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A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause


Jim Chen†

I. LAYING CRITICISM OF THE DORMANT COMMERCE CLAUSE TO REST

The Supreme Court's dormant Commerce Clause doctrine, a body of jurisprudence as deep as it is despised, provides the strongest constitutional bulwark against hostile state regulation and taxation of the national economy. Allowing the states to "guard them[elves] against [interstate] competition" would re-open "the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." Its many opponents characterize the dormant Commerce Clause as the Voldemort of American constitutional law, a dastardly doctrine with no basis in the text of the Constitution. So numerous indeed are the doctrine's critics that credible commentators can no longer be content merely to assert that the dormant Commerce Clause lacks textual, structural, or historical

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Writers seeking tenure or even law review credit must dig deeper within American constitutional law's chamber of secrets.

Insofar as the Supreme Court remains free to disregard even those legal positions which are "supported by all the law professors in the land," Justices Scalia and Thomas stand far taller than other critics of the dormant Commerce Clause. These Justices so despise the dormant Commerce Clause that they no longer call it by its usual name. Instead, because the Clause "does not appear in the Constitution," Justices Scalia and Thomas call it the "negative" Commerce Clause. Move over, Voldemort: the dormant Commerce Clause is the provision that must not be named. Neither Justice Scalia nor Justice Thomas, however, has completely forsworn the Clause's jurisprudential and political underpinnings. Rather, each of these Justices has offered a doctrinal alternative grounded in concrete constitutional text. Justice Thomas has proposed replacing "the judicially created negative Commerce Clause" with what he considers the "original" meaning of the "Import-Export Clause" of Article I, Section 10 as a "check on discriminatory state taxation." For his part, Justice


3. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995); see also Kazmier v. Widmann, 225 F.3d 519, 531 (5th Cir. 2000) ("[T]he support of even [a] prominent . . . academician is an inadequate substitute for . . . recent Supreme Court precedent."); Velasquez v. Frapwell, 160 F.3d 389, 394 (7th Cir. 1998) (noting that the Supreme Court's opinion is the law, "whatever law professors or even professional historians may say"), vacated per curiam on other grounds, 165 F.3d 593 (7th Cir. 1999). See generally Scott C. Idleman, Of Judicial Supremacy and Academic Inadequacy, 18 CONST. COMMENT. 5 (2001).


5. Cf. Camps Newfound/Owatonna, 520 U.S. at 617-18 (Thomas, J., dissenting) ("I suspect we have . . . adhered to the negative Commerce Clause because we believed it necessary to check state measures contrary to the perceived spirit, if not the actual letter, of the Constitution.").

6. Id. at 610 (Thomas, J., dissenting). The Import-Export Clause provides
Scalia has suggested that the task of "guarding against rank discrimination" by any one state "against citizens of other States" should be "regulated not by the Commerce Clause but by the Privileges and Immunities Clause" of Article IV, Section 2.7

In a pair of thoughtful and thought-provoking articles, Professor Brannon Denning has skillfully skewered Justices Scalia and Thomas's proposals. In the winter 1999 issue of the University of Colorado Law Review, Professor Denning exposed the limitations of the Import-Export Clause.8 In the December 2003 issue of this journal, Professor Denning showed how the Privileges and Immunities Clause of Article IV cannot supplant the dormant Commerce Clause.9 These articles demonstrate that the Import-Export and Privileges and Immunities Clauses, at least absent "major rethinking," are "not . . . up to the task of displacing the dormant commerce clause as the doctrinal basis for the Court's regulation of state protectionism and externalities."10 The Import-Export Clause, even if applied to domestic trade,11 would patrol only discriminatory taxation and not regulation.12 As long as a state directs regulation toward an interstate stream of commerce rather than natural persons conducting that commerce, the Privileges and Immunities Clause exerts no restraint on even blatantly discriminatory regulation. Banning the export of minnows from Oklahoma, for instance, deprives Texans of no right, privi-

in relevant part: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." U.S. CONST. art. I, § 10, cl. 2.


12. See Denning supra note 8, at 216–17, 223.
lege, or immunity enjoyed by Oklahomans. When facially neutral state laws impair interstate commerce, neither the Import-Export Clause nor the Privileges and Immunities Clause approaches the flexibility of the dormant Commerce Clause balancing test articulated in *Pike v. Bruce Church, Inc.*, which may be precisely what critics of the Clause hope to jettison.

At a minimum, Professor Denning's thorough scholarship has placed the onus of "explanation and defense" squarely on those who advocate the Import-Export and Privileges and Immunities Clauses as replacements for the dormant Commerce Clause. In their zeal to condemn the dormant Commerce Clause "as a paradigmatic example of judicial activism," judicial and academic critics have overstated "the doctrine's lack of foundation in text and history." Professor Denning's message is unmistakable: Pending further proof, let sleeping dogs lie.

Among the many hounds in the contemporary Supreme Court docket, dormant Commerce Clause controversies are likely to retain their prominent place within this kennel of "boring" and "peewee" cases. Although Justices Scalia and Thomas have convinced only Chief Justice Rehnquist to endorse their attack on the dormant Commerce Clause, any coalition of three Justices enjoys a palpable prospect of eventually overhauling or even overruling outright any disfavored constitutional doctrine. Given the right cases in the docket, shared will, and (most important of all) five reliable votes, any group of Justices can "cast


14. 397 U.S. 137, 142 (1970) ("Where [a state] statute regulates evenhandedly 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." (citation omitted)).

15. See Denning, *supra* note 9, at 413.


overboard numerous settled decisions, and indeed even whole ar-

curring).

21. See, e.g., CHARLES EVANS HUGHES, THE SUPREME COURT OF THE
UNITED STATES 68 (1928) (describing each dissent as “an appeal to the brooding
spirit of the law, to the intelligence of a future day, when a later decision may
possibly correct the error into which . . . the court [has ostensibly] been be-
trayed”). See generally William J. Brennan, Jr., In Defense of Dissents, 37
HASTINGS L.J. 427 (1986); Kevin M. Stack, Note, The Practice of Dissent in the
Supreme Court, 105 YALE L.J. 2235 (1996).

22. See, e.g., Peter D. Enrich, Saving the States from Themselves: Commerce
Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 378,


24. Daniel J. Gifford, Federalism, Efficiency, the Commerce Clause, and the
Sherman Act: Why We Should Follow a Consistent Free-Market Policy, 44
EMORY L.J. 1227, 1254 (1995). See generally Karl Manheim, New-Age Federal-

25. Maxwell L. Stearns, A Beautiful Mend: A Game Theoretical Analysis of


27. See Richard B. Collins, Economic Union as a Constitutional Value, 63
value of protecting outsiders from self-dealing by in-state voters.\textsuperscript{28} The Supreme Court understands that a “regulation [whose] . . . burden falls principally upon those without the state . . . is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.”\textsuperscript{29} In his contribution to this journal, Professor Denning himself tantalizingly promises “a very preliminary structural defense” of the dormant Commerce Clause.\textsuperscript{30} The process-based approach, however, seems to owe closer allegiance to its underlying substantive norms than to the dormant Commerce Clause as such. Commentators therefore speculate whether antidiscrimination and freedom of movement might be better vindicated through the Privileges and Immunities Clause.\textsuperscript{31}

In this reply to Professor Denning, I wish to make a modest and highly tentative effort to accomplish the unusual academic feat of defending Supreme Court doctrine in its current form.\textsuperscript{32} I will sketch the outlines of an argument that Professor Denning dismisses as “one on which contemporary defenders of [dormant Commerce Clause] doctrine [do not] rely.”\textsuperscript{33} Congress’s persistent failure to repeal the dormant Commerce Clause is the singularly impressive feature of American constitutionalism’s approach to protecting free trade. Though it has failed to win academic support, congressional silence provides at least an adequate and perhaps even a persuasive case for preserving the dormant Commerce Clause. The law review equivalent of an extended letter to the editor is hardly the place for a comprehensive study of silence.


\textsuperscript{29} S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938).

\textsuperscript{30} Denning, supra note 9, at 414 n.139.


\textsuperscript{33} Denning, supra note 8, at 172 n.94.
and its legal significance, and I make no claim to theoretical completeness across the entire fabric of American constitutional law. I hope at a minimum, however, that I might persuade Professor Denning to reconsider his suggestion that "[n]o sophisticated, contemporary theorist" would argue that congressional silence has effectively ratified the dormant Commerce Clause.

My argument proceeds in the following fashion. As a general rule, Congress cannot override judicial interpretations of the Constitution merely by passing ordinary legislation. The dormant Commerce Clause is an important exception. Despite enjoying virtually unfettered discretion to override dormant Commerce Clause decisions, Congress has rarely used that power. Constitutional significance abides throughout: in order to evaluate the propriety of contemporary dormant Commerce Clause doctrine, we must assess not only Congress's power to override the courts, but also Congress's actual course of performance in the exercise of that power. Part II of this essay examines the theoretical question of congressional competence, or capacity. Congress's power to square state law with the Commerce Clause should not be compared with, but rather distinguished from, other constitutional doctrines that limit state and local authority over the national economy. A pair of Supremacy Clause doctrines—intergovernmental immunity and preemption—provide especially useful analogies.

Part III takes an unapologetically pragmatic view of congressional performance. The dormant Commerce Clause doctrine ef-


36. Denning, supra note 8, at 172 n.94.

37. I derive the analytical distinction between competence and performance from NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 4 (1965). I admit that the connection between linguistic theory and legal doctrine is not readily apparent to most observers, but I do attempt to explain the link in Jim Chen,
fectively treats the Commerce Clause as though it were an initial assignment of common law authority to the federal courts. Congress's persistent failure to reassign that authority to itself, to federal regulatory agencies, or to the states suggests that the federal courts have demonstrated reasonably sound judgment on issues of interstate trade and taxation. This meritorious history deserves constitutional respect. Part IV concludes that a pragmatic approach to constitutional law—one that treats questions of rights, privileges, duties, powers, and immunities as if they mattered in more than a strictly theoretical sense, as if they materially affected the well-being of real human beings—can happily accept the de facto ratification of the dormant Commerce Clause through congressional inaction.

II. CONGRESSIONAL SUPREMACY OVER COMMERCE

Without doubt the dormant Commerce Clause has profoundly affected the “oldest question of constitutional law.” \(3^{38}\) Strong influence on the law of federalism, however, may have obscured the centrality of separation of powers principles to a doctrinally coherent defense of the dormant Commerce Clause. As a matter of comparative institutional competence, the political branches of government dramatically underperform their judicial counterpart in vindicating the democratic values inherent in economic union and free trade. The Constitution's entire complex of provisions fostering a unified national market—including not only the Commerce Clause but also the Privileges and Immunities, Import-Export, and Tonnage Clauses—would fall woefully short of their aspirations if they relied exclusively on legislative enforcement. \(3^{39}\) Almost any legal system that hopes to ensure the free movement of goods, services, and labor must vest significant responsibility in a judicial body. In Washington as in Brussels or Geneva, “the political reality . . . of mercantilism” shoves onto unelected courts the responsibility for preserving free trade. \(4^{0}\) Since

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\(3^{39}\) Cf. Denning, supra note 8, at 159 (acknowledging that at least the Import-Export Clause may be significantly underenforced). See generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978).

the Marshall era, or at least since the Taney era, the Supreme Court has reviewed state and local restraints on national trade under the authority of the Commerce Clause. Congress has had many opportunities to reject this vast body of judicially developed law. Only rarely has Congress intervened, and the very rarity of congressional action on this front represents a form of de facto constitutional ratification in its own right.

Congressional inaction means nothing to the harshest judicial critics of the dormant Commerce Clause. Neither Justice Scalia nor Justice Thomas gives any credit to “the idea that in enforcing the negative Commerce Clause the Court is not applying a constitutional command at all, but is merely interpreting the will of [a silent] Congress.” Justice Scalia finds no “conceivable reason why congressional inaction under the Commerce Clause should be deemed to have the same pre-emptive effect elsewhere accorded only to congressional action.” Indeed, Justice Scalia ridicules this suggestion as “[t]he least plausible . . . justification of all.” In this setting as in any other, Justice Scalia regards “vindication by congressional inaction [as] a canard.”

For his part, Justice Thomas has also rejected “the ‘pre-emption-by-silence’ rationale.” Most troubling to him, “the ‘pre-emption-by-silence’ rationale virtually amounts to legislation by default, in apparent violation of the constitutional requirements of bicameralism and presentment.” Professor Denning evidently shares at least part of these Justices’ discomfort with the notion that a silent Congress should “be presumed to intend that” all areas of commerce not yet addressed by it should “be left unregulated” altogether. He calls this presumption “an old, but suspect, justification” for the dormant Commerce Clause.

44. Id.
45. Id.
48. Id. at 617 (citing INS v. Chadha, 462 U.S. 919, 951–59 (1983)).
49. Denning, supra note 9, at 398.
50. Id.
By Justice Scalia's own admission, however, the "legislation by inaction" theory of the negative Commerce Clause seems to be the only basis for the doctrine... that Congress can authorize States to enact legislation that would otherwise violate the negative Commerce Clause. One of the most distinctive characteristics of the dormant Commerce Clause as constitutional doctrine is Congress's virtually limitless ability to override the Supreme Court. As Professor Denning correctly recognizes, "Congress, not the Court, has the final say on whether a particular state regulation of interstate commerce is permissible." If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge. To put it somewhat differently, Congress may "confer... upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Indeed, the Court quite strongly presumes that congressional "inaction" should be "equivalent to a declaration that inter-State commerce shall be free and untrammelled." 

Although congressional power to countermand constitutional decisions with ordinary legislation is not limited to the Commerce Clause setting, Congress's ability to second-guess the Justices does distinguish the dormant Commerce Clause from two other

51. Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 263 n.4 (1987) (Scalia, J., concurring in part and dissenting in part); see also id. ("Nothing else could explain the... principle that what was invalid state action can be rendered valid state action through 'congressional consent.'").

52. See Denning, supra note 9, at 397.


doctrines that establish antidiscrimination norms within the national marketplace. Judicial decisions under the Privileges and Immunities Clause of Article IV and the Equal Protection Clause are not subject to further legislative review. The great Julian Eule was flatly wrong to suggest that Congress can use its ordinary legislative powers to insulate states from judicial scrutiny under the Privileges and Immunities Clause.\textsuperscript{58} Congress can do no such thing. Justice Scalia errs in the opposite direction when he asserts, without qualification, that “[t]here is surely no area in which Congress can permit the States to violate the Constitution.”\textsuperscript{59} There are certain instances in which the Constitution merely establishes a presumptive rule, subject to congressional revision through ordinary legislation. But the Privileges and Immunities Clause is not one of those instances. Professor Denning has the better of the argument: unlike the Commerce Clause, the Privileges and Immunities Clause “is not even addressed to Congress,” let alone an affirmative “grant of power.”\textsuperscript{60} Rather, it is an unqualified prohibition of state discrimination on the basis of state citizenship.\textsuperscript{61} Violations of the Privileges and Immunities Clause therefore follow the default rule in constitutional adjudication, which blocks Congress from curing a constitutional violation by excusing the offending state.\textsuperscript{62}

Likewise, when a court uses the Equal Protection Clause to invalidate a state law that discriminates on the basis of state citizenship,\textsuperscript{63} Congress cannot cure the state’s Fourteenth Amendment violation. The most celebrated instance of congressional override of a dormant Commerce Clause decision, the McCarran-Ferguson Act of 1945,\textsuperscript{64} “remove[d] entirely any Commerce Clause restriction upon [the states’] power to tax [or regulate] the insurance business.”\textsuperscript{65} The McCarran-Ferguson Act, however, did “not purport” to invoke Congress’s power to enforce the Fourteenth Amendment, let alone to claim “the final say as to what

\begin{itemize}
\item \textsuperscript{58} See Eule, supra note 2, at 454.
\item \textsuperscript{59} Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue, 483 U.S. 232, 263 n.4 (1987) (Scalia, J., concurring in part and dissenting in part).
\item \textsuperscript{60} Denning, supra note 9, at 399.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} See id. at 412.
\item \textsuperscript{64} Act of March 9, 1945, ch. 20, 59 Stat. 33 (codified at 15 U.S.C. §§ 1011–1015 (1984)).
\end{itemize}
constitutes due process [or equal protection] under the Fourteenth Amendment. Any attempt by Congress to override a judicial definition of the equal protection rights enjoyed by out-of-state businesses would probably meet withering judicial scrutiny. The Supreme Court has "consistently held that Congress may not authorize the States to violate the Fourteenth Amendment."

Section 5's grant of authority to "enforce" the Fourteenth Amendment through "appropriate legislation," after all, does not empower Congress "to determine what constitutes a constitutional violation." "Legislation which alters the meaning of the [Equal Protection] Clause cannot be said to be enforcing the Clause." If "Congress does not enforce a constitutional right by" using Section 5 of the Fourteenth Amendment to "chang[e] what the right is," judicial opprobium must be that much greater should Congress arrogate a "power to restrict, abrogate, or dilute" rights guaranteed by Section 1.

Admittedly, Article I, Section 10 of the Constitution does enable Congress to "[c]onsent" to states' "Imposts or Duties on Imports or Exports" and to "Dut[ies] of Tonnage" laid by the states. The Constitution goes so far as to emphasize that all laws regarding imports or duties on imports or exports "shall be subject to the Revision and Control of the Congress." Moreover, even as it presumptively prohibits states from "enter[ing] into any Agreement or Compact with [other] State[s]," the Constitution also permits Congress to consent to such compacts. Congressional "power to grant or withhold consent, or to grant it under appropriate conditions" constitutes a form of "national supervision" over interstate compacts as a form of cooperative lawmak-

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68. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
70. Id.
71. Id.
72. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); see also id. ("Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.").
73. U.S. CONST. art. I, § 10, cl. 2.
74. Id. art. I, § 10, cl. 3.
75. Id. art. I, § 10, cl. 2.
76. Id. art. I, § 10, cl. 3.
The congressionally sanctioned interstate compact "is more than a supple device for dealing with interests confined within a region"; it can also be "a means of safeguarding the national interest." Once conferred, "congressional consent transforms an interstate compact . . . into a law of the United States." But the Constitution's very grant of congressional authority to consent to these types of state laws provides very strong evidence that the Constitution authorizes no act of Congress that would excuse a state from the obligation to extend its citizens' "Privileges and Immunities" to the citizens of all other states. Expressio unius est exclusio alterius: when the drafters of the Constitution "sought to confer [the] special power[]" of congressional consent to a presumptively unconstitutional practice, "they did so in explicit, unambiguous terms."

Despite its brevity, this comparative analysis of constitutional text establishes that Article IV's Privileges and Immunities Clause belongs to the large set of constitutional provisions that do not permit a simple act of Congress to excuse or waive what would otherwise be a constitutional violation by a state. By contrast, Article I, Section 10 explicitly contemplates circumstances in which Congress might allow a state to levy imposts or duties on imports or exports, to impose tonnage duties, or to enter a compact with other states. The Fourteenth Amendment falls in the usual set rather than the exception: Congress has the power to "enforce" all three Reconstruction amendments "by appropriate legislation," but such power offers no basis for insulating dis-
criminatory state laws from equal protection or due process review by the courts.

How then should one view Congress's power under the Commerce Clause to excuse state and local laws that otherwise would be subject to harsher judicial review under the dormant Commerce Clause? The closest analogy involves the doctrine of intergovernmental tax immunity. M'Culloch v. Maryland\(^4\) established that states may not tax the property and instrumentalities of the federal government and, correlatively, that federal courts may review state laws for compliance with this doctrine.\(^5\) Like the dormant Commerce Clause, this power of review was not so much given by the Constitution as it was snatched by judges on the scantiest of textual authority. Constitutional text offers no hint that the Supremacy Clause might be used to curb the states' power over taxation.\(^6\) As a matter of constitutional text, what Article VI defines as the "supreme Law of the Land" demands more than congressional inaction. The Supremacy Clause subjugates state law to "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States."\(^7\)

In truth, the intergovernmental tax immunity doctrine rests on little authority beyond John Marshall's naked assertion that a government guided by "the very essence of supremacy [would] remove all obstacles to its action within its own sphere, and ... modify every power vested in subordinate governments, as to exempt its own operations from their own influence."\(^8\) Nevertheless, the doctrine rests on...
less, the intergovernmental immunity doctrine entitles courts to invalidate state laws in the name of federal supremacy, even in the absence of federal legislation. Finally, like the dormant Commerce Clause, the intergovernmental immunity doctrine allows Congress to waive the federal government's immunity from state taxation.\textsuperscript{9}

The intergovernmental immunity doctrine and the dormant Commerce Clause are structurally similar. Each doctrine severely restricts state taxation or regulation without explicit authorization in the text of the Constitution. Rather, each doctrine derives its strength from the structure of the Constitution and a judicial instinct that federal interests should prevail over state interests, at least in the first instance. Attaching each doctrine to some identifiable scrap of constitutional text, whether the Supremacy Clause or the Commerce Clause, seems arbitrary at best and gratuitous at worst. Each doctrine gives Congress virtually unreviewable discretion to redelegate complete authority over taxation or regulation back to the states, typically after a judicial decision to the contrary has cued the issue for further legislative consideration. The only surprise lies in the apparent hypocrisy of those who endorse \textit{M'Culloch}'s mantra, "the power to tax is the power to destroy,"\textsuperscript{90} but decry the analytically parallel dormant Commerce Clause as a nontextual usurpation of judicial power to interpret the Constitution.

Supremacy Clause jurisprudence offers another baseline for comparison. Many aspects of the dormant Commerce Clause doctrine operate as the functional equivalent of preemption. Although preemption nominally raises a constitutional question controlled by the Supremacy Clause, "[p]re-emption fundamentally is a question of congressional intent."\textsuperscript{91} Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and


\textsuperscript{90} See 17 U.S. (4 Wheat.) at 427.

\textsuperscript{91} English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990); see also Philadelphia v. New Jersey, 430 U.S. 141, 142 (1977) (per curiam) ("While federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause,... analysis of pre-emption issues depends primarily on statutory and not constitutional interpretation." (citation omitted)).
purpose." "Congress can define explicitly the extent to which its enactments pre-empt state law." When Congress has made its intent [to preempt state law] through explicit statutory language, the courts' task is an easy one." In all other instances, a finding of preemption requires some judicial leap of faith. "Implied" preemption arises not only when "compliance with both federal and state regulations is a physical impossibility," but also when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." At an extreme, "field" preemption displaces state law to the extent that it regulates conduct in a field over which Congress intended to reserve exclusive federal control. Such broadly preemptive intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States," or where an "Act of Congress ... touch[es] a field in which the federal interest is so dominant that the federal system [presumably] preclude[s] state laws on the same subject."

The Supreme Court's preemption recipes list ingredients familiar to any connoisseur of statutory interpretation. But the dish as a whole reeks of constitutional lawmaking. It bears remembering, after all, that preemption is an outgrowth of the Supremacy Clause. Relative to the intergovernmental immunity doctrine, preemption claims at most a marginally firmer basis in constitutional text.

Moreover, the Court's preemption decisions have adopted almost squarely contradictory presumptions that expose the highly indeterminate and political nature of this doctrine. On one hand, many preemption decisions "start[] with the assumption

94. English, 496 U.S. at 79.
that the historic police powers of the States [are] not to be superceded by [a] . . . Federal Act unless that [is] the clear and manifest purpose of Congress."99 One might imagine that such a clear statement rule would very effectively shield state law from preemption whenever Congress adopts an explicit "savings" clause in order to reserve breathing space for state law within an otherwise comprehensive federal statutory scheme. One would be wrong. The Supreme Court routinely "decline[s] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law,"100 choosing on those occasions to reassert the national prerogatives implicit in the doctrine of "field" preemption. The Justices have also stressed, contrary to other doctrines that purport to protect the sovereignty of the states, that "the relative importance to the State of its own law is not material when there is a conflict with a valid federal law."101 Rather than railing against the Supreme Court for developing a judicial doctrine that lives only by congressional sufferance, a true textualist would reserve true outrage for these dueling presumptions' shabby treatment of laws that Congress has actually passed.

Despite the functional similarities between preemption and the dormant Commerce Clause, preemption inspires little of the visceral and passionate opposition attracted by its Commerce Clause counterpart. Though no fan of field preemption,102 Justice Thomas assigns fairly heavy significance to the fact that Congress has affirmatively passed a statute. He infers no "veneer of legitimacy" for the dormant Commerce Clause from the doctrines

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102. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 616–17 (1997) (Thomas, J., dissenting) (describing "field pre-emption [as] . . . suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted").
of implied and field preemption. Given the realities of contemporary constitutional doctrine, however, the line between field preemption and the dormant Commerce Clause is at best razor-thin and often imperceptible. Once upon a time the Supreme Court used to fret that an expansive interpretation of Congress's power to regulate interstate commerce would displace the traditional police power of the states over "not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining—in short, every branch of human industry." Contemporary federal law reaches each of those fields and more. Although an honest assessment of the federal government's regulatory reach today probably "would leave the framers 'rubbing their eyes' with amazement," it has become equally "clear that... Congress has authority to regulate virtually all private economic activity."

It is far from self-evident that constitutional lawmaking through preemption enjoys greater legitimacy than the dormant Commerce Clause. The proliferation of substantive canons of statutory interpretation, whether inspired by the Supremacy Clause or by other provisions of the federal government's basic charter, is nothing short of "stealth" constitutional law. Given the sheer extent of federal legislation, a court that truly wishes to invalidate a state law because of its incompatibility with the na-

103. Id. at 616.
105. Ann Althouse, The Alden Trilogy: Still Searching for a Way to Enforce Federalism, 31 RUTGERS L.J. 631, 658 (2000); cf. New York v. United States, 505 U.S. 144, 157 (1992) (noting that "[t]he Federal Government undertakes activities... unimagimable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities").
106. Earl M. Maltz, The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy, 19 HARV. J.L. & PUB. POLY 121, 129 (1995); cf. Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 129–30 (arguing that the embrace of "commerce today" around "practically every activity of social life" should enable Congress “to reach, through regulation, practically every activity of social life,” even though “the scope of the powers now exercised by Congress far exceeds that imagined by the framers").
tionwide economy need not invoke the dormant Commerce Clause. Though perhaps not the most honest way of accomplishing that goal, an aggressive finding of field preemption remains within the reach of any court willing to stretch the scope of an existing federal statute. Whatever else might be said of the dormant Commerce Clause, that doctrine does represent an unequivocal and unapologetic exercise of judicial power. Justice Scalia’s lament in a different constitutional context should be regarded as a panegyric: “this wolf comes as a wolf.”

One final wrinkle in the interplay between Congress and the courts cements the functional kinship between preemption and the dormant Commerce Clause. As I have already noted, Congress enjoys virtually unfettered discretion to reassign responsibility over an aspect of interstate commerce. As a general rule, Congress may choose to delegate regulatory responsibility over interstate commerce to the states. Complete delegation negates any judicial role under the dormant Commerce Clause. Congress may also elect to craft a more nuanced approach to “cooperative federalism” by adopting a careful mix of expressly preemptive statutory provisions and savings clauses. But Congress does not necessarily have the final say. Under either model, the courts may freely reconstitutionalize the issue—namely, insulate it entirely from congressional override—by asserting meaningful judicial limits on Congress’s Commerce Clause powers. An act of Congress has no preemptive effect on state law, and no Supremacy Clause issue arises, if the law exceeds Congress’s power to regulate commerce among the several states.

Presumably the Supreme Court’s renewed interest in scrutinizing Congress’s use of the commerce power—expressed most prominently in cases such as United States v. Lopez and United States v. Morrison—should have the incidental effect of restrict-

111. 529 U.S. 598 (2000). Other cases suggest that the Court is aggressively transforming the traditional rule on interpreting statutes so as to avoid raising doubts about constitutionality, see, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Catholic Bishop, 440 U.S. 490, 500–01 (1979), into “a roving commission to construe all meaningful life out of regulatory statutes that offend a majority of the Justices.” Jim Chen, Filburn’s Legacy, 52 EMORY L.J. 1719, 1754 (2003); see Solid Waste Agency v. United States Army Corps of Eng’rs, 531 U.S. 159, 174 (2001) (invalidating the Corps’s “migratory bird” rule in order “to avoid the significant constitutional and federalism questions raised” by the rule’s interpretation of the term
ing the scope of the *dormant* Commerce Clause. The Court's reinvigorated dedication to assert clear "distinction[s] between what is truly national and what is truly local" should place certain subjects wholly beyond the reach of the Commerce Clause, no matter which branch of the federal government seeks to assert that power.112 What lies beyond Congress's legislative power *a fortiori* lies beyond the derivative power of the courts to subject state and local laws to dormant Commerce Clause review.

This perfectly logical limit to the dormant Commerce Clause has been known at least since 1978. That year, *Philadelphia v. New Jersey*113 held that the dormant Commerce Clause authorizes judicial scrutiny of any state law that restricts movement in any market where Congress enjoys an affirmative power to regulate.114 To the extent that contemporary doctrine has curbed Congress's ability to legislate under this provision of the Constitution, judicial review under the dormant Commerce Clause should correlativey shrink. None of the opponents of the dormant Commerce Clause on the contemporary Court, however, has expressed any interest in wielding this latent limit on judicial review of state and local laws affecting the national economy, even though decisions such as *Lopez* and *Morrison* would logically dictate a significant reduction in the scope of dormant Commerce Clause review. Much as a squatter might refuse an eminently affordable lease for fear of conceding another claimant's title to disputed land, perhaps Chief Justice Rehnquist and Justices Scalia and Thomas have avoided invoking this limit on the dormant Commerce Clause in order to preserve the sanctity of their assault on the doctrine's legitimacy. Empirical examination of voting behavior on the Rehnquist Court suggests that Justices Scalia and Thomas sometimes seem to "prefer scoring ideological points" over assembling winning coalitions "and may even be willing to sacrifice an occasional imperfect victory" in order to maintain ideological purity.115 If this is true, then the leading judicial opponents of the dormant Commerce Clause are registering

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114. See id. at 622–23.
complaints about the doctrine's putative illegitimacy at the expense of using workable, readily available constitutional doctrine to impose very real and potentially significant limits on the ability of federal courts to second-guess state and local lawmakers.

III. ALL QUIET ON THE EASTERN FRONT

"Although Congress unquestionably has the power to repudiate or substantially modify [the dormant Commerce Clause's] course of adjudication, it has not done so." This singular fact provides a "contemporary explanation" that Professor Denning comes close to endorsing explicitly: the dormant Commerce Clause is "grounded simply on Congress's ability to regulate commerce in a way that delegates power over commerce to the states." The courts have seized what amounts to a broad power of review under the Commerce Clause, but Congress can restore order any time it chooses.

As a matter of practice rather than theory, Congress has very rarely used its Commerce Clause powers to retract an issue from judicial reach and to reassign it to the states. Any fair review of dormant Commerce Clause decisions over time would reveal relatively little congressional dissatisfaction. Indeed, specific instances of congressional waiver in direct response to a dormant Commerce Clause decision are quite rare.

The most celebrated instances in which Congress has overridden judicial interpretations of the dormant Commerce Clause have involved either liquor or financial services. (Whether these subjects are truly separated in time rather than space is left as an exercise for the reader.) When the Supreme Court decided in 1890 that the regulation of alcoholic beverages lay beyond the reach of the states, Congress promptly overrode that decision. Within a year, the Supreme Court acknowledged and approved the congressional override. As prohibitionist sentiment reached fever pitch a generation later, the Court again upheld Congress's authority to commit the regulation of liquor imports to state authority.

117. Denning, supra note 9, at 398.
118. See Leisy v. Hardin, 135 U.S. 100 (1890).
119. See In re Rahrer, 140 U.S. 545, 562 (1891).
The McCarran-Ferguson Act of 1945\textsuperscript{121} is probably the best known and most enduring example of congressional override of the dormant Commerce Clause. In the 1868 decision of \textit{Paul v. Virginia},\textsuperscript{122} perhaps better known for its holding that corporations do not fall within the meaning of "citizen" under the Privileges and Immunities Clause,\textsuperscript{123} the Supreme Court held that insurance contracts "do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."\textsuperscript{124} In 1944, the Supreme Court overruled \textit{Paul} in \textit{United States v. South-Eastern Underwriters Ass'n},\textsuperscript{125} thereby exposing massive amounts of state insurance regulation to potentially withering judicial scrutiny. By "remov[ing] all Commerce Clause limitations on the authority of the states to regulate and tax the business of insurance,"\textsuperscript{126} the McCarran-Ferguson Act restored the states' traditional prerogative to regulate the business of insurance.\textsuperscript{127} With less fanfare, the Court has also upheld the Bank Holding Company Act of 1956\textsuperscript{128} as a similar displacement of dormant Commerce Clause review.\textsuperscript{129}

A quick and admittedly incomplete survey of dormant Commerce Clause jurisprudence reveals precious few other episodes in which Congress has explicitly lifted a judicially imposed restraint on state or local regulation of the interstate economy. Since Justice Scalia began his attack on the dormant Commerce Clause in 1987, I can think of only two instances in which Congress has overridden a Supreme Court decision interpreting the dormant Commerce Clause. Neither instance involved overt congressional hostility to the work of the Court. First, the Surface Transportation Assistance Act of 1982\textsuperscript{130} originally confirmed the Supreme Court's 1981 decision in \textit{Kassel v. Consolidated

\begin{footnotesize}
\begin{enumerate}
\item 75 U.S. (8 Wall.) 168 (1868).
\item See id. at 178–82; Denning, supra note 9, at 394–96.
\item \textit{Paul}, 75 U.S. (8 Wall.) at 183.
\item 322 U.S. 533 (1944).
\item Act of May 9, 1956, ch. 240, § 6, 70 Stat. 137.
\end{enumerate}
\end{footnotesize}
Freightways Corp.\textsuperscript{131} to restrict state regulation of truck lengths, but evidently did so in order to compensate the interstate trucking industry for an increase in federal taxes on gasoline, diesel fuel, and truck weight.\textsuperscript{132} In the 1994 amendments to the Surface Transportation Assistance Act, Congress partially overruled Kassel by permitting states in some circumstances to bar large trucks from interstate highways.\textsuperscript{133}

The second instance produced even more ambiguous evidence of a congressional override. Although the Northeast Interstate Dairy Compact had been the subject of negotiations since at least 1988, Congress's decision to ratify the compact in 1996 may be viewed as a response to the 1994 Supreme Court decision in West Lynn Creamery, Inc. v. Healy,\textsuperscript{134} which invalidated a Massachusetts scheme to raise wholesale prices received by in-state dairy farmers. Over objections that the compact would insulate the New England milkshed from fierce competition by other dairy-producing regions, Congress ratified the compact in order to deliver income support to dairy farmers throughout New England.\textsuperscript{135} The Northeast Interstate Dairy Compact thus became part of the 1996 "farm bill," the federal government's periodic overhaul of its agricultural legislation.\textsuperscript{136} Only opponents of the compact, however, mentioned the connection with West Lynn, and it is unclear whether proponents seriously considered the incompatibility between the compact and the deep body of dormant Commerce Clause decisions involving the marketing and pricing of milk.\textsuperscript{137}

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  \item \textsuperscript{131} 450 U.S. 662 (1981).
  \item \textsuperscript{132} See Steven C. Kohl, Recent Development, Constitutional Law—Kassel v. Consolidated Freightways Corp.: "Goodbuddy" Raymond Revisited in Name Only, \textit{8 J. Corp. L.} 543, 563–64 (1983).
  \item \textsuperscript{134} 512 U.S. 186 (1994).
  \item \textsuperscript{137} See Jim Chen, The Potable Constitution, 15 \textit{Const. Comment.} 1, 5
Although I have not undertaken to measure the precise extent to which the Supreme Court's dormant Commerce Clause decisions have dodged congressional repudiation or even modification,\textsuperscript{138} I do feel safe in asserting that Congress only rarely disturbs the Court's staggering record of decisions in this field. In the closely related context of statutory interpretation,\textsuperscript{139} congressional silence is treated as a less than fully desirable guide to legislative intent and meaning.\textsuperscript{140} In dormant Commerce Clause doctrine as with statutory interpretation, however, "the fact that the dog did not bark can itself be significant."\textsuperscript{141} When Congress so conspicuously fails to revise the dormant Commerce Clause, either in its entirety or in one of its many controversial guises, and its failure stretches over many decades, long-standing silence assumes greater interpretive significance. "In the domain of statutory interpretation," Justice Stevens has observed, "Congress is the master."\textsuperscript{142} Although Congress "obviously has the power to correct [the Court's] mistakes, ... we do the country a disservice when we needlessly ignore persuasive evidence" of Congress's actual acquiescence in the dormant Commerce Clause.\textsuperscript{143}

It is implausible to attribute congressional inaction on the dormant Commerce Clause to indifference or to structural impediments to political intervention. Congress has every motive and opportunity to address fiscal and regulatory crises faced by the states. Very soon after the Supreme Court discarded the

\textsuperscript{138} I am happy to offer moral support, and perhaps even concrete assistance, to any scholar who wishes to document this phenomenon in a rigorous, thorough fashion.

\textsuperscript{139} Cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) ("In the analogous setting of statutory construction, we have ... refused to rely on congressional inaction to alter the proper construction of a pre-existing statute.").


\textsuperscript{143} See id.
Tenth Amendment immunity doctrine of *National League of Cities v. Usery* as "unsound in principle and unworkable in practice," Congress rescued states and local governments from the fiscal burden of obeying federal minimum wage and maximum hour laws. Scarcely more than a year after the Supreme Court overruled *Usery*, Congress amended the Fair Labor Standards Act so that state and local governments could offer their employees "flex time" in lieu of overtime pay at the rate of time-and-a-half. From time to time, states are able to persuade Congress to adopt other measures protecting their dearest fiscal and regulatory interests. Local governments have been exempt from certain aspects of federal antitrust law for two decades, and unfunded mandate reform may be the last surviving element of the 104th Congress's self-styled legal revolution. Statutes such as these undermine the argument that states cannot effectively lobby Congress on their own behalf. The Supreme Court's interpretation of the Tenth Amendment for the past two decades has required states to "find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." States and other

144. 426 U.S. 833 (1976).
146. See, e.g., *Garcia*, 469 U.S. at 578 (Powell, J., dissenting) ("The financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes."); Maryland v. Wirtz, 392 U.S. 183, 203 (1968) (Douglas, J., dissenting) (lamenting that the application of minimum wage and maximum hour laws to state governments could "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education"); cf. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 113 (1993) (O'Connor, J., dissenting) ("Today the Court... impose[s] crushing and unnecessary liability on the States, precisely at a time when they can least afford it.").
150. South Carolina v. Baker, 485 U.S. 505, 512 (1988); see also *Garcia*, 469 U.S. at 556 ("[T]he States occupy a special and specific position in our constitutional system.... But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.").
advocates for greater local control have routinely prevailed in this political struggle. The fact that neither states nor their allies in Congress have chosen, by and large, to engage the Supreme Court's dormant Commerce Clause decisions suggests a very substantial degree of legislative acquiescence.

Empirical work on reactions to Supreme Court decisions on statutory interpretation suggests that Congress frequently does override decisions with which it disagrees. Dormant Commerce Clause decisions are nominally constitutional in character, but in terms of congressional recourse, they do not differ from preemption decisions. Congress has likewise demonstrated its ability and willingness to restore much of the protection that states enjoyed under Usery's interpretation of the Tenth Amendment, again in spite of that doctrine's nominally constitutional character. Nearly two centuries of congressional acquiescence on the dormant Commerce Clause, coupled with striking evidence of Congress's ability to respond to other decisions imposing similar restrictions on state sovereignty, deserve a substantial measure of constitutional respect.

Even Justice Scalia, no reflexive fan of stare decisis, has expressed a willingness to uphold "a clear rule that honors" past dormant Commerce Clause holdings "but declines to extend the rationale that produced those decisions any further." In light of the deeper institutional consensus on the dormant Commerce Clause, this notion of stare decisis is far too miserly. The record compiled jointly by an active Supreme Court and an acquiescent Congress strongly suggests, at a bare minimum, that the dormant Commerce Clause belongs to that class of legal propositions for which it is more important that the "law be settled than that it be settled right." Justice Scalia has conceded that "the doctrine of stare decisis has 'special force' where 'Congress remains free to alter what [the Court has] done.'" Alexander Bickel, a

legal giant no less vigilant than Justice Scalia in combating judicial excess, conceded that the prospect of congressional override served to legitimize the dormant Commerce Clause.\textsuperscript{156}

A pragmatic defense of the dormant Commerce Clause need not and should not rest solely on grounds of enhanced \textit{stare decisis}. (Dare I say "\textit{stare decisis} with attitude"?) "Like all other questions, the question of how to promote a flourishing society [should] be answered as much by experience [as by] theory."\textsuperscript{157} The Supreme Court’s dormant Commerce Clause decisions enjoy the happy trait of actually \textit{working}. Early in our nation’s constitutional history, the Court adopted a fortunate baseline favoring free movement of goods, services, and labor among the states. As Congress’s constitutional power over interstate commerce has expanded, judicial authority to review discriminatory or even merely troublesome state laws has expanded in parallel fashion. Throughout, Congress has retained the ability to reassert its own jurisdiction over these issues, to reassign responsibility to an expert federal agency, or to relegate the matter in part or in whole to the states themselves.\textsuperscript{158} More often than not, however, Congress has elected to leave the federal courts in charge of developing a type of constitutionally flavored federal common law on the extent to which state and local laws may regulate or tax the national economy.

It is a standard constitutional trope to tar the Supreme Court with the charge of "judicial activism!" whenever the Court does something a particular critic dislikes. In truth, the Supreme Court has handled the dormant Commerce Clause with considerable skill. Mindful that “Congress has the power to protect interstate commerce from intolerable or even undesirable burdens,” the Court routinely acknowledges that “the better part of both wisdom and valor is to respect the judgment of the other


\textsuperscript{158} Cf. S. Pac. Co. v. Arizona, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting) (arguing that the existence of a “national agency which has been entrusted with the task of” regulating a particular industry should counsel courts to “intervene only where the state legislation discriminate[s] against interstate commerce or [is] out of harmony with laws which Congress ha[s] enacted”).
branches of the Government.\textsuperscript{159}

Perhaps no other case depicts the Court's finesse as vividly as the 1992 decision in \textit{Quill Corp. v. North Dakota ex rel. Heitkamp}.\textsuperscript{160} A generation earlier, the Court had held in \textit{National Bellas Hess, Inc. v. Department of Revenue}\textsuperscript{161} that a state may not impose sales or use taxes on a retailer who lacks a physical presence in that state. Grounding its decision in both the Due Process Clause of the Fourteenth Amendment and the dormant Commerce Clause, \textit{Bellas Hess} drew a "sharp distinction . . . between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."\textsuperscript{162} This distinction conferred a de facto exemption from state sales taxes for mail-order retailers, who proceeded to flourish in the ensuing decades. Retailers located in sparsely populated states with well-educated, low-wage labor pools reaped an especially high benefit.

Over time, \textit{Bellas Hess} became less politically and legally tenable. Local retailers chafed at the tax exemption enjoyed by out-of-state mail-order competitors, and states lamented the lost sales and use tax revenues more than they embraced economic growth attributable to the mail-order boom. Meanwhile, intervening developments in the Supreme Court's due process jurisprudence made it increasingly difficult to defend the bright line drawn in \textit{Bellas Hess}. The Court held, for instance, that a state may exercise \textit{in personam} jurisdiction over a foreign corporation that has no physical in-state presence but purposefully avails itself of economic benefits in that state.\textsuperscript{163} \textit{Quill} accordingly overruled the due process underpinnings of \textit{Bellas Hess}, holding that a mail-order retailer that "has purposefully directed its activities at . . . residents" of a state thereby acquires "contacts . . . more than sufficient for due process purposes" and may accordingly be subjected to sales and use taxes in that state.\textsuperscript{164}

\textit{Bellas Hess}, however, also rested on dormant Commerce Clause grounds, and \textit{Quill} declined to disturb this aspect of the embattled decision. "[A]lthough . . . cases subsequent to \textit{Bellas

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161. 386 U.S. 753 (1967).
162. \textit{Id.} at 758.
164. \textit{Quill}, 504 U.S. at 308.
\end{footnotesize}
Hess and concerning other types of taxes... have not adopted a similar bright-line, physical-presence requirement," the Quill Court concluded that the "reasoning in those cases does not compel" a rejection of "the rule that Bellas Hess established in the area of sales and use taxes."165 Touting instead "the continuing value of a bright-line rule in this area" as well as "the doctrine and principles of stare decisis," Quill announced that "the Bellas Hess rule remains good law."166 In refusing to overrule Bellas Hess's dormant Commerce Clause holding, the Quill Court relied on Congress's power to override a dormant Commerce Clause restraint on state and local taxation:

[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. Indeed, in recent years, Congress has considered legislation that would "overrule" the Bellas Hess rule. Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in Bellas Hess that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.167

This Solomonic resolution placed the question of state sales and use taxation of mail-order retailing—and, eventually, electronic commerce—before Congress, undoubtedly the forum best suited to resolving the dispute. In a situation such as the one presented by Quill, the Supreme Court is best understood as cueing the issue for Congress and imposing a temporary restraining order on sales and use taxes until Congress can address the issue. In this sense, the dormant Commerce Clause operates as a penalty default rule, reflecting Congress's usual preference but on occasion imposing a penalty default that forces Congress to reveal its real preferences when recommitment to local control would arguably serve national interests.

Critics love to call the Supreme Court's dormant Commerce Clause jurisprudence a "quagmire."168 I suspect that this "swamp

165. Id. at 317.
166. Id.
167. Id. at 318 (footnotes and citation omitted).
The "monster" characterization of a major branch of Supreme Court decision making finds a ready audience in legal academia precisely because most law professors neither understand the dormant Commerce Clause nor care enough about its underlying values to spend the time needed to master the doctrine. The typical teacher of constitutional law, ironically enough, is too wealthy to waste much thought on the value of economic integration (or at least the devastation that would prevail in its absence). The marginal propensity to disdain the dormant Commerce Clause probably bears a sharp and positive correlation with the degree to which a scholar specializes in constitutional law. Oddly enough, the bigger a scholar's professional stake in constitutional law, the lower the likelihood that she will spend time, thought, and footnotes on the dormant Commerce Clause and other issues with the greatest impact on the dollars-and-cents concerns of practicing lawyers and the public at large. A poll of constitutional law scholars would probably fail to rank the dormant Commerce Clause and its antidiscrimination norm high among the values to be vindicated by constitutional government. Aside from the sheer arrogance of giving short shrift to the constitutional doctrine our students are likeliest to encounter in practice, this attitude deprives many scholars of the tools to engage one of the deepest, most reliable, and most stable bodies of Supreme Court case law. Dormant Commerce Clause decisions no more constitute a quagmire than decisions on, say, affirmative action, the public forum doctrine, the religion clauses, and regulatory takings. When difficulty of its own accord becomes an excuse for judicial and intellectual abdication, the Republic very well might crumble.

For those who really do wish to "secure the Blessings of Liberty to ourselves and our Posterity," it is fortunate that the Supreme Court remains at least two votes away from trashing the dormant Commerce Clause. "[T]he 'father of the Constitution,' James Madison," regarded "[t]he 'negative' aspect of the Commerce Clause" as "more important" than that provision's affirmative grant of legislative power. Justice Holmes, wounded in a

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Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 259 (1987) (Scalia, J., concurring in part and dissenting in part); cf. Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 17 (1986) (Burger, C.J., concurring) (referring to "the cloudy waters of this Court's 'dormant Commerce Clause' doctrine").

169. Yes, Michael Stokes Paulsen, I am talking to you. See generally Suzanna Sherry, RFRA-Vote Gambling: Why Paulsen Is Wrong, as Usual, 14 CONST. COMMENT. 27 (1997).

170. U.S. CONST. pmbl.

171. W. Lynn Creamery, 512 U.S. at 193 n.9; accord Camps New-
war sparked by claims of state sovereignty run amok, understood the importance of retaining a federal judicial check on state power: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."\(^{172}\)

The truth is that the dormant Commerce Clause is not that terribly difficult or more internally inconsistent or unpredictable than other bodies of judge-made law. It compares quite favorably with that other body of federal law regarding restraints of trade: antitrust. Well before the passage of the Sherman Act in 1890, the dormant Commerce Clause served as America's original "Magna Carta of free enterprise."\(^{173}\) Like its statutory counterpart, the dormant Commerce Clause supports an evolutive, "common law" approach that encourages courts to take account of contextual nuance before deciding whether to uphold or condemn a measure alleged to restrain commerce among the states.\(^{174}\) Of course, though Justice Scalia might concede the existence of dual "Magna Carta[s] of free enterprise," he would insist that neither "give[s] judges carte blanche" to adopt whichever "approach might yield greater competition."\(^{175}\)

Fair enough. As a matter of constitutional interpretation, the Supreme Court long ago asserted the authority to review state and local laws for their compatibility with the idealized norms of a putatively free national marketplace. In their defense, the Justices took this power in good faith.\(^{176}\) More important, from a

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\(^{172}\) OLIVER WENDELL HOLMES, Law and the Court, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).


\(^{176}\) See generally Philip P. Frickey, Faithful Interpretation, 73 WASH. U.
pragmatic perspective, they have done a good job. Despite numerous opportunities over the course of centuries to undo this state of affairs, Congress has retained the courts' presumptive power to review state and local regulation and taxation of the national economy. That mountain of acquiescence is neither ratification in an Article V sense nor a "constitutional moment" of the sort Bruce Ackerman has advocated. But it will do. Congressional inaction has ratified the dormant Commerce Clause "in a substantial if informal sense."

IV. PRAGMATISM UNMODIFIED

The Supreme Court exerts and will continue to exert "pervasive influence on a wide range of issues that can only in a partial and peripheral way be considered legal rather than political." One of the most important bodies of constitutional law fitting this description is the dormant Commerce Clause. If the deepest criticism of the dormant Commerce Clause is that its absence of firm textual support in the Constitution renders this an unusually political and therefore presumptively improper "policy-laden" body of decisions, defenders of this doctrine can afford to concede the point. Constitutional law by its very nature includes vast bodies of judicial decision making that bear at most tenuous connections to the text, structure, and original intent of the Constitution. I leave to another time, though not necessarily another scholar, the challenge of crafting a more comprehensive answer to the deep conundrum of original meaning in constitutional law. Why should the Framers' understanding of the Constitution be privileged over later interpretations designed to ensure that the "ideas and aspirations" embodied in that document actually "survive more ages than one"? Why indeed does constitutional law frit-

178. White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 211 n.7 (1983). My use of this phrase from White, which I consider to be one of the most atrociously protectionistic cases in dormant Commerce Clause jurisprudence, is opportunistic and cynical.
181. Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992); cf. U.S. CONST. pmbl. (describing the Constitution as having been adopted "in Order to ... secure the Blessings of Liberty to ourselves and our Posterity");
ter away its best intellectual resources on the bootless search for original meaning, when every other field of human enterprise understands that a "science which hesitates to forget its founders is lost"? For now it suffices to endorse Justice Holmes's definition of law as "what the courts will do in fact, and nothing more pretentious."

Left unfettered, state and local laws crippling the greater economy "would ... invite a speedy end of our national solidarity." Our Constitution arose under "the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Vindication of this ideal, though theoretically within the reach of Congress, in practice demands meaningful judicial review. To Justice Scalia's great chagrin, the Supreme Court appears to have extracted—"by a sort of intellectual adverse possession" of the third clause in Article I, Section 8—a judicial power to review state laws from what is nominally a simple grant of legislative authority. In filling in one of the "great silences of the Constitution," the dormant Commerce Clause also satisfies one of the Republic's great needs. Aided (but not supplanted) by the Import-Export Clause and the Privileges and Immunities Clause of Article IV, the shamelessly judicial formulas that comprise dormant Commerce Clause doctrine continue to uphold the core federal interest in a nationwide common market. But Article I as a whole is cluttered with provisions urging Congress to legislate in favor of commerce and private enterprise. The Constitution's recitation of federal legislative powers anticipates that Congress would tax, borrow, harmonize bankruptcies, coin

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) ("This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.").


185. Id.


money, standardize weights and measures, combat counterfeiting, establish a postal system, and create intellectual property in addition to regulating foreign, interstate, and Indian commerce. In light of the prominence of the Commerce Clause within Article I, one truly must ask why we need "a textual hook for what, in essence, is a structural principle—that the union created by the Constitution sought to protect interstate commerce from protectionist regulation by states."\(^{188}\)

The sitting judicial opponents of the dormant Commerce Clause accept none of this, and we have every reason to expect that they never will. According to Justice Scalia, "'Congress' silence is just that—silence.'\(^{189}\) He leaves himself open to a tit-for-tautology retort: "comments in [Justice Scalia's] dissenting opinion[s] . . . are just that: comments in [his] dissenting opinion[s]."\(^{190}\) Meanwhile, critics more open to persuasion might seek stronger reassurance that the dormant Commerce Clause remains moored to the usual sources of constitutional restraint. Professor Denning wisely endorses Donald Regan's observation that constitutional scholars, no less than "nature abhors a vacuum," instinctively "abhor constitutional principles without a specific textual grounding."\(^{191}\) Calvin Johnson has attempted to extract a surrogate for constitutional text from judicial practices that prevailed during the transition from the Articles of Confederation to the Constitution of 1787.\(^{192}\) Economic and process-based defenses of the dormant Commerce Clause do exist, even if they remain a distinct minority within legal scholarship, and serious students of this subject should anticipate Professor Denning's next contribution to this literature with great relish. Still, the fact remains that constitutional silence will always be the great flaw in the dormant Commerce Clause. Silence of a different sort—congressional silence—represents the most promising cure.

The dormant Commerce Clause suffers from constitutional silence. It always has; till a fifth vote on the Supreme Court or a

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188. Denning, supra note 9, at 413–14.
majority in both houses of Congress repeals the doctrine, it always will. This is hardly unique to the dormant Commerce Clause—or cause for constitutional alarm. Among the doctrine's critics, Justices Scalia and Thomas are probably the likeliest to compare the dormant Commerce Clause, and derisively at that, to other constitutional doctrines derived from the "penumbras" and "emanations" of the Constitution. 193 These critics overlook a crucial trait of constitutional adjudication. Penumbras and emanations are precisely the parts of the Constitution that "help give . . . life and substance" to constitutional doctrine. 194 Socially progressive jurists and commentators laud what can only be called "Penumbra Left" in American constitutional law: the jurisprudential arc of substantive due process from Skinner v. Oklahoma 195 to Lawrence v. Texas. 196 For its part, a right-of-center five-Justice coalition within today’s Supreme Court has extended Hans v. Louisiana, 197 itself a decision crafted strictly from the wordless shadows of the Eleventh Amendment, into a "dramatic expansion of the judge-made doctrine of sovereign immunity" that is "unpredictable" and driven solely "by the present majority's perception of constitutional penumbras rather than constitutional text." 198 That project richly deserves the name of "Penumbra Right."

Well, so what? "[W]hen the Court changes its mind, the law changes with it." 199 As Professor Denning has said, pragmatic constitutional adjudication is comfortably penumbral. 200 So am I. Constitutional silence is the usual state of affairs. The quieter

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194. Id.
197. 134 U.S. 1 (1890).
and more mysterious the Constitution is, the greater the levels of judicial creativity and volatility.

Congressional silence, on the other hand, bears close notice. Indefinite congressional acquiescence is the closest thing we have to de facto ratification of the dormant Commerce Clause, and honest constitutional scholars owe a responsibility to say so. In controversies that more overtly involve the separation of powers within the federal government, ratification by silence routinely works. The judicial “construction and [legal] effect of [a] constitutional provision,” especially one affecting the allocation of powers among the branches of the federal government, may be “confirmed by the practical construction that has been given to it by the Presidents”—or, as I argue here, by the Supreme Court—“through a long course of years, in which Congress has acquiesced.” More generally, “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.”

In one of his earliest Supreme Court cases, Justice Scalia inadvertently summarized the essence not only of separation of powers jurisprudence, but also of lawmaking at the highest court in the land: “This is what this [Court] is about. Power.” Three years later, Justice Thurgood Marshall registered an almost identical lament from a jurisprudentially divergent perspective: “Power, not reason, is the . . . currency of this Court’s decision-making.” Neither of these Justices, alas, understood the true significance of an older colleague’s five-finger salute. When Justice Brennan flashed five fingers to his clerks, he was not signifying so much a “rule of five”—the unexceptional strategic rule of thumb that it takes five votes to achieve anything at the Supreme Court—as he was announcing “rule by five”—a more useful reminder that five votes enable a Justice to do anything.

In the context of the dormant Commerce Clause, “rule by five” amplifies the sound of congressional silence into an unmistakable clarion call. For critics of the dormant Commerce Clause, Congress’s “[s]ilence like a cancer grows.” “Although Congress

202. Id. at 689.
unquestionably has the power to repudiate or substantially modify [the dormant Commerce Clause's] course of adjudication, it has not done so. Anything shy of complete denunciation by Congress will further entrench the prevailing judicial practice of reviewing state and local laws for compatibility with a nationwide common market.

The two most celebrated separation of powers controversies in Supreme Court history confirm how congressional acquiescence has effectively ratified the dormant Commerce Clause. To paraphrase Justice Jackson in the more recent and somewhat less famous of these cases:

If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to [review state laws] belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

As for the most famous separation of powers case of them all, a modest modification of Chief Justice Marshall's most strident slogan should represent the final word regarding the legitimacy and wisdom of the dormant Commerce Clause:

It is emphatically the duty and province of the legislative department to say what the law is.