JUSTICE THOMAS, THE IMPORT-EXPORT CLAUSE, AND *CAMPS NEWFOUND/OWATONNA V. HARRISON*

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INTRODUCTION

Pity the poor dormant Commerce Clause.[1]

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1. The term, first alluded to by Chief Justice John Marshall in *Willson v. Black Bird Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829), refers not to a literal "clause" at all; rather it refers to the nontextual limitations implied by Congress's power "to regulate commerce . . . among the several states." *See* U.S. CONST. art. I, § 8, cl. 3. While the power to regulate commerce is exclusive once Congress acts, when Congress is silent states may regulate commerce, but there are limits to that power. Though many of the Court's previous tests have fallen by the wayside, modern dormant Commerce Clause cases are subjected to a two-tiered level of scrutiny:

> When a state statute discriminates directly against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (citation omitted).

Under the less stringent "balancing approach":

> Where the 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 on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact in interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted).

Almost universally reviled by academics[2] and Justices on the Supreme Court[3] as without solid foundation in text or intent,[4] and altogether lacking a coherent application, it nevertheless endures and continues to be employed by the Court,[5] when its

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2. *See, e.g.*, 1 DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 406-14 (1985); 2 DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 31-32 (1990); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217; 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. POL'Y 121 (1995); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, DUKE L.J. 569 (1987); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979); Amy M. Petragnani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215 (1994); Lisa J. Petricone, Comment, *The Dormant Commerce Clause: A Sensible Standard of Review*, 27 SANTA CLARA L. REV. 443 (1987).

3. Justice Scalia has been a vociferous critic of the dormant Commerce Clause. For a sampling of his criticism, see, for example, *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Scalia, J., concurring) (stating that the "'negative Commerce Clause' . . . is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution") and *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that the Court's dormant Commerce Clause doctrine is lacking in any coherent textual justification or non-textual theoretical application).

4. *See* Redish & Nugent, *supra* note 2, at 573 (indicating the dormant Commerce Clause "lacks any basis in constitutional democratic theory"). Elsewhere in their article, Redish and Nugent write that, "The dormant Commerce Clause lacks a foundation or justification in either the Constitution's text or history, and, despite the efforts of respected constitutional scholars, the clause cannot be satisfactorily rationalized outside the text of the Constitution." *Id.* at 617; *see also* Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 888 (1985) (criticizing the Court for not having ever articulated "a *structurally-based conceptual justification* for a negative aspect to the commerce clause and for the Court's reliance on the commerce clause as a basis for invalidating state regulation and taxation affecting interstate commerce" (footnote omitted)); Petragnani, *supra* note 2, at 1215 (indicating the dormant Commerce Clause comes "out of nothingness"); *id.* at 1216 (doctrine "absolutely without support in the text of the Constitution or the intent of the Framers"); *id.* at 1239 ("[t]here is no historical support for" the dormant Commerce Clause doctrine).

5. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994); Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat'l Resources, 504 U.S. 353 (1992); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992); Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).

members are not busy criticizing it. Perhaps to the dismay of its detractors, the doctrine—called by some a "figment of the Supreme Court's imagination"[6]—seems to be gaining, not losing, strength.[7] To cite one recent example, a New York district court avoided the First Amendment altogether and instead relied on the dormant Commerce Clause to bar enforcement of New York's state Internet decency statute.[8] To paraphrase Mark Twain's quip about the weather, the dormant Commerce Clause has become that doctrine that everyone complains about, but no one (on the Court at least) does anything to change.[9]

No one, that is, until Justice Clarence Thomas filed a fascinating dissent in a recent dormant Commerce Clause case, *Camps Newfound/Owatonna v. Harrison*.[10] Never one to eschew provocative arguments or avoid engaging in wholesale recon-

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6. *See* Redish & Nugent, *supra* note 2, at 617 (writing that the dormant Commerce Clause "is little more than a figment of the Supreme Court's imagination—hardly a legitimate basis, in a democratic society, upon which to premise judicial invalidations of state legislative action").

7. *See* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban*, 30 CONN. L. REV. 59, 106 n.213 (1997) (noting that the dormant Commerce Clause is an enduring and relatively popular feature of the constitutional law landscape).

8. *See* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 169-83 (S.D.N.Y. 1997). In a prescient essay, Glenn Reynolds provided an argument that the New York decision tracks closely. *Compare American Libraries Ass'n*, 969 F. Supp. at 181-83, *with* Glenn Harlan Reynolds, *Virtual Reality and "Virtual Welters": A Note on the Commerce Clause Implications of Regulating Cyberporn*, 82 VA. L. REV. 535, 539 (1996) (arguing that subjecting internet service providers to liability under various state laws can violate the dormant Commerce Clause "where the existence of multiple standards would create a significant burden for entities whose activities cross multiple states" (footnote omitted)).

9. Granted, academics have proposed ways that the Supreme Court should alter its jurisprudence to make the application more predictable. Most famously, Professor Regan has indicated the Court should use the doctrine to uphold its "antidiscrimination principle"—and nothing else. *See* Regan, *supra* note 2. Others have proposed that the Court use the doctrine to vindicate "process-based" protections of "outsiders" to protect them from parochial legislation intended to export costs to them for the benefit of state "insiders." *See* Charles L. Black, Jr., *Perspectives on the American Common Market*, *in* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE (A. Dan Tarlock ed., 1981); Eule, *supra* note 2, at 447. On the other hand, Lisa Heinzerling has recently concluded that since the doctrine has no real textual or historical foundations, and it does not really do what the Supreme Court (and some academics) *say* that it does (protect outsiders, promote efficiency, etc.), it ought to be scrapped entirely. *See* Heinzerling, *supra* note 2. This is unlikely, but her argument is provocative, even if (as I believe) it overstates the lack of historical or textual foundation for the doctrine.

10. 117 S. Ct. 1590 (1997).

ceptualization of doctrine,[11] Justice Thomas outlined a way that the Court could utilize an existing textual provision of the Constitution to do the work of the dormant Commerce Clause, while avoiding the excesses that have resulted from, in his opinion, a haphazard, *ad hoc* application of that nontextual doctrine. Thomas's candidate: the Import-Export Clause, which reads:

> 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 it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.[12]

Justice Thomas argues that, but for an erroneous Supreme Court decision,[13] which he believes to be a good candidate for overruling, the Import-Export Clause would have prevented states from levying discriminatory taxes on goods "imported" into or "exported" out of other states.[14] At the Framing, Thomas argues, those reading the words "import" and "export" would not (as we or our late nineteenth century counterparts might) mentally insert the word "foreign."[15] Nor is Thomas's reading of

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11. *See, e.g.*, Eastern Enters. v. Apfel, 118 S. Ct. 2131, 2154 (1998) (Thomas, J., concurring) (urging the court to reconsider the 200-year-old holding in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), that the Ex Post Facto Clause contained in U.S. CONST. art. I, § 9, cl. 3 applied only in the criminal context); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 849 (1995) (Thomas, J., dissenting) (characterizing the Constitution as a compact among peoples of several states, as opposed to a constitutive act of a national people); United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring) (arguing for an interpretation of the word "commerce" in the Commerce Clause that would remove from the ambit of congressional regulation activities that merely have a "substantial effect" on interstate commerce and returning to the alleged original understanding that distinguished among commerce, manufacturing and agriculture as separate activities). Justice Thomas even had the audacity to suggest that the Second Amendment actually contains a right that courts should enforce. *See* Printz v. United States, 117 S. Ct. 2365, 2385-86 (1997) (Thomas, J., concurring).

12. U.S. CONST. art. I, § 10, cl. 2.

13. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

14. *See infra* notes 98-129 and accompanying text.

15. *See id.*

the Clause necessarily a strained one. As explained below, he has on his side judicial precedent from Chief Justices Marshall and Taney.[16] It could be that Thomas has discovered—or rather, rediscovered—the answer to one of the most continuously vexing problems of modern constitutional law.

Or has he? In this article, I carefully examine the Import-Export Clause, and Thomas's dissent in *Camps Newfound/ Owatonna v. Harrison* to see if his case is plausible, and whether the Clause is the magic bullet that he promises. While Thomas's historical case for applying the Import-Export Clause to interstate commerce is sound, I argue that Thomas's solution would retrench the dormant Commerce Clause doctrine beyond the point that he and his ideological soulmate, Justice Scalia, have indicated a willingness to go in previous decisions. Thomas's "solution" inexplicably recharacterizes the scope of the dormant Commerce Clause's "antidiscrimination principle," a key thread running through most modern dormant Commerce Clause cases, and would apply it only to tax cases.

One possible conclusion to be drawn from Justice Thomas's dissent is that he, without warning and without stating so explicitly, has repudiated all of his previous opinions on the antidiscrimination principle and the dormant Commerce Clause. If not, then Thomas's solution encounters problems that are only surmountable by abandoning the strict textuality that makes the Import-Export Clause so appealing to him in the first place. Because these problems admit of no easy resolution, I submit that his solution, while intriguing, is inadequate.

Even if we are unwilling to follow Thomas to his conclusion, however, his dissent does suggest that the Court's Import-Export Clause jurisprudence underenforces the Clause[17] and (though Thomas undoubtedly did not intend this) that claims that the dormant Commerce Clause is atextual and anachronistic (and, by implication, illegitimate constitutional doctrine) have been overstated.[18]

In Part I of this essay, I discuss the Supreme Court's treatment of the Import-Export Clause, including the case of

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16. *See infra* notes 20-32 and accompanying text.

17. *See* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

18. *See infra* Part IV.D and accompanying text.

Woodruff v. Parham,[19] which restricted the Clause's application to foreign commerce. In Part II, I then contrast this line of cases with Thomas's dissent written last Term in *Camps Newfound/ Owatonna*. Part II examines the dissent in detail, with particular attention given to Thomas's reliance on the work of William Crosskey to support his revisionist interpretation of the Clause. Part III evaluates the historical arguments made by both Thomas and the *Woodruff* Court regarding the Import-Export Clause. In Part IV, I describe the corner into which Thomas has painted himself with his theory, and how his dilemma does not admit of easy resolution.

I. THE IMPORT-EXPORT CLAUSE IN THE SUPREME COURT

Before addressing arguments in *Woodruff* that limited the Import-Export Clause to *foreign* imports and exports, and before addressing Justice Thomas's critique of that decision, I present here the sparse case law interpreting the Import-Export Clause prior to *Woodruff*. In brief, Chief Justice Marshall assumed in *Brown v. Maryland*[20] that the Clause applied to foreign and domestic commerce equally; and Chief Justice Taney did not question Marshall's dictum in a later case, *Almy v. California*.[21] But in the latter half of the nineteenth century, the Court ignored these precedents, declared that Marshall and Taney were wrong, and held that the Import-Export Clause was understood in 1787 to apply only to foreign commerce—a holding that stood unquestioned by the Court until Justice Thomas's *Camps Newfound/ Owatonna* dissent.

A. Brown v. Maryland

At issue before Chief Justice Marshall's Court in *Brown v. Maryland* was the constitutionality of an occupation tax imposed by the State of Maryland on importers.[22] While more famous for

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19. 75 U.S. (8 Wall.) 123 (1869).
20. 25 U.S. (12 Wheat.) 419 (1827).
21. 65 U.S. (24 How.) 169 (1861).
22. *See* 25 U.S. (12 Wheat.) at 436 (phrasing the question before the Court as "whether the legislature of a state can constitutionally require the importer of foreign articles to take out a licence from the state, before he shall be permitted to sell a bale or package so imported").

the origins of what became known as the "original package doctrine,"[23] *Brown* was also the Court's initial interpretation of the Import-Export Clause. Chief Justice Marshall held the Maryland tax unconstitutional because, though not a direct tax on the goods imported from abroad, it burdened the process of importing and as such was an *indirect* tax on imports, which was barred by the Import-Export Clause.

Though the facts in *Brown* involved only foreign commerce, Marshall's opinion included the following comment: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State."[24] The statement was dictum to be sure—the case at hand did not concern state regulation of interstate commerce—but it was dictum indicating that the Marshall Court read the Clause as applying equally to foreign and domestic commerce. Indeed, the brevity of Marshall's comment suggests that he regarded the point as self-evident. Chief Justice Marshall's conclusion was questioned neither by Justice Joseph Story in his *Commentaries on the Constitution*,[25] nor by Chief Justice Taney, who adopted Marshall's conclusion when this issue was squarely before the Court nearly thirty-five years later in *Almy v. California*.

B. Almy v. California

In *Almy v. California*,[26] the petitioner had been convicted and fined $100 for exporting gold-dust from California to New York without getting the required stamp on the bills of lading for the gold, as required by California law. Specifically, the law required a stamp on bills of lading "for the transportation from any point or place in that State to any point or place without the State, of gold or silver coin, in whole or in part, gold-dust, or gold or silver bars or other form."[27] The amount of tax paid was based on the amount of gold or silver exported and the stamps "express[ed] in

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23. This doctrine, which held that states may not tax goods in interstate or foreign commerce while they were still in their "original packages" and had not yet "become incorporated and mixed up within the mass of property in the country," *see Brown*, 25 U.S. (12 Wheat.) at 441-42, was repudiated by the Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

24. 25 U.S. (12 Wheat.) at 449.

25. *See infra* notes 274-76 and accompanying text.

26. 65 U.S. (24 How.) 169 (1861).

27. *Id.*

value the amount of such tax or duty."[28] On appeal, the defendant charged that the California law violated the Import-Export Clause. The Supreme Court agreed.

In a brief opinion striking down the statute, Chief Justice Taney wrote that "[t]he only question in this case is upon the constitutionality of a law of California, imposing a stamp tax upon bills of lading."[29] Taney confirmed that *Brown* provided the key to interpreting the Import-Export Clause, and accepted without question Marshall's statement that the Import-Export Clause applied equally to foreign and domestic imports and exports. "If the tax was laid on the gold or silver exported," Taney wrote, "every one would see that it was repugnant to [the Import-Export Clause]."[30] The issue, therefore, was not whether the Import-Export Clause applied to domestic imports (the case proceeded on the assumption that it did), but whether California's imposition of the tax on the bills of lading, as opposed to the gold or silver itself, removed it from the Constitution's prohibition.

In invalidating the law, though the tax was *not* on the goods themselves, Taney sought to apply the Import-Export Clause in a manner consistent with its spirit, as well as its letter. Taney wrote: "[A] tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing . . . ."[31] Taney noted that a bill of lading "is invariably associated with . . . merchandise . . . , and consequently a duty upon that is, in substance and effect, a duty on the article exported."[32] To allow the law to stand, he concluded, would permit states to burden interstate commerce indirectly and thus evade constitutional prohibitions through a mere change in form.

C. Woodruff v. Parham

The use of the Import-Export Clause as a textual restraint on the power of the states to regulate interstate commerce ceased in 1869, however, when the Supreme Court decided *Woodruff v.*

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28. *Id.*
29. *Id.* at 172.
30. *Id.* at 173.
31. *Id.* at 174.
32. *Id.*

Parham.[33] At issue in the case was a Mobile, Alabama ordinance authorizing the collection of a tax on real and personal property, on goods sold both at retail and at auction, and on business income within the city.[34] As in *Brown* and *Almy*, the statute was challenged as a violation of the Import-Export Clause; and, as in *Almy*, interstate commerce was involved. Justice Samuel Miller, the author of the Court's opinion, began with an exposition on the definition of the terms "impost," "imports," and "exports;" noted their frequent use in the Constitution;[35] and concluded that "[i]n the ordinary use of the terms *at this day*, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States."[36]

Justice Miller then concluded that the understanding of these terms "at this day" was identical to the Framers' understanding, and that it was "reasonable to suppose that general usage [of the terms 'import' and 'export'] was the same" at the time *Brown* was decided.[37] The Court termed Chief Justice Marshall's remark in *Brown* to the contrary a "casual remark . . . made in the close of the opinion" and merely "an intimation of what [the Court] might have decided if the case ever came before them, for no such case was then to be decided," and otherwise ignored it.[38] As for *Almy*, Justice Miller concluded that the Court there had reached the correct result, but for the wrong reason: the California law should have been struck down as a burden on interstate commerce, and not as a violation of the Import-Export Clause.[39]

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33. 75 U.S. (8 Wall.) 123 (1869). Some doubts had been raised by other Justices about Chief Justice Marshall's comments on the scope of the Import-Export Clause in *Brown*. *See, e.g.*, The License Cases, 46 U.S. (5 How.) 504, 594 (1847) (McLean, J.). Justice McClean wrote of Justice Marshall's dictum: "This remark of the court was incidental to the question before it, and the point was not necessarily involved in the decision. . . . It must have been made with less consideration than the other points ruled in that important case." *Id.* McLean flatly concluded, but without any supporting authority, that "[t]he word *import* in a commercial sense, means the goods or other articles brought into this country from abroad,–from another country." *Id.* *But see id.* at 623, 625 (Woodbury, J.) (using the term "import" to refer both to items coming into one state from abroad, as well as those passing between states).

34. *See Woodruff*, 75 U.S. (8 Wall.) at 123.

35. *See id.* at 131.

36. *Id.* at 131-32 (emphasis added).

37. *Id.*

38. *Id.* at 139.

39. *See id.* at 138. Miller opined that the Commerce Clause, not the Import-

D. The Import-Export Clause is Dead! Long Live the Dormant Commerce Clause

Our dormant Commerce Clause jurisprudence, while possibly achieving similar results as under the Import-Export Clause, would have had a more solid foundation for development and been less vulnerable to academic charges of judicial fabrication had Justice Nelson, the dissenter in *Woodruff*, and not Justice Miller, written the majority opinion. As the opinions in *Brown* and *Almy* attest, the Import-Export Clause was on its way to pulling the laboring oar thereafter assigned to the dormant Commerce Clause doctrine. Justice Miller passed up an opportunity to build the "antidiscrimination principle," which the Court was beginning to articulate, on something more solid than congressional silence. Miller's skepticism about Chief Justice Marshall's passing comments in *Brown v. Maryland* is understandable: the issue was not before Marshall and his analysis of the Import-Export Clause as a restraint on the states was limited to a single sentence.[40] Miller's bald recharacterization of Chief Justice Taney's decision—that what

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Export Clause, limited the ability of the states to burden the commerce of neighboring states. The law at issue, he noted, was a simple sales tax, applicable to sales of merchandise made by a citizen within or without the State of Alabama:

> There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not . . . an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would . . . be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void.

Id. at 140. Miller added that Congress was, of course, free to exercise its commerce power "in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another." *Id.*

40. *See supra* note 24 and accompanying text. Of course, as Professor Thomas Reed Powell pointed out, there is certainly nothing in the text of the Constitution that suggests the Chief Justice was clearly erroneous in his assumption. "Though I might question whether it was proper thus to add something not called for by the case," Powell wrote, "I certainly would have agreed that goods from sister states are imports." THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 182 (1956). "When the Framers spoke in 1787," Powell continued, "the states were substantially sovereign, and their exercises of sovereign powers in adversely affecting trade from sister states was one of the factors leading to the Annapolis conference which on its unsuccess" resulted in the Constitution's drafting. *Id. But see* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 37 (1937) (concluding that in asserting the Import-Export Clause applied to interstate commerce, Marshall "overreached himself").

Taney *really* meant to say was that the California statute's limitation on the export of gold and silver was invalid under the Commerce Clause because it burdened and discriminated against interstate commerce—is not so easily excused.[41]

It is in Miller's decision, during which the Court was in a "nationalistic" mood,[42] that one can discern the acorn of the anti-discrimination principle from which the oak that is the modern dormant Commerce Clause doctrine grew. At the same time, *Woodruff* prevented the Import-Export Clause from serving as a textual anchor for that enduring, if somewhat peripatetic principle.[43] The late Harvard law professor Thomas Reed Powell noted that, in addition to recharacterizing *Almy*, Justice Miller sought "to shove the actual result of *Brown v. Maryland* aside by saying that the tax there was discriminatory against foreign goods and that the same condemnation would apply to such discrimination against goods from sister states, *but Marshall himself did not invoke discrimination.*"[44] Powell concluded that it is clear from Miller's opinion that "he [was] dominated by considerations of practical desirability and undesirability."[45] University of Chicago law professor David Currie noted that the reconceptualization of the test for whether state regulation offended the Commerce Clause came as the Miller Court literally lurched from one test to another, one such test being whether a state measure discriminated against interstate commerce.[46]

Though still in its embryonic state, the antidiscrimination principle would soon be articulated more forcefully and consistently in later court cases, like *Welton v. Missouri*.[47] Professor Currie wrote that "[P]rotectionism was at the heart of what the [Commerce Clause] was meant to avoid, and *Welton*'s nondiscrimination principle has become a pillar of modern

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41. *See supra* note 39 and accompanying text.

42. FRANKFURTER, *supra* note 40, at 37.

43. Scholars and judges critical of the dormant Commerce Clause doctrine often endorse the antidiscrimination principle, but locate it in, for example, the Privileges and Immunities Clause of Article IV of the Constitution. *See, e.g*, Eule, *supra* note 2.

44. POWELL, *supra* note 40, at 183 (emphasis added) (footnotes omitted).

45. *Id.*

46. *See* 1 CURRIE, *supra* note 2, at 330-42.

47. 91 U.S. 275 (1876) (striking down a Missouri law imposing a discriminatory tax on goods sold from outside the state).

commerce-clause analysis."[48] So, for better or for worse, Justice Miller and Chief Justices Taney and Marshall shared a common terminus, but Justice Miller chose to unify past precedent under one clause of the Constitution. For combating rank discrimination, litigants would thereafter have to seek redress under the Commerce Clause.[49]

Other scholars have expressed doubts about Justice Miller's conclusions in *Woodruff v. Parham*. Thomas Reed Powell commented that "Miller proffers historical and literary support for [his] conclusion in a passage which I have always found confusing when I glanced at it, and which I have *mea culpa*, never taken the time to evaluate."[50] Those who did take the time, like Justice Thomas and William W. Crosskey, have found Miller's analysis wanting. In Part II, I will tie the short, happy life of the Import-Export Clause as a restriction on the power of states to regulate interstate commerce to Justice Thomas's attempted reanimation of the Clause in *Camps Newfound/Owatonna v. Harrison*. In Part III, I will examine both the Court's opinion in *Woodruff* and the evidence mustered by Justice Thomas and Professor Crosskey in some detail to see who has the stronger historical case.

II. *CAMPS NEWFOUND/OWATONNA V. HARRISON* AND JUSTICE THOMAS'S DISSENT

A. The Majority Opinion

While only Justice Thomas knows why he chose this particular case to debut his novel and provocative solution to the dormant Commerce Clause dilemma, perhaps it is because the holding of *Camps Newfound/Owatonna v. Harrison*[51] likely

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48. 1 CURRIE, *supra* note 2, at 405 (footnotes omitted). For other early nondiscrimination cases, see, for example, *Walling v. Michigan*, 116 U.S. 446 (1886) (striking down a discriminatory tax on liquor); *Guy v. Baltimore*, 100 U.S. 434, 442 (1880) (invalidating discriminatory wharfage charges); *Cook v. Pennsylvania*, 97 U.S. 566 (1878) (striking down discriminatory tax on foreign goods at an auction). *See also* 1 CURRIE, *supra* note 2, at 405 n.12.

49. In certain cases, individuals (though not corporations) may also seek redress under the Privileges and Immunities Clause of Article IV. *See* U.S. CONST. art. IV, § 2, cl. 1.

50. POWELL, *supra* note 40, at 182-83.

51. 117 S. Ct. 1590 (1997). My discussion of the majority's opinion in *Camps*

represents to many critics, like Thomas, the latest example of a doctrine run amok. In *Camps Newfound/Owatonna*, the Supreme Court struck down a property tax exemption that benefitted Maine non-profit corporations whose operations were conducted primarily for the benefit of Maine residents.[52] Other organizations, like the church camp that brought the suit, enjoyed a lesser tax break.[53]

The Supreme Judicial Court of Maine had upheld the tax break on the grounds that the exemption was really a "tax expenditure" akin to subsidies the Court has generally allowed[54] and that the "exemption for charitable institutions [was] the equivalent of a purchase of their services."[55]

The United States Supreme Court reversed the Maine high court, and struck down the exemption on the grounds that it offended the dormant Commerce Clause.[56] In doing so, the Court rejected arguments that the Commerce Clause did not apply because the camp was not engaged in "commerce;"[57] because the activity was purely intrastate;[58] or because a real estate tax was at issue.[59] Writing for the majority, Justice Stevens also resisted the analogy that the Maine high court had accepted: that the tax exemption was more like a permissible subsidy "designed to lessen its social service burden and to foster the societal benefits provided by charitable organizations."[60] Justice Stevens wrote: "Although tax exemptions and subsidies serve similar ends, they

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Newfound/Owatonna draws on the discussion in Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1108-13 (1997).

52. *See Camps Newfound/Owatonna*, 117 S. Ct. at 1594.

53. *See id.*

54. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994) (noting that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business"). *But see id.* at 199 n.15 (making pointed mention of the fact that the Court had "never squarely confronted the constitutionality of subsidies"). *See generally* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998).

55. 117 S. Ct. at 1595.

56. *See id.* at 1590.

57. *Id.* at 1596 ("Even though petitioner's camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser . . . but also as a provider of goods and services." (citations omitted)). The Court also recalled that "transportation of persons across state lines . . . has long been recognized as a form of 'commerce.'" *Id.* (citations omitted).

58. *See id.* at 1597.

59. *See id.* ("A tax on real estate, like any other tax, may impermissibly burden interstate commerce.").

60. *Id.* at 1604.

differ in important and relevant respects, and our cases have recognized these distinctions."[61]

In the alternative, the Town argued that the exemption was like "a governmental 'purchase' of charitable services falling within the narrow exception to the dormant Commerce Clause for States in their role as 'market participants.' "[62] The Court rejected this argument as well. The Court had previously refused to apply the market-participant exception to a discriminatory tax credit[63] and refused to reconsider its decision, though it acknowledged that a tax exemption "had 'the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws.' "[64] The "assessment and computation of taxes," the Court concluded, quoting from a previous decision, "[is] a primeval governmental activity"[65] and "is not the sort of direct state involvement in the market that falls within the market-participation doctrine."[66]

Justice Stevens and the majority went on to hold that *all* discriminatory tax exemptions violate the dormant Commerce Clause—whether or not such exemptions are limited to not-for-profit corporations.[67] *Camps/Newfound Owatonna* thus rep-

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61. *Id.* at 1605. Relying on previous case law, the Court saw "no reason to depart from [the traditional distinction between subsidies and exemptions]." *Id.* at 1606.

62. *Id.* at 1604-05 (citations omitted). When state and local governments purchase goods or services as a "market participant" as opposed to a "market regulator," the Supreme Court has held the dormant Commerce Clause doctrine inapplicable; the theory being that when a state acts in the marketplace like any other economic actor, it may set the terms on which it purchases goods or services. *See, e.g.*, White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983) (indicating a state may enforce a rule mandating that construction crews working on city projects be made up of a certain number of local residents); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (indicating state-owned cement plant may, in time of scarcity, favor in-state cement purchasers and relegate out-of-state purchasers to a first-come-first-served basis); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (approving State of Maryland purchase plan for abandoned cars that placed heavier documentation burden on those out-of-state); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). The "market participant" doctrine is not without limits. *See, e.g.*, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (state may not require, as a condition of timber sale, that timber be processed in-state).

63. *See* New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988).

64. 117 S. Ct. at 1607 (quoting *New Energy Co.*, 486 U.S. at 277).

65. *Id.*

66. *Id.*

67. The majority also considered, and rejected, a position not argued by the Town: that the *per se* rule of invalidity regarding discriminatory tax exemptions

resents an extension of the dormant Commerce Clause doctrine. While the Court mentioned that it has "never squarely confronted the constitutionality of subsidies"[68] and emphasized that it "need not address [those] questions today,"[69] much of the Court's reasoning could apply to direct subsidies that excluded out-of-state economic actors. Perhaps it was this expansion of the dormant Commerce Clause doctrine, as well as the possibility that the doctrine might be expanded further, that inspired Justice Thomas to invite his colleagues to join him in pulling down the dormant Commerce Clause edifice and erecting in its stead a new doctrine built on what Thomas argues is more solid ground.

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notwithstanding, "a different rule should apply to tax exemptions for charitable and benevolent institutions." *Id.* at 1602. This argument was made by Justice Scalia in the main dissent he wrote, in which Chief Justice Rehnquist, Justice Ginsburg, and Justice Thomas joined. *See id.* at 1608 (Scalia, J., dissenting). Justice Scalia disputed Justice Stevens' characterization of the tax exemption as a broad one, *see id.* at 1609, arguing instead that under Maine case law, very specific criteria had to be met. *See id.* at 1610. Scalia then argued that the majority's conclusion, that the tax exemption facially discriminated, did not take into consideration "whether the purposes of the tax exemption [i.e. to encourage the provision of certain benefits to Maine citizens] *justify* its favoritism." *Id.* at 1611. Scalia concluded: "If the Court were to proceed with that further analysis it would have to conclude . . . that this is one of those cases in which the 'virtually *per se* rule of invalidity' does not apply." *Id.* at 1612. In the alternative, Scalia suggested:

> [E]ven if Maine's property tax exemption for local charities constituted facial discrimination against out-of-state commerce, and even if its policy justification (unrelated to economic protectionism) were insufficient to survive our 'virtually *per se* rule of invalidity' . . . there would remain the question whether we should not recognize an additional exception to the negative Commerce Clause . . . .

Id. at 1613.

Unpersuaded, the majority cited instances in which the Court had ruled that laws regulating commerce—including the National Labor Relations Act and federal antitrust laws—applied as well to nonprofit enterprises as to for-profit concerns. Justice Stevens concluded that "[t]he nonprofit character of an enterprise does not place it beyond the purview of federal laws regulating commerce." *Id.* at 1602. Regardless of whether businesses are operated for profit or not, Stevens reasoned, "[e]ntities in both categories are major participants in interstate markets" such that "any categorical distinction between the activities of profit-making enterprises and not-for-profit enterprises is . . . wholly illusory." *Id.* at 1603. Citing *Wickard v. Filburn*, 317 U.S. 111 (1942), Stevens argued that although the activities of the particular summer camp at issue might have a negligible effect on interstate commerce, the effect of nonprofits as a whole on the national economy is "unquestionably significant." *Camps/Newfound Owatonna*, 117 S. Ct. at 1603 (footnote omitted).

68. *Camps/Newfound Owatonna*, 117 S. Ct. at 1605 (quoting West Lynn Creamery v. Healy, 512 U.S. 186, 199 n.15 (1994)).

69. *Id.*

B. Thomas's Dissent

Justice Thomas's immodest proposal for reforming the Court's "virtually unworkable"[70] dormant Commerce Clause doctrine is set forth in his dissent to the Court's opinion, in which he was joined by Justice Scalia.[71] Thomas's dissent is divided into three parts: the first is a vigorous (if somewhat familiar) condemnation of the Court's dormant Commerce Clause jurisprudence;[72] the second part sets forth Thomas's theory of how the Import-Export Clause could accomplish the ends to which the dormant Commerce Clause should be restricted.[73] Finally, Thomas concludes with an application of his reinterpretation of the Import-Export Clause to the extant controversy, and an explanation of how it might be applied prospectively.[74]

1. Thomas's Indictment of Current Doctrine

Few scholars writing on the Court's dormant Commerce Clause jurisprudence have anything nice to say about it, so when Thomas asserts in his dissent that the doctrine "makes little sense"[75] and "has proved virtually unworkable in application,"[76] he is in good company.[77] The main problem with the dormant Commerce Clause, argues Thomas, is its lack of a sound textual basis,[78] which in turn has left the Court free to apply the doctrine

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70. *Camps Newfound/Owatonna*, 117 S. Ct. at 1615 (Thomas, J., dissenting).

71. *See id.* at 1614. Chief Justice Rehnquist joined Thomas and Scalia in Thomas's critique of the existing dormant Commerce Clause jurisprudence, but not in his proposal to substitute the Import-Export Clause for the doctrine. *See id.* ("Justice THOMAS, with whom Justice SCALIA joins, and with whom Chief Justice REHNQUIST joins as to Part I, dissenting.").

72. *See id.* at 1615-20.

73. *See id.* at 1620-28.

74. *See id.* at 1628-30.

75. *Id.* at 1615.

76. *Id.*

77. *See supra* note 2. Thomas also bolsters his criticism of the dormant Commerce Clause by citing many present and past members of the Court who have echoed his views. *See Camps Newfound/Owatonna*, 117 S. Ct. at 1615-16 & nn.2-3 (Thomas, J., dissenting) ("In one fashion or another, every Member of the current Court and a goodly number of our predecessors have at least recognized these problems [with the dormant Commerce Clause], if not been troubled by them." (footnotes omitted)).

78. *See Camps Newfound/Owatonna*, 117 S. Ct. at 1615 (calling the doctrine

free from any restraints whatsoever.[79] This has produced contradictory lines of precedent on otherwise indistinguishable facts,[80] he argues, and has done violence to "Our Federalism"[81] by involving the Court in "policy-laden decisionmaking."[82]

Justice Thomas then entertains and rejects two possible justifications for the "exercise of judicial power in an area for which there is no textual basis"[83] historically used by the Court: the exclusivity of the Commerce Clause[84] and a modification of the exclusivity thesis in which Congress, by its silence, preempts state action in the area of commerce.[85]

Justice Thomas notes that the exclusivity thesis, with which Chief Justice Marshall flirted in the early nineteenth century in *Gibbons v. Ogden*,[86] and its corollary that Congress could not "'regrant, or in any manner reconvey to the states that power' . . . quickly proved untenable."[87] In response to the majority's citation of Justice Johnson's concurring opinion in *Gibbons* that embraced the exclusivity thesis, Thomas observes that "the Court has long since 'repudiated' the notion that the Commerce Clause operates as an exclusive grant of power to Congress, and thereby forecloses state action respecting interstate commerce."[88] As for

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"unmoored from any constitutional text" and stating, "[t]he negative Commerce Clause has no basis in the text of the Constitution.").

79. *See id.* (noting that lack of textual basis has "brought within the supervisory authority of the federal courts state action far afield from the discriminatory taxes it was primarily designed to check").

80. *See id.* at 1620 (comparing "*Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and its progeny, on the one hand, and *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888), and its progeny on the other"). Thomas concludes that while the cases were "arguably distinguishable" they were distinguishable "only on policy grounds and not on any distinction from the text of the Constitution itself." *Id.* (discussing the differing outcomes in cases in which states have sought to impose restrictions on commerce in order to preserve certain natural resources).

81. *Id.* at 1616 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

82. *Id.* at 1620.

83. *Id.* at 1616.

84. *See id.*

85. *See id.* at 1617.

86. *Compare* Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 209 (1824) (Marshall, C.J.) (acknowledging that "[t]here is great force" in the exclusivity thesis, but declining to adopt it), *with id.* at 222 (Johnson, J., concurring) (embracing the exclusivity thesis).

87. *Camps Newfound/Owatonna*, 117 S. Ct. at 1617 (Thomas, J., dissenting) (quoting Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 318 (1851)).

88. *Id.* at 1616. Thomas also speculates that "[t]he 'exclusivity' rationale was likely wrong from the outset" and cites in support of his position Hamilton's paper in *The Federalist No. 32* where Hamilton assures readers that "there has been the

the theory that "Congress, by its silence, pre-empts state legislation,"[89] Thomas writes that "[t]o the extent that the 'preemption-by-silence' rationale ever made sense, it too has long since been rejected by this Court in virtually every analogous area of law."[90] Moreover, Thomas notes, the Court's current preemption doctrine—most often applied in cases where state and federal law are in conflict or where Congress has preempted a field through legislation—"provide[s] little aid to defenders of the negative Commerce Clause"[91] for two reasons. First, conflict preemption requires a "direct clash" between a state act and an act of the federal government, whereas "the very premise of the negative Commerce Clause is the *absence* of congressional action."[92] Second, "field preemption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted."[93]

Having dispatched what he characterizes as the two main arguments for the continued use of the dormant Commerce Clause doctrine,[94] Thomas hypothesizes that "we have

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most pointed care in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise of them by the states." *Id.* (quoting THE FEDERALIST NO. 32, at 154 (Alexander Hamilton) (M. Beloff ed., 1987) (footnote omitted)).

In *The Federalist No. 32*, Hamilton argues that in only three cases do states relinquish their ability to act under the Constitution: (1) where the Federal Government was granted exclusive authority in express terms, e.g., Congress's exclusive authority over the seat of government; (2) where there is an express grant to Congress, and a concomitant explicit proscription of the states' power, e.g., Congress's power to lay and collect taxes, imposts and duties and the Import-Export Clause; and (3) where the authority was granted and concurrent exercise of the power "would be absolutely and totally *contradictory* and *repugnant*," as where Congress is charged with prescribing uniform regulations for immigration and naturalization. *See* THE FEDERALIST NO. 32, at 197-99 (Alexander Hamilton) (Clinton Rossiter ed., 1961). One could construe Hamilton's neglect of the Commerce Clause as an admission that Congress and the states exercised the power to regulate interstate commerce concurrently, subject to the limitations of Article I, Sections 9 and 10.

89. 117 S. Ct. at 1617 (Thomas, J., dissenting).

90. *Id.*

91. *Id.* at 1618.

92. *Id.*

93. *Id.* Field preemption is a type of implied preemption where the Court determines that despite the absence of an affirmative statement of intent to preempt parallel state regulation in a particular area, congressional action in that area is so pervasive and so comprehensive as to leave no room for concurrent regulation. *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941).

94. Note that Thomas has really constructed a couple of straw men to knock

nonetheless 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." Specifically, Thomas notes that "[t]o this day, we find discriminatory state taxes on out-of-state goods to be 'virtually *per se* invalid' under our negative Commerce Clause."[95] Although the results in many of the Court's discriminatory tax cases are at least "intuitively . . . desirable" and may be "constitutionally *correct*," Thomas finds their origins in the dormant Commerce Clause rationale "unnecessary"[96] and "unsettling because of that rationale's lack of a textual basis."[97] Justice Thomas's search for a textual anchor for the Court's "correct" decision, combined with his desire to avoid its excursions into "balancing" and other quasi-legislative judicial mischief, is at the heart of his willingness to reconsider the Import-Export Clause.

2. The Import-Export Clause as a Limitation on the Power of States to Regulate Commerce

In the second part of his dissent, Justice Thomas argues that the Import-Export Clause was intended to apply to interstate, as well as foreign, commerce—the Court's 1869 decision in *Woodruff v. Parham*[98] notwithstanding.[99] Constitutional law, like politics, sometimes makes strange bedfellows, and Justice Thomas's reliance on the work of William Winslow Crosskey to bolster his reading of the Import-Export Clause arguably constitutes one of the strangest couplings in recent memory. Crosskey, after all, sought to prove that the Constitution was intended to erect

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down. Most contemporary defenses of the dormant Commerce Clause doctrine endorse some sort of penumbral antidiscrimination principle. *See* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); Regan, *supra* note 2; Sedler, *supra* note 4. Or, they endorse a "political participation" theory of the doctrine, *see, e.g.*, Eule, *supra* note 2. No sophisticated, contemporary theorist is arguing that the Constitution vests the regulation of commerce in Congress exclusively, and the "silence of Congress" argument, though a popular target of the doctrine's critics, *see* Heinzerling, *supra* note 2, at 218-19; Redish & Nugent, *supra* note 2, at 570-71; Petragnani, *supra* note 2, at 1243, is also not one on which contemporary defenders of the doctrine rely.

95. *Camps Newfound/Owatonna*, 117 S. Ct. at 1619.
96. *Id.* at 1615.
97. *Id.* at 1619.
98. 75 U.S. (8 Wall.) 123 (1869).
99. *See* 117 S. Ct. at 1620-28 (Thomas, J., dissenting).

basically a unitary government, while one of Thomas's other dissenting opinions has been described as bringing "the Court a single vote shy of re-installing the Articles of Confederation."[100] Nevertheless, based on Crosskey's work, and the inherent shortcomings of the *Woodruff* opinion itself, Thomas makes a plausible argument that *Woodruff* was wrongly decided and should be overruled.[101]

a. William Winslow Crosskey, and the Original Intent of the Import-Export Clause

Thomas declares in his *Camps Newfound/Owatonna* dissent that "[t]he late Professor William Crosskey, in a persuasive treatment of [the Import-Export Clause] nearly a half-century ago, unearthed numerous Founding-era examples in which the word 'import' referred to goods produced in other States."[102] Given Thomas's reliance on Crosskey's work *Politics and the Constitution in the History of the United States*, it is appropriate to examine Crosskey and his argument, and to place Crosskey's specific argument for interpreting "import" to include goods shipped between the states in the context of his larger thesis.

William Winslow Crosskey was a law professor at the University of Chicago, who in 1953 published a two-volume study entitled *Politics and the Constitution*, on which he had labored nearly two decades.[103] Crosskey argued, among other things,

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100. Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1.

101. *See* 117 S. Ct. at 1622 (Thomas, J., dissenting) ("[I]t is worth assessing the *Woodruff* Court's reasoning with an eye toward reconsidering that decision in an appropriate case."); *id.* at 1628 ("[I]t would seem that *Woodruff* was, in all likelihood, wrongly decided.").

102. *Id.* at 1620-21.

103. 1-2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). In 1980, a third volume was published by one of Crosskey's enthusiasts, William Jeffrey, Jr. *See* 3 WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1980). Philip Bobbitt provides this thumbnail sketch of Crosskey:

> Crosskey was by all accounts an unusual, even an eccentric, man. . . . I remember his portrait on the walls of the Yale Law Journal office—a balding head over a truculent scowl, his large heavy-set frame crammed into a small officer's chair. He obviously dominated that editorial board as he dominated the photograph.

PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 14 (1982).

that the Framers of the Constitution intended to imbue Congress with a general legislative power;[104] that the Commerce Clause was intended to be a general power over *all* commerce—intrastate as well as interstate;[105] and that the power of judicial review was never intended to apply to acts of Congress.[106] For support, Crosskey relied almost exclusively on an elaborate lexicographical exegesis of the terms used by the Framers in the Constitution.[107] He pointedly *refrained from* reliance on the extant records of the Convention, because Crosskey alleged that James Madison had deliberately altered his notes to support a "States' Rights" reading of the Constitution favorable to the South.[108]

Philip Bobbitt described Crosskey as "one of those brilliant men who is obsessed by the conviction that life is far simpler than the nitwits running the world perceive it to be; with such iconoclasm it was idle to suppose that he would attempt anything less than a revolution in constitutional scholarship."[109] While Crosskey's thesis was, to make a gross understatement,

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104. *See* 1 CROSSKEY, *supra* note 103, at 13 (describing his as a "unitary" theory of the Constitution).

105. *See id.* at 17-292. About the commerce power, Crosskey wrote:

> [I]f the words of the Constitution were allowed to govern in this matter [the regulation of commerce], as . . . they are supposed to do, Congress would have a complete, not a fragmentary, power "to regulate Commerce." And if the Supreme Court of the United States were only holding this, all those many evils . . . resulting from the supposed incompleteness of this important national power, could very easily be brought to an end. The laws of Congress in the commercial field could then be complete . . . . Simple, uniform, nation-wide laws for the sale of goods . . . could then be enacted. A simple national companies act could replace the vast and needless complexity that now comprises American corporation law.

Id. at 292. For the provocative and well-reasoned argument that uniform state laws (like the Uniform Commercial Code) that do not exempt interstate transactions might violate the dormant Commerce Clause doctrine, see Boris I. Bittker, *The Dormant Commerce Clause Doctrine,* Swift v. Tyson, *Uniform State Commercial Laws, and Federal Common Law: Ships that Passed in the Night?,* 8 CONSTITUTIONAL COMMENTARY 87 (1991).

106. *See* 2 CROSSKEY, *supra* note 103, at 976-1046.

107. *See* 1 *id.* at 5.

> One main purpose of this book is . . . to provide the reader, as the discussion proceeds, with a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution; and to that ultimate end, for an understanding of the literature of 1787 and 1788 about it.

Id.

108. *See, e.g.,* 1 *id.* at 7-12, 284, 313-14, 515-16, 634; 2 *id.* at 762, 1009-13.

109. BOBBITT, *supra* note 103, at 15.

revolutionary, it was not—as Crosskey no doubt wished it to be—influential.[110] In contrast to a few favorable reviews (primarily written by professors at Yale, where Crosskey got his law degree, or by Crosskey's colleagues at the University of Chicago),[111] *Politics and the Constitution* was dismissed out of hand by eminent professors such as the legal historian Julius Goebel,[112] and by Harvard constitutional law professors Ernest Brown[113] and Henry Hart.[114] When the third volume of his treatise was published in 1980, Crosskey's thesis was exhumed briefly and immediately reburied.[115]

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110. *See id.* at 20-21 ("Crosskey's book has only been cited once in the text of an opinion for the Supreme Court and this for a trivial point." (footnote omitted)). Leaving aside Justice Thomas's dissent in *Camps Newfound/Owatonna*, a computer search turned up only seven other Supreme Court cases in which Crosskey was mentioned at all since the publication of *Politics and the Constitution*. *See* Printz v. United States, 117 S. Ct. 2365, 2388 n.1 (1997) (noting that the word "expressly" was deliberately *not* included in the wording of the Tenth Amendment); Solorio v. United States, 483 U.S. 435, 446 n.12 (1987) (Crosskey cited for the proposition that Congress, not the executive, possessed the power to make rules for the military); Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 760 n.26 (1978) (questioning Crosskey's assertion that "duties" included "excises" despite separate enumeration in Article I, Section 8, Clause 1 of the Constitution); Michelin Tire Corp. v. Wages, 423 U.S. 276, 290-91 (1976) (acknowledging Crosskey's interpretation of the Import-Export Clause); Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (citing Crosskey for the phrase "tub[s] for the whale"—a contemporary anti-federalist phrase used to criticize the Bill of Rights as drafted by Madison in the 1790s); Commissioner v. Bosch, 387 U.S. 456, 476 (1967) (Harlan, J., dissenting); Marcello v. Bonds, 349 U.S. 302, 319 (1955) (Douglas, J., dissenting) (noting that Crosskey believed that ex post facto clauses applied to civil as well as criminal cases).

Bobbitt's original assessment remains true. Though Crosskey was cited three times after the publication of *Constitutional Fate, Politics and the Constitution* has not had an appreciable effect on constitutional doctrine. It remains to be seen if that will continue to be true, in light of Thomas's dissent.

111. *See, e.g.*, Charles E. Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24 (1953); Walton H. Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79 (1953); Abe Krash, *A More Perfect Union: The Constitutional World of William Winslow Crosskey*, 21 U. CHI. L. REV. 1 (1953); George D. Braden, Book Review, 62 YALE L.J. 1145 (1953); Arthur L. Corbin, Book Review, 62 YALE L.J. 1137 (1953); Malcom Sharp, Book Review, 54 COLUM. L. REV. 439 (1954).

112. *See* Julius Goebel, Jr., *Ex Parte* Clio, 54 COLUM. L. REV. 450 (1954).

113. *See* Ernest J. Brown, Book Review, 67 HARV. L. REV. 1439 (1954).

114. *See* Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954).

115. *See, e.g.*, 3 CROSSKEY & JEFFREY, *supra* note 103; Erwin Chemerinksy, *Empty History*, 81 MICH. L. REV. 828 (1983) (book review). In volume three, the authors "attempt to prove the same conclusion, using the same methodology, but by relying on a different set of primary materials," i.e., that "the events occurring

Crosskey has received some attention most recently because of (again) Thomas's concurrence to *United States v. Lopez*.[116] In his *Lopez* concurrence, Thomas argued for a fundamental reexamination of the Court's entire Commerce Clause jurisprudence since the New Deal, and suggested that "commerce" be interpreted according to the "original understanding" of the Framers, which he concluded would result in a much narrower power for Congress to exercise.[117] Legal historian Herbert

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between the signing of the Declaration of Independence and the Constitutional Convention . . . support their contention that the federal government's powers, especially in the area of economic regulations, were intended to be virtually unlimited." Chemerinsky, *supra*, at 830-31. Professor Chemerinsky concluded: "[T]he few useful insights are buried in a book so poorly written as to be almost unreadable." *Id.* at 838.

116. 115 S. Ct. 1624 (1995).

117. *See id.* at 1642-51 (Thomas, J., concurring). Thomas, in his concurring opinion, writes that the Court's Commerce Clause case law "has drifted far from the original understanding of the Commerce Clause" and that "[i]n a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause." *Id.* at 1642.

In particular, Thomas wishes to revisit the Court's interpretation of the Commerce Clause that allows Congress the power to regulate activity that "substantially affects" interstate commerce, writing that such an interpretation gives to Congress a general police power the Court has traditionally held that Congress does not possess, and which is inconsistent with a government of enumerated powers. *See id.*

Thomas argues, *contra* Crosskey, that at the Framing "the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture." *Id.* at 1643. Moreover, such a broad construction that has been given the term "commerce" renders superfluous other congressional powers that "affect commerce" that the Framers saw fit to enumerate in Article I, Section 8. *See id.* at 1644. Moreover, Thomas writes, "[o]ur construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head." *Id.* at 1645. Thomas concludes that "the substantial effects test is but an innovation of the 20th century." *Id.* at 1648.

Yet Thomas, unlike he does in *Camps Newfound/Owatonna*, suggests no prospective corrective to the Court's errors. In fact, he concedes that though he "might be willing to return to the original understanding," he "recognize[d] that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years" due to "*stare decisis* and reliance interest[ ]" considerations. *Id.* at 1650 n.8. But, he adds, his discussion of the Commerce Clause's original understanding "does not necessarily require a wholesale abandonment of our more recent opinions." *Id.* at 1650 (footnote omitted). Rather, Thomas merely points out that the "substantial effects test is far removed from both the Constitution and from our early case law" and that the *Lopez* decision is neither "radical" nor in need of correction in the future. *Id.* Thomas closes by pleading for temperance in future interpretations of "commerce." *Id.* In other words, Justice Thomas urges his colleagues to go and sin no more. Curiously, Thomas expresses no hesitation in *Camps Newfound/Owatonna* to adopt a new doctrine that would implicitly overturn

Hovenkamp suggested that Crosskey's evidence be reexamined in light of Thomas's arguments,[118] and suggested that Crosskey's thesis was dismissed unfairly when he first published his work.[119]

My purpose here is not to reexamine Crosskey's entire thesis,[120] but merely to acknowledge that portion of his work that Thomas cites in support of his interpretation of the Import-Export Clause. As ironic as it may be, considering that the views of Crosskey and Thomas regarding the scope of the Commerce Clause are diametrically opposed,[121] both are critics of the

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dozens of cases.

118. *See* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2227-36 (1996) (discussing Thomas and his views on commerce generally).

> [S]hould Justice Thomas's call for a more historical interpretation of the Commerce Clause be taken seriously, it would be time to open Crosskey's volumes once again. In that case Crosskey would loom large because . . . Crosskey was as much an originalist as Justice Thomas. . . . Justice Thomas's point can be made only if Crosskey can be proven wrong. . . .
>
> Yet proving Crosskey wrong on [the original meaning of "commerce"] would be something akin to proving that the Framers did not believe in republicanism. Crosskey's evidence is simply overwhelming, including quotations from hundreds of British and American sources.

Id. at 2233-34.

While Hovenkamp is correct that Crosskey would become relevant once again to any attempt to revisit the Framers' view of "commerce," I hardly think that Crosskey's argument is a model of disinterested scholarship. On the contrary, I think that proving Crosskey was *correct*, i.e., that the Framers intended to create a unitary government with unlimited national powers, would of necessity involve proving that the Framers did not believe in republicanism, or at least that they were horribly disingenuous when explaining their enterprise to the people during the debates over the Constitution's ratification.

119. The reason Crosskey is ignored today, Professor Hovenkamp maintains, is "not because [his work] was wrong, but because in the twenty years it took [him] to write his book his argument had become irrelevant." *Id.* at 2233.

120. Crosskey began his work during the New Deal, and the events of the years that intervened between his initiation of his research and its publication largely rendered his conclusions irrelevant. Of course, as Hovenkamp's essay pointed out, if the New Deal consensus is going to be challenged—including, for example, the "original intent" of the Commerce Clause—perhaps Crosskey's evidence should be reexamined. *See id.* at 2233-34. Even if he is given a second chance, it is unlikely Crosskey and *Politics and the Constitution* would fare much better the second time around, particularly in light of evidence that seems definitively to exonerate James Madison from the charges of blatant dishonesty in the compilation of his Records prior to their publication. *See* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at xx-xxvi (James H. Hutson ed., 1987) [hereinafter RECORDS] (refuting Crosskey's charges that Madison falsified or rewrote portions of his notes of the Philadelphia Convention based on an examination of forensic evidence).

121. *Compare Lopez*, 115 S. Ct. at 1643-46 (Thomas, J., concurring), *with* 1

dormant Commerce Clause doctrine.[122] Crosskey maintained that: (1) the terms "Import" and "Export" applied to domestic as well as foreign commerce;[123] (2) this clause was to be the vehicle through which the states were to be prevented from hindering interstate commerce;[124] and (3) that it was the "destructive genius" of Justice Miller in *Woodruff v. Parham* who engineered the Import-Export Clause's ouster and fixed the dormant Commerce Clause heresy into the constitutional firmament.[125]

b. Crosskey, Thomas, and the Camps Newfound/Owatonna *Dissent.*

Thomas's dissent in *Camps Newfound/Owatonna* incorporates Crosskey's Import-Export Clause interpretation almost jot-for-jot (except for Crosskey's accusations about the inaccuracies in Madison's notes). Citing many examples used by Crosskey in which the words "import" and "export" are used to refer to articles imported from other states, as opposed to those brought into the states exclusively from abroad, Thomas reaches the following conclusion:

> [B]ased on this common 18th-century usage of the words "import" and "export," and the lack of any textual indication that the Clause was intended to apply exclusively to foreign goods, it seems likely that those who drafted the Constitution sought, through the Import-Export Clause, to prohibit States from levying duties and imposts on goods imported from or exported to other States as well as foreign nations, and that those who ratified the Constitution would have so understood the Clause.[126]

CROSSKEY, *supra* note 103.

122. *Compare supra* notes 70-97 and accompanying text, *with* 1 CROSSKEY, *supra* note 103, at 321 (describing the dormant Commerce Clause theory "as plainly unfounded as a theory could be" and that "[i]t has nothing in logic to commend it"). Crosskey attributed the genesis of this theory to James Madison's "well-known, but fantastic theory . . . that the internal national commercial power 'was intended as a negative and preventive provision' to prevent the states from injuring each other . . . ." *Id.* at 313. This, as well as "certain spurious passages" elsewhere in Madison's notes, argued Crosskey, served to lead the Supreme Court astray at a later time. *Id.*

123. *See id.* at 295-304.

124. *See id.* at 316-17.

125. See *id.* at 315.

126. *Camps Newfound/Owatonna*, 117 S. Ct. at 1622.

Accordingly, Justice Thomas concludes that the *Woodruff* Court was wrong when it dismissed Chief Justice Marshall's *Brown v. Maryland* dicta, ignored Justice Taney's decision in *Almy*, and restricted the Import-Export Clause's application to foreign commerce.[127] "[T]here are passages in the available Convention debates," Thomas writes, "which indicate that interstate trade barriers remained a concern, and that the words of the Import-Export Clause applied to interstate as well as to foreign trade."[128] Further, Thomas argues, delegates to state ratifying conventions, as well as some Antifederalists, furnish additional evidence that the Import-Export Clause was understood to encompass domestic trade, or at least was not understood to be restricted *exclusively* to foreign trade.[129]

3. Prospective Application of the Import-Export Clause as a Restraint on States

In the final part of his dissent, Justice Thomas describes how his theory of the Import-Export Clause might be applied to do the work of the dormant Commerce Clause doctrine. It is here, I argue, that Justice Thomas's plan to substitute the Import-Export Clause for the dormant Commerce Clause doctrine breaks down. Thomas notes that "much of what the Import-Export Clause appears to have been designed to protect against has since been addressed under the negative Commerce Clause."[130] The "much" to which Thomas refers is "discriminatory State taxation," which he describes as "one of the core pieces of our negative Commerce Clause jurisprudence."[131] Thomas even concedes that he would be "inclined to leave well enough alone" if it "[w]ere . . . simply a matter of invalidating state laws under one clause of the Constitution rather than another."[132] However,

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127. *See id.* (writing that "it is worth assessing the *Woodruff* Court's reasoning with an eye toward reconsidering that decision in an appropriate case").
128. *Id.* at 1625.
129. *See id.*
130. *Id.* at 1628.
131. *Id.*
132. *Id.*

> without the proper textual roots, our negative Commerce Clause has gone far afield of its core—and we have yet to articulate either a coherent rationale for permitting the courts effectively to legislate in this field, or a workable test for assessing which state laws pass negative Commerce Clause muster.[133]

Thomas believes that his approach to the Import-Export Clause provides both a textual basis and a rationale for the limited exercise of the dormant Commerce Clause power. Moreover, Thomas argues the wording of the Clause itself would provide a built-in limitation to secure against the excesses of the Court's present approach, inasmuch as it prohibits only the imposition of "imposts" and "duties," and not the imposition of more general "taxes" on imports and exports. Illustrating how the text could limit the application of the principle embodied in the Clause, Thomas (while "reserv[ing] final judgment of the matter for a case where the Import-Export Clause is specifically addressed by the parties"[134]) notes that because Maine's property tax exemption at issue in *Camps Newfound* is neither an impost nor a duty as those terms were historically understood, and the property on which it is levied is neither an import nor an export, he would likely uphold it.[135]

The problem with Justice Thomas's analysis is that his recharacterization of the antidiscrimination core and his reconceptualization of the dormant Commerce Clause doctrine leaves significant areas of interstate commerce subject to onerous and even blatantly discriminatory state regulation and taxation. I will describe the specific problems more fully in Part IV,[136] but first I want to revisit both the *Woodruff* Court's *and* Thomas-Crosskey's historical treatment of the Import-Export Clause. Only if Justice Thomas's and Professor Crosskey's historical analysis is plausible, do my objections to Thomas's proposed use

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133. *Id.*

134. *Id.*

135. *See id.* at 1628-29.

> The amount of the Maine tax is tied to the value of the real property on which it is imposed, not to any particular goods, and not even to the number of campers served. It does not appear, therefore, to be a "duty" on "imports" in any sense of the words.

Id. at 1629-30.

136. *See infra* Part IV.

of the Import-Export Clause as a substitute for the dormant Commerce Clause doctrine become relevant.

III. THE INTENDED SCOPE OF THE IMPORT-EXPORT CLAUSE

What of Justice Thomas's (and Crosskey's) case for the original understanding of the Import-Export Clause? What of Justice Miller's? Crosskey's and Thomas's approach seems to provide more concrete evidence of the way in which the terms "import" and "export" were used around the time of the Framing. But Crosskey's boycott of Madison's notes from the Philadelphia Convention is a substantial omission from his Import-Export Clause analysis, and his exclusively lexicographical approach to constitutional interpretation leaves something to be desired—as others have pointed out.[137] Many would no doubt regard eighteenth-century dictionary definitions as brittle levers with which to overturn a venerable precedent like *Woodruff v. Parham*, and to alter fundamentally a well-accepted doctrine like the dormant Commerce Clause.[138]

Justice Miller's historical case against the *Brown-Almy* reading of the Import-Export Clause boils down to this: the terms "impost," "import," and "export" in the normal usage of the eighteenth century referred exclusively to foreign commerce, unless otherwise indicated.[139] In this section, I examine the origins of the Import-Export Clause, the debates of the delegates

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137. *See* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 678-79 (1987). Powell wrote:

> Rule 9: *At best, history yields probabilities, not certainties.*
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> . . . .
>
> . . . The heart of William Crosskey's famous and controversial study was [a lexicographical inquiry] and a sound understanding of eighteenth- or nineteenth-century word usage clearly is essential to understanding texts from these periods. But this approach has its limits, and it certainly produces probabilities rather than certainties. Professor Crosskey . . . at times fell into the trap of assuming that once he had reconstructed a standard contemporaneous definition for a constitutional term, he then could treat the term, inside or outside the text, as a mere placeholder for the reconstructed definition. . . . [I]t wrongly construes definition as fixing rather than reflecting word usage, and . . . ignores the incredible linguistic creativity of the founders. . . . *Constitutional lexicography cannot produce infallible conclusions.*

Id. at 679 (footnotes omitted) (emphasis added).

138. And Justice Thomas's approach would indeed alter the dormant Commerce Clause radically. I demonstrate how radically in the next section. *See infra* Part IV.A.

139. *See supra* notes 33-39; *infra* notes 167-72 and accompanying text.

at the Philadelphia Convention, some mention of the Clause in the press during the ratification debates, and the remarks of contemporaneous commentators in an attempt to ascertain whether this historical evidence undermines some of Justice Miller's conclusions in *Woodruff v. Parham* and supports the Crosskey-Thomas reading of the Import-Export Clause. First, however, I address some of the other arguments against applying the Clause to interstate commerce that Justice Miller derived from the text and structure of the Constitution.

A. Justice Miller's Textual Argument

Justice Miller argued that the "imposts" Congress was empowered to lay in Article I, Section 8 of the Constitution[140] are "limited to duties on foreign imports."[141] If the Import-Export Clause was "intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another," Miller surmised, "the power conferred is curiously rendered nugatory by [the Export Clause of Article I, Section 9] which declares that no tax shall be laid on articles from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former."[142] However, if we restrict the reading of the provisions to foreign commerce, Miller argued, "we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitation concerning imposts."[143]

But the tension between the two provisions that Miller regards as significant support for his reading of the Import-Export Clause is largely of his own making. First, Miller ignores the fact that the grant of power to lay and collect taxes in Article I, Section 8, and the restriction on that power set forth in Article I, Section 9 are concerned solely with *Congress*, while the Import-Export Clause (as well as the other restrictions in Article I, Section 10) is aimed at the *states*. It is reasonable that the terms import and export, when discussed in terms of Congress's power,

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140. *See* U.S. CONST. art. I, § 8, cl. 1.

141. *Woodruff*, 75 U.S. (8 Wall.) at 132.

142. *Id; see* U.S. CONST. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

143. 75 U.S. (8 Wall.) at 132.

refer to goods moving in and out of the country as a whole; while the same terms in the Import-Export Clause refer to goods moving in and out of the states destined for either foreign countries *or* for other states.[144]

Moreover, the Supreme Court's own interpretation of another restriction on state power offers an additional rejoinder to Justice Miller's argument. Article I, section 10, clause 3 proscribes States from imposing "Dut[ies] of Tonnage"—taxes based on the cargo capacity of a ship—without the consent of Congress.[145] Under Miller's reading, this clause should forbid duties only on ships traveling in *foreign* commerce, if it is true, as he claims, that "duty" was used only in connection with foreign commerce. Yet the prohibition has never been read that narrowly by the Supreme Court.

In the seminal *State Tonnage Tax Cases*,[146] decided only two years after *Woodruff*, the Court struck down an Alabama tax of one dollar per ton levied on "steam boats, vessels, and other water crafts plying in the navigable waters of the States" as a violation of the Tonnage Clause,[147] even though the steamboat owners protesting the tax were merely engaged in intrastate commerce. In its opinion, the Court noted the common origins of the Commerce, Import-Export, and Tonnage Clauses:

> Prior to the adoption of the Constitution, the States attempted to regulate commerce, and they also levied duties on imports and exports and duties of tonnage, and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment

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144. This resolution has occurred to at least one other critic of the *Woodruff* decision. *See* E. Parmalee Price, *Congress and the Regulation of Corporations*, 19 HARV. L. REV. 168, 192 (1906):

> When a governmental power over imports and exports is discussed, the words naturally refer to the territorial boundaries of the government whose powers are considered . . . . To prohibit a state in general terms to tax imports or exports would therefore, in the natural meaning of the words, refer to the territorial boundaries of the power thus limited and would forbid taxing articles across state lines. A similar restriction upon the power of the [national] government would forbid taxing articles across national lines.

Id.

145. *See* U.S. CONST. art. I, § 10, cl. 3.

146. 79 U.S. (12 Wall.) 204 (1871).

147. *Id.* at 209-10.

> of the Confederation and to the more perfect Union under the present Constitution.[148]

Lest one miss the point, the Court emphasized that the Tonnage and Import-Export Clauses were both aimed at a common evil:

> Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by states as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from state taxation.[149]

Curiously, the Court made no mention of its *Woodruff* decision, nor did it acknowledge that under that decision, the Court had restricted the Import-Export Clause's prohibition to imposts and excises on foreign imports and exports only. In fact, the defenders of the state tax readily admitted that the Tonnage Clause applied to "ships or vessels . . . employed in foreign commerce *or in commerce 'among the States.'* "[150] They merely sought a ruling that the prohibition did not apply to purely *intra*state commerce. But the Court turned this argument aside on textual grounds: "Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain."[151]

As a textual matter, the Court's argument in the *State Tonnage Tax Cases* is appealing. Why should it presume to read into the Tonnage Clause exceptions that are nowhere present in the text? This point was forcefully pressed by Justice Nelson, the author of the dissenting opinion in *Woodruff*. If the Framers had intended to limit the Import-Export Clause to "foreign" imports and exports, Nelson argued, why did they not so indicate? As written, "there is nothing in its terms, or connection, that affords the slightest indication that [the Clause] was intended to be

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148. *Id.* at 214.

149. *Id.* at 215.

150. *Id.* at 225 (emphasis added). A later Court would declare that the Tonnage Clause applied "[m]uch more . . . when the vessels are owned by citizens of another State, and are engaged in commerce between the States." Peete v. Morgan, 86 U.S. (19 Wall.) 581, 584 (1873).

151. 79 U.S. (12 Wall.) at 226.

confined to the prohibition of a tax upon foreign imports."[152] Anticipating the Court's later interpretation, Nelson asked whether readers are to read silently "foreign trade," when reading the Tonnage Clause.[153] "If so," he wrote, "then it will be competent hereafter for the States to levy a tax upon the tonnage of vessels employed in carrying on commerce among the States, including the tonnage employed in the coasting trade."[154] Further, knowing that at the time of the Framing the states regarded themselves as sovereign, he asks,

> is it reasonable or consistent with proper rules of construction to suppose, in the absence of any indication from the words of this clause prohibiting the tax on imports or exports, the members used the terms with exclusive reference to foreign countries—that is, countries foreign to the States—and not in reference to the States themselves?[155]

And if a distinction was to be made, "why was not the clause so framed as to indicate it on its face, and not left to mere conjecture and speculation?"[156] Justice Miller's textual argument answered none of Justice Nelson's questions.

Further, Justice Miller's textual analysis, which he argued reduced tension between the Import-Export Clause and other parts of the Constitution, actually created tension in other places. Specifically, Miller's reading rendered "curiously nugatory," the power of Congress to consent to state imposts and duties on imports and exports contained in the Clause itself. The Import-Export Clause permits states to lay such imposts and duties with the consent of Congress, but Article I, section 9, clause 5, the Export Tax Clause, prohibits Congress from taxing exports. If the "exports" referred to in both clauses are only foreign exports, then half of Congress's consent power granted in the Import-Export Clause is rendered null and void by the Export Tax Clause in section 9.

Of course, one might argue that Congress consenting to a state tax on exports is not the same as Congress laying the tax itself, but such a reading would itself leave a sizeable loophole in

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152. *Woodruff*, 75 U.S. (8 Wall.) at 142 (Nelson, J., dissenting).
153. *See id.*
154. *Id.*
155. *Id.* at 143.
156. *Id.*

the Export Tax Clause. On the other hand, if—as Justice Thomas suggests in his *Camps Newfound/Owatonna* dissent[157]—the scope of the terms "import" and "export" must be determined with reference to the jurisdiction from which or into which the goods move, then Congress might be empowered to consent to state taxes of goods moving into other states, while being forbidden to allow the states to tax exports bound for foreign countries.[158]

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157. *See Camps Newfound/Owatonna*, 117 S. Ct. at 1622 (Thomas, J., dissenting); *see also* Price, *supra* note 144, at 192.

158. Curiously, Miller argues that the congressional consent mechanism of the Import-Export Clause *supports* his interpretation. If the purpose of the Clause was to eliminate state commercial warfare, to ease the burden on states lacking large port cities, and to prevent oppression of exporting states by others in Congress, Miller reasoned it was "altogether improbable" that the Import-Export Clause (with its provision that Congress could approve the imposition of imposts and excises) would have been addressed to domestic commerce. *See Woodruff*, 75 U.S. (8 Wall.) at 133. After all, he argued, Congress could hardly be impartial in the matter, since the net of all such duties go into the United States Treasury. *See* U.S. CONST. art. I, § 10, cl. 2 (requiring that "the net Produce of all Duties and Imposts laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States" and subjecting "all such Laws . . . to the Revision and Controul [*sic*] the Congress"). If the Clause applied to state-to-state imports and exports, Miller argued, that meant the Clause "was intended to permit such a tax to be imposed . . . on the products of neighboring States for the use of the federal government" thus placing "Congress, under this temptation," and in the position of arbitrating "between the State which proposed to levy the tax and those which opposed it." *Woodruff*, 75 U.S. (8 Wall.) at 133. Miller terms this "improbable." *Id.*

Why "improbable?" Again, Miller raises an objection and leaves the reader to wonder. Presumably, Miller meant that if the intent of the Import-Export Clause was to prevent predation of one state's commerce by another, it would seem unlikely that the states would have agreed to allow Congress to authorize such raids—especially when Congress itself would benefit. In fact, allowing Congress to act as a mediator between the states is entirely consistent with the intent of the Clause: to reduce commercial strife among the states. The consent provision furnishes a procedure by which states may petition Congress for a waiver of Article I, § 10's prohibition, presumably upon a showing of good cause, and provides for continued supervision of the law as security against abuse or oppression of a neighbor's commerce. That the case of the states for and against congressional consent would be heard by the representatives of other states whose interests were not directly affected, was probably seen as further protection of individual states' interests.

The provision requiring the states to pay the "net produce" of imposts and duties to Congress is further security, ensuring that states collect only enough revenue to cover whatever particular expenses it told Congress it was attempting to meet in the first place. Moreover, in those situations in which congressional consent is *not* needed—levies "absolutely necessary for executing [state] inspection laws"—the "net produce" provision is essential to prevent the pretextual levying of "inspection duties" that are in reality forbidden imposts and duties, or the imposition of clearly excessive imposts and duties whose revenue is far in excess of the costs of

Miller's textual arguments are shot through with serious flaws. Thomas Reed Powell, the eminent Harvard constitutionalist and Commerce Clause expert offered this characteristically astringent observation of Justice Miller's opinion: "In other words, he put in his thumb, pulled out a plumb and said 'What a good boy am I.' "[159] The gaps in his textual and structural arguments alone would be enough to suggest the decision is ripe for reconsideration. The Thomas critique, and my own review of history cinches the case against *Woodruff*.

B. Defining "Imposts" and "Duties"[160]

The Import-Export Clause restrains states from imposing "imposts" or "duties" on imports or exports, without the consent of Congress, except those "absolutely necessary" for the states to enforce their inspection laws.[161] One initial question is what types of exactions the Clause prohibits, since the terms imposts and duties are not self-defining. While the terms encompass

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administering inspections.

The discussion of the inspection provision of the Import-Export Clause at the Philadelphia Convention indicated that the delegates understood the potential for abuse by states seeking to tax the commerce of their neighbors under the pretext of carrying out inspections. *See infra* notes 238-47 and accompanying text. In addition to making such laws subject to Congress's control, Madison suggested at the Convention that aggrieved states could seek redress from the Supreme Court, if such laws were abused. *See infra* note 244 and accompanying text. As for his assertion that Congress's ability to waive the restriction in the Import-Export Clause is a clear conflict of interest, because of the potential for its receipt of revenue generated by the impost or duty, Justice Miller never explains why Congress would go to such lengths when it has the ability to tax items directly under its Article I, section 8 taxing power.

159. POWELL, *supra* note 40, at 183.

160. Interestingly, Miller doesn't mention "duties," only "imposts." *See generally Woodruff*, 75 U.S. (8 Wall.) at 123. The reason, as it will become clear in this section, is that a "duty" was certainly not used with exclusive reference to foreign commerce. Why would Miller omit this when the Import-Export Clause forbids the laying of both "duties" and "imposts"? Even if Miller is correct that "imposts" were used more often than not in connection with foreign commerce (which I doubt), the inclusion of the term "duty," which was used in connection with interstate *and* foreign commerce suggests that the prohibition covered levies states might try to impose on a wide range of commercial activities. It suggests that by including duties within its prohibition that the Import-Export Clause does not apply exclusively to foreign commerce.

161. *See infra* notes 245-51 and accompanying text. Apparently any revenue generated by such duties and imposts above that necessary to cover state expenses is to be held for the benefit of the United States.

types of taxes, they are presumably not synonymous with "taxes" as used in a broader sense elsewhere in the Constitution.[162]

According to the late Professor Crosskey's massive lexicographical study of the Constitution's intended meaning, "imposts" and "duties" "necessarily covered *all state taxes* on 'Imports' and 'Exports,' save property taxes only."[163] While Crosskey allowed that under this reading the prohibition was "sweeping," it was, he added, "eminently sensible" to curb "the infinitely varying duty systems erected by our states; and from the constant striving of the states to favor, openly or subtly, their own respective local products; to erect systems of protection; and to reach out and attempt to draw in revenue from the people of other state."[164]

For our purposes the precise distinctions between a "tax" and an "impost" or "duty" are not as important as determining whether the latter terms were used exclusively with reference to foreign commerce. For in addition to his textual arguments, Justice Miller boldly asserted in *Woodruff* that, at the time of the Framing, "the words imports and imposts were used with exclusive reference to articles imported from foreign countries."[165] In this section and the one that follows, I examine some of the evidence Miller gathered in support of his sweeping statement, and compare it with other evidence from contemporary sources. Like Justice Thomas, I conclude that "the *Woodruff* Court was selective in its use of history, to say the least."[166]

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162. *See* U.S. CONST. art. I, § 9, cl. 5 (prohibiting Congress from imposing a "Tax or Duty on Articles exported from any State"); U.S. CONST. art. I, § 9, cl. 4 (prohibiting the imposition of direct taxes unless apportioned); U.S. CONST. art. I, § 9, cl. 1 (limiting "Tax[es] or Dut[ies]" imposed on the importation of slaves to ten dollars per person); U.S. CONST. art. I, § 8, cl. 1 (empowering Congress to "lay and collect Taxes, Duties, Imposts, and Excises").

163. 1 CROSSKEY, *supra* note 103, at 296.

164. *Id.* at 296-97. While the Supreme Court in a landmark 1976 decision found Professor Crosskey's exegesis persuasive, the Court ultimately surrendered to the terms' ambiguity and abandoned historical precision in favor of a three-part test for state taxes that the Court derived from what it saw as the purposes of the Import-Export Clause. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). Note that the measure challenged in *Michelin Tire Corp.* concerned only *foreign* commerce. The Court did not revisit the debate, reopened by Justice Thomas, about whether the Import-Export Clause was originally intended to apply to both foreign and interstate commerce.

165. *Woodruff*, 75 U.S. (8 Wall.) at 133.

166. *Camps Newfound/Owatonna*, 117 S. Ct. at 1623 (Thomas, J., dissenting).

1. The Articles of Confederation and the Northwest Ordinance of 1787

In support of its "original intent" argument that the Framers understood the Import-Export Clause to apply only to foreign commerce, the *Woodruff* Court cited provisions from the Articles of Confederation related to trade and concluded that "the words 'imports, exports, and imposts are used with exclusive reference to foreign trade, because [those articles] have regard only to the treaty-making power of the federation.'"[167]

In support of his statement, Justice Miller cited Articles VI and IX of the Articles of Confederation. Article VI stated: "No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain."[168] Article IX stated, in relevant part, that:

> The United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever . . . .[169]

Read together, the provisions seem to effect a compromise between the Congress and the states of the Confederation: the states agreed to abstain from passing legislation affecting treaties already negotiated with France or Spain (important allies in the fight against the British), while Congress agreed to abstain from depriving states of control over certain aspects of foreign commerce, like the right to tax foreigners or to lay embargoes.[170] Foreign commerce appears to be a focus of these

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167. *Id.* at 1623 (quoting *Woodruff*, 75 U.S. (8 Wall.) at 134). Justice Thomas calls this conclusion "doubtful." *Id.*

168. U.S. ART. OF CONFED. of 1777, art. VI.

169. *Id.*, art. IX.

170. Justice Thomas misquotes Article VI, ending the sentence after "in Congress assembled," and not including ellipses indicating an omission. *See Camps/Newfound Owatonna*, 117 S. Ct. at 1623 n.13 (Thomas, J., dissenting).

provisions, but Articles VI and IX *do not* suggest a predisposition to use the terms "impost," "duty," "import," and "export" with exclusive reference to foreign commerce, as claimed by the *Woodruff* Court. Article IX's restriction on imposing those imposts and duties on foreigners other than those to which the state's own citizens are subject implies that "imposts" and "duties" are applied to domestic citizens other than in a foreign commerce context. The specificity of the provisions, therefore, seems to cut against Justice Miller's argument: if the terms used therein applied *only* to foreign commerce, why did the authors of the provisions make it clear that foreign commerce was the focus of the two articles?

Article IV of the Article of Confederation, which was *not* cited by the *Woodruff* majority, stated that:

> [T]he people of each State shall have free ingress and regress to and from any other State, and shall enjoy all the privileges of trade and commerce, *subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant.*[171]

The guarantee of free trade and commerce here clearly covers commerce among the states, as do the references to "duties" and "impositions," the latter term a cognate of "impost."

Equally instructive is the Northwest Ordinance of 1787, also not cited by the *Woodruff* Court, or by Thomas in *Camps*, which contained the following provision, providing further evidence that "impost" and "duty" were not exclusively used with reference to foreign commerce:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, *without any tax, impost, or duty therefor.*[172]

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171. U.S. ART. OF CONFED. of 1777, art. IV (emphasis added). The provision was the forerunner of the Privileges and Immunities Clause of Article IV, section 2 of the Constitution.

172. Northwest Ordinance of 1787 (July 13, 1787), art. IV, *reprinted in* THE UNITED STATES CONSTITUTION ANNOTATED (1924) (emphasis added).

2. The Debate over the Constitution

a. Philadelphia Convention

There is evidence that the terms used both in the Import-Export Clause and elsewhere in the Constitution were less than self-evident, even to the Framers. To take one example that is relevant to our inquiry here, when the delegates began debating the printed drafts of the Constitution they received in August, Luther Martin of Maryland immediately sought clarification of the Committee's use of the terms "duties" and "imposts" used both in the state restriction and in the clause granting Congress the power to lay and collect taxes.[173] "If the meaning were the same," he stated, "the former was unnecessary; if different, the matter ought to be made clear."[174] James Wilson answered somewhat obliquely that "*duties* are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties &c."[175] In other words, all imposts are duties, but all duties are not imposts. Wilson did *not* suggest any exclusive connection between either term and foreign commerce, nor did any of the other delegates. Moreover, his comment that imposts relate to commerce, and duties relate to "many objects," supports the point made above that the Import-Export Clause, by including both types of levies within its prohibition, seems addressed to more than just foreign commerce.

At another point in Philadelphia, during a debate whether to prohibit the states from taxing exports as well as imports in what became Article I, section 10, clause 3,[176] George Mason of Virginia noted how states could use taxes on imports to protect "certain manufactures for which they enjoyed natural advantages."[177] James Madison argued in opposition that such encouragement would "require[] duties not only on imports directly from foreign Countries, but from the other States in the Union, which would

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173. *See* 2 RECORDS, *supra* note 120, at 305.

174. *Id.*

175. *Id.*

176. *See id.* at 361 ("Mr. Langdon suggested a prohibition on the States from taxing the produce of other States exported from their harbours.").

177. *Id.* at 441.

revive all the mischiefs experienced from the want of a Gen[era]l Government over commerce."[178] Madison's comment is interesting for three reasons. First, it suggests that the term "imports" included goods coming into one state from another, in addition to goods coming in from a foreign country. Second, Madison used the term "duties," not "imposts" to describe a levy on *both* foreign and domestic commerce. Finally, his comment suggests a connection between the Commerce Clause's grant of power to Congress over interstate and foreign commerce and the Import-Export Clause's corresponding limits on the states with regard to commerce. Again, no one hinted that the commerce to which Madison referred is exclusively foreign commerce.

The delegates continued to tinker with the Import-Export Clause, and on August 28, Roger Sherman moved to require that revenue derived from any imposts or duties laid by the states on imports or exports would inure to the benefit of the United States, not the individual states.[179] Gouverneur Morris spoke in support of Sherman's motion, thinking "the regulation necessary to prevent the Atlantic States from endeavoring to tax the Western States."[180] Again, one of the concerns was that states not be able to enrich themselves through levies of imposts and duties on the commerce of their neighbors.

b. State Ratification Debates

As the several states began to debate the Constitution's ratification, the power of the Federal government to regulate commerce and impose taxes came under attack from Antifederalists. These Antifederalist writings, too, seem to refute Justice Miller's thesis about the nature of the "impost" and the "duty." "Agrippa," a Massachusetts Antifederalist writing in 1787, complained that the "new constitution not only prohibits vessels, bound from one state to another, from paying any duties, but even from entering and clearing [i.e. entering a port and paying taxes]. The only use of such a regulation is to keep each state in complete ignorance of its own resources."[181]

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178. *Id.*

179. *See id.* at 442.

180. *Id.*

181. 1 THE DEBATE ON THE CONSTITUTION 517, 518 (Bernard Bailyn ed., 1993) [hereinafter DEBATE] (quoting *Letters of Agrippa* (pt. 6), MASS. GAZETTE (Boston),

In a later essay, Agrippa presented at some length his arguments against the power of Congress to lay imposts and duties, as well as the power to regulate commerce. Agrippa complained that the taxing power, taken together with the commerce power were "very nearly the same powers claimed formerly by the British parliament."[182] While allowing that the country should speak with one voice with regard to *foreign* trade, Agrippa argued that "if [states] surrender the unlimitted [*sic*] right to regulate trade and levy taxes, imposts will oppress our foreign trade for the benefit of other states," while excises and taxes necessitated by the inability to levy taxes on commerce "will discourage our internal industry."[183]

Agrippa predicted that by surrendering

> the rights of taxation and commercial regulation . . . the landed states at the southward [through their representatives in Congress] will all be interested in draining our resources; for whatever can be got by impost on our trade and excises on our manufactures, will be considered as so much saved to a state inhabited by planters. . . . [W]e ought never to surrender the unlimitted [*sic*] powers of revenue and trade to uncommercial people.[184]

In other words, Agrippa feared a cabal of southern states in Congress would attempt to enrich themselves by levying "imposts" on Massachusetts' trade and excise taxes on their goods. Again, Agrippa's use of the term "impost" in a domestic sense—as something that Congress would lay on their trade—is telling.[185]

In yet another letter written in January of 1788,[186] Agrippa proposed restricting Congress's power to regulate commerce, to the regulation of *foreign commerce*, including a limitation that "[a]ll *imposts levied by Congress on trade* shall be confined to *foreign produce or foreign manufactures imported*, and to foreign

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Dec. 14, 1787).

182. 1 DEBATE, *supra* note 181, at 763, 767 (quoting *Letters of Agrippa* (pt. 12), MASS. GAZETTE (Boston), Jan. 15, 1788).

183. *Id.* at 768.

184. *Id.*

185. Of course the Export Tax Clause prevents Congress from taxing "[a]rticles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

186. *See* 4 THE COMPLETE ANTI-FEDERALIST 87 (Herbert J. Storing ed., 1981) (quoting *Letters of Agrippa* (pt. 10), MASS. GAZETTE (Boston), Jan. 1, 1788).

ships trading in our harbours, and all their absolute prohibitions shall be confined to the same articles."[187] Once again, the word impost is not used as if it is a species of tax levied *solely* on foreign commerce. Agrippa's qualification on the power to levy "imposts" on "trade" is unnecessary and redundant if "impost" or "import" were used only in connection with foreign commerce.

The "garrulous, sour, and pigheaded"[188] Luther Martin, present at the Philadelphia Convention, but who refused to sign the Constitution and thereafter fought against its ratification, complained in his *Genuine Information* that the Import-Export Clause's prohibitions unnecessarily hampered the states in their ability to raise revenue. "It was urged," he wrote,

> as almost all sources of taxation were given to Congress it would be but reasonable to leave the State the power of bringing revenue into their treasuries, by laying a duty on exports if they should think proper, which might be so *light* as not to injure or discourage industry, [yet still produce revenue].[189]

Martin also maintained that it may be beneficial to lay duties "to prohibit the exportation of raw materials" or "to discourage the importation of particular articles into a State."[190] Again, there is no suggestion that he was concerned solely with foreign commerce. In other essays, when Antifederalists railed against the broad powers given to Congress to tax and the restrictions on states' powers, writers made specific mention of "exports" to other States,[191] and of "imposts" and "duties" imposed on goods moving from state to state or consumed within states.[192]

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187. *Id.* at 89-90 (emphasis added).

188. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 250 (1966).

189. 1 DEBATE, *supra* note 181, at 631, 650 (quoting Luther Martin, *The Genuine Information* (pt. 8), MD. GAZETTE (Baltimore), Jan. 22, 1788).

190. *Id.*

191. *See* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 128, 138-39 (quoting *Address by a Plebian*, 1788) (describing current impost laid by New York on goods imported into New York and how it "has been a subject of complaint" by New Jersey and Connecticut; describing how that under the impost law "a draw-back of duties is allowed by law, *upon all goods exported to either of the beforementioned states* [i.e., New Jersey and Connecticut]" (emphasis added)).

192. *See, e.g.*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 393, 395-96 (quoting *Essays of Brutus* (pt. 6), N.Y. J., Dec. 27, 1787 (arguing that if Congress is allowed the general power to tax, it will use that power to raise revenue by imposing duties and excises on "every necessary and convenience of life" or "if not

Supporters of ratification took up the gauntlet thrown down by the Antifederalists, and defended the restraints on the states' power to prey upon out-of-state commerce. Given the opposition by many Antifederalists to the Constitution's substantial circumscription of the states' power over the regulation of commerce and their ability to raise revenue, proponents of the Constitution could have been expected to correct the Antifederalists' overly broad reading of the prohibition, if a narrower reading was intended. Interestingly, and ultimately detrimental to Justice Miller's case in *Woodruff*, they did not.

An anonymous proponent of ratification in Rhode Island, writing as "Phocion," described the freedom that would come to Rhode Island merchants under the new Union, and lamented life under the old Confederation, when "the trade of Rhode-Island government might be confined within her own limits by the restrictions, *duties* and embargoes *of the neighbouring States*."[193]

In the Connecticut ratifying convention, Oliver Ellsworth argued against states having the power to lay duties and imposts because "[i]t will give some states an opportunity of oppressing others and destroy all harmony between them."[194] In the Virginia ratifying convention, James Madison argued at length in favor of Congress's having the general power over interstate commerce:

> All agree that the General Government ought to have the power for the regulation of commerce. . . . We are now obliged to defend against . . . the interfering regulations in different States, with little success. There are regulations in different States which are unfavourable to the inhabitants of other States, and which militate against the revenue. *New-York levies money from New-Jersey by her imposts.* In New-Jersey,

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these, such as from custom and habit are esteemed so," such as locally-produced cider or ale; "This power, exercised without limitation, will introduce itself into every corner of the city, and country."); 4 THE COMPLETE ANTI-FEDERALIST, at 63, 65 (quoting William Symmes, Speech in Massachusetts Convention, Jan. 22, 1788 ("Congress may lay *an impost on the produce and manufactures of the country, which are consumed at home.*") (emphasis added)).

193. 2 DEBATE, *supra* note 177, at 526, 528 (quoting *Phocion*, U.S. CHRON. (Providence, R.I.), July 17, 1788 (emphasis added)).

194. III THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 548, 550-51 (John P. Kaminski & Gaspare J. Saladino eds., 1997) [hereinafter DOCUMENTARY HISTORY] (quoting Oliver Ellsworth, *Remarks at the Connecticut Ratifying Convention*, Jan. 7, 1788).

> instead of co-operating with New-York, the Legislature favors violations on her regulations.[195]

Later, Madison defended the Import-Export Clause in an exchange with George Mason,[196] in which Madison termed it "more consistent with justice and equity than any other practicable mode; for, if the states had the exclusive imposition of duties on exports, they might raise a heavy contribution of the other states, for their own exclusive emoluments."[197]

c. *Miscellaneous Writings from the Era*

Other letters from the era are also instructive as to the varied use of the words "impost" and "duties." In written instructions to its representative prior to the ratification of the Constitution, the town of Chesterfield, Massachusetts, complaining of the oppressive imposts levied by New York, requested "as a means of redress of these unequal, and injurious circumstances" that the representative "insist on additional duties, and imposts, on all importations, (of foreign articles) from such delinquent states, into this state."[198] Or consider a letter from a Kentucky judge to a Virginia friend written in December of 1787 in which the judge wrote, "If I recolect [*sic*] it is not in the Power of any State to lay a Duty or Impost on goods &c brought into it from any other of these States. [T]hat may be hard on this District [Kentucky] in a future day . . . ."[199] By contrast, when writers intended these terms to refer exclusively to *foreign* commerce, they usually made that clear in either text or context.[200]

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195. IX DOCUMENTARY HISTORY, *supra* note 194, at 1142, 1153 (quoting James Madison, *Remarks During Debates at the Virginia Ratifying Convention*, June 11, 1788 (emphasis added)).

196. *See* X DOCUMENTARY HISTORY, *supra* note 194, at 1363. Mason had stated that under Congress's power to revise and control the imposts laid by States to carry out their inspection, would mean that "men in the states where no tobacco is made would [judge] . . . this business," *id.*, and pronounced it "one of the most wanton powers of the general government." *Id.*

197. X DOCUMENTARY HISTORY, *supra* note 194, at 1364.

198. IV DOCUMENTARY HISTORY, *supra* note 194, at 59, 60 (quoting *Chesterfield [Mass.] Town Meeting: Instructions to Representative*, Oct. 9, 1787).

199. VIII DOCUMENTARY HISTORY, *supra* note 194, at 254, 255 (quoting *Letter from Samuel McDowell to William Fleming*, Dec. 20, 1787).

200. *See, e.g.*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 400, 404

C. *Of "Imports" and "Exports"*

Nothing on the face of the Import-Export Clause restricts those terms to "foreign" imports and exports, unless, as Justice Miller did in *Woodruff*, one assumes the terms "foreign import" and "foreign export" to be redundant.[201] As a result of *Woodruff*, the early use of the Import-Export Clause to invalidate state measures that today would be invalidated under the dormant Commerce Clause doctrine was halted.[202]

(quoting *Essays of Brutus* (pt. 7), N.Y. J., Jan. 3, 1788 ("There is one source of revenue, which it is agreed, the general government ought to have the sole controul [sic] of. *This is an impost upon all goods imported from foreign countries.*" (emphasis added))); 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 39, 41 (quoting *Essays of an Old Whig* (pt. 6), INDEP. GAZETTEER (Philadelphia) ("Without the power of imposing duties on *foreign commerce* and regulating trade, the United States will be weak and contemptible . . . ." (emphasis added))); 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 154, 156 (quoting *Letters of Centinel* (pt. 3), INDEP. GAZETTEER (Philadelphia), Nov. 5, 1787 (discussing "commerce" in general on the one hand, and "the excessive importation of *foreign* merchandise and luxuries" on the other) (emphasis added)); 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 171, 172 (quoting *Letters of Centinel* (pt. 6), INDEP. GAZETTEER (Philadelphia), Dec. 22, 1787 (decrying "the excessive importations of *foreign merchandise* and luxuries, which have drained the country of its specie and involved it in debt" (emphasis added))). *See also* III DOCUMENTARY HISTORY, *supra* note 194, at 512-13 (quoting *Connecticutensis: To the People of Connecticut* (urging that money be raised by laying "duties . . . upon those *foreign* articles which are imported and sold among us" (emphasis added))); 3 THE COMPLETE ANTI-FEDERALIST *supra* note 186, at 146-47 (quoting *A Jerseyman: To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787 (noting that "the proper regulation of *our commerce* would be insured; the imposts on all foreign merchandise imported into America would still effectualy aid our Continental treasury")); III DOCUMENTARY HISTORY, *supra* note 186, at 373, 374 (quoting *Letter from Massachusetts*, CONN. J., Oct. 17, 1787 ("I have no desire we should import either foreign LUXURIES or foreign VICES.")). *But see*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 388, 392 (quoting *Essays of Brutus* (pt. 5), N.Y. J., Dec. 13, 1787 (defining "external taxes" to include "impost duties on all imported goods" but not specifically mentioning *foreign* goods)); 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 234, 239 (quoting *Letters from the Federal Farmer* (pt. 3), COUNTRY J. (Poughkeepsie, N.Y.), Oct. 10, 1787 (referring to "impost duties" laid on imports, but not specifying whether imports came from abroad or from other states)).

201. Professor Crosskey acknowledged that "[i]n our modern usage, 'imports' and 'exports' are appropriated exclusively to the designation of things brought into this country from abroad" but that those terms "did not bear [that meaning] exclusively, or even presumptively, when the Constitution of the United States was drawn." 1 CROSSKEY, *supra* note 103, at 297; *see also supra* notes 200-06 and accompanying text (quoting Crosskey's examples).

202. *See supra* note 33 and accompanying text.

Did the Framers understand the terms "Import" and "Export" to refer exclusively to foreign commerce, or could items be "imported" into and "exported" from the several states? Professor Crosskey's answer was an unequivocal "yes," and he cited for support one example after another of advertisements in local newspapers contemporaneous with the Framing that referred to goods shipped from other states as "Just Imported."[203] Crosskey claimed such advertisements "were of constant occurence."[204]

> In the North, these advertisements covered not only European and other foreign goods, but such items as "fine" or "Superfine Maryland Flour," similar grades of "Philadelphia Flour," "Carolina Rice," "Carolina Pork," and other "Imports" from the more southerly states of the Union. In the South, they included, besides "Philadelphia Flour," and "Maryland Flour," such things as "Connecticut Beef" and "Potatoes, Apples, Onions by the bunch and bushel, Beats, Carrots, and good Cheese, from Rhode Island."[205]

Crosskey then cited two advertisements, one from a northern and the other from a southern paper, both "typical in every way of a great host of others."[206] The first, from *The Newport* [Rhode Island] *Mercury*, in 1784 wrote of "Superfine and common Flour" and "*Burlington* [New Jersey] and *Carolina* Pork in Barrels" as having been "*Just Imported* in the Sloop Newport Packet from *Philadelphia*" and offered for sale.[207] The second, from a Charleston newspaper, in June 1787 advertised "Dr. Martin's Celebrated Medicine for Cancers, Ulcers, Wens, Scurvies, Tatters, Ringworms, etc." as "*Just Imported from Philadelphia.*"[208] Crosskey concluded that the advertisements indicate "sufficiently what 'imports' were covered when the word was applied to the American states."[209]

At the same time, some historians tell us, and Justice Miller implied in *Woodruff*, that the *primary* commercial problems

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203. *See* 1 CROSSKEY, *supra* note 103, at 297-301.
204. *Id.* at 298.
205. *Id.* at 297-98.
206. *Id.* at 298.
207. *Id.* (quoting THE NEWPORT MERCURY (R.I.), June 12, 1784) (emphasis added).
208. *Id.* (quoting THE COLUMBIAN HERALD (Charleston, S.C.), June 18, 1787).
209. *Id.*

plaguing the new country stemmed from the lack of centralized regulation of commerce with countries like England.[210] Whose is the correct interpretation? Although Crosskey's near-obsession with contemporary word usage is easy to ridicule, his evidence, along with Chief Justice Marshall's statement in *Brown v. Maryland*, is initially more compelling than Justice Miller's *ipse dixit*, which rests largely on conjecture and assumption. It is possible that the Framers in Philadelphia, whatever the popular understanding of the terms, had only foreign commerce in mind. Even if that is true, however, a plausible argument can be made that the intentions of those who voted for ratification in the state conventions, not the Framers in Philadelphia, should control.[211] I show in this section that popular understanding of "import" and "export" at the Framing placed no such limitations on the terms. In light of the evidence on the usage of the terms "impost" and "duty" presented above, Justice Miller's assumptions should be taken with a large grain of salt.

1. Articles of Confederation

Recall that the *Woodruff* Court relied heavily upon Articles VI and IX of the Articles of Confederation to support its historical argument.[212] According to Justice Miller, these articles, which dealt with the Confederation Congress's power to make treaties with foreign nations, provided conclusive evidence that the terms used therein (impost, export, import) were only used in connection with foreign commerce, and that the Framers had this in mind when drafting the Import-Export Clause.

It is true that Articles VI and IX concern treaties, and mention "foreigners," but instead of supporting Justice Miller's reading of the Import-Export Clause—the text of which does not explicitly limit the restriction to imposts and duties on foreign commerce—the specificity of the Articles of Confederation

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210. *Compare* MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789, at 400-07 (1950) (indicating commercial strife largely confined to commerce with foreign countries), *with* JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789, at 144-54 (1888) (indicating commercial strife among the several states brought county to brink of civil war).

211. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 17-18 (1996).

212. *See supra* notes 168-70 and accompanying text.

undermines it. As Justice Thomas observed in *Camps Newfound/Owatonna v. Harrison*, "[t]he absence of this very qualifier [i.e., that the provisions involved foreign commerce] in the later-enacted Import-Export Clause creates a negative inference that the unqualified constitutional language covered more than did the limited prohibition in the Articles of Confederation."[213] In addition, Article IV of the Articles provided that:

> [T]he people of each state shall have free ingress and regress to and from any other state, and shall enjoy all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereto respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the owner is an inhabitant.[214]

As used in Article IV, which seeks to promote freedom in interstate commerce, the "imports" can come from Plymouth, England or Plymouth, Massachusetts.

Justice Nelson's dissent in *Woodruff* provides another perspective on Justice Miller's analysis of the trade protections in the Articles of Confederation, and also provides a convenient segue into the next section's discussion of the Import-Export Clause's evolution at the Philadelphia Convention. Comparing the positive grant of "privileges of trade and commerce" in the Articles to the negative language of the Import-Export Clause's general prohibition (tempered by congressional discretion to waive the restriction), Nelson concluded that the altered phrasing would not have been necessary, but for the fact that widespread disregard of the Articles of Confederation often rendered its protections illusory.[215] By including the Import-Export Clause in the Constitution, the Framers "adopted a more complete and thorough security to the enjoyment of the privileges of this commerce."[216] The adoption of this "complete and

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213. 117 S. Ct. at 1623 n.13 (Thomas, J., dissenting). Thomas added, "In fact, the two provisions, read together, suggest the existence of a much broader class of 'imposts,' 'imports,' and 'exports,' and that only the *subclass* of imposts interfering with foreign trade might be prohibited." *Id.*

214. U.S. ART. OF CONFED. of 1777, art. IV (emphasis added).

215. *See Woodruff*, 75 U.S. (8 Wall.) at 145-46 (Nelson, J., dissenting).

216. *Id.* at 145.

thorough security" in Philadelphia is the subject of the next section.

2. The Philadelphia Convention

What did the delegates to the Philadelphia Convention have in mind as the scope of the Import-Export Clause when they included it in Article I, section 10? On August 6, 1787, a printed copy of the Constitution was submitted by the Committee of Detail to each member of the Convention. Included in its provisions was a prohibition on the states laying "imposts or duties on imports" without the consent of the Legislature.[217]

On August 21, as the delegates were still debating the provisions of the printed drafts they received on August 6, John Langdon of New Hampshire pointed out that Article VII, section 4, which proscribed the ability of the federal government to tax goods exported from the states, left open the possibility that the states themselves could tax exports.[218] He commented that "N[ew] H[ampshire] therefore with other non-exporting States, will be subject to be taxed by the States exporting its produce. This could not be admitted."[219] Oliver Ellsworth defended the arrangement as it stood, expressing the opinion that "[t]he power of regulating trade between the States [contained in the Commerce Clause] will protect them against each other."[220] In any event, state attempts to tax the exports of their neighbors would be self-defeating, Ellsworth argued, because it would force the exporting states to arrange other methods of export, and deprive the taxing states of business.[221]

Delegates seemed dubious of the argument that the Commerce Clause alone would be sufficient to prevent states from pursuing localist trade measures. Gouverneur Morris spoke in favor of what would be Langdon's proposal: parochial concerns

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217. 2 RECORDS, *supra* note 120, at 187.

218. *See* 2 *id.* at 359. What became the Import-Export Clause of Article I, section 10, at that time, prohibited only state levies on imports.

219. *Id.*

220. *Id.* at 359-60.

221. *See id.* at 360. On the other hand, Ellsworth felt that excellent reasons existed for prohibiting Congress from taxing exports: (1) duties would hinder industry; (2) the duties would fall unevenly upon different States that produced different articles for export; and (3) the imposition of such duties would "engender incurable jealousies." *See id.*

"ought not to impede the general interest. There is great weight in the argument, that the exporting States will tax the produce of their uncommercial neighbors."[222] First, he said, the power of regulating commerce would not be sufficient to prevent states from taxing one another.[223] Moreover, taxes would not force direct exportation from the noncommercial states because "[t]he advantages possessed by a large trading City, outweigh the disadvantage of a moderate duty; and will retain the trade in that channel."[224] Langdon then rose with a formal proposal prohibiting "the States from taxing the produce of other States exported from their harbours."[225] Madison, in a later reply to Oliver Ellsworth, expressed similar doubts that "regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports."[226]

But delegates were also skeptical of Langdon's plan. John Dickinson of Delaware thought a blanket prohibition on taxing all exports by both governments "dangerous." Better, he thought, "to except particular articles from the power."[227] James Madison then suggested that the central government should be free to impose taxes on exports, and the delegates became enmeshed in a debate over the *propriety* of the proposed ban on federal export taxes.[228] Langdon's proposal was put off.

A week later, on August 28, as the delegates began to take up the restrictions placed on the states themselves, Madison proposed to make the prohibition on the laying of imposts or duties on imports by states absolute, instead of allowing

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222. *Id.*
223. *See id.*
224. *Id.*
225. *Id.*
226. *Id.* at 361.
227. *Id.*
228. *See id.* "A proper regulation of exports," he said, "may and probably will be necessary hereafter, and for the same purposes as the regulation of—imports; viz, for revenue—domestic manufacturers—and procuring equitable regulations from other nations." *Id.* The delegates then began to debate the propriety of allowing the federal government to tax the exports of the states. *See id.* at 362-63. The argument cleaved along sectional lines: the southern states vehemently opposed; northern states (and national-minded southerners like Madison) much in favor of the power. In an effort to prevent the total prohibition of the power of Congress over exports, Madison proposed adding a supermajority requirement on the power to tax exports. *See id.* at 363. His proposal was defeated, and the total prohibition remained in place. *See id.* at 363-64.

Congress to consent to their actions, as it was written.[229] "He observed that as the States interested in this power by which they could tax the imports of their neighbors passing thro[ugh] their markets, were a majority, they could give the consent of the Legislature, to the injury of [noncommercial States like] N[ew] Jersey, N[orth] Carolina &c."[230] Roger Sherman disagreed, arguing that "the power might safely be left to the Legislature of the U[nited] States."[231] George Mason, though, noted how States could use taxes on imports to protect "certain manufactures for which they enjoyed natural advantages."[232]

Madison responded, with some apparent exasperation, that such encouragement would "require[] duties not only on imports directly from foreign Countries, but from the other States in the Union, which would revive all the mischiefs experienced from the want of a Gen[era]l Government over commerce."[233] Madison's comment not only suggests that "imports" included those goods coming into one state from another, in addition to goods coming in from a foreign country, but also that taxes on such imports had presented a problem they were trying to correct. It also again suggests that the Import-Export Clause was seen not only as a limitation on the states' power to raise revenue, but also on their power to regulate commerce through their taxing power. Madison's proposal to make the prohibition on state import duties absolute, however, was voted down.[234] Immediately thereafter, Rufus King of Massachusetts proposed, as Langdon had proposed a week earlier,[235] to amend the provision to proscribe states from laying imposts and duties on exports, as well as imports, without the consent of Congress.[236] No debate was recorded, and the amendment passed 6-5.[237]

Roger Sherman then moved for a further amendment that would ensure that net revenue derived from any imposts or duties laid by the states on imports or exports would inure to the

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229. *See id.* at 441.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *See id.* at 442.
235. *See generally supra* notes 178, 222-26 and accompanying text.
236. *See* 2 RECORDS, *supra* note 120, at 442.
237. *See id.*

benefit of the United States, not the individual states.[238] Madison approved "as preventing all State imposts," but "lamented the complexity [the delegates] were giving to the commercial system."[239] Gouverneur Morris also approved, thinking "the regulation necessary to prevent the Atlantic States from endeavoring to tax the Western States."[240] Though there was some grumbling among certain delegates, opposition was apparently not widespread, as the amendment carried 9-2.[241]

As the Delegates hurried to complete their work, a few other interesting changes were made. On September 12, George Mason moved that states be allowed to impose duties on exports "for the sole purpose of defraying the Charges of inspecting, packing, storing and indemnifying the losses, in keeping the commodities in the care of the public officers, before exportation."[242] Madison seconded Mason's motion, asserting that "[i]t would at least be harmless; and might have the good effect of restraining the States to bona fide duties for the purpose, as well as of authorizing explicitly such duties,"[243] which the Import-Export Clause may have, by implication, otherwise forbidden. On the other hand, Madison admitted, "perhaps the best guard against an abuse of power of the States on this subject was the right in the Gen[era]l Government to regulate trade between State & State."[244] Again, Madison's comment suggests that the "exports" being inspected would be shipped, not to a foreign country necessarily, but to a sister state, and again illustrates the connection between the Commerce Clause and the Import-Export Clause.

Opponents of the measure expressed the fear that states would levy duties on goods under the pretext of the proposed exception for inspection laws.[245] Nathaniel Gorham and John Langdon "thought there would be no security if the proviso sh[oul]d be agreed to, for the States exporting thro[ugh] other

238. *See id.*
239. *Id.*
240. *Id.*
241. *See id.* at 442-43.
242. *Id.* at 588.
243. *Id.*
244. *Id.* at 588-89.
245. *See id.* at 589 (statement of Jonathan Dayton) ("Mr. Dayton was afraid the proviso w[oul]d enable Pennsylva[nia] to tax N[ew] Jersey under the idea of inspection duties of which Pen[sylvani]a would Judge.").

States, ag[ain]st oppressions of the latter."[246] They asked "[h]ow was redress to be obtained in case duties should be laid beyond the purpose expressed?"[247] In a most prescient response in light of the eventual evolution of the dormant Commerce Clause doctrine, Madison replied that "[t]here will be the same security as in other cases—The jurisdiction of the Supreme Court must be the source of redress."[248] The problem of states passing laws to abuse their neighbors could have been avoided, Madison sniffed, had the Convention adopted his idea of allowing the National Government a general negative on all State laws, but "this had been overruled."[249]

To address Gorham and Langdon's concern, John Dickinson proposed that Congress be required to authorize such inspection duties.[250] The Convention then adjourned for the day without a vote taken on either Mason's proposal or on Dickinson's amendment; both were approved the following day by a 7-3 vote that took place without further debate.[251]

What should one make of the debates? First, discussions of regulation of commerce were inextricably linked with the taxing power,[252] but delegates were not willing, despite the arguments of some, to rely entirely on the power of Congress to regulate commerce among the states to cure the problems resulting from a lack of centralized power over commerce under the Articles of Confederation. Therefore they sought the additional security of an affirmative prohibition on the states that not only complements Congress's taxing power, but its power to regulate commerce as well. Despite the lack of any explicit statement one way or the other, implicit in the discussions of the delegates over this prohibition is the recognition that, if left to their own

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246. *Id.*
247. *Id.*
248. *Id.* at 589.
249. *Id.*
250. *See id.*
251. *See id.* at 607. A motion was made on September 15 to remove the congressional revision and control power from what became the Import-Export Clause, but the motion failed and the Convention agreed to the Clause, as rewritten by the Committee of Style. The Committee's rewrite added the requirement that the duties be "absolutely necessary" for the execution of state inspection laws, and it gave Congress the power to revise them after they are passed. *See id.* at 624.
252. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 63 n.63 (1997) (remarking on "the intimate relation between Congress's power to tax and to regulate commerce").

devices, states will tend to promote their interests to the detriment of their sister states.[253] The lack of serious debate over *whether* such a prohibition should be imposed at all seems an acknowledgment that such behavior was inconsistent with the spirit animating the Constitution. In addition, several delegates explicitly used the term *import* in reference to trade among the states.

In contrast, the debate over whether *Congress* should be prohibited from laying taxes or duties on exports seemed entirely concerned with foreign commerce, despite the lack of any explicit limitation in the text of the clause itself. Those, like Madison, who argued against such a prohibition, noted that export duties might be used both to benefit domestic manufacturers and to secure favorable treatment for American commerce from foreign countries.

Thus, historical usage seems to confirm my reading of the text in Part A: that the meaning of the words used in the Import-Export Clause and elsewhere turns in part on the party to whom the particular prohibition is addressed. The evidence from Philadelphia also further undermines Justice Miller's insistence that impost, import and export were used exclusively to refer to foreign commerce.

3. The Federalist

In *Federalist No. 44*, Madison included the Import-Export Clause in his discussion of those provisions of the Constitution that specifically restrict the powers of the states, writing:

> The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the

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253. In a letter written to a Professor Davis in 1832, James Madison wrote, "New York, Pennsylvania, Rhode Island, and Virginia, previous to the establishment of the present Constitution, had opportunities of taxing the consumption of their neighbours, and the exasperating effect on them formed a conspicuous chapter in the history of the period." Letter from James Madison to Professor Davis (1832), *reprinted in* 3 RECORDS, *supra* note 120, at 518, 519; *see also* James Madison, Preface to Debates in the Convention of 1787, *reprinted in* 3 RECORDS, *supra* note 120, at 538, 547-48 ("The . . . want of a general power over Commerce led to an exercise of this power separately, by the States, w[hi]ch not only proved abortive, but engendered rival, conflicting, and angry regulations. . . . *Some of the States, as Connecticut, taxed imports as from Mass[achuset]ts higher than imports even from G[reat] B[ritain]* . . . ." (emphasis added)).

> necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head, than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the convenience of their imports and exports, and to the United States a reasonable check against the abuse of this discretion.[254]

One wishes Madison had "remark[ed] further" on the Clause; however, there is no explicit or implicit mention of the Clause's being applicable to foreign commerce only—on the contrary, the concern seemed to be the potential for states to make mischief with "regulation[s] of trade." At several other points in *The Federalist*, reference was made both to the commercial difficulties that existed under the Articles of Confederation, and the need for central regulation of commerce, as well as explicit restrictions on the states' ability to tax commerce. The latter two were deemed necessary to squelch the former.[255]

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254. THE FEDERALIST NO. 44, *supra* note 88, at 249-50 (James Madison).

255. *See, e.g.*, THE FEDERALIST NO. 7, *supra* note 88, at 62-63 (Alexander Hamilton). Hamilton wrote:

> [C]ompetitions of commerce would be another fruitful source of contention. The States less favorably circumstanced, would be desirous of escaping from the disadvantages of their local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate Confederacy, would pursue a system of commercial polity, peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. *The habits of intercourse, on the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance.* . . . The spirit of enterprise, which characterizes the commercial part of America . . . *would [not] pay much respect to those regulations of trade, by which particular States may endeavor to secure exclusive benefits to their own citizens.*

Id. (emphasis added); THE FEDERALIST NO. 22, *supra* note 88, at 143, 144-45 (Alexander Hamilton).

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have in different instances, given just cause of umbrage and complaint to others; and it is to be feared, that examples of this nature, if not restrained by a national control, would be multiplied and extended, till they became not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the Confederacy. . . . [W]e may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

THE FEDERALIST NO. 42, *supra* note 88, at 264, 267-68 (James Madison).

> Were [the States] at liberty to regulate the trade between State and State, it must be foreseen, that ways would be found out to load the articles of import and export, during the passage through their

4. Debates in the Press

Antifederalists generally opposed the Constitution's latitudinarian grant of power to levy taxes and regulate commerce, and the concomitant restraints on the power of the states to act concurrently. Many writers did, however, concede that the federal government needed power to regulate foreign commerce, that they should have that power, and that states should be limited in their regulations of foreign commerce. Yet the fact that the writers perceived that such a distinction should be made between interstate and foreign commerce, and that no supporters of the Constitution replied that the Antifederalists were interpreting the powers too broadly, suggests that restrictions like the Import-Export Clause were not restricted to foreign commerce alone.

In January 1788,[256] the Massachusetts Antifederalist writing as "Agrippa,"[257] proposed that the United States's "power to regulate the intercou[r]se between these states and foreign dominions" be subject to restrictions, one of which was that "All imposts levied by Congress on trade shall be confined to *foreign produce or foreign manufactures imported, and to foreign ships trading in our harbours, and all their absolute prohibitions shall be confined to the same articles.*"[258] Agrippa obviously understood absolute prohibitions concerning the laying of imposts to encompass both interstate and foreign commerce, and wished them restricted to the latter.

In Virginia, George Mason printed his objections to the Constitution, which he, like Luther Martin, had refused to sign

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> jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances and both by that and a common knowledge of human affairs, that it would nourish increasing animosities, and not improbably terminate the serious interruptions of the public tranquility. . . . [T]he desire of the commercial States to collect in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than unfair; since it would stimulate the injured party by resentment as well as interest, to resort to less convenient channels for their foreign trade.

Id.

256. *See* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 186, at 87, 89-90 (quoting *Letters of Agrippa* (pt. 10), MASS. GAZETTE , Jan. 1, 1788).

257. *See supra* notes 181-87 and accompanying text.

258. *Supra* note 256, at 89-90 (emphasis added).

at the conclusion of the Philadelphia Convention. He complained that "[t]he State Legislatures are restrained from laying export duties on their own produce" by virtue of the Import-Export Clause.[259] James Iredell, writing as "Marcus," answered that "[t]he American States are so circumstanced, that some of the States necessarily export part of the produce of neighboring ones. Every duty laid upon such exported produce, operates in fact as a tax by the exporting State upon the non-exporting State."[260] Had exports been subject to taxation by the states, a "source of discord" would have been left open.[261] Even Congress, Iredell reminded his readers, is forbidden to lay taxes on exports, "because by that means those States which have a great deal of produce to export, would be taxed much more heavily than those which have little or none for exportation."[262]

"Phocion,"[263] writing in favor of ratification in a Rhode Island newspaper, celebrated the commercial powers granted the new government, commenting that they eliminate "all State impediments or barriers," and that "a free, unfettered trade to all the inland country will be opened to the sea-port towns of this State [Rhode Island],"[264] as opposed to commerce under the Articles where:

> [T]he trade of Rhode-Island government might be confined within her own limits by the restrictions, duties and embargoes of the neighboring States.—But by the proposed Constitution, the whole extended country is opened to her industrious and enterprizing [*sic*], and *she will experience all the advantages of her seaports and harbours which she could if the whole country was within her jurisdiction.*[265]

Writings from other commentators suggest that state impositions on commerce moving among the states were a problem, and that the Constitution took from the states that

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259. 1 DEBATE, *supra* note 181, at 345, 349 (quoting George Mason, *Objections to the Constitution*, VA. J., Nov. 22, 1787).

260. 1 DEBATE, *supra* note 181, at 363, 395 (quoting *Answers to Mason's "Objections"* (pt. 5), NORFOLK AND PORTSMITH J., Mar. 19, 1788).

261. *Id.*

262. *Id.*

263. *See supra* note 193 and accompanying text.

264. 2 DEBATE, *supra* note 181, at 526, 528 (quoting *Phocion*, U.S. CHRON., July 17, 1788).

265. *Id.* (emphasis added).

power. Prior to the Constitution's ratification, for example, a group of traders from Winchester, Virginia petitioned the Virginia House of Delegates asking for a repeal of all duties and imposts on goods imported from other states:

> [A]dmitting the Propriety of Duties on Forreign [*sic*] Goods Your Memorialists humbly insist, that Trade and mutual intercourse between the several States ought to be free. Restrictions are inconsistent with the spirit of the Union . . . . Your Petitioners therefore pray that all Laws imposing Duties on Goods or Merchandize [*sic*] from any of our Sister States may be repealed[.][266]

Similarly, a letter from a Virginia merchant, written in January 1788, indicates that states imposed these duties, even while sometimes exempting goods manufactured domestically. The merchant wrote, "[o]ur Assembly have lately increased the duties on several imported articles very considerably" and while "articles that are the produce and manufacturing of America are free, but such as are produced from foreign raw Materials are subject to duty which will much injure our Trade with New England."[267] Note that goods of American manufacture, but produced from *foreign* raw materials, were not exempt from state duties. Recall as well the letter from the Kentucky judge who interpreted the Constitution as prohibiting the laying of "a Duty or Impost on goods &c brought into it from any of these other States."[268]

5. The First Congress

For a time, Rhode Island and North Carolina existed with the "United States" as nominally independent states, neither having ratified the Constitution. During that time Rhode Island, for example, passed a revenue act that imposed "on goods imported into the state the same duties that Congress might

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266. VIII DOCUMENTARY HISTORY (Va. 17 Microfiche Supp. 1988), *supra* note 194, at 14 (quoting *Memorial of Winchester Merchants and Traders to the Virginia House of Delegates*, prior to Nov. 6, 1787).

267. DOCUMENTARY HISTORY, *supra* note 194, at 329 (quoting *Letter from William Hartshorne and Company to Nathaniel West and Company*, Jan. 26, 1788).

268. *Supra* note 199 and accompanying text.

thereafter lay upon [Rhode Island's] imports into the Union."[269] To induce Rhode Island and North Carolina to join the Union, the First Congress passed laws granting shipowners from both states the privileges of United States citizens.[270] There was a stick accompanying this carrot, however, because "a variety of goods produced in North Carolina or Rhode Island were subjected to customs duties when 'brought into the United States'—just like goods 'imported from any foreign state, kingdom, or country.'"[271] During the debates on the bill, Representative Fisher Ames of Massachusetts urged the impositions of heavy tariffs on certain products because they were "*imported in considerable quantities from a neighboring State* that had not yet adopted the Constitution."[272] Rhode Island only ratified the Constitution after Congress threatened to treat the small state "as foreign, and thus subject to import duties on all its products as well as discriminatory treatment of its shipping."[273] Rhode Island was not a part of the United States, but it was hardly a foreign country in the sense that the *Woodruff* Court used the term, and yet the Congress used the term "import" to refer to goods that were coming from Rhode Island and North Carolina into their neighboring states.

6. Contemporary Commentaries

Chief Justice Marshall's statement in the 1827 *Brown v. Maryland* decision that the Import-Export Clause applied to interstate commerce was not challenged by the era's most prominent commentator on the Constitution, Joseph Story. In his *Commentaries on the Constitution,* Story wrote that there "is . . . wisdom and policy in restraining the states themselves from

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269. FRANK GREENE BATES, RHODE ISLAND AND THE FORMATION OF THE UNION 172 (1898); *see also* 2 SAMUEL GREENE ARNOLD, HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 483, 490 (4th ed. 1894) (describing Rhode Island's refusal to accede to the proposed Impost of 1781, which would have given the Confederation Congress the right to impose an impost on goods for purposes of raising revenue; Rhode Island objected because she "required her trade to protect her from the inland duties that her neighbors might legally impose").

270. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST ERA 1789-1801, at 97-98 (1997).

271. *Id.* at 98.

272. *Id.* n.340 (quoting 1 ANNALS OF CONG. 162-63 (1834) (statement of Rep. Ames) (emphasis added)).

273. *Id.*

the exercise of the [taxing] power injuriously to the interests of each other."[274] Story's treatment contained no suggestion that the Import-Export Clause applied only to foreign commerce.[275] "The power in Congress [to regulate commerce] being exclusive," he wrote, "no state is at liberty to pass any laws imposing a tax upon importers, importing goods from foreign countries, *or from other states*. . . . [I]t is a restriction of the right of commerce, not conceded to the states."[276]

D. Conclusions

While it would be nice to have a more definite statement from those present at the creation of the Constitution, the instances given above, as well as those provided by Professor Crosskey, create a presumption (rebuttable though it may be) that the terms used in the Import-Export Clause were not used exclusively in reference to foreign commerce. The evidence suggests that the *Woodruff* Court was too hasty in its dismissal of Marshall's dictum in *Brown*, and wrong to recharacterize *Almy v. California*, because Justice Miller's reading of the Import-Export Clause was too narrow.

The alternate reading championed by Crosskey, and now by Justice Thomas in *Camps Newfound/Owatonna v. Harrison*, is confirmed by stepping back from the Import-Export Clause and

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274. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 354 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833).

275. Elsewhere Story argues that the presence of the Import-Export Clause should not be construed as a limitation on the *states'* power to regulate commerce, but only because he maintained that the power to regulate commerce was an exclusive power of the Federal Government, a claim that has not stood the test of time:

> Nor can any power be inferred in the states to regulate commerce from other clauses in the constitution, or the acknowledged rights exercised by the states. The constitution has prohibited the states from laying any impost or duty on imports or exports; but this does not admit, that the state might otherwise have exercised the power, as a regulation of commerce.

Id at 367.

276. *Id.* at 368 (emphasis addcd). William Rawle, the author of another influential nineteenth century commentary on the Constitution similarly gave no indication that the Import-Export Clause was restricted to foreign commerce. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 111-12 (1825) (discussing the Import-Export Clause). Elsewhere Rawle made such a distinction. *See id.* at 75-76 (differentiating between commerce generally and foreign commerce).

taking into account its relationship with other provisions of the Constitution, as well as the overall purposes of the Framers. The Marshall-Crosskey-Thomas reading of the Import-Export Clause makes sense for a number of reasons. First, the delegates were troubled by state interference with both interstate and foreign commerce, specifically the levying of duties on commerce as it moved in, through, or out of the states. As a result of this concern, Congress was given the power to regulate interstate and foreign commerce, but because of doubts that the Commerce Clause *alone* would prevent the states from preying on the commerce of other states and interfering with foreign commerce—doubts reflected in both the statements and actions of the delegates at the Philadelphia Convention—the Constitution contained a specific textual provision, the Import-Export Clause, that was intended to operate in conjunction with the Commerce Clause to restrain the power of the states to levy taxes and otherwise interfere with commerce.

By *granting* power to Congress while simultaneously *withdrawing* it from the states, the Framers also sought to reduce the number of instances in which the states and the Federal government would come into conflict. So even in the absence of a "smoking gun" statement in either the Philadelphia Convention or in the *Federalist*, Chief Justice Marshall, Professor Crosskey, and now Justice Thomas have endorsed a reading of the Import-Export Clause that is consistent with the text, structure, overall theory, and history of the Constitution—more consistent certainly than the reading offered by the *Woodruff* Court, which had to ignore two statements to the contrary by the Supreme Court, as well as contemporary understanding of the terms "import" and "export," in the course of its interpretation.[277]

277. Justice Miller's majority opinion in *Woodruff* contains a final policy argument that should be addressed. If the Clause was interpreted to prohibit states from laying imposts and duties on goods incoming from other states, Miller argued, it would constitute a de facto tax immunity for wholesalers. By keeping their goods in original packages, these merchants could escape "all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports." Again, Justice Miller's argument leaves a good bit to be desired. He assumed no limitations inherent in the terms "imposts" and "duties," merely equating those terms with "taxes," in the broadest sense of the word. However compelling Miller's policy argument might have been in its day, the idea that interstate commerce is forever exempt from general property taxes is a position the Court has repudiated in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 279 (1976), *overruling Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871). *See also* United States v.

As for Justice Miller's presentist opinion in *Woodruff*, an early critic of the decision seems to have gotten it about right. "[T]ime and experience of the workings of the Constitution," he wrote, "[sometime] give later generations better opportunities for practical understanding of that instrument . . . [but] it is not likely that in 1868 [*sic*] the language of the Constitution could better be understood than in earlier times."[278]

IV. JUSTICE THOMAS'S DILEMMA

The fact that the Import-Export Clause *could* be applied to interstate commerce does not, *ipso facto*, mean that it would be, as Justice Thomas claims, a superior substitute for the principles expressed through the dormant Commerce Clause doctrine. To summarize Justice Thomas's thesis: the core of the Court's antidiscrimination principle, which it enforces through the application of the dormant Commerce Clause, concerns the prevention of discriminatory state taxation of interstate commerce. According to Thomas, by adopting his interpretation of the Import-Export Clause, the Court could continue to enforce the antidiscrimination principle, but could use an explicit textual provision to firmly place the doctrine in the text of the Constitution, and cabin its expansion by the strict application of the Clause's language. As I argued in the last section, Thomas does make a strong historical case that *Woodruff v. Parham*'s conclusions about the scope of the Import-Export Clause were erroneous. In this section, however, I argue that Thomas's thesis itself is flawed. It would radically narrow the protections afforded interstate commerce and would implicitly overrule an entire line of well-established constitutional doctrine. Moreover, Thomas's restatement of the dormant Commerce Clause doctrine contradicts many of his own previous opinions.

International Bus. Machs. Corp., 517 U.S. 843, 847-49 (1992) (distinguishing Export Tax Clause prohibition on "taxes" from the Import-Export Clause's prohibition on "imposts and duties").

278. Price, *supra* note 144, at 191.

A. Recharacterizing the Antidiscrimination Principle

Careful readers will have noticed that Justice Thomas has either engaged in a rather cheeky bit of sleight-of-hand or painted himself into a corner, depending on one's capacity for charity. Discriminatory taxation is indeed a part of the Court's dormant Commerce Clause jurisprudence, but only a part, and not necessarily the *major* part.[279] Taxation is certainly not the only means by which the states may discriminate against interstate commerce, yet Thomas's characterization of the antidiscrimination principle and his discussion of the Import-Export Clause as a textual substitute omits all mention of discriminatory state *regulations*. This omission is significant—rather like the thirteenth chime of the clock—since cases involving discriminatory state regulation constitute a significant

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279. In the tenth edition of his famous casebook, Gerald Gunther omitted an entire section on state taxation, present in previous editions, after concluding that the issue "require[d] more time and space than the undertaking warrant[ed]." GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 342 (10th ed. 1980). *But see* Walter Hellerstein, *Commerce Clause Restraints on State Taxation: Purposeful Protectionism and Beyond*, 85 MICH. L. REV. 758, 761 (1987) (arguing that "[t]he Court's decisions over the past decade sustaining state taxes over commerce clause objections . . . support the hypothesis that the Court views its essential responsibility as safeguarding taxpayers from purposeful economic protectionism and cumulative tax burdens"). Of course Professor Hellerstein's article does not suggest *restricting* the exercise of the Court's role to policing state taxation *only*.

Other casebooks have tended to follow Gunther's lead. *See* JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 189-258 (1996) (including only one tax case and placing it in general discussion of state power to regulate commerce); DAAN BRAVERMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM (3d ed. 1996) (no separate discussion of tax cases); WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 246 (10th ed. 1997); NORMAN REDLICH ET AL., CONSTITUTIONAL LAW (3d ed. 1996) (not discussing state taxation of interstate commerce); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 312-15 (2d ed. 1991) (limiting discussion of taxation of interstate commerce to a three page note in which the authors state that "[t]he doctrines applying the commerce clause to state taxes are extremely complex" but suggesting that "doctrines regarding taxes and regulations are in the process of converging"). Professors Cohen & Varat write:

> The taxation cases have run an elaborate course independently of the regulation cases. . . .
>
> It is no longer possible in a basic constitutional law book to trace the intricate doctrines involved in the hundreds of taxation cases. . . . Here, an occasional tax case will be used where it helps illuminate issues involved in the regulation cases.

COHEN & VARAT, *supra*, at 246.

portion of the Court's dormant Commerce Clause jurisprudence.[280]

B. Thomas on the Dormant Commerce Clause Before Camps Newfound/Owatonna

If Thomas's silence means that he is prepared to adopt the position that *only* discriminatory state taxation of interstate commerce is prohibited under the Commerce Clause, his Import-Export Clause theory is dramatically underinclusive of the range of action a state may take to discriminate against interstate commerce. Even Justice Scalia, in his periodic full-froth condemnations of the dormant Commerce Clause, has admitted that states do not have free reign to burden commerce; and that in the absence of congressional action, the Court has some role to play in preventing wanton discrimination against interstate commerce.[281] In *West Lynn Creamery v. Healy*,[282] for example,

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280. *See, e.g.*, C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994) (flow control ordinance prohibiting export of solid waste and requiring disposal at town-operated transfer facility invalid under dormant Commerce Clause); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (state anti-takeover statute challenged); Maine v. Taylor, 477 U.S. 131 (1986) (state ban on importation of live baitfish upheld); Sporhase v. Nebraska, 458 U.S. 941 (1982) (restrictions on the exportation of groundwater into neighboring state for irrigation struck down); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (Florida law imposing restrictions on out-of-state banks, bank holding companies, and trust companies invalid under dormant Commerce Clause); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (state restrictions on importation of out-of-state solid waste unconstitutional); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977) (state packaging requirements held invalid); Edwards v. California, 314 U.S. 160 (1941) (California law prohibiting the importation of "indigents" unconstitutional).

281. *See, e.g.*, Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part). In *Tyler Pipe*, Scalia argued that "[t]he historical record provides no grounds for reading the Commerce Clause to be other than . . . an authorization for Congress to regulate commerce." *Id.* at 263. He went on to infer from the fact that there was no major debate over the Commerce Clause at the Philadelphia Convention that it was not intended to operate as a restraint on the powers of the states. "I think it beyond question that many 'apprehensions' would have been 'entertained' if supporters of the Constitution had hinted that the Commerce Clause . . . gave this Court the power it has since assumed." *Id.* at 264.

But then Scalia concluded his dissent by expressing the opinion that states could not wantonly discriminate against interstate commerce:

> *[T]o the extent that we have gone beyond guarding against rank discrimination against citizens of other States*—which is regulated not by the Commerce Clause but by the Privileges and Immunities Clause, U.S. Const., Art. IV, §. 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States")—the

Justice Scalia, in a concurring opinion joined by Justice Thomas, acknowledged the "formal adopt[ion]" of the dormant Commerce Clause by the Court and stated that "on *stare decisis* grounds, [he would only] enforce a self-executing 'negative' Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce; and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court."[283] The dormant Commerce Clause doctrine embraced here by Justice Scalia is broad, even as he tries to limit its application, and even if it is merely supported on principles of *stare decisis*, it is not consistent with Justice Thomas's wish to enforce an antidiscrimination principle *only* against discriminatory taxes.

Since assuming his seat on the Court in 1991, Justice Thomas has agreed with Justice Scalia's general formulation of the dormant Commerce Clause that admits the existence of a fairly broad, judicially-enforced limit on the states.[284] In fact, Thomas has not only joined the majority in several dormant Commerce Clause cases dealing with alleged discriminatory regulation, as opposed to taxation,[285] he has even written

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> Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well.

Id. at 265 (emphasis added). Thus, despite his complaints of dormant Commerce Clause excesses, Scalia accepts without question the validity of the antidiscrimination principle and does *not* limit it to cases in which only discriminatory taxation is at issue. One might point out that Justice Scalia's invocation of the Article IV Privileges and Immunities Clause would require alteration of historical understanding more than would a penumbral or structural theory of the dormant Commerce Clause. *See, e.g.*, Regan, *supra* note 2, at 1202-06 (noting problems with suggestion by scholars that Privileges and Immunities Clause of Article IV could do the work of the dormant Commerce Clause and concluding that "we should let sleeping dogs lie").

282. 512 U.S. 186 (1994).

283. *Id.* at 209-10 (Scalia, J., concurring).

284. *See, e.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia and Thomas, JJ., concurring) ("I agree with the Court's conclusion that Oklahoma's sales tax does not facially discriminate against interstate commerce. . . . That seems to me the most we can demand to certify compliance with the 'negative Commerce Clause' . . . ."); *West Lynn Creamery*, 512 U.S. at 209-10 (Scalia and Thomas, JJ., concurring).

285. *See, e.g.*, C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 384 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992) (striking down Michigan Solid Waste Disposal Act imposing import restrictions on the transportation of solid waste). In *C & A Carbone*, Justice Thomas

majority opinions himself that endorse an antidiscrimination principle broader than that articulated in his *Camps Newfound/Owatonna* dissent. In *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,[286] for example, Justice Thomas, writing for a 7-2 majority, struck down an Oregon statute charging out-of-state waste nearly three times as much to process per ton as in-state waste as discriminatory. In his opinion, Thomas defined "'discrimination' simply [as] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[287] Thomas continued, "If a restriction on commerce is discriminatory, it is virtually *per se* invalid."[288]

While nothing precludes Justice Thomas from changing his mind and abandoning his earlier endorsement of the antidiscrimination principle, one would expect that such an abrupt *volte face* would warrant at least a footnote. But in his *Camps Newfound/Owatonna* dissent, Justice Thomas seems either not to recognize the break between his present position and his earlier opinions, or he takes care to conceal his shift in position from his audience.

C. Justice Thomas's Dilemma

Let us assume, though, that Justice Thomas intends to tear up root and branch nearly two centuries of case law restraining state legislatures from discriminating against interstate commerce through protectionist taxation or regulation, and that

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joined in Justice Kennedy's majority opinion holding that Clarkstown, New York's flow control ordinance, which, *inter alia*, forbade the exportation of solid waste generated in the town, was "one more instance of local processing requirements that we have long held invalid." *C & A Carbone*, 511 U.S. at 391. "The essential vice in laws of this sort," Kennedy continued, "is that they bar the import of the processing service. . . . Put another way, the offending local laws horde a local resource . . . for the benefit of local businesses that treat it." *Id.* at 392.

Thomas also joined in the companion decision to *Fort Gratiot*, in which larger fees were charged for processing out-of-state garbage than in-state garbage. *See* Chemical Waste Management v. Hunt, 504 U.S. 334 (1992). Though the discriminatory fees were part of a larger regulatory scheme, the case is more closely analogous to the tax cases Thomas discusses in his dissent.

286. 511 U.S. 93 (1994).

287. *Id.* at 99.

288. *Id.* In dissent, Chief Justice Rehnquist accused the Court of "crank[ing] the dormant Commerce Clause ratchet against the States." *Id.* at 109 (Rehnquist, C.J., dissenting).

he would have the Import-Export Clause do the future work of the antidiscrimination principle embodied in the dormant Commerce Clause doctrine. Justice Thomas would be turning a blind eye to blatant discrimination against interstate commerce that does not take the form of an impost or a duty, though his earlier dormant Commerce Clause opinions, and those in which he was a member of the majority, suggest that it is the impermissible discrimination, and not the form the discrimination takes, that is constitutionally forbidden. Thomas thus seems willing to allow form to triumph over substance, unless he has relied on an unarticulated belief that a principled distinction exists between taxes and other forms of regulation. Even if such a distinction could be made, Thomas's parsimonious characterization of the antidiscrimination principle would run smack into the text of the Import-Export Clause, which prohibits only "imposts" and "duties" as opposed to prohibiting "taxes" in general, because not all discriminatory taxes would be considered either an impost or a duty, as he acknowledges in his dissent. The difference between a valid and an invalid tax could merely turn on a legislature's drafting skills.

D. Possible Unintended Consequences of Thomas's Dissent

Only Justice Scalia endorsed Justice Thomas's modest proposal in *Camps Newfound/Owatonna*, so the prospect of wholesale repudiation of the Court's dormant Commerce Clause jurisprudence—whether one finds the prospect thrilling or chilling—is unlikely to say the least. *Stare decisis* alone would seem to ensure that *Woodruff v. Parham*, as mistaken as that decision likely was, will not be repudiated in favor of an application of the Import-Export Clause to interstate commerce.

Even so, Justice Thomas's labors are hardly in vain. In his quest to dismantle the existing dormant Commerce Clause edifice, Justice Thomas, ironically, may have furnished sufficient evidence to rebut critics, like himself and Justice Scalia, who charge that the doctrine was made up out of whole cloth by various courts over the years.

Though a complete (or even a qualified) defense of the dormant Commerce Clause is beyond the scope of this article, the evidence Justice Thomas adduces in support of his interpretation

of the Import-Export Clause suggests a far greater historical and textual foundation for it than its critics have allowed. The evidence that Thomas presents in his dissent, and that I have attempted to corroborate in part, suggests: (1) that the Framers were concerned about restraining states' abilities to enrich their coffers at the expense of their sister states, largely, though not exclusively, through taxation; (2) that, as a result of their concerns, the Framers placed an explicit textual protection in the Constitution, in addition to the general power of Congress to regulate interstate commerce; and (3) that following the Constitution's ratification, contemporary commentary suggests that it was thought the combination of the Commerce and the Import-Export Clauses was in fact meant to prohibit such practices among the states.

From this perspective, the dormant Commerce Clause principle—particularly the "virtually per se" rule against discriminatory taxes and regulations—appears less the product of two centuries of collective Supreme Court delusion and more like the reasonable judicial extrapolation of principle from the text, structure and history of the Constitution; more like a principle that has evolved over time to prevent subversion by changes in form, and that has been applied, it is worth adding, without much controversy, save among academics.

The Import-Export Clause *could* be interpreted to prohibit state measures that accomplish the same ends as the prohibited imposts or duties. The Court has done this with similar clauses to give effect to constitutional provisions that could otherwise be easily evaded if interpreted literally. The Court's treatment of the Tonnage Clause provides a good analogy.

The Tonnage Clause prohibits states from "lay[ing] any Duty of Tonnage" without Congress's consent.[289] However, the Court has made it clear that just because a particular duty is not computed based on the storage capacity of a particular vessel, it is not automatically insulated from invalidation under that clause.[290] Were the Court to restrict the provision only to those

289. U.S. CONST. art. I, § 10, cl. 3.

290. *See* Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 32, 34-35 (1867) (holding that a flat $5.00 fee on any ship entering the Port of New Orleans when services were neither requested nor enjoyed by a vessel violated the Tonnage Clause even though the fee was not tied to a ship's tonnage); *see also* Inman Steamship Co. v. Tinker, 94 U.S. 238 (1876) (striking down a New York statute that imposed

measures tied to tonnage, Chief Justice Chase wrote in an early opinion,

> the constitutional provision would not fully accomplish its intent. The general prohibition [found in the Import-Export Clause] would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. . . . [Similarly] [i]t was not only a *pro rata* tax which was prohibited [by the Tonnage Clause], but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty.[291]

One might likewise credibly argue that if the enforcement of the Import-Export Clause were literally limited to imposts and duties, states could devise regulatory means to defeat the intent of the Framers in their effort to eliminate this particular species of unfair trade barriers among the states.[292] But to adopt such a position, Justice Thomas would sacrifice the security he deems inherent in an explicit textual provision; security that theoretically limits the ability of courts charged with interpreting and applying such a provision, as opposed to allowing the application of a virtually open-ended doctrine, like the dormant Commerce Clause.[293] Of course, one might question Justice Thomas's premise that a textual provision can effectively restrain action; such provisions are after all subject to judicial

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a tonnage tax on shipping entering, loading or unloading, or making fast to any wharves within the port of New York); Peete v. Morgan, 86 U.S. (19 Wall.) 581 (1873) (striking down a tonnage tax on vessels arriving at the quarantine stations of any town on the coast of Texas); State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204, 217-18 (1870) (striking down an Alabama law that levied a $1.00 per ton tax on vessels "plying in the navigable waters of the State").

291. *Steamship Co.*, 73 U.S. (6 Wall.) at 34-35.

292. The Court made such an argument in *West Lynn Creamery*. In the majority opinion, Justice Stevens wrote the following:

> The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State. . . .
>
> . . . [T]ariffs have long been recognized as violative of the Commerce Clause. In fact, tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. *Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means.*

West Lynn Creamery, 512 U.S. at 93 (emphasis added).

293. *See supra* text accompanying notes 75-82.

interpretation. The Court's interpretation of the Commerce Clause itself provides perhaps the most compelling refutation of Justice Thomas's assumption.

CONCLUSION

In *Camps Newfound/Owatonna v. Harrison,* Justice Thomas suggests an interesting, but ultimately flawed solution to what he sees as a doctrine with little foundation in history or text, and therefore one whose legitimacy as a tool for judicial invalidation of state laws is suspect. Thomas suggests relying on the Import-Export Clause as a textual substitute to prevent discrimination against interstate commerce, currently accomplished under the dormant Commerce Clause doctrine. Yet Thomas's characterization of what types of discrimination the antidiscrimination principle embodied in that doctrine seeks to prevent—discriminatory taxation only—is at odds with long-standing Court precedent; his own pronouncements on the matter; the view of his closest ally on the Court, Justice Scalia; and with the history of the principle. Adopting Justice Thomas's solution would, with almost no evidence that the Framers would have approved, cut protection for interstate commerce against discriminatory and parochial state legislation to the quick.

However, the convincing historical evidence Justice Thomas musters in support of his interpretation that the Import-Export Clause was intended to apply to interstate commerce *does* support much of the Court's dormant Commerce Clause jurisprudence to date. In the end, the doctrine's lack of foundation in text and history may have been overstated both by members of the Court and scholars fond of criticizing the doctrine as a paradigmatic example of "judicial activism." As in other cases where conservative Justices like Thomas and Scalia have used "penumbral reasoning"[294] to strengthen important constitutional values like separation of powers, federalism, and state sovereignty, the antidiscrimination principle in interstate commerce cases, too, is an attractive candidate for the application of that same interpretative methodology. At least to the chorus of critics who, in their critiques of the dormant Commerce Clause doctrine, have asked why the Framers did not write a restraint

294. *See generally* Denning & Reynolds, *supra* note 51.

on state regulations of commerce into the Constitution if they intended to so limit them, Justice Thomas's provocative opinion provides the compelling evidence that they did, but we just haven't been paying attention.