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Essay

Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine

Brannon P. Denning†

A perennial object of judicial and academic brickbats,¹ the

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¹. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (arguing that the DCCD “makes little sense” and “has proved virtually unworkable in application” stemming in part from the fact that it “has no basis in the text of the Constitution”); Tyler Pipe Indus. v. Wash. State Dep’t of Rev., 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that the DCCD finds no support in the Constitution’s text, structure, or history); Michael DeBow, Codifying the Dormant Commerce Clause, 1995 PUB. INT. L. REV. 69, 73 (“The basic problem raised by the Dormant Commerce Clause is that it has no basis in the text of the Constitution.”); Martin H. Redish & Shane V. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 571 (“Our position is that...there is no dormant commerce clause to be found within the text or textual structure of the Constitution.” (citation omitted)); Note, Functional Analysis, Subsidies, and the Dormant Commerce Clause, 110 HARV. L. REV. 1537, 1537 (1997) (“The lack of clarity in the Court’s dormant commerce clause opinions largely results from the absence of any ‘clear theoretical underpinning,’ the dormant commerce clause developed...out of an ad hoc administrative concern that Congress would be unable to fend off states’ efforts at protectionism without the courts’ help.” (citations omitted) (quoting Tyler Pipe Indus., 483 U.S. at 262)); Amy M. Petragnani, Comment, The Dormant Commerce Clause: On Its Last Leg, 57 ALB. L. REV. 1215, 1216 (1994) (arguing that the doctrine is “absolutely without support in the text of the Constitution or the intent of the Framers”). For a thoughtful discussion of the current criticisms of the DCCD, including those from Justices Scalia and Thomas, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2 (3d ed. 2000).
dormant Commerce Clause doctrine (DCCD)\textsuperscript{2} is also frequently the object of would-be reformers eager to reroute rivers of doctrine to cleanse what many feel is constitutional law’s equivalent of the Augean Stables.\textsuperscript{3} One popular solution—suggested in an oft-cited article by the late Professor Julian Eule\textsuperscript{4} and

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\textsuperscript{2} The DCCD is the name given to the self-executing limitations inferred from the Commerce Clause and applied by courts to prohibit states from adopting legislation that discriminates against or impermissibly burdens interstate commerce. See generally Boris I. Bittker, Bittker on the Regulation of Interstate and Foreign Commerce §§ 6.01–6.08 (1999 & Supp. 2003) (discussing the development of the DCCD). The modern DCCD protects interstate commerce from discriminatory or protectionist taxation and regulation imposed by states. See S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 169 (1999) (observing that facially discriminatory taxes violate the Constitution absent certain justifications); Camps Newfound/Owatonna, Inc., 520 U.S. at 595 (striking down a discriminatory tax exemption); Fulton Corp. v. Faulkner, 516 U.S. 325, 346–47 (1996) (invalidating discriminatory corporate tax); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 385–85 (1994) (striking down regulations barring export of solid waste); Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (striking down a price affirmation statute requiring liquor to be sold in-state at prices no higher than those charged out-of-state); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (holding that regulations embodying “simple economic protectionism” are “virtually per se invalid”). Nondiscriminatory state regulations can be invalidated if their burden on interstate commerce is “clearly excessive” when balanced against “the putative local benefits” conferred by the regulation. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The DCCD has also been employed to protect interstate commerce from state regulations that, if multiplied, could result in an impermissible burden on that commerce, or that regulate “extraterritorially,” that is, beyond the boundaries of the legislating state. See Healy v. Beer Inst., 491 U.S. 324, 335–43 (1989); Edgar v. MITE Corp., 457 U.S. 624, 640–46 (1982); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671–75 (1981); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 527–30 (1959); S. Pac. Co. v. Arizona, 325 U.S. 761, 781–82 (1945). In addition to protecting interstate commerce from discriminatory taxes, the DCCD also prevents states from imposing unapportioned taxes. See, e.g., Am. Trucking Ass'n v. Scheiner, 483 U.S. 266, 282 (1987) (invalidating unapportioned flat fees and axle taxes that produced discrimination against interstate commerce). Moreover, in order to tax interstate commerce, the state must have a sufficient connection with the activity taxed, and the tax must be “fairly related” to state benefits provided to the taxpayer. See, e.g., Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287 (1977) (upholding a privilege tax on gross receipts as applied to a corporation in the business of transporting automobiles from Jackson, Mississippi, to in-state car dealerships).

\textsuperscript{3} See, e.g., Camps Newfound/Owatonna, Inc., 520 U.S. at 610 (Thomas, J., dissenting) (describing the DCCD as a “morass”); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (describing the DCCD as a “quagmire”); Tyler Pipe Indus., 483 U.S. at 260 (Scalia, J., concurring in part and dissenting in part) (arguing that the application of the DCCD “makes no sense”); Kassel, 450 U.S. at 706 (Rehnquist, J., dissenting) (arguing that the DCCD is “hopelessly confused”).

\textsuperscript{4} Julian Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale
once offered by no less a judicial Hercules than Justice Scalia\(^5\)—is to abandon the DCCD altogether and combat discrimination against interstate commerce by relying solely on the Privileges and Immunities Clause of Article IV, Section 2.\(^6\)

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5. *Tyler Pipe Indus.*, 483 U.S. at 264 (Scalia, J., concurring in part and dissenting in part) (stating that "rank discrimination against citizens of other States" is not regulated by the Commerce Clause, but by the Privileges and Immunities Clause of Article IV).

6. *U.S. Const.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

Another candidate for combating state discrimination is the Equal Protection Clause of the Fourteenth Amendment. At least once, the Court struck down a discriminatory state regulation of insurance on equal protection grounds. *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 883 (1985) (concluding that taxation of out-of-state corporations to protect domestic industry was not a legitimate state purpose). Since the regulation concerned the insurance industry, the DCCD was unavailable, because the McCarran-Ferguson Act, 15 U.S.C. § 1011, permits state regulation of insurance that would otherwise be prohibited by the DCCD. Moreover, since the appellant was a corporation, the Privileges and Immunities Clause of Article IV was similarly unavailable, because the Clause has long been interpreted to exclude corporations from its protections. *See infra* Part II. The Court's decision drew a strong dissent from Justices O'Connor, Brennan, Marshall, and Rehnquist. *See* Ward, 470 U.S. at 883-902 (O'Connor, J., dissenting). The decision was also in tension with an earlier decision of the Court upholding a retaliatory tax imposed by California on out-of-state insurance companies whose home states discriminated against California insurers doing business in those home states. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655–74 (1981). There, the Court specifically upheld California's retaliatory tax against an Equal Protection Clause challenge by concluding that the state's purpose in imposing the tax was legitimate, and that legislators could have rationally believed that the measure would achieve that purpose. *Id.* at 671–74. Even after *Ward* the Court upheld laws favoring New England banks over those from other regions. *See* Northeast Bancorp v. Bd. of Governors, 472 U.S. 159, 162–75 (1985). In *Northeast Bancorp*, the Court distinguished *Ward* by noting that the Alabama statute in *Ward* discriminated against all out-of-state insurance companies, not just those outside a particular region of the country. *Id.* at 177–78.

In general, the Equal Protection Clause, as well as the Due Process
For Justice Scalia, this would solve two problems with the DCCD: (i) it would provide a textual peg authorizing courts to enforce a limitation on state power,\(^7\) and (ii) it would restrict the courts' enforcement to instances of discrimination by one state against out-of-state commerce. It would relieve courts, so goes the argument, of engaging in policy-laden analyses masquerading as "balancing tests."\(^8\) This solution is entirely consistent with Justice Scalia's (and other conservatives') preference for rules over more mutable standards.\(^9\)

Clause, places a heavier burden on plaintiffs to prove illegitimacy of purpose or irrationality of the means to achieve that purpose. See, e.g., New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."); see also Williamson v. Lee Optical Co., 348 U.S. 483, 490–91 (1955). Because of this deferential review of state "economic and social legislation," the Equal Protection and Due Process Clauses—Ward notwithstanding—are not as potent as the more searching standards of review under both the DCCD and the Privileges and Immunities Clause for challenging discrimination against out-of-state commerce.

[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.


7. See Camps Newfound/Owatonna, Inc., 520 U.S. at 610 (Thomas, J., dissenting) (arguing that the DCCD's incoherence has, in part, stemmed from lack of textual foundations); cf. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., concurring) (arguing that the term "negative" is more appropriate than "dormant" to describe the DCCD because the DCCD does not appear in the text of the Constitution).

8. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (arguing that "balancing" interests is not possible because the interests balanced are incommensurate: "It is more like judging whether a particular line is longer than a particular rock is heavy."); see also Camps Newfound/Owatonna, Inc., 520 U.S. at 620 (Thomas, J., dissenting) (arguing that balancing under the DCCD invited improper "policy-laden decisionmaking" in which the Court functions as a legislature, rather than as a judicial body).

9. See, e.g., Kathleen M. Sullivan, The Supreme Court, 1991 Term, Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 24, 65 (1992) (describing Justice Scalia as the Court's leading proponent of rules versus standards); see also Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1182 (1989) (arguing that when judges eschew rules for standards, "equality of treatment is difficult to demonstrate and... impossible to achieve; predictability is destroyed; and judicial arbitrariness is facilitated; judicial courage is impaired").
The very simplicity of the proposed solution (hereinafter unimaginatively referred to as "substitution") is at once its most attractive and most deceptive feature. In reality, the substitution solution offers no solution at all. Advocates of substitution either conceal or fail to appreciate the problems resulting from refashioning the Privileges and Immunities Clause as a vehicle for enforcing the DCCD's prohibition on state discrimination against interstate commerce. As will be shown, substituting the Privileges and Immunities Clause for the DCCD would neither be a simple matter nor an even trade.

Part I of this Essay briefly summarizes the history of Article IV, Section 2 and traces its doctrinal development. While Article IV, Section 2 and the DCCD overlap to a degree, Part II details the gaps that would arise from abandoning the DCCD. Part III analyzes the response, if any, given by substitution's advocates to the problems attending implementation of their remedy. I note that to the extent the shortcomings of the Privileges and Immunities Clause as a replacement for the DCCD are noticed, substitution advocates are often quick to offer solutions that play fast and loose with text and history, or that curb the powers of Congress and the states—precisely the complaints lodged against the DCCD itself. A brief conclusion follows in Part IV.

I.

The Privileges and Immunities Clause of Article IV originated in the Articles of Confederation. Its principles were ap-

10. This Essay is a twin of an earlier essay in which I analyzed Justice Thomas's suggestion that the Import-Export Clause of the Constitution be substituted for the DCCD. I concluded that Justice Thomas was probably correct—inasmuch as he argued that the Clause was intended to restrain state imposts and duties on interstate as well as foreign commerce—but that his remedy would radically prune the scope of protection afforded interstate commerce under the DCCD. See Brannon P. Denning, Justice Thomas, the Import-Export Clause, and Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155, 157-60 (1998).

11. See ARTICLES OF CONFEDERATION OF 1781 art. IV (U.S. 1781). Article IV (i) granted to citizens of each state the rights of "free ingress and regress" to and from the several States; (ii) guaranteed the "privileges of trade and commerce" in the states on the same terms as citizens of those states; and (iii) secured the right to remove "property imported into any state, to any other state" inhabited by the owner of that property. Id. This Article apparently had "no clear colonial antecedent," and its appearance in the Articles is the subject of some speculation. See Mark P. Gergen, The Selfish State and the Market, 66 TEX. L. REV. 1097, 1121-27 (1988). For an account of Article IV, Section 2's
parently so well accepted that they were included in the Constitution without debate at the 1787 convention. It barely warrants mention in *The Federalist*, though Alexander Hamilton called it “the basis of the Union” in his defense of federal court jurisdiction over diversity cases.

The earliest judicial interpretation of the Privileges and Immunities Clause came in 1823. In *Corfield v. Coryell*, Justice Bushrod Washington, sitting on circuit, offered the following gloss on just what “privileges and immunities” the Clause protected: “The right of a citizen of one state to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise . . . [and] exemption from the higher taxes or impositions than are paid by the other citizens of the state.” Nearly a half-century later, the focus of the Clause was still understood as removing unfair disabilities from outsiders, especially those burdening one’s ability to conduct trade or make a living upon crossing into a new state. The “object,” according to the Court, was
to place the citizens of each State upon the same footing with citizens of other States. . . . [Article IV, Section 2] inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness . . . .

In the years following *Corfield*, most of the cases in which the Clause was applied touched on one of the areas mentioned in Justice Washington’s opinion: (i) the right of out-of-staters to conduct commerce on the same terms as in-state residents; (ii) the right of an out-of-stater to pay no higher taxes or exactions than in-state residents; and (iii) the right to pursue a profession on the same terms as in-state citizens. These cases make

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16. See, e.g., Supreme Court v. Piper, 470 U.S. 274, 288 (1985) (striking down a state law requiring state residence for admission to the bar); Toomer v. Witsell, 334 U.S. 385, 403 (1948) (invalidating a discriminatory license fee on
clear that discrimination against outsiders, particularly where that discrimination burdens one's ability to carry on trade or commerce, or to pursue a profession, is prohibited. 17

Modern Privileges and Immunities Clause doctrine can be traced to the Court's 1948 decision in Toomer v. Witsell. 18 There the Court invalidated a South Carolina law obliging out-of-state shrimpers to pay a license fee one hundred times greater than that paid by in-state fishermen. 19 The Clause, wrote the Court, "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy," including the right to do business in State B "on terms of substantial equality" with State B's citizens. 20 "Substantial equality" meant that if State A's residents were treated differently, there must be "perfectly valid independent reasons" for the difference, and the "degree of discrimination [must] bear[] a close relationship" to the differences. 21 The Court found that no such reasons existed for the South Carolina law.

Over time, Toomer's test has been refined, but its essence remains the same. If there is discrimination between residents and nonresidents, 22 (i) there must be a "substantial reason" for

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17. See, e.g., Piper, 470 U.S. at 281 (holding that "the practice of law falls within the ambit of the Privileges and Immunities Clause"); Toomer, 334 U.S. at 403 (holding that "commercial shrimping ... like other common callings, is within the purview of the privileges and immunities clause"); Ward, 79 U.S. (12 Wall.) at 430 (holding that the Clause provides nonresidents the ability to "lawfully sell ... any goods which the permanent residents of the state might sell ... without being subjected to any higher tax or excise" than permanent residents of the state).

18. 334 U.S. 385.

19. Id. at 389.

20. Id. at 395–96.

21. Id. at 396.

22. Throughout this Essay, I assume that explicit discrimination between in-state and out-of-state citizens (as opposed to facially neutral legislation that is discriminatory in effect) is a threshold requirement for invoking the protections of the Privileges and Immunities Clause. I have found no case in which the Supreme Court struck down a facially neutral state law under the Privileges and Immunities Clause on the ground that it nevertheless had the effect of discriminating against out-of-state citizens. The Court seemed to suggest that facial discrimination was a requirement for invoking Article IV, Section 2 when, in Zobel v. Williams, 457 U.S. 55, 58–65 (1982), it struck down an Alaska law that conditioned payments from state oil revenues on length of residency in the state. Justice Burger wrote that the Privileges and Immunities Clause was inapplicable because "[t]he statute does not involve the kind of discrimination which [the Clause] was designed to prevent." Id. at 60 n.5.
Burger continued: "That Clause 'was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.'" Id. (quoting Toomer, 334 U.S. at 395).

While Zobel does not overtly distinguish between facial discrimination and discriminatory effects, it seems to assume the existence of a regulatory scheme that draws a distinction between in-state residents and those from elsewhere. Courts and commentators have also assumed that facial discrimination is required. See Ponderosa Dairy v. Lyons, 259 F.3d 1148, 1156 (9th Cir. 2001) (rejecting a challenge to California milk laws: "The amendments do not, on their face, create classifications based on any individual's residency or citizenship."), rev'd sub nom. Hillside Dairy, Inc. v. Lyons, 123 S. Ct. 2142 (2003); Kirkpatrick v. Shaw, 70 F.3d 100, 102–03 (11th Cir. 1995) (rejecting a Privileges and Immunities Clause challenge to the denial of admission to state bar; bar rules applied to residents and nonresidents alike); Davrod Corp. v. Coates, 971 F.2d 778, 791 (1st Cir. 1992) (rejecting a Privileges and Immunities Clause challenge to state fishing boat length limitation: "The regulation 'was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States.'" (quoting Manchester v. Manchester, 139 U.S. 240, 265 (1891))); Giannini v. Real, 911 F.2d 354, 357 (9th Cir. 1990) ("Discrimination on the basis of out-of-state residency is a necessary element for a claim under the Privileges and Immunities Clause."); Ga. Ass'n of Realtors, Inc. v. Ala. Real Estate Comm'n, 748 F. Supp. 1487, 1492 (M.D. Ala. 1990) ("[A]ll of the cases in which the Court is aware in which [the Privileges and Immunities Clause] has been construed have been cases where statutes enacted statutes that overtly distinguished between residents and non-residents."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 350–51 (1st ed. 1997) ("Discrimination against citizens of other states is a prerequisite for application of the privileges and immunities clause." (emphasis added)); DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 1044 (3d ed. 2003) ("Unlike the Dormant Commerce Clause, the Privileges and Immunities Clause only applies when there is an overt discrimination. . . . Indirect burdens on interstate commerce do not count for privileges and immunities purposes."); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 338 (6th ed. 2000) (stating, as a threshold requirement, the use of "a residency or citizenship classification to trigger Privileges and Immunities Clause scrutiny). But see Tolchin v. Supreme Court of N.J., 111 F.3d 1099, 1111 (3d Cir. 1997) ("If a state statute or regulation imposes identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents, it does not violate the Privileges and Immunities Clause." (emphasis added) (citing Lutz v. City of York, 899 F.2d 255, 263 (3d Cir. 1990))).

While this Essay was in production, the Supreme Court decided Hillside Dairy, Inc. v. Lyons, 123 S. Ct. 2142 (2003), and reversed the Ninth Circuit, which had held that facial discrimination "on the basis of citizenship or residency" was required to trigger scrutiny under the Privileges and Immunities Clause of Article IV. See Ponderosa Dairy, 259 F.3d at 1156. The Court, per Justice Stevens, noted that this holding was "inconsistent" with an older case, Chalker v. Birmingham & Northwestern R. R. Co., 249 U.S. 522 (1919), in which the Court applied the Privileges and Immunities Clause to a state tax that "did not on its face draw any distinction based on citizenship or residence." Hillside Dairy, 123 S. Ct. at 2147 (emphasis added). The tax in Chalker, while not facially discriminating on the basis of citizenship or resi-
the distinction and (ii) that distinction must bear a substantial relationship to the state's objective. However, an additional limitation crept into the doctrine: The strictures of Article IV, Section 2 are only triggered by differentiations between residents and nonresidents where the nonresident seeks to exercise a "fundamental right." Thus, the Court upheld a Montana statute that charged out-of-state hunters much higher license fees than in-state hunters because the Court did not find elk hunting to be a fundamental right.


[When confronted with a challenge under the Privileges and Immunities Clause to a law distinguishing between residents and nonresidents, a State may defend its position, by demonstrating that (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination against nonresidents bears a substantial relationship to the State's objective.]

Id. at 298 (quoting Supreme Court v. Piper, 470 U.S. 274, 284 (1985)).

24. See Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978) (limiting Article IV, Section 2's protection to the exercise of "fundamental rights").

25. See id. Justice Blackmun claimed to derive this limitation from Justice Washington's Corfield opinion. See id. at 387. Justices Brennan, Marshall, and White dissented, claiming that the focus should be on the state's reason for the discrimination. See id. at 402 (Brennan, J., dissenting).
Assuming that engaging in interstate commerce, especially as it relates to commercial activity, is a "fundamental right," substituting Article IV analysis for the two-tiered scrutiny of the DCCD appears to be a fairly simple affair. If there is some kind of differentiation—some kind of discrimination—between in-state and out-of-state residents, then the burden would fall on the regulating state to (i) give a substantial reason for that discrimination and (ii) demonstrate a substantial relationship between the differentiation and the discrimination. So stated, the test seems to capture perfectly the core concern of the DCCD: elimination of discriminatory or protectionist trade barriers erected by states that inhibit the national common market. There are, however, some dramatic but unadvertised costs in making such a substitution.

II.

Wholesale substitution of the Privileges and Immunities Clause for the DCCD involves some unintended consequences that are either not discussed or are glossed over by its proponents. Two immediate concerns arise: (i) the Clause, as currently interpreted by the Court, does not apply to corporations; and (ii) the Clause may not reach conduct that the DCCD strictly scrutinizes. Moreover, giving the Privileges and Immunities Clause pride of place in the enforcement of the antidiscrimination principle would also mean that Congress and the states would have less authority to regulate interstate commerce than is now possible under the DCCD. Specifically, the Court has declined to read into the Clause a "market-

26. The Court has always assumed so in its Privileges and Immunities cases dealing with in-state employee preferences. See, e.g., United Bldg. & Constr. Trades Council, 465 U.S. at 219 ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.").

27. On at least one occasion, the Court has succinctly described the purpose of the Commerce Clause doctrine:

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 export, 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.

participant" exception, like that created for the DCCD. In addition, the text of the Clause seems to foreclose the ability of Congress to permit discrimination, as it can under the DCCD, by clearly delegating that power to the states.

A. PAUL V. VIRGINIA AND THE CORPORATE "CITIZEN"

In 1866, Virginia passed a law prohibiting out-of-state insurance companies from operating in the state without a license, which would be granted only after depositing a large sum of money with the State Treasurer. Virginia also made it a crime to act as an agent for an unlicensed insurance company. An agent for a New York insurance company challenged the laws under, inter alia, the Privileges and Immunities Clause of Article IV. The Court rejected the challenge, observing that "corporations are not citizens within [Article IV's] meaning. The term citizens as there used applies only to natural persons . . . not artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."

While conceding that "the object of the clause [was] to place the citizens of each State upon the same footing with citizens of other States," the Court said that "[s]pecial privileges enjoyed by citizens in their own States are not secured in other States by this provision." Under the law at the time, no state had to allow an out-of-state corporation to operate within its borders; a grant of a corporate charter by one state was just the sort of "special privilege" that the Court was unwilling to force upon a nonconsenting state through an expansive interpretation of the Privileges and Immunities Clause. Such an interpretation would be "utterly destructive of the independence and the har-

29. Id. at 169.
30. Id.
31. Id. at 176–77.
32. Id. at 180. At least one commentator has challenged Paul's conclusion on this issue. See Chester J. Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 WM. & MARY L. REV. 1 (1967) (arguing that the Clause was intended to protect the natural rights of U.S. citizens, regardless of residency). But see Bogen, supra note 11, at 841–45 (concluding that, based on the drafting history of the Clause, Paul was correct on this issue).
33. Paul, 75 U.S. at 181 ("Now a grant of corporate existence is a grant of special privileges to the corporators . . . .").
mony” of the states,34 inhibiting the ability of states to “limit the number of corporations doing business” within the state or to “repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens” despite the fact that “it might be of highest public interest” for the state to do so.35 Because those results were unthinkable, the Court concluded that the Privileges and Immunities Clause did not protect corporations.36

Despite the fact that much of the Court’s discussion concerning the rights of states to prohibit or regulate foreign corporations had been superseded,37 the Supreme Court nevertheless affirmed Paul’s exclusion of corporations from the Privileges and Immunities Clause’s protections as recently as 1981.38 In Western & Southern Life Insurance Co. v. State Board of Equalization, the Court declined to invalidate a California retaliatory tax imposed on out-of-state life insurance companies.39 The Court observed that “there are three provisions of the Constitution under which a taxpayer may challenge an allegedly discriminatory tax: the Commerce Clause . . . the Privileges and Immunities Clause . . . and the Equal Protection Clause.”40 The dormant Commerce Clause was not available to the Ohio insurance company protesting the California taxes because Congress had “redelegated” power to the states to regulate the insurance business.41 The Privileges and Immunities

34. Id.
35. Id. at 182.
36. Id. at 178–82. The Court reasoned that “[i]t is impossible . . . upon any sound principle, to give such a construction to the article in question—a construction which would lead to results like these.” Id. at 182 (internal quotation marks omitted). The Court rejected the argument that the laws violated the Commerce Clause, not on the ground that the Commerce Clause did not protect corporations, but because it concluded that the business of insurance was not “commerce.” See id. at 183. This holding has since been overruled. See United States v. S.-E. Underwriters Ass’n, 322 U.S. 533, 553 (1944) (overruling Paul’s insurance-is-not-commerce holding and upholding the Sherman Act as applied to insurance companies).
37. See BITTKER, supra note 2, § 6.06[D].
39. Id. at 652, 674.
40. Id. at 655–56 (citations omitted). For a discussion of decisions on the suitability of the Equal Protection Clause as a substitute for the DCCD, see supra note 6.
41. W. & S. Life Ins. Co., 451 U.S. at 652–53 (“If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action
Clause was unavailable because it was "inapplicable to corporations."42

B. THE MARKET-PARTICIPANT DOCTRINE

Under the DCCD, states that act as "market participants" as opposed to "market regulators" may avoid the DCCD altogether.43 The market-participant exception permits states to favor local economic interests over out-of-state interests when the state is buying or selling for its own account.44 The Supreme Court, however, has declined to import this exception into Privileges and Immunities Clause cases.45

In the 1984 case United Building & Construction Trades Council v. Mayor of Camden,46 the Court refused to apply the market-participant exception in a Privileges and Immunities Clause challenge to a municipal ordinance requiring forty percent of work crews on city construction projects to be city residents.47 Earlier, the Court had held that the market-participant doctrine applied in a case involving a similar Boston ordinance and upheld the ordinance against a dormant Commerce Clause challenge.48

The Court conceded that, as in the Boston case, "everyone affected by the Camden ordinance is also 'working for the city' and, therefore, has no grounds for complaint [under the
dormant Commerce Clause] when the city favors its own residents." The Court, however, "decline[d] to transfer mechanically into this context [i.e., the Privileges and Immunities Clause] an analysis fashioned to fit the Commerce Clause." The Court saw the Commerce Clause and the Privileges and Immunities Clause as serving different functions; the function of the latter clause was not amenable to a market-participant exception. First, as Justice Rehnquist observed, insofar as a state is merely participating in the market, it does not implicate the Commerce Clause's implied restrictions on state regulation of interstate commerce. More importantly, the Privileges and Immunities Clause "imposes a direct restraint on state action in the interests of interstate harmony." In other words, the Camden ordinance, which favored city residents at the expense of those residing outside the city and the state, was precisely the sort of law the Clause was intended to bar. Article IV, Section 2's language, moreover, does not seem to anticipate an exception of the sort created for the DCCD by the Court in response to its concern with comity, which "cuts across the market regulator-market participant distinction." That Camden was arguably only participating in the market by spending its own resources on construction projects was irrelevant to the Court when a violation of the Privileges and Immunities Clause is claimed.

C. CONGRESSIONAL REDELEGATION TO STATES

The DCCD is unique in constitutional law because Congress, not the Court, has the final say on whether a particular state regulation of interstate commerce is permissible or not.

49. United Bldg. & Constr. Trades Council, 465 U.S. at 219. The White Court referred to everyone "working for the city" to explain why the application of the ordinance to subcontractors as well as contractors—only the latter were in privity of contract with the City of Boston—was not the sort of "downstream restriction" that exceeded the exception's scope. See S.-Cent. Timber Dev. Inc. v. Wunnike, 467 U.S. 82, 95 (1984) (citing United Bldg. & Constr. Trades Council, 465 U.S. at 219).


51. Id. at 220.

52. Id.

53. Id.

54. See id. ("It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.").

55. Id.

56. Id.
Long ago, the Court held that Congress could, by exercising its legislative power under the Commerce Clause, permit states to regulate in ways that, absent congressional action, the DCCD would prohibit.\(^5^7\) In part, this rule derives from an old, but suspect, justification for the DCCD: Through inaction Congress can be presumed to intend that the area be left unregulated.\(^5^8\) A contemporary explanation is grounded simply on Congress's ability to regulate commerce in a way that delegates power over commerce to the states. Whatever its theoretical basis, redelegation is now a clearly established part of the DCCD, and Congress has exercised its power to permit states to regulate the importation of liquor\(^5^9\) and the business of insurance,\(^6^0\) to give two twentieth-century examples. It is this ability of Congress to overturn Supreme Court decisions that led even prominentponents of judicial restraint to tolerate, even give grudging approval to, the DCCD.\(^6^1\)

Were the Privileges and Immunities Clause substituted for the DCCD, Congress probably would not have the same power.

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57. See, e.g., In re Rahrer, 140 U.S. 545, 564–65 (1891) (upholding a congressional act empowering states to regulate the importation of liquor). See generally BITTKER, supra note 2, § 9.04 (discussing congressional “redelegation”).

58. For an example of this congressional silence rationale, see Robbins v. Shelby County Taxing District, which stated:

Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom.


60. See Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 436 (1946) (upholding the McCarran-Ferguson Act, which authorized states to regulate the business of insurance, notwithstanding the DCCD); see also W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652–53 (1981) (noting that Congress may disable the DCCD limitations on states through an affirmative exercise of its commerce power).

Article IV, Section 2, unlike the Commerce Clause, is not a grant of power—indeed, it is not even addressed to Congress. Rather, it is an unqualified prohibition of state discrimination on the basis of state citizenship. Moreover, unlike other limitations on state power listed in Article I, Section 10, the Privileges and Immunities Clause contains no provision for congressional waiver of its restriction.  

D. UNDERPROTECTING INTERSTATE COMMERCE

One might argue that the foregoing obstacles to substitution are relatively minor. They could be overcome by forthrightly overruling some cases that probably deserve it, by importing familiar concepts into a new setting, or by using other congressional powers to permit in the Privileges and Immunities Clause context what the DCCD already allows. Were it simply a matter of substituting one textual provision for a line of judicial doctrine, with no net loss in protection against "rank discrimination," but which enabled the Court to steer clear of "judicial policymaking," then substitution might not radically affect the DCCD as currently applied by courts. However, as with Justice Thomas's proposed substitution of the Import-Export Clause for the DCCD, which I have criticized elsewhere, replacing the DCCD with the Privileges and Immuni-

62. Compare U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . .") (emphasis added) and id. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War . . . .") (emphasis added), with id. art. IV, § 2 (omitting any reference to Congress).

63. See supra notes 28-42 and accompanying text (examining the lack of protection for corporations under Article IV, Section 2).

64. See supra notes 43-56 and accompanying text (discussing the refusal of the Court to create a market-participant exception for the Privileges and Immunities Clause).

65. See supra note 62 and accompanying text (analyzing whether Congress would have the same ability to permit states to engage in prohibited discrimination under the Privileges and Immunities Clause as it has under the DCCD).

66. See supra note 7 (observing that Justice Scalia and Justice Thomas believe that the DCCD lacks textual support).


68. Id.

ties Clause of Article IV would not offer interstate commerce the same protection against state discrimination it currently enjoys. This section explains the reasons why, and offers examples of cases invalidating discriminatory state laws that would be upheld under a Privileges and Immunities Clause analysis because the laws in question did not discriminate on their face.

Recall the present requirements for finding a violation of the Privileges and Immunities Clause of Article IV. There must be a "privilege or immunity" that is offered to the citizens of State A (the legislating state) that is not extended to citizens of State B, or State B's citizens must be burdened with a handicap not placed on State A's citizens. In other words, as many courts and commentators have assumed, the Clause seems to require facial discrimination. If the citizens of both State A and State B are deprived of something equally, then there is no discrimination; citizens of State B have not been denied the privileges and immunities of citizenship in State A. The DCCD does not work this way. Under the DCCD, discrimination need not be apparent on the face of a statute, nor is it a defense that some in-state commerce is burdened along with out-of-state commerce.

Consider the case of Hunt v. Washington State Advertising Commission. There, the Court unanimously struck down a North Carolina statute prohibiting the use of any grade on closed containers of apples shipped in the state other than that of the United States Department of Agriculture (USDA). In effect, the statute prevented apples from the State of Wash-

70. See supra notes 23–25 and accompanying text. There needs to be a "fundamental right" at issue, but Court decisions have treated the ability to pursue a common calling or pursue a trade as qualifying. See supra notes 24–25 and accompanying text.

71. See supra note 22.

72. See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (noting that strict scrutiny applies "[w]hen a state statute directly . . . discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests").

73. See, e.g., Dean Milk Co. v. Madison, 340 U.S. 349, 354 n.4 (1951) (stating that whether some in-state commerce is burdened along with interstate commerce is "immaterial"); see also Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 361 (1992) ("[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.").


75. Id. at 348–54.
ingston from bearing the grade developed by that state, which was regarded nationwide as superior to the USDA's grade.\textsuperscript{76} North Carolina, which also produced apples, had no state grading system, leaving its apples unaffected by the regulation.\textsuperscript{77} The Court agreed with the lower court that "the challenged statute has the practical effect of... discriminating against" the Washington apples both by raising the costs of doing business in North Carolina (occasioned by the necessity of repackaging the apples) and by stripping away the competitive advantage Washington earned by developing its grading and inspection system.\textsuperscript{78} The Court found that the prohibition had "a leveling effect which insidiously operates to the advantage of local apple producers" who would no longer have to compete with out-of-state apples marked with a superior grading system.\textsuperscript{79} Although the statute was facially neutral, the Court required North Carolina to demonstrate a legitimate local benefit and that its legitimate purpose could not be achieved through less discriminatory means.\textsuperscript{80} North Carolina could not meet its burden, and the Court struck down the statute.\textsuperscript{81}

Were that case heard without the DCCD, the North Carolina statute would likely have been upheld. There was, after all, no discrimination regarding the treatment of in-state and out-of-state apples. All apples in the state were required to use either the USDA grades or no grades at all. Since there was no difference in treatment, the state, under existing Privileges and Immunities doctrine,\textsuperscript{82} would not be required to justify the difference in treatment.

Or consider \textit{Dean Milk Co. v. Madison},\textsuperscript{83} where the Court struck down an ordinance prohibiting the sale of milk as "pasteurized" if the milk had not been processed within a five-mile radius of the town square.\textsuperscript{84} Although an out-of-state milk distributor brought the suit, the ordinance itself affected in-state

\begin{itemize}
\item \textsuperscript{76} Id. at 351 ("The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade.").
\item \textsuperscript{77} Id. at 340 ("North Carolina, unlike Washington, had never established a grading and inspection system. Hence, the statute had no effect on the existing practices of North Carolina producers . . . .")
\item \textsuperscript{78} Id. at 350–51.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id. at 353.
\item \textsuperscript{81} Id. at 353–54.
\item \textsuperscript{82} See supra notes 14–25 and accompanying text.
\item \textsuperscript{83} 340 U.S. 349 (1951).
\item \textsuperscript{84} Id. at 350.
\end{itemize}
milk producers and distributors as well. Nevertheless, the Court found it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." Not so if the Privileges and Immunities Clause were the only available clause on which to base a claim. The lack of discrimination between in-state and out-of-state milk would bar scrutiny of Madison’s suspect ordinance.

In *Pike v. Bruce Church, Inc.*, the Supreme Court heard a challenge to an Arizona regulation prohibiting the export of cantaloupes unless they had been packaged in the state prior to shipment. Arizona argued unsuccessfully that the regulation only reached intrastate packing activities and thus did not implicate the DCCD. Arizona, wrote the Court, “would require that an operation now carried on outside the State must be performed instead within the State so that it can be regulated there.” The Court continued: “If the appellant’s theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge. Yet such statutes have been consistently invalidated by this Court under the Commerce Clause.” The Court continued this trend in *Pike*, concluding that the putative local benefits (here, the protection of the reputation of Arizona’s produce) were “clearly exceeded” by the burden it placed on interstate commerce (namely, the $200,000 it would have cost the company to build a packing plant in Arizona).

The Court claimed to accept Arizona’s sincerity in claiming that the law sought only to protect and enhance the reputation of its products, but the Court’s actions in the case belied its suspicion of Arizona’s motives. The Court analogized the Arizona law to “state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere”—such statutes the Court noted had “been declared to be virtually per se illegal.” Even assuming that the

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85. *Id.* at 354 n.4.
87. *Id.* at 139–40.
88. *Id.* at 140.
89. *Id.* at 141.
90. *Id.* at 140–41.
91. *Id.* at 145.
92. *Id.*
state was sincere, since the Court had struck down such statutes where the articulated state interest was to provide employment for state residents, it found Arizona's ostensible purpose—protecting the reputation of its produce—less defensible in light of the burden placed on interstate commerce. Yet, as with the cases mentioned above, the statute was facially neutral and did not draw the distinctions between in-state and out-of-state residents that Article IV forbids. The Court recognized as much, purporting to rely on its "balancing" test to avoid troublesome inquires into actual (as opposed to ostensible) state motives in enacting the law.

This selection of cases is meant to be illustrative, not exhaustive. There are other state regulatory schemes that the Court has struck down under the DCCD despite the lack of facial discrimination. The examples offered here, however, are

93. See id. at 146. The Court noted that the added cost on the out-of-state company "could perhaps be tolerated if a more compelling state interest were involved," but ultimately the Court concluded:

The State's interest here is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

Id.

94. Id. at 142. Interestingly, the Pike Court never really applied the balancing test it articulated, instead referring to the discriminatory, local-processing regulations that would fall under its "virtually per se" rule of invalidity. Id. at 145. Thus, I think that Donald Regan has it right when he characterizes Pike as a case about discrimination, not balancing. See Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091, 1209–20 (1986). For another case in which discrimination against out-of-state commerce seemed to figure prominently in the Court's decision, although a plurality purported to employ balancing, see Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). Justices Brennan and Marshall concurred in the result, but would have justified their decision on a finding of impermissible discrimination. See id. at 685 (Brennan, J., concurring).

95. See, e.g., W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 188 (1994). In West Lynn Creamery, the Court struck down a tax-subsidy scheme that imposed a nondiscriminatory tax on all sales of milk within the state; the tax proceeds were placed in a segregated fund from which subsidies were drawn for the benefit of in-state milk producers. Id. The Court found that in practical effect, the facially neutral tax actually burdened only out-of-state interests because in-state producers were eligible for subsidies. Id. at 194. Despite the fact that neither subsidies nor nondiscriminatory taxes, in isolation, ordinarily poses a problem under the DCCD, the two here were "linked" in such a way to trigger DCCD scrutiny. The problem of "suspect linkages" has been specifically
sufficient to show that substitution of the Privileges and Immunities Clause for the DCCD would change the outcome in a number of cases where, to a greater or lesser degree, "rank discrimination" was involved. If the critics of the DCCD are, as they often claim, uninterested in permitting states to discriminate against interstate commerce or engage in economic protectionism, then they should assume the responsibility of explaining how these burdens would be addressed, if at all, under Article IV. If the Privileges and Immunities Clause does not reach the fact situations discussed above, then either the argument that substitution would provide sufficient protection against discrimination needs to be qualified, or proponents of substitution should admit the underprotection and provide an argument that the costs to interstate commerce are outweighed by the virtues of discarding the DCCD for the short-sheet protection of the Privileges and Immunities Clause.

III.

As noted above, the usual brief against the DCCD involves one or more of the following arguments: it is ahistorical, it lacks a textual foundation, it invites uncabined "judicial policymaking" as courts are sometimes called upon to "balance" local benefits against interstate burdens, and it is insufficiently respectful of federalism. Enthusiasm for substitution, then, stems from the perception that Article IV would be superior to the DCCD because it appears to have been intended to address the evil presently addressed by the DCCD, it is textual, and its text will prevent judges from straying beyond the purpose of the Clause, i.e., combatting "rank discrimination" by states against citizens from other states.

As noted in the previous Part, however, the problem is that

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97. See, e.g., id. at 265 (Scalia, J., concurring in part and dissenting in part).
Article IV, Section 2 and the DCCD are not interchangeable. Substitution, in fact, would render interstate commerce vulnerable to discrimination, leave states free to engage in economic protectionism, and prevent both Congress and the states from regulating interstate commerce in ways they currently enjoy under the DCCD. This Part discusses how the proponents of substitution address these gaps (to the extent that they address them at all) and notes how their remedies would require judges to disregard the Constitution's text, history, and structure—precisely what judges enforcing the DCCD are now accused of doing.

A. THE CORPORATIONS PROBLEM

In his influential critique of the DCCD, Professor Julian Eule wrote that only the “anachronistic definition of the term ‘citizen’ in the privileges and immunities guarantees of Article IV, Section 2... justifies the preservation of” the doctrine that corporations are not covered by Article IV, Section 2.98 “Paul,” Eule wrote aphoristically, “has become a holding without a rationale.”99 Much of Justice Brennan’s opinion in Western & Southern Life Insurance Co., Eule argued, “stripped Justice Field’s position [in Paul] of every one of its legal underpinnings.”100 But Brennan’s opinion nevertheless declined to undertake a reexamination of Paul’s conclusion that corporations were excluded from Article IV’s protections. The Court’s reaffirmation of Paul on this point, noted Eule, was “gratuitous” because it was not a claim advanced by the petitioner.101 Eule hoped that Paul would eventually be put out of its misery, “enabling the privileges and immunities clause to become the favored implement for judicial dissection of state commercial regulation.”102 It has been more than twenty years since Eule’s critique, but the Court has not revisited the issue or even obliquely called into question that portion of Paul. Nor is there any discontinuity between the Court’s interpretation of the term “citizens” in Article IV, Section 2 and its interpretation of the same word in the Privileges or Immunities Clause of the Fourteenth Amendment.103

98. Eule, supra note 4, at 428.
99. Id. at 453.
100. Id. at 452.
101. Id. at 453.
102. Id. at 454.
103. In 1939, the Court held that corporations were not citizens for pur-
Despite the shift in judicial doctrine concerning the extent to which states can limit or restrict out-of-state corporations from operating within their territory, Eule nowhere demonstrates that, as a matter of original intent, Justice Field was mistaken. This is important, insofar as part of Eule's attack on the DCCD's protection of a national free market is premised on the lack of intent on the part of the Framers to provide any such protection. "The Framers," he wrote, "did not explicitly protect free trade" and expressed "no intent ... to inject a philosophy of laissez-faire into the constitutional fabric."105

Redish and Nugent, for their part, also recognize the corporations problem, but offer that "it can be reasonably argued that corporations should, in fact, be afforded the protections of Article IV."106 Because, "[f]rom a policy perspective, there can be little doubt that corporations should receive the protections of the privileges and immunities clause," only an argument that the text prohibits corporate coverage would, for them, counsel against overruling Paul.107 But text, it turns out, poses no real problem for them. Given Redish and Nugent's furious denunciation of the DCCD's complete lack of textual foundation, it is surprising to see them adopt a much more relaxed attitude towards the text of the Privileges and Immunities Clause, insofar as it proves inconvenient to their argument for substitution.

The term "person" in the fourteenth amendment has been consistently interpreted to include corporations, and the term "citizens" in the diversity jurisdictional statute, which in turn is premised on the use of the same term in article III of the Constitution, includes corporations by its language. Why, then, should we hesitate to treat the same term in article IV in the same manner?108

This is a curious argument. First, how courts have interpreted the term "persons" when construing the Fourteenth Amendment is irrelevant to whether a different word, "citizens," used in a different constitutional provision, can be similarly construed. Had the Court interpreted "citizens" to cover corporations in the Fourteenth Amendment's Privileges or


104. Eule, \textit{supra} note 4, at 429.

105. \textit{Id.} at 435; \textit{see also id.} at 434 ("The commerce clause ... cannot be said to establish and protect free trade or a national marketplace as a fundamental constitutional value.").

106. Redish & Nugent, \textit{supra} note 1, at 611.

107. \textit{Id.}

108. \textit{Id.}
Immunities Clause,109 their argument might have some force. But in Hague v. Committee for Industrial Organization,110 the Court held that corporations were not citizens for purposes of the Fourteenth Amendment's Privileges or Immunities Clause.111

Additionally, even though the diversity jurisdiction statute includes corporations as citizens for diversity purposes,112 there is a difference between a congressional definition of a term in a statute authorized by a constitutional grant of power113 and a judicial construction of the same term in a constitutional limitation—just as Redish and Nugent argue there is a difference between Congress limiting state power over commerce through the exercise of its constitutionally delegated power and courts enforcing a similar limitation based on structural inferences from the same provision.114 Moreover, their solution to the corporations problem, like Eule's, evinces little concern with whether the Framers intended the term "citizens" to cover corporations.115

It would surely produce no cosmic rift in judicial doctrine to simply overrule what remains of Paul v. Virginia and treat corporations as citizens. Proponents of this solution, however, provide little evidence that the term "citizens," as used in 1789, included legal fictions like corporations. Thus, insofar as substitution seems to require an anachronistic reading of Article IV's term "citizen," it would begin life tainted with the same infidelity to originalism with which critics tar the DCCD.116

B. THE PROBLEM OF DISCRIMINATORY EFFECTS

What I have characterized as the most serious objection to

110. 307 U.S. 496 (1939).
111. See id. at 514.
114. Redish & Nugent, supra note 1, at 573.
115. Cf. id. at 585–86 (concluding, after reviewing evidence, that "the historical evidence provides no firm support for the dormant commerce clause's existence"). In fairness to their discussion of the corporations problem, they emphasize that the "scope of the privileges and immunities clause is not the primary focus of this article and therefore an exhaustive examination of the corporations issue is not included." Id. at 611.
116. Justice Scalia, although an advocate for substitution, has not indicated whether he favors overruling Paul and including corporations within the ambit of the Privileges and Immunities Clause.
substitution—that it leaves interstate commerce underprotected against ostensibly neutral, but effectively discriminatory, regulation—has not been acknowledged by proponents of substitution. Eule did not discuss it. Justice Scalia, as well as Redish and Nugent, merely talk of the Privileges and Immunities Clause reaching discriminatory legislation, without indicating whether they read the Clause as also reaching discrimination in effect.117

Like the corporations problem, though, remedying this gap would not be terribly difficult. It is axiomatic that the Constitution prohibits subtle as well as blatant violations of its provisions;118 therefore, form could give way to substance when enforcing them. Even self-proclaimed textualists warn against literalism in construing either statutes or constitutional provisions.119 Thus, a judge could, with ease, proclaim that the Privi-

117. See Redish & Nugent, supra note 1, at 610. It appears as if Redish and Nugent assume the protection against discrimination in the DCCD and the Privileges and Immunities Clause to be coterminous. Id. ("[I]t appears that the Court has recognized the same right under both the privileges and immunities and dormant commerce clauses—the right of an out-of-state resident to be free from discriminatory state regulations of commerce."). Others criticizing substitution have mentioned in passing that the DCCD has a broader scope than the Privileges and Immunities Clause, but do not discuss the problem of facially neutral legislation in detail. For example, see Jenna Bednar & William N. Eskridge, Jr., Steady the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1488 (1995), which rejects "the suggestion of several commentators that the Court abandon its dormant commerce clause jurisprudence and focus instead on the Privileges and Immunities Clause" because the Privileges and Immunities Clause has been construed to protect only against state rules... distinguishing between citizens and non-citizens of states. Without major rethinking, privileges and immunities jurisprudence would not be up to the task of displacing the dormant commerce clause as the doctrinal basis for the Court's regulation of state protectionism and externalities. Id. at 1488.

Mark Gergen argues that one problem with substitution is "the clause's apparent inability to correct evenhanded measures that pose an intolerable burden on interstate commerce." Gergen, supra note 11, at 1117-18. His reference to an "intolerable burden" suggests that he had in mind the Pike balancing test instead of the discriminatory effects problem. See id. at 1118.

118. Cf. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (noting that the "Constitution... requires that [the Court] keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded'" (citations omitted)).

leges and Immunities Clause prohibited those regulations that were protectionist or discriminatory in their effects, despite the fig leaf of facial neutrality.

But once a judge departs this much from the text of the Privileges and Immunities Clause, which anticipates a distinction between in-state and out-of-state residents, in order to enforce its apparent purpose, what principle remains to prevent the same judge from later weighing benefits and burdens? The rule-like benefits of a textual provision would be endangered, and one of the purported benefits of substitution compromised. At the same time, allowing states to subvert the Clause by subtle discrimination would defeat the very purpose of the Clause.

C. THE MARKET-PARTICIPANT EXCEPTION AND CONGRESSIONAL REDELEGATION

The other problems with substitution described in Part II—the lack of a congressional override of Court cases involving the Privileges and Immunities Clause and the lack of a market-participant doctrine—are less easily remedied. These problems illustrate instances in which substitution will hamstring Congress and the states—precisely the criticism leveled against the DCCD, i.e., that it usurps congressional power and unduly limits State police powers.

The Supreme Court has declined to engraft a market-participant exception onto the Privileges and Immunities Clause. This means that certain "privileges and immunities" that states offer their citizens—subsidized college tuition or preferential admissions to state universities, for example—would be subject to scrutiny under Article IV, Section 2, as

should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means" and that "the good textualist is not a literalist"). Elsewhere, Justice Scalia, commenting upon constitutional interpretation, wrote: "In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear." Id. at 37.

120. Whether potential plaintiffs would be successful depends, in part, on whether the ability to pursue an education in a particular state was a "fundamental right." See supra notes 24–25 and accompanying text. The Court has held that education is not a fundamental right under the Fourteenth Amendment. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988) (holding that education is not a fundamental right under the Equal Protection Clause); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (refusing to recognize a fundamental right to education under the Due Process Clause).
would programs designed to benefit in-state commercial actors. The Court's reluctance to perform this doctrinal transplant is understandable. The purpose of the Clause, after all, is to prevent precisely the kind of parochial legislation that is permitted under the market-participant exception. The exception thus permits that which the text of the Clause seems explicitly to forbid: states conferring "privileges" on their own citizens that they deny to noncitizens. Ignoring the Clause's limitations and creating a market-participant doctrine would detract from the supposed advantages of a textual provision. Ironically, without the market-participant doctrine, Article IV, Section 2 seems to tie the hands of states more tightly than the DCCD. Thus, substitution could prove to be as indifferent to federalism principles as the DCCD is alleged to be, unless the Court aggressively expanded the "fundamental rights" requirement to contract the universe of privileges and immunities that out-of-state residents could claim. This solution, however, also departs from the text of the Clause: Article IV, Section 2 nowhere suggests its prohibitions extend only to fundamental rights.

Neither Justice Scalia nor Redish and Nugent address this particular asymmetry between the two provisions. Again, the point is not that the Court's refusal to extend the market-participant doctrine to the Privileges and Immunities Clause is unassailable, but rather that the unavailability of the exception would pose a doctrinal obstacle to seamless substitution. Inasmuch as critics of the DCCD object to the doctrine's alleged inroads on state sovereignty and federalism, the lack of a market-participant exception to the Privileges and Immunities Clause makes substitution less attractive than it appears at first glance. Remedy the problem would involve overruling

121. See, e.g., Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (upholding under the market-participant exception a state regulation limiting sales of cement from state-owned plants to in-state residents before selling to out-of-state residents).

122. Professor Eule's article appeared prior to the Court's ruling that the market-participant exception does not apply to the Privileges and Immunities Clause.


case law and, possibly, engrafting judicial exceptions onto a clear textual prohibition.\textsuperscript{125}

Finally, substitution would also limit congressional power because Congress now possesses the ability to disable the DCCD through the exercise of its Commerce Clause power.\textsuperscript{126} Were the Privileges and Immunities Clause substituted for the DCCD, would Congress have the same power? Professor Eule suggested that it might. "The privileges and immunities clause," he wrote, "has not been applied to limit federal power. Congress therefore arguably enjoys broader scope to provide for resident/non-resident distinctions than do the states."\textsuperscript{127}

But Eule does not explain why this is so, or identify where the Constitution might authorize Congress to make those distinctions. Eule's conclusion is particularly curious, coming as it does in the course of his explanation of why the Privileges and Immunities Clause of Article IV is a more effective tool for combating state discrimination than the Equal Protection Clause.\textsuperscript{128} Using the latter, he noted, would involve review of state regulations under the rational basis standard, while courts reviewing laws under the Privileges and Immunities Clause employed a more demanding standard of review (Eule likened it to "intermediate scrutiny" under the Fourteenth Amendment).\textsuperscript{129} Moreover, Eule continued, according to the Supreme Court, Congress "clearly lacks the power to authorize the states to violate the Fourteenth Amendment Equal Protection clause."\textsuperscript{130}

\textsuperscript{125} It is true, perhaps, that the market-participant exception would not be necessary for upholding city-funded projects like that at issue in \textit{United Building \\& Construction Trades Council}. After all, the Court there did not strike down the Camden measure. Rather, the Court merely placed the burden of proof on the city to demonstrate that the discrimination was necessary to remedy the particular problems presented by workers working in Camden and living elsewhere. \textit{Id.} at 222–23. For an argument that the right to a city job is not a "fundamental right" covered by the Privileges and Immunities Clause, see Sullivan, \textit{supra} note 123, at 1356–60.

\textsuperscript{126} \textit{See supra} notes 57–62 and accompanying text.

\textsuperscript{127} Eule, \textit{supra} note 4, at 455 (citations omitted). The values of Eule's preferred "process model" for the DCCD were protected, he wrote, because "[i]n Congress, the citizens of all states are represented. Disparate treatment of a particular state's residents authorized by this broader-based body deserves a greater presumption of validity." \textit{Id.} (citation omitted).

\textsuperscript{128} \textit{Id.} at 454–55; \textit{see also supra} note 6 (discussing the Equal Protection Clause as an alternative to the DCCD).

\textsuperscript{129} Eule, \textit{supra} note 4, at 454.

\textsuperscript{130} \textit{Id.} (emphasis added) (citation omitted).
Like the provisions of the Fourteenth Amendment, the Privileges and Immunities Clause is a straightforward restriction on the power of states to discriminate on the basis of state citizenship. Eule provides no reason why Congress should be barred from authorizing states to violate the Fourteenth Amendment but permitted to authorize them to violate Article IV, Section 2. As noted above, the Framers knew how to allow Congress to waive restrictions on the states and did so in other provisions, but not in Article IV, Section 2.131 The flexibility that the redelegation doctrine has introduced into the DCCD has been celebrated by scholars.132 Congress has, on occasion, taken advantage of this flexibility to allow states more leeway in the regulation of certain forms of commerce.133 If the Privileges and Immunities Clause alone became the workhorse for enforcing a commercial nondiscrimination principle, congressional redelegation would likely have to be jettisoned.

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Where does this leave proponents of substitution? These arguments show that the advocates for the Privileges and Immunities Clause are, first and foremost, critics of the DCCD. To the extent that they have considered the historical, textual, and doctrinal problems with replacing the DCCD with Article IV, Section 2, they either minimize them or suggest judicial quick fixes to eliminate the discontinuities. They often fail, however, to see how these solutions sit uneasily beside the critiques of the DCCD that they argue mandate substitution in the first place. Remedying the corporations problem would entail infidelity to original intent, unless there is a historical case to be made that the Framers did intend "citizens" to include fictional entities like corporations. Covering effectual, as opposed to facial, discrimination; extending the market-participant exception to Article IV, Section 2; and allowing Congress to permit what the Clause forbids, moreover, all involve ignoring the text of the Constitution. If judges feel compelled to push the nondiscrimination principle of Article IV, Section 2 a bit beyond its text to compensate for the gaps occasioned by substitution,

131. See supra note 62 and accompanying text.
132. See supra note 61 and accompanying text.
then would anything have been gained by replacing the DCCD with the Privileges and Immunities Clause? Or as Dan Farber put it, "Why bother finding a textual hook if you're going to hang the same clothes on it anyway?" If the Privileges and Immunities Clause is, in the hands of the DCCD's critics, merely a convenient stick used to beat an unloved doctrinal dog, then the problems with substitution described here should be forthrightly engaged, especially the extent to which it leaves interstate commerce vulnerable to subtle discrimination.

There is, however, another possibility: Particular textual hooks may be suggested precisely because they are seen to hold less than that which they replace. Justice Thomas's enthusiasm for the Import-Export Clause as a replacement for the DCCD, for example, stems in part from his opinion that it would prohibit only discriminatory taxation, and not discriminatory regulation. Advocates of substitution may be aware of the changes substitution would work on the current DCCD beyond the jettisoning of *Pike* balancing and might welcome them. If so, then that position requires some explanation and defense. Most substitution advocates, however, strongly imply that all that would be lost in the transition from the DCCD to the Privileges and Immunities Clause is *Pike*'s much-maligned balancing test.

There is one final point worth mentioning. Advocates of substitution, like Justice Thomas in proffering the Import-Export Clause as a substitute for the DCCD, seem bent on finding a textual hook for what, in essence, is a structural prin-

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134. Personal Communication from Jim Chen to Brannon Denning (relating comment of Farber).
136. Decisions handed down at the end of the 2002 term tend to confirm my initial suspicions. Justice Thomas has now made clear that he simply will no longer enforce the DCCD. See Hillside Dairy, Inc. v. Lyons, 123 S. Ct. 2142, 2148 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that the doctrine has "no basis in the text of the Constitution, makes little sense, and [is] virtually unworkable in application" (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting))); Pharm. Research & Mfrs. of Am. v. Walsh, 123 S. Ct. 1855, 1878 (2003) (Thomas, J., concurring) (same). Justice Scalia, too, took the opportunity in *Walsh* to affirm—perhaps harden—his position on the DCCD. His concurring opinion implies that only in cases of facial discrimination or in cases involving nondiscriminatory action "of the precise sort hitherto invalidated" will he apply the DCCD. *Walsh*, 123 S. Ct. at 1874 (Scalia, J., concurring).
137. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 637–40 (Thomas, J., dissenting); see also Denning, supra note 10 (discussing and critiquing Thomas's proposal).
principle—that the union created by the Constitution sought to protect interstate commerce from protectionist regulation by states. As Don Regan once observed, "Just as 'nature abhors a vacuum,' so we are taught to abhor constitutional principles without a specific textual grounding. When such a principle is implicated in some case, we therefore rush in with misguided suggestions for a textual grounding inspired by the context at hand."\(^{138}\) The textual evidence of the DCCD as a valid structural principle is at least as good as, perhaps better than, the evidence that Justices Thomas and Scalia have adduced in support of a broad principle of sovereign immunity. It is as strong as the evidence brought forth in support of background principles of federalism that operate to limit the exercise of powers enumerated in Article I, Section 8. One can see, for example, evidence of the principles embodied in the DCCD in the delegation of power over interstate commerce to Congress and by corresponding restrictions on states, such as the Import-Export Clause, the Tonnage Clause, and the Privileges and Immunities Clause. If the primary objection to the DCCD, and the search for a textual substitute, stem from its alleged lack of foundation in the Constitution's text or history, then critics like Justices Scalia and Thomas ought to indicate why the principles protected by the DCCD are less apparent in the structure of the Constitution, and less deserving of judicial protection, than sovereign immunity or federalism principles.\(^{139}\)

IV.

Critics of the DCCD have advocated allowing the Privileges and Immunities Clause of Article IV, Section 2 to serve as the constitutional bulwark against interstate commercial discrimination. As demonstrated here, however, the substitution of one for the other entails losing both flexibility for Congress and the states, as well as substantial protection for interstate commerce. While the problems could be remedied were substitution to be effected, these remedies would come at the expense of the alleged advantages of abandoning the DCCD for the Privileges

\(^{138}\) Donald H. Regan, Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 MICH. L. REV. 1865, 1889 (1987).

and Immunities Clause in the first place, i.e., that Article IV, Section 2 is textually based and would cabin judicial discretion in its application, and that its historical pedigree is superior to that of the DCCD. In addition, the unavailability, under the Privileges and Immunities Clause, of certain exceptions to the DCCD (like the market-participant exception and Congress's redelegation power) would limit states and Congress to a greater degree than does the DCCD. These problems, which have not been adequately addressed by proponents, demonstrate that substitution of the Privileges and Immunities Clause for the DCCD is far from an even trade. Critics of the DCCD who advocate substitution should acknowledge the shortcomings of their remedy, and assess whether the benefits outweigh those costs.