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The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure

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THE NEGATIVE COMMERCE CLAUSE AS A RESTRICTION ON STATE REGULATION AND TAXATION: AN ANALYSIS IN TERMS OF CONSTITUTIONAL STRUCTURE

ROBERT A. SEDLER†

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INTRODUCTION

A very important area of constitutional law at the present time is the negative aspect of the commerce clause: the commerce clause as the source of constitutional limits on the power of the states to regulate and tax entities engaged in interstate commerce. Each recent Term of the Supreme Court typically has seen three or more negative commerce clause decisions, and challenges to state regulation and taxation on this basis are likely to continue. In times of

1. This area is sometimes referred to as the "dormant commerce clause." The use of the terms, "negative aspect of the commerce clause," and "dormant commerce clause," relate to the fact that the commerce clause by its terms is an affirmative grant of power to Congress and does not expressly impose any restriction on the power of the states to regulate or tax interstate commerce.

A negative commerce clause challenge to state economic regulation or taxation must be distinguished from challenges that have their basis in Congress' affirmative exercise of the commerce power, such as when state regulation directly conflicts with congressional regulation, see, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), or where state regulation is preempted by a comprehensive scheme of federal regulation, see, e.g., Fidelity Fed. Savs. & Loan Assoc. v. De La Cuesta, 458 U.S. 141 (1982). Not infrequently a direct conflict or preemption challenge is joined with a negative commerce clause challenge. See, e.g., Edgar v. Mite Corp., 457 U.S. 624 (1982); infra notes 97-101 and accompanying text.

2. The number of opinions issued by the Court in cases involving challenges to state regulation and taxation on negative commerce grounds in each of the recent Terms are as follows: 1983 Term - 4; 1982 Term - 3; 1981 Term -3; 1980 Term - 5; 1979 Term - 4; 1978 Term - 2; 1977 Term - 6; 1976 Term - 4; 1975 Term - 3; 1974 Term - 2. Three cases involving negative commerce clause challenges
economic downturn and until recently a widely-perceived energy shortage, states may try to protect their internal economies and the economic interests of their own residents at the expense of the interstate economy and the interests of out-of-staters. As state regulation and taxation become more burdensome, entities engaged in interstate commerce will rely on the negative commerce clause to challenge particular regulations and modes of taxation. This reliance is a matter of necessity, since state economic regulation is virtually immune to challenge on due process or equal protection grounds. For these reasons, constitutional challenges to state regulation and taxation under the negative aspect of the commerce clause will continue and will remain a very important area of constitutional law.

The Supreme Court has long held that while the commerce power is not an exclusively federal power, the commerce clause operates in a negative manner to restrict the power of the states to...
regulate or tax entities engaged in interstate commerce.\(^5\) However, the Court has never adequately set forth a *structurally-based conceptual justification* for a negative aspect to the commerce clause and for the Court's reliance on the commerce clause as a basis for invalidating state regulation and taxation affecting interstate commerce.\(^6\) A structurally-based conceptual justification is one that would be consistent with the structure of constitutional governance established by the Constitution. The structure of constitutional governance established by the Constitution, hereinafter referred to as the *constitutional structure*, both allocates and limits governmental power. It allocates power between the federal government and the states, and between the three branches of the federal government, and it defines the scope and mode of exercise of federal power. At the same time, it imposes limitations on the exercise of power by the federal government and by the states which are designed to protect individual rights from improper governmental interference.\(^7\) Therefore, a conceptual justification for a negative aspect to the commerce clause and for reliance on the commerce clause as a source of restriction on state regulatory and taxation power is consistent with the constitutional structure only if the justification properly can be found to inhere in that part of the constitutional structure either allocating power or imposing limitations on the exercise of power designed to protect individual rights.

\(^5\) The seminal case recognizing a negative aspect to the commerce clause and establishing the commerce clause as a restriction on state regulatory and taxation power is *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). See infra notes 142-43 and accompanying text. As the Court stated in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945): "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."


\(^7\) For a further discussion of limitations on the exercise of power in the
Because the constitutional structure allocates power between the federal government and the states and also imposes limitations on the exercise of state power, it follows analytically that state power can be restricted in one of three ways. First, certain specific powers are denied to the states, either expressly by the Constitution, or by necessary implication from the affirmative grant to Congress of what is considered an exclusive power. Second, since the Constitution embodies the principle of federal supremacy, a particular exercise of state power may be proscribed because it conflicts with or is preempted by Congress' affirmative exercise of its delegated powers. These two methods of restriction obviously relate to the allocation of power part of the constitutional structure. The third method of restriction relates to the limitation of governmental power. The constitutional structure see Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 Ohio St. L.J. 93, 120-36 (1983).

8. Certain powers that are expressly granted to Congress by art. I, § 8, are expressly and absolutely denied to the states by art. I, § 10, cl. 1. These include the powers to enter into treaties, grant letters of marque and reprisal, and coin money. Other powers granted to Congress, such as the power to lay imposts on duties or exports, and the power to engage in war, are expressly denied to the states by art. I, § 10, cl. 2, 3, unless Congress gives its affirmative consent to the exercise of state power. The matter of denial of certain specific powers to the states by necessary implication from the affirmative grant of power to Congress relates to the question of whether the federal power is an "exclusive" one. See infra notes 390-93, 397-404 and accompanying text. A federal power is "exclusive" only when the nature of the power is such that it could not concurrently exist in two sovereigns, because the exercise of that power by one sovereign would necessarily be incompatible with the exercise of the same power by another sovereign. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196 (1819). Research has disclosed no case where the Court has specifically held that the exercise of state power over the matter in issue was prohibited by necessary implication from the affirmative grant of an exclusive power to Congress, or that any power granted to Congress under art. I, § 8, but not expressly denied to the states by art. I, § 10, was an exclusive federal power. See *Goldstein v. California*, 412 U.S. 546 (1973) (copyright power not an exclusive federal power). Certain examples of an exclusive federal power, however, come readily to mind, such as the naturalization and immigration power, under art. I, § 8, cl. 4, see, e.g., *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817); the power to fix the standard of weights and measures under art. I, § 8, cl. 5; and the postal power under art. I, § 8, cl. 7. Art. I, § 8, cl. 17, also provides for exclusive federal power over federal property.

9. While the principle of federal supremacy is textually embodied in art. VI, § 2, it can also be contended that this principle follows from the constitutional structure. The premise here is that since the federal government is given certain specific powers by the Constitution while the states retain the general sovereign power they possessed prior to the adoption of the Constitution, the specific grant must control over the general reservation, so that an exercise of federal power within the constitutional grant of authority controls over an inconsistent exercise of state power. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-06 (1819); see also *The Federalist* No. 33, at 203, 204-05 (A. Hamilton) (J. Cooke ed. 1961).
Constitution imposes a number of limitations on the exercise of state power designed to protect individual rights, such as the limitations contained in the fourteenth amendment.\textsuperscript{10}

The structural problem with a negative aspect to the commerce clause arises because the commerce clause as a source of restriction on state regulatory and taxation power does not clearly come within any of these three structural methods of restriction. The Constitution does not expressly prohibit the states from regulating or taxing entities engaged in interstate commerce. The Court has long held that the commerce power is not an exclusive federal power that implicitly prohibits all state regulation or taxation affecting interstate commerce.\textsuperscript{11} By definition, the negative aspect of the commerce clause comes into play only when Congress has not affirmatively exercised its commerce power, so there is no question of direct conflict or preemption. The Constitution by its terms does not recognize a "right" on the part of entities engaged in interstate commerce to be free from state regulation or taxation. Furthermore, the Constitution does not expressly impose any limitation on the power of the states to regulate or tax interstate commerce. It could be argued, therefore, that once the Court held that the commerce power was not an exclusive federal power, the commerce clause could not by its own force operate to impose any restriction on state regulatory and taxation power.\textsuperscript{12}

For the above reasons, it would seem incumbent on the Court to delineate precisely the structural basis for concluding that the commerce clause has a negative aspect serving as a source of restriction on state regulatory and taxation power. This the Court has not done. In an almost casual manner, it has invoked two alternative conceptual justifications for a negative aspect to the commerce clause: the diminution of power justification and the implied intention of Congress justification. Under the diminution of power justification, the affirmative grant of the commerce power to

\textsuperscript{10} As will be demonstrated, limitations on governmental power designed to protect individual rights may be found in the internal inferences of the Constitution as well as in its text. \textit{See infra} notes 477-83 and accompanying text.

\textsuperscript{11} \textit{Cooley v. Board of Wardens}, 53 U.S. (12 How.) 229 (1851). \textit{See infra} notes 142-44 and accompanying text.

\textsuperscript{12} Chief Justice Taney had strongly maintained that the commerce power was not an exclusive federal power and that it did not by its own force impose any restriction on the power of the state to regulate interstate commerce. Nonetheless, he silently acquiesced in the Court's holding in \textit{Cooley}. See the discussion of Taney's position in F. Frankfurter, \textit{The Commerce Clause Under Marshall, Taney and White} 46-73 (1937).
Congress under article I, section 8, even though not exclusive, diminishes the power of the states to regulate or tax interstate commerce. Under the implied intention of Congress justification, the failure of Congress to authorize expressly state regulation or taxation of interstate commerce in certain circumstances impliedly indicates congressional intention to preclude state regulation or taxation in those circumstances. As the Court stated in *Southern Pacific Co. v. Arizona*:

> [T]he states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, or upon the presumed intention of Congress, where Congress has spoken, the result is the same.

And in *California v. Zook*, it is stated simply:

> Certain first principles are no longer in doubt. Whether as inference from congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce.

The Court has gone no further. It has never related either the diminution of power justification nor the implied intention of Congress justification to the constitutional structure. It has never explained why the affirmative grant of a nonexclusive power to Congress could diminish to any extent the exercise of the reserved general regulatory and taxation powers of the states. Nor has it explained how Congress could exercise its legislative power by silence, when article I, section 7 specifically sets forth the mode for the exercise of legislative power, requiring affirmative action by both houses of Congress and concurrence by the President. The Court has simply asserted its role as the "final arbiter of the competing demands of state and national interests" where state regulation or taxation

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affects interstate commerce and has sought standards by which to define the appropriate scope of state power in these areas. The lack of a fully-developed and structurally-based conceptual justification for a negative aspect to the commerce clause, and for the use of the commerce clause as a restriction on state regulatory and taxation power, has contributed to the admitted lack of clarity in negative commerce clause doctrine.16

At the same time, however, the Court's institutional behavior17 in dealing with the negative commerce clause as a restriction on state regulatory and taxation power is most revealing. Two distinct patterns of institutional behavior emerge, depending on the discriminatory nature of the regulation or tax in question. Where the essential effect of the challenged regulation or tax has been to discriminate against or disadvantage interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the Court consistently and without exception has held such regulation or tax to be unconstitutional.18 This consistent pattern has been followed from the 1870's to the present time.19 It is with respect to nondiscriminatory regulation and taxation that the Court's institutional behavior has fluctuated dramatically. At the present time, however, nondiscriminatory regulation and taxation almost invariably have been sustained.20

The focus of this Article will be on the relationship between the Court's institutional behavior and a structurally-based conceptual justification for a negative aspect to the commerce clause. We will subject the negative commerce clause to analysis in terms of constitutional structure, which the Court has so pointedly omitted.21


17. The Court's institutional behavior refers to what the Court does in the process of constitutional adjudication, and is analyzed in terms of the results that the Court reaches in that process. The Court's institutional behavior is not always consistent with the Court's articulated doctrine and sometimes diverges sharply from that doctrine. The "law" of the Constitution is thus a reflection of the interaction between the Court's articulated doctrine and the results the Court reaches in the application of that doctrine. For a further discussion of the Court's institutional behavior, see Sedler, supra note 7, at 109-20.

18. This assumes that the state is not acting as a market participant or that the discriminatory regulation has not been expressly authorized by Congress. See infra notes 135-38 and accompanying text.

19. The leading case setting forth the nondiscrimination principle under the negative commerce clause is Welton v. Missouri, 91 U.S. 275 (1875). See infra notes 204-08 and accompanying text.

20. See infra notes 76-110, 130-33 and accompanying text.

21. An analysis in terms of constitutional structure has a number of elements.
Looking to the ways that the exercise of state power can be restricted under the constitutional structure, we will consider whether a conceptual justification can be found for reliance on the commerce clause in its negative aspect as the source of a restriction on state power to regulate or tax interstate commerce. We will demonstrate that neither the diminution of power justification nor the implied intention of Congress justification properly can be found to inhere in that constitutional structure. We will also demonstrate that another justification sometimes asserted for a negative aspect to the commerce clause, the free trade principle which purportedly originated in the historical context of the commerce clause, finds no support in that context.

We will then demonstrate, in light of the historical context of the commerce clause, that the commerce clause may be viewed as embodying the *nondiscrimination principle*; that a major historical reason for the affirmative grant of the commerce power to Congress was to prevent discrimination by the states against interstate commerce and out-of-state interests in favor of local commerce and in-state interests. When so viewed, the commerce clause properly can be relied on as the source for finding a *right* on the part of entities engaged in interstate commerce and on the part of out-of-state interests not to be subject to discrimination or disadvantage because of the interstate nature of that commerce or the out-of-state nature of those interests. This right is found in the *internal inferences* of the Constitution rather than in its text, but once recognized, it provides constitutional protection against discriminatory state regulation and taxation of interstate commerce in the same manner as if it were expressly contained in the Constitution.

It involves a consideration of the underlying theory of the allocation of power under the Constitution and of the underlying theory of the Constitution as the source of protection of individual rights against governmental action. It places great importance on the respective roles of the federal and state governments in our constitutional scheme and on the bases for finding constitutional restrictions on the existence or exercise of governmental power. It also involves a consideration of the Constitution as a whole and of the relationship between its different provisions. Finally, under such an analysis, careful attention is paid to text and historical context of constitutional provisions and to the functions of the different provisions in our constitutional scheme.

An analysis in terms of constitutional structure, however, does not go beyond trying to find answers to constitutional questions in the structure of constitutional governance established by the Constitution. It should not be confused with "structuralism" as a methodology in legal analysis or otherwise. Cf. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979).

22. For a discussion of the meaning of historical context, see infra note 450.

23. For a discussion of the meaning of internal inferences of the Constitution, see infra notes 477-83 and accompanying text.
The thesis of this Article, therefore, is as follows: The commerce clause does not by its own force operate negatively to restrict the power of the states to regulate or tax entities engaged in interstate commerce. The commerce clause, however, is the source of a right on the part of entities engaged in interstate commerce and out-of-state interests to be free from discrimination or disadvantage because of the interstate nature of that commerce or the out-of-state nature of those interests. It thus follows that what the negative commerce clause prohibits is discrimination or disadvantage against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.

Part I of the Article will explore the Court’s approach to the negative commerce clause as a restriction on state regulation and taxation. It will first discuss the Court’s current approach and the results that the Court has reached in the application of that approach. This analysis will reveal that, as a practical matter, the Court is now invalidating all discriminatory regulation and taxation and generally upholding nondiscriminatory regulation and taxation. Part I will next review the Court’s approach from an historical perspective, tracing the Court’s evolution toward its present approach. It will then take a retrospective view of the Court’s current approach and its approach from an historical perspective. This will demonstrate that while the Court’s institutional behavior with respect to the negative commerce clause as a general limitation on state regulatory and taxation power has fluctuated dramatically, the Court has followed a completely consistent pattern of institutional behavior regarding discriminatory regulation and taxation. Without exception it has invalidated all state regulation and taxation that has had the effect of discriminating against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.

Part II of the article will discuss the conceptual justifications that have been advanced for a negative aspect to the commerce clause and will demonstrate that the only conceptual justification that can withstand analysis in terms of constitutional structure is that the commerce clause embodies the nondiscrimination principle. It is this principle that may be relied on as the source of a right to be free from state regulation and taxation discriminating against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. Thus, the Court’s consistent pattern of institutional behavior and the results that it has reached in the application of its current approach are in accord with what we maintain is the only proper structurally-based conceptual justification for a negative aspect to the commerce clause.
Part III will discuss further considerations relating to the non-discrimination principle: the power of Congress to authorize discriminatory regulation or taxation, the relationship between the non-discrimination principle of the negative commerce clause and the privileges and immunities clause of article IV, and the constitutionality of discrimination in favor of local commerce and in-state interests where the state is acting as market participant or dispenser of benefits.

I. THE COURT'S APPROACH TO THE NEGATIVE COMMERCE CLAUSE AS A RESTRICTION ON STATE REGULATION AND TAXATION

A. The Court's Current Approach

The Court's current approach to the negative aspect of the commerce clause as a restriction on the exercise of state power has been articulated differently with respect to regulation and taxation. For this reason, these areas will be discussed separately, although the results of the Court's decisions are substantially the same in both areas. Despite the articulated difference in approach, the results of the Court's decisions have been to invalidate all discriminatory regulation and taxation and generally to sustain nondiscriminatory regulation and taxation.

1. Regulation

Ever since Southern Pacific Co. v. Arizona, the Court's approach to the negative commerce clause as a restriction on state regulatory power has been articulated in terms balancing competing national and state interests. "[R]econciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved." The Court recently observed that the balancing of interests approach has been applied in its negative commerce clause cases for the past forty-five years, and the commentators generally are agreed that this has been the prevailing mode of analysis. The general test, as articulated in Pike v. Bruce Church, and repeated in a number of subsequent cases, is as follows:

26. 461 U.S. at 391.
27. See, e.g., L. Tribe, American Constitutional Law 326-27 (1978); Blumstein, supra note 4, at 500; Hellerstein I, supra note 4, at 63, 67-68.
Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities.30

The application of the balancing approach differs, however, depending on whether the challenged regulation is "discriminatory." Where the state has not regulated "even-handedly," in the sense that the regulation, either expressly or in practical effect, discriminates against or disadvantages interstate commerce or out-of-state interests in favor of local commerce or in-state interests, the degree of scrutiny is stricter and the burden of justification on the state is correspondingly greater. In that circumstance, "the burden falls on the State to justify [the discriminatory treatment] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."31

Therefore, under the Court's articulated approach, there is a balancing of competing national and state interests, with the method of analysis and the degree of scrutiny dependent upon whether the challenged regulation by its terms or in practical effect discriminates against or disadvantages interstate commerce or out-of-state interests in comparison with local commerce or in-state interests. In practice, there have been two types of negative commerce clause challenges: "discrimination" and "undue burden." Both grounds of challenge, however, are accommodated within the balancing of interests approach. Thus, it is theoretically possible for a "discriminatory" regulation to be sustained if the state satisfies its burden with respect to the substantiality of the asserted state interest and the unavailability of nondiscriminatory alternatives. Furthermore, a "nondiscriminatory" regulation may be invalidated if the Court finds that on balance it imposes an "undue burden" on interstate commerce.


30. 397 U.S. at 142 (citation omitted).

While the Court has expressly applied this approach to all of the regulation cases before it, the results that the Court has reached would indicate that, in fact, the Court is following a very different kind of approach. The results of the cases indicate that, with the exception of the recent decision in *Edgar v. Mite Corp.*,[32] which clearly could have been decided the same way on other grounds, the "undue burden" rationale has been limited to state regulation of transportation and, even there, the latest decisions can be explained on discrimination grounds. With these exceptions, as long as the effect of the challenged law has been truly even-handed, the Court has not invalidated a state regulation on "undue burden" grounds, despite the adverse impact of the regulation on the "free flow of commerce." Conversely, where the Court has concluded that the challenged regulation did not regulate "even-handedly," but had the effect of discriminating against or disadvantaging interstate commerce or out-of-state interests in favor of local commerce or in-state interests, it has always invalidated the regulation despite the cogency of the asserted state interest.[33] The Court has found either that the asserted state interest was impermissible because it was avowedly protectionist,[34] or that the asserted state interest could be advanced by nondiscriminatory alternatives.[35] As a practical matter, nondiscriminatory alternatives will always be available, so that in the two-pronged application of the balancing of interests approach, discriminatory regulation necessarily will fail to pass constitutional muster.[36] Indeed, as the Court has sometimes stated, "where simple economic protectionism is effected by state legislation, a virtual per se rule of invalidity has been erected."[37]

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33. See infra notes 41-43 & 49-51.
35. See, e.g., Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (ban on use of superior grading standards of state of origin unconstitutional where asserted consumer protection purpose could be accomplished by permitting state of origin grading in addition to required grading); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (barring access of milk to local market produced elsewhere unconstitutional where asserted health purpose could be accomplished by inspection at place of production or acceptance of federal health standards).
36. The fact that nondiscriminatory alternatives always will be available is a strong indication that the failure to employ those alternatives was motivated by a "protectionist" purpose. In *Hunt*, for example, the "uniform grading" requirement, which prohibited the use of the superior Washington grading standards, was adopted at the instigation of the North Carolina apple growers. 432 U.S. at 352.
In practice then, the Court’s application of the balancing of interests approach draws a sharp distinction between “discrimination” challenges and “undue burden” challenges. While this distinction purportedly relates to differing standards of review, in practice it becomes result-dispositive. Discriminatory regulations have always been invalidated, but when the discrimination challenge fails, the undue burden challenge is virtually certain to fail as well.

It is submitted, therefore, that outside of the transportation area, and apart from Edgar v. Mite Corp., the results in all of the regulation cases depend upon whether or not the challenged regulation has been found to discriminate against interstate commerce or out-of-state interests in favor of local commerce or in-state interests. The outcome in all of these cases can be explained consistently in terms of the following operative principle: Where the essential effect of the regulation is to discriminate against or disadvantage interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the regulation is violative of the negative commerce clause. Conversely, where the essential effect of the regulation is not discriminatory, as defined above, the regulation is not violative of the negative commerce clause, despite the “burden” it may place on interstate commerce or the incidental advantage it may produce for some segment of the local economy.

The key elements of this operative principle look to whether the essential effect of the regulation is to discriminate against interstate commerce or out-of-state interests in favor of local commerce or in-state interests and to whether the discrimination is because of the interstate nature of that commerce or the out-of-state nature of those interests. The clearest cases illustrating this operative principle are those where there is express discrimination in favor of local commerce or in-state interests at the expense of interstate commerce or out-of-state interests, and those where there is no discrimination whatsoever in favor of local commerce or in-state interests.

The first category consists of cases where the state regulation expressly barred the entry of out-of-state products or businesses into

38. In Hughes v. Oklahoma, 441 U.S. 322, 337 (1979), the Court stated that facial discrimination, “at a minimum . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.” For further discussion of differing standards of review, see Maltz, supra note 4, at 49-54; Hellerstein I, supra note 4, at 67-69.
the state,\textsuperscript{41} embargoed local products or resources from the interstate market,\textsuperscript{42} or gave local residents preferential access to local products or resources.\textsuperscript{43} Regardless of the cogency of the asserted state interest in these cases, such as protecting the wholesale milk price structure in \textit{Baldwin v. G.A.F. Seelig Inc.},\textsuperscript{44} or protecting the environment in \textit{Philadelphia v. New Jersey},\textsuperscript{45} such overt discrimination and blatant protectionism simply has not been permitted. As the Court observed in \textit{Philadelphia v. New Jersey}: “Whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”\textsuperscript{46} The second category includes price-fixing cases,\textsuperscript{47} where there was no discrimination in favor of local interests, and where the effect of the regulation failed to provide even an incidental advantage for some segment of the local economy over a competitive segment of the interstate economy. In these cases, local consumers felt the effect of the price-fixing in exactly the same manner as the out-of-state consumers; discrimination was completely absent.\textsuperscript{48}


\textsuperscript{43} \textit{Sporhase v. Nebraska ex rel. Douglas}, 458 U.S. 941 (1982); \textit{Polar Ice Cream & Creamery Co. v. Andrews}, 375 U.S. 361 (1964). \textit{H.P. Hood & Sons, Inc. v. DUMond}, 336 U.S. 525 (1949), also falls into this category. The basis of the Court’s decision in \textit{Hood} was that the license was denied “on the articulated ground that such facilities would divert milk supplies needed by local consumers,” so that the license denial “discriminated against interstate commerce.” See \textit{Cities Serv. Gas Co. v. Peerless Oil & Gas Co.}, 340 U.S. 179, 188 (1950) (citing \textit{Hood}). If the license had been denied on the ground that an additional depot in the area would lead to “destructive competition in a market already adequately served,” there would have been no negative commerce clause violation notwithstanding that Hood intended to sell the milk in the interstate market. See \textit{Tuscan Dairy Farms, Inc. v. Barber}, 45 N.Y.2d 215, 380 N.E. 2d 179, 408 N.Y.S.2d 348, aff’d mem., 439 U.S. 1040 (1978).

\textsuperscript{44} 249 U.S. 511 (1935).

\textsuperscript{45} 437 U.S. 617 (1978).

\textsuperscript{46} \textit{Id.} at 626-27.


\textsuperscript{48} The fact that the price-fixing regulations substantially increased the prices of goods moving in interstate commerce was not deemed to produce an “undue burden” on interstate commerce.
Another series of cases illustrating this operative principle are those where the Court found that the essential effect of the regulation was to discriminate against or disadvantage interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. This category of cases includes *Dean Milk Co. v. Madison*, 49 340 U.S. 349 (1951). *Hunt v. Washington State Apple Commission*, 50 432 U.S. 333 (1977), and *Pike v. Bruce Church*. 51

The "protectionist motive" was obvious in all of these cases either from the terms of the regulation 52 or from its application in the particular case. 53 The Court, however, has generally rejected "improper motivation" as a relevant consideration in constitutional analysis, 54 and instead has accepted the state's asserted purpose at face value. It has then gone on to find that the asserted purpose could be advanced by nondiscriminatory alternatives and has held the challenged regulation to be unconstitutional.

In *Dean Milk*, the regulation by its terms prevented milk processors in other states from having access to the Madison milk market and thus gave local milk producers an effective monopoly in that market. 55 As the Court noted: "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." 56

The reference to "plainly discriminat[ing] against interstate commerce" makes it clear that for negative commerce clause purposes the focus is on discriminatory effect, rather than on discriminatory intent, and that so long as the essential effect of the regulation is to discriminate

52. See *Dean Milk*, where the regulation prevented the sale in Madison of any milk produced at a plant more than five miles from the center of Madison.
53. See *Hunt*, where the uniform grading standards requirement was adopted at the instigation of North Carolina apple producers, see *supra* note 36 and *Pike*, where the practical effect of the Arizona regulation, as applied to the activities of Bruce Church, would have resulted in economic advantage to Arizona workers and suppliers over California workers and suppliers, see *infra* notes 60-62 and accompanying text.
55. It was immaterial, for negative commerce clause purposes, that Wisconsin milk producers outside of Madison were also disadvantaged. 340 U.S. at 354 n. 4. However, a Wisconsin milk producer outside of Madison that was engaged in interstate commerce also would be entitled to invoke the protections of the negative commerce clause and thus would have standing to challenge the regulation on that basis. For negative commerce clause purposes, the relevant discrimination is against interstate commerce in favor of local commerce, not against nonresidents in favor of residents. *See infra* notes 514-33 and accompanying text.
56. 340 U.S. at 354.
against interstate commerce or out-of-state interests, it is not necessary to show that such discrimination was "intended."57

In *Hunt*, the practical effect of the regulation was to disadvantage Washington apple growers in comparison to North Carolina apple growers by denying to the Washington growers the competitive advantage they would otherwise have had because of Washington's superior grading standards. Because the regulation had this effect, it amounted to discrimination against interstate commerce for negative commerce clause purposes and, as always, the purportedly neutral state interest could be advanced by nondiscriminatory alternatives.58 As *Hunt* makes clear, discrimination for negative commerce clause purposes may take the form of a denial of a competitive advantage due to the out-of-state origin of the products, as well as a ban on entry of out-of-state products or an embargo on in-state products.59 It is the protectionist effect of the regulation and the practical discrimination against, or the disadvantage to interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests that is unconstitutional.

Although *Bruce Church* contains the classic exposition of the balancing approach, and was expressly decided under an "undue burden" analysis, the result in the case is fully consistent with the operative principle herein set forth. If *Bruce Church* had been compelled to move its packing shed to Arizona, it necessarily would have been more likely to employ Arizona workers and to contract with Arizona suppliers than it would be if it were permitted to pack the Arizona-grown cantaloupes in California. The practical effect of the Arizona regulation, therefore, was to favor Arizona economic interests over California economic interests.60 This point seemed very

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57. This is in accordance with the Court's long-standing interpretation of the nondiscrimination principle of the negative commerce clause. See infra notes 215-29 and accompanying text.

The contrast between the "effects" standard under the nondiscrimination principle of the negative commerce clause and the "intent" standard under the nondiscrimination principle of the fourteenth amendment's equal protection clause raises some very provocative questions, which are obviously beyond the scope of the present writing. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r. v. Feeney*, 442 U.S. 256 (1979).

58. *See supra* note 35.

59. 432 U.S. at 351-53.

60. *Pike* thus presents a clear example of what is meant by discrimination against out-of-state interests in favor of local interests, as opposed to discrimination against interstate commerce in favor of local commerce. The regulation applied to all cantaloupes grown in California and offered for sale, regardless of whether the grower was engaged in interstate commerce or in purely local commerce. Thus,
significant in the Court’s “undue burden” analysis. The Court discussed at length the earlier case of *Toomer v. Witsell*, where it had invalidated a South Carolina law requiring shrimp boats fishing in the maritime belt off South Carolina to unload and pack their catch in that state. The Court noted that the effect of requiring the work to be done in South Carolina would have been to “divert to South Carolina employment and business which might otherwise go to Georgia.”

In *Bruce Church*, as in *Toomer*, the practical effect of the regulation would have been to favor local interests over out-of-state interests, and it is this type of discrimination that is prohibited by the negative commerce clause.

It is important to note that in *Dean Milk*, *Hunt*, and *Bruce Church*, the essential effect of the regulation was to discriminate against or disadvantage interstate commerce or out-of-state interests in favor of local commerce or local interests *because of* the interstate nature of that commerce or the out-of-state nature of those interests. In all of these cases, the practical discrimination was between groups that were similarly situated except for their in-state and out-of-state location: the Madison and out-of-state milk producers in *Dean Milk*; the North Carolina and Washington apple growers in *Hunt*; the Arizona and California workers and suppliers in *Bruce Church*.

The importance of the interstate nature of the commerce or the out-of-state nature of the interests as the basis of the discrimination becomes most significant in cases where the Court rejected the discrimination claim and upheld the challenged regulation. This category of cases includes *Breard v. Alexandria*, *Exxon Corp. v. Maryland*, and *Minnesota v. Clover Leaf Creamery Co.*, where at least one of the effects of the challenged regulation was to provide an advantage for some segment of the local economy over a competitive segment of the interstate economy. In these cases, the regulations were upheld because they did not produce a discriminatory effect for negative commerce clause purposes. Whatever discrimination was produced by the regulation was not between groups that were

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there was no discrimination against entities engaged in interstate commerce, such as *Bruce Church*. But because *Bruce Church* was subject to the regulation and because its interests were intertwined with unidentified out-of-state workers and suppliers, it could challenge the regulation, as applied to its activities, as being violative of the negative commerce clause. *See infra* note 495.

61. 334 U.S. 385 (1948).
62. *Id.* at 403 (*quoted in Bruce Church*, 397 U.S. at 146).
63. In so doing, the Court also rejected the claim that the challenged regulation imposed an “undue burden” on interstate commerce.
64. 341 U.S. 622 (1951).
simply situate except for their in-state and out-of-state location. Thus, the essential effect of the regulation was not to discriminate against or disadvantage interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.

In Breard, the purpose of the ordinance was to protect householder privacy and the regulation prohibited all door-to-door commercial solicitation. In one area of commercial solicitation, subscriptions

67. The question of what constitutes a discriminatory effect for negative commerce clause purposes was the basis of the disagreement between Justice Stevens, writing for the Court, and Justice Blackmun, dissenting in Exxon. Justice Stevens emphasized that the challenged regulation did not distinguish between independent retailers and producer-marketeers. 437 U.S. at 125-26. Justice Blackmun maintained that there was "discrimination against interstate commerce," because the producer-marketeers were interstate operators while the independent retailers were "overwhelmingly local businessmen." Id. at 137. Professor Eule says that the "fundamentally different definitions of discrimination" employed by Justices Stevens and Blackmun in Exxon demonstrate the Court's "failure to identify unambiguously who or what it is that state legislatures may not discriminate against." Eule, supra note 4, at 444-45. The Court, however, has identified "who" is protected against discrimination: the protection extends to entities engaged in interstate commerce and to out-of-state interests. See, e.g., Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977); Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

The disagreement between Justices Stevens and Blackmun relates to the kind of discrimination that the negative commerce clause prohibits and, as the holding in Exxon makes clear, the kind of discrimination that the negative commerce clause prohibits is discrimination against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. Since the discrimination in Exxon was not between in-state and out-of-state independent retailers, there was no discrimination against interstate commerce because of the interstate nature of that commerce, and thus no discrimination within the meaning of the negative commerce clause. 437 U.S. at 125-26.

68. In Exxon, for example, a motivating factor behind the enactment of the regulation indeed may have been to protect Maryland retail service stations against competition from interstate producer-marketeers. However, since that regulation did not produce a discriminatory effect for negative commerce clause purposes, the motivation behind the enactment of the regulation was constitutionally irrelevant. See supra note 54.

69. Note that the Court held that the ordinance was not violative of the first amendment. 341 U.S. at 641-45. Although the decision was premised on the now discarded assumption that commercial speech receives relatively little first amendment protection, the same result would probably be obtained under the Court's current commercial speech doctrine. That doctrine distinguishes between the protection afforded to commercial and noncommercial speech, so the fact that the ordinance might be unconstitutional as applied to noncommercial speech would not be result-dispositive. See generally Martin v. City of Struthers, 319 U.S. 141 (1943) (a municipal ordinance forbidding a person from distributing handbills—as applied to a person distributing religious pamphlets—invalid under the first amendment). The state's interest in protecting householder privacy probably would be held to outweigh the solicitor's interest in face-to-face contact with potential customers. Cf. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
to national magazines, the regulation had the effect of favoring local retail merchants over interstate magazine solicitors because the latter could operate effectively only by door-to-door solicitation. But the regulation also had the effect of favoring local retail merchants over local solicitors with respect to the sale of magazines and every other product. Thus, the discrimination was not against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. The discrimination against interstate magazine solicitors was a by-product of a regulation which, for the purpose of protecting householder privacy, had the effect of discriminating against solicitors—both local and interstate—in favor of local retail merchants. Since the regulation impacted equally on local and interstate solicitors, its essential effect was not to discriminate against groups that were similarly situated except for their in-state and out-of-state location, and it thus was not violative of the negative commerce clause.

In Clover Leaf, the state enacted an "environmental protection" regulation designed to reduce the amount and type of material entering the state’s solid waste system. The primary effect of the regulation was felt by milk producers and milk container producers, who were prevented from packaging milk for sale in the Minnesota market in plastic, nonreturnable containers. This effect was felt equally by Minnesota milk producers and packagers and by out-of-state milk producers and packagers. A secondary effect of the regulation was to increase the sale of pulpwood at the expense of plastic resin because only paperboard milk containers, derived from pulpwood, could be used in the Minnesota milk market. Because plastic resin was produced entirely by non-Minnesota firms, and pulpwood was a major Minnesota industry, the effect of the regulation was not to favor Minnesota pulpwood producers over out-of-state pulpwood producers. The actual effect was to favor all pulpwood producers, both in-state and out-of-state, over resin producers, who were all out-of-state. Again, since the discrimination was not between groups that were similarly situated except for their in-state and out-of-state location, there was no impermissible discrimination for negative commerce clause purposes.

70. The importance of door-to-door solicitation in obtaining subscriptions to national magazines was established by the record. 341 U.S. at 635 n.18.

71. The Court did not discuss separately the "undue burden" claim, merely noting that "[w]e cannot say that this ordinance of Alexandria so burdens or impedes interstate commerce as to exceed the regulatory powers of that city." Id. at 641.

72. 449 U.S. at 471-72.
In *Exxon*, the regulation was designed to favor retail service stations, practically all of which were local, over producer-marketeers who were necessarily interstate operations. While there were a few interstate retail service stations in Maryland, the result would not have been different if all the retail service stations had been local. Here again the discrimination was between different groups, retail service station operators and producer-marketeers, not between groups that were otherwise similarly situated except for their in-state and out-of-state location. As the Court noted: "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Since there was no discrimination against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the negative commerce clause was not violated.

Thus, outside of the transportation area, and except for *Edgar v. Mite Corp.*, the results in all of the regulation cases can be explained consistently in terms of an overriding principle of nondiscrimination. The negative commerce clause is violated when—and only when—the essential effect of the regulation is to discriminate against or

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73. 437 U.S. at 125. This would have been true even if some of the producer-operators had their principal place of business in Maryland, which none did. *Id.* at 126.

74. *Id.* at 126.

75. *Id.* The Court also rejected the "undue burden" claim on the ground that there was no showing that the supply of petroleum products coming into Maryland had been diminished because of the regulation. *Id.* at 127.

76. In *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974), the Court held that Mississippi’s refusal to enforce an interstate contract for the sale of cotton at the insistence of a noncomplying foreign corporation was violative of the negative commerce clause. Cases such as *Allenberg* analytically involve a specialized application of the nondiscrimination principle. The issue in these cases is whether the foreign corporation’s business activities in the state are sufficient to justify requiring the corporation to comply with the state’s foreign corporation licensing laws. Compare *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961), *with Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). If the local activities are sufficient, the compliance requirement may be enforced by barring suits by noncomplying foreign corporations, notwithstanding that the corporation is engaged in interstate commerce and that the suit is on an interstate contract. In such circumstances, the bar is not imposed because the foreign corporation is engaged in interstate commerce, but because it has failed to comply with a requirement to which it is properly subject. However, if the corporation’s local activities are insufficient to justify the compliance requirement, the state has no legitimate basis for barring a suit by that corporation on what is necessarily an interstate contract. Such a bar would be unconstitutional because the state would be discriminating against suits on interstate contracts by denying those suits the same access to its courts that it provides for suits on local contracts.
disadvantage interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. Where such discrimination has not been found to exist, the Court has not invalidated any regulation on the ground that it imposes an "undue burden" on interstate commerce.\footnote{77}

The Court has recognized an exception to the nondiscrimination principle when the state is acting as a market participant and has held that the negative commerce clause is completely inoperable in that situation.\footnote{78} Thus, the state can limit its purchases of products to resident sellers,\footnote{79} limit its sales of products produced by state-owned businesses to resident buyers,\footnote{80} and require that its contractors give employment preference on state contracts to state residents.\footnote{81}

Let us now consider the transportation cases and \textit{Edgar v. Mite Corp.},\textsuperscript{82} which were expressly decided on "undue burden" grounds. In the relatively older transportation cases of \textit{Southern Pacific Co. v. Arizona},\textsuperscript{83} and \textit{Bibb v. Navajo Freight Lines},\textsuperscript{84} the challenged regulations were truly nondiscriminatory, equally applicable in every respect to local commerce and interstate commerce, and provided no competitive advantage to local commerce. These two cases represent exceptions to the nondiscrimination principle and are examples of the Court's invalidation of state regulations on pure "undue burden" grounds.\footnote{85} The results in the more recent transportation cases,\textsuperscript{85a}

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  \item \textsuperscript{77} \textit{See}, \textit{e.g.}, Exxon Corp. v. Maryland, 437 U.S. 117, 127 (1978); \textit{Breard v. Alexandria}, 341 U.S. 622, 633-41 (1951).
  \item \textsuperscript{78} \textit{See infra} notes 548-67 and accompanying text.
  \item \textsuperscript{79} \textit{Hughes v. Alexandria Scrap Corp.}, 426 U.S. 794 (1976).
  \item \textsuperscript{80} \textit{Reeves v. Stake}, 447 U.S. 429 (1980).
  \item \textsuperscript{81} \textit{White v. Massachusetts Council of Constr. Employers, Inc.}, 460 U.S. 204 (1983).
  \item \textsuperscript{82} \textit{Edgar v. Mite Corp.}, 457 U.S. 624 (1982).
  \item \textsuperscript{83} 325 U.S. 761 (1945).
  \item \textsuperscript{84} 359 U.S. 520 (1959).
  \item \textsuperscript{85} Another exception can be found in \textit{Morgan v. Virginia}, 328 U.S. 373 (1946), where the Court used the negative commerce clause to invalidate racial segregation on interstate buses at a time when it was not ready to hold unconstitutional all state imposed racial segregation. Since Virginia also required racial segregation on intrastate buses, \textit{Morgan}, strictly speaking, represents another case in which the Court invalidated a state regulation that did not discriminate against interstate commerce in favor of local commerce on "undue burden" grounds. It is difficult to believe, however, that \textit{Morgan} was anything more than one of the "narrower ground" holdings, such as \textit{Sweatt v. Painter}, 339 U.S. 629 (1950), that ultimately culminated in \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954). Its negative commerce clause rationale should be deemed to have been superseded by
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Raymond Motor Co. v. Rice and Kassell v. Consolidated Freightways, however, can be explained consistently with the nondiscrimination principle. Although, in both cases, the Court applied the balancing approach and invalidated the challenged regulations on “undue burden” grounds, the length of vehicle restrictions in both cases contained exemptions that were found to favor local interests. This “protectionism” was significant in the Court’s balancing analysis.

In Kassell, the challenged regulation prohibited the use of sixty-five feet double trucks in Iowa, but it contained an exception permitting cities that abutted the state line to adopt the length limitations of adjoining states for use within the city limits and in nearby commercial zones. In addition, an Iowa truck manufacturer could obtain a permit to ship trucks that were as long as seventy feet, and permits were available to move oversized mobile homes from one location in Iowa to another, or for delivery to an Iowa resident. Justice Powell, writing for the plurality, concluded that the exemptions, designed to benefit local economic interests, weakened the asserted safety justification and contributed to striking the balance against the regulation’s constitutionality. Justices Brennan and Marshall, concurring in the result, viewed the purpose of the regulation, in light of the exemptions, as discouraging interstate truck traffic on Iowa’s highways, thus constituting an impermissible “protectionist” purpose under the negative commerce clause.

In Raymond, there were a number of exemptions from Wisconsin’s fifty-five feet truck length limit. One exemption permitted Wisconsin industries to transport their products from Wisconsin to other states without a reciprocal exemption for out-of-state industries to transport their products through Wisconsin. These exemptions were relied on by the Court to belie the asserted safety purpose and to invalidate the regulation on “undue burden” grounds.

The results in *Kassell* and *Raymond* can be analyzed under the nondiscrimination principle by focusing on the exemptions that expressly discriminated against interstate commerce and out-of-state interests in favor of local commerce and in-state interests. Consistent application of the nondiscrimination principle should preclude allowance of any exemptions in safety regulations that expressly or in practical effect discriminate against interstate commerce or out-of-state interests in favor of local commerce or in-state interests. A safety regulation containing such an exemption should be declared unconstitutional; the state should regulate in an evenhanded manner by removing the exemption or by foregoing the regulation.  

A parallel analysis can be drawn with respect to the requirement of content neutrality in the first amendment area. Where the state adopts otherwise permissible time, place and manner limitations, but makes an exception for certain expression based on the content of that expression, the regulation is facially invalid as violative of the first amendment. For example, a time, place and manner limitation on picketing that contains an exemption for picketing connected with a labor dispute, violates the requirement of content neutrality and is, therefore, unconstitutional. Likewise, safety regulations that contain exemptions favoring local commerce or in-state interests should be held to violate the negative commerce clause. On this basis, *Kassell* and *Raymond* can be brought within the ambit of the nondiscrimination principle, leaving *Southern Pacific* and *Bibb* as the only transportation cases falling outside.

Finally, *Edgar v. Mite Corp.* merits discussion. If ever there was a case where the Court was absolutely clear as to the result it wanted to reach, but had great difficulty in arriving at a doctrinal basis to sustain that result, *Edgar* is that case. Whereas the six Justices who reached the merits all agreed that applying Illinois business takeover law to an attempted takeover of a Delaware corporation with its principal place of business in Connecticut was invalid, they had great difficulty agreeing on the doctrinal basis for the invalidity. Justice White, joined by Chief Justice Burger and Justice Blackmun, shared the view that all state regulation of corporate takeover and tender offers was preempted by federal law.  

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94. For a somewhat different view as to the constitutional effect of exemptions in safety regulations, see Tushnet, *supra* note 4, at 156-63.


97. Justices Marshall, Brennan, and Rehnquist contended that the case was moot. *Id.* at 655-67.

98. *Id.* at 630-40.
by Chief Justice Burger and Justices Stevens and O'Connor, further contended that the application of the Illinois law was unconstitutional because it was "a direct restraint on interstate commerce and . . . has a sweeping extraterritorial effect." These four Justices also found the law to be unconstitutional under the "Bruce Church balancing test" on the ground that, "the burden imposed on [interstate commerce] must not be excessive in relation to local interests served by the statute."" The Edgar Court's plurality opinion invalidates application of the Illinois law on "undue burden" grounds. The Court, however, should have reached the result it obviously wanted on completely different grounds. The appropriate constitutional vehicle for invalidating the application of the Illinois law in Edgar was the full faith and credit clause, not the negative commerce clause. In the "undue burden" part of his opinion, Justice White emphasized the broad sweep of the Illinois law and expressed great concern over the effect of conflicting state takeover laws on takeover efforts directed at interstate corporations. Justice White noted: "The Act thus applies to corporations that are not incorporated in Illinois and have their principal place of business in other states. Illinois has no interest in regulating the internal affairs of foreign corporations." Additionally, "[i]f Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled." It is precisely these kind of concerns which the full faith and credit clause was intended to address. The full faith and credit clause, as Justice Stevens has observed, was "designed to transform the several States from independent sovereignties into a single, unified Nation." The primary function of the full faith and credit clause has been to compel recognition of judgments reached in sister states. In certain limited circumstances,
However, the "federal interest in national unity," reflected in the full faith and credit clause, also requires a state to refrain from applying its own law to a transaction or situation that is connected with more than one state.\textsuperscript{107} For example, with respect to the internal affairs of a corporation that carries on its activities in a number of states, the Supreme Court has long held, as a matter of full faith and credit, that the law of the state of incorporation must govern the validity of a deficiency assessment against stockholders of a corporation or members of a fraternal benefit association.\textsuperscript{108} If deficiency assessments were valid in some states and invalid in others the corporation or fraternal benefit association could not function effectively on a national basis. In that circumstance, the "federal interest in national unity" requires the application of a uniform law to govern the validity of the deficiency assessment, and the most appropriate law for that purpose is the law of the state of incorporation.

For the same reasons set forth by Justice White in \textit{Edgar}, the "federal interest in national unity" requires the application of a uniform law to takeovers and tender offers involving interstate corporations.\textsuperscript{109} Thus, Illinois, which was neither the state of incorporation nor the state of the corporation's principal place of business, could not, consistent with full faith and credit, apply its law to regulate a takeover attempt directed toward that corporation. Therefore, the holding of unconstitutionality in \textit{Edgar} should have been based on a full faith and credit clause analysis. It was completely unnecessary for the Court to have relied upon "undue burden on interstate commerce" grounds.

Since the result in \textit{Edgar} can be explained on the basis of full faith and credit requirements, and since the results in \textit{Kassell} and \textit{Raymond} can be brought within the ambit of the nondiscrimination principle, only \textit{Southern Pacific} and \textit{Bibb} remain as pure "undue burden on interstate commerce" cases after almost forty years of negative commerce clause decisions in the regulation area.\textsuperscript{110} The results in all of the other nondiscrimination principle and prohibits discriminatory refusal to enforce claims existing under the law of a sister state. See infra notes 490-94 and accompanying text.

\textsuperscript{109} See supra notes 98-101 and accompanying text.
\textsuperscript{110} As stated previously, Morgan v. Virginia, 328 U.S. 373 (1946), in retrospect, should not be considered a negative commerce clause case. See supra note 85.
cases can be explained in terms of the nondiscrimination principle: the negative commerce clause precludes discrimination or disadvantage against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. All state regulations having this kind of discriminatory effect have been held unconstitutional by the Court and, conversely, nondiscriminatory state regulation generally has not been invalidated on "undue burden" grounds.\footnote{In United States Brewers Ass’n v. Healy, 692 F.2d 275 (2d Cir. 1982), \textit{summarily aff’d}, 104 S. Ct. 265 (1983), the Second Circuit invalidated a Connecticut beer price affirmation law as "placing an unconstitutional burden on interstate commerce." \textit{Id.} at 276. The law required beer brewers to file a monthly schedule stating the per unit price that it would charge Connecticut wholesalers for its products in the following month, and a sworn affirmation that its posted per unit prices would be no higher than its prices for corresponding units sold in any state bordering Connecticut during that month. It also contained provisions designed to insure that beer would be offered to Connecticut wholesalers on the same terms that it was offered to wholesalers in adjacent states. The contention of the brewers that the law had a discriminatory effect on interstate commerce was rejected by the district court, and was not considered by the Second Circuit. \textit{Id.} at 281 \& n.12, 282. Rather, the Second Circuit found that the law placed an "undue burden" on interstate commerce because it had the practical effect of regulating the prices that the brewers could charge to wholesalers in neighboring states. \textit{Id.} at 282. In the earlier case of Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966), the Supreme Court had upheld, against a negative commerce clause challenge, a New York price affirmation law requiring liquor manufacturers to sell liquor in New York at a price no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. The \textit{Healy} court distinguished \textit{Seagram} on the ground that the Connecticut law would control the brewers’ future conduct in the neighboring states. 692 F.2d at 283. The Supreme Court’s summary affirmance of the Second Circuit’s decision does represent a case where the Court sustained an "undue burden" challenge. However, summary dispositions have little precedential value in the Supreme Court. \textit{See} Edleman v. Jordan, 415 U.S. 651, 670-71 (1974). Thus, the summary affirmance in \textit{Healy} does not undercut the Court’s general rejection of "undue burden" challenges to nondiscriminatory state regulation.} 

This result oriented explanation of the Court’s negative commerce clause decisions in the regulation area can be reconciled with a structurally-based conceptual justification for a negative aspect to the commerce clause. The nondiscrimination principle, which has been the operational basis of the Court’s decisions in these cases, has been followed consistently by the Court, in both the regulation and the taxation area, throughout the time that it has relied on the negative commerce clause to invalidate state regulation and taxation. The nondiscrimination principle is the only structurally proper basis for invalidating state regulation and taxation under the negative commerce clause. Therefore, the sole prohibition of the negative
commerce clause is discrimination or disadvantage against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. Under the Court's current approach to the negative commerce clause as a restriction on state regulation, there has been an almost complete concurrence between the results reached by the Court in the cases coming before it and the structurally-based conceptual justification that will be advanced below for a negative aspect to the commerce clause.

2. Taxation

The negative commerce clause as a restriction on state taxation affecting interstate commerce has had a tortuous evolution. As a part of that evolution, negative commerce clause limitations tended to be merged with due process limitations and, as a result, a combined due process-negative commerce clause challenge was asserted against state taxation affecting interstate commerce. In *Complete Auto Transit, Inc. v. Brady*,112 decided in 1977, the Court articulated a completely new approach toward permissible state taxation of interstate commerce. State taxation of interstate commerce would be sustained when four elements were satisfied: (1) the tax is applied to an activity having a substantial nexus with the taxing state; (2) the tax is fairly apportioned to that activity; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state.113

Despite the continued due process-negative commerce clause linkage under this approach, elements (1), (2), and (4) of the *Complete Auto Transit* test clearly involve due process considerations of "reasonableness and fairness."114 They are similar to the "minimum contacts and fundamental fairness" criteria115 which govern the constitutional permissibility of a state's exercise of judicial jurisdiction over nonresidents and foreign corporations,116 and emanate from the same constitutional concerns. Whenever a state attempts to tax entities that are engaged in interstate commerce and carry on activities connected with more than one state, as when it attempts to exercise

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113. *Id.* at 279. The Court upheld a state "privilege tax," measured by a percentage of gross income, as applied to a contract motor carrier that hauled vehicles in interstate commerce.
114. *Id.* Note that "fairness" is required in both elements (2) and (4).
judicial jurisdiction over nonresidents and foreign corporations, territorially-based due process considerations of reasonableness and fairness come into play. In the judicial jurisdiction context, these considerations focus on the connection between the defendant and the forum state seeking to exercise jurisdiction, or on the connection between the transaction giving rise to the litigation and the forum state. In the taxation context, these considerations similarly focus on the connection between the activity on which the tax is based and the taxing state, and on the fair apportionment of the tax to that activity, and may be expressed in terms of "substantial nexus," "fair apportionment," and "fair relation to services provided." They arise out of a due process concern with reasonableness and fairness because the subjects of state taxation are engaged in interstate commerce and are carrying out their business activities in more than one state. The particular form of taxation, in order to be reasonable and fair as a matter of due process, must take this factor into account. Elements (1), (2), and (4) of the Complete Auto Transit test are the concrete means of measuring the due process concern with the reasonableness and fairness of the particular form of taxation.117

Therefore, only the third element of the Complete Auto Transit test finds its source in considerations relevant to the negative commerce clause. Just as the negative commerce clause precludes discriminatory regulation of interstate commerce, it precludes discriminatory taxation of interstate commerce, and the Court has

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117. In Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 219-20 (1980) the Court stated:
The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation [of the income of a business operating in interstate commerce]: a "minimal connection" or "nexus" between the interstate activities and the taxing State, and a "rational relationship between the income attributed to the State and the intrastate values of the enterprise." The tax cannot be "out of all appropriate proportion to the business transacted by the [enterprise] in that State."

Id. (citations omitted).

In Western Oil & Gas Ass'n v. Cory, 726 F.2d 1340 (9th Cir. 1984), aff'd by an equally divided court, 105 S. Ct. 1859 (1985), the Ninth Circuit invalidated on negative commerce clause ground California's regulations computing "rent" for the leasing of state owned tidelands and submerged lands based on the volume of oil in interstate and foreign commerce passing over the leased property. The court found that this method of computing "rent" was unreasonable, because it failed to reflect the value of the land and was not directed toward compensating the state for the use of the land. This rationale would indicate that the decision more properly should have been based on due process rather than negative commerce clause grounds. The court also found a violation of the import-export clause because 95% of the oil entering California was in foreign commerce and the method of computing "rent" could have a discriminatory effect on foreign commerce.
consistently so held. When a state taxation scheme, expressly or in practical operation, discriminated against interstate commerce or out-of-state interests in favor of local commerce or in-state interests, it was held unconstitutional, both before and after Complete Auto Transit.\footnote{118} As the Court has stated:

One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may “impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.” This antidiscrimination principle “follows inexorably from the basic purpose of the Clause,” to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution.\footnote{119}

As in the regulation area, the focus is on the discriminatory effect of the tax. The tax must be analyzed in light of its actual effect, considered in conjunction with the other provisions of the state’s scheme of taxation, and the inquiry must be directed toward whether the tax, “will in its practical operation work discrimination against interstate commerce.”\footnote{120} Thus, in Maryland v. Louisiana,\footnote{121} Louisiana’s “first use” tax on certain uses of natural gas brought into the state was held to be unconstitutional because it contained various credits and exclusions, the essential effect of which was to encourage the use and production of natural gas in Louisiana rather than in other states.\footnote{122} This being so, it “unquestionably discriminate[d] against interstate commerce in favor of local interests,”\footnote{123} and thus was unconstitutional. In Boston Stock Exchange v. State Tax Commission,\footnote{124} the Court invalidated a New York state stock transfer tax which imposed a greater tax liability on out-of-state sales than on in-state sales, with the obvious effect of extending a competitive advantage to sales on New York stock exchanges at the expense of sales on regional exchanges.\footnote{125}

\footnote{118} See infra notes 347-55 and accompanying text for a discussion of the pre-Complete Auto Transit cases. Professor Hellerstein states that the protection afforded interstate commerce against state taxation is “essentially a guarantee of nondiscriminatory treatment.” Hellerstein II, supra note 4, at 1448.


\footnote{120} Id. at 756.

\footnote{121} Id. at 725 (1981).

\footnote{122} Id. at 756-58.

\footnote{123} Id. at 756.

\footnote{124} 429 U.S. 318 (1977).

\footnote{125} The fact that the favorable tax treatment extended to in-state sales by
Again, as in the regulation area, the tax is discriminatory within the meaning of the negative commerce clause only when it discriminates against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. In Commonwealth Edison Co. v. Montana, the Montana coal severance tax was challenged as being discriminatory, in violation of the negative commerce clause, because ninety percent of the coal was shipped out-of-state, with the effect that the tax was borne primarily by out-of-state consumers. The Court sharply rejected this challenge, noting that the tax was based entirely on the amount of coal consumed and not on any distinction between in-state and out-of-state consumers. Therefore, the Court was "not confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases." The Court also made it clear that there was no "undue burden" limitation on the power of the states to tax interstate commerce. It flatly rejected the contention that the negative commerce clause gives residents of one state a right of access at "reasonable prices" to resources located in another state that is richly endowed with such resources. The only right of access that the Court found to be recognized by the Constitution is the same right of access that is enjoyed by the residents of the state where the resource is located.

Apart from the discrimination cases, in the wake of Complete Auto Transit, state taxation of interstate commerce has invariably been upheld. In the process, the Court has overruled a number of nonresidents did not obviate the negative commerce clause violation. While discriminatory tax treatment of nonresidents in comparison to residents is violative of the privileges and immunities clause of art. IV, § 2, Austin v. New Hampshire, 420 U.S. 656 (1975) (tax unconstitutional because it fell exclusively on nonresidents and was not imposed similarly upon residents), in Boston Stock Exchange it was the discrimination against interstate commerce in favor of local commerce-independent of the residence of the seller—that was the basis of the constitutional violation. See infra note 526 and accompanying text.

127. Id. at 618. In this sense, the effect of the tax was the same as that of a price fixing scheme which impacted equally on in-state and out-of-state consumers. See supra note 48.
128. Id. at 618. See also McGrath & Hellerstein, supra note 4, at 169-71.
129. 453 U.S. at 622-23.
130. The Court has, however, invalidated some state schemes of taxation affecting foreign commerce. In Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), the Court invalidated, on negative commerce clause grounds, the application of California's ad valorem property tax to cargo containers of Japanese companies, which were used exclusively in foreign commerce and which were based, registered, and subjected to full value property taxes in Japan. The Court assumed that the California tax would be constitutional in its application to instrumentalities
of interstate commerce, but went on to say that commerce clause analysis operated differently where foreign commerce was involved. Where foreign commerce was involved, there was no "authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value," so that foreign commerce might be subjected to the risk of a double tax burden to which domestic commerce was not exposed. *Id.* at 447-48. The Court also discussed the "international complications" that could result from state taxes on instrumentalities of foreign commerce, and found that the application of California's *ad valorem* property tax to Japan Line's containers "prevents the Federal Government from 'speaking with one voice' in international trade." *Id.* at 453.

*Japan Line* was distinguished in *Container Corp. of Am. v. Franchise Tax Bd.*, 103 S.Ct. 2933 (1983), where the Court upheld California's inclusion of the "business income" of foreign subsidiaries in the "unitary business" formula used to determine the tax liability of an American corporation doing business in California. The Court emphasized that the tax in *Container Corp.* fell on an American corporation, rather than on a foreign corporation and concluded that there were no significant foreign policy implications in California's decision to include the "business income" of the foreign subsidiaries in its determination of the American corporation's tax liability.

The decision in *Japan Line* is properly explained on the basis of federal power over foreign policy, rather than on the basis of the negative commerce clause. The federal government's control over foreign policy, reflected both in the foreign relations power of the President, *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), and in the foreign commerce power of Congress, may be relied upon to invalidate the application of state law where such application would be inconsistent with federal control over foreign policy. For example, federal control over foreign policy dictates that what is considered "an act of state" under federal law be recognized as such by state courts in litigation coming before them. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Similarly, state laws providing for the escheat of a decedent's estate where an alien heir's country would not allow American citizens reciprocal rights of inheritance have been invalidated as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Zschernig v. Miller, 389 U.S. 429, 432 (1968).

By the same token, the "international complications" that the Court in *Japan Line* found could result from the states' application of *ad valorem* property taxes to cargo containers owned by foreign companies and used exclusively in foreign commerce, should render such application unconstitutional as inconsistent with federal control over foreign policy. The distinction of *Japan Line* in *Container Corp.*, on the basis of the absence of foreign policy implications in the latter case, is a further indication that *Japan Line* is more properly explained on grounds of interference with federal power over foreign policy.

Due process considerations also may operate differently where state taxation affects foreign commerce rather than interstate commerce. For example, the connection between American corporations and their foreign subsidiaries may be sufficiently attenuated so as to preclude the states from treating the subsidiaries as part of a "unitary business" related to the corporation's activities in the taxing state. In *ASARCO v. Idaho Tax Comm’n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation and Revenue Dep’t*, 458 U.S. 354 (1982), the Court held that there was insufficient control over an American corporation's foreign subsidiaries to justify including dividends received from those subsidiaries in the corporation's net income, and that such inclusion, therefore, was violative of due process. Compare these cases with *Mobil Oil Corp. v. Commissioner of Taxes*,
earlier cases that had substantially limited the taxing power of the states. The recent cases generally have involved apportionment formulae designed to reach the income of foreign corporations doing business in the state. The Court has upheld the apportionment formula in every case, making it clear that the states have broad discretion in deciding precisely how to allocate the foreign corporation’s gross income to its activities in the taxing state. In practice, therefore, the results under the Court’s current approach to the permissibility of state taxation of interstate commerce indicate that the only limitation imposed by the negative commerce clause is that the tax be nondiscriminatory in its practical operation. When the actual effect of the tax is found to be discriminatory, it will be invalidated without further inquiry.

445 U.S. 425 (1980), where the corporation’s integrated petroleum enterprise included wholly and partially owned foreign subsidiaries and affiliates, which provided the major share of its foreign source dividend income. That dividend income thus was related to the corporation’s sale of petroleum products in the taxing state and constitutionally could be subject to taxation in that state.

131. See Hellerstein II, supra note 4, at 1444-46; Kitch, supra note 4, at 30-31. The Court also has held that the application of a nondiscriminatory ad valorem property tax to foreign imports shipped into the state is not prohibited by the import-export clause of art. I, § 10, cl. 2, overruling earlier precedents to the contrary. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976); Hellerstein II, supra note 4, at 1427-34; see also Limbach v. Hooven & Allison Co., 104 S. Ct. 1837 (1984). The import-export clause is similar to the negative commerce clause in that it only prohibits discriminatory taxation against imports.


133. Following Complete Auto Transit, the Court has not found any nondiscriminatory state taxation of interstate commerce, as opposed to foreign commerce, to be violative of due process. See supra note 130 for a discussion of nondiscriminatory state taxation of foreign commerce. For an application of the Complete Auto Transit test to uphold severance taxes imposed by an Indian tribal authority, see Merrion v. Kicarilla Apache Tribe, 455 U.S. 130 (1982).

134. In the 1983 Term, the Court invalidated three state taxing schemes that expressly discriminated against interstate commerce in favor of local commerce. See Bacchus Imports v. Dias, 104 S. Ct. 3049 (1984) (Hawaii’s exemption of certain locally-produced alcoholic beverages from a 20% excise tax imposed on liquor at wholesale); ARMCO, Inc. v. Hardesty, 104 S. Ct. 2620 (1984) (West Virginia’s exemption of locally manufactured goods from a gross receipts tax); Westinghouse Elec. Corp. v. Tully, 104 S. Ct. 1856 (1984) (New York’s allowance of a corporate tax credit upon accumulated income of a subsidiary domestic international sales corporation, but not upon accumulated income of a subsidiary nondomestic international sales corporation).

In Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985), the Court,
3. The Court's Current Approach: A Summing Up

Thus far this Article has reviewed the Court's current approach to the negative commerce clause as a restriction on the power of the states to regulate and tax interstate commerce. It is our conclusion that, in the regulation area, although the articulated approach is to balance competing state and national interests, and although under that approach a regulation of interstate commerce can be invalidated on either "discrimination" or "undue burden" grounds, the results of the cases indicate that the Court actually is following a very different line of analysis. Apart from the relatively older transportation cases, *Southern Pacific* and *Bibb*, and apart from *Edgar v. Mite Corp.*, which would have been decided more appropriately on full faith and credit grounds, the results in all of the regulation cases can be explained consistently in terms of the non-discrimination principle which was set forth above. When the essential effect of the regulation is to discriminate against or disadvantage interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the regulation violates the negative commerce clause. Conversely, where the essential effect of the regulation is not discriminatory, as defined above, it will not be invalidated on the ground that it imposes an "undue burden" on interstate commerce.

In the taxation area, the four-element approach that the Court articulated in *Complete Auto Transit* represented a completely new approach toward permissible state taxation of interstate commerce.

In a 5-4 decision, invalidated on equal protection grounds an Alabama taxing scheme that taxed out-of-state insurance companies doing business in Alabama at three to four times the rate at which domestic insurance companies were taxed. Discriminatory state taxation of out-of-state insurance companies is not subject to negative commerce clause challenge because of specific congressional authorization of state regulation of out-of-state insurance companies. *See infra* notes 136-38 and accompanying text. The Court, however, found that, despite the congressional authorization, the promotion of domestic business by discriminating against non-resident competitors was not a legitimate state purpose under the equal protection clause. But see *id.* at 1684 where Justice O'Connor, in dissent, contended that "[t]he Court's analysis casts a shadow over numerous congressional enactments that, adopted as federal policy 'the type of parochial favoritism' the Court today finds unconstitutional."

In *Williams v. Vermont*, 105 S. Ct. 2465 (1985), a Vermont motor vehicle use tax granted credit to residents for sales tax paid to a reciprocating state, but denied such a credit to new residents who bought and registered the vehicles outside of Vermont before becoming Vermont residents. The tax was challenged on negative commerce clause grounds and equal protection grounds. The Court found the resulting discrimination to be violative of equal protection but did not consider the negative commerce clause challenge. *Id.* at 2474.
The only element of that approach that properly finds its source in the negative commerce clause, however, is the nondiscrimination element; the other three elements involve due process considerations. Following *Complete Auto Transit*, the Court has invalidated discriminatory schemes of taxation, but has upheld all other state taxation of interstate commerce against combined negative commerce clause—due process challenges. The operative principle in practice, therefore, is that the nondiscrimination principle and the commerce clause in its negative aspect is now utilized by the Court to invalidate state regulation and taxation that discriminates against or disadvantages interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.

There are two qualifications to the nondiscrimination principle. One, alluded to earlier, is that the nondiscrimination principle is not applicable when the state acts as a market participant, limiting its purchases of products to resident sellers or its sales of products produced by state-owned businesses to resident buyers, or requiring that its contractors give employment preference to state residents on state contracts. The second qualification, repeatedly emphasized by the Court, is that Congress can expressly authorize state regulation or taxation of interstate commerce which would otherwise be constitutionally impermissible. Thus, since Congress has expressly removed all restrictions on the authority of the states to regulate and tax the insurance business, California’s “retaliatory tax” on foreign insurance companies, based on the insurance laws of their home state, did not violate the negative commerce clause, which would have been the case in the absence of congressional authorization.

135. *See supra* notes 78-81 and accompanying text. The constitutional basis for this qualification, from a structural perspective, will be discussed *infra* in the text.


The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body. Congress unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the Commerce Clause in the exercise of its spending power. Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.


The discussion thus far has been limited to an analysis of what the Court has been doing in practice under its articulated approach to the negative commerce clause as a restriction on state regulation and taxation. Whether the Court’s actions have been consistent with a structurally-based conceptual justification for a negative aspect to the commerce clause has not yet been considered. Nonetheless, the implications of this analysis for the thesis presented herein are clear. Precisely because the operative principle in practice has been the nondiscrimination principle, this principle is more likely to support a structurally-based conceptual justification for a negative aspect to the commerce clause. This is particularly so in light of the analysis of the Court’s approach from an historical perspective, which is presented below.

B. The Court’s Approach from an Historical Perspective

As this discussion indicates, the primary reason for analyzing the Court’s approach from an historical perspective is to demonstrate that in both the regulation and the taxation areas, the Court has adhered consistently to the nondiscrimination principle, while it has fluctuated dramatically and inconsistently in its treatment of the constitutional permissibility of discriminatory regulation and taxation. This analysis also will reveal that the Court clearly has set forth a structurally-based conceptual justification for the negative commerce clause as the source of a constitutional prohibition against discriminatory state regulation and taxation, but has not adequately developed a similar justification for the negative commerce clause as the source of a constitutional restriction on discriminatory state regulation and taxation affecting interstate commerce. In addition, an understanding of the Court’s past institutional behavior with respect to the negative commerce clause, and the Court’s evolution toward its present approach, may assist in the evaluation of the different structurally-based conceptual justifications that have been advanced for a negative aspect to the commerce clause.139

\[\text{But see Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985).}\]

In Northeast Bancorp, Inc. v. Federal Reserve Sys. Bd. of Governors, 105 S. Ct. 2545 (1985), the Court found that section 3(d) of the Bank Holding Company Act of 1956, the Douglas Amendment, furnished “specific authorization” for Connecticut and Massachusetts to adopt statutes permitting bank holding companies in New England states—but in no other state—to acquire banks located in Massachusetts and Connecticut, provided that the New England state granted reciprocal privileges to bank holding companies located in Massachusetts and Connecticut.

139. Such an analysis has not been done previously. The tendency on the part of present day commentators has been to begin with Southern Pacific and to assume that prior to that time the Court did not have a clearly defined approach
The historical evolution of the Court’s approach to the negative commerce clause as a restriction on state regulation and taxation can be traced from the seminal *Cooley*\(^{140}\) case to the Court’s current approach. The discussion is divided appropriately into two parts: (1) from *Cooley* to *Southern Pacific*; and (2) from *Southern Pacific* to the advent of the Court’s current approach.\(^ {141}\) This analysis will reveal that from *Cooley* to *Southern Pacific*, the Court’s approach to the negative commerce clause as a restriction on state regulation and taxation was in terms of *allocation of power*. Insofar as the Court attempted to set forth a structurally-based conceptual justification for a negative aspect to the commerce clause, it was that the affirmative grant of the commerce power to Congress under article I, section 8, operated to diminish the states’ exercise of the reserved general regulatory and taxation power with respect to interstate commerce. Under this view, while the states were not deprived of the power to enact regulations affecting entities engaged in interstate commerce or to impose taxes on such entities, they were deprived of the power to regulate or tax interstate commerce itself. In practice, this meant that if the Court characterized a particular regulation or tax as a regulation or tax on interstate commerce itself, it was unconstitutional as beyond the authority of the states. If it was not so characterized, it was within the proper exercise of the states’ reserved general regulatory and taxation power, notwithstanding that the regulation or the tax affected entities engaged in interstate commerce. This allocation of power approach was replaced by the balancing of interests approach in *Southern Pacific* with respect to the validity of state regulation affecting interstate commerce. In the taxation area, although the approach was somewhat modified and later eroded, it was not fully abandoned until *Complete Auto Transit*.

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2. This division results in some time frame problems. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945), is chosen as the division point because it marks the adoption of the Court’s current articulated approach to the permissibility of state regulation affecting interstate commerce. The Court’s current approach to the permissibility of state taxation of interstate commerce, however, was adopted in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and represents a
Quite independently of the allocation of power approach, however, in the years following *Cooley* the Court also invoked the nondiscrimination principle to invalidate all state regulation or taxation discriminating against or disadvantaging interstate commerce or out-of-state interests. Whenever the practical effect of a regulation or tax was "protectionist"—when it discriminated against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests—the Court invariably held the regulation or tax to be unconstitutional. It did not matter that the regulation or tax, if nondiscriminatory, would have been sustained as not constituting a regulation or taxation of interstate commerce itself. The discriminatory effect of the regulation or tax rendered it unconstitutional, and it was firmly established that the commerce clause operated negatively to preclude all such discriminatory state regulation or taxation. In the period from *Cooley* to *Southern Pacific*, then, the allocation of power approach and the nondiscrimination principle operated in tandem. State regulation or taxation affecting interstate commerce could be invalidated either on the ground that it was discriminatory or on the ground that it constituted a regulation or taxation of interstate commerce itself.

In the period following *Southern Pacific*, however, the Court's articulated approach with respect to the constitutionality of state regulation and taxation affecting interstate commerce diverged. In the taxation area, the Court continued to follow the allocation of power approach, but was influenced by the "free trade" principle which it viewed as being embodied in the commerce clause. As a result, the Court scrutinized state taxation schemes more strictly and was more disposed toward invalidating nondiscriminatory state taxation. In the regulation area, although the Court substituted the balancing of interests approach for the allocation of power approach, in practice nondiscriminatory state regulation generally was sustained. In both the regulation and taxation areas, however, all discriminatory state action continued to be invalidated. The results in the regulation completely new approach to the permissibility of such taxation. Prior to *Southern Pacific*, both doctrinally and in practice, the Court followed the same approach to the permissibility of state regulation and taxation affecting interstate commerce. The Court did not completely abandon that approach in the taxation area until *Complete Auto Transit*. Nonetheless, the Court's approach to the permissibility of state taxation of interstate commerce, beginning in the late 1930's, was influenced significantly by its articulation of the "free trade" principle, and the Court was more disposed than it previously had been to invalidate state taxing schemes applied to entities engaged in interstate commerce. The change in the operation of the Court's approach in the taxation area thus coincided generally with the Court's adoption of a new articulated approach in the regulation area. For these reasons, *Southern Pacific* seems to be an appropriate division point in our historical analysis.
and taxation areas were brought back into accord by the Court’s application of the balancing approach in the regulation area, and the completely different approach to the permissibility of state taxation affecting interstate commerce taken by the Court in Complete Auto Transit. In practice, this has meant that all discriminatory regulation and taxation have been invalidated, while nondiscriminatory regulation and taxation generally have been sustained.

1. From Cooley to Southern Pacific

The differing views on the Court as to the effect of the affirmative grant of the commerce power to Congress on the power of the states to regulate and tax interstate commerce, and the Court’s decisions leading up to Cooley, have been reviewed extensively elsewhere and will not be repeated here.\(^\text{142}\) The Court’s holding in Cooley was obviously a compromise between the view that the commerce power was an exclusive federal power so as to preclude all state regulation or taxation affecting interstate commerce and the view that the commerce clause imposed no restriction at all on the reserved general regulatory and taxation power of the states. Like many compromise decisions, the compromise in Cooley may have been the result of a tacit agreement to avoid explicit discussion of the Court’s rationale. Although the Court held that the commerce power was not an exclusive federal power so as to preclude all state regulation or taxation affecting interstate commerce, it also held that the affirmative grant of the commerce power to Congress of its own force deprived the states of the power to regulate where the matter in issue "imperatively demand[ed] a single uniform rule."\(^\text{143}\) Although the issue in Cooley, the regulation of pilotage, was not one that imperatively demanded a single uniform rule,\(^\text{144}\) Cooley firmly established the proposition that the affirmative grant of the commerce power to Congress diminished the reserved general regulatory and taxation power of the states. Thus, the commerce clause had a negative as well as an affirmative aspect, and could be relied upon by the Court as a basis for invalidating state regulation or taxation affecting interstate commerce.

The Court in Cooley never set forth the rationale for its conclusion that the affirmative grant of the commerce power to Congress

\(^\text{142}\) See generally F. Frankfurter, supra note 12, at 11-58. See also Sholley, The Negative Implications of the Commerce Clause, 3 U. Chi. L. Rev. 556, 568-77 (1936).

\(^\text{143}\) Cooley, 53 U.S. at 319.

\(^\text{144}\) "It is the opinion of . . . the Court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots . . . ." Id. at 320.
deprived the states of the power to regulate where the matter in issue "imperatively demand[ed] a single uniform rule." Although the Court held that the commerce power was not an exclusive federal power, it never explained why the affirmative grant of the commerce power to Congress should impose any constitutional restraint on the states' exercise of the reserved general regulatory power. Indeed, in the case that would have seemed to be most on point on this issue, *Sturges v. Crowninshield,* the Court held that the bankruptcy power was not an exclusive federal power, and thus, in the absence of congressional action, the Constitution imposed no restriction on the power of the states to regulate creditor-debtor relations. In any event, after the *Cooley* holding that the affirmative grant of the commerce power to Congress of its own force limited the power of the states to regulate interstate commerce, the Court proceeded to develop fully the allocation of power approach to the permissibility of state regulation affecting interstate commerce. The essence of the allocation of power approach was the Court's characterization

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146. The diminution of power justification for a negative basis to the commerce clause and the failure of the Court in *Cooley* to deal with this question will be discussed at greater length in the next part of this Article.
147. Once it is understood that this is the approach that the Court was taking, it will be apparent that the Court was applying this approach with a fair degree of consistency. The problem arose in its application to a great variety of state regulations and schemes of taxation affecting interstate commerce.

The Court's adoption of the allocation of power approach to determine the permissibility of state regulation of interstate commerce had a collateral effect on the Court's interpretation of the scope of the affirmative commerce power of Congress. If the activity being regulated was held not to constitute "commerce" within the meaning of the commerce clause, the commerce clause, in its negative aspect, could not be relied on to challenge state regulation of that activity. This also meant, however, that the activity could not be regulated by Congress in the affirmative exercise of the commerce power. Thus, when the Court in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869), upheld state regulation of interstate insurance transactions on the ground that "issuing a policy of insurance is not a transaction of commerce" within the meaning of the commerce clause, it was assumed that Congress lacked the power to regulate the interstate insurance business. This assumption was not dispelled until United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). Similarly, the Court's decision in *Kidd v. Pearson,* 128 U.S. 1 (1888), upholding a state ban on liquor manufacture on the ground that manufacturing was not "commerce," influenced its decision in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), to the effect that a monopoly of sugar manufacture was not a "monopoly in interstate commerce" within the meaning of the Sherman Act. Indeed, the Court has continued to say that manufacturing is not "commerce," and has upheld federal regulation of manufacturing on "affecting commerce" rather than "regulation of commerce" grounds. See *United States v. Darby,* 312 U.S. 100, 118 (1941).
of the nature of the challenged regulation or tax. If it was characterized as a regulation or taxation of interstate commerce itself, it was deemed to impose a "direct burden" on interstate commerce and was found to be beyond the power of the states to enact, and thus was unconstitutional. If it was not characterized as a regulation or taxation of interstate commerce itself, it was said only to "affect" interstate commerce or to impose only an "indirect burden" and thus was a proper exercise of the reserved general regulatory and taxation power of the states.\textsuperscript{148}

Under the allocation of power approach, however, there was no independent "burden analysis"; the Court did not consider how the particular regulation or tax in actual operation affected interstate commerce, or whether it "obstructed the free flow of commerce."\textsuperscript{149} The Court's use of the terms "direct burden" and "indirect burden" represented merely legal conclusions, resulting from the Court's characterization of the nature of the regulation or tax.\textsuperscript{150} As the Court stated:

\begin{quote}
148. As the Court stated in the Minnesota Rate Cases, 230 U.S. 352, 400, 402 (1913):
The principle, which determines this classification, underlines the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains.

But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected.

Similarly, the Court stated in Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298, 307 (1924):
The line of division between cases where, in the absence of congressional action, the State is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution, is not always clearly marked. In the absence of congressional legislation, a State may constitutionally impose taxes, enact inspection laws, quarantine laws and, generally, laws of internal police, although they may have an incidental effect on interstate commerce. But the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce.

149. This is the "burden" language of Southern Pacific.

150. "The distinctive feature of this jurisprudence was an effort to carve out an area of interstate commerce that would be immune from state regulation while the rest of commerce would be free for unhindered state regulation. The purpose, reasonableness, or effects of the state legislations were not to count." Kitch, supra note 4, at 27.
\end{quote}
Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action . . . and a tax upon articles in one state that are destined for use in another State cannot be called a regulation of interstate commerce . . . . The action of a State as a regulation of interstate commerce does not depend on the degree of interference; it is illegal in any degree.\textsuperscript{151}

Again, if the regulation or tax was characterized as a regulation or taxation of interstate commerce itself, it was unconstitutional. If it was not so characterized, it was constitutional because it was within the reserved powers of the state.\textsuperscript{152}

The key element in the Court’s characterization of the nature of the challenged regulation or tax involved the identification of the activity that was being regulated or taxed. If it was possible to identify a local activity upon which the incidence of the regulation or tax fell, and to separate that local activity from interstate activity, the regulation or tax would not be characterized as a regulation or

\textsuperscript{151} Heisler v. Thomas Colliery Co., 260 U.S. 245, 259 (1922).

\textsuperscript{152} There does appear to have been one situation where the court employed an independent “burden analysis” to determine the constitutionality of a challenged regulation. This was the situation where state or local law required interstate trains to make what the railroads claimed were unnecessary stops. Where the Court concluded that the required stops were adequately served, it held the regulation to be unconstitutional. It first did so in Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896), and later simply followed the holding of that case. See St. Louis & S.F. Ry. v. Public Serv. Comm’n, 261 U.S. 369 (1923); St. Louis & S.F. Ry. v. Public Serv. Comm’n, 254 U.S. 535 (1921); Chicago, Burlington & Quincy R.R. v. Railroad Comm’n, 237 U.S. 220 (1915); Herndon v. Chicago, R.I. & Pac. Ry. 218 U.S. 135 (1910); Atlantic Coast Line R.R. v. Wharton, 207 U.S. 328 (1907); Mississippi R.R. Comm’n v. Illinois Cent. R.R., 203 U.S. 335 (1906); Cleveland, C.C. & St. L. Ry. v. Illinois, 177 U.S. 514 (1900). In other cases, however, the Court upheld train stoppage requirements. See Gulf, C. & S.F. Ry. v. Texas, 246 U.S. 58 (1918); Wisconsin, M., & P. R.R. v. Jacobson, 179 U.S. 287 (1900); Lake Shore & M.S. Ry. v. Ohio, 173 U.S. 285 (1899). In Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917), the Court invalidated a state law requiring trains to slacken their speed at every grade crossing, on the ground that the law would cause unreasonable delays. In Missouri, K. & T. Ry. v. Texas, 245 U.S. 484 (1918), the Court invalidated a state law requiring that all trains start no more than 30 minutes after scheduled departure time. In South Covington Ry. v. Covington, 235 U.S. 537 (1915), the Court invalidated certain provisions of a local ordinance as applied to an interstate street car company. The invalidated provisions regulated the number of passengers per car and the number of cars, and required a uniform temperature in all cars. The provisions that were upheld prohibited riding on platforms, required a railing on the platforms, and required cleaning and fumigation of the cars. Only in this line of cases did the Court employ an independent “burden analysis” and invalidate what otherwise would not be considered a “regulation of interstate commerce” under the allocation of power approach.
tax of interstate commerce itself and it would be upheld. In this circumstance, it did not matter that the entity subject to regulation or tax was engaged in interstate commerce or that the local activity was connected with interstate activity in some way. But where the incidence of the regulation or tax fell on a purely interstate activity, and it was not possible to identify a local activity distinct from interstate activity, the regulation or tax was deemed to be on interstate commerce itself and was unconstitutional.

Let us now consider some examples of permissible and impermissible regulation. The states could not require the licensing of a foreign corporation doing only interstate business, or a solicitor for a foreign corporation doing only interstate business, or peddlers of interstate goods. Nor could they bar suit on an interstate contract by a foreign corporation not licensed to do business in the state, or deny a certificate of convenience and necessity to an interstate transportation operator. Similarly, they could not license an instrumentality of interstate commerce, such as a vessel or vehicle used entirely in interstate commerce. However, as time went on, the Court became more disposed to identify a local activity so as to uphold the licensing of entities engaged in interstate commerce, such as foreign corporations doing some business in the state.

156. See Furst v. Brewster, 282 U.S. 493 (1931); Davis v. Farmer’s Coop. Equity Co., 262 U.S. 312 (1923); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914); see supra note 76.
transportation agents selling interstate transportation,\textsuperscript{160} and interstate motor carriers using state highways.\textsuperscript{161}

Price regulation was upheld when it was applied to a transaction centered in the state, such as intrastate rail transportation,\textsuperscript{162} grain elevator storage,\textsuperscript{163} natural gas sales to consumers or wholesalers in the state,\textsuperscript{164} charges for handling and selling tobacco in the state,\textsuperscript{165} and in-state sales of milk.\textsuperscript{166} Price regulation was invalidated when it was applied to "purely interstate" transactions, such as grain sales to interstate dealers,\textsuperscript{167} interstate sales of electricity or natural gas to local utilities or distributors,\textsuperscript{168} coal destined for interstate shipment,\textsuperscript{169} and interstate freight shipments.\textsuperscript{170} In \textit{Milk Control Board v. Eisenberg Co.},\textsuperscript{171} and \textit{Parker v. Brown},\textsuperscript{172} however, which in terms of time are really a part of the \textit{Southern Pacific} era, the Court upheld price regulation as applied to products destined primarily for interstate commerce.\textsuperscript{173}

\textsuperscript{160} See California v. Thompson, 313 U.S. 109 (1941), overruling Di Santo v. Pennsylvania, 273 U.S. 34 (1927); see also Engel v. O'Malley, 219 U.S. 128 (1911) (state statute regulating receipt of deposits of money is not a burden on foreign or interstate commerce, even though such deposits are likely to be transmitted out-of-state or to other countries).


\textsuperscript{162} See Minnesota Rate Cases, 230 U.S. 352 (1913); Gulf, C. & S.F. Ry. v. Texas, 204 U.S. 403 (1907); Railroad Comm'n Cases, 116 U.S. 307 (1886); Chicago & N.W.R.R. v. Fuller, 84 U.S. (17 Wall.) 560 (1873).

\textsuperscript{163} See Budd v. New York, 143 U.S. 517 (1892); Munn v. Illinois, 94 U.S. 113 (1877).


\textsuperscript{165} See Townsend v. Yeomans, 301 U.S. 441 (1937).

\textsuperscript{166} See Higland Farms Dairy v. Agnew, 300 U.S. 608 (1937).

\textsuperscript{167} See Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922).


\textsuperscript{169} See Railroad Comm'n v. Worthington, 225 U.S. 101 (1912).

\textsuperscript{170} See Wabash, St. Louis & P. Co. v. Illinois, 118 U.S. 557 (1886). In Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 (1894), the Court invalidated a state's effort to fix rates over an interstate bridge, but in Port Richmond & Bergan Point Ferry Co. v. Board, 234 U.S. 317 (1914), it upheld regulation of ferry rates across the Hudson River.

\textsuperscript{171} 306 U.S. 346 (1939).

\textsuperscript{172} 317 U.S. 341 (1943).

\textsuperscript{173} The Court stated in \textit{Parker v. Brown} that a price-fixing regulation could be sustained under the "mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold or shipped out of it . . . ." \textit{Id.} at
General economic regulation was often upheld because it was possible to identify some local activity on which the incidence of the regulation fell. Usually the regulation would take effect only after interstate movement had ended or before it had begun. Among the kinds of regulations upheld on this basis were regulations requiring railroads to accept shipments, provide local service, and settle claims; securities regulations; anti-trust regulation; product quality regulation, notwithstanding that the products were intended for export; health, safety, and consumer protection regulations, notwithstanding that the products had been brought into the state; prohibition of liquor manufacture; employee protection laws; civil liability laws as applied to liability arising out of an interstate transaction; and laws imposing liens or attachments on vessels and other instrumentalities used in interstate commerce. The states could not, however, ban the sale of products originating in another

360. See infra notes 266-67 and accompanying text. The Court's statement in *Parker* is not strictly accurate in light of the above cases. They now have been effectively overruled. See *Arkansas Elec. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 389-95 (1983).


state, or regulate a purely interstate transaction or an entity engaged entirely in interstate commerce.

Safety regulations were upheld almost invariably. Whenever the challenged law was a safety regulation, the Court would not characterize it as a regulation of interstate commerce, and the law thus could be applied to what otherwise would be considered a purely interstate transaction. The most common safety regulations coming before the Court during this period were those applicable to railroads, such as the full crew laws, and all such regulations were sustained, even when applied to purely interstate journeys. The Court’s 1938 decision in South Carolina State Highway Department v. Barnwell Brothers,


187. See Michigan Pub. Util. Comm’n v. Duke, 266 U.S. 570 (1925). In Kansas City S. Ry. v. Kaw Valley Drainage Dist., 233 U.S. 75 (1914), the Court held that the state could not require a railroad company to remove a bridge that was a necessary part of its interstate operations despite a finding that such removal was necessary for the improvement of a drainage district.

188. Thus, although a state ordinarily could not deny a certificate of convenience and necessity to an interstate transportation operator, Buck v. Kuykendall, 267 U.S. 307 (1925), it could do so on the ground that the proposed route was congested, Bradley v. Public Util. Comm’n, 289 U.S. 92 (1933). Since the purpose of the denial was to promote safety, rather than to regulate economic competition, the effect on interstate commerce was deemed to be “incidental.” Id.


The only exceptions to the Court’s practice of upholding state safety regulations applicable to railroads are Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917), and South Covington Ry. v. Covington, 235 U.S. 537 (1915).

191. 303 U.S. 177 (1938).
upholding a truck weight and width regulation as applied to an interstate motor carrier, merely confirmed the Court's long-standing practice of holding all safety regulations constitutional because they placed only an "incidental burden" on interstate commerce. In
spection and quarantine laws were always upheld for the same reason.

The Court generally found that taxation of interstate activities was permissible if the tax was imposed on a local, as distinct from an interstate activity, or if the tax was exacted before interstate movement had begun or after it had come to an end. Taxes were sustained when they were imposed on in-state production or manufacture of goods, in-state sales and business operations, and property that had its situs in the state. The states also could

192. The truck weight regulation was prescribed by four other states, id. at 182; the width limitation was unique to South Carolina, id. at 184. For other cases upholding state safety regulations affecting interstate commerce, see Sproles v. Binford, 286 U.S. 374 (1932) (truck size and load limits); Morris v. Duby, 274 U.S. 135 (1927) (truck load limit); Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912) (telegraph wires).

The Barnwell Court also emphasized deference to legislative judgment in matters of safety regulation, notwithstanding the fact that the regulation affected interstate commerce: "[t]he judicial function, under the commerce clause, as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." 303 U.S. at 190.

193. See Kelly v. Washington, 302 U.S. 1 (1937) (inspection of vessels not subject to inspection under federal law); Mintz v. Baldwin, 289 U.S. (1933) (ban on importation of cattle unless certified to be free from Bang's Disease); Turner v. Maryland, 107 US. 38 (1883) (tobacco inspection).


impose "license taxes" on the local business of foreign corporations, and on brokers and peddlers selling in the state. The Court, however, found invalid taxes on the "privilege of engaging in interstate commerce," taxes directly imposed on interstate transportation or an instrumentality of interstate transportation, and taxes on interstate transactions, such as a tax on a purely interstate sale. With respect to taxes on the income of foreign corporations,


200. See McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940); Bingaman v. Golden Eagle W. Lines, 297 U.S. 626 (1936); Henson & Randolph v. Kentucky, 279 U.S. 245 (1929); Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906); Pickard v. Pullman S. Car Co., 117 U.S. 34 (1886); Moran v. City of New Orleans, 112 U.S. 69 (1884); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1873); St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1870). See also Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U.S. 158 (1933), where a tax on the entire fleet of tank cars used by a foreign corporation to transport its products from its factory in the taxing state to other states was held unconstitutional because only a small percentage of the individual cars were in the taxing state on a daily average. The Court found that the state was limited to taxing its proper share of the cars, as measured by the number of cars which on the average were physically present in the taxing state. Similarly, in Ingels v. Morf, 300 U.S. 290 (1937), a state permit fee as applied to an interstate motor carrier was held unconstitutional, because the amount of the fee was found excessive in relation to the carrier's use of the state's highways.

201. See Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650 (1936); Texas Co. v. Brown, 258 U.S. 466 (1922); Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921). In McLeod v. Dilworth Co., 322 U.S. 327 (1944), the Court applied this principle to hold unconstitutional Arkansas' application of its sales tax to interstate sales by Arkansas buyers from Tennessee sellers. The Tennessee sellers had solicited orders in Arkansas by sending in traveling salesmen,
the Court upheld net income taxes on the corporation's intrastate business,\textsuperscript{202} and gross income taxes if clearly apportioned to the corporation's in-state activity, such as a tax on a railroad's gross income based on a comparison of the railroad's mileage in the state to its total mileage.\textsuperscript{203} On the whole, because it frequently was possible to find a local activity, distinct from interstate activity, on which the tax was imposed, or to exact the tax before interstate movement had begun or after it had ended, during this period the negative commerce clause did not place too great a restriction on the power of the states to tax entities engaged in interstate commerce.

The Court applied the allocation of power approach to determine the validity of the challenged regulation or tax only when the regulation or tax was nondiscriminatory. Independently of this approach, however, the Court invoked the nondiscrimination principle to invalidate \textit{all} regulation or taxation that expressly or in practical effect discriminated against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.

The leading case setting forth the nondiscrimination principle under the negative commerce clause is \textit{Welton v. Missouri}, decided and by making mail and telephone solicitations from Tennessee. The sellers had filled the orders by delivering the goods to carriers in Tennessee for delivery to the Arkansas buyers. \textit{McLeod}, and some of the other cases in the late 1930's and early 1940's invalidating state taxes, reflect the Court's approach to the permissibility of state taxation affecting interstate commerce during what, for purposes of our historical analysis, is the period after \textit{Southern Pacific}. \textit{See supra} note 141.


\textit{203. See} Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940); Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929); Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895); Cleveland, C., C. & St. L. Ry. v. Backus, 154 U.S. 439 (1894); Pullman's Palace Car Co. v. Hayward, 141 U.S. 36 (1891). Gross income taxes were also upheld when they were levied on the corporation's purely intrastate activity, \textit{see} Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940), and Pacific Tel. & Tel. Co. v. Tax Comm'n of Wash., 297 U.S. 403 (1936), or where they were found to be proportioned precisely to the corporation's intrastate activity in relation to its interstate activity, \textit{see} Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939). \textit{See also} Great N. Ry. v. Washington, 300 U.S. 154 (1937), where a tax based on a public utility's gross operating revenues was sustained as representing the reasonable cost of supervision and regulation.

The Court's decisions beginning in the late 1930's, invalidating unapportioned gross receipts taxes, will be discussed in the next section of this Article.
in 1875. Missouri required the payment of a license tax by peddlers who “deal in the selling of patent or other medicines, goods, wares, or merchandise . . . which are not the growth, produce, or manufacture of this State . . . .” No similar tax was required of peddlers selling goods grown, produced, or manufactured in Missouri. The Court characterized the tax as a tax on interstate commerce, since it applied only to goods brought into the state. Finding that the tax was beyond state power under the allocation of power approach, the Court held the tax unconstitutional. However, the Court also focused on the discrimination against interstate commerce that was effected by the tax, and held that such discrimination was unconstitutional. The Court specifically found the nondiscrimination principle to be a major historic purpose of the commerce clause, stating that, “[t]he very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation.” The Court also noted that the grant of the commerce power to Congress was deemed to protect property that entered the state “from any burdens imposed by reason of its foreign origin.”

Following Welton, the Court developed the nondiscrimination principle more precisely as an independent ground for invalidating state regulation and taxation. The nondiscrimination principle as

204. 91 U.S. 275 (1875). The nondiscrimination principle had been articulated earlier by the Court in Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868). In upholding a license tax on the sale of goods at auction, the Court emphasized that the tax did not discriminate against out-of-state goods, and stated: “But a law having such operation, would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void.” Id. at 140. This language was cited by the Court in Welton. 91 U.S. at 283. In Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871), the Court held invalid, under the privileges and immunities clause, a state law requiring an annual license for nonresidents selling goods manufactured out-of-state.

205. The Court recognized the difficulty in defining the point at which “the commercial power of the Federal Government over a commodity has ceased and the power of the state has commenced,” and stated that federal power continued “until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.” 91 U.S. at 282.

206. Id. at 279.

207. Id. at 280.

208. Id. at 282.

209. However, in Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887), the Court held that a state could not require a solicitor of orders for an interstate sale to secure a license or pay a license tax. Robbins subsequently was relied on to hold that the states could not regulate or tax a purely interstate transaction. See supra notes 186 & 191 and accompanying text. The license and tax required in Robbins, however, applied only to persons “not having a regularly licensed house of business in the Taxing District,” and thus should have been
an independent basis for invalidation is illustrated by *Guy v. Baltimore*, where the Court held unconstitutional a city's wharfage fee that applied only to vessels transporting out-of-state goods. The Court noted that it had upheld nondiscriminatory taxes applied to goods imported from other states. In those cases the Court emphasized that the tax fell equally on interstate and local commerce. The Court stated:

In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, 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.

As in *Welton*, the Court specifically related the nondiscrimination principle to the historical context of the affirmative grant of the commerce power to Congress. It noted that Congress had been granted the commerce power because of the "oppressed and degraded state" of commerce existing under the Articles of Confederation, and concluded that if discriminatory state legislation were not held unconstitutional, "it is easy to perceive how . . . the equality of commercial privileges secured by the Federal Constitution to citizens of the several states [could] be materially abridged and impaired." In retrospect, the Court was relating the affirmative grant of the commerce power to Congress to a right on the part of those engaged in interstate commerce and residents of other states to be free from state legislation discriminating against interstate commerce or out-of-state interests in favor of local commerce or in-state interests.

In *Minnesota v. Barber*, the Court extended the nondiscrimination principle to reach facially neutral laws that in practical operation discriminated against interstate commerce in favor of local commerce.

invalidated on the ground that it discriminated against interstate commerce in favor of local commerce. The Court subsequently explained *Robbins* on this basis. See Nipper v. Richmond, 327 U.S. 416, 423-26 (1946); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 55-57 (1940).
In that case the Court invalidated a Minnesota law requiring fresh meat sold in Minnesota to have been inspected by a Minnesota inspector within twenty-four hours of slaughter. The practical effect of the law was to prevent the sale in Minnesota of meat slaughtered in other states, and it was this effect that rendered the law unconstitutional.\(^{216}\) The Court made it clear that where the practical effect of a state regulation was to discriminate against interstate commerce in favor of local commerce, the regulation necessarily was violative of the negative commerce clause. As the Court stated:

> The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.\(^{217}\)

The Court also emphasized that Minnesota could prohibit the sale of all meat that it considered to be unfit for human consumption. It could not, however, establish an inspection scheme that in practical operation excluded from the Minnesota market meat slaughtered in other states.

In *Brimmer v. Rebman*,\(^{218}\) decided in 1891, the Court further explicated the nondiscrimination principle and focused on the discrimination between groups similarly situated except for their in-state and out-of-state location. There the Court invalidated a Virginia law requiring the postslaughter inspection in each county of meat that had been transported over one hundred miles from the place of slaughter. The practical effect of the law was to disadvantage sellers of meat that had been slaughtered more than one hundred miles from the place of sale, including meat slaughtered in other states. These sellers would have to pay a substantial inspection fee, while the sellers of meat slaughtered locally would not have to pay

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216. The Court noted that Minnesota could rely on inspections in the state of origin to insure that the meat had been slaughtered properly. *Id.* at 322-23.
217. *Id.* at 319.
218. 138 U.S. 78 (1891).
such a fee.\textsuperscript{219} As applied to sellers of meat slaughtered in other states, therefore, the resulting competitive disadvantage rendered the regulatory scheme violative of the negative commerce clause.\textsuperscript{220} The state tried to defend against the discrimination claim by arguing that the law also applied to Virginia sellers of meat slaughtered more than one hundred miles from the place of sale. The Court rejected this argument: Discrimination for negative commerce clause purposes consisted of putting out-of-state sellers of meat at a disadvantage in comparison with Virginia sellers, and it was irrelevant that some Virginia sellers were similarly disadvantaged.\textsuperscript{221}

The nondiscrimination principle was followed by the Court with complete consistency throughout this period and thereafter. Whenever the regulation or tax expressly or in practical effect discriminated against or disadvantaged interstate commerce in favor of local commerce, such as by expressly applying only to interstate commerce,\textsuperscript{222} embargoing the sale of local products outside of the state,\textsuperscript{223} prohibiting the entry of out-of-state products into the state,\textsuperscript{224} taxing enterprises engaged in interstate commerce differently from enterprises engaged in local commerce,\textsuperscript{225} or giving any kind of preference to local commerce or in-state interests over interstate commerce or

\textsuperscript{219} The state, of course, could require that all meat be certified as pure meat when sold regardless of where it had been slaughtered.

\textsuperscript{220} As the Court stated:

The owners of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms of 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.

138 U.S. at 82.

\textsuperscript{221} \textit{Id.} at 83. In \textit{Dean Milk}, the Court relied on this part of the \textit{Brimmer} holding to support its conclusion that it was constitutionally irrelevant that Wisconsin milk producers outside of Madison were also disadvantaged by the discriminatory inspection requirement. See \textit{supra} note 55.


\textsuperscript{223} See Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).


\textsuperscript{225} See Best Co. v. Maxwell, 311 U.S. 454 (1940); Bethlehem Motors Corp. v. Flynt, 256 U.S. 421 (1921); Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908).
out-of-state interests, it was held unconstitutional without further inquiry.

The nondiscrimination principle was expounded in Best & Co. v. Maxwell, where the Court invalidated a state tax applicable to sellers of retail goods by sample who were not "regular retail merchants in the state."

The commerce clause forbids discrimination, whether forthright or ingenuous. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. . . . The freedom of commerce which allows merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

The Court also made it clear that the nondiscrimination principle operated independently of the general allocation of power approach to the permissibility of state regulation or taxation affecting interstate commerce. Even though the regulation or tax otherwise would be constitutionally permissible as not constituting a regulation or taxation of interstate commerce itself, it was unconstitutional if it expressly or in practical operation discriminated against or disadvantaged interstate commerce in comparison with local commerce. As the Court stated in Baldwin v. G.A.F. Seelig, Inc., where it invalidated a New York law prohibiting the sale of milk bought outside the state at a price lower than the minimum price for purchases of similar milk in New York:

Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed

226. See Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).
227. In Scott v. Donald, 165 U.S. 58 (1897), South Carolina took over the purchase and sale of intoxicating liquors and discriminated in favor of local products. The Court held such discrimination to be unconstitutional. It would be upheld today, however, since the state when acting as purchaser can discriminate in favor of local products. See supra text accompanying notes 78-81.
228. 311 U.S. 454 (1940).
229. Id. at 455-57.
230. Id. at 456-57.
231. 294 U.S. 511 (1935).
purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.\textsuperscript{232}

The Court thus has consistently held, throughout this period and thereafter, that all discrimination against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests was violative of the negative commerce clause.

During this period, the Court also considered the power of Congress to authorize the states to enact what otherwise would be a constitutionally impermissible regulation or taxation of interstate commerce. After the Court held that the states could not prohibit the in-state sales of intoxicating liquors that had been shipped from out-of-state,\textsuperscript{233} Congress enacted the Wilson Act.\textsuperscript{234} This Act subjected intoxicating liquors, once transported into a state, to the operation of state prohibition laws. In \textit{In re Rahrer},\textsuperscript{235} the Court upheld the constitutionality of the Wilson Act, rejecting the contention that Congress had delegated its power to regulate interstate commerce to the states or that it had granted to the states a power denied to them under the Constitution. Rather, the Court reasoned, Congress had merely "removed an impediment to the enforcement of state laws" by allowing the regulation of liquor shipped into the state to be treated as a "local activity" as soon as the liquor arrived in the state.\textsuperscript{236}

The Wilson Act was not completely effective in enabling the states to enforce their prohibition laws, since it did not apply to sales of liquor that were purely interstate. The regulation of interstate liquor sales was held by the Court to be a regulation of interstate commerce itself and therefore beyond the states' power.\textsuperscript{237} Congress subsequently enacted the Webb-Kenyon Act,\textsuperscript{238} which absolutely prohibited the shipment of liquor into any state.

\textsuperscript{232} \textit{Id.} at 522.
\textsuperscript{233} \textit{See} Leisy \& Co. v. Hardin, 135 U.S. 100 (1890).
\textsuperscript{234} Ch. 728, 26 Stat. 313 (1890).
\textsuperscript{235} 140 U.S. 545 (1891).
\textsuperscript{236} \textit{Id.} at 564.
\textsuperscript{238} Ch. 90, 37 Stat. 699 (1913).
In *Clark Distilling Co. v. Western Maryland Railway Co.*,\(^{239}\) the Court sustained the constitutionality of the Webb-Kenyon Act on the ground that Congress had "conformed its regulation as to produce cooperation between the local and national forces of government."\(^{240}\) Although the Court's recognition of Congress' power to authorize what otherwise would be unconstitutional state regulation of interstate commerce was quite troubling to academic commentators of the period,\(^{241}\) it was not troubling to the Court. Thus, when the challenged state regulation or tax specifically was authorized by Congress, the negative commerce clause was completely inapplicable.\(^{242}\)

In summary, the "state of the law" from *Cooley* to *Southern Pacific* reflects the Court's general approach to the negative commerce clause as a restriction on state regulation and taxation in terms of allocation of power. The permissibility of a particular exercise of state regulatory or tax power depended on the Court's characterization of the nature of the regulation or tax. If it was characterized as a regulation or taxation of interstate commerce itself, it was deemed to constitute a "direct burden" on interstate commerce and was beyond the power of the states. If the regulation or tax was not characterized as a regulation or taxation of interstate commerce itself, it was deemed only to "affect" interstate commerce or to impose an "indirect burden" on interstate commerce and so was within the reserved general regulatory and taxation power of the states. But all regulation and taxation discriminating against or disadvantaging interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests was violative of the negative commerce clause. Congress, however, could expressly authorize what otherwise would be an impermissible regulation or taxation of interstate commerce.

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239. 242 U.S. 311 (1917).
240. *Id.* at 331. With the passage of the twenty-first amendment, the negative commerce clause no longer operated to impose any limitation on the power of the states to regulate the sale or distribution of liquor within the state. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964). However, the twenty-first amendment does not authorize discriminatory state regulation or taxation, notwithstanding that liquor is involved. See *Bacchus Imports v. Diaz*, 104 S. Ct. 3049 (1984).
241. The Court's recognition of Congress' power to authorize state regulation of interstate commerce gave rise to the "implied intention of Congress," as a conceptual justification for a negative aspect to the commerce clause. See infra notes 408-14 and accompanying text.
242. See supra notes 136-38 and accompanying text.
2. From Southern Pacific to the Advent of the Current Approach

a. The Development of the Balancing of Interests Approach

As the foregoing analysis indicates, in the years between Cooley and Southern Pacific the Court had developed a clearly defined approach to the constitutional permissibility of state regulation and taxation affecting interstate commerce. Its general approach was in terms of allocation of power, with the result depending on whether the challenged regulation or tax was characterized as a regulation or tax on interstate commerce itself. The difficulty in the application of that approach, which required the Court to characterize the nature of a great variety of regulatory and tax laws, made the negative commerce clause appear to be an uncertain area of constitutional law. There was no difficulty in the application of the nondiscrimination principle, which operated in tandem with the Court's general approach, since either the discrimination was express or the discriminatory effect of the regulation or tax was clear.

The allocation of power approach came under attack by Justice (later Chief Justice) Stone because of what he considered to be its "mechanical nature" and its failure to focus on the "inherent conflict" between state and national interests whenever state regulation affected interstate commerce. Justice Stone's views first

243. This conclusion is contrary to the general view of the academic commentators of an earlier period. See Dowling I, supra note 6, at 5-8; Shenton, supra note 6, at 160-62; Sholley, supra note 6, at 558-59; Stern, The Problems of Yesteryear—Commerce and Due Process, 4 Vand. L. Rev. 446, 451-52 (1951). The difference may be due to the fact that these commentators tended to focus on the doctrine and language of the Court's opinions, rather than on the actual approach that the Court was following and the results that were reached in the application of that approach.

244. See Milk Control Bd. v. Eisenberg Farm Prod., 306 U.S. 346, 352 (1939), where the Court stated: "These principles have guided judicial decision for more than a century. . . . The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse." The Court's use of the terms "direct burden," and "indirect burden" also may have caused confusion, if it was not realized that the Court was using these terms in a tautological rather than analytical sense. See supra notes 148-52 and accompanying text.

245. Justice Stone did not question the nondiscrimination principle as an independent ground for invalidating state regulation and taxation affecting interstate commerce. Academic commentators similarly took the nondiscrimination principle for granted or ignored it. Their concern was with the use of the negative commerce clause as a general limitation on state regulatory and taxation power and they contended that it should be employed to invalidate nondiscriminatory regulation and taxation as well. See Dowling I, supra note 6, at 16-17.
surfaced in a short dissent in the 1927 case of Di Santo v. Pennsylvania,\textsuperscript{246} where the Court held unconstitutional, as a regulation of interstate commerce, Pennsylvania’s attempt to license travel agents selling interstate transportation.\textsuperscript{247} He stated:

\begin{quote}
[T]he traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, 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 rather than any trustworthy formula by which it is reached.\textsuperscript{248} . . . [I]t seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.\textsuperscript{249}
\end{quote}

Justice Stone’s opinions in negative commerce clause cases following his Di Santo dissent increasingly referred to the matter of “national and state interests” and “burden” on interstate commerce.\textsuperscript{250} The Justice thereby proposed a balancing of interests approach instead of an allocation of power approach. Under the balancing approach, no regulation would be held to be unconstitutional solely on the ground that it was characterized as a regulation of interstate commerce itself. It only would be unconstitutional if the Court, “upon consideration of all the facts and circumstances,” con-

\begin{footnotesize}
\begin{enumerate}
\item[246.] 273 U.S. 34 (1927).
\item[247.] Di Santo was overruled in California v. Thompson, 313 U.S. 109 (1941).
\item[248.] 273 U.S. at 44 (Stone, J., dissenting). As we have pointed out previously, however, the Court was using these terms in a conclusive rather than analytical sense. The result described by the labels depended on the Court’s characterization of the nature of the regulation or tax. See supra notes 147-52 and accompanying text. What Justice Stone really objected to was the allocation of power approach and the characterization test that it employed.
\item[249.] 273 U.S. at 44.
\item[250.] See Duckworth v. Arkansas, 314 U.S. 390 (1941); California v. Thompson, 313 U.S. 109 (1941).
\end{enumerate}
\end{footnotesize}
cluded that the regulation "infringe[d] the national interest in maintaining the freedom of commerce" across state lines.\footnote{Thompson, 313 U.S. at 116.} Conversely, no regulation would be held constitutional solely on the ground that its incidence fell on local activity, distinct from interstate activity. For example, as previously discussed, safety regulations almost invariably had been upheld. They were considered to involve identifiable local activity, such as the use of the state's highways, and thus were not characterized as a "direct" regulation of interstate commerce. Under Justice Stone's proposed approach, a safety regulation could be held to be unconstitutional because of its "actual effect on the flow of commerce."\footnote{Di Santo, 273 U.S. at 44.} Academic support for a balancing approach to replace the allocation of power approach came from Professor Dowling,\footnote{See Dowling II, supra note 6.} and looked to a conceptual justification for a negative aspect to the commerce power. Insofar as the Court had attempted to state a conceptual justification for a negative aspect to the commerce clause which would support the allocation of power approach, it was the affirmative grant of the commerce power to Congress that by its own force operated to diminish the states' exercise of the reserved general regulatory and taxation power.\footnote{See supra notes 143-52 and accompanying text.} To the academic commentators, this justification seemed to be inconsistent with the Court's position that Congress could expressly authorize the states to undertake what otherwise would be an impermissible regulation or taxation of interstate commerce.\footnote{See Bikle, supra note 6, at 209-13; Dowling II, supra note 6, at 25-26; Powell, supra note 6, at 115-18.} Dowling and others resolved this seeming inconsistency by concluding that the conceptual justification for a negative aspect to the commerce clause was not based on any notion of a diminution of state power by the affirmative grant of the commerce power to Congress, but on the "implied intention of Congress."\footnote{See supra note 255.} According to Dowling, the Court had imposed restrictions on the power of the state to regulate and tax interstate commerce because Congress had "impliedly intended" that such restrictions be imposed. In his view, this conclusion followed from the Court's holdings in In re Raher\footnote{140 U.S. 545 (1891).} and Clark Distilling Co. v. Western Maryland Railway Co.,\footnote{242 U.S. 311 (1917).} that Congress could expressly authorize the states to enact what otherwise would be an impermissible regulation or taxation of
interstate commerce, and from the fact that Congress, in the affirmative exercise of the commerce power, could prohibit or preempt regulation otherwise within the states' power. Congress, therefore, could supersede state action in matters that had been characterized as "local" under the allocation of power approach and permit it in matters that had been characterized as "interstate" under that approach. According to Dowling, since it would be unthinkable that Congress could authorize the states to do something that had been held by the Court to be unconstitutional, whenever the Court invalidated a state regulation or tax on the basis of the commerce clause, the Court was "effectuating the will of Congress and not the commerce clause per se." 

Once having established that the conceptual justification for a negative aspect to the commerce clause was the "implied intention" of Congress, Dowling proceeded to set forth an operational test by which this "implied intention" could be ascertained by the Court: "[I]n the absence of affirmative consent a Congressional negative will be presumed in the courts against state action which in its effect upon interstate commerce constitutes an unreasonable interference with national interests, the presumption being rebuttable at the pleasure of Congress." In order to determine whether the state action "constitutes an unreasonable interference with national interests," the Court would have to engage in a "deliberate balancing of national and local interests." Such an approach, said Dowling, "would provide flexibility in the adjustment and accommodation of national and state interests, at the same time preserving the judicial and amplifying the legislative function." While the Court would

259. Dowling II, supra note 6, at 6.
260. Id. at 18-19. In support of the "theory of the implied will of Congress," Dowling cited a footnote in Justice Stone's opinion in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 479 n.1 (1939). In the course of discussing the significance of congressional silence with respect to whether the states should be able to tax the salaries of employees of a federal agency, Justice Stone stated: The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them the authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority.

According to Dowling, "[n]o clearer statement of the implied will of Congress appears in the Reports." Dowling II, supra note 6, at 18.
261. Dowling II, supra note 6, at 20.
262. Id. at 21.
263. Id. at 23.
be making the determination as to the permissibility of state regulation or taxation in the first instance, Congress would have the final say. At all times, Congress would be exercising the commerce power, expressly or impliedly, to determine the permissibility of state regulation or taxation affecting interstate commerce.264

Thus, Chief Justice Stone and Professor Dowling were advocating the substitution of a balancing of interests approach for the allocation of power approach that the Court had been following since the time of Cooley.265 In the 1943 case of Parker v. Brown,266 Justice Stone succeeded in putting the balancing approach on a par with the allocation of power approach. At issue in that case was a California price-fixing scheme for the marketing of raisins, the major part of which were destined for interstate commerce. Price regulation imposed by the state of production before the products left the state had long been considered to be the regulation of local activity rather than the regulation of interstate commerce for negative commerce clause purposes. Justice Stone began by upholding the regulation under what he referred to as "the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold or shipped out of it."267

He then went on to set forth the balancing test that he had been advocating ever since his Di Santo268 dissent:

But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce,269 the reconciliation of the power thus granted with that reserved to the state is to be attained

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264. Id.
265. As pointed out previously, Stone did not question the nondiscrimination principle as an independent ground for invalidating state regulation and taxation. See supra note 245. While Dowling vehemently maintained that the prohibitions of the negative commerce clause should not be limited to discrimination against interstate commerce, he did not deal specifically with discrimination in his development of the balancing approach. Dowling II, supra note 6, at 16-17.
266. 317 U.S. 341 (1943).
267. Id. at 360.
269. Under the allocation of power approach of Di Santo, if a state regulation also operated as a regulation of interstate commerce it would be held unconstitutional. Id. at 44.
by the accomodation of the competing demands of the state and national interests involved.\textsuperscript{270}

At this point Justice Stone undertook a considerable amount of "revisionism" of the Court's prior negative commerce clause decisions. Citing cases where state regulations had been upheld, Stone stated:

Such regulations by the state are to be sustained, not because they are "indirect" rather than "direct,"\textsuperscript{271} . . . not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations.\textsuperscript{272} But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principle objects sought to be secured by the Commerce Clause.\textsuperscript{273}

If this was the basis for the Court's decisions in those cases, no indication to that effect will be found in the Court's opinions, including the \textit{Barnwell} opinion which was authored by Stone himself just a few years before.\textsuperscript{274}

\textbf{b. The Balancing of Interests Approach in the Regulation Area: \textit{Southern Pacific} and Thereafter}

It was the decision in \textit{Southern Pacific}\textsuperscript{275} which saw the Court unqualifiedly adopt the balancing of interests approach in the reg-

\begin{itemize}
\item \textsuperscript{270} 317 U.S. at 362.
\item \textsuperscript{271} As we have emphasized repeatedly, the Court was using the terms, "indirect," and "direct," only in a tautological sense.
\item \textsuperscript{272} Again, this represented a conclusion.
\item \textsuperscript{273} 317 U.S. at 362-63.
\item \textsuperscript{274} South Carolina v. \textit{Barnwell Bros., Inc.}, 303 U.S. 177 (1938). In \textit{Barnwell}, Stone emphasized deference to legislative judgment in matters of safety regulation, \textit{see supra} note 192, and did not speak at all about any need to accommodate conflicting state and national interests. 303 U.S. at 190.
\item \textsuperscript{275} 325 U.S. 761 (1945).
\end{itemize}
ulation area and, unlike its decision in *Parker v. Brown*, invalidate the challenged state regulation as constituting an "undue burden" on interstate commerce. *Southern Pacific* is also remarkable in that the Court invalidated a state safety regulation dealing with the length of freight trains in the face of a virtually unbroken line of precedents sustaining such state safety regulations against negative commerce clause challenges.\(^{276}\)

Writing for the Court, Chief Justice Stone began by downplaying the significance of the conceptual justification for a negative aspect to the commerce clause that had so concerned Dowling and other academic commentators. Justice Stone stated simply: "Whether or not this long recognized distribution of power between the national and state governments is predicated upon the implications of the commerce clause itself... or upon the presumed intention of Congress, where Congress has not spoken... the result is the same."\(^{277}\) Stone then continued the "revisionism" he had begun in *Parker v. Brown*, by implying that the balancing of interests approach was merely a refinement of the approach that the Court had been following since *Cooley*. Referring to the "infinite variety of cases in which regulation of local matters may also operate as a regulation of commerce," he maintained that in those cases, "reconciliation of the conflicting claims of state and national power [was] to be attained only by some appraisal and accommodation of the competing demands of state and national interests involved."\(^{278}\) Thus, Stone concluded, "[f]or a hundred years it has been accepted constitutional doctrine... that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."\(^{279}\)

Justice Stone then considered the constitutionality of the Arizona train limit regulation under the balancing of interests approach. In deciding whether that regulation was permissible, Stone found:

matters for ultimate determination are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce

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\(^{276}\) See supra notes 188-92 and accompanying text.

\(^{277}\) 325 U.S. at 768 (citations omitted).

\(^{278}\) Id. at 768-69.

\(^{279}\) Id. at 769.
and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference. 280

After extensively reviewing the facts and the findings of the state trial court, Justice Stone concluded, "'[h]ere examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail.' 281

In a strong dissent, Justice Black stated:

There have been many sharp divisions of this Court concerning its authority, in the absence of congressional enactment, to invalidate state laws as violating the Commerce Clause. 282 That discussion need not be renewed here, because even the broadest exponents of judicial power in this field have not heretofore expressed doubt as to a state's power, absent a paramount congressional declaration, to regulate interstate trains in the interest of safety. 283

If there was a need for uniform regulation of train length, the constitutional remedy, according to Justice Black, was in the affirmative exercise of the commerce power of Congress, not in the invalidation of state regulation by the Court on the ground that it "unduly burdened" interstate commerce. 284

280. Id. at 770-71.
281. Id. at 783-84.
282. It appears that Justice Black, too, was engaging in a bit of "revisionism" here. The disagreement among the members of the Court was not over the Court's authority to invalidate state laws as violative of the negative commerce clause, but over the application of the Court's allocation of power approach to the cases coming before it for decision. Chief Justice Stone was correct in his statement that, ever since the time of Cooley, the authority of the Court to invalidate state laws under the negative commerce clause had not been questioned. See 325 U.S. at 769.
283. Id. at 790 (Black, J., dissenting). Justice Black discussed the Court's opinion in Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914), where Justice Hughes, speaking for the Court, referred to "the settled principle that, in the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce." Id. at 291.
284. Justice Black also dealt with Justice Stone's concern for "uniformity" in regulation, with reference to Atlantic Coast Line, where Justice Hughes stated that, if there was a need for uniformity, "That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient." 325 U.S. at 791.
Thus, in Southern Pacific, despite Chief Justice Stone's effort at "judicial revisionism," the Court abandoned the allocation of power approach in the regulation area and adopted in its stead an approach based on a balancing of competing state and federal interests. Under this balancing of interests approach, the analysis in determining the permissibility of state regulation affecting interstate commerce would not be based on a characterization of the nature of the regulation, but on an appraisal of the "competing demands of state and national interests." When, as in Southern Pacific, the Court concluded that the regulation did little to advance the asserted state interest, and operated to "obstruct the free flow of commerce," the regulation would be found to impose an "undue burden" on interstate commerce and would be held to be unconstitutional.

Under the balancing of interests approach, the emphasis was on the Court's role as the "final arbiter of the competing demands of state and national interests," and the implication was that state regulation would be invalidated when the Court concluded that such regulation imposed an "undue burden" on interstate commerce. However, the years after Southern Pacific saw the Court in its application of this approach generally sustaining nondiscriminatory regulation while continuing to invalidate all regulation that expressly or in practical effect discriminated against interstate commerce or out-of-state interests in favor of local commerce or in-state interests. Except for the racial segregation case of Morgan v. Virginia, and the transportation case of Bibb v. Navajo Freight Lines, from the time of Southern Pacific to the advent of the current approach, all nondiscriminatory state regulation was sustained against negative commerce clause challenges. Among the state regulations sustained despite the claim that they imposed an "undue burden" on interstate commerce.

285. Id. at 769.
286. As Professor Tushnet has noted, the balancing approach of Southern Pacific is similar to a due process analysis of the validity of economic regulation. Tushnet, supra note 4, at 141-47.
287. 328 U.S. 373 (1946). See supra note 85. In Edwards v. California, 314 U.S. 160 (1941), the Court relied on the negative commerce clause to strike down a California law that prohibited bringing an indigent person into the state. Four Justices found that this prohibition violated the privileges and immunities clause of the fourteenth amendment. Id. at 177-86 (separate concurrences). Today, however, such a prohibition would be held unconstitutional on the ground that it directly interfered with the constitutional right of interstate travel. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (statute denying welfare benefits to indigents residing within the jurisdiction for less than one year subject to strict scrutiny because it interferes with the indigent's right of interstate movement, and violates the equal protection clause).
commerce, were regulations prohibiting racial discrimination by entities engaged in interstate commerce;\textsuperscript{289} regulations prohibiting advertising on vehicles, many of which were used in interstate commerce, and by a radio station broadcasting in interstate commerce;\textsuperscript{290} an ordinance prohibiting door-to-door solicitation as applied to solicitors for national magazines;\textsuperscript{291} state licensing and price regulation of pipeline companies selling natural gas in interstate commerce;\textsuperscript{292} state licensing of vehicles engaged in interstate transportation;\textsuperscript{293} application of a smoke abatement ordinance to a vessel engaged in interstate commerce;\textsuperscript{294} and state regulation of liquor pricing based on prices at which liquor was sold to wholesalers and retailers in other states.\textsuperscript{295}

In \textit{Bibb}, the Court held that an Illinois law requiring the use of contour mudflaps instead of straight mudflaps was unconstitutional as applied to trucks engaged in interstate commerce.\textsuperscript{296} Noting that all other states permitted the use of straight mudflaps, and the neighboring state of Arkansas required their use, and finding that the safety advantage of contour mudflaps over straight mudflaps was "dubious at best," the Court concluded that, "[t]he heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems to us to pass the permissible limits even for safety regulations."\textsuperscript{297} The Court's 1968 decision in \textit{Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. R.R.},\textsuperscript{298} however, appeared to limit sharply the use of the "undue burden" analysis to invalidate nondiscriminatory state safety regulation. The Court upheld the constitutionality of an Arkansas "full crew" law despite the lower court's conclusion that the safety benefits of such laws were "negligible" and that compliance by the railroads substantially increased the cost of interstate railroad operations.\textsuperscript{299} Justice Black, who had dissented in \textit{Southern Pacific}, authored the Court's opinion,

\textsuperscript{294} See Huron Cement Co. v. Detroit, 362 U.S. 440 (1960).
\textsuperscript{296} 359 U.S. at 529.
\textsuperscript{297} Id. at 550.
\textsuperscript{298} 393 U.S. 129 (1968).
\textsuperscript{299} Id. at 143-44.
and in response to the finding of the lower court, stated: "[w]e think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." While Justice Black distinguished the facts of Southern Pacific from those of Bibb, his analysis in Brotherhood of Locomotive Firemen leaves little room for invalidation of state safety regulations on "undue burden" grounds. The results in the later transportation cases of Raymond and Kassell can be explained under the nondiscrimination principle.

During this period, the Court continued to invalidate all discriminatory state regulation. In addition to Dean Milk and Hood, discussed earlier, the Court applied the nondiscrimination principle in Polar Ice Cream & Creamery Co. v. Andrews, to invalidate a Florida scheme of milk regulation that had the effect of requiring Florida milk distributors to purchase a substantial portion of their milk from Florida producers. The Court noted that part of the Florida regulatory scheme was invalid as a "burden on interstate commerce" because it reserved a substantial share of the Florida milk market to local producers. The Court thus applied the nondiscrimination principle within the framework of its articulated balancing of interests approach. When the challenged regulation was found to be discriminatory, however, no balancing was performed and the regulation was held to be unconstitutional.

300. Id. at 136. For older cases upholding the constitutionality of the Arkansas "full crew" law see supra note 189. In an earlier version of Brotherhood of Locomotive Firemen, 382 U.S. 423 (1966), the Court rejected the claim that the "full crew" law, which exempted railroads with less than 100 miles of tracks, improperly discriminated against interstate commerce. The effect of the exemption was that none of the intrastate railroads were subject to the law, while most interstate railroads were. However, since the classification was based on miles traveled, it did not have the effect of discriminating against interstate commerce because of its out-of-state origin, and the law was thus not violative of the negative commerce clause.

301. 393 U.S. at 139-40.

302. See Tushnet, supra note 6, at 144. Professor Tushnet maintains, however, that the Court has not accepted Justice Black's analysis fully.

303. See supra notes 86-95 and accompanying text.

304. See supra notes 43 & 55-57 and accompanying text.

305. 375 U.S. 361 (1964).

306. The Court held that Baldwin v. G.A.F. Seelig, Inc. and Dean Milk controlled. Id. at 373.

307. Id. at 375. The discrimination effected by the scheme of regulation was against milk producers in other states.

308. In Mullaney v. Anderson, 342 U.S. 415 (1952), a state law requiring a $5 license fee for resident commercial fishermen, and a $50 license fee for nonresident commercial fishermen, was held to be violative of the privileges and
In practice, therefore, in the period after *Southern Pacific*, the balancing of interests approach did not operate to interfere significantly with the power of the states to impose nondiscriminatory regulations on interstate commerce. The "pure burden" analysis employed by the Court in *Southern Pacific* and *Bibb* did not result in the invalidation of nondiscriminatory regulations in any other cases, and it seems clear that, in practice, the Court was not engaging in "an appraisal of the competing demands of state and national interests." In the application of its new approach to the permissibility of state regulation affecting interstate commerce, the Court had in effect expanded the power of the states to regulate interstate commerce, so long as the regulation was nondiscriminatory. Where the regulation was discriminatory, expressly or in its essential effect, the Court continued to hold it unconstitutional.

c. The Approach in the Taxation Area

A different development took place in the taxation area. The Court did not adopt the balancing of interests approach of *Southern Pacific* when dealing with the permissibility of state taxation affecting interstate commerce. Doctrinally, it continued to follow the allocation of power approach, with the result often depending on the Court's characterization of the nature of the tax in question and on the ability to identify a local activity, distinct from interstate activity, on which the incidence of the tax fell. But the Court's application of the allocation of power approach in the taxation area during this time was influenced by its view that the commerce clause embodied a free trade principle, so as to require the invalidation of all state taxation schemes that "had the effect of impeding the free flow of trade between states." The allocation of power approach in the taxation area, as applied by the Court with reference to the free trade principle, meant that nondiscriminatory taxation, like nondiscriminatory regulation under the balancing of interests approach,

immunities clause of art. IV, § 2. It also could have been held to be violative of the negative commerce clause, since it had the practical effect of discriminating against interstate commerce in favor of local commerce. See infra notes 527-29 and accompanying text.

309. But see Morgan v. Virginia, 328 U.S. 373 (1946), discussed supra note 85.

310. This is probably not what Chief Justice Stone had intended when he asserted that the role of the Court was that of a "final arbiter of the competing demands of state and national interests." *Southern Pacific*, 325 U.S. at 769. Since Stone died in 1946, he had no opportunity to influence the Court's application of the balancing of interests approach that had been adopted in *Southern Pacific*.

could be invalidated if it had the effect of imposing an "undue burden" on interstate commerce. Invocation of the free trade principle in the taxation area also gave rise to a strong concern about the possibility of "multiple taxation" of interstate commerce, which was deemed to be inconsistent with the free trade principle.\footnote{312}

As discussed earlier, under the allocation of power approach, as applied by the Court prior to this time, the negative commerce clause did not place too great a restriction on the power of the state to impose nondiscriminatory taxes on entities engaged in interstate commerce.\footnote{313} This was because it frequently was possible to find a local activity, distinct from interstate activity, on which the tax was imposed, and to exact the tax before interstate movement had begun or after it had come to an end.\footnote{314} Beginning in the late 1930's, however, the Court, influenced by the newly found free trade principle, became more disposed to invalidate state taxation schemes as applied to entities engaged in interstate commerce. These state taxation schemes tended to be more complex and often were based on the gross receipts of the entity subject to the tax. Entities engaged in interstate commerce challenged the application of state taxation schemes to their activity on both negative commerce clause and due process grounds, and these grounds of challenge tended to merge.\footnote{315} The emphasis, however, was on the negative commerce clause and on the free trade principle that it was seen as embodying.

One consequence of the Court's invocation of the free trade principle was that all gross receipts taxes imposed on an entity engaged in interstate commerce were held to be unconstitutional unless they were shown to be apportioned clearly to the entity's identified local activity.\footnote{316} It did not matter that the effect of the tax

\footnote{312}{It was also contended that "multiple taxation" was discriminatory because local commerce was not exposed to "multiple taxation." \textit{See} Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 439-40 (1939) (Stone, C.J.). However, entities engaged in interstate commerce were exposed to "multiple taxation" only because they were doing business in more than one state. Within each taxing state, local commerce and interstate commerce were treated exactly the same, so there was no "discrimination" for negative commerce clause purposes. It also may be noted that "multiple taxation" is not violative of due process so long as each of the taxing states has conferred a benefit on the subject of the tax. \textit{See} State Tax Comm'n v. Aldrich, 316 U.S. 174, 177-82 (1941).}

\footnote{313}{\textit{See supra} notes 194-203 and accompanying text.}

\footnote{314}{\textit{See supra} notes 194-98 and accompanying text.}

\footnote{315}{The Court took the position that the tests of validity under the negative commerce clause and under the due process clause were similar. \textit{See} National Bellas Hess, Inc. v. Illinois Dep't of Revenue, 386 U.S. 753, 756 (1967).}

\footnote{316}{\textit{See} Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948);
was nondiscriminatory in the sense that its incidence fell equally on entities engaged in purely local commerce.\textsuperscript{317} The possibility that the entity engaged in interstate commerce would be subject to "multiple taxation" on gross receipts arising out of interstate activity was sufficient to render the tax unconstitutional. Chief Justice Stone and Justice Frankfurter were in the forefront of the articulation of the free trade principle; this was apparent in their opinions holding unconstitutional unapportioned gross receipts taxes.

In \textit{Gwin, White & Prince, Inc. v. Henneford},\textsuperscript{318} Chief Justice Stone, writing for the Court, stated that an unapportioned gross receipts tax was unconstitutional because it:

\begin{quote}
burdens commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.\textsuperscript{319}
\end{quote}

Justice Stone related the unconstitutionality of the potential double taxation to the free trade principle that he saw as being embodied in the negative commerce clause:

\begin{quote}
Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not in the contingency that some
\end{quote}


\textsuperscript{318} 305 U.S. 434 (1939).

\textsuperscript{319} \textit{Id.} at 439.
other state may first have subjected the commerce to a like burden.\footnote{320}

Under this view, an unapportioned gross receipts tax was unconstitutional per se, notwithstanding that the entity subject to the tax was engaged in substantial activities in the taxing state, and that the amount of the tax was reasonable in relation to the extent of the entity's activity in the taxing state. A tax imposed on the gross receipts of an entity engaged in interstate commerce, subjecting the entity to the possibility of multiple taxation on its interstate activities, was deemed to be inconsistent with the free trade principle and thus rendered the tax unconstitutional.

In \textit{Freeman v. Hewitt},\footnote{321} the Court invalidated a gross receipts tax on the interstate sale of securities. Justice Frankfurter, writing for the Court, emphasized that a tax on an interstate transaction could be unconstitutional, notwithstanding that a similar tax was imposed on local transactions, thereby sharply distinguishing the free trade principle from the nondiscrimination principle. He stated:

In two recent cases [\textit{Southern Pacific} and \textit{Morgan}] we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference among the States. \ldots This limitation on State power, as the \textit{Morgan} case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. \ldots But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

\ldots Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. \ldots It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate

\footnote{320. \textit{Id.} at 440.}
\footnote{321. 329 U.S. 249 (1946).}
commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in interstate commerce.\textsuperscript{322}

According to Frankfurter, the tax on the interstate sale of securities was unconstitutional because it was "a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."\textsuperscript{323}

The concern with the possibility of multiple taxation of entities engaged in interstate commerce was extended to \textit{ad valorem} property taxes. In \textit{Standard Oil Co. v. Peck},\textsuperscript{324} the Court invalidated, as violative of due process, Ohio's imposition of an \textit{ad valorem} property tax on vessels owned by an Ohio corporation. Since the vessels were used outside of the state most of the time, the Court held that the tax had to be apportioned strictly according to the vessels' use in Ohio.\textsuperscript{325} In \textit{Central Railroad Co. v. Pennsylvania},\textsuperscript{326} the Court held that Pennsylvania's unapportioned tax on the value of freight cars used in runs between Pennsylvania and New Jersey was unconstitutional because New Jersey also could impose a tax on such cars, leading to multiple taxation of interstate operations.\textsuperscript{327}

The Court's invocation of the free trade principle in the taxation area may explain its continued adherence to the allocation of power approach in that area, although it had converted to a balancing of interests approach in the regulation area. A tax on interstate commerce itself would be inconsistent with the free trade principle, which was deemed to confer immunity from such taxation on interstate commerce. The Court continued to follow the allocation of power

\begin{itemize}
\item \textsuperscript{322} \textit{Id.} at 252-54.
\item \textsuperscript{323} \textit{Id.} at 256.
\item \textsuperscript{324} 342 U.S. 382 (1952).
\item \textsuperscript{325} \textit{Id.} at 384.
\item \textsuperscript{326} 370 U.S. 607 (1962).
\item \textsuperscript{327} \textit{Id.} at 613. The tax was sustained as applied to freight cars used on runs to other states, because there was no showing that any other state had acquired taxing jurisdiction over those cars. \textit{Id.} at 614. In \textit{Ott v. Mississippi Valley Barge Line Co.}, 336 U.S. 169 (1949), the Court upheld an \textit{ad valorem} property tax on vessels, based on the ratio between the total number of miles of the carrier's lines in the state and the total number of miles of the entire line. \textit{See also Norfolk & Western Ry. v. Missouri State Tax Comm'n}, 390 U.S. 317 (1968), where the Court found unconstitutional a state's use of a mileage formula, to impose an \textit{ad valorem} property tax on a railroad's rolling stock, which produced a distorted result in terms of a difference between assessed value and real value.
\end{itemize}
approach in the taxation area and, totally apart from the matter of proper apportionment, a tax could be invalidated depending on the form that the tax took and the activity on which it fell. If the tax was characterized as a tax on interstate commerce or on an interstate transaction it would be invalidated. The tax would be sustained where it was possible to identify a local activity on which the incidence of the tax fell, such as taxes on manufacturing, production or sales in the state, or taxes on property having a situs in the state.

The formalism of the Court's approach to the permissibility of state taxation affecting interstate commerce in the period after Southern Pacific is best illustrated by Spector Motor Service, Inc. v. O'Connor. In that case the Court struck down a Connecticut franchise tax as applied to an interstate motor freight carrier characterizing the tax as a tax "on the privilege of carrying on exclusively interstate transportation in the State," notwithstanding that the tax applied equally to entities engaged in intrastate commerce. The Court noted: "[e]ven though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so." Nor was it relevant that the tax was fairly apportioned to the carrier's local activity, and thus would have been sustained had it taken the form of a tax on the carrier's gross receipts, apportioned to the carrier's local


330. See Braniff Airways, Inc. v. Nebraska Bd. of Equalization & Assessment, 347 U.S. 590 (1954); Bode v. Barrett, 344 U.S. 583 (1953); City of Chicago v. Willett Co., 344 U.S. 574 (1953); Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950); Aero Mayflower Transit Co. v. Board of R.R. Comm'rs, 332 U.S. 495 (1947); Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947). If the property was used in other states, the tax had to be properly apportioned according to the use of the property in the taxing state. See supra notes 324-27 and accompanying text.

332. Id. at 608.
333. Id.
The Court found: "[t]he constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."335

_Michigan-Wisconsin Pipe Line Co. v. Calvert_,336 is another extreme example of how the Court's characterization of the nature of the particular tax was result-dispositive. A state tax on natural gas, measured by the volume of gas taken, was held unconstitutional as applied to the taking of gas from the outlet of an independent gasoline plant in the state for immediate shipment into interstate commerce. Although the tax applied equally to gas moving in intrastate and interstate commerce, it was found to be unconstitutional because its incidence did not fall on the production of the gas, but rather on its shipment into interstate commerce after production was complete.337 The Railway Express Agency cases338 epitomize the result-dispositive effect of the Court's characterization of the nature of a particular tax. There Virginia tried to obtain taxes from Railway Express Agency, which was doing substantial business in the state. In Virginia's first effort, the tax was characterized by the Court as a tax on "the privilege of engaging in interstate commerce," and thus was held to be unconstitutional.339 After Virginia revised the wording of the tax, labeling it a tax on intangible property in the form of "going concern" value as measured by the corporation's gross receipts from business in Virginia, the tax was sustained.340 As the Court subsequently recognized, there was not a real economic difference between the two taxes, and both impacted on Railway Express in exactly the same manner.341

The Court also had some difficulty in determining the circumstances under which the states could require an interstate seller to collect a use tax.342 It upheld the state's power to require collection of the use tax where orders for the product were solicited in-state by brokers and wholesalers,343 and where aviation fuel purchased

334. Id. at 609-10.
335. Id. at 609.
337. Id. at 169. The Court again noted the possibility of "multiple taxation.”
342. The Court had no difficulty in concluding that an in-state seller could be required to collect the sales tax notwithstanding that the product was going to be shipped out-of-state. See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).
out-of-state was stored and loaded aboard aircraft in-state for use in interstate flights. However, it held that the use tax collection requirement was unconstitutional as applied to an out-of-state seller who made the sales in its out-of-state stores, although it advertised extensively in the taxing state, and an out-of-state mail order house that had made upwards of one million dollars in annual sales in the taxing state.

Throughout this period, the Court continued to invalidate all state taxation schemes that expressly or in practical effect discriminated against interstate commerce in favor of local commerce. In Nippert v. City of Richmond, the Court held unconstitutional the application of a municipal flat sum license tax as applied to a solicitor of orders for interstate sales. The license tax was unconstitutional.

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346. See National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). The Court used a combined commerce clause-due process analysis, noting that the commerce clause and due process claims were closely related and that the tests for determining a commerce clause and a due process violation in the area of state taxation affecting interstate commerce were similar. Id. at 756. In invalidating the use tax collection requirement, the Court stated that, "the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States Mail." Id. at 758. In his dissent, Justice Fortas pointed out that National Bellas Hess had made over $2 million in Illinois sales for the 15 months for which taxes were levied. He contended that,

[t]here should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient "nexus" to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions.

Id. at 761-62 (Fortas, J., dissenting).

In National Geographic Soc'y v. California Equalization Bd., 430 U.S. 551 (1977), the Court upheld a requirement that the Society collect California's use tax on mail order sales to California residents, mailed from the Society's Washington, D.C. office, in response to orders they mailed on forms the Society had distributed by mail announcements or in its magazine. In discussing National Bellas Hess and Miller Bros., the Court emphasized the lack of "contacts" between the out-of-state seller and the taxing state in those cases. In National Geographic by contrast, the Court noted that the Society maintained offices in California, and thus received a "benefit" from the taxing state. Id. at 558-62. If Miller Bros. and National Bellas Hess were to be followed today, it would be because of the lack of "nexus" between the out-of-state seller's activity and the taxing state, under the first element of the Complete Auto Transit test. The "nexus" requirement, as previously discussed, involves due process rather than negative commerce clause concerns. The negative commerce clause should not be seen as imposing any limits on the power of a state to require an out-of-state seller to collect the use tax on goods sold to residents of the taxing state.

347. 327 U.S. 416 (1946).
because the amount of the tax bore no relationship to the amount of the solicitor's sales in the city; the tax had to be paid by anyone who engaged in even a single act of solicitation.\textsuperscript{348} The Court focused on the practical effect of the tax and concluded that the effect was to disadvantage interstate commerce in comparison with local commerce. The Court stated:

the small operator particularly and more especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun. And this effect will be extended to more substantial and regular operators, particularly those whose product is of highly limited or special character and whose market in any single locality for that reason or others cannot be mined more than once in every so often.\textsuperscript{349}

The discriminatory effect of the tax on interstate commerce was aggravated by the fact that it was a municipal tax which, if sustained, could thereafter be imposed by all municipalities in the state, so that, "the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the state or the salesman who operates within a single community or only a few."\textsuperscript{350} While it was true that such a tax also could affect local solicitors adversely, the Court found it more likely to adversely affect out-of-state solicitors. The Court concluded that, "[t]he tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one."\textsuperscript{351}

\textsuperscript{348} The terms of the ordinance are set out in a footnote to the opinion. See 327 U.S. at 418-19 n.2.

\textsuperscript{349} Id. at 429.

\textsuperscript{350} Id. at 430.

\textsuperscript{351} Id. at 434. \textit{Nippert} may be compared with Breard v. Alexandria, 341 U.S. 622 (1951). In \textit{Nippert}, the Court noted the fact that out-of-state solicitors would be competing with local retail merchants, which was also true in \textit{Breard}. In \textit{Nippert}, however, the tax placed out-of-state solicitors at a competitive disadvantage in comparison to local retail merchants as a general proposition. In \textit{Breard}, by contrast, all solicitors, local and interstate, were placed at a competitive disadvantage in comparison to local retail merchants. The discrimination thus effected by the tax in \textit{Nippert} was against interstate commerce generally in comparison to local commerce, while the discrimination effected in \textit{Breard} was against solicitors generally in comparison to retail merchants. Thus, there was unconstitutional discrimination against interstate commerce for negative commerce clause purposes in \textit{Nippert}, while such discrimination was absent in \textit{Breard}. 
In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, a tax was applied to the solicitation of business for laundries not licensed in the state. Local laundries were subject to other taxes, but the effective per truck tax for local laundries was only eight dollars, in comparison to an effective per truck tax of fifty dollars for out-of-state laundries. The Court found that the effect of the tax was to discriminate against interstate commerce. In *West Point Wholesale Grocery Co. v. City of Opelika*, the city imposed a flat-sum privilege tax on wholesale firms delivering groceries to the city from points outside the city or state, while no comparable tax was imposed on local grocery firms. Since the practical effect of the tax was to discriminate against interstate commerce in favor of local commerce, as in *Dean Milk*, the tax was held unconstitutional, notwithstanding that it also disadvantaged some in-state grocery firms. In *Halliburton Oil Well Cementing Co. v. Reily*, the Court invalidated a Louisiana tax scheme which applied to certain transactions of an out-of-state user-manufacturer, but did not apply to the same transactions when carried on by an in-state user-manufacturer. The in-state user-manufacturer would not have to pay a sales tax on the transaction while the out-of-state user-manufacturer would have to pay a use tax on the transaction. The Court found: "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."

During this period, the Court's treatment of discriminatory taxes thus differed considerably from its treatment of nondiscriminatory taxes. Where the tax was nondiscriminatory, the court invoked the free trade principle and looked only to the form of the tax or the possibility of multiple taxation of interstate commerce. Where the claim was that the tax discriminated against interstate commerce in favor of local commerce, however, the Court focused on the effect of the tax in operation and, emphasizing the nondiscrimination principle rather than the free trade principle, continued to invalidate all taxation schemes that had the effect of discriminating against interstate commerce in favor of local commerce.

The number of cases involving challenges to state taxation affecting entities engaged in interstate commerce began to decline in the 1960's, and the early 1970's saw a perceptible change in the Court's view toward the permissibility of state taxation affecting

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355. *Id.* at 70.
356. This was particularly so during the latter part of the decade.
interstate commerce. Whereas, in 1972 the Court in *Evco v. Jones* invalidated per curiam an unapportioned gross receipts tax as applied to interstate sales of goods delivered to out-of-state buyers, in 1975 the Court in *Standard Pressed Steel v. Washington Revenue Department* upheld a Washington tax imposed upon a foreign corporation's gross receipts from interstate shipments to a buyer in the taxing state. *Standard Pressed Steel* is particularly significant in two respects. First, while the Court previously had invalidated unapportioned gross receipts taxes on the ground that they gave rise to a possibility of multiple taxation, in *Standard Pressed Steel* the Court found that the taxpayer had the burden of demonstrating that it was subject to the risk of multiple taxation, and that no such showing had been made. Second, the Court focused on the "fair relation" between the entity's activities in the taxing state and the imposition of the tax, concluding that the tax in question, in light of the extent of the entity's activities in Washington, bore a "reasonable relation to the protection and benefits conferred by the taxing State."

In *Colonial Pipeline Co. v. Traigle*, also decided in 1975, the Court upheld the application of Louisiana's franchise tax to an interstate carrier of liquified petroleum products. Although the carrier did no interstate business through Louisiana, it had employees there to inspect and maintain its pipeline, pumping stations, and related activities. The Court emphasized that the validity of the tax depended on whether the tax was "related to a corporation's local activities and [on whether] the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return." Since the tax applied to "operating incidences of activities

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357. See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707 (1972), where the Court upheld a municipal airport's $1 charge for each deplaning passenger. The Court emphasized that both intrastate and interstate flights were subject to the same charges and that the charges reflected a fair, if imperfect, approximation for the use of the facilities by those for whose benefit they were imposed.
358. 409 U.S. 91 (1972) (per curiam).
360. Standard sold aerospace fasteners to Boeing Company in Seattle, based on orders that Boeing sent to Standard's headquarters in Pennsylvania. These orders were filled by interstate shipments to Boeing in Seattle. Standard had one full-time employee in Washington whose job was to keep Standard aware of products that Boeing might use and to "keep track" of Boeing's use of Standard's products. Cf. General Motors Corp. v. Washington, 377 U.S. 436 (1964).
361. 419 U.S. at 563.
362. Id. at 562. The Court essentially employed a due process analysis.
363. 421 U.S. 100 (1975).
364. Id. at 108.
within Louisiana for which the State affords privileges and protections that constitutionally entitle Louisiana to exact a fairly apportioned and nondiscriminatory tax, the tax was upheld.

*Complete Auto Transit, Inc. v. Brady,* decided in 1977, was the culmination of the trend reflected in *Standard Pressed Steel* and *Colonial Pipeline.* The significance of *Complete Auto Transit* for this discussion, however, lies in the Court's articulation of a completely new approach toward permissible state taxation of interstate commerce. The *Complete Auto Transit* Court abandoned the allocation of power approach, with its emphasis on the characterization of the nature of the particular tax. As evidenced by the Court's decisions since *Complete Auto Transit,* it has abandoned reliance on the free trade principle to shield entities engaged in interstate commerce from the operation of nondiscriminatory state taxation. The current focus of the Court is on nondiscrimination and "fair relation," and all nondiscriminatory state taxation of interstate commerce will be sustained.

d. Congressional Authorization

In the period following *Southern Pacific,* the Court again affirmed the power of Congress to authorize the states to impose what otherwise would be a constitutionally impermissible regulation or taxation of interstate commerce. The leading case on this point is *Prudential Insurance Co. v. Benjamin,* which involved South Carolina's taxation of premiums received by foreign insurance companies in the state. No similar tax was required of South Carolina insurance companies. By the McCarran-Ferguson Act, Congress specifically provided: "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed 'to impose any barrier to the regulation or taxation of such business by the several States.'"

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365. *Id.* at 113. The Court distinguished *Spector* and the earlier *Railway Express* case on the ground that here the Louisiana legislature amended the law "purposefully to remove any basis of a levy upon the privilege of carrying on an interstate business and narrowly to confine the impost to one related to appellant's activities within the State in the corporate form." *Id.* at 113-14. Justice Stewart found this distinction to be "specious." *Id.* at 116. See generally Hellerstein, State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipeline, 61 VA. L. REV. 149 (1976).


367. *Spector* was specifically overruled. The Court stated, "[s]imply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned." *Id.* at 288-89.

368. "Fair relation" is a due process concern, as noted previously.


371. *Id.* § 1011.
The insurance companies argued that Congress could not constitutionally authorize the states to impose a discriminatory tax on foreign insurance companies. In response to this argument, the Court stated:

The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. . . .

This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective. Here both Congress and South Carolina have acted, and in complete coordination, to sustain the tax. . . .

In this light the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce clause, in letter or spirit, is presented.372

Thus, even when the regulation or tax otherwise would amount to constitutionally impermissible discrimination against interstate commerce, it could be specifically authorized by Congress and, on that basis, would be immune to negative commerce clause challenge.

3. The Court's Current Approach and Its Approach from an Historical Prespective: A Retrospective View

A retrospective view of the Court's approach to the negative commerce clause as a restriction on state regulatory and taxation power reveals two distinct patterns of institutional behavior, one of which has fluctuated dramatically, and one of which has demonstrated complete consistency from Cooley to the present time. The Court has had great institutional difficulty in dealing with the negative commerce clause as a general limitation on state regulatory and taxation power. In Cooley, the Court took the position that the affirmative

372. 328 U.S. at 434-36.
grant of the commerce power to Congress operated to diminish the
reserved regulatory and taxation power of the states whenever the
exercise of state power affected entities engaged in interstate com-
merce. The Court’s approach to the permissibility of state regulation
and taxation affecting interstate commerce thus was in terms of
allocation of power, and the constitutional result depended upon the
Court’s characterization of the nature of the challenged regulation
or tax. If it was characterized as a regulation or tax on interstate
commerce itself, it was deemed to impose a “direct burden” on
interstate commerce and was unconstitutional. If it was not so
characterized, it was sustained as being within the reserved regulatory
and taxation power of the states.373 In Southern Pacific, the Court
adopted a markedly different approach to the constitutionality of
state regulation affecting interstate commerce. Under this approach,
the constitutional permissibility of the regulation depended upon a
balancing of competing state and national interests, rather than upon
a characterization of the nature of the regulation. The Court would
balance the state interest advanced by the challenged regulation
against the national interest in the free flow of commerce across
state lines, and the regulation would be invalidated if it was found
to impose an “undue burden” on interstate commerce.374 The Court
did not appear to be concerned with a conceptual justification for
a negative aspect to the commerce clause, stating almost casually
that the justification could be found either in the diminution of state
regulatory power as a result of the affirmative grant of the commerce
power to Congress, or in the “implied intention” of Congress that
state regulatory power be restricted in matters where the exercise of
state power would impose an “undue burden” on interstate com-
merce.375

While the balancing of interests approach is the Court’s current
articulated approach to the permissibility of state regulation affecting
interstate commerce, the results reached in the application of that
approach in the years following Southern Pacific, up through the
present time, would indicate that a very different kind of approach
is being followed. With the exception of the transportation cases,
the more recent of which can be brought within the nondiscrimination
principle,376 and Edgar v. Mite Corp.,377 which can be explained on
full faith and credit grounds,378 the Court never has invalidated a

373. See supra notes 153-203 and accompanying text.
374. See supra notes 276-86 and accompanying text.
375. See Southern Pacific, 325 U.S. at 768.
376. See supra notes 86-95 and accompanying text.
378. See supra notes 97-98 and accompanying text.
state regulation on "undue burden" grounds, despite the adverse impact of the regulation on the "free flow of commerce." Conversely, where the Court has concluded that the essential effect of the regulation in practical operation was to discriminate against or disadvantage interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the Court has always invalidated the regulation. In terms of results, it thus would appear that the Court is not following the articulated balancing of interests approach, but instead is following an approach under which all nondiscriminatory state regulation is sustained and all discriminatory state regulation is invalidated. As far as results are concerned, the absence of balancing stands out sharply and thus there is a clear inconsistency between the Court's articulated approach and the results that the Court reaches. Again, in terms of results, the Court has come full circle from the allocation of power approach adopted in *Cooley*, to the point at which it will uphold virtually all nondiscriminatory state regulation against a negative commerce clause challenge.

In the taxation area, the Court's institutional behavior has fluctuated even more dramatically than in the regulation area. Here too, in terms of results, the Court now has reached the point where all nondiscriminatory state taxation affecting interstate commerce is likely to be upheld against a negative commerce clause challenge. While continuing to follow the allocation of power approach until its abandonment in *Complete Auto Transit*, the Court's application of that approach in the *Southern Pacific* era was influenced by the free trade principle, which the Court viewed as embodied in the negative commerce clause. The Court invalidated all unapportioned gross receipts taxes because of the possibility of multiple taxation of interstate commerce, and invalidated all taxes that, because of their form or the activity on which they fell, were characterized as a tax on interstate commerce itself. During the early 1970's, a perceptible change was apparent in the Court's view toward the permissibility of state taxation of entities engaged in interstate commerce, culminating in the Court's adoption of a completely new approach in *Complete Auto Transit*. The four element test of *Complete Auto Transit* focuses on the issue of nondiscrimination and the issue of "fair relation," which is a due process rather than a negative commerce clause concern. The Court's decisions after *Complete Auto Transit* make it clear that all nondiscriminatory state taxation of entities engaged in interstate commerce will likely be sustained.

379. See supra notes 312-68 and accompanying text.
380. See supra notes 112-17 and accompanying text.
Thus, the Court’s institutional behavior, and its articulated approach with respect to the negative commerce clause as a general limitation on state regulatory and taxation power, have fluctuated dramatically over the years. The Court never has adequately set forth a structurally-based conceptual justification for the negative commerce clause as a general restriction on state regulatory and taxation power. In terms of results, however, the Court’s institutional behavior has evolved to the point where, coming full circle from Cooley, it is now sustaining virtually all nondiscriminatory regulation and taxation against negative commerce clause challenge. On the other hand, whenever the essential effect of the regulation or tax has been to discriminate against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the Court has followed a completely consistent pattern of institutional behavior. From Cooley to the present time, all such regulation or taxation has been held to violate the negative commerce clause, except where the state was acting as market participant or where the particular state regulation or tax had been authorized specifically by Congress. The Court also has found and articulated a structurally-based conceptual justification for invalidating discriminatory state regulation and taxation, related to a major historical purpose of the commerce clause. Since a major purpose for the affirmative grant of the commerce clause power to Congress was to prevent the states from discriminating against interstate commerce or out-of-state interests in favor of local commerce or in-state interests, the Court has relied on the negative aspect of the commerce clause to invalidate all discriminatory regulation and taxation, even in the absence of congressional action. Thus, there has been a consistent pattern of institutional behavior, supported by a structurally-based conceptual justification, invalidating all discriminatory state regulation and taxation affecting interstate commerce.

Much can be learned from the Court’s institutional behavior with respect to the negative commerce clause as a restriction on state regulatory and taxation power. The Court has followed a consistent pattern of invalidating all discriminatory regulation and taxation, while its institutional behavior has fluctuated dramatically in regard to nondiscriminatory regulation and taxation. This dichotomy in behavior may be a strong indication that the negative commerce clause as a ban on discriminatory regulation and taxation is firmly rooted in constitutional structure, while it is lacking such structural support as a restriction on nondiscriminatory regulation.

381. See supra notes 204-14 and accompanying text.
and taxation. In addition, great weight must be attached to the results that the Court reaches in practice; they are a much better indicator of the Court's view of the proper meaning of the Constitution than is the constitutional doctrine that the Court articulates, or the approach to the resolution of constitutional questions that the Court purportedly follows. Thus, the fact that the Court's institutional behavior with respect to the negative commerce clause as a restriction on state regulatory and taxation power has evolved to the point where the Court is invalidating all discriminatory regulation and taxation, while sustaining all nondiscriminatory regulation and taxation, is a further indication that a structurally-based conceptual justification for a negative aspect to the commerce clause can be found in the nondiscrimination principle, and that it cannot be found on any other basis.

It is, therefore, appropriate at this point to consider structurally-based conceptual justifications that have been advanced for a negative aspect to the commerce clause.

II. STRUCTURALLY-BASED CONCEPTUAL JUSTIFICATION FOR A NEGATIVE ASPECT TO THE COMMERCE CLAUSE

This part of the Article addresses the four conceptual justifications that have been advanced in support of a negative aspect to the commerce clause. These justification theories may be described as follows: (1) Diminution of power: The affirmative grant of the commerce power to Congress operates to diminish the reserved general regulatory and taxation powers of the state where the regulation or tax affects interstate commerce; (2) Implied intention of Congress: The failure of Congress to authorize specifically state regulation or taxation affecting interstate commerce in certain circumstances indicates that Congress intended that state regulation or taxation be precluded in those circumstances; (3) The free trade principle: A major historical purpose for the grant of the commerce power to Congress was to establish a national free trade area; state regulation or taxation that unreasonably burdens interstate commerce or interferes with interstate trade or movement is unconstitutional; \[383\]

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382. The Court's function in defining the meaning of the Constitution is discussed in Sedler, supra note 7, at 113-20.

383. Proponents of the free trade principle justification have relied on the historic context of the commerce clause for support. The term "historical context" refers to the "principles and ideas which most importantly influenced the development of our constitutional texts." Saphire, Judicial Review in the Name of the Constitution, 8 U. DAYTON L. REV. 745, 780 (1983). Professor Saphire uses the term "historic context" to avoid the problems associated with use of the term.
(4) The nondiscrimination principle: A major historical purpose for the grant of the commerce power to Congress was to prevent economic protectionism and discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests; state regulation or taxation that discriminates against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests is unconstitutional.384

As stated previously, the validity of these conceptual justifications will be analyzed in terms of constitutional structure. Constitutional structure may restrict the exercise of state power in one of three ways. First, certain specific powers are denied to the states, either expressly or implicitly, by the grant of an exclusive power to

“,framers’ intent.” He states:

Given my view of the intractable dilemma inherent in the search for the individual and collective intentions of those individuals who were centrally involved in the promulgation of our constitutional texts, and given the fact that the term “framers’ intent” has become so closely associated with the personal, subjective views of those individuals, I believe that continued reference to “the framers’ intent” in the discourse of constitutional theory should generally be avoided. [Thus, the reference to the historic context of a constitutional provision is a reference to foundational principles and ideas [that] transcend the views expressed by particular persons. Those principles and ideas are epochal; they must be extrapolated, however imperfectly, from the events of an entire political era.

Id.

The term “historical context” is particularly appropriate in understanding the circumstances surrounding the promulgation of the commerce clause. The focus of the inquiry is on the major historical purposes for the affirmative grant of the commerce power to Congress. Those purposes can be ascertained clearly from the events of the political era during which the nation first operated under the Articles of Confederation and later under the Constitution.

384. The nondiscrimination principle, as a conceptual justification for a negative aspect to the commerce clause, can be sustained with reference to the historical context of that clause, and the Court has relied on the historical context of the commerce clause in support of the nondiscrimination principle. See supra notes 204-14 and accompanying text. With reference to the matter of a structurally-based conceptual justification for a negative aspect to the commerce clause, then, it is necessary only to engage in an “interpretive review” or, as my colleague, Professor Grano, would put it, “to constitutionalize values not inferable from the Constitution itself.” Grano, Judicial Review and a Written Constitution in a Democratic Society, 28 WAYNE L. REV. 1, 64 (1981). I maintain that “noninterpretive review” is necessary for constitutional adjudication involving the “majestic generalities” of the Constitution, such as the equal protection clause or the due process clause. Sedler, supra note 7, at 132-36. However, finding limitations on the exercise of state power on the basis of an affirmative grant of power to Congress obviously does not involve the Court’s role in defining the “majestic generalities” of the Constitution. Therefore, in dealing with the matter of a negative aspect to the commerce clause, the Court’s focus is properly on the historical context of that clause.
Congress. Second, a particular exercise of state power may be proscribed because it conflicts with, or is preempted by, Congress' affirmative exercise of its delegated powers. Third, an exercise of state power may be limited by constitutional provisions designed to protect individual rights. It must be determined, therefore, whether any of the conceptual justifications that have been advanced for a negative aspect to the commerce clause properly can be brought within one of these structurally-based methods of restricting state power.

The diminution of power justification obviously relates to the first structural method of restriction. The question is whether it is consistent with the allocation of federal and state power under the Constitution to conclude that the affirmative grant of the nonexclusive commerce power to Congress operates to diminish the reserved general regulatory and taxation powers of the state where the regulation or tax affects interstate commerce. The implied intention of Congress justification relates to the second structural method of restriction, since it involves preclusion of state regulation as a matter of federal supremacy. The question under this theory of justification is whether it is consistent with the allocation of federal legislative power under the Constitution to conclude that Congress may exercise that power negatively as well as affirmatively. Has Congress by its failure to authorize specifically state regulation or taxation affecting interstate commerce in certain circumstances effectively acted to preclude state regulation or taxation in those circumstances?

The free trade principle and the nondiscrimination principle justifications both relate to the third structural method of restriction. Limitations on the exercise of governmental power may be found in the internal inferences of the Constitution, as well as in its text. The question here is whether the commerce clause may be relied upon as the source of a right accruing to entities engaged in interstate commerce, to be free from state regulation or taxation that unreasonably burdens interstate commerce or interferes with interstate trade or movement (the free trade principle), or discriminates against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests (the nondiscrimination principle).

385. The structurally-based conceptual justification for a negative aspect to the commerce clause that will be advanced also leads to certain conclusions in determining the validity of state regulation and taxation affecting interstate commerce. See infra notes 496-500 and accompanying text.

386. See infra notes 477-83 and accompanying text.
A. The Diminution of Power Justification

The diminution of power justification was the basis of the Court's holding in *Cooley* that the affirmative grant of the commerce power to Congress by its own force deprived the states of the power to regulate where the matter in issue "imperatively demand[ed] a single uniform rule." As previously discussed, the Court's holding in *Cooley* clearly was a compromise between the view that the commerce power was an exclusively federal power, so as to preclude all state regulation or taxation affecting interstate commerce, and the view that the commerce clause imposed no limitation at all on the reserved general regulatory and taxation power of the states. The Court avoided any discussion of the rationale for its conclusion that the federal commerce power was, in effect, a "partly exclusive" power. The Court did not give a structural explanation of how a federal power could be partly exclusive, such that the affirmative grant of that power of Congress could operate to diminish the exercise of the reserved powers of the states. In other words, the Court never related the diminution of power justification to the constitutional allocation of power.

The Court's failure to deal with the structural question in *Cooley* is very troubling because the diminution of power justification seems inconsistent with the underlying theory of allocation of power under the Constitution. The theory behind the allocation of federal and state power under the Constitution is that the federal government possesses only those powers that have been delegated to it by the Constitution. The states retain general regulatory power and all other sovereign powers that they possessed prior to the adoption of the Constitution, except where the exercise of such power was denied to the states or otherwise restricted by the Constitution. The *Cooley* Court's holding that the commerce power was not an exclusive federal power, should have meant that the Constitution did not by necessary implication deny the states the power to regulate matters...
that were within the ambit of the federal commerce power. Inasmuch as the states retain general regulatory power, except where the exercise of that power is restricted by the Constitution, it is difficult to find any structural basis upon which the commerce clause could operate negatively to limit state regulatory power over matters requiring a uniform rule.

The Court’s conclusion in Cooley that the affirmative grant of a nonexclusive power to Congress could, by its own force, operate to limit the exercise of the states’ reserved general regulatory power also appears inconsistent with the Court’s earlier holding in Sturges v. Crowinshield.390 Sturges looked at the effect of the federal bankruptcy power on state power to regulate insolvency. The Sturges Court held that the bankruptcy power was not an exclusive federal power and, thus, in the absence of congressional action there was no constitutional restriction on the power of the states to regulate insolvency.391

Chief Justice Marshall, writing for the Court, began by discussing the theory of allocation of power under the Constitution, and the test for determining the exclusivity of federal power:

When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by the instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the state has not been expressly prohibited. . . . Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.392

391. Id. at 196-97. The particular state regulation of insolvency, however, was invalidated as constituting an impairment of the obligations of a contract, in violation of art. I, § 10 of the Constitution. Id. at 197-99.
392. Id. at 193.
Thus, when the Constitution does not expressly prohibit the exercise of state power, an affirmative grant of a power to Congress does not preclude the exercise of state power unless the nature of the power is such that it should be exercised exclusively by Congress. Finding that the bankruptcy power was not of this nature, Marshall concluded that, in the absence of congressional action, the states remained free to regulate insolvency in all respects.\textsuperscript{393}

The point to be emphasized is that in \textit{Sturges}, once the Court held that the bankruptcy power was not an exclusive federal power, the constitutional inquiry concerning the power of the states to regulate insolvency was at an end; the affirmative grant of the bankruptcy power to Congress did not interfere with the states' ability to exercise their general regulatory power over insolvency. The \textit{Cooley} Court was not consistent with respect to the effect of the grant of a nonexclusive federal power on the exercise of the general regulatory power of the states. Once it held that the commerce power was not an exclusive federal power, the constitutional inquiry concerning the power of the states to apply their general regulatory power to matters coming within the ambit of the federal commerce power should have ended. The state regulation over pilotage involved in \textit{Cooley} should not have been subject to challenge as being beyond the reserved powers of the state.

However, in analyzing whether the commerce power was an exclusive federal power, the Court in \textit{Cooley} stated: "[w]hatever subjects of this [commerce] 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."\textsuperscript{394} The Court thereby held that the commerce power was a "partly exclusive" federal power; the affirmative grant of the commerce power to Congress operated to diminish the exercise of the general regulatory power of the states over subjects requiring one uniform rule.

The Court failed, however, to demonstrate that the concept of a partly exclusive federal power was consistent with the structural allocation of federal and state power under the Constitution. The Court also failed to explain how the commerce power, unlike the bankruptcy power involved in \textit{Sturges}, could, by its own force, limit the exercise of the reserved powers of the states.

Following \textit{Cooley}, the Court continued to follow the allocation of power approach to the permissibility of state regulation and taxation affecting interstate commerce, but has made no further attempt to

\textsuperscript{393} \textit{Id.} at 193-96.

\textsuperscript{394} \textit{Cooley}, 53 U.S. at 319.
deal with the crucial structural questions left unanswered in *Cooley*. The Court simply repeated the assertion that, "'[w]here the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be enroached upon by the State . . . .'"\(^{395}\) At a later time, the Court reaffirmed this view, stating that the commerce clause "'remains in the Constitution as a grant of power to Congress . . . and as a diminution *pro tanto* of absolute state sovereignty over the same subject matter.'"\(^{396}\) However, the Court has never subjected this diminution of power justification to a structural analysis or explained how the affirmative grant of the commerce power to Congress can operate as a "'diminution *pro tanto*" of the reserved general regulatory and taxation powers of the states consistent with the allocation of power under the Constitution.

The Court's holding in *Cooley*, that the affirmative grant of the commerce power to Congress operates to diminish the reserved general regulatory and taxation powers of the states where interstate commerce is involved, not only conflicts with its holding in *Sturges*, but also with its more recent holding in *Goldstein v. California*.\(^{397}\) The *Goldstein* Court held that the copyright power was not an exclusive federal power; the affirmative grant of the copyright power to Congress did not, by its own force, restrict the power of the states to protect copyrights within the state. The *Goldstein* opinion is particularly noteworthy because the Court discussed *Cooley* at length, citing it for the proposition that, "'Congress alone may legislate over matters which are *necessarily* national in import.'"\(^{398}\) Relating that proposition solely to the question of whether the copyright power was an exclusive federal power, the Court concluded that it was not, and held that there was no constitutional restriction on the power of the states to protect copyrights.\(^{399}\) Only with respect to the

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395. Leisy & Co. v. Hardin, 135 U.S. 100, 108-09 (1890). See also, Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 610 (1938); Helson v. Kentucky, 279 U.S. 245, 248-49 (1929); Texas Co. v. Brown, 258 U.S. 466, 475 (1922); Dahnke-Walker Mill Co. v. Bondurant, 257 U.S. 282, 290 (1921); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204, 209-12 (1894). As the Court stated in *Dahnke-Walker*, "'[t]he Commerce Clause of the Constitution . . . expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter.'" 257 U.S. at 290. The *Coverdale* Court found, "'[t]axation by the states of the business of interstate commerce is forbidden only because it is deemed an interference with that commerce, the uniform regulation of which is necessarily reserved to the Congress.'" 303 U.S. at 610.


398. *Id.* at 554 (citing *Cooley*, 53 U.S. at 299).

399. 412 U.S. at 554-58. The *Goldstein* Court emphasized that the concurrent
commerce power has the Court invoked the notion of "partly exclusive" federal powers and held that the affirmative grant of the commerce power to Congress somehow diminishes the reserved general regulatory and taxation powers of the states.

It is this author's submission that diminution of power cannot be sustained as a conceptual justification for a negative aspect to the commerce clause because it is completely inconsistent with the allocation of federal and state power under the constitutional structure. The constitutional structure does not assign particular powers to the federal government and to the states. Rather, the underlying theory of allocation of power is that the states possess all the sovereign power that they possessed prior to the adoption of the Constitution, while certain specific powers are affirmatively granted to the federal government by the Constitution. The Constitution does deny certain specific powers to the states, either expressly or by necessary implication, because such state powers would be incompatible with the existence of the same powers on the part of the federal government.

exercise of the power to protect copyrights on the part of Congress and the states would not necessarily lead to difficulty. The Court concluded, "[n]o reason exists why Congress must take affirmative action either to authorize protection of all categories of writings or to free them from all restraint." Id. at 560.

The federal admiralty power also has been held not to be an exclusive federal power, and the affirmative grant of the admiralty power to the federal government does not preclude state regulation of maritime matters. See Askew v. American Waterways Operators, Inc., 411 U.S. 325, 339-41 (1973). The only exception occurs where there is direct conflict with, or preemption by, a federal statute. Id. at 337.

This view is not completely original. Professor Shenton observed many years ago:

It must be realized at the outset, then, that in defining the power of the states to regulate interstate commerce while Congress is silent the Supreme Court has diserted all constitutional basis and guidance for the principles which rule its decisions, and that it is acting solely and entirely upon its own discretion. The rules which it applies are founded on its own notions of expediency, and not upon the mandates of Congress, or the expressed intentions of the framers of the Constitution. No amount of scrutiny of that instrument will reveal the principles according to which some subjects of interstate commerce are reserved exclusively for regulation by Congress, while others may be regulated by states pending action by Congress. During the silence of Congress the Supreme Court itself clearly regulates interstate commerce,—"prescribes the rules by which it is to be governed,"—though Congress is the only federal agency to which the Constitution ascribes that function.

Shenton, Interstate Commerce During the Silence of Congress, 23 Dick. L. Rev. 78, 80-81 (1919).

See supra note 389.

For a discussion of the powers that are denied to the states, either expressly or by necessary implication, see supra note 8.
The delegation of specific powers to the federal government, however, does not, under the constitutional structure, affect as such the exercise of the reserved powers of the states.\textsuperscript{403} The fact that a particular power has been delegated to the federal government is relevant, with regards to the existence of state power, only on the issue of denial of state power by necessary implication from the affirmative grant of federal power. Where the nature of the federal power is such that it can be exercised only by one sovereign, it is an exclusive power and it is denied to the states by necessary implication. Where the power is not an exclusive federal power, however, the affirmative grant of that power to the federal government can have no effect on the reserved powers of the states.\textsuperscript{404}

Thus, with regard to the allocation of federal and state power under the Constitution the concept of a "partly exclusive" federal power is analytically unsound. The Constitution recognizes only exclusive and nonexclusive federal powers. If a federal power is exclusive, it is denied to the states by the Constitution; if it is not exclusive, the affirmative grant of that power to the federal government has no effect on the exercise of the reserved powers of the states. Diminution of power, therefore, must be rejected as a conceptual justification for a negative aspect to the commerce clause, because it is completely inconsistent with the allocation of federal and state power under the constitutional structure. Since the commerce power has been held not to be an exclusive federal power, the affirmative grant of the commerce power to Congress cannot be relied on to diminish the exercise of the states' reserved general regulatory and taxation powers.\textsuperscript{405} The Constitution thus does not restrict in any way the power of the states to regulate or tax entities engaged in interstate commerce; such regulation and taxation is fully within the reserved powers of the states.

\textsuperscript{403} As pointed out previously, the principle of reserved state sovereignty is embodied textually in the tenth amendment, but also would follow from the allocation of federal and state power under the constitutional structure. \textit{See supra} note 389.

\textsuperscript{404} \textit{See supra} notes 392-93 and accompanying text.

\textsuperscript{405} It also is not strictly accurate to say that under the Constitution the states and the federal government possess "concurrent power" to regulate interstate commerce. The Constitution gives the federal government the power to regulate interstate commerce, as one of its enumerated powers. The Constitution does not give any powers to the states, since under our constitutional scheme the states are deemed to possess all of the sovereign power they had prior to the adoption of the Constitution. Thus, strictly speaking, the Constitution gives Congress the power to regulate interstate commerce, whereas the states may apply their reserved general regulatory and taxation power to entities engaged in interstate commerce, in the absence of conflicting or preemptive federal regulation.
B. The Implied Intention of Congress Justification

The theory underlying the implied intention of Congress justification for a negative aspect to the commerce clause is that the states lack the power to regulate or tax interstate commerce in certain circumstances because Congress, by its failure to authorize affirmatively state regulation or taxation in those circumstances, has manifested its intention to preclude all state regulation or taxation.406 This justification is premised on preclusion by silence: Congress has exercised the commerce power by its silence, and by failing to authorize affirmatively state regulation or taxation in certain circumstances, it has prohibited the exercise of state power. The effect is the same as if there had been express prohibition or preemption, and as a matter of federal supremacy, the implicit action by Congress prevails over inconsistent state action.407

The implied intention of Congress justification was developed by academic commentators to deal with what they saw as a theoretical inconsistency in the diminution of power justification. The Court had held that Congress could expressly authorize the states to undertake what otherwise would be an impermissible regulation or taxation of interstate commerce408 However, if the Constitution restricted the power of the states to regulate or tax interstate commerce, then how could Congress, by legislation, authorize the states to do what the Constitution prohibited?409 The commentators sought

406. The implied intention of Congress justification accommodates both an allocation of power approach and a balancing of interests approach. Under this justification, it could be said that Congress, by its silence, intended to preclude "state regulation or taxation of interstate commerce itself," or state regulation or taxation where, "on balance, the national interest in the free flow of commerce predominates over the asserted state interest."


408. See Bikle, supra note 6, at 209-13; Dowling II, supra note 6, at 25-26; Powell, supra note 6, at 115-18.

409. The Court recognized this theoretical inconsistency in California v. Zook, 336 U.S. 725 (1949), but found it to be inconsequential: "There is no longer any question that Congress can redefine the areas of local and national predominance . . . despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right. The words of the Clause—a grant of power—admit of no other result." Id. at 728 (citation omitted).
a constitutional explanation for a negative aspect to the commerce clause that would explain why, in the absence of congressional authorization, certain state regulation or taxation affecting interstate commerce was impermissible, although the same regulation or taxation was permissible when congressional authorization was present. They found this explanation in the implied intention of Congress. Thus, whenever the Court held state regulation or taxation affecting interstate commerce to be impermissible, it should not be on the ground that the Constitution imposed restrictions on the power of the states to regulate interstate commerce but rather, on the ground that Congress impliedly intended to preclude the states from imposing the particular regulation or tax on interstate commerce. According to Professor Thomas Reed Powell:

[The Supreme Court] could declare that the states have concurrent power with Congress over all interstate commerce. The congressional power is superior to the state power. Congress may exercise its power by silence as well as by speech. The silence of Congress requires interpretation. To interpret this silence the court must have regard to the nature of the particular commerce in issue. If it appears to be of a kind to render diverse regulations in different states undesirable, the silence of Congress will be deemed equivalent to a declaration that the particular commerce be free from legal restraint. But Congress may at any time by speaking rebut the inference previously drawn from its silence.\[410\]

Similar views were expressed by other commentators in the 1920's and the 1930's.\[411\]

It was left to Professor Dowling to develop fully the implied intention of Congress justification.\[412\] In Dowling's view, the implied intention of Congress justification for a negative aspect to the

410. Powell, supra note 6, at 137. The Court had stated at various times that where the matter was within the "exclusive jurisdiction" of Congress, the failure of Congress to regulate that matter indicated the intention of Congress that the matter not be regulated. See, e.g., Leisy & Co. v. Hardin, 135 U.S. 100, 109-10 (1890). For a later tongue-in-cheek discussion about the "silence of Congress," see Powell, The Still Small Voice of the Commerce Clause, in THREE SELECTED ESSAYS ON CONSTITUTIONAL LAW 931-32 (1938).


412. We have previously detailed Professor Dowling's development of this conceptual justification and his relating it to a balancing of interests approach to the permissibility of state regulation affecting interstate commerce. See supra notes 454-64 and accompanying text.
commerce clause followed from the fact that Congress could, in the affirmative exercise of its commerce power, both prohibit or preempt state regulation of matters that the Court had found to be within the states' constitutional power, and authorize state regulation of matters that the Court had found to be beyond the states' constitutional power. Since it would be unthinkable for Congress to authorize the states to do something that the Court had held to be beyond their constitutional power, whenever the Court invalidated a state regulation or tax under the commerce clause, the Court was "effectuating the will of Congress and not the commerce clause per se." Dowling went on to state that, "except for explicitness and generalizations," the implied intention justification was "the position to which the Court itself had come by a process of trial and error over nearly a hundred years."

Writing for the Court in *Southern Pacific*, Chief Justice Stone expressly recognized the implied intention of Congress justification as a basis for a negative aspect to the commerce clause, but accepted the diminution of power justification as well, indicating that the particular justification relied upon by the Court was not important. He thus downplayed the significance of the issue of a conceptual justification, which had so concerned Professor Dowling and the other academic commentators. To the Chief Justice, it was the substitution of the balancing of interests approach for the allocation of power approach in the regulation area, and the assertion of the Court's role as the "final arbiter of the competing demands of state and national interests," that was significant. In fact, there was no need for the Court to find in favor of either justification. Regardless of which justification was relied on, the negative aspect to the commerce clause would remain, and the commerce clause, in the absence of congressional action, would restrict the power of the states to regulate or tax interstate commerce. Moreover, the process by which the Court would determine what restrictions were

413. Dowling II, *supra* note 6, at 19; *see also supra* note 260 and accompanying text.
416. *Id.* at 768.
417. In a subsequent writing, Professor Dowling complained that Stone "pointedly left open the question as to the source or nature of the impediment to state action." Dowling I, *supra* note 6, at 554. Thus, despite recognition of the implied intention justification in *Southern Pacific*, Dowling lamented that, "no satisfactory exposition of the underlying theory has ever come from the Court." *Id.*
418. 325 U.S. at 769-71.
imposed by the negative commerce clause on state regulatory and taxation power would be the same under either conceptual justification. If the affirmative grant of the commerce power to Congress operated to diminish the exercise of state regulatory or taxation power affecting interstate commerce, the Court, in the performance of its function of defining the meaning of the Constitution, would state what limitations the Constitution imposed. If it was the implied intention of Congress that interstate commerce be immune from state regulation or taxation in certain circumstances, it is the Court that would have to decide what restrictions on state regulatory and taxation power Congress impliedly intended to impose. It is easy to see why Chief Justice Stone, whose concern was with the role of the Court as the "final arbiter of the competing demands of state and national interests," felt no need to decide in favor of one justification over another.

Neither the implied intention of Congress justification, nor the diminution of power justification, can withstand any degree of structural analysis. It is perhaps revealing that Professor Dowling and the other proponents of the implied intention of Congress justification did not attempt to undertake such an analysis, and never addressed the question of the source of Congress' authority under the Constitution to "legislate by silence." No such authority can be found, because the concept of "legislation by silence" would be completely inconsistent with the provisions of article I, setting forth the method by which the federal legislative power is to be exercised; article I, section 7 is very specific in its requirements of affirmative action on the part of both houses of Congress and the President. In order to become law, a bill must be introduced, it must be passed by both the House of Representatives and the Senate, and it must be signed by the President or passed by a two-thirds vote of both houses over the President's veto. The Constitution makes no provision for Congress to "legislate by silence." As Professor Monaghan has pointed out:

419. The commentators long had recognized that, regardless of the theoretical basis for a negative aspect to the commerce clause, the Court was effectively determining the circumstances in which state regulation or taxation would be permitted. See Shenton, supra note 6, at 160-62; Sholley, supra note 6, at 558-59.

420. Professor Dowling tried to demonstrate the theoretical inconsistency of the diminution of power justification, and advanced policy-type arguments in favor of the implied intention of Congress justification: it would not entail a sharp break with past judicial practice, it would amplify the judicial and legislative functions, it would be agreeable to Congress, and it would afford a common ground on which the divergent views of the then members of the Court could be brought together. Dowling II, supra note 6, at 20-27. Powell simply stated that, "Congress may exercise its power by silence as well as by speech." Powell, supra note 6, at 137.
The Constitution, after all, expressly prescribes the process by which legislation is to be enacted, and it is one which requires both affirmative congressional action and a role for the President. It is difficult to see how legislation by silence can be squared with this constitutionally prescribed process.\textsuperscript{421}

Thus, the structural fallacy of the implied intention of Congress justification is that Congress cannot exercise the federal legislative power implicitly under the Constitution; Congress cannot manifest any "implied intention." It can exercise the federal legislative power only in accordance with the process set forth in the Constitution, and that process makes no provision for legislation by silence. Congress cannot, therefore, by its failure to enact legislation specifically authorizing state regulation or taxation of interstate commerce in certain circumstances, be deemed to have precluded implicitly state regulation or taxation in those circumstances. It can preclude state regulation or taxation only by taking affirmative action, since

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\item \textsuperscript{421} Monaghan, \textit{The Supreme Court, 1974 Term, Foreward: Constitutional Common Law}, 89 \textsc{Harv. L. Rev.} 1, 16-17 (1975) (footnotes omitted). Professor Monaghan's own explanation of the negative aspect of the commerce clause is in terms of "constitutional common law." He maintains that the commerce clause "embodies a national free-trade philosophy which can be read as requiring the Court, in limited circumstances, to displace state-created trade barriers." \textit{Id.} at 17. Monaghan states that, while the source of the Court's authority in this respect is the text of the Constitution, its decisions are subject to congressional revision. Thus, in effect, the Court is "making constitutionally inspired common law." \textit{Id.} Professor Monaghan's discussion of the negative commerce clause does not go beyond this tautological analysis, and his main concern in the article is with constitutional common law in the area of constitutional criminal procedure. Professors Schrock and Welsh, whose concern is to rebut Monaghan's constitutional common law explanation of the constitutional criminal procedure cases, also do not adequately address the negative commerce clause. They explain the cases as involving the proper allocation of power between Congress and the states: "Judicial invalidation of state law as an impermissible burden on interstate commerce constitutes a judgment that the transaction to which the state law applied was one which, in the constitutional scheme of things, was to be governed by Congress." Schrock & Welsh, \textit{Reconsidering the Constitutional Common Law}, 91 \textsc{Harv. L. Rev.} 1117, 1139 (1978).
\end{itemize}

Whether or not the federal courts have the power to establish constitutional common law, is beyond the scope of this Article. It must be emphasized, however, that Professor Monaghan does not subject the matter to any structural analysis; he does not show that it is within the judicial function of the federal courts under article III to establish constitutional common law. For present purposes, he is doing no more than attempting to provide an explanation for the fact that Congress can authorize state regulation or taxation of interstate commerce that otherwise would be constitutionally impermissible. Since we can provide a structurally-based explanation for that phenomenon, it is not necessary to turn to the constitutional common law analysis.
it is only by affirmative action that Congress can exercise the federal legislative power. The proposition that Congress cannot, consistent with the constitutional structure, legislate by silence, seems so obvious as not to require extended discussion. As one commentator observed some time back:

It is carrying things a bit too far to say that Congress is "making laws" by its very refusal to make laws, and that its unexpressed intentions and desires are the "supreme law of the land." It follows that there can be no warrant in the Constitution for the proposition that the silence of Congress can in any way limit or restrain the exercise of a state power.

Thus, it is astonishing that such distinguished constitutional scholars as Professors Dowling and Powell completely ignored the limitations imposed by constitutional structure in finding a conceptual justification for a negative aspect to the commerce clause in the implied intention of Congress.

Thus, like the diminution of power justification, the implied intention of Congress justification is completely inconsistent with the structure of governance established by the Constitution. The fact that both of these conceptual justifications have been accepted by the Court for a long time cannot alter their structural unsoundness. Neither justification can be relied on to support a negative aspect to the commerce clause.

C. The Free Trade Principle Justification

The free trade principle justification analytically relates to the third structural method of restriction: limitations on the exercise of state power designed to protect individual rights. The question is

422. Congress can, of course, enact laws that express its intention in very generalized terms. It could enact a law providing that: "No state shall enact any law that imposes an undue burden on interstate commerce," or "No state regulation or tax affecting interstate commerce shall be valid in circumstances where the national interest in the free flow of commerce outweighs the state interest advanced by the regulation or tax." Were Congress to enact such a law, the Court would have to interpret and apply it despite its very generalized terms. But in so doing, the Court would be performing the judicial function of interpreting and applying legislation. In that case, the state regulation or tax affecting interstate commerce would be invalidated on the ground that it was prohibited by federal law, as the Court had interpreted that law.

423. Sholley, supra note 6, at 587.

424. These limitations can be found in the internal inferences of the Con-
whether the commerce clause properly may be relied on as the source of a right, on the part of entities engaged in interstate commerce, to be free from state regulation or taxation that violates the free trade principle, such as by "unreasonably burdening" interstate commerce or interfering with interstate trade or movement. It is important at the outset of this analysis to distinguish the free trade principle from the nondiscrimination principle as a structurally-based conceptual justification for a negative aspect to the commerce clause. Not infrequently, the Court has talked about "free trade" and "free access" in the context of invalidating discriminatory state regulation or taxation, thereby confusing the free trade principle with the nondiscrimination principle. For example, Justice Jackson's opinion for the Court in *H.P. Hood & Sons v. DuMond*, is said to represent the Court's recognition of the free trade principle as the basis for a negative aspect to the commerce clause. Justice Jackson referred to a "federal free trade unit," and stated:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Justice Jackson, however, was relating the matter of free access to the nondiscrimination principle, as indicated by his examples of discrimination and retaliation, and his reference to embargoes and customs duties. *Hood* involved a state regulation that was found to discriminate expressly against interstate commerce and out-of-state

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428. *H.P. Hood,* 336 U.S. at 538.
429. *Id.* at 539.
430. *Id.* at 535-38.
interests; it was on this basis that the Court held the regulation to be unconstitutional. The discussion of a "federal free trade unit," in Hood, therefore, must be evaluated in the context of discrimination. Thus viewed, Hood does not stand for the proposition that the negative commerce clause embodies a free trade principle that may be relied on to invalidate nondiscriminatory state regulation and taxation.

As we previously discussed, the free trade principle, as distinct from the nondiscrimination principle, came to the fore in the taxation cases of the late 1930's and the 1940's, and was deemed to require the invalidation of state taxation schemes that had "the effect of impeding the free flow of trade between States." Chief Justice Stone and Justice Frankfurter were leaders in articulating the free trade principle, which they sharply distinguished from the nondiscrimination principle. Chief Justice Stone referred to "the barriers to interstate trade which it was the object of the commerce clause to remove," taking the position that, in light of the free trade principle, an unapportioned gross receipts tax, as applied to an entity engaged in interstate commerce, was unconstitutional per se because of the possibility that the entity would be subject to multiple taxation. The clearest distinction between the free trade principle and the nondiscrimination principle is found in Justice Frankfurter's opinion for the Court in Freeman v. Hewitt:

[The Commerce Clause . . . by its own force created an area of trade free from interference by the states. . . . This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance.]

431. Id. at 530. See supra note 43.
432. For other references to a "federal free trade unit" or a "common national market" created by the commerce clause, see United Air Lines v. Mahin, 410 U.S. 623, 632 (1972) (Douglas, J., dissenting); General Motors Corp. v. Washington, 377 U.S. 436, 462 (1964) (Frankfurter, J., dissenting).
433. See supra notes 316-20 and accompanying text.
436. See supra notes 316-20 and accompanying text.
438. Id. at 252.
Justice Frankfurter also referred to the "very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." 439

More recently, Professor Maltz, on the assumption that the commerce clause embodies the free trade principle, has developed the "free location principle" as an approach to the permissibility of state regulation affecting interstate commerce. 440 The underlying theory of this approach is that "entrepreneurs should be free to choose the state where various conditions give them a competitive advantage in the national marketplace." 441 Maltz sets forth criteria to determine when a state regulation is violative of the free location principle. These criteria are similar to those that form the basis of the nondiscrimination principle: facial discrimination against out-of-state consumers, or facially neutral actions that are intended to protect local industry from outside competition. 442 His concern, however, is with commercial competition and market advantage, rather than with discrimination against interstate commerce or out-of-state interests. Thus, his application of the free location principle leads to some results that differ from those reached by the Court's application of the nondiscrimination principle. Maltz would, for example, uphold discriminatory regulation that was not designed to give in-state industry a commercial advantage over out-of-state industry, such as the challenged regulations in Philadelphia v. New

439. Id. at 256. See also McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330-31 (1944) (Frankfurter, J.) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.").

Although the free trade principle was not invoked in the regulation area, that principle could support the balancing approach to the constitutionality of state regulation affecting interstate commerce set forth in Southern Pacific, particularly as regards "undue burden." Where a nondiscriminatory state regulation, on balance, was found to unduly burden interstate commerce, it could be said that such regulation was inconsistent with the free trade principle.

440. Maltz, supra note 4, at 64-65. Professor Maltz does not discuss the matter of a structurally-based conceptual justification for a negative aspect to the commerce clause. He simply assumes that the free trade principle furnishes such a justification, and that the commerce clause embodies that principle, relying on Jackson's "free access" language in Hood. However, Maltz never explains precisely why the commerce clause is said to embody the free trade principle. In addition, he confuses, both in his citation of Jackson's language in Hood, and in his criteria for the application of the free trade principle, the nondiscriminatory principle and the free trade principle. Id.

441. Id. at 66.

442. Id. at 67.
Jersey, \textsuperscript{443} Rice, \textsuperscript{444} and Kassell. \textsuperscript{445} Maltz also concludes that Hood, \textsuperscript{446} Dean Milk, \textsuperscript{447} and Hunt, \textsuperscript{448} were wrongly decided, reasoning that in the absence of a specific finding that the challenged regulations were adopted with "protectionist intent," their application does not violate the free location principle. \textsuperscript{449} The essential effect of each of the challenged regulations was to discriminate against or disadvantage interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests; the regulations were held to be unconstitutional in all of these cases. Maltz's approach to the permissibility of state regulation affecting interstate commerce is thus a further illustration of the difference between the free trade principle and the nondiscrimination principle.

The next question to be considered is whether there is any reasonable basis for concluding that the commerce clause embodies the free trade principle, so that it may be relied upon, in its negative aspect, as the source of a right to be free from state regulation or taxation that violates the free trade principle. To the extent that proponents of the free trade principle, such as Justice Frankfurter, \textsuperscript{450} have addressed this question, it has been in terms of the historic context of the commerce clause. \textsuperscript{451} Their assumption has been that a major historic purpose of the affirmative grant of the commerce power to Congress was to create a free trade area, that is, a constitutional common market. \textsuperscript{452} If this were so, the commerce clause could be relied upon as a source of a right on the part of entities engaged in interstate commerce to be free from state regulation or taxation that unreasonably burdens interstate commerce or interferes with interstate trade or movement. \textsuperscript{453}

\begin{itemize}
\item \textsuperscript{443} 437 U.S. 617 (1978). See Maltz, \textit{supra} note 4, at 73-74.
\item \textsuperscript{444} 434 U.S. 429 (1978). See Maltz, \textit{supra} note 4, at 83.
\item \textsuperscript{445} 450 U.S. 662 (1981). Maltz concludes that \textit{Southern Pacific} and \textit{Bibb} also were wrongly decided. See Maltz, \textit{supra} note 4, at 81-85.
\item \textsuperscript{446} 336 U.S. 525 (1949).
\item \textsuperscript{447} 340 U.S. 349 (1951).
\item \textsuperscript{448} 432 U.S. 333 (1977).
\item \textsuperscript{449} Maltz, \textit{supra} note 4, at 74-81.
\item \textsuperscript{450} Other proponents of the free trade principle include Chief Justice Stone and Professor Maltz.
\item \textsuperscript{451} As to the meaning of "historic context of the commerce clause," see Saphire, \textit{supra} note 383.
\item \textsuperscript{452} \textit{See}, e.g., Freeman v. Hewitt, 329 U.S. 249, 252 (1946) (Frankfurter, J.) (very purpose of the commerce clause was to create an area of free trade among the several states).
\item \textsuperscript{453} Justice Frankfurter himself, however, approached the matter in terms of the lack of state power rather than in terms of a violation of individual rights. \textit{See} McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330-31 (1944).
\end{itemize}
Since the free trade principle as a structurally-based conceptual justification for a negative aspect to the commerce clause purportedly is found in the historic context of the commerce clause, and since no other structurally-based conceptual justification for the free trade principle has been advanced, its justification must be sustained by reference to that historic context. It is doubtful that there is any evidence to indicate that a major historic purpose for the commerce clause was to create a free trade area among the states, to protect interstate commerce from burdensome state regulation or taxation that interfered with the free flow of trade. The proponents of the free trade principle have never engaged in any kind of historical analysis. They have not tried to show, by analyzing the circumstances leading to the affirmative grant of the commerce power to Congress, that a major concern of the framers was the unrestricted commercial intercourse across state lines. They merely assumed that a primary historical purpose of the commerce clause was to "create an area of free trade among the several states."

It has been demonstrated persuasively that the affirmative grant of the commerce power to Congress was not intended to create a free trade area or a national common market. In a comprehensive analysis of the historic context of the commerce clause and related provisions granting power to the federal government and restricting state power in the commercial area, Professor Kitch has analyzed the argument for a "constitutional common market." He contends that the argument that a constitutional common market exists must be constructed from a number of provisions that (1) grant powers to Congress, (2) restrict federal power, and (3) restrict state power. The Constitution grants Congress not only the commerce power, but also a number of other powers involving commercial matters, including the powers to lay uniform duties and excises, to establish uniform rules for naturalization and bankruptcy, to coin money and fix standards of weights and measures, to establish post offices, and to grant patents and copyrights. The Constitution also imposes certain restrictions on federal power in the commercial area, such as the prohibition on taxes on exports from a particular state and the ban on preferences for the ports of one state over

456. Id. § 8, cl. 4.
457. Id. § 8, cl. 5.
458. Id. § 8, cl. 7.
459. Id. § 8, cl. 8.
460. Id. § 9, cl. 5.
another.\textsuperscript{461} Similarly, the Constitution expressly imposes certain restrictions on the exercise of state power in the commercial area, such as the ban on a tax on imports or exports,\textsuperscript{462} the ban on duties of tonnage,\textsuperscript{463} and the prohibition against laws impairing the obligations of contracts.\textsuperscript{464} Looking to the apparent purpose behind the inclusion of these benefits in the Constitution, Kitch concludes that "[t]hese clauses in the Constitution did not result from a program to create a customs union, a free trade area, or a common market," but rather they, "responded to a series of more limited and practical problems."\textsuperscript{465}

These problems all related to the authority of the federal government to deal with commercial matters. A primary concern was to enable the federal government to bargain effectively with European governments about American rights of commerce and navigation.\textsuperscript{466} Another concern was the need to provide the federal government with a reliable revenue base. This concern was reflected, both in the grant of power to impose duties to the federal government and the denial of the corresponding power to the states, assuring that the states could not erode federal income from duties through overlapping taxes.\textsuperscript{467} Kitch concludes, however, that the Constitution was not designed to implement a common market, but rather to establish the authority of the federal government to deal with commercial matters. The series of constitutional provisions involving federal and state power in the commercial area, including the commerce clause, were designed to respond to particular problems that were the concern of the framers at that time.\textsuperscript{468} There is no historical evidence to indicate that the framers were concerned with maintaining an "area of free trade among the several states." The existence of a "free trade" area of a "national common market," would depend upon Congress establishing one in the affirmative exercise of its commerce power or other powers in the commercial area.\textsuperscript{469}

Professor Eule, also has examined the historical question, and notes that our Constitution, unlike, for example, the Australian

\textsuperscript{461} Id. § 9, cl. 6.
\textsuperscript{462} Id. § 10, cl. 2.
\textsuperscript{463} Id. § 10, cl. 3.
\textsuperscript{464} Id. § 10, cl. 1.
\textsuperscript{465} Kitch, supra note 4, at 20.
\textsuperscript{466} Id.
\textsuperscript{467} Id. at 21.
\textsuperscript{468} Id.
\textsuperscript{469} Id. Actually, the federal government has used its commercial powers rather sparingly. According to Kitch: "A review of the Constitution and the debates that surround commercial issues lead one to conclude that the federal commercial laws and policies that emerged after the signing of the Constitution varied greatly from what the Federalists had envisaged." Id. Kitch suggests that Marshall was
constitutions does not articulate explicitly the free trade ideal. He points out that there were few references to free trade during the debates preceding the adoption of the Constitution. Eule contends that while "economic parochialism" was a motivating force behind the calling of the constitutional convention, "[o]ur Constitution. . . did not attempt to solve economic parochialism by an express prohibition against interference with free trade, [but] instead it shifted legislative power over economic matters that affect more than one state to a single national body." He concludes that "[t]he commerce clause thus cannot be said to establish and protect free trade or a national marketplace as a fundamental constitutional value." Professor Eule questions "the persistent judicial articulation of a free trade model in the Court's dormant commerce clause cases," and states that,

"the answer is clear, and has been ably documented by others: the Constitutional Convention was prompted by commercial protectionism. A uniform system of commercial regulations was seen as necessary for the preservation of national unity and tranquility. Congress, accordingly, was provided a tool for encouraging this free trade ideal as a means of protecting the nation from self-destruction. There was no intent, however, to inject a philosophy of laissez-faire into the constitutional fabric."

Professor Eule's observations may shed some light on why Justice Frankfurter, and other proponents of the free trade principle as a conceptual justification for a negative aspect to the commerce clause, have simply assumed that this principle is embodied in the commerce clause. The court has recognized that a major motivating force behind the calling of the constitutional convention, and a major historical purpose for the affirmative grant of the commerce power to Congress, was to bring an end to the "commercial protectionism" that had existed under the Articles of Confederation. This historical concern with commercial protectionism may have led proponents of the free trade principle to assume that the commerce clause was designed to embody the "free trade ideal" and to create a "constitutional common market." To relate the free trade principle to trying to preserve the Federalist vision when he urged that the commerce clause itself operated negatively to limit state power to regulate and tax interstate commerce.

Id. at 22.

470. Eule, supra note 4, at 429. Eule uses the term, "free market ideal."

471. Id. at 430.

472. Id. at 434.

473. Id. at 434-35.

474. See infra notes 484-89 and accompanying text.
the historical concern with commercial protectionism, however, is to confuse the free trade principle with the nondiscrimination principle.\textsuperscript{475}

The free trade principle that Justice Frankfurter and others saw as being embodied in the commerce clause is, as this Article has noted, and as Justice Frankfurter himself has emphasized, quite different from the nondiscrimination principle. According to Justice Frankfurter, the commerce clause by its own force, "created an area of trade free from interference among the states," and rendered unconstitutional "any action which may fairly be deemed to have the effect of impeding the free flow of trade between states."\textsuperscript{476} The free trade principle, as embodied in the commerce clause, would protect interstate commerce from "burdensome" state action even if completely nondiscriminatory, and thus "nonprotectionist" in nature.

The assumption that the commerce clause embodies the free trade principle, therefore, is inconsistent with the premise upon which that assumption is based: that a major motivating force behind the calling of the constitutional convention, and the affirmative grant of the commerce power to Congress, was a concern with the commercial protectionism that had existed under the Articles of Confederation. This concern with commercial protectionism, however, resulted from discriminatory state action favoring local commerce and in-state interests at the expense of interstate commerce and out-of-state interests, not from nondiscriminatory state action allegedly burdening interstate commerce. The free trade principle that Justice Frankfurter apparently derived from an historical concern with commercial protectionism, on the other hand, would invalidate nondiscriminatory, and thus nonprotectionist state action.

Thus, as a structurally-based conceptual justification for a negative aspect to the commerce clause, the free trade principle cannot be sustained on the basis on which it has been proposed. That principle cannot be found in the historical context of the commerce clause. There is no historical evidence indicating that a major purpose for the affirmative grant of the commerce power to Congress was to create a "constitutional common market" or "an area of trade free from interference among the states." The historical evidence indicates a concern with the commercial protectionism that had

\textsuperscript{475} Thus, like Professor Maltz, Professor Eule fails to distinguish between the free trade principle and the nondiscrimination principle. See infra notes 546-47 and accompanying text.

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existed under the Articles of Confederation, not with a "free trade ideal" that would immunize interstate commerce from nondiscriminatory state regulation and taxation. Thus, there is no structural basis for finding a free trade principle embodied in the commerce clause, and for relying on the commerce clause, in its negative aspect, as the source of a right to be free from nondiscriminatory state regulation and taxation that purportedly burdens interstate commerce or impedes the free flow of trade between the states.

D. The Nondiscrimination Principle Justification

We submit that a structurally-based conceptual justification for a negative aspect to the commerce clause, and for reliance on the commerce clause to invalidate state regulation and taxation, properly may be found in the nondiscrimination principle. A major historical purpose for the affirmative grant of the commerce power to Congress was to prevent discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests. Thus, the commerce clause may be said to embody the nondiscrimination principle, and it may be relied upon, in its negative aspect, as the source of a right on the part of entities engaged in interstate commerce and out-of-state interests not to be subject to discrimination or disadvantage because of the interstate nature of that commerce or the out-of-state nature of those interests.

Limitations on the exercise of governmental power, designed to protect individual rights, must be found either in the text of the Constitution or in its internal inferences.477 While most of these constitutionally protected rights have a textual source, others, such as the right to interstate travel, are not expressly guaranteed by the Constitution. The Court has found the source of these rights in the internal inferences of the Constitution, that is, in the inferences that follow from the Constitution as a whole and from the relationship among the different constitutional provisions. Professor Charles Black has described this process as involving "the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."478 The right to interstate travel was first recognized by the Court in Crandall v. Nevada,479 on a theory of membership in the national polity: the requirements of the national government that its citizens travel to the places at which

477. See supra note 424.
479. 73 U.S. (6 Wall.) 35 (1867).
the national government maintains its offices and the correlative right of citizens to travel to those places. Professor Black expands on this rationale and maintains that the fact that the United States is a single nation warrants an inference as to mobility of population. The right to travel within the country is an inference from the national unity that the Constitution was designed to establish. The Court later stated in *United States v. Guest*: "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union."

The right of entities engaged in interstate commerce and out-of-state interests to be free from discriminatory state regulation or taxation because of the interstate nature of that commerce or the out-of-state nature of those interests also may be found in the internal inferences of the Constitution. The source of this right is the nondiscrimination principle embodied in the commerce clause. Since a major historical purpose for the affirmative grant of the commerce power to Congress was to prevent commercial protectionism and discrimination in favor of local commerce and in-state interests at the expense of interstate commerce and out-of-state interests, the nondiscrimination principle may be considered to be embodied in the commerce clause. That principle may then be relied on to create a right on the part of entities engaged in interstate commerce and out-of-state interests to be free from state regulation or taxation that discriminates against or disadvantages interstate commerce or out-of-state interests because of the interstate nature of the commerce or the out-of-state nature of those interests.

The Court consistently has recognized that the commerce clause embodies the nondiscrimination principle, and has found the non-

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480. *Id.* at 43-45. The Court held unconstitutional Nevada's imposition of a head tax on the exit of all persons from the state.

481. BLACK, supra note 478, at 27-28. In Edwards v. California, 314 U.S. 160 (1941), the Court invalidated a California law that prohibited bringing an indigent person into the state. According to Black, Edwards should have been decided on right to travel grounds, rather than on negative commerce clause grounds:

I should prefer to think of Edwards' right to travel, and of his brother-in-law's right to bring him into the state, as a consequence of his being one of the people in a unitary nation, to which, because of its nationhood, internal barriers to travel are unthinkable, rather than pretending that I have performed a warranted inference from a clause empowering Congress to regulate commerce among the several states. I am pretty sure that it was the first of these thoughts, rather than the second, that really moved the Court in the Edwards case.

BLACK, supra note 478, at 28-29.


483. *Id.* at 757.
discrimination principle in the historical context of the commerce clause. An analysis of the historical context shows incontrovertibly that the prevention of commercial protectionism on the part of the states was one of the main reasons for the affirmative grant of the commerce power to the Congress. It was a widely-held belief at the time of the adoption of the Constitution, that the Articles of Confederation had failed, in large part, because the states had waged destructive trade wars against one another. State governments had been too responsive to local economic interests, with the result that interstate economic competition was conducted more through political processes than through the marketplace. As the Court observed in Baldwin v. G.A.F. Seelig Inc., "a chief occasion of the commerce clause was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'" The Court had observed earlier, in Guy v. Baltimore, that Congress had been granted the commerce power because of the "oppressed and degraded state" of commerce existing under the Articles of Confederation. The nondiscrimination principle, as a major historical purpose for the affirmative grant of the commerce power to Congress, was most recently recognized by the Court in Maryland v. Louisiana:

One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution.

Since discrimination against interstate commerce and out-of-state interests in favor of local commerce and in-state interests violates

484. See supra notes 204-14 and accompanying text.
485. See L. Tribe, American Constitutional Law 321-22 (1978) and the sources cited therein. Professor Kitch questions the premises upon which this widely-held belief was based: "The idea that the thirteen years of experience under the Articles of Confederation proved that decentralized authority over commerce would degenerate into restrictions on freedom of trade has played a central role in the American tradition." Kitch, supra note 4, at 15.
487. 100 U.S. 434, 440 (1879).
489. Id. at 754 (citations omitted.)
the nondiscrimination principle embodied in the commerce clause, the commerce clause may serve as the structural basis for finding a right on the part of entities engaged in interstate commerce and out-of-state interests to be free from such discrimination.

The nondiscrimination principle is also embodied in the full faith and credit clause and the privileges and immunities clause of article IV. The full faith and credit clause, while evincing a constitutional concern for national uniformity, and the uniform recognition of sister state judgments, also prohibits the discriminatory refusal to enforce claims existing under the law of a sister state. The privileges and immunities clause expressly embodies the nondiscrimination principle, and states in unqualified language: "The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens of the several states." The Supreme Court has noted that there is a "mutually reinforcing relationship between the Privileges and Immunities Clause of Article IV, section 2 and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." The nondiscrimination principle, as embodied in the commerce clause, the full faith and credit clause, and the privileges and immunities clause, thus demonstrates a general constitutional concern with interstate discrimination. In this federal union, interstate commerce shall be treated equally with local commerce, nonresidents shall be treated equally with residents, and claims under a sister state's law shall stand on equal footing with claims under a state's own law.

490. See supra notes 105-08 and accompanying text.
491. See supra note 106.
492. For example, if a state allows a wrongful death action under its own law it cannot, consistent with full faith and credit, refuse to enforce a wrongful death claim existing under the law of a sister state. First Nat'l Bank v. United Air Lines, 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951). As long as the state is not discriminating against claims existing under the law of a sister state, it may refuse to enforce such claims on the same basis as it would refuse to enforce claims existing under its own law. See, e.g., Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) (claim barred by statute of limitations).
493. Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978). For discussions of the relationship between the privileges and immunities clause and the negative commerce clause see Varat, supra note 4, at 488-91 and Tribe, supra note 485, at 404-05. The precise relationship between the privileges and immunities clause and the negative commerce clause will be discussed infra notes 512-33 and accompanying text. The point to be emphasized is that the privileges and immunities clause also embodies the nondiscrimination principle, and textually expresses a concern that out-of-staters shall not be subject to discrimination simply because they are out-of-staters.
494. This principle is subject to the "nonfundamental rights" qualification.
It is with this background that the nondiscrimination principle can be recognized as the structurally-based conceptual justification for a negative aspect to the commerce clause. Finding its source in the historical purpose for the affirmative grant of the commerce power to Congress, and in related provisions of the original Constitution such as the full faith and credit clause and the privileges and immunities clause, the nondiscrimination principle has become firmly established in our constitutional system. The Court properly can rely on the nondiscrimination principle to find, in the internal inferences of the Constitution, a right on the part of entities engaged in interstate commerce and out-of-state interests to be free from discriminatory state regulation and taxation.\textsuperscript{495}

The focus of the nondiscrimination principle, as embodied in the negative commerce clause, is on commercial protectionism and on the competitive disadvantage suffered by interstate commerce or out-of-state interests in comparison with local commerce or in-state interests. Two conclusions follow therefrom with respect to the meaning of that principle in determining the validity of state regulation and taxation affecting interstate commerce. First, whether the challenged state regulation or taxation is discriminatory for negative commerce clause purposes depends upon the essential effect of the regulation or tax on interstate commerce or out-of-state interests in comparison with local commerce or in-state interests. Where the essential effect of the state regulation or tax is to advance local

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495. The right of entities engaged in interstate commerce and the right of out-of-state interests are necessarily intertwined. In effect, the entity engaged in interstate commerce asserts its right on behalf of unidentified out-of-state interests as well as on its own behalf. For example, in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), the New York milk distributor who was subject to the challenged regulation was asserting its own right to purchase milk from out-of-state farmers instead of in-state farmers for sale in New York. This right was intertwined with the right of unidentified Vermont milk producers to have equal access with New York milk producers to the New York milk market. Similarly, in Pike v. Bruce Church, 397 U.S. 137 (1970), Bruce Church was asserting its own right to locate its shed in California instead of in Arizona. This right was intertwined with the rights of unidentified California workers and suppliers not to be subject to discrimination in favor of Arizona workers and suppliers with respect to the Arizona grown cantaloupes. For a discussion of intertwined rights, see generally Sedler, \textit{The Assertion of Constitutional Jus Tertii: A Substantive Approach}, 70 CALIF. L. REV. 1308, 1328-29 n.64 (1982). In some cases, the out-of-state victims of the discrimination are identified and, therefore, could sue as plaintiffs to challenge the discrimination. Thus, in Philadelphia v. New Jersey, 437 U.S. 617 (1978), the City of Philadelphia, which had entered into disposal contracts with New Jersey landfill owners, brought suit along with the landfill owners to challenge the validity of the regulation.
economic interests at the expense of interstate or out-of-state economic interests, there is commercial protectionism, which is necessarily inconsistent with the nondiscrimination principle. Under such circumstances, the Court has held that there is a constitutional violation, and it was not necessary to show that the discrimination was intended.\footnote{496} Second, a state regulation or tax is discriminatory for negative commerce clause purposes only where its essential effect is to discriminate against interstate commerce or out-of-state interests \textit{because of} the interstate nature of that commerce or the out-of-state nature of those interests. There is no constitutional violation unless the favored and disfavored interests are similarly situated \textit{except for} the interstate or out-of-state nature of the disfavored interests. In \textit{Exxon v. Maryland},\footnote{497} where the effect of the regulation was to favor retail service stations over producer-marketeers, there was no violation of the nondiscrimination principle, notwithstanding the fact that the producer-marketeers were all interstate. The effect of the regulation was to favor one kind of economic interest over a different kind of economic interest, not a local economic interest over an interstate or out-of-state economic interest; it is only the latter kind of favoritism that is inconsistent with the nondiscrimination principle.

Once a scheme of state regulation or taxation has been found to discriminate against interstate commerce or out-of-state interest in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, it is unconstitutional.\footnote{498} The Court does not consider the governmental interest purportedly advanced by the discriminatory regulation or tax, or the availability of alternative means to advance that interest. It is the discrimination itself that violates the values reflected in the nondiscrimination principle; any interest the state may seek

\footnote{496} \textit{See supra} notes 215-32 and accompanying text.
\footnote{497} \textit{437 U.S. 117} (1978).
\footnote{498} Under this structurally-based conceptual justification, the unconstitutionality of discrimination against interstate commerce or out-of-state interests is \textit{value-based}; it has nothing to do with process-type concerns, such as the lack of representation of interstate or out-of-state economic interests in the state’s political process. Some commentators have advocated a process-type analysis of discrimination. Professor Tushnet maintains that the Court should take a differentiated approach to discrimination, depending on how the distribution of benefits and burdens is allocated between local and out-of-state interests. The premise of this approach is that where local interests also will suffer from the challenged regulation, it may be assumed that “the potential burden-bearers can adequately represent the national interest in free trade.” Tushnet, \textit{supra} note 4, at 148-49. Tushnet proposes a spectrum of standards by which to determine the constitutionality of a state regulation which has been challenged as discriminating against interstate commerce. The standard of review would depend upon the local and out-of-state distribution
to advance must be achieved by nondiscriminatory means. Finally, under the nondiscrimination principle, it is clear that the negative commerce clause imposes identical limitations on state regulation and state taxation affecting interstate commerce.

of burdens and benefits. Automatic invalidation would follow from a finding of intentional discrimination, and invalidation also would result where the burdens of the regulation fell exclusively on out-of-state interests. Tushnet puts *Hunt* into this category. *Id.* at 131-35. Where the burdens fell on both in-state and out-of-state interests, but the benefits were solely local, there would be a lower level of scrutiny and a "reasonable alternatives" inquiry. Tushnet puts *Dean Milk* into this category. *Id.* at 136-37, 141. Where the burdens fell on a large number of out-of-staters and only a small number of local residents, but the benefits accrued to many local residents and only a few out-of-staters, the Court would require a showing of a "fair and substantial relation" between the state's nondiscriminatory purpose and the regulation adopted. Tushnet put *Bread* into this category; *Exxon*, which came down subsequent to the publication of his article, would also fall into this category. *Id.* at 137-39, 141. Where the benefits and burdens were so distributed that substantial numbers of local residents both felt the burden and gained the benefits, Tushnet says that it would be "unlikely that the political process will be distorted by protectionist impulses, and judicial intervention on grounds of discrimination would be unjustified." In such cases, the Court would use a "simple rationality" test. Tushnet puts *Raymond* into this category. *Id.* at 139-41.

Professor Eule also advocates a spectrum of standards approach to determine the constitutionality of commercial protectionism. The standard to be used would depend on the comparative impact of the challenged regulation on local interests and on out-of-state interests. This approach, which is based on the premise that the privileges and immunities clause, rather than the negative commerce clause, is the "more appropriate vehicle" to deal with "commercial discrimination." This approach will be discussed infra notes 535-47 and accompanying text. Professor O'Fallon also has contended that, "[i]n the context of commerce clause adjudication, the central question is whether a legislature representative of the people whose significant interests are affected, made the decision. If the question can be answered affirmatively, the legislative decision may be presumed to be legitimate." O'Fallon, *supra* note 4, at 400.

This author's disagreement with such process-type approaches to the validity of discrimination against interstate commerce or out-of-state interests relates to the structurally-based conceptual justification that has been advanced for a negative aspect to the commerce clause. Since this nondiscrimination principle justification finds its source in the values embodied in the commerce clause, the focus is on whether the challenged regulation is inconsistent with those values. If so, the regulation cannot be permitted to stand, regardless of the theoretical effectiveness of the political process in preventing such discrimination. In this particular instance, the political process was not effective in preventing economic protectionism, and the result is inconsistent with the nondiscrimination principle.

499. This approach accords with the results that have been reached in practice, because nondiscriminatory alternatives always will be available. See *supra* notes 36-37 and accompanying text.

500. As to due process limitations on state taxation affecting interstate and foreign commerce, see *supra* notes 117-18 and accompanying text and *supra* note 130.
E. A Concluding Note

Analysis of the structurally-based conceptual justifications proposed for a negative aspect to the commerce clause leads to the following conclusions: (1) The diminution of power justification cannot be sustained because it is completely inconsistent with the allocation of federal and state power under the constitutional structure. As long as a federal power, like the commerce power, is nonexclusive, the affirmative grant of that power to Congress can have no effect on the exercise of the reserved powers of the states. (2) The implied intention of Congress justification cannot be sustained because, under the constitutional structure, Congress cannot legislate by silence, but must exercise the federal legislative power by affirmative action in accordance with the process set forth in article I, section 7. The “silence of Congress” cannot be relied upon to restrict the exercise of the reserved powers of the states. (3) The free trade principle justification cannot be sustained because the commerce clause does not embody that principle. Proponents of the free trade principle have contended that a major historical purpose for the affirmative grant of the commerce power to Congress was to create an area of free trade among the states. This contention, however, is not supported by analysis of the historical context of the commerce clause; there is no basis on which to conclude that the commerce clause embodies the free trade principle. This being so, the negative commerce clause cannot be relied upon as the source of a right to be free from nondiscriminatory state regulation or taxation that purportedly burdens interstate commerce or impedes the free flow of trade between the states. (4) The only conceptual justification for a negative aspect to the commerce clause that can be sustained with reference to the constitutional structure is one that is based on the nondiscrimination principle. Since a major historical purpose for the affirmative grant of the commerce power to Congress was to prevent discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests, the commerce clause may be said to embody the nondiscrimination principle. It may, therefore, be relied upon, in its negative aspect, as the source of a right on the part of entities engaged in interstate commerce and out-of-state interests to be free from discriminatory state regulation or taxation. Under this conceptual justification, the right of entities engaged in interstate commerce and out-of-state interests to be free from discriminatory state regulation or taxation is found in the internal inferences of the Constitution. The sole, but absolute prohibition, of the negative commerce clause is directed toward discrimination against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.
The results reached by the Court, under its current approach to the negative commerce clause as a limitation on state regulatory and taxation power, find support in the nondiscrimination principle justification. The Court's acceptance of this structurally-based conceptual justification for a negative aspect to the commerce clause, and its promulgation of doctrine reflecting the nondiscrimination principle, would establish the negative commerce clause as an important, although narrow, restriction on state regulation and taxation affecting interstate commerce. Although the Court would have to alter its articulated approach to the negative commerce clause in the regulation area, it would have to disapprove the results only in Southern Pacific and Bibb. State regulation affecting interstate commerce would no longer be subject to constitutional challenge on the ground that it imposed an undue burden. However, whenever the essential effect of a state regulation or tax was to discriminate against or disadvantage interstate commerce or out-of-state interests in comparison to local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the regulation or tax would be unconstitutional. The Court, in practice, has consistently reached this result. One effect of the Court's acceptance of the nondiscrimination principle, therefore, would be to bring theory into accord with results. Another effect would be to eliminate undue burden challenges, which generally have proved unavailing in practice. Above all, the Court would finally bring order to negative commerce clause theory; the negative commerce clause as a restriction on state regulatory and taxation power would be rooted firmly in the structure of the Constitution.

III. FURTHER CONSIDERATIONS RELATING TO THE NONDISCRIMINATION PRINCIPLE

The nondiscrimination principle also raises questions concerning: (1) the power of Congress to authorize discriminatory regulation and

501. There would be no "balancing" where discrimination is involved. Under the Court's current articulated approach, theoretically there may be balancing in those circumstances. In practice, however, the balance has always been struck against the challenged discriminatory regulation.

502. The Court would not have to alter its approach in the taxation area. As we have demonstrated previously, under the four-element Complete Auto Transit test only the third element—the absence of discrimination against interstate commerce—implicates commerce clause, as opposed to due process concerns. See supra notes 117-18 and accompanying text. The Court also would have to explain Edgar v. Mite Corp. on full faith and credit grounds. See supra notes 97-108 and accompanying text.
taxation by the states; (2) the relationship between the nondiscrimi-
ination principle of the negative commerce clause and the non-
discrimination principle of the privileges and immunities clause; and
(3) the constitutionality of discrimination in favor of local commerce
and in-state interests where the state is acting as market participant
or dispenser of benefits. Analysis of these questions in terms of
constitutional structure leads to the following conclusions: First,
Congress may authorize state regulation or taxation that discriminates
against interstate commerce or out-of-state interests in favor of local
commerce or in-state interests, because the commerce clause by its
own force imposes no limitations on the exercise of federal power
over interstate commerce. The nondiscrimination principle embodied
in the commerce clause is applicable only to the exercise of state
power. Second, the negative commerce clause and the privileges and
immunities clause serve separate, though related, functions in our
constitutional scheme. Particular kinds of discrimination against out-
of-state interests will invoke the application of one or the other
 provision. Third, in terms of constitutional structure, neither the
negative commerce clause, nor the privileges and immunities clause,
should operate as a limitation on the power of the states to utilize
state-owned resources for the benefit of their residents. There can
be no constitutional restriction on the power of a state to favor its
own residents when acting as a purchaser or a seller of products
produced by state-owned enterprises. Similarly, the power of the
state to give residents preference in the use of or access to state-
owned resources should not be limited.

A. The Power of Congress To Authorize Discriminatory Regulation and
Taxation by the States

As previously discussed, the Court has emphasized repeatedly
that Congress may authorize state regulation or taxation affecting
interstate commerce which otherwise would be constitutionally im-
permissible. The Court specifically has upheld congressional au-
thorization of state regulation or taxation that would discriminate
against interstate commerce in favor of local commerce, finding
that: "The Commerce Clause is a grant of authority to Congress,
and not a restriction on the authority of that body. Congress, unlike
a state legislature authorizing similar expenditures, is not limited by
any negative implications of the Commerce Clause in the exercise

503. See supra notes 136-38 and accompanying text.
504. See Prudential Ins. Co. v. Benjamin, 328 U.S. 440 (1951); Western &
of its spending power." The Court's position is correct from a structural standpoint. It follows from recognition of the nondiscrimination principle as the structurally-based conceptual justification for a negative aspect to the commerce clause.

Since the commerce clause embodies the nondiscrimination principle, it may properly be relied upon as the source of a right of entities engaged in interstate commerce and out-of-state interests to be free from discriminatory actions on the part of the states in the exercise of their reserved general regulatory and taxation powers. However, the commerce clause structurally is an affirmative grant of power to Congress, and it cannot by its own force limit the exercise of congressional power. The nondiscrimination principle does not relate to action on the part of the federal government, because it has its source in an historical concern with discrimination by the states, not by the federal government.

The Constitution does impose certain limitations on the exercise of federal power. These limitations are contained in article I, section 9, and include, for example, the requirement that in the exercise of the commerce power granted in article I, section 8, Congress can give no preference to the ports of one state over another. Section 9, however, contains no "nondiscrimination" limitation on the exercise of powers granted in section 8. Since section 9 is designed to impose limitations on the exercise of those powers, it would be improper, from a structural standpoint, to infer any other limitations. Thus, except as limited by section 9 and by other provisions of the Constitution, such as the Bill of Rights, Congress may exercise the powers granted in section 8, without constitutional restraint. It may exercise the commerce power in such a way as to require, or to permit, discrimination against interstate commerce in favor of local commerce. The Court was indisputably correct, from a structural standpoint, when it stated in *Prudential Insurance Co. v. Benjamin*.

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506. As noted previously, a major historical purpose for the affirmative grant of the commerce power to Congress was to prevent commercial protectionism by the states.

507. In *McCulloch v. Maryland*, the Court relied on the fact that the "necessary and proper clause" was contained in the grant of powers under art. I, § 8, rather than in the limitation on powers under art. I, § 9, as one of the bases for concluding that that clause was intended to enlarge, rather than to restrict the scope of congressional power. 17 U.S. at 419.


509. 328 U.S. 408 (1945).
The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce . . . .

The Constitution thus contains no limitation on the affirmative exercise of the commerce power that would preclude Congress from exercising that power in a way that discriminates against interstate commerce. When state regulation or taxation is expressly authorized by Congress, it is the authorization itself that is an issue for constitutional purposes, not the state action undertaken pursuant to it, and that congressional authorization is not limited by the non-discrimination principle. By authorizing discriminatory state regulation or taxation affecting interstate commerce, Congress is not making constitutional what otherwise would be unconstitutional. The states are precluded by the negative commerce clause from discriminating against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. No such restriction is imposed on the affirmative exercise of the commerce power by Congress.

510. Id. at 434.

511. A congressional scheme of regulation, incorporating discriminatory state regulation or taxation of interstate commerce, is but one example of a situation where congressional regulation may be upheld in circumstances in which comparable state regulation would not. This phenomenon results from the grant of certain specified powers to Congress and from the fact that there are different limitations on the exercise of state and federal power in the Constitution. For example, since the Constitution, in art. I, § 10, cl. 1, expressly prohibits the states from "impairing the obligation of contracts," but imposes no comparable limitation on the federal government, only a state law can be challenged on that ground. A federal law interfering with existing contractual relations can be challenged only on due process grounds, and is likely to be sustained. Compare Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935), with Allied Structural Steel Co. v. Spannous, 438 U.S. 234 (1978). Similarly, in view of the plenary congressional power over immigration and naturalization, federal discrimination against aliens challenged on fifth amendment equal protection grounds has been sustained, while comparable state discrimination against aliens has been held to be violative of the fourteenth amendment's equal protection clause. Compare Mathews v. Diaz, 426 U.S. 67 (1976), with Graham v. Richardson, 403 U.S. 365 (1971); Hampton v. Wong, 426 U.S. 88 (1976), and Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980), cert. denied, 450 U.S. 959 (1981), with Sugarman v. Douggall, 413 U.S. 634 (1973).

But see Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985), where
B. The Relationship Between the Nondiscrimination Principle of the Negative Commerce Clause and the Nondiscrimination Principle of the Privileges and Immunities Clause

The negative commerce clause and the privileges and immunities clause serve separate, though related, functions in our constitutional scheme. It is important to focus on the separate functions of these provisions because, as the Court long has noted, they have a mutually reinforcing relationship.\footnote{See supra note 493.} This mutually reinforcing relationship results from the fact that both provisions embody the nondiscrimination principle. Dean Sandalow has pointed out that particular values sometimes may be found in more than one constitutional provision, so that there may be a choice among "overlapping" constitutional provisions on which the Court may rely as the basis for a decision. He states:

Often . . . the need for choice from among constitutional provisions arises because the values that impel us toward a particular decision may plausibly be said to receive expression in more than one constitutional provision. Since those values are expressed differently in the different provisions, however, the implications of reliance upon one or another of the provisions may differ significantly. If the implications of resting decision upon one constitutional provision are unacceptable, it may be possible to rest decision upon another with implications we can accept. The existence of such "overlapping" constitutional provisions thus permits us to achieve a more sensitive accommodation of competing values than would otherwise be possible and thereby contributes to our capacity to adapt the Constitution to the balance of values that currently seems appropriate.\footnote{Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033, 1056-57 (1981).}
The negative commerce clause and the privileges and immunities clause are overlapping constitutional provisions in the sense that both embody the nondiscrimination principle. One, or the other, or both of these provisions may be relied upon to deal with particular kinds of discrimination against out-of-state interests. The nondiscrimination principle, as embodied in the negative commerce clause and in the privileges and immunities clause, have different meanings that are related to the separate functions of the provisions in our constitutional scheme.

It should be noted at the outset that each provision has had a different "line of growth." The protections afforded by the negative commerce clause apply to all entities engaged in interstate commerce. The protections afforded by the privileges and immunities clause, in contrast, apply only to individuals and not to corporations. Moreover, the privileges and immunities clause does not prohibit discrimination with respect to "nonfundamental rights." The Court's interpretation of the privileges and immunities clause also has recognized that certain distinctions between residents and nonresidents may be constitutionally permissible, because they are "objectively reasonable" and thus are not inconsistent with the nondiscrimination principle.

514. As to the "line of growth" of constitutional provisions, see id. at 1054-56.

515. See Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). See the discussion and criticism of this position in Eule, supra note 4, at 483-89.

516. See Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978). It must be noted that the distinction between "fundamental" and "nonfundamental" rights, for purposes of a two-tier standard of due process and equal protection review, has no application in the privileges and immunities context. It is only a very limited category of "nonfundamental" rights that are not entitled to protection under the privileges and immunities clause. See Baldwin, 436 U.S. at 383-87.

517. See Sedler, Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics," 34 Mercer L. Rev. 593, 629-31 (1983). The classic example of an objectively reasonable distinction between residents and nonresidents is the requirement that a nonresident plaintiff post security for costs in a court action, although a similar requirement is not imposed on resident plaintiffs. See, e.g., Brewster v. North Am. Van Lines, 461 F.2d 649 (7th Cir. 1972); see also Kreitzer v. Puerto Rico Cars, Inc., 417 F. Supp. 498 (D.P.R. 1975), aff'd, 535 F.2d 140 (1st Cir. 1976). Another example of an objectively reasonable distinction is that contained in a nonresident attachment statute, allowing routine attachment of the property of nondonciliary defendants residing outside of the state. See Central
The different line of growth of these provisions is indicative of the fact that they serve separate functions in our constitutional scheme. The privileges and immunities clause is an express limitation on the exercise of state power, designed to protect individual rights, and by its terms is designed to deal with discrimination against nonresidents. The nondiscrimination principle of the privileges and immunities clause has nothing to do with commercial protectionism, but is premised on the notion of equal treatment between residents and nonresidents. Thus, that provision is invoked most appropriately where the state has given a benefit to residents that it has denied to nonresidents or has imposed a burden or tax on nonresidents that it has not imposed on residents. The differential treatment of nonresidents violates the privileges and immunities clause unless there is an independent reason for treating nonresidents differently. The privileges and immunities clause, therefore, renders unconstitutional discrimination against nonresidents on the basis of their nonresidency such as New Hampshire’s imposition of a “commuters tax” applicable only to nonresidents, Alaska’s ban on nonresident employment in any enterprise connected with the Alaska pipeline, or New Hampshire’s residency requirement for admission to the Bar. It does not render unconstitutional reasonable distinc-

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519. Privileges and immunities protection is subject to the “nonfundamental rights” qualification. See supra note 516.


523. Hicklin v. Orbeck, 437 U.S. 518 (1978). A privileges and immunities clause challenge was more appropriate than a negative commerce clause challenge in this case. The discrimination was directed expressly against nonresident individuals, and the right to work had long been held to be a fundamental right for privileges and immunities purposes. Because the discrimination was based expressly on residency, the issue arose as to whether there was an independent justification for the differential treatment of nonresidents. The Hicklin Court noted the “mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2 and the Commerce Clause,” and stated that this relationship made relevant the Court’s decisions involving discrimination under the negative commerce clause. 437 U.S. at 531-32. Those decisions, however, were not necessary to support the Court’s conclusion in Hicklin that there was not any independent justification for the differential treatment of nonresidents, with respect to the opportunity to work in enterprises connected with the Alaska pipeline.

tions between residents and nonresidents where the fact of residency is relevant to the matter in issue, such as a requirement that a nonresident plaintiff post security for costs in a court action, although a similar requirement is not imposed on resident plaintiffs.525

The nondiscrimination principle embodied in the negative commerce clause relates to the historical concern with commercial protectionism. It operates to prohibit all discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state of those interests. The protections afforded by the negative commerce clause may be invoked by all entities engaged in interstate commerce, whether individual or corporate, resident or nonresident.526 The focus is on discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests, not on discrimination between residents and nonresidents.

The nondiscrimination principle embodied in the negative commerce clause and the privileges and immunities clause may operate in tandem where there is express discrimination against nonresident individuals with respect to commercial activity in the state. In that circumstance, there is discrimination both between residents and nonresidents, with respect to the enjoyment of a benefit in the state, and against interstate commerce, in favor of local commerce. Thus, both a negative commerce clause challenge and a privileges and immunities clause challenge are appropriate; the discrimination is violative of both constitutional provisions.527 In *Toomer v. Witsell*,528

525. *See supra* note 517.

526. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), resident landfill owners in New Jersey, who engaged in interstate commerce by transporting waste from other states to their New Jersey landfills, felt directly the discriminatory impact of the regulation as an identified user of the New Jersey landfills as did the City of Philadelphia. Both the landfill owners and the City could mount a negative commerce clause challenge to the regulation. The discrimination, however, was not between residents and nonresidents, but between local commerce and in-state interests on the one hand, and interstate commerce and out-of-state interests on the other hand. In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the entity engaged in interstate commerce was an Oklahoma minnow dealer, and the adversely affected out-of-state interests—potential purchasers of Oklahoma seized minnows in other states—were not identifiable. The Oklahoma minnow dealer could mount a negative commerce clause challenge to the regulation, but could not mount a privileges and immunities clause challenge.

527. In other contexts, particular forms of discrimination have been found to be violative of both the due process and equal protection clauses. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (ban on interracial marriage violative of equal protection clause as an indivisible racial classification and violative of due process clause as an impermissible interference with the fundamental right to marry).

for example, the Court held that South Carolina's attempt to charge nonresidents one hundred times more than residents for a license to pursue migratory shrimp in the state's coastal waters constituted unjustifiable discrimination against nonresidents and thus violated the privileges and immunities clause. It also could have based its decision on the negative commerce clause, since there was express discrimination against interstate commerce in favor of local commerce with respect to commercial activity within the state. Invocation of both grounds of challenge also would be appropriate where an identified out-of-state individual was denied access to locally produced goods. The point to be emphasized is that the negative commerce clause and the privileges and immunities clause have separate, though related, functions in our constitutional scheme. While both provisions embody the nondiscrimination principle, each is directed towards different kinds of discrimination. Both provisions stem from a "shared vision of federalism," and have a "mutually reinforcing relationship." To that extent, they are "overlapping" provisions. But each has a distinct role to play under the Constitution.

Professor Eule has proposed an approach to the constitutionality of commercial protectionism that would eliminate the distinct func-

529. This provision was not challenged on negative commerce clause grounds. Another provision of South Carolina's shrimping regulations, which required that shrimp caught in South Carolina waters be packed in South Carolina ports rather than in the ports of the shrimper's home state, was challenged and invalidated on negative commerce clause grounds. Id. at 403-06. For a discussion of this point in connection with the Court's subsequent holding in Pike v. Bruce Church, 397 U.S. 137 (1970), see supra notes 60-62 and accompanying text.

530. This is on the assumption that access was denied on the basis of nonresidency. In Hughes v. Oklahoma, 441 U.S. 322 (1979), the regulation prohibited shipping the minnows for sale outside of the state. Thus, the regulation discriminated against interstate commerce in favor of local commerce, but did not discriminate against nonresidents in favor of residents. If a prospective out-of-state purchaser had been identified, that party could have challenged the Oklahoma regulation on negative commerce clause grounds, but not on privileges and immunities grounds.

531. We have no occasion to consider in the present Article whether the privileges and immunities clause had properly been interpreted as limiting its protections to natural persons. For the contention that its protections should apply to corporations, as well as to natural persons, see Eule, supra note 4, at 449-53.


533. Id. at 531.

534. The distinct functions of the privileges and immunities clause and the negative commerce clause were emphasized by the Court in United Bldg. & Constr. Trades Council v. Mayor of Camden, 104 S. Ct. 1020 (1984). The Court held that although a required preference for state residents in the workforce of contractors on state-funded construction projects was not violative of the negative commerce clause, such a required preference might be violative of the privileges and immunities clause.
tions of the negative commerce clause and the privileges and immunities clause in our constitutional scheme. This approach would establish the privileges and immunities clause as the "more appropriate vehicle" to deal with "commercial discrimination." \(^{335}\) Professor Eule would recast the privileges and immunities clause to include corporations, and would relate the protections afforded by that clause to the "representation-enforcing approach." \(^{536}\) Under his approach, there would be a "spectrum of standards" of review, depending on the comparative impact of the challenged regulation on local interests, which are represented in the state's political process, and out-of-state interests, which are not. \(^{537}\) When the state regulation disproportionately burdens out-of-state interests in comparison with local interests, the state would have a heavier burden of justifying the efficacy of the means selected. \(^{538}\) As the burden on local interests from a particular regulation more closely approximates the burden on out-of-state interests, both interests may be deemed to be adequately protected by the political process and the degree of judicial scrutiny accordingly would be reduced. \(^{539}\) For example, Eule contends that in *Philadelphia v. New Jersey*, \(^{540}\) the denial of access to New Jersey landfill space for out-of-state waste impacted much more severely on resident landfill users than on their out-of-state customers, so that a reduced degree of scrutiny was appropriate. Eule suggests

The Court stated that the clauses have different objectives and establish different standards for evaluating state conduct. The Court concluded:

The Commerce Clause acts as an implied restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unrelated) matters involving interstate commerce. . . . The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce. *Id.* at 1028 (citations omitted). This case will be discussed at length *infra* notes 574-86 and accompanying text.

535. Eule, *supra* note 4, at 446-49. Eule notes that the privileges and immunities clause, in its original form as contained in the fourth article of the Articles of Confederation, referred to "all the privileges of trade and commerce." *Id.*

536. *Id.* at 449-54, 456-57. Eule states: "A representation-enforcing approach requires a court to ascertain whether the mechanisms of participatory democracy have failed to function properly. When that failure appears, intensive judicial scrutiny of the legislative product is warranted. When no such defect appears, deference to the political processes is commanded." *Id.* at 456.

537. See generally *id.* at 456-74 for the application of Eule's approach.

538. *Id.* at 470-72.

539. *Id.* at 460-61.

that the challenged regulation probably should have been upheld.\textsuperscript{541}

Most evident under Professor Eule's approach is his conclusion that commercial protectionism would not necessarily be unconstitutional. It would be sustained where the political process could provide a check, because represented local interests would suffer substantially as much as unrepresented out-of-state interests.

The underlying difficulty with Professor Eule's approach is the lack of any structurally-based conceptual justification for it. Eule does not deal with the separate roles that the privileges and immunities clause and the negative commerce clause play in our constitutional scheme. Nor does he explain why the privileges and immunities clause, which is directed toward discrimination between residents and nonresidents, is more appropriate than the negative commerce clause to deal with commercial protectionism. Eule also neglects to set forth any basis for defining the meaning of the privileges and immunities clause in terms of a "representation-enforcing approach," rather than with reference to the nondiscrimination principle that clearly is embodied in its text. Above all, he presents no evidence as to why the commerce clause is not properly interpreted as embodying the nondiscrimination principle, and why the Court should not rely on the negative commerce clause to invalidate all discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests.

Eule's approach thus suffers from two major structural flaws. First, he would assign a meaning to the privileges and immunities clause that is completely unwarranted in light of its express language. Its language is the language of values, not the language of process. Discrimination against nonresidents is prohibited, not because they are unrepresented in the local legislature, but because such discrimination is inconsistent with the "vision of federalism"\textsuperscript{542} that the Constitution established and the "'norm of comity' that is to prevail among the States with respect to their treatment of each other's residents."\textsuperscript{543} The command of the privileges and immunities clause

\textsuperscript{541} Eule, \textit{supra} note 4, at 463. Eule indicates similar disagreement with the results reached by the Court in other cases. His focus is primarily on the Court's method of analysis in these cases, but the method which he advocates would likely lead to different results. For example, in \textit{Hughes v. Oklahoma}, Eule says that the express ban on the out-of-state shipment of seined minnows should not per se be held unconstitutional, because local minnow dealers also were affected adversely. \textit{Id.} at 462-63. In \textit{Exxon} and \textit{Cloverleaf}, however, he says that the entire impact of the regulation was felt by out-of-state interests, thereby justifying a higher degree of scrutiny. \textit{Id.} at 464-66.

\textsuperscript{542} Hicklin v. Orbeck, 437 U.S. 518, 532 (1978).

\textsuperscript{543} \textit{Id.} at 523-24 (citations omitted).
is clear: in the allocation of benefits and burdens, there must be equality of treatment between residents and nonresidents unless there is an independent justification for the differential treatment of nonresidents.\(^5\) Where there is no independent justification for the differential treatment of nonresidents, the nondiscrimination principle of the privileges and immunities clause has been violated, and that violation is not lessened because some local interests also are disadvantaged by the discrimination against nonresidents.\(^5\) There simply is no proper basis for ascribing a process-type meaning to the privileges and immunities clause, nor for any balancing where an independent justification for the differential treatment of nonresidents cannot be shown. Thus, even if the privileges and immunities clause is the "more appropriate vehicle" to deal with commercial protectionism, which it is not, it could not be relied on to support the approach to the constitutionality of "commercial discrimination" that Professor Eule advocates.

Second, and perhaps more important, Professor Eule has not demonstrated that the privileges and immunities clause is a more appropriate vehicle than the negative commerce clause to deal with commercial protectionism. His contention that the negative commerce clause should not be relied upon to deal with commercial protectionism completely ignores the nondiscrimination principle that is derived from the historical context of the commerce clause. Perhaps Professor Eule has failed to differentiate the nondiscrimination principle from the free trade principle. Eule has shown that the commerce clause does not embody the free trade principle, and it is on this basis that he dismisses the negative commerce clause, not only as the source of constitutional protection against burdensome state regulation, but also as the source of constitutional protection against discriminatory state regulation.\(^5\) Since it is incontrovertible that the commerce clause does embody the nondiscrimination principle,\(^5\) the commerce clause may properly be relied on in its negative aspect as the source of a right on the part of entities engaged in interstate commerce and out-of-state interests to be free from discrimination because of the interstate nature of that commerce or the out-of-state nature of those interests. The nondiscrimination principle embodied

\(^5\) This principle is qualified by the "nonfundamental rights" exception and should not be applicable when the state is using state-owned resources for the benefit of its own residents. See infra note 598.

\(^5\) The same is true as regards the nondiscrimination principle embodied in the negative commerce clause. See supra notes 55 & 221 and accompanying text.

\(^5\) See supra notes 470-73 and accompanying text.

\(^5\) See supra notes 484-89 and accompanying text.
in the negative commerce clause addresses itself precisely to commercial protectionism, making the negative commerce clause, rather than the privileges and immunities clause, the most appropriate vehicle to deal with commercial protectionism under our constitutional scheme. Therefore, the approach to the constitutionality of commercial protectionism advocated by Professor Eule cannot withstand structural analysis and must be rejected.

In summary, the privileges and immunities clause and the negative commerce clause both embody the nondiscrimination principle. But the nondiscrimination principle of each is directed towards different kinds of discrimination. The nondiscrimination principle of the negative commerce clause is directed toward commercial protectionism, and the negative commerce clause has properly been relied on by the Court to invalidate all discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests. The negative commerce clause thus has a function in our constitutional scheme that is distinct from the function performed by the privileges and immunities clause.

C. The Constitutionality of Discrimination in Favor of Local Commerce and In-State Interests Where the State is Acting As Market Participant or Dispenser of Benefits

The Court has consistently held that when the state acts as a market participant, it constitutionally can discriminate in favor of local commerce or in-state interests at the expense of interstate commerce or out-of-state interests. As a purchaser, the state can limit itself to purchases from state residents and, as a seller of products produced by state-owned businesses, the state can limit its sales to state residents. The state also can require that its contractors give employment preference to state residents on state contracts. In terms of the constitutional structure, it can be shown that neither the negative commerce clause, nor the privileges and immunities clause, can operate as a limitation on the power of a state to utilize state resources for the benefit of its people. Therefore, there properly can be no constitutional restriction on either the power of a state

550. White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1982). However, although such preference has not been held to violate the negative commerce clause, the Court has held that it may violate the privileges and immunities clause. See infra notes 574-86 and accompanying text.
to favor its residents when acting as purchaser or seller of products produced by state-owned enterprises, or the power of the state to give residents preference in the use of, or access to, state-owned resources.

The Court has advanced two seemingly distinct rationales for its conclusion that the nondiscrimination principle does not apply when the state is acting as market participant; these may be described as the "market freedom" rationale and the "state sovereignty" rationale. In *Hughes v. Alexandria Scrap Corp.*, the first case involving discrimination by the state when acting as market participant, Justice Powell emphasized the "marked freedom" rationale. In upholding the power of Maryland to limit its bounty payments for automobile hulks to Maryland residents, Justice Powell stated: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Insofar as the automobile hulks would be processed in Maryland rather than in other states as a result of the "Maryland only" bounty program, "[t]hey remain within Maryland in response to market forces, including that exerted by money from the State." In *Reeves, Inc. v. Stake*, where the Court upheld a preference for South Dakota residents in access to cement produced by a state-owned cement plant, Justice Blackmun added the "state sovereignty" rationale. He stated:

Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people," and "the long recognized right of trader or manufacturer, engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal."

Both the market freedom and the state sovereignty rationales were invoked in *White v. Massachusetts Council of Construction Employers, Inc.*, where the Court upheld, against a negative commerce clause challenge, a municipal regulation requiring that all construction

552. Id. at 810.
553. Id.
555. Id. at 438-39 (citations omitted).
556. 460 U.S. 204 (1982).
projects financed in whole or in part by city funds be performed by
a work force consisting of at least fifty percent city residents.

From a structural standpoint, when the state acts as a market
participant, there is a significant difference between the market
freedom rationale and the state sovereignty rationale in regard to resi-
dent preference. The difference is highlighted in the dissenting
opinion in Reeves, where Justice Powell appeared to repudiate the
market freedom rationale he had set forth in Hughes, in favor of the
state sovereignty rationale. Justice Powell concluded that the negative
commerce clause did not operate to constrain the state when the
state was acting as purchaser, but it did when the state was acting
as seller. He reasoned that state procurement involved an exercise
of state sovereignty, rendering the negative commerce clause in-
aplicable, whereas the sale of products produced by a state-owned
enterprise did not involve a comparable exercise of sovereignty. He
stated:

The application of the Commerce Clause to this case
should turn on the nature of the governmental activity in-
volved. If a public enterprise undertakes an “integral op-
eratio[n] in areas of traditional governmental functions,”557
the Commerce Clause is not directly relevant. If, however,
the State enters the private market and operates a commercial
enterprise for the advantage of its private citizens, it may
not evade the constitutional policy against economic Bal-
kanization.

The distinction derives from the power of governments to
supply their own needs, and from the purpose of the Com-
merce Clause itself, which is designed to protect “the natural
functioning of the interstate market.”558 In procuring goods
and services for the operation of government, a State may

557. Here Justice Powell cited National League of Cities v. Usery, 426 U.S.
833 (1976), where the Court held that there was a “state sovereignty” exception
to Congress’ otherwise plenary power over interstate commerce, which rendered
unconstitutional the application of the minimum wages and maximum hours
provisions of the federal Fair Labor Standards Act to employees of state and
municipal governments. It may be significant that Usery and Alexandria Scrap were
decided the same day. In Reeves, Justice Powell makes clear his view that these
two cases involved comparable state sovereignty considerations. While the state
sovereignty exception of Usery has now been rejected completely, and Usery has
been overruled by Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct.
1005 (1985), this does not undercut the validity of state sovereignty considerations
in the very different context where the state is utilizing state-owned resources for
the benefit of its own residents.

558. It is submitted that, at this point, Justice Powell confuses the free trade
act without regard to the private marketplace and remove itself from the reach of the Commerce Clause. But when a State itself becomes a participant in the private market for other purposes, the Constitution forbids actions that would impede the flow of interstate commerce. These categories recognize no more than the "constitutional line between the State as government and the State as trader."

The Court holds that South Dakota, like a private business, should not be governed by the Commerce Clause when it enters the private market. But precisely because South Dakota is a State, it cannot be presumed to behave like an enterprise "engaged in an entirely private business." A State frequently will respond to market conditions on the basis of political rather than economic concerns. To use the Court's terms, a State may attempt to act as a "market regulator" rather than a "market participant." In that situation, it is a pretense to equate the State with a private economic actor. State action burdening interstate trade is no less state action because it is accomplished by a public agency authorized to participate in the private market.\(^5\)

Justice Powell's point that the state does not have the "market freedom" of a private entity, so as to render the negative commerce clause inapplicable merely because the state has entered the market, seems irrefutable.\(^5\) The Constitution applies to the state in whatever capacity the state acts and, as a result, the state does not have the same market freedom as does a private entity.\(^5\) Just as the non-principle with the nondiscrimination principle. As previously demonstrated, the "purpose of the Commerce Clause itself" is not to "protect the natural functioning of the interstate market," but to prevent discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests. See supra note 547 and accompanying text.

559. 447 U.S. at 449-51 (Powell, J., dissenting) (citations omitted).
560. Justice Blackmun's response to this point was merely that when the state enters the market, it has the attributes of both a political entity and a private business, and that it was not possible to ignore the similarities of private businesses and public entities when they function in the marketplace. Id. at 439, n.12.
561. Similarly, the state, as an employer, is subject to constitutional restraints. While the state can assert interests as an employer that it cannot assert as a regulator, see Kelley v. Johnson, 425 U.S. 238 (1975) (hair style and length rule valid as applied to uniformed police officers), it cannot, without limitation, discharge or disadvantage its employees for reasons involving the permissible exercise of first amendment rights, see, e.g., Pickering v. Board of Educ., 391 U.S. 563 (1968) (public criticism of governmental employer), Elrod v. Burns, 427 U.S. 347 (1976) (political affiliation), or of other fundamental rights, see, e.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1973) (mandatory maternity leave for public school teachers after the fourth or fifth month of pregnancy).
discrimination principle embodied in the negative commerce clause precludes the state from requiring discrimination in favor of local commerce and in-state interests by private market participants, the same principle would operate to restrict the market freedom of the state to discriminate when it is acting as a market participant.

However, when the state provides for resident preference that is directly traceable to the expenditures of state funds, or other utilization of state-owned resources, it is doing much more than asserting market freedom. It is engaging in an act of sovereignty by utilizing the collective wealth of the state for the benefit of its peoples or a segment of them. In so doing, it is performing the primary function for which any government is established, the advancement of the welfare of its people.

In this regard, Justice Powell’s distinction between the situation where the state is acting as a purchaser, and the situation where the state is acting as a seller, is unsound. In both instances, the state is engaged in an act of sovereignty by using state resources for the benefit of the people of the state. When it limits its purchases to state residents, as in Alexandria Scrap, it is using state funds directly to benefit its residents; when it limits the sale of products produced by state-owned enterprises to its residents, as in Reeves, it likewise is using state resources to confer a benefit on its residents. Thus, the state sovereignty rationale set forth by Justice Powell in Reeves should lead to the same result in Reeves as it did in Alexandria Scrap.

This point was recognized by Justice Blackmun in Reeves, to the extent that he relied on the state sovereignty rationale, rather than the market freedom rationale, to sustain the constitutionality of South Dakota’s preference for access by South Dakota residents to cement produced by state-owned cement plans. He stated: “At bottom, the discrimination challenged in Alexandria Scrap was motivated by the same concern underlying South Dakota’s resident-preference policy—a desire to channel state benefits to the residents of the State supplying them.” 562

In terms of constitutional structure, therefore, the Constitution should not be interpreted as placing any restriction on the power of a state to utilize state-owned resources for the benefit of the people of that state. The primary reason for the existence of any government is to advance the welfare of its people. Our constitutional structure proceeds on the theory that state governments retain all the attributes of sovereignty, except as expressly or impliedly limited by the Constitution. It follows, therefore, that the reason for the existence of separate governments in our constitutional scheme is to allow

562. 447 U.S. at 442-43 n.16.
each state to advance the welfare of its own citizens. It is the constitutional function of the federal government, in contrast, to advance the interests of the nation as a whole. State sovereignty encompasses the use of the collective wealth of that state for the benefit of the people of that state. It is inconsistent with the principle of state sovereignty, and with the role of the states as independent sovereigns in our constitutional scheme, to require a state to use its collective wealth for the benefit of citizens of other states, whose welfare is the responsibility of their home states.

This point has been recognized explicitly with regard to entitlement to state-provided benefits under the privileges and immunities clause. As a general proposition, the privileges and immunities clause does not require that nonresidents be given equal access with residents to state-provided benefits, such as welfare or attendance at a publicly supported university.563 This should be equally true with regards to a claim under the negative commerce clause to benefits resulting from the utilization of state-owned resources.564 The nondiscrimination principle embodied in the negative commerce clause, like the nondiscrimination principle embodied in the privileges and immunities clause, should not be applicable when the state is utilizing state resources for the benefit of its citizens. As Professor Maltz has stated so well, "to hold that the Constitution requires payment of benefits to nonresidents would be totally inconsistent with the concept of states as quasi-sovereign entities primarily responsible for the welfare of their respective citizenries rather than that of the nation as a whole."565 In the same vein, Professor Hellerstein has stated: "To preclude the States from preferring in-state interests in the distribution of state natural resources would deprive the States of an important attribute of their separate existence as independent political units in the federal system."566

It is submitted, therefore, that the state sovereignty rationale, rather than the market freedom rationale, should have been the basis of the Court's decisions in Alexandria Scrap, Reeves, and White: The state sovereignty principle fully renders constitutional the resident preference that was involved in those cases. In all three cases the exercise of state sovereignty served the objective of promoting the welfare of the residents of the state through the use of the state's

563. See Simson, supra note 4, at 395-98; Varat, supra note 4, at 552-54.
564. There is no practical difference between direct spending by the state and the provision of a benefit that has been derived from the utilization of a state-owned resource. See Anson & Schenklan, supra note 4, at 86.
565. Maltz, supra note 4, at 68.
566. Hellerstein I, supra note 4, at 77.
collective wealth. This exercise of state sovereignty is an integral part of our constitutional structure, which provides for the existence of separate sovereign states to promote the welfare of the people of each state. Thus, in terms of constitutional structure, neither the negative commerce clause, nor the privileges and immunities clause, should be interpreted as imposing any limitation on the power of a state to use its collective wealth for the benefit of its residents.

Professor Varat, while conceding that "the continuation of state government as contemplated by the Framers necessarily requires recognition of some state authority to treat residents more favorably than non-residents," nonetheless maintains that not all distinctions "legitimately reflect the separate existence of the states." He says that "[i]n the context of state discrimination on the basis of residence, there is an inherent conflict between the objectives of the Constitution’s interstate equality provisions and the continued significance of state government." Varat concludes: "Because state power to discriminate against nonresidents, even in the state’s public sector, is at odds with the constitutional goals of national unification and an open economy, it is necessary to decide whether the objectives of interstate equality or the purposes of state government shall prevail in any particular context." He proposes a balancing approach to the constitutionality of state resident preference programs, and sets forth criteria by which to determine whether the interest in interstate equality should prevail over the interest in state sovereignty in particular circumstances.

Critical to Professor Varat’s approach, is the assumption that state sovereignty and interstate equality are equal and competing values in our constitutional scheme. This assumption, however, cannot be supported in terms of the constitutional structure. In the context of the use of the collective wealth of a state to benefit its residents, no conflict is present between competing constitutional values. The function of each state is to advance the welfare of the

567. The existence of separate states is recognized textually in art. IV, § 3, cl. 2, which prohibits the formation of a new state within the boundaries of any other state, or the combination of two or more states into a new state without the consent of the affected states, and in art. IV, § 4, which requires that the United States guarantee to every state a “republican form of government,” and protect each state against invasion or domestic violence.

568. Varat, supra note 4, at 517.

569. Varat is referring to both the privileges and immunities clause and the negative commerce clause.

570. Varat, supra note 4, at 516.

571. Id. at 530.

572. Id. at 531-40.
citizens of that state, and not the welfare of citizens of other states. Interstate equality is not at issue in these circumstances, and thus cannot be balanced against the state sovereignty value. Any "discrimination" against citizens of other states, resulting from the use of a state's resources for the benefit of its own citizens, follows from the function of state governments in our constitutional scheme and is inherent in the existence of separate states. Thus, the application of the nondiscrimination principle in that context would be inconsistent with our constitutional structure. Under our Constitution, there can be no limitation on the power of a state to promote the welfare of its residents through the utilization of its collective wealth.

The Supreme Court has accepted this proposition fully with respect to negative commerce clause challenges to preference for state residents resulting from the utilization of state resources,573 but not with respect to a privileges and immunities clause challenge. In United Building & Construction Trades Council v. Mayor of Camden,574 the Court held that, although a city's requirement for employment preference for city residents in the workforce of a contractor on a city construction contract was insulated from challenge under the negative commerce clause,575 the resulting discrimination against out-of-state residents could be violative of the privileges and immunities clause. In that case, the City of Camden required that at least forty percent of the employees of contractors and subcontractors working on city construction contracts be Camden residents. With only Justice Blackmun dissenting,576 the Court held that insofar as the employment preference operated to discriminate against out-of-state residents, it was subject to challenge under the privileges and immunities clause.577

Crucial to the Court's analysis, was a distinction between the functions of the negative commerce clause and the privileges and immunities clause in our constitutional scheme, and a seeming

573. See Alexandria Scrap, Reeves, and White. See also supra notes 548-50 and accompanying text.
575. See supra note 550.
576. Justice Blackmun dissented on the ground that the privileges and immunities clause did not apply to discrimination on the basis of municipal residence. 104 S. Ct. at 1030-37 (Blackmun, J., dissenting).
577. The Court remanded the case to the state court for a determination of whether there was a "substantial reason" for the difference in treatment between residents and nonresidents. The city had contended that the resident preference was necessary to increase employment in the city and to arrest "middle class flight." The Court concluded that it was impossible to evaluate the city's justification on the present state of the record. Id. at 1029-30.
acceptance of the market freedom rationale, rather than the state sovereignty rationale, as the basis for the market participant exception to the nondiscrimination principle of the negative commerce clause.\textsuperscript{578} These two matters were related. The Court explained its decision in \textit{White} on the basis of the distinction between the government acting as a market participant and as a market regulator. That distinction was not found to be dispositive in the privileges and immunities clause challenge, because "'[t]he two clauses have different aims and set different standards for state conduct.'\textsuperscript{579}

The privileges and immunities clause, according to the Court, "imposes a direct restraint on state action in the interests of interstate harmony."\textsuperscript{580} The Court went on to say:

This concern with comity cuts across the market regulator-market participant distinction that is crucial under the Commerce Clause. It is discrimination against out-of-state residents on matters of fundamental concern which triggers the [privileges and immunities] Clause, not regulation affecting interstate commerce. Thus, the fact that Camden is merely setting conditions on its expenditure for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.\textsuperscript{581}

The Court recognized the significance of the fact that city funds were involved in the construction project that was the source of the preference, but maintained that this was not sufficient to insulate the preference from challenge under the privileges and immunities clause. "The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute’s discrimination violates the Privileges and Immunities Clause. But it does not remove the Camden ordinance completely from the purview of the Clause."\textsuperscript{582} The Court remanded the case for a determination of whether the discrimination against nonresidents could be justified on the ground that it was necessary to alleviate unemployment in the city and a resulting population decline.\textsuperscript{583}

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\textsuperscript{578} Id. at 1028.
\textsuperscript{579} Id.
\textsuperscript{580} Id.
\textsuperscript{581} Id. at 1028-29.
\textsuperscript{582} Id. at 1029.
\textsuperscript{583} See supra note 577.
It is submitted that the effort of the city to utilize its collective wealth to promote the welfare of its residents should not be subject to challenge under the privileges and immunities clause, just as it is not subject to challenge under the negative commerce clause. As previously discussed,\(^5\) neither the nondiscrimination principle of the privileges and immunities clause, nor the nondiscrimination principle of the negative commerce clause, is applicable when the state is utilizing state resources for the benefit of state residents. Such application is inconsistent with the state sovereignty value, reflecting the existence of separate states and the function of state governments in our constitutional scheme.

In this regard, the Court’s seeming acceptance of the market freedom rationale, rather than the state sovereignty rationale, as the basis for the market participant exception to the nondiscrimination principle of the negative commerce clause, may have influenced strongly the privileges and immunities holding in \textit{Camden}. In the Court’s view, the requirement of employment preference for residents in the workforces of contractors on city construction projects was merely an effort by the city to set “conditions on its expenditures for goods and services in the marketplace.”\(^5\) However, the requirement of resident preference represents an act of sovereignty in which the city is utilizing the collective wealth of the city for the benefit of its own people. In so doing, the city is performing the primary function for which any government is established, the advancement of the welfare of its people.\(^5\) If the Court had accepted the state sovereignty rationale as the basis for the market participant exception to the negative commerce clause, it could have carried that rationale over to the privileges and immunities clause challenge as well. As things now stand, however, all state efforts to prefer state residents over nonresidents are at least potentially subject to challenge under the privileges and immunities clause.

The better position would hold that as long as the state owns the resource, it constitutionally can limit to its own residents the receipt of benefits directly traceable to that resource. If a state owns oil deposits, for example, it should be able to limit the sale of oil obtained from those deposits to state residents.\(^5\) Similarly, it should be able to give residents preferential access to the exploitation of those resources, such as providing that only residents can obtain

\(^{584}\) See supra notes 518-34 and accompanying text.  
\(^{585}\) 104 S. Ct. at 1028-29.  
\(^{586}\) See supra notes 562-67 and accompanying text.  
\(^{587}\) This point is established with respect to the negative commerce clause. \textit{See} Reeves v. Stake, 447 U.S. 429 (1980).
drilling leases for state-owned oil deposits. It is further contended that just as the state should be able to limit the sale of oil obtained from state-owned oil deposits to state residents when the state itself is exploiting the resource, it should be able to impose such limits when the resource is being exploited by private entities under lease from the state. Either way, the oil that is available for sale comes from state-owned oil deposits, and the state should be able to require that its residents be given preferential access to such resources.

Preference for state residents in the use of or access to state-owned natural resources presumably would not violate the negative commerce clause, regardless of whether the resource was being exploited by the state itself or by private entities under lease from the state. However, in light of the Court's holding in *Camden*, such resident preference might be subject to challenge under the privileges and immunities clause if the resource is being exploited by private entities. In *Camden*, the Court held that a requirement of resident preference in the workforce of private contractors working on city-funded construction projects was subject to challenge under the privileges and immunities clause. However, a requirement that state employees be state residents, or that city employees be city residents, presumably would not violate that clause. The *Camden* Court noted that public employment is qualitatively different from employment in the private sector, and said that the "exercise of power to bias the employment decision of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause." It can be argued, however, that as long as it is the state itself that is giving the preference, resulting from the state's exploitation of a state-owned resource, and the state is not trying to compel such a preference on the part of private entities, considerations of state sovereignty may come to the fore and insulate the preference from a privileges and immunities clause challenge.

588. For discussions of the view that the state cannot constitutionally require resident preference when the resource is being exploited by private entities, see Anson & Schenklan, supra note 4, at 92-94 and Hellerstein I, supra note 4, at 79-82.

589. This assumption is made in light of the Court's rejection of the negative commerce clause challenge in *White*, 460 U.S. at 208. See also *Camden*, 104 S. Ct. at 1028-29.

590. See Varat, supra note 4, at 546-48. But see Simson, supra note 4, at 392-95. In McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976), the Court held per curiam that a requirement that municipal employees be residents of the city during the period of their employment did not violate the constitutional right to travel.

591. 104 S. Ct. at 1028.

592. Id. at 1029.
In *Hicklin v. Orbeck*, 593 the Court held violative of the privileges and immunities clause Alaska’s attempt to require private employers to employ residents in any work connected with the Alaska pipeline. The Court’s decision in that case was based on the fact that the preference went far beyond work that involved exploitation of the resource itself. 594 The Court noted that “the connection of the State’s oil and gas with much of the covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents.” 595 The *Hicklin* Court recognized that state ownership of a resource is “a factor—although often the crucial factor—to be considered in evaluating whether the statute’s discrimination against noncitizens violates the [privileges and immunities] Clause,” 596 but found that this factor was not dispositive in *Hicklin* because of the law’s “extensive reach.” The Court concluded: “In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska’s decision to develop its oil and gas resources to bias their employment practices in favor of residents. We believe that Alaska’s ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates.” 597 Under the *Hicklin* Court’s approach, if the state itself had been giving the preference, such as giving residents preferential access to exploitation of oil deposits by way of the lease of drilling rights or the purchase of oil produced from those deposits, the Court might have held that this was not violative of the privileges and immunities clause. However, in light of *Camden*, any required preference for state residents resulting from exploitation of the resource by private entities presumably would be subject to privileges and immunities clause challenge. 598 Under this view, the Court’s decision in the older case of *McCready v. Virginia*, 599 upholding Virginia’s exclusion of nonresidents from

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594. The provisions of “Alaska Hire” are set out in the opinion. See id. at 529-30.
595. Id. at 529.
596. Id.
597. Id. at 531.
598. This proposition assumes that the benefit involved would constitute a “fundamental right” for privileges and immunities clause purposes. The Court might hold, however, that a particular benefit, such as obtaining oil from state-owned deposits, was not “‘fundamental’ to the promotion of interstate harmony so as to ‘fall within the purview of the privileges and immunities clause.’ ” *Camden*, 104 S. Ct. at 1027-28.
599. 94 U.S. 391 (1877).
planting oysters in state-owned tidelands, should still be considered viable today.\textsuperscript{600} There, the state was giving state residents preferential access in the exploitation of the state-owned resource. In the later case of \textit{Toomer v. Witsell},\textsuperscript{601} by contrast, the Court invalidated South Carolina's attempt to charge nonresidents one hundred times more than residents for a license to pursue migratory shrimp. In that case, South Carolina owned neither the shrimp, nor the waters in which they were taken. Therefore, state sovereignty considerations were absent, and the discrimination was unconstitutional.\textsuperscript{602}

It is again submitted that as long as the state owns the resource, state sovereignty considerations dictate that the state should be able to limit to its own residents the receipt of benefits directly traceable to that resource. Further, it should be able to do so whether the resource is being exploited by private entities under lease from the state, or by the state itself. \textit{Hicklin} was decided correctly because the resident preference involved therein was far too extensive. However, it should be constitutional for the state to require that private entities exploiting state-owned resources give employment preferences to state residents in work directly connected with such exploitation, or that they give state residents or businesses preferential access to the products derived from such exploitation. The Supreme Court may be prepared to hold that the state constitutionally may give preferential access to state residents with respect to the exploitation and products of the resource itself. As things now stand, however, any effort to compel private entities exploiting the resource to give preferential access or treatment to state residents presumably would be subject to challenge under the privileges and immunities clause.

Once the state disposes of a state-owned resource, that resource no longer represents the collective wealth of the state and, for constitutional purposes, it is no different from any other resource owned by a private entity.\textsuperscript{603} State sovereignty considerations are no

\textsuperscript{600} \textit{McCready}, however, was questioned in \textit{Hicklin v. Orbeck}, 437 U.S. at 528-29, where the Court noted that state ownership of a resource did not completely exempt a law concerning that resource from the prohibitions of the privileges and immunities clause. For the view that the resident preference involved in \textit{McCready} violated the privileges and immunities clause, see \textit{Varat}, \textit{supra} note 4, at 557-58.

\textsuperscript{601} 334 U.S. 385 (1948).

\textsuperscript{602} Although the Court based its decision on the privileges and immunities clause, it also could have based it on the negative commerce clause, since the law expressly discriminated against interstate commerce in favor of local commerce with respect to commercial activity within the state. \textit{See supra} notes 527-29 and accompanying text.

\textsuperscript{603} Similarly, once the government makes a bona fide sale of public property to a private entity, the private entity can operate the property free of constitutional constraints. \textit{See, e.g., Tonkins v. City of Greensboro}, 276 F.2d 890 (4th Cir. 1960).
longer applicable and the nondiscrimination principles embodied in
the negative commerce clause and the privileges and immunities
clause should preclude the state from requiring the private owner
to favor state residents. Thus, if a state transferred state-owned oil
deposits to a private entity, the state could not constitutionally
require, as a condition of the transfer, that the new owner sell the
oil only to state residents or give state residents preference in
employment involving the working of the oil deposits. This type of
situation was presented to the Supreme Court last Term in South-
Central Timber Development, Inc. v. Wunnicke. In that case, Alaska
had required that timber taken from state land by private developers
under contract with the state be partially processed within the state
prior to export. The stated purpose of the requirement was to
“protect existing industries, provide for the establishment of new
industries, derive revenue from all timber resources, and manage
the State’s forests on a sustained yield basis.” The Ninth Circuit
had sustained the regulation on the ground that it was authorized
implicitly by Congress’ policy regarding timber taken from federal
land. The Supreme Court reversed, finding that Congress had acted
only with respect to federal lands, and that it could not be inferred
that Congress thereby intended to authorize a similar policy with
respect to state lands. The state argued that the judgment of the
court of appeals should be affirmed on the ground that the require-
ment was permissible because the state was acting as “market
participant rather than market regulator.” In an opinion by Justice
White, four Justices held that the requirement could not be sustained
under the “market participant” doctrine. Justice White’s analysis
utilized the “market freedom” rationale, but he concluded that,
“[t]he limit of the market-participant doctrine must be that it allows
a State to impose burdens on commerce within the market in which
it is a participant, but allows it to go no further.” Market freedom
could not be used to allow the state to regulate the separate economic

605. Id. at 2239.
606. Id. at 2243.
607. Id. at 2240.
608. There was no dissent on the issue of congressional authorization. Justices
Brennan, Blackmun, and Stevens agreed with Justice White on the negative commerce
clause question. Chief Justice Burger and Justice Powell, concurring in the judgment,
would have remanded the case to the court of appeals for initial consideration of
the negative commerce clause question. Justices Rehnquist and O’Connor dissented
on the ground that the resident preference came within the “market participant”
exception. Justice Marshall did not participate in the case.
609. Id. at 2245.
relationships of its trading partners, because the state was not a participant in the market after the transaction between it and the purchaser of the timber had been completed.  

Under our analysis, the question of "what is the market" would not be relevant in the constitutional equation. The justification for resident preference in benefits resulting from the utilization of state resources is state sovereignty; once the state disposes of the resource, state sovereignty considerations no longer are applicable. A compelled preference for state residents in these circumstances is violative of the nondiscrimination principle. South-Central indicates that "downstream restrictions" probably will be found to be unconstitutional, and that the market participant exception to the nondiscrimination principle is likely to be limited to situations in which the state retains ownership of the resource.

The final question involving discrimination in favor of local commerce or in-state interests, where the state is acting as a market participant or a dispenser of benefits, concerns the power of Congress to prohibit such discrimination. Again, in terms of constitutional structure, the answer seems clear. Congress, in the affirmative exercise of its commerce power, can prohibit such discrimination. Now that the Court has rejected completely any state sovereignty limitation on the affirmative exercise of the commerce power, there is no structural bar to Congress’ exercise of that power to prohibit the states from discriminating against interstate commerce or out-of-state interests even when the state is acting as a market participant or a dispenser of benefits. It should be noted, in this regard, that state resident preference in benefits resulting from the utilization of state-owned resources is justified on the ground that it is the function of state governments, under our constitutional scheme, to advance the welfare of its citizens. The function of the federal government, however, is to advance the welfare of the "nation as a whole." When the state gives its residents preference in benefits resulting from the utilization of state-owned resources, the state is performing its constitutional function; when Congress prohibits such resident preference, it also is performing its constitutional function. However,

610. Id. at 2246.
611. The dissenters contended that the state was paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. Id. at 2248. Under the state sovereignty rationale that we have advanced, state sovereignty considerations would come to an end after the resource had been transferred. Accordingly, the state could no longer, consistent with the nondiscrimination principle, require the private entity to discriminate against interstate commerce in favor of local commerce.
as a matter of federal supremacy, congressional action to advance the welfare of the "nation as a whole" prevails over inconsistent state action to advance the welfare of its citizens. In terms of constitutional structure, therefore, there can be no doubt that Congress constitutionally may prohibit such state resident preferences.

D. A Concluding Note

The relationship between the nondiscrimination principle embodied in the negative commerce clause, state sovereignty considerations, and the affirmative power of Congress is illustrated by the following "exercise in symmetry" based on Philadelphia v. New Jersey.613 The State of New Jersey faced the problem of competition between out-of-state waste and New Jersey waste for access to New Jersey landfill space. The state, concerned with conserving landfill space and disposing of New Jersey waste, resolved the problem by giving New Jersey waste preferential access to privately-owned New Jersey landfills. This blatant discrimination in favor of New Jersey waste, at the expense of out-of-state waste, was inconsistent with the nondiscrimination principle embodied in the negative commerce clause and, therefore, was constitutionally proscribed.614 The Constitution sometimes requires a state to make hard choices.615 At the same time, however, it usually enables the state to make a particular choice if it is willing to pay the political or economic price that the Constitution requires. Thus, if New Jersey wants its landfill space to be used only to dispose of New Jersey waste, it may accomplish this by purchasing the privately-owned landfills through its eminent domain power, and then limiting their use. If, however, Congress concludes that the national interest in the "free flow of waste" dictates that New Jersey landfill space be accessible to out-of-state waste, it can, in the affirmative exercise of the commerce power, prohibit the state from discriminating against out-of-state waste. By the same token, Congress may conclude that it is in the national interest that the waste generated in each state be disposed of in that state, and may establish a scheme of regulation by which each state

614. See supra notes 34-38 and accompanying text.
615. One such example is the choice between prohibiting all concerted expression in the public forum or providing access to "unpopular" concerted expression. See supra note 95 and accompanying text. See also Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 30:

Everyone at some time or other loves a parade whatever its effect on traffic and other uses of public streets. Municipalities pressed by concern with the protest movement may be inhibited in any rush to flat nondiscriminatory prohibitions by the difficulty of distinguishing between the parades we like and others. Equal protection may, therefore, require freedom for the parades we hate.
can limit the disposal of waste in privately-owned landfills to in-state waste.

Under our constitutional structure, the affirmative grant of the commerce power to Congress means that Congress has the final say with respect to the matter of "interstate waste disposal." In the absence of congressional regulation, the answer to the problem is, nevertheless, found in the constitutional structure. The nondiscrimination principle embodied in the negative commerce clause precludes a state from giving in-state waste preferential access to privately-owned landfill space. But the principle of state sovereignty operates to permit a state to make landfill space a state-owned resource that shall be utilized only for the benefit of its residents. The point to be emphasized is that, in the absence of congressional regulation, the Constitution does permit New Jersey to give New Jersey waste preferential access to New Jersey landfill space if the state is willing to pay the price that the Constitution requires.

CONCLUSION

This Article has explored at length the negative commerce clause as a restriction on state regulatory and taxation power, and demonstrated that the only conceptual justification for a negative aspect to the commerce clause that can withstand structural analysis is the nondiscrimination principle. Since a major historical purpose for the affirmative grant of the commerce power to Congress was to prevent discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests, the commerce clause may be said to embody the nondiscrimination principle. Thus, it may be relied upon in its negative aspect as the source of a right on the part of entities engaged in interstate commerce and out-of-state interests to be free from discriminatory state regulation or taxation. Under this conceptual justification, the negative commerce clause absolutely prohibits discrimination against interstate commerce or out-of-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.

The nondiscrimination principle justification for a negative aspect to the commerce clause has been shown to accord substantially with the results reached by the Court under its current articulated approach to the negative commerce clause as a restriction on state regulatory and taxation power. The Court's express acceptance of this conceptual justification would establish the negative commerce clause as an important, although narrowly focused, restriction on state regulation and taxation affecting interstate commerce. Most importantly perhaps, the Court would finally bring order to the negative commerce clause, and the negative commerce clause as a limitation on state regulatory and taxation power would be firmly rooted in the structure of the Constitution.