370] There, the City of Philadelphia sought to enforce a license fee on an interstate telegraph company. Defending the company, the able John F. Dillon argued that the city was imposing an unconstitutional fee for the transaction of business.[371] Relying upon the Court's opinion in *Western Union Telegraph Co. v. New Hope*,[372] Justice Brewer rejected Dillon's argument, holding that the fee was a valid service charge.[373] Brewer, however, did acknowledge some limits on the municipality, such as the reasonableness of the charge.[374] Not surprisingly, the *Huse* and *Atlantic & Pacific* reasoning surfaced in a number of decisions.[375]

IV. REASONABLENESS OF THE REGULATION

The decisions of the Court illustrate a second implicit concern for examining the constitutionality of state legislation that is arguably in conflict with the commerce clause. The Court toward the end of the

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369. *Id.*

370. 190 U.S. 160 (1903).

371. *Id.* at 164.

372. 187 U.S. 419 (1902). Ten years earlier, Justice Brewer decided a similar case against the Western Union Telegraph Company; Dillon was counsel for the company in that case as well. *See* St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893). Justice Brewer wrote that St. Louis had imposed a privilege tax as a fee for services rendered by the municipality. *Id.* at 97–98. Dissenting in that case, Justice Brown adhered to the principle that municipalities may charge for their services but here he believed those charges were unreasonable. *Id.* at 105 (Brown, J., dissenting).

373. *Atlantic & Pacific Telegraph Co.*, 187 U.S. at 165–66 (citing *New Hope*).

374. *Id.* at 165.

375. *See, e.g.*, Pittsburg & S. Coal Co. v. Louisiana, 156 U.S. 590 (1895) (upholding, inter alia, a charge for inspection); Harmon v. Chicago, 147 U.S. 396, 411 (1893) (distinguishing *Huse*); Sands v. Manistee River Improvement Co., 123 U.S. 288, 294 (1887) (states may levy tolls for the use of their proprety); Quachita Packet Co. v. Aiken, 121 U.S. 444, 447 (1887) (upholding reasonable rate for maintaining wharf); Transportation Co. v. Parkersburgh, 107 U.S. 691 (1882) (wharfage charge); Northwestern Union Packet Co. v. St. Louis, 100 U.S. 428 (1879) (municipality may impose wharfage charge proportioned by the tonnage of the vessel); Packet Co. v. Keobuk, 95 U.S. 80 (1877) (upholding wharfage charge proportioned to tonnage of vessels, reasoning that charge imposed for services rendered); Inman S.S. Co. v. Tinker, 94 U.S. 238 (1876) (invalidating tonnage duty); Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 471–72 (1874) (states may exercise control of their property); Cannon v. New Orleans, 87 U.S. (20 Wall.) 577 (1874) (holding that fixed duty for steamboats mooring or landing on dock, the duty measured by the number of tons, was actually a tax upon the privilege of stopping and therefore an unconstitutional tonnage duty); Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31, 32 (1867) (state may not impose fee on vessels arriving at port unless as a fee for a valid inspection statute). These cases illustrate that the constitutionality of a statute often hinged upon whether the Court considered the fee as an invalid tonnage duty under the Constitution. *See* U.S. CONST. art. 1, § 10,

century developed a rule of reasonableness limiting the exercise of state power potentially in conflict with federal authority.[376] Although the scope of the states' power included a vast array of subjects, such as legislating for the public health, safety, welfare, morals, and convenience of its citizens, a state could not unreasonably burden interstate commerce. An unreasonable burden on interstate commerce indicated that a state was attempting to regulate commerce under the guise of its police or taxing power.[377] Following the adoption of the fourteenth amendment, the Court mixed both due-process and commerce-clause analyses[378] and established the rule that statutes had to be reasonably related to a legitimate state objective. Justice Harlan articulated this rule when he upheld a railroad safety law because it had a "real, substantial relation to an object as to which the State is competent to legislate."[379]

Statutes discriminating against interstate trade, for example, indicated an unreasonable exercise of a state's police power. The Court considered such statutes to be attempts to regulate commerce under the guise of exercising the police power.[380] For instance, a state could not regulate the inspection of products imported from other states when it did not regulate similar in-state products; "[a]ny local regulation which in terms or by its necessary operation denies this equality in the markets of a state is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states, and therefore void."[381] Even if a statute on its face did not discriminate

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376. Of course, the restriction that a statute must be "reasonable" is nothing more than a general limitation on the exercise of the states' police power. *See generally* T. COOLEY, *supra* note 31. Others recognize the importance of the reasonableness of a statute in considering a commerce-clause objection. *See* B. GAVIT, *supra* note 268, at 23; Shenton, *supra* note 23, at 94.

377. *See, e.g.*, Collins v. New Hampshire, 171 U.S. 30 (1898); Brimmer v. Rebman, 138 U.S. 78 (1891).

378. Hennington v. Georgia, 163 U.S. 299 (1896). In *Hennington*, the Court repeated the "well settled rule . . . that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution." *Id.* at 303–04. The Court supported this assertion by citing to both a commerce-clause and a due-process-clause case. *See id.* (citing Minnesota v. Barber, 136 U.S. 313 (1890); Mugler v. Kansas, 123 U.S. 623 (1887)).

379. New York N.H. & H.R.R. v. New York, 165 U.S. 628, 632 (1897).

380. Walling v. Michigan, 116 U.S. 446, 460 (1886); *see also id.* at 455 ("A discriminating tax imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the constitution upon the Congress of the United States."). Taxing articles of commerce because of their character as articles of commrce effectively discriminated against them as "imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed." Brown v. Houston, 114 U.S. 622, 633 (1885).

381. Voight v. Wright, 141 U.S. 62, 67 (1891).

against products from other states, an unreasonable statute would have the same impermissible effect of discriminating against such out-of-state products.[382] In purpose and effect, discriminatory legislation operating on interstate commerce was viewed as an unreasonable attempt to reach property and persons over which a state had no jurisdiction.[383] The Court, along with state courts, prohibited state attempts at economic protectionism through discriminatory legislation.

The central issue in many cases became deciding when discrimination ceased. This is the question that Justice Field considered in *Welton v. Missouri*,[384] and it is also the rationale for the "original package" doctrine, developed by Marshall in *Brown v. Maryland*.[385] In the license fee cases, if the tax was treated by the Court as imposed upon the interstate product, then state jurisdiction was held to attach only once the product became mingled with the general mass of state property. Otherwise, states could regulate commerce under the pretext of exercising their legitimate police power. This same reasoning applied when states taxed the value of franchises. An unreasonable charge was an attempt to reach property outside the state.[386]

When states exercised their power beyond the necessity for its operation, the Court held that such legislation unreasonably encroached upon the commercial power.[387] Deciding the constitutionality of a railroad safety law, Justice Harlan declared that states must exercise their police power reasonably.[388] *Illinois Central Railroad v. Illinois*[389] is illustrative. There, the Court rejected the state's argument that requiring trains to stop at county seats was a valid exercise of its police power.[390] The Court noted that the railroad company already had furnished such facilities; otherwise, the decision might have been different.[391] Conversely, the Court sustained the railroad law in *Hennington v. Geor-*

382. *See, e.g.*, Minnesota v. Barber, 136 U.S. 313 (1890) (discussed *supra* notes 137–40 and accompanying text).

383. Discriminatory legislation might also be viewed as an attempt to restrain trade, and such attempts often were treated as an invalid exercise of the police power. *See* T. COOLEY, *supra* note 31, at 287 n.1.

384. 91 U.S. 275, 281–82 (1875) (quoted *supra* text accompanying note 200).

385. 25 U.S. (12 Wheat.) 419 (1827).

386. *See, e.g.*, Erie R.R. v. Pennsylvania, 153 U.S. 628, 645 (1894).

387. *See* B. GAVIT, *supra* note 268. Gavit correctly notes that the commerce clause posed a jurisdictional question for the Court—that is, it merely served as a jurisdictional divider. *Id.* at 33. Yet, Gavit may be incorrect when he suggests that the commerce clause conferred no rights upon individuals.

388. *See supra* note 178 and accompanying text.

389. 163 U.S. 142 (1896) (discussed *supra* notes 164–65 and accompanying text).

390. *Id.* at 154.

391. *Id.*

gia,[392] reasoning that the statute was reasonably related to the state's police power and did not go beyond the necessities of the case.[393] Furthermore, the constitutionality of inspection and quarantine laws invariably turned on whether the law went beyond the necessity of the case[394]—thereby discriminating against out-of-state products.[395]

In *Brimmer v. Rebman*,[396] for example, a state statute required all meat to be inspected if the animal had been slaughtered more than one hundred miles from the place at which it is offered for sale. Writing for the Court, Justice Harlan held that the statute discriminated against meat from other states. He added that states may not, under the guise of the police power, "make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other States."[397] He wrote that the state's attempt to justify its inspection tax "in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition."[398] When considering a similar statute, Harlan commented that "it is our duty to inquire, in respect to the statute before us . . . whether there is a real or substantial relation between its

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392. 163 U.S. 299 (1896) (discussed *supra* note 378 and accompanying text).

393. *Id.* at 304–09, 313, 318.

394. *See* Crossman v. Lurman, 192 U.S. 189 (1904) (adulterated coffee); Reid v. Colorado, 187 U.S. 137 (1902) (diseased cattle); Capitol City Dairy Co. v. Ohio, 183 U.S. 238 (1902) (butter substitute); Collins v. New Hampshire, 172 U.S. 30 (1898) (prohibition of oleomargarine rather than inspection statute); Schollenberger v. Pennsylvania, 171 U.S. 1 (1898) (oleomargarine); Patapsco Guano Co. v. North Carolina Bd. of Agriculture, 171 U.S. 345 (1898) (fertilizer inspection); Missouri, Kan. & Tex. Ry. v. Haber, 169 U.S. 613 (1898) (diseased cattle); Scott v. Donald, 165 U.S. 58 (1897) (dispensary law); Pittsburg & S. Coal Co. v. Louisiana, 156 U.S. 590 (1895) (inspection law); Voight v. Wright, 141 U.S. 62 (1891) (inspection of flour); Brimmer v. Rebman, 138 U.S. 78 (1891) (meat inspection); Minnesota v. Barber, 136 U.S. 313 (1890) (same); Kimmish v. Ball, 129 U.S. 217 (1889) ("Texas Cattle" statute); Railroad Co. v. Husen, 95 U.S. 465 (1877) (diseased cattle); Chy Lung v. Freeman, 92 U.S. 275 (1876) ("leud [sic] women"). The following passage from Smith v. St. Louis & Southwestern Railway Co., 181 U.S. 248 (1901), illustrates the thrust of the foregoing cases:

> It depends upon whether the police power of the State has been exerted beyond its province—exerted to regulate interstate commerce—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent beyond what is necessary for any proper quarantine. The words in italics express an important qualification.

Id. at 255.

395. The Court in Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886), held that such laws unduly burden interstate trade because their natural effect is to discriminate against interstate commerce. *Id.* at 463–65. Implicit in this reasoning is the premise that legislators know the "natural effect" of the laws they pass. The Court in *Smith*, for example, reasoned that "[w]hat, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained." 181 U.S. at 257.

396. 138 U.S. 78 (1891).

397. *Id.* at 82.

398. *Id.* at 83.

avowed objects and the means devised for obtaining those objects."[399]

V. CONCLUSION

The commerce-clause opinions during the nineteenth century illustrate some of the central concerns that the Justices had in trying to establish the proper role of the state and federal governments. They principally sought to preserve the territorial integrity of each of the states, while simultaneously acknowledging Congress' power under the Constitution to regulate interstate commerce. Industry repeatedly tested the constitutionality of state laws impeding commercial intercourse and during the late nineteenth century succeeded in establishing a federal right that could be regulated only by Congress.

The paradigm of dual federalism facilitated this development by declaring that each sovereign is supreme within its own sphere of influence. A state could exercise its police power and the federal government could exercise its commercial power. Two factors essentially dictated whether a regulation was of the former or the latter type. If a state law necessarily operated extraterritorially or unreasonably burdened the introduction of nondomestic products, the Court treated the law, regardless of conclusory labels such as "direct" or "indirect" or "local" or "national," as a regulation of interstate commerce solely within the realm of federal jurisdiction. This was so because the law necessarily was *aimed at* interstate commerce. When the state's exercise of the police power was not *aimed at* interstate commerce but the means chosen merely "affected" interstate commerce, states were free to regulate the subject, unless or until preempted by Congress. Yet, since these same means under the states' police power might also serve as permissible objects of federal regulation under the commercial power, the Court cautiously balanced calling something an exercise of the police power or a regulation of interstate commerce.

The failure to make explicit this distinction between the means and the aims—or ends—of state regulation proved critical around the turn of the century, when the shift to congressional power became justified on the basis that the subject under regulation affected interstate commerce. Yet, within the next several decades, the distinction between means and ends became lost. The dichotomy between the police and the commercial powers became overlooked by those who chose instead to focus on the purported "tests." With all this, the underlying concept of dual federalism failed to operate as the governing paradigm.

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399. Minnesota v. Barber, 136 U.S. 313, 320 (1890).