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## AMERICAN COMMON MARKET REDUX

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## AMERICAN COMMON MARKET REDUX

*Richard Collins*\*

The *Tennessee Wine* case, decided in June of 2019, had a major effect on the path of the law for an issue not argued in it. The Supreme Court affirmed invalidity of a protectionist state liquor regulation that discriminated against interstate commerce in violation of the dormant Commerce Clause doctrine (the Doctrine in this paper).<sup>1</sup> Its holding rejected a vigorous defense based on the special terms of the Twenty-first Amendment that ended Prohibition—an issue of interest only to those involved in markets for alcoholic drinks.<sup>2</sup> However, the Court’s opinion eliminated serious doubts about validity of the Doctrine itself, even though the petitioner and supporting amici curiae did not ask it to review the issue.<sup>3</sup> The Doctrine was

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<sup>1</sup> *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019). “Protectionism is the economic policy of restricting imports from, and exports to, other states or countries by tariffs, embargoes, quotas, and related regulations.” *Protectionism*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Protectionism> (last visited Aug. 11, 2020).

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *Petition for Certiorari* at 6, *Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96) (sole question presented based on Amend. XXI); *Petitioner’s Brief, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief for Mich. Beer & Wine Wholesalers Ass’n as Amicus Curiae in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief of Amicus Curiae KHBC Partners II, Ltd. in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief of Wine & Spirits Wholesalers of Tenn., Inc. as Amicus Curiae in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Amici Curiae Brief of U.S. Alcohol Pol’y All. & Pub. Health Researchers & Advoc. in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief Amici Curiae of Nat’l Conf. of State Legislatures, Nat’l Ass’n of Cntys., Nat’l League of Cities, U.S. Conf. of Mayors, Int’l City/County Mgmt. Ass’n & Int’l Mun. Law. Ass’n in Support of Petitioners, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief for Ill., Ala. Ark., Colo., Conn., Del., D.C., Fla., Ga., Idaho, Ind., Iowa, Kan., Ky., La., Mass, Mich., Miss., Mont., Nebr., N.Y., N.C., N.D., Ohio, Okla., Pa., R.I., S.C., S.D., Tex., Utah, Vt., Va., Wash., W. Va. & Wis. as Amici Curiae in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief of Amer. Bev. Licensees as Amicus Curiae in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief of Amicus Curiae Consumer Action in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief of Amicus Curiae Open Markets Inst. in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief of Major Brands, Inc. as Amicus Curiae in Support of Petitioner, Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); *Brief of Nat’l Alcohol Beverage Control Ass’n & Nat’l Liquor L. Enf’t Ass’n as Amici Curiae in Support of Petitioner, Tenn. Wine*, 139

established by 19th century Supreme Court decisions that set the legal framework for the American common market—until Justices advocating the Doctrine’s abolition seemed close to a majority early in the present century.<sup>4</sup> The *Tennessee Wine* opinion eliminated that threat for the foreseeable future.<sup>5</sup>

## I. THE AMERICAN COMMON MARKET

### A. *Established*

Interstate commerce generated major legal disputes as soon as we parted from the British Empire. Unsuccessful attempts at legal rules to promote it were made in the Continental Congress under the Articles of Confederation. Their failure was a major incentive (many claim the most important) for calling the Constitutional Convention.<sup>6</sup> Among the rights granted to the new federal government was the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” the Commerce Clause.<sup>7</sup> As law students know well, it is the most often adjudicated passage in the original text.<sup>8</sup>

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S. Ct. 2449 (No. 18-96); Brief of Nat’l Beer Wholesalers Ass’n as Amicus Curiae in Support of Petitioner, *Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); Brief of Ctr. for Alcohol Pol’y as Amicus Curiae in Support of Petitioner, *Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96); Brief of Wine & Spirits Wholesalers of Am., Inc. as Amicus Curiae in Support of Petitioner, *Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96).

<sup>4</sup> See *infra* notes 30–36 and accompanying text.

<sup>5</sup> The precedents and chance of reversal are explained in the text and notes below. In addition to the constitutional doctrines addressed by the Court, two others were argued but ignored. See *infra* notes 21, 130.

<sup>6</sup> See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 7–12 (Yale Univ. Press 1913) (“Interference with the arteries of commerce was cutting off the very life-blood of the nation, and something had to be done. The articles of confederation provided no remedy, and it was evident that amendments to that document, if presented in the ordinary way, were not likely to succeed. Some other method of procedure was necessary, and a promising way had already been opened . . . . Whatever complex of causes there may have been, the sequence of events resulting in this convention was, as outlined, the apparent impossibility of obtaining from the states the necessary amendments to vest in congress adequate powers in taxation and commerce, the calling of a trade convention, and then the calling of a general convention . . . .”). See also *Tenn. Wine*, 139 S. Ct. at 2449 and authorities cited.

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>8</sup> All constitutional law casebooks devote more pages to this provision than to any other part of the 1787 text, although the Fourteenth Amendment gets much more. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 155–215, 444–88 (6th ed. 2020).

Congress often uses the commerce power to establish federal regulation of interstate or international transportation or markets, and many legal contests test the power's boundaries.<sup>9</sup> It can instead pass laws that leave commercial regulation to states but protect interstate commerce against parochial state laws. But this power is virtually never used. The likely reason is the Supreme Court's assumed authority to define and defend our domestic common market based on the Commerce Clause.<sup>10</sup> Not overnight; the process stretched over much of the nineteenth century.<sup>11</sup> An antecedent claim, which would have established national control of all domestic markets, was made to the Marshall Court in the famous 1824 case that overturned New York's law imposing a monopoly on the right to operate steamships in state waters.<sup>12</sup> Represented by Daniel Webster, the monopoly's opponents argued that the Commerce Clause gave Congress exclusive power of commercial regulation, leaving none to the states. Without dissent, the Court discussed the claim extensively and in favorable terms, concluding, "There is great force in this argument, and the Court is not satisfied that it has been refuted."<sup>13</sup> But the Court decided the case against New York based on preemption of the state law by a federal statute, so the quoted statement was dictum.<sup>14</sup>

Of course, the 1824 dictum inspired litigants to renew the claim. The Marshall Court embraced Webster's theory in a foreign commerce decision overturning a state law requiring importers to buy a state license.<sup>15</sup> But the theory was then limited by that Court and rejected by most justices on the more states-rights (slavery protecting) Taney Court (1836–1864).<sup>16</sup> In 1852

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<sup>9</sup> See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 567 U.S. 519 (2012) (regarding the Affordable Care Act); *Gonzales v. Raich*, 545 U.S. 1 (2005) (regarding marijuana regulation).

<sup>10</sup> The *Tenn. Wine* Court recognized another reason why the power is seldom used to guard interstate commerce. *Tenn. Wine*, 139 S. Ct. at 2461 n.4 (2019) ("Even at the time of the adoption of the Constitution, it would have been asking a lot to require that Congress pass a law striking down every protectionist measure that a State or unit of local government chose to enact.").

<sup>11</sup> See *infra* notes 12–21 and accompanying text.

<sup>12</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 3 (1824).

<sup>13</sup> *Id.* at 209.

<sup>14</sup> *Id.* at 209–21.

<sup>15</sup> See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827) (alternative holding).

<sup>16</sup> See *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (sustaining state statute authorizing dam on navigable creek). The leading Taney Court decision before *Cooley, infra*, was *The License Cases*, 46 U.S. (5 How.) 504 (1847) (sustaining state laws requiring licenses to sell liquor including that imported from other states). For license rules that do not discriminate against interstate or foreign commerce, this decision was consistent with common market doctrine and remains good law.

the *Cooley* decision squarely rejected Webster's theory of exclusive federal power over interstate and foreign commerce.<sup>17</sup> A Pennsylvania law required all vessels sailing into or out of Philadelphia to employ a local pilot. In a suit to enforce the law, defendant Cooley argued that the state law violated the Commerce Clause. A federal statute claimed power over pilots but authorized state regulation. The Supreme Court sustained validity of both the federal and the state statutes, so Cooley lost.<sup>18</sup> But the Court's opinion said that other subjects of the interstate commerce power that "are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to of such a nature as to require uniform regulation by Congress."<sup>19</sup>

The 1852 dictum could have been forgotten. Instead, the post-Civil War Court embraced it in holdings overturning state laws that impeded interstate commerce.<sup>20</sup> Employing the incremental system of the common law, the Court evolved rules to define which state laws are invalid and thus to establish our domestic common market. Common markets also require equality of citizenship and free movement of persons for economic purposes. Both are guaranteed to Americans by other constitutional rules.<sup>21</sup>

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<sup>17</sup> See *Cooley v. Bd. of Wardens of the Port of Phila.*, 53 U.S. (12 How.) 299 (1852).

<sup>18</sup> *Id.* at 319–21.

<sup>19</sup> *Id.* at 319. The opinion did not try to identify which subjects are exclusively national.

<sup>20</sup> See Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877 (2011); Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409 (2008); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 443–44 (1941); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459–61 (2019). Arguably the Court's first common market holding after *Cooley* was the pre-War tax invalidation in *Hays*, although it did not invoke the Commerce Clause. *Hays v. Pac. Mail SS Co.*, 58 U.S. (17 How.) 596 (1855).

<sup>21</sup> *Edwards v. California*, 324 U.S. 160 (1941); *Crandall v. Nevada*, 73 U.S. 35 (1867) (insuring free interstate movement of persons). *Ward v. Maryland*, 79 U.S. 418 (1871) (art. IV, § 2 forbids state laws discriminating against citizens of other states in private market opportunities); *Saenz v. Roe*, 526 U.S. 489 (1999) (14th Amend. forbids many state laws discriminating against new residents in eligibility for state rights and benefits). The latter ruling could be extended to overturn protectionist residence rules like Tennessee's. In *Tenn. Wine*, one respondent's brief and two amici curiae briefs argued that it should be, but everyone else, including the courts, ignored this theory. See Brief for Respondent Affluere Investments, Inc. at 44–93, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); Brief of Amici Curiae Law Professors in Support of Respondent Affluere Investments, Inc. at 26–30, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondents at 11–13, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

From the 1920s, the Court's jurisprudence developed alongside international research and negotiations leading to formation of the General Agreement on Tariffs and Trade (GATT) adopted in 1947 to govern international trade among signatory nations, and of the 1957 Treaty of Rome defining the European Common Market, now the European Union (EU).<sup>22</sup> Indeed, one can match EU treaty provisions directly to American rules.<sup>23</sup> The Court relied on Marshall Court's opinions to adopt "dormant Commerce Clause doctrine" as the moniker for its common market rules.<sup>24</sup>

Common markets and trade treaties are often associated with the tag line "free trade." A better description is trade free of specified parochial barriers. Current Supreme Court doctrine, in place since 1980, has three basic rules. State regulations and taxes challenged under the dormant Commerce Clause doctrine are valid unless they (1) discriminate against interstate or foreign commerce, or (2) impose other burdens on interstate or foreign trade that the Court deems excessive (the undue burden rule).<sup>25</sup> (3) State subsidies in favor of their domestic commerce that resemble forbidden discriminations are

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<sup>22</sup> GATT has been supplanted by the World Trade Organization, although WTO incorporates GATT's text. See *From the GATT to the WTO: A Brief Overview*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235> (last visited Aug. 11, 2020).

<sup>23</sup> Treaty of Rome provisions that conceptually match American rules (1) and (2) (defined in text and notes below) include 1957 Articles 3(a) & (c), 9, 12, 30, 34.1 & 95.1. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 3, [https://ec.europa.eu/romania/sites/romania/files/tratatul\\_de\\_la\\_roma.pdf](https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf) (last visited Aug. 11, 2020). Decisions of the European Court of Justice enforcing EU treaties have refined common market theory substantially. The court is described at: *Court of Justice of the European Union (CJEU)*, EUR. UNION, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last visited Aug. 11, 2020). Its foundational decisions refining common market concepts are reviewed in WILLIAM PHELAN, *GREAT JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE: RETHINKING THE LANDMARK DECISIONS OF THE FOUNDATIONAL PERIOD* (2019).

<sup>24</sup> "Dormant Commerce Clause doctrine" appeared four times in *Tenn. Wine*, once in the majority and three times in the dissenting opinions. *Tenn. Wine*, 139 S. Ct. 2449, 2469, 2477. This caption first appeared in a dissent long after the Doctrine had been well established in case law. *Hill v. Florida*, 325 U.S. 538, 547 (1945) (Frankfurter, J., dissenting). The Marshall Court origins were *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) (when unused by Congress, the commerce power must "lie dormant") and *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) ("the power to regulate commerce in its dormant state"). Some justices opposed to the Doctrine prefer the gloomier term "negative commerce clause." *E.g.*, *infra* Justice Thomas's quote in text at note 36.

<sup>25</sup> Leading modern precedents are (1) *Philadelphia v. New Jersey*, 437 U.S. 617 (1976) (holding state law barring trash imports illegally discriminated against interstate commerce); (2) for regulations: *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (holding Iowa limit on length of trucks passing through the state imposed an undue burden on interstate commerce); (3) for taxes: *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (detailing tax law rules). See *infra* notes 56–71 and accompanying text. For discussion of a purported but erroneous additional rule, see *infra* notes 100–122.

nevertheless immune from the Doctrine (the market participant rule).<sup>26</sup> The Court sustains any act of Congress that overrides a Supreme Court rule; the Doctrine applies only when congressional power is, well, dormant.<sup>27</sup> Thus, Congress could abolish the Doctrine by an ordinary statute, or restore it were the Court to do so. This gives the Doctrine a degree of democratic legitimacy. In the context of the *Tennessee Wine* decision, Congress could modify or overrule the Court.

### B. Opposed

Individual justices have often dissented from decisions enforcing the dormant Commerce Clause doctrine. In some cases, dissenters objected to majority mistakes.<sup>28</sup> Much more common are ad hoc votes finding a state's particular justification sufficient. Policy preferences show up. Conservative justices are more likely to favor state regulations over federal power; liberal votes are more likely to sustain state tax laws.<sup>29</sup> But there are no clear cases in which a Supreme Court majority took this path. Unless they become frequent majorities, these dissents are of little consequence for the common market.

Justices who assert that the Doctrine is categorically illegitimate are more important but only if there is a reasonable chance that they become the Court's majority and vote to abolish it. From emergence of the Doctrine after the Civil War until the 1980s, there were never more than one or two

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<sup>26</sup> *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (South Dakota-owned cement plant's preference for in-state buyers was a subsidy immune from the dormant Commerce Clause doctrine). *Reeves* was 5-4, but dissents disappeared from later cases; the subsidy exception is well established.

<sup>27</sup> *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415 (1946). Justice Rutledge wrote for a unanimous Court. He may have had the Court's best understanding of trade theory but died after only six years on it. Later opinions have often referred to his, notably in *Complete Auto Transit, Inc. v. Brady*, *supra* note 25 and *infra* notes 68 & 91. Although congressional power to override the Court is clear, it has been used very seldom. By implication, Congress supports the Doctrine.

<sup>28</sup> See *infra* notes 84–85, 90, 92–93, 94, 97 and accompanying text.

<sup>29</sup> Statistical support for this statement would take too many citations for a short paper. See, for example, *Philadelphia*, 437 U.S. 617 and *Kassel*, 450 U.S. 662 for a sampling of conservative dissents in regulatory cases. For liberal dissents in tax cases, see, for example, *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951), *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) *infra* notes 90–92. On the ambiguous views of Justice Black and Chief Justice Rehnquist, see *infra* note 30.

members making this claim.<sup>30</sup> Then original intent and textualist jurisprudence, championed by Justices Scalia and Thomas and supported by the Federalist Society and its allies, changed the calculus.<sup>31</sup> Justice Scalia's first term on the Court included three complex cases that induced him to express his view that the Doctrine was illegitimate.<sup>32</sup> But he adopted an intermediate position, to follow Rule (1) and limit his adherence to Rule (2) to clear precedents.<sup>33</sup> Justice Thomas was slower to come out against the Doctrine. But he jumped in with both feet in 1997. A Maine property tax statute discriminated against interstate commerce in favor of local charities, making a sympathetic case for an exception to the Doctrine but no logical way to avoid collateral application of an exception to less empathetic situations.<sup>34</sup> The Court split 5-4, the majority holding the law invalid.<sup>35</sup> Sympathy likely accounted for Justice Ginsburg's dissenting vote. Justice Thomas, joined by Rehnquist and Scalia, took the occasion for a vehement attack on the Doctrine: "The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application," followed by 31 pages of elaboration.<sup>36</sup> Three votes for abolition combined with political support for new appointees committed to original intent and textualist jurisprudence made the Doctrine's future uncertain.

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<sup>30</sup> Justice Black (1937–1971) almost always dissented from enforcement of the Doctrine and at times seemed to argue that it was illegitimate. *See, e.g.*, *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 545–63 (1948) (Black, J., dissenting); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 316–33 (1938) (Black, J., dissenting). Justice Douglas (1939–1975) and Justice Murphy (1940–1949) often dissented case-by-case but did not claim that the Doctrine was mistaken. *See, e.g.*, *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 332–35 (1944) (Douglas, J., dissenting). Chief Justice Rehnquist (1978–2005) dissented from most decisions enforcing the Doctrine based on support for whatever justification was offered by the state. *See, e.g., infra* notes 58 & 78. He joined Justice Scalia's 1987 opinion questioning the Doctrine's legitimacy and Justice Thomas's 1997 opinion advocating repeal, but his own opinions did not assert that position. *See infra* note 36 and accompanying text.

<sup>31</sup> *See The Great Debate: Interpreting Our Written Constitution*, FEDERALIST SOC'Y, <https://fedsoc.org/commentary/publications/the-great-debate-interpreting-our-written-constitution> (last visited Aug. 11, 2020).

<sup>32</sup> *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 303 (1987) (Scalia, J., dissenting); *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94–98 (1987) (Scalia, J., concurring in part and concurring in the judgment).

<sup>33</sup> *See Tyler Pipe Indus.*, 483 U.S. at 254.

<sup>34</sup> *See Camps Newfoundland/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 609–40.



Justice Thomas's opinion calling for abolition laid out two distinct grounds: that the Doctrine lacked specific support in constitutional text and was thus inconsistent with original intent, and it was senseless and unworkable. The following sections examine these claims.

### *1. Text and Original Intent*

Lack of precisely explicit text is a given. But unlike many modern quarrels about original intent, the American market is not an issue that was unknown to founding-era America. To the contrary, it was one of the great questions of the day, providing plenty of fuel for discussion.<sup>37</sup> No one disputes the proposition that the Commerce Clause was intended to address market problems. However, knowledge about how to do so was tentative and evolving. Private, interstate business corporations that now dominate the economy were rare and their legal status murky.<sup>38</sup> The issue nicely fits Madison's Federalist essay opining that all new laws are "more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."<sup>39</sup>

The *Tennessee Wine* Court could have simply taken the Doctrine as received law based on precedent, as the Court often does when no one argues to the contrary. Instead, the opinion took original intent head on and made a convincing case that the Framers intended to create an American common market, even if they were uncertain about its mechanisms.<sup>40</sup> The opinion noted that "removing state trade barriers was a principal reason for the adoption of the Constitution," the Convention's "discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers," and in ratifying state conventions, "fostering free trade among the States was prominently cited as a reason for ratification."<sup>41</sup> It cited essays in *The Federalist* that criticized state protectionism and touted the benefits of a free national market.<sup>42</sup>

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<sup>37</sup> See FARRAND, *supra* note 6.

<sup>38</sup> See FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (2020); *infra* notes 46–47 and accompanying text.

<sup>39</sup> THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1981).

<sup>40</sup> See *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459–61 (2019).

<sup>41</sup> *Id.* at 2460.

<sup>42</sup> *Id.* (citing THE FEDERALIST NOS. 7, 11 (Alexander Hamilton), NO. 42 (James Madison)).

Those points are rarely contested. The battles are over how to interpret the constitutional text related to them. The Commerce Clause empowers Congress to promote trade, and other clauses expressly forbid certain commercial discriminations. As the *Tennessee Wine* Court noted, additional provisions that showed intent to have a national common market were the Privileges and Immunities (“P & I”) Clause of Article IV and the Import-Export Clause of Article I.<sup>43</sup> Both were hobbled by narrow interpretations in 19th century decisions. The Import-Export Clause was read to apply only to foreign commerce.<sup>44</sup> That was a contestable interpretation, but reversing it would cover only tax discriminations, well short of the scope of the Doctrine.<sup>45</sup> The broader rights guaranteed by the P & I Clause were denied to corporations before they became the dominant vehicle for American businesses.<sup>46</sup> A good case can be made that even were that reading correct for the kinds of corporations in use at the founding, it should not have applied to the fully private business corporations that emerged later.<sup>47</sup> The gist of the *Tennessee Wine* Court’s opinion is that the essential concept was intent to have a national common market. The founders’ inexact provisions for it reflected the imperfect knowledge of their time. That is sufficient support for the Doctrine, which can be and is refined with every decision of the Court, tempered by congressional power to modify it.<sup>48</sup>

## 2. Coherence

Justice Thomas’ claim that the Doctrine is incoherent and inconsistent in application has occasional support from academic critics.<sup>49</sup> What does the

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<sup>43</sup> *Id.* (citing U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. art. I, § 10, cl. 2).

<sup>44</sup> *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 128 (1869).

<sup>45</sup> For an extended argument that *Woodruff* was wrong, see *Camps Newfound/Owatonna*, 520 U.S. at 621–37 (Thomas, J., dissenting).

<sup>46</sup> *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

<sup>47</sup> The opinion in *Bank of Augusta* implied that state-chartered banks comprised a large share of corporations at the time, that these were much involved with state governments and state sovereignty, and that this connection was important to the Court’s decision. *Id.* However, the Court has continued to adhere to the interpretation. See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655–56 (1981).

<sup>48</sup> *Tenn. Wine*, 139 S. Ct. at 2459–61.

<sup>49</sup> See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 342 (1985) (“a disaster”); Anthony L. Moffa & Stephanie L. Safdi, *Freedom from the Costs of Trade: A Principled Argument Against Dormant Commerce Clause Scrutiny of Goods Movement Policies*, 21 N.Y.U. ENV’T L.J. 344 (2014); Paul E. McGreal, *The Flawed Economics of the*

Court's record show? Early on, one problem was uncertainty about common market theory. There was a general notion that discrimination against interstate and foreign commerce should be invalid,<sup>50</sup> but the Court struggled to define what that meant in a complex field that the Court was, to some extent, creating. Another problem was the formalist style that dominated the Court's jurisprudence in the late 19th Century, when the Doctrine was adopted.<sup>51</sup> Opinions were often more absolute than facts and theory justified. A third cause, still at work, arose from reaction to the formalist style, requiring what is often termed realism; opinions are supposed to be based on how a rule actually functions.<sup>52</sup> That in turn suffers from the Anglo-American tradition of generalist judges.<sup>53</sup> Trade law is a specialized subject. Judges with no expertise in it approach it gingerly and make mistakes, though more often in articulation than application. That is, they get the right result but botch the explanation. Cases based on all three basic rules offer examples.<sup>54</sup> But trade theory has steadily improved over time, and the Court has accordingly corrected past errors.<sup>55</sup>

Rule (1), forbidding discrimination against interstate or foreign commerce, overrides states' regulations and taxes that discriminate against their imports or exports in favor of competing internal commerce, unless the

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*Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998); Edmund W. Kitch, *Regulation and the American Common Market*, 6 HARV. J.L. & PUB. POL'Y 119, 123 (1982) ("an idea of absolutely no merit"). See also Justice Rehnquist's remark *infra* note 78. Many academic writers support the Doctrine. See Brief of Amici Curiae Law Professors in Support of Respondent Affluere Investments, Inc., Tenn. Wine, 139 S. Ct. 2449 (No. 18–96); Freidman & Deacon, *supra* note 20; Williams, *supra* note 20; Abel, *supra* note 20; *infra* note 115 (Regan, Denning & Martin).

<sup>50</sup> Abstract discussions in the Court's opinions usually centered on some conception of discrimination. See, e.g., *Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465, 508 (1888).

<sup>51</sup> See Morton J. Horowitz, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 16–19, 198–200 (1992).

<sup>52</sup> See *id.* at 169–92, 199–200. On formalism and realism, see, for example, Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, LEGAL THEORY (2010).

<sup>53</sup> For discussion of the generalist judicial tradition and its pluses and minuses, see Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847 (2012). For an example of a clumsy and mistaken formalist rule, see *infra* notes 83–87 and accompanying text on the former "original package" doctrine.

<sup>54</sup> For examples of opaque and confused opinions, see *infra* notes 67, 73, 74, 77–79, 90, 92, 97, 112 and accompanying text. The incoherence claim is furthered by many constitutional law textbooks, which chop up the Doctrine into irrational pieces. See, e.g., JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM D. AMAR, *CONSTITUTIONAL LAW: CASES & MATERIALS* 285–364 (13th ed. 2009) (nine categories). Textbook authors are generalists, too.

<sup>55</sup> See, e.g., *infra* notes 87, 91 and accompanying text.

state can show a justifying purpose.<sup>56</sup> This formulation covers several situations. For explicit state discriminations (tariffs, embargoes, and quotas), the rule in common market theory is nearly absolute.<sup>57</sup> The only justifying state interest that has succeeded in a Supreme Court decision is a legitimate quarantine.<sup>58</sup> This induces litigants to offer bad defenses that courts reject one by one, but feed incoherence claims.<sup>59</sup> However, Rule (1) also forbids certain indirect discriminations, when a state bans or burdens a specific commodity that is mostly imported from or exported to other states. That is, a law explicitly discriminates against a commodity and not against imports or exports of it. When such laws favor a competing but different internal product or interest, a lawsuit may claim violation of Rule (1). The Court's rule for such cases sustains the state's discrimination if it has a plausible, nonprotectionist purpose, a low bar that states usually clear.<sup>60</sup> But in a handful of cases, courts have overturned laws that lacked such a purpose and functioned like tariffs or embargoes.<sup>61</sup> In practice, these aspects of Rule (1) cause no enforcement mistakes, but the Court's inexact explanations feed claims of incoherence.

The word discrimination in the rule implies comparative disadvantage, that is, taxing or regulating imports or exports more severely than competing internal sales. In most reported decisions, that is the case, but the rule also

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<sup>56</sup> *Philadelphia v. New Jersey*, 437 U.S. 617 (1976). This is often cited as the Court's lead decision, and it is featured in most casebooks. Its unusual feature was the state's attempt to forbid imports of trash; the "good" being protected was access to state landfills.

<sup>57</sup> *See id.* at 624 ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.")

<sup>58</sup> *See Maine v. Taylor*, 477 U.S. 131 (1986) (sustaining a quarantine). No Court opinion says that only quarantines work, but no other successful defense has been reported. For a failed attempt to invoke the quarantine rulings, see *Philadelphia*, 437 U.S. at 628–29.

<sup>59</sup> The routine defense that appears in many decisions including *Tenn. Wine* argues that the protectionist law at issue is necessary for health and safety. The Court patiently explains why it is not. *See Tenn. Wine*, 139 S. Ct. at 2474–76.

<sup>60</sup> *E.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617–29 (1981) (sustaining hefty state severance tax on coal that was mostly exported to other states); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (sustaining state ban on plastic retail milk containers that were all imported); *E Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (sustaining state ban on petroleum retailers owned by external refiners).

<sup>61</sup> *E.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977) (overturning state ban on labeling sources of apples); *Collins v. New Hampshire*, 170 U.S. 30 (1898) (overturning state requirement that margarine sold as food be colored pink); *Mapco v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979) (overturning Ohio tax that discriminated against low-sulfur coal, all imported).

forbids laws that remove market advantages of imports or exports; the state claims to be equalizing interstate with internal transactions.<sup>62</sup> This shows up directly when a regulatory scheme imposes minimum prices on both local and imported goods to prop up internal producers.<sup>63</sup> These purportedly neutral measures defeat the economic purpose of a common market, to favor efficiency, just as much as rules that make imports more expensive than local products. The Court's decisions forbid such price controls but do so based on the misleading claim that the state is attempting to regulate activities outside the state, which causes confusion for other kinds of cases.<sup>64</sup>

Harder cases could arise if a state's nonprotectionist regulatory policy imposed costs on internal production or sales, and it imposed an equalizing tariff on imports or exports. This would impair the efficiency purpose of common markets to pursue a competing social objective such as environmental preservation or social equity. No such claim has been reported.<sup>65</sup>

Rule (2) gives critics more red meat because its basic formulation is opaque, forbidding "undue burdens" on interstate commerce.<sup>66</sup> Its most frequently cited expression is a very general balancing test: state laws that do not violate Rule (1) will be upheld unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits."<sup>67</sup> The issue is, again, whether states impose disadvantages on interstate commerce, albeit indirect and as a matter of degree, in contrast to Rule (1)'s categorical discriminations. In practice, the burdens that can invalidate state laws are reasonably specific. One is taxes and fees that are multiplied when imposed

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<sup>62</sup> *E.g.*, *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169–70 (1999).

<sup>63</sup> *E.g.*, *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511 (1935).

<sup>64</sup> *Id.* at 522; *Healy v. Beer Inst.*, 491 U.S. 324, 330 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986). For discussion of the confusion, *see infra* notes 100–22 and accompanying text.

<sup>65</sup> However, state regulations imposed on interstate businesses are the frequent basis for Rule (2) claims. *See infra* notes 100–22 and accompanying text.

<sup>66</sup> *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018).

<sup>67</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court unanimously overturned a state law that violated Rule (1); the quoted statement was dictum. *See also Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 595 (2015) (opinion of Gorsuch, J.: "By any reckoning, that's a pretty grand, even 'ineffable,' all-things-considered sort of test, one requiring judges (to attempt) to compare wholly incommensurable goods for wholly different populations (measuring the burdens on out-of-staters against the benefits to in-staters.)" (upheld state requirement for use of renewable energy).

on interstate activities. An important Rule (2) remedy requires that they be apportioned to the share of taxable activity in each state.<sup>68</sup> Another is barriers to interstate shipments that mostly (sometimes exclusively) burden commerce in transit through a state.<sup>69</sup> The third is multiple or conflicting regulations that burden interstate actors who must comply with more than one scheme or with conflicting rules.<sup>70</sup> No overall explanation appears in any Court opinion; this summary is based on compiling decisions that overturned or sustained state laws. Moreover, as the word “undue” and wording of the Court’s balancing test “clearly excessive” imply, Rule (2) invalidates laws only when these burdens are severe and immune to internal correction. This is particularly important for review of claims based on multiple or conflicting regulations. Multistate businesses must comply with lots of reasonable local laws in each state or city. Common market issues arise only when regulations apply mostly to interstate activities, burdens are severe, and states lack good policy justifications.<sup>71</sup>

Rule (3), by *sustaining* protectionist state subsidies, is a domestic exception to common market theory; EU and GATT/WTO rules restrict subsidies.<sup>72</sup> This ought to please critics of the Doctrine, but the rule has a complicating effect when legal schemes mix subsidies with regulations or

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<sup>68</sup> See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (explaining apportionment; unanimous Court). The Court’s first remedy restricted taxation of ships to the state of their home port, adopted by the Taney Court in *Hays v. Pac. Mail SS Co.*, 58 U.S. (17 How.) 596 (1855) (holding a ship with home port in New York could not be taxed based on its visits to California). The Court invoked no explicit legal theory but stated, “Now, it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax.” *Id.* at 599. Pennsylvania imposed an apportioned tax on railroad property, which the Court sustained—its first approval of apportionment. *Pullman’s Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). Much later the apportionment rule supplanted the home port rule for ships. *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949).

<sup>69</sup> *E.g.*, *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945) (overturned state regulation of train lengths). See also *infra* notes 75–82 and accompanying text.

<sup>70</sup> *E.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (overturned state law regulating hostile corporate takeovers); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (involved conflicting requirements for trucks’ mud-flaps; Illinois law overturned). On *Edgar*, see *infra* notes 103–09 and accompanying text.

<sup>71</sup> See discussion *infra* notes 100–22 and accompanying text.

<sup>72</sup> On GATT/WTO and subsidies, see *Subsidies and Countervailing Measures*, WORLD TRADE ORGANIZATION, <https://www.wto.org/english/tratope/scme/scme.htm> (last visited Aug. 11, 2020). On EU and subsidies, see Treaty of Rome Article 92, Mar. 25, 1957, 298 U.N.T.S. 3. See *supra* note 23 for linked site.

taxes. Complex and difficult cases can result, feeding the incoherency attack.<sup>73</sup> Instances of this problem are few and confined, but that does not restrain critics. A further problem for Rule (3) is imprecision of its “market participant” label and definition.<sup>74</sup>

Any review of coherence should include the case about Iowa’s truck length limits that is featured in most Constitutional Law casebooks and cited in many judicial opinions.<sup>75</sup> The state forbade most trucks longer than 55 feet; other states allowed 65-foot trucks. The Rule (2) issue was whether Iowa had imposed undue burdens on commerce in transit through the state. Truckers sued, relying on a decision three years before that had unanimously overturned a similar Wisconsin statute.<sup>76</sup> Four justices dutifully voted to follow the precedent.<sup>77</sup> Three dissented based on the odd claim that Iowa had tried harder to defend its law than had Wisconsin.<sup>78</sup> The other two voted against Iowa based on a novel discrimination theory with no basis in common market doctrine.<sup>79</sup> The case allows teachers to make helpful points about political theory by distinguishing the Iowa and Wisconsin decisions from an earlier case in which the Court unanimously sustained South Carolina’s limit

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<sup>73</sup> Two very complex decisions involved state regulation of trash disposal, a subject that seems to generate schemes mixing subsidies and regulations. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (upheld law, 5-3 vote); *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994) (invalidated law, 6-3 vote). For simpler cases involving taxes and subsidies, see *W. Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (held state tax invalid; 2 dissenters); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (held state tax invalid; Scalia, J. for unanimous Court). See also *Dep’t of Revenue v. Davis*, 553 U.S. 328 (2007) (held municipal bond favoritism justified by subsidy exception); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984) (held subsidy exception did not allow state to restrict resale of subsidized timber).

<sup>74</sup> The Court first confronted the subsidy issue in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976), where it described a state bounty for junked cars as the state entering “the market as a purchaser.” Next, in *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980), it referred to sale of state-owned cement to residents at a below-market price as the state acting as a “market participant,” and this became the usual tag for the exception. However, it applies to any subsidy, whether or not made in a market purchase or sale. Some opinions do refer to subsidies. *E.g.*, *New Energy Co.*, 486 U.S. 269 *passim* (1988) (Scalia, J.).

<sup>75</sup> *Kassel v. Consol. Freightways*, 450 U.S. 662 (1981). See, *e.g.*, GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 267–73 (8th ed. 2018).

<sup>76</sup> *Kassel*, 450 U.S. at 668 (citing *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978)).

<sup>77</sup> *Id.* at 664 (Powell, J., plurality opinion).

<sup>78</sup> See *id.* at 687–706 (Rehnquist, J., dissenting). Skill of a state’s lawyers is hardly a sound basis for a common market rule. This opinion included the self-fulfilling remark that the “jurisprudence of the ‘negative side’ of the Commerce Clause remains hopelessly confused.” *Id.* at 706.

<sup>79</sup> *Id.* at 679 (Brennan, J., concurring). The theory never appeared in any other Supreme Court opinion. It was likely a futile attempt to define a more precise rule.

on truck lengths.<sup>80</sup> Iowa and Wisconsin had made numerous exceptions allowing longer trucks for any local firm that asked for one.<sup>81</sup> These undermined their safety claims and eliminated local political pressures that would otherwise adjust state rules to market practices. South Carolina had made no such exceptions, allowing correction by local politics.<sup>82</sup>

### 3. Errors

On occasion, the Supreme Court's attempts to define an appropriate common-market rule for a state's imports from other states overcompensated for state bias to favor interstate over intrastate transactions. These have been corrected but sometimes too slowly, fueling criticism of the Doctrine. One began in 1827, when the Court overturned a Maryland license fee imposed on importers of foreign goods, defining the fee as an import duty expressly forbidden by the Import-Export Clause.<sup>83</sup> After the Civil War, the Court morphed that precedent into broad immunity from state laws of goods that are imported into a state from other states or foreign nations so long as the goods are in their original packages.<sup>84</sup> The rule was perhaps useful to protect imported goods in transit through a coastal state, but it created a tax preference for imported goods in receiving states. Worse, the Court applied it to imports of alcoholic drinks into states that had banned them altogether.<sup>85</sup> This undermined state prohibition laws until Congress intervened to override

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<sup>80</sup> *South Carolina State Hwy. Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). *Cf. Sproles v. Binford*, 286 U.S. 374 (1932) (sustained Texas limits on truck size and weight; minimal showing of burden on interstate commerce).

<sup>81</sup> *Kassel*, 450 U.S. at 665–66, 675–77. The opinion implied, but failed to specify, that the state's restriction mostly burdened commerce in transit through the state—interests with almost no political influence in the state.

<sup>82</sup> Soon after the Court's decision, the South Carolina Legislature amended its laws to conform to trucking industry norms. *Barnwell*, 303 U.S. at 180–84. 40 S.C. STAT. Act No. 845, art. III, §§ 1, 6–7 (1938); S.C. CODE § 1617 (Supp. 1938).

The *Kassel* Court discussed the safety issue extensively and noted its effect on Iowan politics. *Kassel*, 450 U.S. at 667–77. It cited *Barnwell* as well as *Raymond. Id.* at 670.

<sup>83</sup> *Brown*, 25 U.S. at 437–45 (1827) (alternative holding, applying U.S. CONST. art. I § 10 cl. 2). The other basis for the holding was based on an early version of Rule (1) discrimination. *Id.* at 445–48. *See also supra* note 15 and accompanying text.

<sup>84</sup> *Leisy v. Hardin*, 135 U.S. 100 (1890). Three justices dissented. *Brown v. Maryland*, had planted the seed with its dictum, “we suppose the principles laid down in this case, to apply equally to importations from a sister State.” *Brown*, 25 U.S. at 449.

<sup>85</sup> *See id.*



the “original package doctrine” as applied to alcohol bans.<sup>86</sup> Much later, the Court repealed the Doctrine altogether.<sup>87</sup>

Another, more complex, mistake arose from the Court’s attempts to address state tax changes inspired by the Great Depression. During the Doctrine’s 19th century development, the Court outlawed Rule (1) tax discriminations and addressed the Rule (2) problem of multiple taxation by imposing, first, its homeport-only rule for ships, then the duty of apportionment for railroad property and gross receipts.<sup>88</sup> That worked for common forms of taxation of that era. The Depression induced many states to impose new sales and income taxes. These generated new forms of potential multiple taxation when both the seller’s and buyer’s state could tax an interstate transaction. In the cases reaching the Court, only one of the states was taxing sales; multiple taxation was only potential. But apportionment seemed a doubtful remedy. The issue was clearly laid out in a 1946 concurring opinion by Justice Rutledge, who also proposed a sensible solution: the receiving state could impose its use tax on the sale. If the seller’s state taxed the same transaction, it would have to credit tax paid to the buyer’s state to avoid multiple taxation.<sup>89</sup> But no other Justice joined his opinion. Instead, the Court toyed with a rule forbidding any state tax imposed “directly” on “the privilege of doing business” in interstate commerce.<sup>90</sup> That rule favored interstate over intrastate commerce, but it could be avoided by careful drafting, and the Court overruled it.<sup>91</sup>

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<sup>86</sup> Webb-Kenyon Act, 27 U.S.C. § 122. Congress had to try twice. See *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2464–66 (2019).

<sup>87</sup> *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

<sup>88</sup> See *supra* note 68 and accompanying text; *Maine v. Grand Trunk Ry.*, 141 U.S. 217 (1891) (sustaining apportioned gross receipts tax).

<sup>89</sup> *Freeman v. Hewitt*, 329 U.S. 249, 259 (1946) (Rutledge, J., concurring). This required a judgment that the receiving state has the dominant interest in the transaction. As the text following shows, the Court in 2018 implicitly arrived at that idea by the back door.

<sup>90</sup> The theory was an alternative holding in *Freeman*; asserted by four dissenters in *Memphis Nat. Gas Co. v. Stone*, 335 U.S. 80, 99 (1948) (Frankfurter, J., dissenting); then became the opinion of the Court in *Spector Motor Serv.*, 340 U.S. 602. It seems to have been a failed attempt to simplify.

<sup>91</sup> The *Spector* theory was undermined as states learned to draft around it, and it was unanimously overruled in *Complete Auto Transit v. Brady*, 430 U.S. 274, 288–89 (1977). See *id.* at 284–85 (“The *Spector* rule had come to operate only as a rule of draftsmanship and served only to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause.”).

Some tax challengers asserted that a taxing state lacked sufficient contacts with parties it sought to tax in violation of either the Due Process Clause or the Commerce Clause or both. The Commerce Clause claim narrowly succeeded in a 1944 decision that overturned an Arkansas sales tax imposed on shipments into the state by sellers in other states.<sup>92</sup> Justice Rutledge's dissent carefully explained why that analysis was wrong.<sup>93</sup> The question became more important as interstate shopping increased. A 1967 decision held that a retailer could be required to collect and remit use taxes on interstate sales only if it had a physical presence in the receiving state.<sup>94</sup> Imposing the duty on other retailers denied both Due Process and Commerce Clause rights.<sup>95</sup> The decision created a tax preference for interstate over local sales and was criticized and attacked.<sup>96</sup> A confused 1992 decision reversed the Due Process ruling but retained the Commerce Clause rule.<sup>97</sup> In 2018 a divided Court overruled the 1967 and 1992 decisions.<sup>98</sup> However, none of

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<sup>92</sup> *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 339 (1944) (“[T]he sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction.”) (5-4 decision). *Cf. Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 446 (1940) (rejected Due Process attack on apportioned state tax on corporate dividends; 5-4 decision; Roberts, J., dissenting, said that Wisconsin had illegally taxed “outside her boundaries”).

<sup>93</sup> *See Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 349 (1944) (opinion of Rutledge, J. in three related cases).

<sup>94</sup> *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). Three justices dissented. Despite similarity to *McLeod*, *supra* note 92, the Court did not cite it.

<sup>95</sup> *Nat'l Bellas Hess, Inc.*, 386 U.S. 753.

<sup>96</sup> *See, e.g.*, Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 994, 1006–15 (1986); Charles Rothfeld, *Mail Order Sales and State Jurisdiction to Tax*, 53 TAX NOTES 1405, 1414–19 (1991); *Bellas Hess, Quill, and Online Sales Tax Collection*, BLOG.FEDTAX.NET, <https://blog.fedtax.net/2012/04/25/bellas-hess-quill-and-online-sales-tax-collection/> (last visited Aug. 11, 2020). The preference was practical, not formal. States could legally impose the use tax on each buyer, but collecting it was very difficult except for large businesses and motor vehicle purchases. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (sustaining use tax on imported heavy machinery).

<sup>97</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The Court unanimously overruled the due process rationale relied on in *Nat'l Bellas Hess*. The five-justice majority reaffirmed the dormant Commerce Clause holding of *Nat'l Bellas Hess* based on a flawed nexus argument. Three justices voted to reaffirm the commerce rationale based solely on stare decisis. Justice White's lone dissent expressly relied on Justice Rutledge's analysis to argue that *Nat'l Bellas Hess* be completely overruled. Justice White had voted with the Court in *Nat'l Bellas Hess*, so this was an all too rare example of a Justice admitting a mistake. *See Nat'l Bellas Hess*, 386 U.S. at 752.

<sup>98</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). All nine justices agreed that *Nat'l Bellas Hess* was wrongly decided, and the majority of five overruled it. The four dissenters relied on stare decisis combined with Congress's power to correct the error. The flaw in the latter position is that the Court

the governing opinions identified the common-market issue at stake: whether the rule was necessary to avoid “undue” multiple taxation of interstate sales.<sup>99</sup>

The use tax battle was but one involved in a mistaken attempt to decide common market issues based on allegedly illegal extraterritoriality alone, that is, the claim that a state law violates the Doctrine, without more, because it tries to impose the state’s authority outside its boundaries. The concept is often traced to the 1935 decision in which the Supreme Court overturned a New York statute that imposed minimum wholesale prices on milk either produced in the state or imported from others.<sup>100</sup> As explained above, this is a form of tariff that violates Rule (1) and was correctly invalidated.<sup>101</sup> But the Court said it was because “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”<sup>102</sup>

Another precedent often cited involved a Rule (2) issue. In 1982, the Court overturned an Illinois law that imposed extensive and burdensome regulations on hostile corporate takeovers of any company with significant local activities.<sup>103</sup> The Court’s main opinion said that the statute violated the Commerce Clause on two alternative grounds. The first recited that invalidity was based on the statute’s “sweeping extraterritorial effect,” but it received only four votes.<sup>104</sup> The second, based on Rule (2) conflicts with other states’ laws, received five votes and is properly designated the Court’s holding. Five years later, the Court sustained an Indiana statute regulating such takeovers but only for firms incorporated in the state.<sup>105</sup> The latter case correctly described the issue as whether these laws subjected interstate firms to multiple and conflicting regulations that were burdensome enough to be

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should protect the common market subject to exceptions imposed by Congress when it deems them necessary, not vice versa.

<sup>99</sup> The only opinion to do so was Justice White’s dissent in *Quill Corp. Quill*, 504 U.S. 298.

<sup>100</sup> *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511 (1935).

<sup>101</sup> See *supra* notes 63–64 and accompanying text.

<sup>102</sup> *Baldwin*, 294 U.S. at 521. Earlier Supreme Court opinions made occasional reference to extraterritoriality in relation to dormant Commerce Clause issues. See, e.g., *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 435 (1926); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925).

<sup>103</sup> *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

<sup>104</sup> *Id.* at 642, 626. The opinion relied on extraterritorial language in *S. Pac. Co. v. Arizona*, a leading decision on the Rule (2) category of undue burdens on transit through a state. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Edgar*, 457 U.S. at 642–43.

<sup>105</sup> *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

“undue.”<sup>106</sup> The problem was avoided by restricting regulatory authority to the state of incorporation (which of course means that Delaware’s rules dominate the field)<sup>107</sup>—the remedy that Justice Rutledge proposed in 1946.<sup>108</sup> But the extraterritorial language in the 1982 case is often cited.<sup>109</sup>

Later in the 1980s, the Court overturned two state laws that imposed limits on commodity prices based on those charged in neighboring states.<sup>110</sup> As noted, these operate like tariffs and were properly struck down. But both opinions of the Court cited and relied on the extraterritorial passage in the 1935 case.<sup>111</sup> The second, *Healy* in 1989, made an extended discussion of and reliance on extraterritoriality that dominated the opinion. Justice Scalia concurred that the law violated Rule (1) but disagreed with the extraterritorial rationale, correctly pointing out that “innumerable valid state laws affect pricing decisions in other States.”<sup>112</sup>

Thereafter, lawyers for businesses resisting state taxes or regulations invoked these precedents, particularly *Healy*, to persuade many lower federal courts that there is a per se Commerce Clause rule against extraterritoriality,<sup>113</sup> or that there is an “extraterritoriality doctrine” with the

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<sup>106</sup> *Id.* at 88–89. The opinion was authored by Justice Powell, who refused to join the extraterritorial rationale in *Edgar*, 457 U.S. at 646.

<sup>107</sup> See 2019 Annual Report Statistics, DEL. DIV. CORP., <http://corp.delaware.gov/stats/> (last visited Aug. 11, 2020) (67.8 % of Fortune 500 companies are incorporated in Delaware).

<sup>108</sup> See *supra* note 89 and accompanying text.

<sup>109</sup> See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1331 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 795 (2016); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 615 (7th Cir. 1999).

<sup>110</sup> *Healy v. Beer Inst.*, 491 U.S. 324; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

<sup>111</sup> *Healy v. Beer Inst.*, 491 U.S. at 330; *Brown-Forman*, 476 U.S. at 582.

<sup>112</sup> *Healy v. Beer Inst.*, 491 U.S. at 345.

<sup>113</sup> The purported per se rule first appeared in *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 638–40 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994) (invalidated state law requiring specified due process rights for persons disciplined by NCAA). It was followed by *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 792–94 (8th Cir. 1995) (rejected extraterritorial attack on state’s ban on sale of petroleum-based sweeping compounds; remanded to apply balancing test), then *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 63 F.3d 652 (7th Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996) (invalidated state law that restricted access to state landfills to waste from locations with a recycling program meeting state standards) and *Dean Foods Co. v. Brancel*, 187 F.3d 609, 614–16 (7th Cir. 1999) (invalidated state’s milk pricing regulations as applied to exported milk). Other principal Courts of Appeals decisions reciting a per se rule: *Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 Fed. App’x, 736, 741–21, 745–47 (10th Cir. 2016) (upheld state law regulating contact lens pricing); *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1145–46 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2448 (2016) (upheld state law forbidding possession or sale of shark fins); *Energy & Env’t Legal Inc. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2016) (Gorsuch,

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J.), *cert. denied*, 136 S. Ct. 595 (2015) (upheld state requirement for use of renewable energy); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 645–48 (6th Cir. 2010) (held a state milk labeling regulation did not violate per se extraterritorial Commerce Clause rule); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307–09 (10th Cir. 2008), *cert. denied*, 556 U.S. 1209 (2009) (upheld state statutes regulating loans as applied); *KT&G Corp. v. Att'y Gen of Okla.*, 535 F.3d 1114, 1143–46 (10th Cir. 2008) (upheld state statutes carrying out national cigarette settlement); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am. Inc.*, 492 F.3d 484, 492 (4th Cir. 2007) (upheld state law limiting direct sales of cars by manufacturers); *Grand River Enter. Six Nations v. Pryor*, 425 F.3d 158, 168 (2d Cir. 2005), *cert. denied*, 549 U.S. 951 (2006), *later appeal*, 481 F.3d 60 (2d Cir. 2007) (plaintiffs alleged a claim that statutes carrying out national cigarette settlement agreement violated per se extraterritorial Commerce Clause rule but lost on the merits after remand); *All. of Auto. Mfrs v. Gwadosky*, 430 F.3d 30, 35 (1st Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006) (upheld state regulation of car makers' warranty reimbursement of dealers); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 311–12 (1st Cir. 2005), *cert. denied*, 547 U.S. 1179 (2006) (upheld state law regulating prescription drugs); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) (rejected commerce claim against state cigarette contraband statute); *Southern Union Co. v. Missouri PUC*, 289 F.3d 503, 507–08 (8th Cir. 2002) (upheld state law regulating investments by public utilities); *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 470 (9th Cir. 2001) (upheld city ordinance that required contractors to provide benefits to registered domestic partners); *Pharm. Rsch. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79–82 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003) (upheld state prescription drug pricing law; Supreme Court affirmed denial of externality claim without calling it a doctrine or per se rule).

same effect.<sup>114</sup> Academic commentary focused on the latter version.<sup>115</sup> Another set of decisions recognized extraterritoriality as a separate Commerce Clause category without calling it a doctrine or per se rule.<sup>116</sup>

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<sup>114</sup> The phrase appeared in a judicial opinion that rejected the claim based on it in *IMS Health, Inc. v. Mills*, 616 F.3d 7, 29, 30 (1st Cir. 2010) (data privacy case). It appeared in an opinion in which it was applied to overturn a state law in *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362 *passim* (6th Cir. 2013), *cert. denied*, 571 U.S. 817 (2013). Other principal decisions by U.S. Courts of Appeals: *Ammex, Inc. v. Wenk*, 936 F.3d 355, 369 (6th Cir. 2019) (Bush, C.J., concurring) (upheld state gasoline-volatility regulation); *Vizio, Inc. v. Klee*, 886 F.3d 249, 256 (2d Cir. 2018) (upheld state recycling law); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 795 (2016) (overturned state law imposing royalty on out-of-state sales of residents' art); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013), *cert. denied*, 573 U.S. 946 (2014) (upheld state regulation of ethanol used in motor fuel). See *Daniels Sharpshooters, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018) (affirmed District Court decision enforcing "extraterritorial doctrine" claim that state waste disposal law was invalid as applied); *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 675 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019) (overturned state law regulating prescription drug prices based on claim labeled "extraterritorial doctrine" by dissent); *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016) (overturned, based on preemption, state law forbidding electric power purchases that would increase statewide power sector carbon dioxide emissions; affirmed trial court that had relied on "extraterritoriality doctrine").

<sup>115</sup> Donald 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, 1873 (1987) (a pre-*Healy* article). Regan used the term "extraterritoriality principle" to describe several legal doctrines and discussed references to extraterritoriality in *Edgar v. MITE Corp.*, 457 U.S. 624. But he said the concept was not properly part of dormant Commerce Clause law. "The extraterritoriality doctrine" to describe an alleged dormant Commerce Clause rule appeared in Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 342, 344 (1999) (relying on Regan). See also Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 803–06, 827 (2001); Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013); Susan Lourde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497 (2016) (reviewing more than 30 lower court decisions in which extraterritoriality claims were made). In addition to Professor Regan, authors Goldsmith, Sykes, and Denning argue that extraterritoriality is not a proper dormant Commerce Clause rule.

<sup>116</sup> *E.g.*, *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), *cert. denied*, 562 U.S. 829 (2010) (Posner, J.) (invalidated state law regulating car loans as applied to out-of-state lender); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009), *after remand*, 711 F.3d 253 (2d Cir. 2012) (claim that Thruway's tolls invalid per dormant Commerce Clause stated a cause of action, but lost on remand); *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 943–44 (8th Cir. 2009), *cert. denied*, 559 U.S. 1068 (2010) (upheld state escrow statute carrying out national cigarette settlement); *Bainbridge v. Turner*, 311 F.3d 1104, 1110–11 (11th Cir. 2002) (Rule (1) violation; extraterritoriality claim recited in passing); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110–12 (2d Cir. 2001), *cert. denied*, 536 U.S. 905 (2002) (upheld state law regulating labels for products containing mercury).

States are barred from regulating external activities to which they lack minimum contacts by the Due Process Clause.<sup>117</sup> But in reported Commerce Clause cases, states regulate parties operating within their boundaries. The common market issue is whether these regulations overburden interstate transactions because they subject interstate firms to multiple and conflicting laws and thus disadvantage them compared with local companies. Interstate business must comply with numerous local laws that differ from those of other states; that is inherent in a federal system. The costs of doing so are compatible with our common market except for extreme (“undue,” “clearly excessive”) cases.<sup>118</sup> The challenge for courts is to define them. Trying to do so by labeling regulations extraterritorial oversimplifies the question; too many state laws have external effects. Proper criteria are: whether a regulation’s effects on interstate activities dominate over local activities, whether compliance by interstate firms with every state’s law would impose extreme costs, whether the regulating state has a reasonable, nonprotectionist purpose,<sup>119</sup> whether the state is correcting a market failure, and whether the regulation would have the retroactive effect of unduly impairing investments in interstate facilities.<sup>120</sup>

Has the erroneous test of extraterritoriality led to incorrect results? So far, the problem is more rhetorical than real. No Supreme Court opinion used the phrase “extraterritoriality doctrine” or said there is a per se rule against extraterritoriality, and its decisions that relied on the concept as a factor seem clearly correct in result.<sup>121</sup> Many lower court opinions recited a per se rule, but most rejected claims based on the concept, and those that invalidated often included proper analysis of conflicts.<sup>122</sup> However, lawsuits will

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<sup>117</sup> *World-Wide Volkswagen Corp. v. Woodson*, 222 U.S. 286 (1980).

<sup>118</sup> See *supra* notes 66–71 and accompanying text.

<sup>119</sup> For a case in which the asserted state purpose was obsolete, see *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (overturning state rule that burdened small interstate firms).

<sup>120</sup> See, e.g., *Heydinger*, 825 F.3d at 912.

<sup>121</sup> See *supra* notes 63–64, 100, 110–12 and accompanying text.

<sup>122</sup> Five decisions in notes 113–14, 116, *supra* overturned state laws. The two in which extraterritoriality seemed to be the sole basis to invalidate were *Am. Beverage Ass’n*, 735 F.3d 362 *passim*, and *Meyer*, 63 F.3d 652. However, in both, the courts pointed out less burdensome ways the state could achieve its purpose. *Am. Beverage Ass’n*, 735 F.3d at 375, 376; *Meyer*, 63 F.3d at 662–63. Curiously, a concurring opinion nicely laid out why the extraterritoriality rule was mistaken, then relied on it. *Am. Beverage Ass’n*, 735 F.3d at 377–81 (Sutton, J.). In sum, extraterritoriality has so far not seemed to generate clearly erroneous holdings. However, some scholars argue that the Doctrine is a threat to the environment. See Kayla Rice, *A Tale of Two Portlands: How Port Cities Can Survive Dormant Commerce*

continue to assert the extraterritoriality claim. Our common market will be better served by dropping this shortcut.

### *C. Risk of Repeal*

As noted, three Justices voted to overturn the Doctrine in the 1997 *Camps* case, and politics supported new Supreme Court appointments by Republican presidents to be grounded in the doctrines of original intent and textualism.<sup>123</sup> Of course the political focus for appointments was not on the Doctrine; effects on it were a byproduct.<sup>124</sup> Moreover, liberal and centrist Justices have deviated from the Doctrine in the past.<sup>125</sup> Whether new justices will support or oppose the Doctrine cannot be certain until they have committed themselves. Three Justices who sat in the 1997 case, two in dissent, continued to serve in 2019.<sup>126</sup> Would the six replacements add enough votes to overturn the Doctrine? Prior votes gave reason to forecast one vote each way; the other four were uncertain.<sup>127</sup> *Tennessee Wine*

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*Clause Challenges to Fossil Fuel Shipping Restrictions*, 26 HASTINGS W.-NW. J. ENV'T L. & POL'Y 81 (2020); Sam Kalen & Steven Weissman, *The Electric Grid Confronts the Dormant Commerce Clause*, 45 ECOLOGY L. CURRENTS 132 (2018); Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENV'T L. REV. 423 (2015); Anthony L. Moffa & Stephanie L. Safdi, *Freedom from the Costs of Trade: A Principled Argument Against Dormant Commerce Clause Scrutiny of Goods Movement Policies*, 21 N.Y.U. ENV'T L.J. 344 (2014); Thomas Alcorn, *The Constitutionality of California's Cap-and-Trade Program and Recommendations for Design of Future State Programs*, 3 MICH. J. ENV'T & ADMIN. L. 87 (2013); Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381 (2013); Engel, *supra* note 115. None of these articles isolates on extraterritoriality, although all discuss it.

<sup>123</sup> See *supra* notes 31, 36, and accompanying text.

<sup>124</sup> The issues that mattered were politically important, such as abortion, guns, religion, and gay rights. See Jason Zengerie, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html?smid=tw-nytmag&smtyp=cur>.

<sup>125</sup> See *supra* notes 29–30 and accompanying text.

<sup>126</sup> See *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (Thomas, Ginsburg & Breyer, JJ.).

<sup>127</sup> Justice Alito, author of the *Tenn. Wine* opinion, had strongly supported the Doctrine. See *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (2015); *Dep't of Revenue v. Davis*, 553 U.S. 328, 376 (Alito, J., dissenting); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 355 (2007) (Alito, Stevens & Kennedy, JJ., dissenting). Justice Gorsuch had expressed opposition to it. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring). Both voted accordingly in *Tenn. Wine*. Decisions of Chief Justice Roberts and Justices Sotomayor, Kagan, or



eliminated any doubt. Seven joined the Court's opinion finding that the Doctrine is consistent with original intent and has sufficient grounding in the text. Earlier calls for repeal were expressly and politely acknowledged but rejected.<sup>128</sup> There will be lots of disputes and disagreements about how the Court should define the American common market, but for some years to come, its existence is not threatened.

## II. THE TWENTY-FIRST AMENDMENT

*Tennessee Wine's* interpretation of the Twenty-first Amendment was far less important than its reaffirmation of the dormant Commerce Clause doctrine. But it had a like effect, to resolve uncertainty on the Court. The Tennessee statute reviewed by the Court had protected established wine and liquor package retailers from new competition by requiring two years' residence in the state to qualify for a license.<sup>129</sup> The rule was invalid under Rule (1) unless the Doctrine were disabled by Section 2 of the Amendment. This section literally immunizes all state laws regulating their alcohol imports from all older provisions of the Constitution: the Bill of Rights, the Fourteenth Amendment, the Ex Post Facto Clause, and of course the Commerce Clause.<sup>130</sup> The Court has often held that the Amendment cannot

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Kavanaugh, from their appointments until 2019, did not show clear commitments either way. All four joined the *Tenn. Wine* majority.

<sup>128</sup> *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (citing and acknowledging "vigorous and thoughtful critiques" by Scalia, Thomas & Gorsuch, JJ.).

<sup>129</sup> Three state rules were attacked in the case. In addition to the two-year residence rule described in the text, the second Tennessee rule required that applicants for renewal of a retail license be state residents for at least ten years, and an initial license of a two-year resident had to be renewed after one year. The third rule forbade licenses to any corporation with even one nonresident shareholder and required all resident shareholders to meet the residence rules for persons. This outlawed licenses to publicly traded corporations. All three rules were overturned in the lower courts, but petitioner defended only the two-year residence rule in the Supreme Court. *Tenn. Wine*, 139 S. Ct. at 2456–57. However, the theory of the *Tenn. Wine* dissent would have revived all of them. *See Tenn. Wine*, 139 S. Ct. at 2476–84 (Gorsuch, J., dissenting).

<sup>130</sup> *See* 139 S. Ct. at 2468–69. The text of U.S. CONST. amend. XXI, § 2 states:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Two related novel twists in the case had opposing implications. On the one hand, amend. XXI, § 2 literally applies only to imported goods, not to duration of residence rules. On the other, Rule (1) precedents had involved discriminations against imported goods, not against new residents. The Court noted both points, passed over the former, and had no trouble deciding that the latter violated Rule (1). *Tenn. Wine*, 139 S.

be read literally.<sup>131</sup> But some Justices claimed an exception for the Doctrine and voted to sustain state discriminations against alcohol imports.<sup>132</sup> These were dissenting votes, but the most recent decision, in 2005, garnered four of them.<sup>133</sup> With but one more vote, an alcohol exception would be adopted. By 2019, there were again six new Justices who might supply votes to reverse. Instead, the Court reaffirmed application of the Doctrine to interstate commerce in alcohol by the same 7-2 vote that reaffirmed the Doctrine.<sup>134</sup>

### CONCLUSION

The *Tennessee Wine* decision had the unusual effect of resolving an issue not argued to the Court. In 1997 three Justices called for abolition of the dormant Commerce Clause doctrine that defines and protects the American common market. They argued that the Doctrine was inconsistent with the tenets of original intent and textualism and was incoherent. Political support for new appointments to the Court to be based on those doctrines raised the possibility that three in 1997 would become at least five in 2019. Instead, seven Justices joined an opinion finding the Doctrine consistent with those doctrines and, implicitly, not incoherent. Hence the American common market will continue to be defended by the Court for the foreseeable future.

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Ct. at 2470–72. The residence rule also implicated two other constitutional doctrines. The Court addresses non-commercial duration of residence rules based on the Fourteenth Amendment. *See supra* note 21. The *Tenn. Wine* rule also discriminated against nonresidents. This violates U.S. CONST. art. IV, § 2 applied to natural persons and partnerships. Both doctrines were ignored in *Tenn. Wine*. *See Tenn. Wine*, 139 S. Ct. 2449.

<sup>131</sup> *Tenn. Wine*, 139 S. Ct. at 2462 (“This would mean, among other things, that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge under the Equal Protection Clause. Similarly, if a state law prohibited the importation of alcohol for sale by proprietors who had expressed an unpopular point of view on an important public issue, the First Amendment would provide no protection.”).

<sup>132</sup> *Granholm v. Heald*, 544 U.S. 460, 497 (2005) (Thomas, Rehnquist, Stevens & O’Connor, JJ., dissenting); *Healy v. Beer Inst.*, 491 U.S. at 348 (1989) (Rehnquist, Stevens & O’Connor, JJ., dissenting); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 359 (1987) (Rehnquist & O’Connor, JJ., dissenting); *Brown-Forman Distillers Corp.*, 476 U.S. at 586 (White, Rehnquist & Stevens, JJ., dissenting); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 340 (1964) (Black & Goldberg, JJ., dissenting); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (Rehnquist, Stevens & O’Connor, JJ., dissenting).

<sup>133</sup> *Granholm*, 544 U.S. 460. Many of the points in the *Tenn. Wine* opinion were covered in the Court’s *Granholm* opinion but for only five justices. *Tenn. Wine*, in effect, solidified *Granholm*, which it freely cited.

<sup>134</sup> *Tenn. Wine*, 139 S. Ct. at 2462–74. Notwithstanding, the court in *Lebamoff Enterprises, Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), sustained an amend. XXI, § 2 defense to a state law. The decision’s attempt to distinguish *Tenn. Wine* was doubtful. *See Lebamoff Enterprises, Inc.*, 956 F.3d at 869–75.

