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THE DORMANT COMMERCE CLAUSE: WHY *GIBBONS v. OGDEN* SHOULD BE RESTORED TO THE CANON

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The dormant Commerce Clause is preoccupied with state economic protectionism. As young lawyers learn, the Supreme Court has applied a virtually fatal form of strict scrutiny to state laws that discriminate against interstate commerce and a more forgiving balancing test that practically rubber-stamps other laws that only incidentally affect interstate commerce.[1] Pressed to identify the theoretical justification for the "dormant" component of the Commerce Clause and the Court's doctrinal focus on state protectionism, defenders of the modern doctrine point to Justice Jackson's famous defense of the dormant Commerce Clause in *H.P. Hood & Sons, Inc. v. Du Mond*.[2] In it, Justice Jackson discussed at some length how the history of internecine commercial warfare among the states following the Revolutionary War was one of the salient events prompting the Constitutional Convention of 1787 and leading the framers to vest the commerce power in Congress.[3]

Few individuals are proponents of state economic protectionism (at least overtly so), and therefore Justice Jackson's defense of the dormant Commerce Clause finds a sympathetic audience among scholars and students alike. Nevertheless, conceptualizing the dormant Commerce Clause solely as an anti-protectionist constitutional safeguard poses several problems, and they are significant. First, Justice Jackson's anti-protectionist defense of the dormant Commerce Clause is not formally rooted in the constitutional text—a feature

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1. *Compare* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (applying a "virtually *per se* rule of invalidity" to laws that discriminate against interstate commerce), *with* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that laws which only incidentally affect interstate commerce will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"). *See also* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (summarizing modern test).

2. 336 U.S. 525 (1949). For the most recent example of this phenomenon, see *Granholm v. Heald*, Nos. 03-1116, 03-1120, 03-1274, slip op. at 8 (U.S. May 16, 2005), in which the Court invoked the *Hood* anti-protectionism principle to invalidate several states' discriminatory wine shipment laws.

3. 336 U.S. at 533–34.

that critics of the doctrine have been quick to seize upon. Justice Scalia, for example, has been particularly critical of the dormant Commerce Clause, disparaging the "lack of any clear theoretical underpinning" for the doctrine.[4] Perhaps Mark Tushnet is right that the historical underpinning of the doctrine trumps the absence of an express textual foundation—that the Court is merely fulfilling an unstated but immanent constitutional aversion to state parochialism[5]—but students cannot help but wonder that there isn't some better way to ground such a central feature of our constitutional landscape as the dormant Commerce Clause.

Second, as a doctrinal matter, the anti-protectionist justification for the dormant Commerce Clause cannot be easily squared with the Court's modern case law. For example, the anti-protectionist theory immediately calls into question the legitimacy of the *Pike* balancing test that is applicable to non-discriminatory state legislation.[6] What plausible anti-protectionist justification could there be for having courts police non-discriminatory legislation? Not surprisingly, the absence of a ready-made answer to this question has led several Justices and commentators to call for the abandonment of the *Pike* test.[7] So too, the anti-protectionist reading of the dormant Commerce Clause cannot be easily reconciled with the "market participant" exception, which provides that states may favor in-state economic interests in the distribution of state-owned resources,[8] or with the exemption for state monetary subsidies for in-state interests.[9] Courts find no constitutional problem, for example, with a state reserving the production of cement from a state-owned factory solely for in-state construction projects[10] or with a state providing a lucrative subsidy for

4. Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 619–20 (1997) (Thomas, J., dissenting) (contesting the validity of the dormant Commerce Clause).

5. Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1724 (1990).

6. *Pike*, 397 U.S. at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

7. Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in the judgment); *Camps Newfound/Owatonna*, 520 U.S. at 619–20 (Thomas, J., dissenting).

8. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984).

9. *See* New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988) (suggesting that direct subsidy is permissible under the dormant Commerce Clause).

10. Reeves, Inc. v. Stake, 447 U.S. 429, 438–39 (1980).

businesses headquartered in the state.[11] Yet, both types of actions are patently protectionist.

This incongruence between theory and doctrine generates some fairly predictable reactions among students. Some, who embrace the theory, advocate amending the doctrine to bring it in line with the theory. Others, who like the doctrine, search for a different or more complete theory to justify the doctrine. Still others view the dormant Commerce Clause as a naked, illegitimate act of judicial legislation that should be consigned to the proverbial trash heap of history.

In my view, these views are the unfortunate byproduct of the conventional account's preoccupation with state economic protectionism. While the dangers of such economic protectionism are not to be ignored or trivialized, much could be gained (and much cynicism about the dormant Commerce Clause dissipated) by prodding students to consider whether there is some other constitutionally-rooted conception of the dormant Commerce Clause. Of course, there is such a conception. It was first outlined in *Gibbons v. Ogden*,[12] and, though it has been eclipsed by the modern anti-protectionist theory, it is worth considering again.

Gibbons, as you will recall, involved the validity of New York's statutory grant of an exclusive monopoly to Robert Livingston and Robert Fulton for steamboat travel on New York waters. Aspiring competitors challenged the validity of the state-created monopoly, arguing (in what we would later term a dormant Commerce Clause claim) that the Commerce Clause of its own force divested New York of authority to enact regulations of interstate commerce.[13] The New York Court of Errors, the state's highest court at the time, rejected their constitutional challenge and upheld the monopoly.[14] Delivering one of the opinions explaining the result, Chief Justice James Kent, no slouch in matters of American law, concluded that the power to regulate interstate commerce, like the power of taxation, was held concurrently by both the states and the federal government and that, therefore, the Commerce Clause did not operate as a limit on state authority.[15]

A few years after the Court of Errors' decision, Thomas Gibbons decided to challenge the monopoly and began running a steamboat—captained by the young Cornelius Vanderbilt, the future railroad tycoon—from New Jersey to New York City. To justify his brazen challenge to the monopoly, Gibbons

11. *New Energy Co.*, 486 U.S. at 278 (noting that direct subsidies do not "ordinarily" violate dormant Commerce Clause). *But cf.* Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 746 (6th Cir. 2004) (invalidating state investment tax credit for purchases of equipment for in-state use but not out-of-state use).

12. 22 U.S. (9 Wheat.) 1 (1824).

13. *Id.* at 1.

14. Livingston v. Van Ingen, 9 Johns. 507 (N.Y. 1812).

15. *Id.* at 576–81 (Kent, C.J.).

obtained a federal coasting license pursuant to the federal Navigation Act of 1793, which he contended gave him the right to enter New York waters despite the contrary New York statutes.[16] James Kent, now the Chancellor, disagreed, concluding that the federal coasting license did not preempt state authority but merely served to designate the ships holding such licenses as American in character.[17] Gibbons appealed to the U.S. Supreme Court, and the stage was set for a showdown of historic and jurisprudential significance.

The case, of course, presented the Marshall Court with its first opportunity to discuss the meaning of the Commerce Clause. More importantly, however, the lawsuit squarely presented the question whether and to what extent the Commerce Clause itself limited state authority. Indeed, the vast bulk of the five-day oral argument focused not on the meaning and significance of the federal coasting license but rather on the existence and scope of a dormant Commerce Clause divesting states of the power to regulate interstate commerce.[18]

As we all know, the Court invalidated the steamboat monopoly on the ground that the federal coasting license issued pursuant to the federal Navigation Act preempted the conflicting New York statutes and authorized Gibbons (and any other holder of such license) to enter New York waters in order to conduct interstate trade.[19] In defending Congress's power to enact the Navigation Act, Marshall elaborated upon the scope of Congress's commerce power. Marshall's description was striking in its breadth: "Commerce," Marshall declared, "undoubtedly, is traffic, but it is something more; it is intercourse."[20] Moreover, Congress's power over interstate commerce reached into the interior of each state, empowering Congress to regulate those activities within a state that "affect the states generally."[21] Only the "completely internal commerce of a state" was beyond Congress's constitutional authority.[22] And, if that were not enough, Marshall declared that the commerce power was plenary; it is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[23] In fact, Marshall declared that the power over commerce "is vested in Congress as absolutely as it would be in a single government"[24]—an obvious rebuke to those proponents of states' rights who asserted that the federal

16. Ogden v. Gibbons, 4 Johns. Ch. 150, 153–54 (N.Y. Ch. 1819), *aff'd*, 17 Johns. 488, 509–10 (N.Y. 1820).

17. *Id*. at 156–57.

18. Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1411–12 (2004).

19. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

20. *Id.* at 189.

21. *Id.* at 195.

22. *Id.*

23. *Id.* at 196.

24. *Gibbons*, 22 U.S. (9 Wheat.) at 197.

government's powers should be narrowly construed because (in their view) the United States was merely a confederation of sovereign states.

These passages are familiar to students of American constitutional law. They provide the grist for discussions of Congress's affirmative regulatory power under the Commerce Clause. Indeed, these statements from *Gibbons* are often the first materials that students read in their introduction to the commerce power.[25] And well they should, for *Gibbons* remains a touchstone case with significance for contemporary debates over Congress's regulatory power.[26] Unfortunately, these passages are the only materials from *Gibbons* to which students typically are exposed in any significant manner. When it comes time to discuss the dormant Commerce Clause, some casebooks omit *Gibbons* entirely,[27] while others relegate it to a prefatory remark.[28] Even those casebooks that include excerpts from *Gibbons* in their dormant Commerce Clause materials seem interested in the case only for its historical importance; after moving on to the more modern decisions, *Gibbons* and its defense of a dormant Commerce Clause are rarely mentioned again.[29] In short, Marshall's

25. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 103 (2001); JESSE CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 65–67 (9th ed. 2001); DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 841–44 (3d ed. 2003); LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 329–32 (5th ed. 2003); CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 183–85 (2001); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 143–46 (4th ed. 2001); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 124–26 (15th ed. 2004).

26. *Compare* United States v. Lopez, 514 U.S. 549, 553 (1995) (concluding that *Gibbons* held that commerce power did not extend to "completely internal" commerce and thus established a limit on federal power), *and id.* at 594 (Thomas, J., concurring) (contending that "the principal dissent is not the first to misconstrue *Gibbons*" and citing *Wickard v. Filburn*, 317 U.S. 111, 120 (1942), as example), *with id.* at 604 (Souter, J., dissenting) (concluding that *Gibbons* had recognized "broad" federal power over commerce), *and id.* at 615, 631 (Breyer, J., dissenting) (concluding that *Gibbons* recognized federal authority over intrastate commercial activities that "significantly affect interstate commerce" and arguing that, had the Court interpreted commerce power "as this Court has traditionally interpreted it"—citing *Gibbons* as an example—it would have upheld statute). *See also* Solid Waste Agency v. U.S. Army Corp. of Eng'rs, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting) (accusing Court of ignoring *Gibbons* in adopting narrow interpretation of commerce power); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (contending its approach is drawn from *Gibbons*); *id.* at 641, 646 (Souter, J., dissenting) (accusing majority of misreading *Gibbons*).

27. *See, e.g.*, FISHER, *supra* note 25, at 327–28; CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 414–15 (2d ed. 2001) (beginning dormant Commerce Clause discussion without reference to *Gibbons*).

28. *See, e.g.*, CHEMERINSKY, *supra* note 25, at 323–24; CHOPER ET AL., *supra* note 25, at 207–09; MASSEY, *supra* note 25, at 271–72; STONE ET AL., *supra* note 25, at 258–59.

29. Though they appear to include it primarily for historical reasons, these editors nevertheless should be praised for including a lengthy excerpt from, and discussion of, *Gibbons*. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 126–33 (4th ed. 2000); WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL

lengthy and illuminating discussion of the "dormant" or "negative" component of the Commerce Clause has been banished from the modern dormant Commerce Clause canon and relegated to the status of a mere historical curio.

Ignoring or minimizing Marshall's discussion of the dormant Commerce Clause is unfortunate because Marshall's understanding of the dormant Commerce Clause differs markedly from the modern view. Significantly, Marshall's approach was not rooted in a concern about state economic protectionism; rather, as Marshall viewed it, the existence of a dormant component of the Commerce Clause depended upon the nature of the commerce power vested by the Constitution in Congress. For Marshall, the central task confronting the Court was to determine whether the commerce power was held concurrently both by the states and federal government (as Ogden argued and James Kent had held) or possessed exclusively by Congress (as Gibbons argued).[30]

To answer that question and determine whether the commerce power was exclusive, Marshall began by focusing on the arguments proffered by Ogden in support of the concurrent view.[31] Marshall was not impressed. For example, Marshall disagreed with the notion that the commerce power was akin to the taxation power, which all acknowledged was concurrent in nature. The taxation power, Marshall noted, could be possessed by both sovereigns without problem because:

> [t]axation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes.[32]

In contrast, when a state is attempting to regulate interstate commerce, "it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[33]

In a similar fashion, Marshall rejected Ogden's suggestion that the limitations in Article I, Section 10, on the states' power to levy imposts and tonnage duties demonstrated by negative implication that the states retained the authority to regulate commerce. Those constitutional provisions, Marshall explained, were adopted to limit the states' taxation authority and, therefore,

LAW: CASES AND MATERIALS 145–52 (11th ed. 2001); FARBER ET AL., *supra* note 25, at 1001–04; RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 83–90 (7th ed. 2003); SULLIVAN & GUNTHER, *supra* note 25, at 247–49.

30. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197–98 (1824).

31. *Id.* at 199.

32. *Id.*

33. *Id.* at 199–200.

did not contemplate that the states retained some concurrent power over interstate commerce.[34]

But what about all of the various regulatory laws, such as health inspection laws, that the states had adopted? They were manifestly not adopted pursuant to the states' taxation authority. Did not their existence and uncontested validity demonstrate that the states retained the power to regulate interstate commerce? Marshall's answer was no, and his explanation formed the early framework for assessing dormant Commerce Clause challenges. Marshall acknowledged that many state laws could affect interstate commerce, but he disputed that those laws were enacted pursuant to a commerce power. Rather, such laws stemmed from the states' "system of police" or police powers, which were retained by the states as a means of providing for the health and safety of their citizens.[35] Marshall conceded that such police laws might look similar to commercial regulations adopted by Congress, but he disagreed that any similarity in form demonstrated a similarity in origin. As Marshall put it,

> [a]ll experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.[36]

Unpersuaded by Ogden's arguments in favor of a concurrent theory of the commerce power,[37] Marshall turned to Gibbons's argument in favor of the exclusive theory, which he thought had "great force."[38] Summarizing Gibbons's claim, Marshall stated that as

> the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much

34. *Id*. at 200–03.

35. *Gibbons*, 22 U.S. (9 Wheat.) at 204.

36. *Id.*

37. In addition to the claims discussed in the text, Marshall also rejected other arguments proffered by Ogden in favor of a concurrent commercial power. *See id.* at 205–07 (rejecting inference of concurrent power from the Slave Immigration Clause of Article I, Section 9); *id*. at 207–08 (rejecting inference from congressional statute authorizing federal agents to enforce state quarantine laws). These are interesting and important points, but, in my experience, students without a deep grounding in American history find it difficult to understand Ogden's arguments and Marshall's responses on these points.

38. *Id.* at 209.

> disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.[39]

Marshall's sympathy for the dormant Commerce Clause was manifest, but, somewhat surprisingly, Marshall announced that the Court did not have to formally decide the matter because the New York statutes were preempted by the federal Navigation Act.[40] Given his extended discussion and refutation of the "concurrent" view of the commerce power espoused by Ogden, it is striking to say the least that Marshall did not rest the decision at least in part on the dormant Commerce Clause. I have explored the reasons for Marshall's hedge at length elsewhere,[41] but for present purposes it is important to note only that Marshall provided an extended discussion of the theoretical justification for a dormant Commerce Clause—that the commerce power was necessarily exclusive in nature. Further, he had begun to sketch the contours of such a doctrine—that the validity of a state law depended upon whether it was a commercial regulation or a police regulation.

Perhaps even more illuminating in some respects is Justice Johnson's concurrence. Johnson disagreed with Marshall and the Court that the federal Navigation Act had anything to do with the case.[42] Rather, Johnson would have rested the decision solely on the dormant Commerce Clause, which he expressly concluded divested the states of authority over interstate commerce because of the exclusive nature of the commerce power.[43] Critically, Johnson justified the exclusivity of Congress's commerce power in part by focusing on the internecine commercial warfare among the states in the wake of the Revolutionary War, which, Johnson noted, prompted the framers to vest in Congress the commerce power.[44] Thus, more than a century before Justice Jackson, Johnson had identified the framers' hostility to state protectionism as a core ingredient of the commerce power, but, unlike Jackson, Johnson did not read the Commerce Clause as itself embodying an anti-protectionist limitation on state authority. Rather, Johnson saw these historical events as a justification for the much broader proposition that the states were divested of all authority over interstate commerce, whether exercised for protectionist purposes or not. Further bolstering his view of the exclusive nature of the commerce power, Johnson pointed to the fact that the Commerce Clause also

39. *Id.*

40. *Gibbons*, 22 U.S. (9 Wheat.).

41. Williams, *supra* note 18, at 1450–76.

42. *Gibbons*, 22 U.S. (9 Wheat.) at 231–33.

43. *Id.* at 227 ("[T]he power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.").

44. *Id.* at 223–25.

vested Congress with power over foreign commerce, which everyone agreed was necessarily exclusive.[45]

Lastly, Johnson attempted to provide some guidance as to how to distinguish between constitutional and unconstitutional state laws. Like Marshall, Johnson acknowledged that the states retained authority to adopt inspection and other laws pursuant to their police powers. According to Johnson, the key to distinguishing between the two types of laws lay in the legislative purpose animating the state act.[46] To be sure, Johnson acknowledged the lack of certainty inherent in such a test: "The line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation."[47] Yet, he remained convinced that the Constitution required such line-drawing and that the New York statutes were clearly on the commercial side of the line.

Obviously, *Gibbons* provides a much different account and justification for the dormant Commerce Clause than the modern doctrine. While the latter is preoccupied with state economic protectionism,[48] *Gibbons* views the dormant component of the Commerce Clause as a necessary byproduct of our federal system of government. Stated differently, the modern, anti-protectionist account conceives of the dormant Commerce Clause as a protection against a particularly noxious form of state legislation, a sort of rights-based conception that views individuals as holding a right to trade interstate free of state protectionist-motivated interference, while Marshall and Johnson's approach treats the doctrine as a function of the division of power between the federal government and the states, a powers-based conception that is concerned only indirectly with the impact of state legislation upon individual interests.

OK, but why should students in the twenty-first century read the nineteenth-century decision in *Gibbons* in conjunction with their study of the dormant Commerce Clause? There are several reasons. First, restoring *Gibbons* to the constitutional law canon provides students with a more robust understanding of the historical development of the dormant Commerce Clause. As many casebook editors have acknowledged, that is important in and of itself,[49] but it also has the collateral benefit of bolstering the doctrine's perceived legitimacy. Much of the students' skepticism about the doctrine's legitimacy derives from their perception that the dormant Commerce Clause is a relatively recent development. The modern doctrine and its preoccupation

45. *Id*. at 228–29.

46. *Id.* at 235 ("Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision.").

47. *Gibbons*, 22 U.S. (9 Wheat.) at 238.

48. *See, e.g.*, Granholm v. Heald, Nos. 03-1116, 03-1120, 03-1274 (U.S. May 16, 2005) (invalidating discriminatory wine shipment laws as protectionist).

49. *See supra* note 29.

with state economic protectionism did not fully emerge until after World War II—indeed, Justice Jackson's anti-protectionist defense was offered only in 1949.[50] Left without any exposure to the earlier materials, astute students are sure to wonder why such a central feature of our constitutional order as a prohibition on state protectionism would take more than 150 years for the Court to recognize and implement.[51]

Gibbons, however, was decided less than forty years after the Constitutional Convention. Once students learn that the dormant Commerce Clause has such deep historical roots, they are less likely to perceive the doctrine as some illegitimate invention. Moreover, the fact that the existence of the dormant component of the Commerce Clause dates back to the first case to discuss the Clause imbues the doctrine with added legitimacy. The dormant Commerce Clause was not some late embellishment, but an original component of the Supreme Court's understanding of the Commerce Clause.

Second, *Gibbons* provides an alternative way of thinking about the dormant Commerce Clause. The modern account's focus on anti-protectionism appeals to students' antipathy to state parochialism, but there are other constitutional provisions that seem better suited (and more expressly tailored) to policing against state economic protectionism: the Privileges and Immunities Clause of Article IV;[52] the Import-Export Clause of Article I, Section 10;[53] and the Equal Protection Clause of the Fourteenth Amendment.[54]

50. To be sure, there were references to economic protectionism in the Court's dormant Commerce Clause jurisprudence before World War II. *See, e.g.*, Welton v. Missouri, 91 U.S. 275, 280–82 (1875). Indeed, as noted above, Justice Johnson in *Gibbons* drew upon this antipathy to economic protectionism to justify the dormant Commerce Clause. Yet, the Court's dormant Commerce Clause doctrine during that time did not focus on the presence or absence of state protectionism in assessing the constitutionality of state legislation. Rather, even while professing concern about state protectionism, the Court instead asked whether the challenged state legislation indirectly or directly regulated commerce—an inquiry with no perceivable connection to rooting out state protectionism.

51. Including *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), dispels some of the students' skepticism; *Cooley*, after all, was decided little over sixty years after the framing. Including *Cooley*, however, does not substitute for a discussion of *Gibbons*. Not only was *Gibbons* decided a full generation before *Cooley*, Justice Curtis's discussion of the dormant Commerce Clause in *Cooley* was modeled upon Chief Justice Marshall's opinion in *Gibbons*. Only by examining the latter can students appreciate the former.

52. 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.").

53. The Import-Export Clause states:

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.

Viewing the dormant Commerce Clause in anti-protectionist terms renders it little more than a largely, though not exclusively, redundant feature of the constitutional landscape.[55]

Gibbons offers a different conception of the dormant Commerce Clause. Rather than focus on whether a state measure discriminates against interstate commerce, Gibbons instructs courts to assess whether the measure is commercial or municipal in nature—that is, whether it was adopted to protect the health, safety, or welfare of the people or to promote some commercial interest. Of course, to say that it provides a different account of the dormant Commerce Clause is not to say that it provides a superior account. There is much to be said in favor of the anti-protectionist theory—state economic protectionism finds few serious academic defenders—but there is also much to be said in favor of the exclusivity theory. And even those who agree with Justice Jackson's account may nevertheless find value in exploring whether some elements of Chief Justice Marshall's opinion should be retained as part of the modern doctrine.

Third, *Gibbons* clarifies some of the "oddities" of the modern doctrine. Indeed, there is much more of *Gibbons* lurking in the substrate of the modern doctrine than one might suppose. For one, take the *Pike* balancing test for non-discriminatory state legislation. According to the anti-protectionist reading of the dormant Commerce Clause, there is no justification for the continued use of the *Pike* test. If a state measure does not distinguish between intrastate and interstate commerce, it is not protectionist and, therefore, presumptively permissible. In contrast, an exclusive commerce power condemns both discriminatory and non-discriminatory state commercial legislation. As noted above, the key task is in distinguishing between municipal and commercial measures. The *Pike* test's condemnation of state laws whose burdens on interstate commerce clearly outweigh the local benefits is perhaps one way of distinguishing between commercial and municipal measures. If a measure

U.S. CONST. art. I, § 10, cl. 2; *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 621–37 (1997) (Thomas, J., dissenting) (urging reinterpretation of Import-Export Clause to bar discriminatory state taxation of interstate commerce).

54. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see also* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 883 (1985) (holding that Equal Protection Clause prohibits state from imposing higher premium tax upon insurance policies issued by out-of-state insurance companies).

55. The anti-protectionist scope of the dormant Commerce Clause is broader than that of the Article IV Privileges and Immunities Clause, which (as currently interpreted) protects only citizens and not corporations. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177–78 (1868) (holding that corporations are not citizens within meaning of Privilege and Immunities Clause). So too, it is broader than that of the Import-Export Clause, which (as currently interpreted) applies only to state taxes and then only to state taxes on foreign, not interstate, goods. Woodruff v. Parham, 75 U.S. 123, 136 (1868) (holding that Import-Export Clause does not apply to state tax on interstate goods).

generates few local benefits when compared to its burdens on interstate commerce, it may be safe to conclude that the measure was not adopted to promote the health, safety, or welfare of the people, but rather to promote one commercial interest at the expense of some other commercial interest. Thus, for example, the fact that there are no health or safety benefits accruing from a state's requirement that all cantaloupes grown in the state be packaged before shipment suggests that the real purpose of the requirement was to foster certain industries (e.g., agricultural packers) at the expense of other commercial interests (e.g., farmers).[56] That may or may not be desirable, but it is a choice best left to Congress and, according to Marshall, a task exclusively assigned to Congress.

Moreover, the exclusivity theory also provides some basis for the market participant exception. Recall that on a purely anti-protectionist reading of the dormant Commerce Clause, the market participant exception is troubling since it authorizes states to nourish and act upon protectionist concerns in distributing state-owned resources or funds. An exclusive commerce power, however, divests the states only of their authority to regulate interstate commerce; their authority to manage state-owned resources is a separate power that was not transferred to the federal government by virtue of the adoption of the Commerce Clause. Indeed, only if one buys into the exclusivity theory does that exception's critical distinction between the state acting in a regulatory versus proprietary capacity make any sense whatsoever.

Fourth, and perhaps most importantly, *Gibbons* helps illuminate and provide a way of thinking about the ultimate constitutional issue underlying the Commerce Clause (and all questions of federalism)—namely, how does the Constitution allocate powers between the federal government and states? With regard to interstate commerce, the Court's answer in *Gibbons* was that the Constitution entrusted the regulation of interstate commerce exclusively to Congress but allowed the states to continue to adopt police regulations to protect the health, safety, and welfare of their citizens, even if such regulations incidentally affected interstate commerce. To modern lawyers, the Court's categorical approach is overly formalistic and impossibly vague in practice. Nevertheless, it focuses the students on the key problem confronting a federal system of government: defining the respective roles of the two sovereigns. Once they understand that this is the central task, they have a better foundation for assessing the various doctrinal tests that come later. The distinction between "national" and "local" matters announced by the Court in *Cooley v. Board of Wardens*[57] can be seen as a well-meaning elaboration upon *Gibbons*, though ultimately no more definitive in practice. Meanwhile, the balancing

56. Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970) (noting that state packaging requirement does not promote safety or consumer fairness).

57. 53 U.S. (12 How.) 299 (1851).

test from *Southern Pacific Company v. Arizona*[58] is utterly useless, not just because it is vague, but because it does not seem even remotely linked to distinguishing between the respective spheres of sovereignty. More fundamentally, however, students can then appreciate that the same task ultimately underlies all of the various federalism provisions of the Constitution, including the "affirmative" Commerce Clause. Is a prohibition on the possession of a firearm near a school a regulation of commerce (which Congress may adopt), a purely municipal measure (which only a state may adopt), or a mixture of both (which a state may adopt pending the passage of federal legislation preempting or superseding state authority)?

I do not mean to suggest that Gibbons and its exclusivity theory are the be-all, end-all of the dormant Commerce Clause, but these benefits are considerable and sufficient to warrant *Gibbons*'s inclusion in a significant manner in the Constitutional Law curriculum. Before rushing to judgment, however, perhaps we should consider why some might dispute the value of teaching Gibbons.

One might discount Marshall's discussion of the dormant Commerce Clause as pure dicta, but the benefit of including Gibbons does not depend on whether its discussion of the dormant Commerce Clause is good law or even law. Rather, its value lies in its description and argumentative defense of its proposed interpretation of the Commerce Clause. Perhaps Marshall's discussion of the dormant Commerce Clause has no more jurisprudential force than the Federalist Papers, but no one disputes the propriety of assigning the Federalist Papers despite their status as non-law. It is their argumentative value, not their jurisprudential status, that merits their inclusion in a Constitutional Law class. So too with Gibbons.

Moreover, this *dicta* objection proves too much: were we to exclude *Gibbons* on this ground, we would also be forced to exclude several other dormant Commerce Clause cases that are routinely taught, notably *Cooley*. Indeed, instructors often forget that *Cooley upheld* Philadelphia's pilot ordinance, making Justice Curtis's ruminations about what might offend the Commerce Clause *dicta* as well.[59] Rather, in *Gibbons*'s (or *Cooley*'s) place, we would be forced to substitute the *Passenger Cases*,[60] the first Supreme Court decision to hold a state law (a local ordinance in that case) unconstitutional because of the dormant Commerce Clause. I pity the poor

58. 325 U.S. 761, 770–71 (1945).

59. In *Cooley*, Justice Curtis suggested that the Commerce Clause restricted state authority over matters of "national" importance but left the states with control over "local" matters. 53 U.S. at 319. Justice Curtis did not give an extended defense of his proposed rule because he was drawing upon *Gibbons* and its progeny; his "national" versus "local" distinction was simply his way of elaborating what he took to be the rule pronounced by Marshall in *Gibbons*.

60. 48 U.S. (7 How.) 283 (1849).

students (and instructors) forced to wade through and make sense of the various and lengthy seriatim opinions rendered in that case.

On a different note, some might dispute that *Gibbons* provides a sufficiently valuable discussion of the dormant Commerce Clause to warrant inclusion in a significant manner. That is, they might challenge Marshall's exclusivity theory on its *merits*, arguing that we should not teach a theory that is (in their view) erroneous or unhelpful. There are a number of merits-based objections to the exclusivity theory. Some challenge the exclusivity theory on theoretical grounds. For example, Justices Scalia and Thomas have argued that federal and state authority cannot be coterminous and mutually exclusive in the way that *Gibbons* seems to indicate.[61] They argue that, given the expansive scope of Congress's modern commerce power, treating Congress's power as exclusive would substantially restrict state regulatory authority, allowing states to regulate only those matters outside Congressional power (such as possession of guns near schools). Others might point out that, as a descriptive matter, *Gibbons* does not solve all of the puzzles lurking in the doctrine. For example, Congress may overrule the Court's dormant Commerce Clause decisions and restore state authority to regulate in ways that would otherwise run afoul of the doctrine.[62] Far from explaining this doctrinal feature, *Gibbons* calls it into question.[63] And still others might object that, as a doctrinal matter, Marshall's formalistic distinction between commercial and municipal measures is impossibly vague and incapable of judicial enforcement.

As an initial matter, I view the substance of these criticisms as overblown. For example, Justices Scalia and Thomas's charge that the exclusivity theory cannot be reconciled with the expansive scope of the commerce power ignores the possibility of a selectively exclusive commerce power. The commerce power need not be exclusive over the entire domain of regulatory actions within its scope. Indeed, in *Gibbons*, Daniel Webster and William Wirt, the counsel for Gibbons, argued only for a selectively exclusive commerce power.[64] Admittedly, defining the scope of the exclusive portion of the commerce power would, of course, entail some difficulty. What is so necessarily federal in nature so as to fall within the exclusive portion of the commerce power versus what is not so essential so as to fall into the concurrent portion? But one should not be too fast to pooh-pooh the idea of a

61. Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 614 (1997) (Thomas, J., dissenting).

62. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 431 (1946).

63. *See* Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. (forthcoming 2005) (arguing that, correctly interpreted, the Commerce Clause does not empower Congress to overrule dormant Commerce Clause limitations on state authority).

64. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 165 (1824).

selectively exclusive commerce power. Indeed, that is precisely what we have today as a practical matter: Congress's affirmative regulatory power is much broader than the scope of the judicially enforceable dormant Commerce Clause.[65]

Nor is there much force to the objection that the exclusivity theory fails to account for the modern doctrine. That is undoubtedly true, but it hardly seems a valid reason for ignoring *Gibbons*. The anti-protectionist theory also fails to account for several significant features of the modern doctrine, such as the *Pike* balancing test and the market participant exception.

Similarly, the objection that the exclusivity theory is too difficult to apply in practice has some truth to it but not enough to warrant ignoring the theory entirely. Distinguishing between commercial and municipal regulations is no easy task, but the modern doctrine also requires courts to perform a fairly difficult job. For example, although one might think that identifying facial discrimination would be simple, the Court has confused matters by holding that some municipal laws that favor *municipal* residents constitute discrimination against out-of-state citizens.[66] Worse still, the Court's efforts in determining when facially neutral state laws have a discriminatory intent or effect befuddle even the most acute observers.[67] And, of course, the *Pike* balancing test as applied by the Court is simply a bog.[68] Thus, both the anti-protectionist and exclusivity theories require courts to engage in difficult line-drawing.

More fundamentally, though, all of these merits-based objections are ultimately beside the point. I am not arguing that *Gibbons* fully accounts for

65. *Compare* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that commerce power authorizes Congress to regulate intrastate activities that have "substantial economic effect" upon interstate commerce), *with* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87–88 (1987) (holding that dormant Commerce Clause prevents states from adopting regulations that discriminate against or impermissibly burden interstate commerce).

66. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391–92 (1994); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

67. *Compare, e.g.*, Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 351–52 (1977) (holding that state requirement that apples packaged in closed containers list only the USDA grade markings—thereby barring containers listing other state-determined grades—in effect discriminated against apples from Washington), *with* Exxon Corp. v. Maryland, 437 U.S. 117, 125–26 (1978) (holding that state prohibition on petroleum refiners from operating retail gas stations in state did not in effect discriminate against interstate commerce, even though all refiners affected by the statute were out-of-state and most retailers that benefited from the statute were in-state).

68. *Compare CTS Corp.*, 481 U.S. at 91–94 (upholding state law providing that acquirer of control shares of domestic corporation in tender offer does not thereby acquire voting rights of such shares unless approved by owners of majority of disinterested shares), *with* Edgar v. MITE Corp., 457 U.S. 624, 643–46 (1982) (invalidating state law regulating tender offers for stock of domestic corporations as imposing excessive burden on interstate commerce in relation to local benefits).

and justifies the dormant Commerce Clause, that it provides a perfectly coherent, normatively attractive, easily workable, and descriptively accurate conception of the dormant Commerce Clause. Rather, my goal is a more modest one: to demonstrate that there is pedagogical value in restoring *Gibbons* to the Constitutional Law canon taught in American law schools. The choice between the two frameworks—the anti-protectionist and exclusivity theories—is a comparative one. Even if one prefers the anti-protectionist account, there is surely value for the reasons discussed above in discussing *Gibbons.*

Lastly, one might argue that, well, all the foregoing is true, but there are so many dormant Commerce Clause cases, and there is so little time in the typical Constitutional Law class. Gibbons might be interesting, but there are many interesting cases, and we cannot cover every single one. Under the circumstances, surely it is reasonable to focus on the modern cases, which (so the argument goes) drive contemporary doctrine.

I am not unsympathetic to this argument in principle because there are far more decisions and other materials worthy of attention than can possibly be covered in the typical, introductory Constitutional Law class. Judgment calls must be made, and, as a general matter, I am not about to be critical of how different instructors make those calls. But Gibbons provides a special case in my view for reasons that are tied to my conception of a good Constitutional Law class and the role of doctrine in it.

Obviously, the teaching of doctrine is a critical part of any law class—new lawyers must know what the law is—but doctrine cannot be the exclusive focus of a Constitutional Law course. Constitutional law is not static; rather, it is in constant flux as the Supreme Court modifies and tweaks doctrinal rules. Sometimes that tweaking is incremental in scope and glacial in pace; other times it is revolutionary and abrupt.[69] Either way, the legal rule announced today may not be the rule a year from now and is almost assuredly not going to be the rule a generation or two hence (by which time the Court will have supplanted today's rule with another).

It is precisely because constitutional law is in continual development that new lawyers must know not only what the law is but also how to critically analyze that law, assessing its strengths and weaknesses on a variety of metrics. How does that rule cohere with the constitutional text? Our history? The constitutional structure? What are the alternatives? How do they compare when judged by these same criteria? The task confronting the modern constitutional lawyer is not the self-evident, mechanical application of some pre-ordained, incontestable legal rule to a new set of facts—such cases, if they

69. *See, e.g.,* United States v. Lopez, 514 U.S. 549, 567–68 (1995) (invalidating congressional statute as beyond scope of commerce power for the first time in more than half a century).

occur at all, are rare. Rather, it is to challenge (or defend) the relevance and/or propriety of applying a given rule to the type of legal dispute at hand: does the proffered rule apply in this situation, and, if so, does that rule reflect the right interpretation of the underlying constitutional provision? Stated more abstractly, the key disputes in constitutional cases are interpretive in nature.

Of course, no one disputes the need to teach law students how to pierce the doctrinal veil—to think, as we like to say, like lawyers. But what does that have to do with the dormant Commerce Clause and *Gibbons*? Two things, both of which point to the final reasons for restoring *Gibbons*. First, the dormant Commerce Clause provides an excellent, largely apolitical platform for exposing students to the continual reshaping of constitutional law. In fact, since its inception, dormant Commerce Clause doctrine has undergone virtually continual revision.[70] Asked to juxtapose *Gibbons* with the modern doctrine, students are astounded at the extent to which the doctrine and its justification have changed over the past century and three quarters. To be sure, other doctrinal areas have undergone substantial revisions over time—few, if any, have not—but the interpretive changes in the dormant Commerce Clause area are less obviously tied to instrumental, partisan concerns about the legislation at issue. For example, students, at least initially, are prone to see the evolution of substantive due process doctrine in political terms; in their view, the Court's differing positions as to the constitutionality of social welfare legislation from *Lochner v. New York*[71] to *Nebbia v. New York*[72] reflected the partisan biases of the justices on those Courts. In contrast, the changes in the dormant Commerce Clause are not nearly so susceptible to this jaundiced, political view of constitutional adjudication. Rather, the doctrinal changes at work in the dormant Commerce Clause are comparatively apolitical in nature;

70. *Cooley* recast the critical inquiry as whether the contested measure addressed matters of "national" or "local" importance. *See supra* note 59. Ensuing decisions refocused the inquiry on whether the contested measure related to "commerce" or some other form of economic activity. *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868) (holding that insurance is not commerce and that, therefore, state insurance regulation does not violate the dormant Commerce Clause); Kidd v. Pearson, 128 U.S. 1, 20 (1888) (holding that manufacturing is not commerce and that, therefore, state prohibition of the manufacture of alcoholic beverages does not violate the dormant Commerce Clause). That inquiry, in turn, gave way during the New Deal to the *Southern Pacific* balancing test, according to which the challenged state regulation's impact upon interstate commerce was weighed against the local benefit sought to be obtained by the regulation. S. Pac. Co. v. State of Arizona *ex rel.* Sullivan, 325 U.S. 761, 770–71 (1945). Needless to say, this balancing test seemed to turn upon fairly fine, perhaps even arbitrary, distinctions. *Compare id.* at 781–82 (invalidating state law limiting length of trains to fourteen passenger cars or seventy freight cars), *with* S. Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938) (upholding state law limiting width of semi-trailer trucks to ninety inches). Not surprisingly, that test in turn gave way to the modern, anti-protectionist doctrine.

71. 198 U.S. 45 (1905) (invalidating maximum-hour limitation for bakers).

72. 291 U.S. 502 (1934) (upholding minimum-price requirement for milk producers).

the choice between *Cooley*'s "national/local" rule versus the *Southern Pacific* balancing test has yet to trigger a bitter, partisan debate among my law students, and I doubt it will yours. Thus, the dormant Commerce Clause serves as a particularly good doctrinal area to demonstrate that constitutional doctrine is in continual flux, and for reasons other than ideological partisanship.

Second, and more importantly, the Rehnquist Court has shown some interest in rethinking the dormant Commerce Clause. While no dramatic upheaval has taken place as of yet, several justices have publicly called for a wholesale reappraisal of the doctrine.[73] It is precisely at these potentially revolutionary moments that there is the greatest need for a comprehensive understanding of the theoretical and historical foundations for the doctrine. The lawyers of tomorrow may be asked not only whether the particular state tax or regulation at issue is discriminatory but what basis there is for the courts to continue to police state and local measures for compliance with the dormant Commerce Clause and whether those reasons extend to the situation at hand. *Gibbons* alone cannot provide a conclusive answer to those questions any more than it could or did in antebellum America, but the future lawyers of the twenty-first century can only be helped by knowing Chief Justice Marshall's answer.

CONCLUSION

Gibbons and its exclusivity theory are not the magic keys by which to unlock the mysteries of the dormant Commerce Clause. By the same token, however, neither are *H.P. Hood* and its anti-protectionist account of the Clause. Both theories have much to be said in their favor. For too long, however, we have emphasized the latter and virtually ignored the former. It is high time to acknowledge that anti-protectionism is not the only plausible theoretical foundation for the dormant Commerce Clause. It is high time to restore *Gibbons* to the Constitutional Law canon.

73. *See supra* note 4 and accompanying text.