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## ARTICLES

### REVITALIZING THE FORGOTTEN UNIFORMITY CONSTRAINT ON THE COMMERCE POWER

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## INTRODUCTION

IN Michigan, running a betting pool on the Super Bowl will get you hard time in prison. Operating a Super Bowl pool in Nevada, by contrast, is perfectly legal, as long as you have the proper license. Indeed, Nevada's economy benefits enormously from a multi-million dollar state-licensed sports betting industry.<sup>1</sup> Of course, the fact that an activity is legal in one state but not another is in itself hardly shocking; ours is a federalist system of government that affords significant regulatory authority to the states. But what *is*, or at least should be, eyebrow-raising is that this conduct violates *federal* law in some states, but not in others. Pursuant to the Professional and Amateur Sports Protection Act of 1992 ("Sports Protection Act"),<sup>2</sup> running a sports betting scheme is categorically prohibited by federal law in forty-six states, but not in Nevada, Delaware, Oregon, or Montana.<sup>3</sup>

And there is nothing that the forty-six constrained states can do about it. The Sports Protection Act does not merely regulate private conduct; it curtails the regulatory and revenue-raising authority of the states. It precludes non-exempted states from legalizing sports gambling or running state-sponsored lotteries that tie their

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<sup>1</sup> See S. Rep. No. 102-248, at 12 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3563; Anthony N. Cabot & Robert D. Faiss, Sports Gambling in the Cyberspace Era, 5 Chap. L. Rev. 1, 7 (2002).

<sup>2</sup> Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701–3704 (2000).

<sup>3</sup> See *id.* § 3704. The statute does not actually refer to these states by name. Rather, it provides that the sports betting ban does not apply to any scheme that was legal under state law prior to the introduction of the federal legislation, as long as legal gambling actually took place in that state before the federal ban. See *id.*; H. Wayne Clark, Jr., Who's In? The Bona Fide Future of Office Pools, 8 Gaming L. Rev. 202, 204 (2004) (suggesting that a few state laws authorizing office pools may also have been grandfathered in by the Sports Protection Act); I. Nelson Rose, Gambling and the Law: Internet Gambling: Statutes and International Law, SE81 ALI-ABA 231, 242–44 (2000) (listing other state-authorized gambling schemes that may have been grandfathered in by the Sports Protection Act). No state is completely exempt from the federal proscription; each exempted state may continue only those forms of sports gambling that were legal and practiced prior to the federal legislation. Thus, Nevada is precluded from creating a sports-based lottery (as it allowed only casino sports gambling prior to the federal ban), and Oregon is precluded from introducing casino sports books (as it ran only a sports-based lottery scheme). See 138 Cong. Rec. 12,973 (1992) (statement of Sen. DeConcini).

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payoffs to the outcome of sporting events.<sup>4</sup> Thus, Oregon and Delaware may run these popular and highly lucrative lotteries, but other states may not.<sup>5</sup> Similarly, Nevada may derive enormous financial benefits from casino sports book betting, but other states may not.<sup>6</sup>

In the months immediately preceding the passage of this statute—during which many states were faced with severe budget shortfalls<sup>7</sup>—a large number of states, including Florida and California, were actively considering implementing sports-based state lotteries or otherwise legalizing some form of sports betting as a way to make ends meet.<sup>8</sup> The express purpose of the Sports Protection Act was to preclude those states from carrying out their plans. As the Senate Report explains, Congress wanted “to stop the spread of State-sponsored sports gambling.”<sup>9</sup> “Once a State legalizes sports gambling,” notes the report, “it will be extremely difficult for other States to resist the lure. The current pressures in such places as New Jersey and Florida to institute casino-style sports gambling illustrate the point.”<sup>10</sup> Lamenting that “[w]ithout Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum,”<sup>11</sup> Congress stepped in to stem the tide.

The Sports Protection Act has achieved its goal.<sup>12</sup> Today, as the states are once again faced with profound budget crises, there is

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<sup>4</sup> See 28 U.S.C. §§ 3702, 3704.

<sup>5</sup> See S. Rep. No. 102-248, at 10 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3561.

<sup>6</sup> See *id.* at 10, 12, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3561, 3563.

<sup>7</sup> See Stephen Loffredo, “If You Ain’t Got the Do, Re, Mi”: The Commerce Clause and State Residence Restrictions on Welfare, 11 *Yale L. & Pol’y Rev.* 147, 171 (1993).

<sup>8</sup> See S. Rep. No. 102-248, at 5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556; 138 Cong. Rec. 12,972 (1992) (statement of Sen. DeConcini); Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 *Seton Hall J. Sport L.* 5, 8 n.12 (1992).

<sup>9</sup> S. Rep. No. 102-248, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555.

<sup>10</sup> *Id.* at 5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556.

<sup>11</sup> *Id.*

<sup>12</sup> In recent years, numerous bills have been proposed in Congress to close the “Las Vegas loophole” created by the Sports Protection Act, but these bills seek to place Nevada on the same ground as the rest of the states only with regard to betting on amateur sports; they do not purport to challenge Nevada’s federally granted monopoly on professional sports gambling. See Aaron J. Slavin, Comment, *The “Las Vegas*

nothing that a state like Michigan can do if it decides that it wants to compete with Nevada in the casino sports book business or if it decides that it wants to increase revenue with an NFL-based lottery; it is required by federal law to stay completely out of the lucrative sports betting arena.<sup>13</sup>

Is this law constitutional? The Supreme Court would likely say that it is. Employing a straightforward textual reading of the Commerce Clause,<sup>14</sup> and contrasting that clause with the plain language of the Bankruptcy Clause<sup>15</sup> and the Tax Uniformity Clause<sup>16</sup>—both of which expressly mandate uniform regulation—the Court has repeated time and time again in recent years (though it has never squarely held) that Congress is not constrained by a requirement to legislate uniformly among the states in its exercise of the commerce power.<sup>17</sup> Thus, according to the Court, Congress is

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Loophole” and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling, 10 U. Miami Bus. L. Rev. 715, 720 (2002).

<sup>13</sup> Of the forty-six states that were not afforded some form of exemption from the federal ban, only one—New Jersey—was given an opportunity to legalize sports gambling. See 28 U.S.C. § 3704(a)(3); Rose, *supra* note 3, at 242. Included within the Sports Protection Act was a peculiar provision affording New Jersey one year in which to legalize sports betting in Atlantic City. See 28 U.S.C. § 3704(a)(3); Rose, *supra* note 3, at 242. This provision did not mention New Jersey by name; rather, it afforded a one-year window of opportunity to authorize sports gambling in any municipality in which there had been continuous casino gambling for the past ten years “pursuant to a comprehensive system of State regulation authorized by that State’s constitution and applicable solely to such municipality.” 28 U.S.C. § 3704(a)(3). Of course, Congress knew full well that only Atlantic City fell into that cramped statutory category. Congress inserted this provision into the law “to assuage the state of New Jersey’s Atlantic City casino lobbyists.” Thomas J. Ostertag, *From Shoeless Joe to Charley Hustle: Major League Baseball’s Continuing Crusade Against Sports Gambling*, 2 Seton Hall J. Sport L. 19, 20 n.4 (1992). Due largely to the political influence of Senator Bradley, one of the federal bill’s principal sponsors, see *id.* at 20 n.3, New Jersey declined to exercise this option. See also Dan Caesar, *Sports Books in St. Louis? No Chance, Says a 1992 Law*, St. Louis Post-Dispatch, July 12, 2001, at 36 (quoting Professor I. Nelson Rose).

<sup>14</sup> U.S. Const. art. I, § 8, cl. 3 (empowering Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

<sup>15</sup> *Id.* § 8, cl. 4 (empowering Congress to establish “uniform Laws on the subject of Bankruptcies throughout the United States”).

<sup>16</sup> *Id.* § 8, cl. 1 (empowering Congress to “lay and collect Taxes, Duties, Imposts and Excises” but requiring that “all Duties, Imposts and Excises shall be uniform throughout the United States”). This clause is usually referred to simply as the Uniformity Clause.

<sup>17</sup> See *infra* note 36.

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free to enact commercial regulations that apply in some states, but not in others, or that explicitly treat some states differently than others.

This Article will seek to call that conclusion into question. Despite the nonchalance with which the Court has pronounced and restated its current rule, it is in fact quite a radical thing to suggest, based on nothing more than a superficial textual analysis, that the Commerce Clause empowers Congress to discriminate between the states. That suggestion does not, I submit, stand up to more searching scrutiny.

In Part I, I will review the modern cases articulating the lack of a uniformity constraint on the commerce power and criticize the current doctrine as the product of a perfunctory textual analysis of a type wholly unsuited to constitutional decisionmaking.

Part II will briefly explore the notion of uniformity in constitutional law, examining the various types of uniformity that might be expected from federal laws and the various rationales for seeking them. It will explain that uniformity can serve the goals of both efficiency and nondiscrimination.

Part III will approach the question from an historical perspective—an inquiry that paints a picture very different from the one depicted by the current doctrine. Uniformity may be forgotten today, but its importance to the framing generation cannot be overstated. The desire for uniform regulation of commerce was perhaps the single biggest catalyst for the Constitutional Convention. The states were unable to coordinate their trade policies to counter the protectionist actions of foreign nations; instead, they undercut each other's efforts and bickered incessantly among themselves, to the virtual ruin of American shipping. For that reason, there was a near-universal consensus both before and during the Federal Convention that the federal government should be invested with the power to enact a single uniform set of commercial regulations.

And more importantly, the need for uniformity was not simply the precipitating factor in the creation of the federal commerce power; it was also considered to be a fundamental limitation upon that power. Many delegates to the Convention—particularly those from the Southern states—feared that Congress would use the commerce power as a means of discriminating in favor of some

states at the expense of others. Thus, the Southern states proposed, and the Convention ratified, a provision intended to preclude Congress from enacting nonuniform regulations of commerce. For purely stylistic reasons, that provision was ultimately broken into two different clauses, the Port Preference Clause<sup>18</sup> and the Uniformity Clause, but the Framers understood those clauses to be one in purpose, and to have the combined effect of categorically prohibiting the nonuniform exercise of the commerce power. Had the Constitution been understood to provide otherwise, it is likely that it would never have been proposed, let alone ratified.

Yet today, the Supreme Court has reached the exact opposite conclusion. For a Court that purports to care so much about originalism to articulate and stand by a principle so utterly oblivious to history is curious to say the least. In Part IV, I will explore how this curiosity came to pass—how the Court lost sight of such a fundamental historical principle. As it turns out, the Court's modern rule is not the product of a principled turn from history and precedent. Quite the contrary, it is the result of nothing more than sloppy decisionmaking.

That conclusion, in turn, presents the crucial question, which I will address in Part V: What, if anything, should be done to bridge the gap between the Framers' intent to create a uniformity constraint on the commerce power and the modern Court's conclusion that no such constraint exists?

Much is at stake in the answer to that question, for Congress's nonuniform regulation of commerce goes well beyond the idiosyncratic world of sports betting. In recent years, Congress has regulated nonuniformly through the commerce power in countless areas touching on all facets of modern life, from tax law to environmental law and criminal law. If the Court's conclusion that there is no uniformity constraint on the commerce power is wrong, then a great many federal statutes are constitutionally suspect.

Stepping back even further, the question of whether we should revive the forgotten historical consensus begs a more fundamental

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<sup>18</sup> U.S. Const. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.").

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inquiry into the proper role of history and text in constitutional interpretation. In particular, this inquiry reveals an unheralded downside to modern originalism; emphasizing the original meaning of the text over the original understanding of the Framers has many virtues, to be sure, but also runs the risk of undermining core constitutional values that are, for insubstantial reasons, imperfectly reflected in the text.

Part V will argue that the uniformity constraint on the commerce power is just such a core constitutional value. Because the Framers narrowly conceived the commerce power as extending only to the imposition of excises and duties and the regulation of navigation and shipping, the decision to divide the mandate against the nonuniform regulation of commerce into two more narrowly drawn clauses was, in the minds of the Framers, inconsequential. The Uniformity Clause, which requires all excises and duties to be uniform throughout the United States, and the Port Preference Clause, which precludes Congress from enacting regulations of navigation or shipping that favor the ports of one state over those of another, were sufficient in their day to fully protect against the nonuniform exercise of the commerce power. In today's world, however—a world in which the commerce power has achieved a drastically broader ambit—if we continue to read the Uniformity Clause and the Port Preference Clause narrowly and literally, and if we fail to imply a general uniformity constraint on the commerce power, then we fatally undermine the fundamental constitutional principle that pervaded the Constitutional Convention, that Congress must not be permitted to use the commerce power to favor some states at the expense of others. Part V will contend that we should interpret the Constitution in a manner that preserves this fundamental precept and ensures that it remains relevant and vital in the twenty-first century and beyond.

Finally, Part VI will explain that reviving the general uniformity constraint on the federal commerce power, though it would call into question a number of federal statutes, would not have unacceptably dire consequences for the corpus juris. If the courts were to recognize a uniformity limitation in the Commerce Clause, the vast majority of federal laws enacted pursuant to the commerce power that can be said to discriminate in some sense between

states would not be struck down. Federal acts that regulate in neutral terms but naturally burden some states more than others—by, for instance, imposing environmental constraints on coal mining—would not violate the uniformity principle. Nor would laws that incorporate differing state standards. The only federal laws that would potentially be unconstitutional under the uniformity principle would be those statutes that—like the Sports Protection Act—regulate along state lines and treat the same object differently in different states. Part VI will examine some representative federal statutes of this nature and will explore the circumstances in which they might survive, or fail, constitutional scrutiny. To be sure, Part VI will raise more questions than it answers. The exact contours of the constitutional uniformity principle have never been clearly established, even after two centuries of jurisprudence under the Uniformity and Bankruptcy Clauses, and it is not my purpose here to attempt to delineate them or to explain exactly how they would operate to constrain the commerce power. The goal of Part VI is substantially more modest: to flag the issues that the courts will need to decide and the factors that they will need to consider if they choose to revitalize the uniformity constraint on the commerce power. In particular, one question that the courts will be forced to confront is whether it violates the uniformity principle for Congress to grandfather in existing state laws from the scope of new federal regulations, as was done with the Sports Protection Act. Part VI will offer some preliminary thoughts on this difficult and important question.

#### I. THE MODERN RULE: NO UNIFORMITY CONSTRAINT

Not surprisingly, the Sports Protection Act discussed above was opposed by the National Conference of State Legislatures, the National Association of State Budget Officers, the North American Association of State and Provincial Lotteries, and the Council of State Governments, none of which wanted to see the regulatory authority and revenue-generating capacity of their members curtailed—and many of which were particularly troubled by the bill's



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unequal treatment of the states.<sup>19</sup> But those who opposed the law did not assert the existence of any sort of categorical constitutional bar to nonuniformity in the exercise of the commerce power. Rather, they couched their objections to the nonuniform application of the bill in equal protection terms, conceding that it “is true that the courts require a showing of only a rational basis”<sup>20</sup> to uphold a federal statute enacted pursuant to the commerce power that discriminates between the states, but claiming that there was no such basis for the differing treatment of the states by the Sports Protection Act.<sup>21</sup>

This was not much of an objection. As every law student learns, rational basis review is, in the Supreme Court’s words, “the most relaxed and tolerant form of judicial scrutiny”<sup>22</sup>—“a paradigm of judicial restraint.”<sup>23</sup> So long as there are “‘plausible reasons’ for Congress’s action, ‘[the judicial] inquiry is at an end.’”<sup>24</sup> Congress surely had plausible reasons for grandfathering in existing state laws. It recognized that the asserted evils of sports gambling—the threat to the integrity and image of amateur and professional

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<sup>19</sup> See Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary, 102d Cong. 99–190, 231–35 (1991); Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary, 102d Cong. 58–72, 88–100 (1991); S. Rep. No. 102-248, at 7, 13 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3558, 3563.

<sup>20</sup> 138 Cong. Rec. 12,975 (1992) (statement of Sen. Grassley).

<sup>21</sup> See S. Rep. No. 102-248, at 13 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3563 (minority views of Sen. Grassley) (“There is simply no rational basis, as a matter of Federal policy, for allowing sports wagering in three States, while prohibiting it in the other 47, nor any rational basis . . . for the purported discrimination between Nevada, Oregon, and Delaware.”); 138 Cong. Rec. 12,975 (1992) (statement of Sen. Grassley) (“[T]here is no rational basis for letting some well-connected States with sports gambling get away with what the other 46 cannot.”); see also Rose, *supra* note 3, at 242 (“The statute is of questionable constitutionality, because there is no rational reason for . . . which states get special treatment and benefits.”). Senator Grassley proposed an amendment that would have afforded all of the other states an opportunity, similar to the one given to New Jersey, see *supra* note 13, to exempt themselves from the federal law. See 138 Cong. Rec. 12,974 (1992) (statement of Sen. Grassley). That amendment failed. See *id.* at 12,979 (1992) (statement of Sen. Kerry, Presiding Officer).

<sup>22</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

<sup>23</sup> *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993).

<sup>24</sup> *Id.* at 313–14 (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

sports and the encouragement of youth gambling<sup>25</sup>—would seem to call for a full nationwide ban, but it had “no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of [the federal] legislation,”<sup>26</sup> or to Montana, which had already legalized certain forms of sports gambling at bingo parlors.<sup>27</sup> Nor did Congress have “any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry.”<sup>28</sup> This differential treatment may not have reached the height of fairness, but it was by no means entirely irrational.<sup>29</sup> For that reason, even the leader of the bill’s opposition could only bring himself to assert on the Senate floor that the law was “arguably unconstitutional.”<sup>30</sup>

That the Sports Protection Act’s opponents made no effort to argue that the nonuniform regulation of commerce, even if rational, is beyond the power of Congress is not particularly surprising. The Supreme Court has repeatedly scorned that very assertion. While the dormant Commerce Clause prohibits *states* from discriminating against interstate commerce,<sup>31</sup> that doctrine is not

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<sup>25</sup> See S. Rep. No. 102-248, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555.

<sup>26</sup> *Id.* at 8, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559.

<sup>27</sup> 138 Cong. Rec. 12,973 (1992) (statement of Sen. DeConcini).

<sup>28</sup> See S. Rep. No. 102-248, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559; see also 138 Cong. Rec. 12,978 (1992) (statement of Sen. DeConcini) (“So instead of trying to have the Government run roughshod over a State that has built its economy around that, we exempted them. It seems to me that this is what good legislation is all about, being understanding of the economic gains in each State.”). The exemption for New Jersey is surely a more difficult call, since New Jersey did not authorize, and had never authorized, sports betting. Still, Atlantic City was a major casino center, rivaled only by Las Vegas, and it was probably rational for Congress to decide that, because New Jersey had long ago created a gambling city upon which it had built a substantial part of its economy, it should have been given the right to decide for itself which forms of betting would be legal there and whether it wanted to compete in the sports betting arena with Las Vegas.

<sup>29</sup> *Cf.* *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (employing rational basis scrutiny to uphold a grandfather provision of local ordinance under the Equal Protection Clause). Indeed, the Supreme Court has long maintained that “[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all.” *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949).

<sup>30</sup> 138 Cong. Rec. 12,975 (1992) (statement of Sen. Grassley).

<sup>31</sup> See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996); *infra* note 158.

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applicable to the federal government.<sup>32</sup> To the contrary, the federal government is, according to the Court, perfectly free to regulate the states unevenly pursuant to the commerce power. The Supreme Court has found “no warrant” for the “contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid.”<sup>33</sup> According to the Court, “[i]t is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power,” and may “choose the . . . places to which its regulation shall apply.”<sup>34</sup> Thus, the Court has declared time and again over the course of the last century (though it has never squarely held<sup>35</sup>) that “[t]here is no requirement of uniformity in connection with the commerce power.”<sup>36</sup>

Because the Court has disavowed the existence of a uniformity requirement, it has declared that a nonuniform exercise of the commerce power should be subjected only to the permissive constraints of the equal protection component of the Due Process Clause.<sup>37</sup> If such a law does not employ suspect classifications or infringe on fundamental rights, it will be upheld as long as the distinctions that it draws between states are not entirely irrational.<sup>38</sup>

It was this line of cases that gave the supporters of the Sports Protection Act confidence that the law was constitutional, notwithstanding its discriminatory scope. Senator Bradley defended the

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<sup>32</sup> In fact, the Court has long held that Congress can authorize the states to discriminate in certain circumstances. See, e.g., *Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).

<sup>33</sup> *Currin v. Wallace*, 306 U.S. 1, 14 (1939).

<sup>34</sup> *Id.*

<sup>35</sup> See *infra* note 267.

<sup>36</sup> *Currin*, 306 U.S. at 14; see also, e.g., *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982) (“Such uniformity in the applicability of legislation is not required by the Commerce Clause.”); *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (“Nor does the Commerce Clause impose requirements of geographic uniformity.”); *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 327 (1917) (“[I]t is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States.”).

<sup>37</sup> See *Hodel v. Indiana*, 452 U.S. 314, 331–33 (1981). See generally *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the Fifth Amendment’s Due Process Clause contains a guarantee of equal protection of the laws).

<sup>38</sup> See *Hodel*, 452 U.S. at 331–32.

constitutionality of the bill in the legal press by insisting that, because the “Supreme Court has explicitly held that there is no requirement of uniformity when Congress is exercising its power pursuant to the Commerce Clause,” there was “no legitimate constitutional basis” for objecting to the bill on the ground that it discriminates among the states.<sup>39</sup> And it was this line of cases that forced the bill’s opponents to resort to unconvincing and half-hearted pleas of irrationality.

The Court’s language in these cases is plain enough. But is there really “no legitimate constitutional basis” at all for suggesting that Congress cannot enact regulations of commerce that explicitly discriminate between the states? I hope to establish below that, at the very least, this was an overstatement on Senator Bradley’s part. Indeed, if we even so much as dab a toe beneath the surface of the calm seas of settled precedent, we immediately feel the tug of a powerful undertow.

The Court’s failure to find a uniformity requirement in the exercise of the commerce power is based on a simple comparison of constitutional texts. The Commerce Clause empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>40</sup> As Chief Justice Marshall explained long ago, that power is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”<sup>41</sup> The Commerce Clause contains no express uniformity requirement, in marked contrast with the Uniformity Clause—which empowers Congress to impose taxes, but directs that “all Duties, Imposts and Excises shall be uniform throughout the United States”<sup>42</sup>—and the Naturalization and Bankruptcy Clauses, which allow Congress “[t]o establish [a] uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>43</sup> Noting the lack of a comparable expression of a uniformity requirement in the Com-

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<sup>39</sup> Bradley, *supra* note 8, at 17–18.

<sup>40</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>41</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

<sup>42</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>43</sup> *Id.* § 8, cl. 4.

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merce Clause, the Court has concluded that no such requirement exists.<sup>44</sup>

The only express limitation on the commerce power in the Constitution is the largely forgotten Port Preference Clause, which provides that “[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”<sup>45</sup> But this clause imposes, on its face, a very narrow restriction, applying only to commercial regulations directly targeting or affecting ports. Thus, the Court has considered the Port Preference Clause only rarely, usually in cases involving acts that operated to steer shipping traffic from one port to another, such as a law placing an obstruction in one fork of a river, thus diverting the water to the other fork (in another state),<sup>46</sup> or a law approving a low-clearance bridge that precluded boats with high masts from sailing up the river into another state.<sup>47</sup>

The Court’s reasoning in refusing to countenance a general uniformity constraint on the commerce power has the appeal of simplicity. The Constitution contains a provision precluding discrimination in the regulation of commerce, but that provision on its face applies only to a narrow set of laws regulating ports. The Framers knew how to express a more general requirement of uniform legislation; they did so with regard to some congressional powers, like the bankruptcy and tax powers, but did not do so for the commerce power. When a text contains a restriction in some sections, but not others, ordinary principles of statutory interpretation counsel against reading the restriction into the other sections.<sup>48</sup>

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<sup>44</sup> See *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 468–69 (1982); *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950); *Morgan v. Virginia*, 328 U.S. 373, 388–89 (1946) (Frankfurter, J., concurring); *Currin v. Wallace*, 306 U.S. 1, 14 (1939).

<sup>45</sup> U.S. Const. art. I, § 9, cl. 6.

<sup>46</sup> See *South Carolina v. Georgia*, 93 U.S. 4, 8–13 (1876).

<sup>47</sup> See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433–46 (1855). More recently, lower courts have applied the Port Preference Clause to acts involving regulation of airports. See, e.g., *Kansas v. United States*, 16 F.3d 436, 439–41 (D.C. Cir. 1994); *City of Houston v. FAA*, 679 F.2d 1184, 1196–98 (5th Cir. 1982).

<sup>48</sup> See, e.g., *Bailey v. United States*, 516 U.S. 137, 144–46 (1995); *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (“That Congress was perfectly capable of adopting a ‘voluntariness’ limitation where it felt that one was necessary is plain from

But affording dispositive weight to base textualism of this sort in constitutional interpretation must surely prompt John Marshall to flail in his grave. To employ such reasoning is, after all, to “forget[] that it is a *constitution* we are expounding,” not a “legal code.”<sup>49</sup> The Constitution is not the Employment Retirement Income Security Act (“ERISA”), and a constitutional analysis that begins and ends with the text, and does nothing more than compare the disparate wording of different clauses, is, in most circumstances, woefully incomplete.

And so it is here. In fact, the Court’s modern rule is, I submit, directly contrary both to the original intent of the Framers and to the once-settled general understanding of the scope of the commerce power. It would probably come as a surprise to Senator Bradley, and to many members of the current Supreme Court, that Justice Story once declared quite matter-of-factly that the Constitution “prevent[s] any possibility of applying the power to . . . regulate commerce[] injuriously to the interests of any one state, so as to favour or aid another.”<sup>50</sup> And the Justices might be even more shocked to learn that the Court itself once decreed that, because “the want of uniformity in commercial regulations[] was one of the

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comparing § 2(a) with § 2(b), which excludes only those individuals who ‘*voluntarily* assisted the enemy forces . . . in their operations . . .’ Under traditional principles of statutory construction, the deliberate omission of the word ‘voluntary’ from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.” (quoting Constitution of the International Refugee Organization, Dec. 15, 1946, annex I, pt. 2, § 2(b), 62 Stat. 3037, 3052, 18 U.N.T.S. 3, 20)).

<sup>49</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). It is of course true that Marshall himself, in *McCulloch* itself, drew a comparison between the disparate wording of constitutional clauses. See *id.* at 414–15 (“It is, we think, impossible to compare the sentence which prohibits a State from laying ‘imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,’ with that which authorizes Congress ‘to make all laws which shall be necessary and proper for carrying into execution’ the powers of the general government, without feeling a conviction that the [C]onvention understood itself to change materially the meaning of the word ‘necessary,’ by prefixing the word ‘absolutely.’” (quoting U.S. Const. art. I, § 10, cl. 2; § 8, cl. 18)). But that comparison was merely a single thread in a rich and detailed tapestry of textual, contextual, historical, and conceptual arguments. See *id.* at 401–25; see also Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 750–58 (1999). It was in no way a dispositive argument unto itself.

<sup>50</sup> 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011 (Boston, Hilliard, Gray, and Co. 1833).

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grievances of the citizens under the Confederation[] and the new Constitution was adopted, among other things, to remedy th[at] defect[] in the prior system,” the Constitution provides that “Congress . . . is forbidden to make any discrimination in enacting commercial or revenue regulations.”<sup>51</sup>

Clearly, there is more to the picture here than meets the eye upon a casual review of the text of Article I. Yet that casual review is all that the Supreme Court has undertaken in recounting its current position. An adequate explanation necessitates a significantly more thorough inquiry, starting with a careful examination of the historical record.

## II. THE NATURE OF UNIFORMITY

But first, before asking *whether* the Framers intended to impose a uniformity constraint on the commerce power, it is useful to inquire as to *why* they might have chosen to do so, and what effect they might have intended such a constraint to have. That is to say, why did the Framers seek to provide that certain federal regulations (such as those governing bankruptcy, direct taxes, naturalization, and, as we shall see, commerce) must be uniform throughout the United States? And what, exactly, does it mean to require “uniformity” among the states?

Although the term “uniform throughout the United States” could potentially encompass any number of concepts, at the most fundamental level, it suggests two distinct ideas, which I will label, for lack of a better taxonomy, “uniform rules” and “uniform treatment.” Each of these ideas reflects a different rationale for the uniformity requirement.

I use the phrase “uniform rules” to signify a single set of regulations that are generally applicable nationwide, in service of the goal of economic efficiency. For most of us, this is the concept that first comes to mind when we think about uniform laws. This is the type of uniformity sought by the National Conference of Commissioners on Uniform State Laws, whose many uniform acts, including, most notably, the Uniform Commercial Code, are intended to

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<sup>51</sup> Ward v. Maryland, 79 U.S. (12 Wall.) 418, 431 (1870).

promote a single efficient national market and legal system.<sup>52</sup> Such uniform rules are

desirable and most urgently and immediately needed in matters affecting directly the business common to and coextensive with the whole country, [because] variant and conflicting laws produce in all the states the special evils or inconveniences of perplexity, uncertainty, and confusion, with consequent waste, a tendency to hinder freedom of trade and to occasion unnecessary insecurity of contracts, resulting in needless litigation and miscarriage of justice.<sup>53</sup>

In calling for “uniform” regulations, the Framers clearly had in mind uniform rules of this type, and for just this reason.<sup>54</sup>

But this notion of “uniform rules” is not the only notion of uniformity that pervaded the Constitutional Convention. The Framers also demanded “uniform treatment”—a term that I use to convey an anti-discrimination, as opposed to a utilitarian, concept. The motivation for uniform treatment is not the efficiency that stems from establishing a single set of rules to govern all transactions throughout the nation, but rather the fairness that results from ensuring that the states (and their people) are all treated equally by the federal government.<sup>55</sup> On an individual (as opposed to a state)

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<sup>52</sup> See Walter P. Armstrong, Jr., *A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws* 13 (1991).

<sup>53</sup> *Id.* at 20.

<sup>54</sup> See *infra* Part III.

<sup>55</sup> It may be worth noting that the line that I am drawing here between “uniform rules” and “uniform treatment” does not correspond to the principal lines that have been drawn in employment discrimination and equal protection law. The fundamental division in those areas has been between the notions of “disparate treatment” and “disparate impact.” Both disparate treatment and disparate impact are concerned with nondiscrimination; disparate treatment involves express discrimination, whereas disparate impact involves the discrimination that results from the unequal effect of facially neutral policies. See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Thus, both disparate treatment and disparate impact can be said to fall within the concept of “uniform treatment.” (Although, I hasten to add, “disparate impact” cases would not be cognizable under the uniformity constraint on the commerce power. See *infra* Section VI.A.) “Uniform rules,” by contrast, is not an equality concept at all; it is an efficiency concept.

Along the same lines, there has been much discussion of a potential distinction in equal protection law between “equality of opportunity” and “equality of result.” See, e.g., Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurispruden-*



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level, this notion of uniformity as a means of ensuring equal treatment is the impetus behind institutions like the Federal Sentencing Guidelines<sup>56</sup> and, indeed, the appellate jurisdiction of the Supreme Court.<sup>57</sup>

It is important to distinguish between these two concepts when contemplating questions of uniformity among the states. Because a call for uniform rules is a more stringent demand than a call for uniform treatment, some laws can be “uniform” in the latter sense, but not the former. For instance, a federal law allowing each state to decide for itself whether it wishes to legalize sports gambling is uniform in the sense of uniform treatment, but not in the sense of uniform rules. Such a law affords each state the same opportunity to act (thus uniform treatment), but the ultimate rules are likely to vary across state lines—sports betting will probably be legal in

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tial Appraisal, 74 Cal. L. Rev. 1687, 1698 (1986); David A. Strauss, The Illusory Distinction Between Equality of Opportunity and Equality of Result, 34 Wm. & Mary L. Rev. 171, 171–72 (1992). That distinction also differs from the one drawn here, and for the same reason. Both “equality of opportunity” and “equality of result” are concerned with treating people the same—with genuine notions of nondiscrimination and equality. The question is simply whether equality should be determined by the opportunities seemingly afforded ex ante by the policy in question or by the ultimate impact of that policy on the well-being of the people. Neither of those concepts corresponds to “uniform rules,” which seeks efficiency rather than equality.

<sup>56</sup> See, e.g., Jason Bent, Note, Sentencing Equality for Deportable Aliens: Departures from the Sentencing Guidelines on the Basis of Alienage, 98 Mich. L. Rev. 1320, 1345 (2000) (noting that “the idea of equal treatment for similarly situated defendants was central to the creation of a uniform system of sentencing guidelines”).

<sup>57</sup> As future-Justice Iredell remarked at the North Carolina Ratification Convention:

The propriety of having a Supreme Court in every government must be obvious to every man of reflection. There can be no other way of securing the administration of justice uniformly in the several states. There might be, otherwise, as many different adjudications on the same subject as there are states. It is to be hoped that, if this government be established, connections still more intimate than the present will subsist between the different states. The same measure of justice, therefore, as to the objects of their common concern, ought to prevail in all. A man in North Carolina, for instance, if he owed £100 here, and was compellable to pay it in good money, ought to have the means of recovering the same sum, if due to him in Rhode Island, and not merely the nominal sum, at about an eighth or tenth part of its intrinsic value. To obviate such a grievance as this, the Constitution has provided a tribunal to administer equal justice to all.

4 Debates on the Adoption of the Federal Constitution 147 (Ayer Co. 1987) (Jonathan Elliot ed., 1888) [hereinafter Elliot’s Debates].

some states, and not in others—as some states will choose to legalize gambling and others will not (thus nonuniform rules). Nationwide efficiency may be sacrificed, but nondiscrimination will be preserved.

### III. THE HISTORICAL UNIFORMITY MANDATE

An examination of the historical record reveals that, notwithstanding what was essentially an inadvertent failure to include an explicit uniformity mandate in the text of the Commerce Clause, the Framers of the Federal Constitution were deeply concerned with both “uniform rules” and “uniform treatment” in all commercial matters.

#### *A. The Articles of Confederation*

The lack of a provision in the Articles of Confederation empowering Congress to regulate commerce was one of the primary catalysts for the Constitutional Convention.<sup>58</sup> Because the commerce power resided in the several states, rather than in the central government, foreign nations—most notably Great Britain—dealt with the states as a set of individual, rival trading nations, imposing embargoes and restrictions on American shipping and successfully pitting the states against one another.<sup>59</sup> Lacking regulatory authority over commerce, Congress was powerless to strike back with a unified trade policy. Some individual states sought to respond with their own trade restrictions, but that simply afforded the other states a competitive advantage. For example, in 1785, three New England states, Massachusetts, Rhode Island, and New Hampshire, “passed laws restricting British trade in their ports, hoping to force concessions from the British in the West Indies. But Connecticut, seeing a chance to draw the British trade to itself, refused to join

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<sup>58</sup> See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827) (“It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress.”); *The Federalist* No. 22 (Alexander Hamilton).

<sup>59</sup> See David Hutchison, *The Foundations of the Constitution* 102 (1975).

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the others, and the scheme foundered.”<sup>60</sup> In the absence of federal authority, it was simply impossible to get all thirteen states to retaliate in unison against foreign restrictions.<sup>61</sup>

To make matters worse, the states also taxed and discriminated against goods shipped in interstate commerce:

Some states taxed the goods of other states and greatly irritated their neighbors. Connecticut taxed the imports of Massachusetts. Rhode Island taxed her neighbors. New York, New Jersey, Pennsylvania, and Maryland passed navigation laws which treated the citizens of the other states of the Union as aliens. The laws of Maryland, in violation of the Articles of Confederation, granted exclusive privileges to her own vessels, yet all Congress could do was to recommend to the contrary. Virginia did the same thing. New York, Pennsylvania, Virginia, and South Carolina “taxed and irritated the adjoining States trading through them.”<sup>62</sup>

Here again, Congress was impotent, and American commerce suffered greatly as a result.

Consequently, pleas were repeatedly made in Congress for the states to empower the federal government to regulate commerce. For instance, a committee consisting of, among others, Elbridge Gerry and Thomas Jefferson, reported in 1784 on the “delicate situation of commerce at this time,” declaring that

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<sup>60</sup> Christopher Collier & James Lincoln Collier, *Decision in Philadelphia* 6 (1986). Madison lamented this development in a letter to Jefferson:

The States are every day giving proofs that separate regulations are more likely to set them by the ears than to attain the common object. When Massachusetts set on foot a retaliation of the policy of Great Britain, Connecticut declared her ports free. New Jersey served New York in the same way. And Delaware I am told has lately followed the example in opposition to the commercial plans of Pennsylvania.

Charles Warren, *The Making of the Constitution* 16 (2d ed. 1937) (quoting a letter from James Madison to Thomas Jefferson (Mar. 18, 1786)).

<sup>61</sup> See Hutchison, *supra* note 59, at 102–03.

<sup>62</sup> *Id.* at 103 (quoting the recollections of Madison in 5 Elliot’s *Debates*, *supra* note 57, at 119 (footnotes omitted)); see also Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 *Minn. L. Rev.* 432, 448–49 (1941).

few objects of greater importance can present themselves to their notice. The fortune of every Citizen is interested in the fate of commerce: for it is the constant source of industry and wealth; and the value of our produce and our land must ever rise or fall in proportion to the prosperous or adverse state of trade.<sup>63</sup>

The committee explained that, “[a]lready has Great-Britain attempted a monopoly which is destructive of our trade with her West-India Islands,” and there was “too much reason to apprehend other nations might follow the example, and the commerce of America become the victim of illiberal policy.”<sup>64</sup> The committee thus cautioned that,

unless the United States can act as a nation and be regarded as such by foreign powers, and unless Congress for this purpose shall be vested with powers competent to the protection of commerce, they can never command reciprocal advantages in trade; and without such reciprocity, our foreign commerce must decline and eventually be annihilated.<sup>65</sup>

The following year, Congress explained the problem in much greater detail in a letter to the state legislatures imploring them to authorize a federal power to regulate commerce:

If . . . the Commercial regulations, of any foreign power, contravene the interests of any particular State . . . , what course[] will it take to remedy the evil? If it makes similar regulations to counteract those of that power by reciprocating the disadvantages which it feels, by imposts or otherwise, will it produce the desired effect? What operation will it have upon the neighbouring States? Will they enter into similar regulations, and make it a common Cause? On the contrary will they not in pursuit of the same local policy avail themselves of this circumstance, to turn it to their particular advantage? Thus then we behold the several States taking sepa-

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<sup>63</sup> Circular Letter of the Committee to Whom Was Referred Sundry Letters and Papers Relative to Commercial Matters (April 22, 1784), in 26 *Journals of the Continental Congress 1774–1789*, at 262, 269 (Gaillard Hunt ed., 1928).

<sup>64</sup> *Id.* at 270.

<sup>65</sup> *Id.*

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rate measures in pursuit of their particular interests, in opposition to the regulations of foreign powers, and separately aiding those powers to defeat the regulations of each other; for unless the States act together there is no plan of policy into which they can separately [sic] enter which they will not be separately [sic] interested to defeat, and of Course all their measures, must prove vain and abortive.<sup>66</sup>

To say that the problem required a national solution—as virtually everyone did—was to say that it required a *uniform* solution. As the foregoing indicates, the problems facing commerce stemmed from the inability to craft a single, uniform rule. The trading laws of some states “were defeated by diversion of foreign shipments to others which, by chance or by design, undercut the tariffs of the former; and, until a uniform control of the subject was placed in federal hands, other nations could circumvent with impunity the commercial regulations of the several states.”<sup>67</sup>

Thus, the calls for congressional power over commerce emphasized the need not just for national regulation, but for *uniform* national regulation. For instance, a 1786 committee report declared that “[f]or want of due regulation the foreign commerce of the [U]nion is threatened with annihilation,” and concluded:

Convinced of the great utility of a well regulated commercial system and the impracticability of forming one, uniform and efficacious under thirteen different authorities, we think it the duty of Congress to call the attention of the States to a subject of such magnitude, the longer neglect of which must be attended with evils of vast importance.<sup>68</sup>

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<sup>66</sup> Letter to State Legislatures from the Committee to Whom was Referred the Motion of James Monroe (March 28, 1785), in 28 Journals of the Continental Congress 1774–1789, at 199, 203 (John C. Fitzpatrick ed., 1933).

<sup>67</sup> Abel, *supra* note 62, at 448; see also, Hutchison, *supra* note 59, at 103 (noting that one defect in the Articles of Confederation giving rise to the Constitutional Convention “was the lack of uniformity in the commercial regulations of the United States”).

<sup>68</sup> Committee Report to Whom Were Recommitted Sundry Papers and Documents Relative to Commerce (Feb. 28, 1786), in 30 Journals of the Continental Congress 1774–1789, at 85, 88 (John C. Fitzpatrick ed., 1934); see also, e.g., 1 George Bancroft, *History of the Formation of the Constitution of the United States of America* 250 (New York, D. Appleton and Co. 1882) (noting that commissioners from Virginia and

The inability to create uniform rules was the problem—the very reason why the new nation needed a federal commerce power. But the want of uniformity was more than just the precipitating factor in the call for greater national power; it was also a necessary limitation on the existence of any such power. For the Framers were deeply concerned not only with “uniform rules,” but also with “uniform treatment.” That is to say, they demanded uniformity not only in the name of efficiency, but also in the name of nondiscrimination. Many states—specifically the Southern states and the small states, both of which saw themselves as outnumbered—feared that a national commerce power would end up serving as a vehicle by which a majority of states would advance their own interests at the expense of the minority.<sup>69</sup> For instance, Richard Henry Lee wrote to Madison in 1785:

It seems to me clear beyond doubt that the giving Congress a power to legislate over the trade of the Union would be dangerous in the extreme to the five Southern or staple States, whose want of ships and seamen would expose their freightage and their produce to a most pernicious and destructive monopoly. With such a power eight States in the Union would be stimulated by extreme interest to shut close the door of monopoly, that by the exclusion of all rivals, whether for the purchasing of our produce or freighting it, both these might be at the mercy of our East and North. The spirit of commerce throughout the world is a spirit of avarice, and could not fail to act as above stated.<sup>70</sup>

As much to allay this fear of discrimination as to ensure the utilitarian benefits of nationwide standards, many of the proposals for an early commerce power contained explicit uniformity limitations. Representative Witherspoon, for example, proposed in 1781 that “the United States in Congress assembled should be vested with . . . the exclusive right of laying duties upon all imported articles,” provided, however, that “the same articles shall bear the

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Maryland who met in 1785 at the request of George Washington to draft a compact for jurisdiction over the Chesapeake Bay and other shared waters also “recommended to the two states . . . a uniformity of commercial regulations”).

<sup>69</sup> See, e.g., Warren, *supra* note 60, at 567–90.

<sup>70</sup> *Id.* at 580–81.

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same duty and impost throughout the said states without exemption.”<sup>71</sup>

Thus, as the Supreme Court once noted, throughout the pre-Convention debates,

the claim that it was essential to confer upon Congress the authority to lay duties, imposts and excises to be uniform throughout the United States, became associated in the discussion with the asserted necessity that Congress should have the power to establish uniform regulations of commerce to prevent the discrimination resulting from the laying of duties, imposts and excises by the respective States.<sup>72</sup>

Far and away the most important of these early propositions was James Madison’s proposal in the Virginia House of Delegates that Virginia should take the lead in asking the states to vest Congress with the power to regulate commerce. The preamble to that proposal stated:

Whereas the relative situation of the United States has been found, on trial, to require *uniformity in their commercial regulations*, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States; for preventing animosities which cannot fail to arise among the several states from the interference of partial and separate regulations; and whereas such uniformity can be best concerted and carried into effect by the federal councils, which, having been instituted for the purpose of managing the interests of the states in cases which cannot so well be provided for by measures individually pursued, ought to be invested with authority in this case, as being within the reason and policy of their institution.<sup>73</sup>

To that end, Madison proposed that Congress “be authorized to prohibit vessels belonging to any foreign nation from entering any of the ports [of the states], or to impose any duties on such vessels

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<sup>71</sup> 1 Elliot’s Debates, supra note 57, at 92.

<sup>72</sup> Knowlton v. Moore, 178 U.S. 41, 100 (1900).

<sup>73</sup> 1 Elliot’s Debates, supra note 57, at 114 (emphasis added).

and their cargoes which may be judged necessary; *all such prohibitions and duties to be uniform throughout the United States.*"<sup>74</sup>

This proposal played a central role in the formation of the Federal Constitution. As the Supreme Court has noted, "[t]hough the resolution of Mr. Madison was not adopted, it led to the sending by Virginia of commissioners to Annapolis to meet commissioners from the other States, the result of which meeting was the Federal [C]onvention of 1787."<sup>75</sup> Those commissioners were tasked "to consider how far a *uniform* system in [the states'] commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act, . . . as . . . will enable [Congress] effectually to provide for the same."<sup>76</sup> In Daniel Webster's words, "[t]he entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade."<sup>77</sup>

Attendance in Annapolis was sparse, and the commissioners therefore voted to ask the states to send commissioners to a new meeting to be held in Philadelphia in May of 1787, at which the delegates would discuss the need for a uniform federal commerce power along with other problems plaguing the young nation.<sup>78</sup> That new meeting was, of course, the Constitutional Convention.

Thus, the men who called the Constitutional Convention passionately sought uniformity in all commercial regulations, and they did so for two distinct reasons. First, they believed that "uniform rules" were necessary to save the fledgling Republic; efficiency demanded that Congress be empowered to establish a single set of rules to govern nationwide. And second, they believed that "uniform treatment" was essential to prohibit unjust discrimination; the

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<sup>74</sup> Id. (emphasis added).

<sup>75</sup> *Knowlton*, 178 U.S. at 101.

<sup>76</sup> 5 Elliot's Debates, *supra* note 57, at 113 (emphasis added); see also 1 id. at 117 (recounting that all of the commissioners from the several states that met in Annapolis in 1786 had nearly identical marching orders).

<sup>77</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 12 (1824) (summarizing the arguments of counsel); see also Nelson Lund, Comment, The Uniformity Clause, 51 U. Chi. L. Rev. 1193, 1217 (1984) ([M]uch of the discussion leading up to the Convention was concerned with ensuring that the related measures of taxation and commercial regulation would be made uniform.").

<sup>78</sup> See 1 Elliot's Debates, *supra* note 57, at 117-18.



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powerful states that would dominate the Congress could not be permitted to use their newly granted commercial power maliciously to oppress the weaker states.

*B. The Constitutional Convention*

As such, when the Framers arrived in Philadelphia in the summer of 1787 to hammer out a new blueprint for government, they maintained as perhaps their single most pressing goal the need to effectuate the Madisonian proposal by vesting Congress with the power to enact regulations and duties governing interstate commerce, so long as those regulations and duties were uniform throughout the United States. In this endeavor, the Framers surely thought that they succeeded. The entire substance of Madison's proposal ultimately made it into the Constitution. But, due essentially to stylistic tinkering, the mandate ended up being disbursed in three separate clauses: the Commerce Clause, the Uniformity Clause, and the Port Preference Clause.

*1. The Commerce and Tax Power*

Each of the original proposals for enumerated congressional powers—Charles Pinckney's alternative to the Virginia Plan,<sup>79</sup> and William Patterson's New Jersey Plan—contained a clause granting Congress the power to collect commercial taxes and to regulate commerce.<sup>80</sup> Although today we tend to think of these powers as

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<sup>79</sup> Rather than enumerating individual federal powers, the Virginia Plan submitted by Edmund Randolph (though largely the work of Madison) afforded Congress the broad power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." 1 *The Records of the Federal Convention of 1787*, at 21 (Max Farrand ed., 1911) [hereinafter *Farrand*]. This power surely encompassed authority over commerce, as Randolph himself made clear. See 1 *id.* at 19 (listing the lack of a commerce power as a fundamental defect of the Articles of Confederation); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve Statute Control Over Social Issues*, 85 *Iowa L. Rev.* 1, 31 n.121 (1999). Pinckney submitted his plan on the same day as the Virginia Plan. See 1 *Farrand*, *supra*, at 20–23.

<sup>80</sup> See 5 *Elliot's Debates*, *supra* note 57, at 130 (Pinckney Plan) ("The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises; To regulate commerce with all nations, and among the several states."); 1 *Farrand*, *supra* note 79, at 243 (recounting the New Jersey Plan, which would author-

entirely distinct—as they are now set forth in separate constitutional clauses—the Framers viewed them largely as one and the same.<sup>81</sup> They repeatedly spoke of the power over “regulation of excises & of trade,”<sup>82</sup> or the “Power of . . . levying Money & regulating Commerce,”<sup>83</sup> as though this were a single prerogative.<sup>84</sup> To the Framers, the power to regulate commerce necessarily implied and included a power to impose duties.<sup>85</sup>

Thus, for instance, in a discussion that anticipated future disputes about the existence of the dormant Commerce Clause, Madison declared that “[w]hether the States are now restrained from laying tonnage duties depends on the extent of the power ‘to regulate commerce,’” and John Langdon “insisted that the regulation

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ize Congress “to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the U. States . . . to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other”). The Committee of Detail essentially adopted the phrasing of the Pinckney Plan, changing only one word. See 5 Elliot’s Debates, *supra* note 57, at 130, 378 (changing “regulate commerce with all nations” to “regulate commerce with foreign nations”).

<sup>81</sup> Much of the voluminous evidence in support of this proposition is collected in Abel, *supra* note 62, at 446–51.

<sup>82</sup> 2 Farrand, *supra* note 79, at 344.

<sup>83</sup> 2 *id.* at 583 (detailing a letter from the Convention to Congress proposing the Constitution).

<sup>84</sup> See also The Federalist No. 40, at 32 (James Madison) (Legal Classics Library 1983) (“[W]as it not an acknowledged object of the [C]onvention, and the universal expectation of the people, that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue?”); 2 Farrand, *supra* note 79, at 135 (discussing the “exclusive Power of regulating Trade and levying Imposts”); 2 *id.* at 211 (reproducing the notes of James McHenry regarding the “extraordinary power . . . to lay and collect taxes, duties, imposts and excises, and to regulate commerce among the several States”); 3 *id.* at 116 (recounting Charles Pinckney’s statement regarding “the complete power of regulating the trade of the Union, and levying . . . imposts and duties upon the same”).

<sup>85</sup> See, e.g., 3 Farrand, *supra* note 79, at 520–21 (reproducing Madison’s 1832 letter to Professor Davis, which noted that “[i]n expounding the Constitution and deducing the intention of its Framers, it should never be forgotten, that the great object of the Convention was to provide, by a new Constitution, a remedy for the defects of the existing one; that among these defects was that of a power to regulate foreign commerce; that in all nations this regulating power embraced the protection of domestic manufactures by duties and restrictions on imports.”); Abel, *supra* note 62, at 448 (reviewing the contemporary records and concluding that “customs control obviously was regarded as the principal ingredient of commercial regulation”); *id.* at 450 (“The office of the commerce clause, by and large, was to afford an effective control over imports and exports . . .”).

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of tonnage was an essential part of the regulation of trade.”<sup>86</sup> And in the debate over the Export Clause,<sup>87</sup> which forbids the federal government from imposing export duties, James Wilson lamented that “[t]o deny this power is to take from the Common Govt. half the regulation of trade.”<sup>88</sup>

That the Framers conceived of the power to regulate commerce and the power to tax commerce as a single power is not surprising. The defect in the Articles of Confederation discussed above was that the states could not act together to respond to trade restrictions, and any individual retaliatory action served only to advantage the other states. This was true whether the retaliation took the form of a non-revenue regulation—such as an embargo on goods from a particular nation—or an impost or duty. In Congress’s own words, quoted above, a federal commerce power was necessary because if a single state “makes similar regulations to counteract those of th[e] [foreign] power, by reciprocating the disadvantages which it feels, *by impost or otherwise*,” such regulations will not “produce the desired effect.”<sup>89</sup> The power to retaliate by both taxes and regulations had to be vested in Congress.

This conception of a unified tax and commerce power is perhaps most clearly manifested in the blending of the two powers in the notes of the Committee of Detail. The Wilson notes, for instance, contain an awkwardly phrased clause empowering Congress “to pass Acts for the Regulation of Trade and Commerce as well with foreign Nations as with each other *to lay and collect Taxes*.”<sup>90</sup> In what was likely an effort to improve readability, the Committee of

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<sup>86</sup> 2 Farrand, *supra* note 79, at 625; see also, e.g., The Federalist No. 44, at 71 (James Madison) (Legal Classics Library 1983) (“The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils.”); 2 Farrand, *supra* note 79, at 441 (recounting Madison’s argument at the Convention that allowing states to impose duties “would revive all the mischiefs experienced from the want of a Genl. Government over commerce”); 2 *id.* at 588–89 (recounting Madison’s argument that “perhaps the best guard against an abuse of the power of the States on this subject [duties], was the right in the Genl. Government to regulate trade between State & State”).

<sup>87</sup> U.S. Const. art. I, § 9, cl. 5.

<sup>88</sup> 2 Farrand, *supra* note 79, at 362.

<sup>89</sup> 1 Elliot’s Debates, *supra* note 57, at 112 (emphasis added).

<sup>90</sup> 2 Farrand, *supra* note 79, at 157.

Style ultimately broke the power to regulate commerce and the power to collect duties, excises, and imposts into separate clauses. In substance, however, these powers remained two sides of the same coin: the complete federal power over commercial matters.

## *2. The Uniformity Requirement*

Neither the Pinckney Plan nor the New Jersey Plan made specific mention of a uniformity limitation on this power. That omission caused great concern among the Southern states, who worried about uniform treatment in addition to uniform rules. The South feared that, if “the regulation of trade is to be given to the Genl. Government, they [Congress] will be nothing more than overseers for the Northern States.”<sup>91</sup> Thus, James McHenry of Maryland noted a discussion that took place among the delegates of his state:

We adverted also to the 1<sup>st</sup> sect of the VII article which enabled the legislature to lay and collect taxes, duties, imposts and excises, and to regulate commerce among the several States. We almost shuddered at the fate of the commerce of Maryland should we be unable to make any change in this extraordinary power.<sup>92</sup>

And it was not just the Southerners who were concerned. Although the Northern states dominated in 1787, both in terms of the number of states and the number of citizens, conventional wisdom held that there would soon be a population explosion in the resource-rich but sparsely populated Southern states and Southwestern territories, and that a number of new states in the Southwest—states whose interests would align closely with the Southern states—would soon be admitted to the Union.<sup>93</sup> Thus, at the Convention, some Northern delegates “expressed the fear that the Southern States would join with the [soon to be admitted] new Western States in oppressing the commerce of the Eastern States.”<sup>94</sup> Gouverneur Morris, for instance, proclaimed a desire “to

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<sup>91</sup> 1 *id.* at 567 (reproducing Madison’s notes recounting the remarks of General Pinckney).

<sup>92</sup> 2 *id.* at 211.

<sup>93</sup> See generally Collier & Collier, *supra* note 60, at 135–66.

<sup>94</sup> Warren, *supra* note 60, at 571; see also Collier & Collier, *supra* note 60, at 138 (“In designing a new government, the North had to assume that the South would soon

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provide some defence for the N[orthern] States” from the “oppression of commerce” that would result if the South and West were to gain the upper hand in Congress.<sup>95</sup> It seems that everyone was worried about the potential for Congress to discriminate against his state in its exercise of the commerce power.<sup>96</sup>

The Southern states, for whom the risk of oppression was more immediate, first attempted to ameliorate it by seeking to require a two-thirds majority vote for all acts of Congress regulating navigation and commerce.<sup>97</sup> But the proposals along those lines, which would likely have severely hampered Congress’s efforts to solve the nation’s commercial woes, were defeated—in historian Charles Warren’s words, “a decided victory for the Northern States, and a severe defeat for the South.”<sup>98</sup>

So rebuffed, the defeated Southern states remained unwilling to allow an unchecked commerce power. As Professor Warren explains, “[i]t is impossible to understand properly the fight over the adoption of the Constitution in the Convention, or over its ratification outside, unless this fear of the South at Northern domination of its commerce is thoroughly realized.”<sup>99</sup>

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become the dominant section of the country in both numbers and wealth. This assumption later proved incorrect, but in 1787, northerners were nervous about the possibility of a government dominated by the South.”).

<sup>95</sup> 1 Farrand, *supra* note 79, at 604; see also 2 *id.* at 2–3 (“Mr. Gerry . . . [feared] . . . the dangers apprehended from Western states. He was for admitting them on liberal terms, but not for putting ourselves into their hands. They will if they acquire power like all men, abuse it. They will oppress commerce, and drain our wealth into the Western Country.”).

<sup>96</sup> See, e.g., 2 *id.* at 363 (“Mr. Clymer remarked that every State might reason with regard to its particular productions, in the same manner as the Southern States. The middle States may apprehend combinations agst. them between the Eastern & Southern States as much as the latter can apprehend them between the Eastern & middle.”).

<sup>97</sup> See 2 *id.* at 449.

<sup>98</sup> Warren, *supra* note 60, at 579. The defeat was part of the famed horse trade pursuant to which the North agreed to preclude Congress from abolishing the slave trade until 1808, in return for the South abandoning the supermajority requirement for commercial regulations. See Abel, *supra* note 62, at 453.

<sup>99</sup> Warren, *supra* note 60, at 580; see also Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. Rev. 22, 37–38 (1983) (“The fears and jealousies among the states and the apprehensions that the general legislature might discriminate in favor

On August 25, in another effort to protect minority interests against abuse of the commercial power, the Maryland delegates offered a series of proposals imposing an explicit uniformity constraint on the commerce and tax power.<sup>100</sup> The first of these proposed amendments was not targeted specifically at the broad threat of Northern domination over the South, but rather was concerned with another way in which Congress might use the commerce power to favor one state over another. The Maryland delegates

expressed their apprehensions, and the probable apprehensions of their constituents, that, under the power of regulating trade, the general legislature might favor the ports of particular states, by requiring vessels destined to or from other states to enter and clear thereat: as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, &c.<sup>101</sup>

To the end of precluding legislation of this sort, the Maryland delegates proposed that

[t]he legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other state than in that to which they may be bound, or to clear out in any other than the state in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one state in preference to another.<sup>102</sup>

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of one state or region to the economic detriment of another were among the most strident themes of the Convention.”).

<sup>100</sup> See 2 Farrand, *supra* note 79, at 378 (reproducing McHenry’s notes on August 22, which stated that “Mr. Martin shewed us some restrictory clauses drawn up for the VII article respecting commerce—which we agreed to bring forward”).

<sup>101</sup> 5 Elliot’s Debates, *supra* note 57, at 478–79. As Luther Martin explained, without a nondiscrimination provision

it would have been in the power of the general government to compel all ships sailing into or out of the Chesapeake, to clear and enter at Norfolk or some port in Virginia—a regulation which would be extremely injurious to [Maryland’s] commerce, but which would, if considered merely as to the interest of the Union, perhaps not be thought unreasonable, since it would render the collection of revenue arising from commerce more certain and less expensive.

<sup>1</sup> *id.* at 375.

<sup>102</sup> 5 *id.* at 479.

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At the same time, the Maryland delegates introduced another, more general proposal also aimed at protecting against the discriminatory regulation of commerce—one providing that “[a]ll duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States.”<sup>103</sup> By its plain terms, this resolution demanded uniformity not only in taxation (“duties, imposts, and excises”), but also in non-revenue commercial regulation (“prohibitions or restraints”<sup>104</sup>), two now-distinct powers that, as I have endeavored to explain, were considered one and the same by the Framers.

James McHenry recorded in his notes that these propositions were intended, in combination, “to prevent the U.S. from giving prefe[re]nces to one State above another or to the shipping of one State above another.”<sup>105</sup> As he explained to the Maryland House of Delegates, they were introduced to “prevent any Combination of States” from oppressing the others.<sup>106</sup>

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<sup>103</sup> 5 *id.* (quoting the Maryland delegates).

<sup>104</sup> As is self-evident from its terms, the phrase “prohibitions or restraints” denotes non-revenue commercial regulations, rather than taxes. See, e.g., *Field v. Clark*, 143 U.S. 649, 684 (1892) (discussing the Act to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 53, 1 Stat. 565, 565–66 (1798), which suspended trade between the United States and France and required all American ships to post a bond to be forfeited if the ship does business with France or its citizens, but authorized the President to “discontinue the prohibitions and restraints hereby enacted” in the event that France lifted its trade restrictions on the United States). *Id.*

<sup>105</sup> 2 Farrand, *supra* note 79, at 470; see also, e.g., Warren, *supra* note 60, at 588 (“It will be noted that all the limitations, thus adopted, were intended to allay . . . the fear lest Congress might discriminate against certain of the States.”).

<sup>106</sup> 3 Farrand, *supra* note 79, at 149. The North Carolina delegates gave the same explanation of the intended effect of these provisions:

We had many things to hope from a National Government and the chief thing we had to fear from such a Government was the Risque of unequal or heavy Taxation, but we hope you will believe as we do that the Southern States in general and North Carolina in particular are well secured on that head by the proposed system. . . . It is expected a considerable Share of the National Taxes will be collected by Impost, Duties and Excises, but you will find it provided in the 8th Section of Article the first that all duties, Impost and excises shall *be uniform* throughout the United States.

3 *id.* at 83–84 (quoting a letter from North Carolina Delegates to Governor Caswell). Although these remarks (and McHenry’s as well) focus in particular on nondiscrimi-

The Maryland proposals were “considered of such vital importance that they [were] referred to a Special Committee of one from each State, elected by ballot.”<sup>107</sup> On August 28, the committee issued a report combining the specific proposition (involving preferences to particular ports) and the general proposition (involving preferences in commercial regulation and taxation) into a single proposal, which was approved with minor changes the following week:<sup>108</sup>

[t]hat there be inserted, after the 4th clause of the 7th sect.—nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another, or oblige vessels bound to or from any state to enter, clear, or pay duties, in another; and all tonnage, duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States.<sup>109</sup>

There is no indication that the words “prohibitions or restraints” were omitted from the latter clause for reasons other than style and redundancy, the proposal already beginning with the words

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nation in taxes, the Maryland regulations were clearly intended to achieve the same equality in all commercial regulations.

The provision forbidding federal taxes on exports from any state was also intended to protect the commerce of the Southern states. See 2 *id.* at 305–06, 362–63; 3 *id.* at 365–66. Because the Southern economy was heavily agricultural, and was “entirely dependant” on the exportation of crops that grew only in the South, such as tobacco, rice, and indigo, the Southern states feared that the Congress, dominated by the North, would cripple the Southern economy by imposing massive export taxes on these crops alone. See Warren, *supra* note 60, at 572–73. The Southern delegates therefore insisted on a categorical ban on all federal export taxes. See *id.*

And finally, this fear of discriminatory commercial regulations can also be seen in the debates on June 8 concerning the (ultimately rejected) proposal to grant Congress a veto power over state laws. Gunning Bedford of Delaware spoke out against the proposition:

Delaware now stands 1/13th of the whole—when the system of equal representation [in the House of Representatives] obtains Delaware will be 1/90th—Virginia & Pensylvania will stand 28/90th—Suppose a rivalry in commerce or manufacture between Delaware and these two States; what chance has Delaware agt. them? Bounties may be given in Virgina. & Pensylvania, and their influence in the Genl. Govt. or Legislature will prevent a negative, not so if the same measure is attempted in Delaware.

<sup>1</sup> Farrand, *supra* note 79, at 172; see also 1 *id.* at 167.

<sup>107</sup> Warren, *supra* note 60, at 587.

<sup>108</sup> See 5 Elliot’s Debates, *supra* note 57, at 483–84, 506–07.

<sup>109</sup> 5 *id.* at 483–84.



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“any regulation of commerce or revenue.”<sup>110</sup> Indeed, it appears that James McHenry, who had introduced the general proposition demanding uniformity in all exercises of the commerce power, was satisfied that the Convention had adopted his proposal in full. He recorded in his notes from August 31 that “the restrictory propositions from Maryland were taken up—and carried.”<sup>111</sup> There is no indication that McHenry, or anyone else, was dissatisfied with the change in wording or was concerned in any way that this clause might be interpreted to permit discrimination in commercial regulations.

When the Committee of Style proposed a full draft of the Constitution on September 12, however, it accidentally left the uniformity mandate out of the document altogether. That error was promptly remedied two days later, at which point the clause was broken back up into two parts, again by unanimous vote with no indication of a change in meaning.<sup>112</sup> As the Supreme Court long ago explained:

On September 14, 178[7], the words “But all such duties, imposts and excises shall be uniform throughout the United States,” which, in their adoption had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one State over the port of another State—in other words, had been a part of another clause—were shifted, by a unanimous vote, from that paragraph, and were annexed to the provisions granting the power to tax.

Thus, it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the

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<sup>110</sup> See *Knowlton v. Moore*, 178 U.S. 41, 104 (1900) (“It will be noticed that the committee recommended, not merely that preferences between ports should be forbidden by ‘any regulation of commerce,’ but also that such preferences should not be made by ‘any regulation of *revenue*.’ This, obviously, rendered it unnecessary to include, in the latter part of the clause, ‘prohibitions or restraints,’ as proposed by Mr. McHenry and General Pinckney. The substantial effect of the first clause of the paragraph was to require that all regulations of commerce *or of revenue* affecting commerce through the ports of the States should be the same in all ports.”).

<sup>111</sup> 2 Farrand, *supra* note 79, at 482.

<sup>112</sup> See *United States v. Ptasynski*, 462 U.S. 74, 80 n.10 (1983).

purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 7 of article 1, and the other is a part of the first clause of section 8 of article 1.<sup>113</sup>

Thus, the provisions that became the Port Preference Clause and the Uniformity Clause were “one in purpose.” And, as the foregoing indicates, that purpose was clear. They were intended to be “an interrelated limitation on the National Government’s commerce power”<sup>114</sup>—a power that the Framers understood to encompass both regulation and taxation. Specifically, they were intended to fully implement the substance of Madison’s original proposal for a federal commerce power, and to allay the fears of the Southern states by mandating that all federal regulations of commerce must treat the states uniformly.

Recall that the proposal drafted by James Madison—the putative father of our Constitution—that precipitated the Constitutional Convention asked that Congress “be authorized to prohibit vessels belonging to any foreign nation from entering any of the ports [of the states], or to impose any duties on such vessels and their cargoes which may be judged necessary; all such prohibitions and duties to be uniform throughout the United States.”<sup>115</sup> A century ago, the Supreme Court emphasized the significance of that seminal text in interpreting the Constitution:

It will be noticed that the words “uniform throughout the United States” are the same which were subsequently adopted in the [Uniformity Clause], and that the term uniformity, in the resolution of Mr. Madison, was applied not only to duties, but to *regulations and prohibitions respecting external commerce*, which were designed to be *the same* all over the Union.<sup>116</sup>

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<sup>113</sup> *Knowlton*, 178 U.S. at 105–06; see also Warren, *supra* note 60, at 588; Lund, *supra* note 77, at 1216.

<sup>114</sup> *Ptasynski*, 462 U.S. at 80 n.10; see also *id.* at 81 (“There was concern that the National Government would use its power over commerce to the disadvantage of particular States. The Uniformity Clause was proposed as one of several measures designed to limit the exercise of that power.”).

<sup>115</sup> 1 Elliot’s Debates, *supra* note 57, at 114.

<sup>116</sup> *Knowlton*, 178 U.S. at 100.

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Accordingly, in the minds of the Framers, the total effect of the Uniformity Clause, the Commerce Clause, and the Port Preference Clause was to effectuate fully Madison's proposal—to empower Congress to enact regulations governing, and to impose duties upon, commerce, as long as those regulations and duties were uniform throughout the United States. As Charles Pinckney explained at the Convention, the Constitution

invests the United States, with the complete power of regulating the trade of the Union, and levying such imposts and duties upon the same, for the use of the United States, as shall, in the opinion of Congress, be necessary and expedient. So much has been said upon the subjects of regulating trade, and levying an impost, and the States have so generally adopted them, that I think it unnecessary to remark upon this article. The intention, is to invest the United States with the power of rendering our maritime regulations uniform and efficient, and to enable them to raise a revenue, for Federal purposes, uncontrollable [sic] by the States.<sup>117</sup>

At the time, the Framers' decision to break the Madisonian proposal for a limited federal commerce power into three separate clauses was inconsequential; the sum of the three parts was equal to the whole. That is to say, the combined effect of the Commerce Clause, the Uniformity Clause, and the Port Preference Clause was to afford Congress plenary authority to tax and regulate commercial matters, but to require that all such regulations be uniform.

This was so because the Framers had a narrow conception of the scope of the commerce power. Most scholars agree that the Framers imagined the commerce power to include only the power to tax and regulate commercial shipping and navigation between states.<sup>118</sup> Virtually all of this activity was conducted through ports. "In the 1780s the transportation of goods in the United States was almost

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<sup>117</sup> 3 Farrand, *supra* note 79, at 116.

<sup>118</sup> See, e.g., Abel, *supra* note 62, at 450, 494; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 123, 137, 145–46 (2001); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1395, 1454 (1987). But see, e.g., 1 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 115–292 (1953) (arguing for a much broader original understanding of the scope of the commerce power); Nelson & Pushaw, *supra* note 79, at 107 (same).

entirely by water.”<sup>119</sup> Given this limited understanding of the breadth of the commerce power, the uniformity principle could be fully effectuated by guaranteeing uniformity of duties, imposts, and excises and by precluding regulations that favored the ports of one state over those of another. These were the only ways in which it would have occurred to the Framers that the commerce power might be exercised nonuniformly to the detriment of particular states. Because the Framers did not foresee the explosion of land-based shipping and the significant expansion of the scope and nature of the commerce power in the late nineteenth and early-to-mid-twentieth centuries, they would not have imagined any reason, after the reworking of the text by the Committee of Style, to supplement the Uniformity Clause and the Port Preference Clause by including (redundantly, in their minds) the word “uniform” in the Commerce Clause.

### *C. Ratification and Beyond*

This intent to bring about uniform, nondiscriminatory commercial regulations was recounted on a number of occasions during the ratification debates, from Madison’s statement in the Virginia Convention that the “power for the regulation of commerce” will finally allow for the needed “uniform regulations,”<sup>120</sup> to his declaration in the Federalist Papers that the Constitution will allow “foreign trade [to] be properly regulated by uniform laws,”<sup>121</sup> to William Dawes’s proclamation in the Massachusetts Convention that the Constitution will facilitate much-needed “uniformity in duties, imposts, excises, [and] prohibitions.”<sup>122</sup> As McHenry explained to the Maryland House of Delegates, the Maryland resolutions restricting congressional power over commerce and trade were manifestations of the “attention to general Equality that governed the deliberations of Convention.”<sup>123</sup>

This understanding of a uniformity limitation on the commerce power that encompassed both “uniform rules” and “uniform

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<sup>119</sup> Collier & Collier, *supra* note 60, at 30.

<sup>120</sup> 3 Elliot’s Debates, *supra* note 57, at 260.

<sup>121</sup> The Federalist No. 53, at 132 (James Madison) (Legal Classics Library 1983).

<sup>122</sup> 2 Elliot’s Debates, *supra* note 57, at 58.

<sup>123</sup> 3 Farrand, *supra* note 79, at 149.

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treatment” persisted in the national consciousness for some time after ratification of the Constitution. It found perhaps its most eloquent articulation in a February 3, 1792, speech on the floor of the House of Representatives by Hugh Williamson of North Carolina, himself a former delegate to the Convention:

In the Constitution of this Government . . . [i]t is also provided, that all duties, imposts, and excises, shall be uniform throughout the United States; and it is provided, that no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another. The clear and obvious intention of the articles mentioned was, that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another. It appeared possible, and not very improbable, that the time might come, when, by greater cohesion, by more unanimity, by more address, the Representatives of one part of the Union might attempt to impose unequal taxes, or to relieve their constituents at the expense of other people. To prevent the possibility of such a combination, the articles that I have mentioned were inserted in the Constitution.<sup>124</sup>

Williamson continued:

The certain operation of that measure is the oppression of the Southern States, by superior numbers in the Northern interest. This was to be feared at the formation of this Government, and you find many articles in the Constitution, besides those I have quoted, which were certainly intended to guard us against the dangerous bias of interest, and the power of numbers. . . . I do not hazard much in saying, that the present Constitution had never been adopted without those preliminary guards in it.<sup>125</sup>

Charles Pinckney echoed these comments in an 1820 speech on the floor of the House of Representatives:

I will only mention here, as it is perfectly within my recollection, that the power was given to Congress to regulate the commerce

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<sup>124</sup> 3 id. at 365.

<sup>125</sup> 3 id. at 365–66.

by water between the States, and it being feared, by the Southern, that the Eastern would, whenever they could, do so to the disadvantage of the Southern States, you will find, in the 6th section of the 1st article, Congress are prevented from taxing exports, or giving preference to the ports of one State over another, or obliging vessels bound from one State to clear, enter, or pay duties in another.<sup>126</sup>

And Joseph Story explained in his *Commentaries on the Constitution* that the purpose of the Uniformity Clause

was to cut off all undue preferences of one state over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different states, might exist. The agriculture, commerce, or manufactures of one state might be built up on the ruins of those of another; and a combination of a few states in congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favoured neighbours.<sup>127</sup>

The Port Preference Clause served a similar end. In Story's words, "[t]he obvious object of these provisions [in combination] is, to prevent any possibility of applying the power to lay taxes, or regulate commerce, injuriously to the interests of any one state, so as to favour or aid another."<sup>128</sup>

The Supreme Court fully appreciated all of this throughout the nineteenth century, as the Court struggled with questions about the scope and exclusivity of the federal commerce power.<sup>129</sup> Thus, the

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<sup>126</sup> 3 *id.* at 444. Of course, Williamson and Pinckney were Southerners who may have had an incentive to rewrite history to support the Southern cause, but their recollections in these speeches accord with the contemporary records of the Convention.

<sup>127</sup> 2 Story, *supra* note 50, § 954.

<sup>128</sup> 2 *id.* § 1011.

<sup>129</sup> Indeed, notions of uniformity played a central role in the Court's very first landmark Commerce Clause case, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), in which Attorney General William Wirt argued on behalf of the prevailing party that the word "uniform" should essentially be read into the Commerce Clause:

It was an entire, regular, and uniform system, which was to be carried into effect, and would not admit of the participation and interference of another hand.

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*Passenger Cases* of 1849<sup>130</sup> reflect a general understanding that “[t]he whole spirit of the Constitution is, that the commercial regulations of Congress should be uniform throughout the whole country.”<sup>131</sup> As Justice Wayne put it, the Port Preference Clause “is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States.”<sup>132</sup> It “was intended to establish among [the states] a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality.”<sup>133</sup>

Twenty-one years later, the Court repeated that “the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.”<sup>134</sup> The Court again emphasized not only the utilitarian aspects of uniformity, but also the nondiscrimination aspects: “Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations.”<sup>135</sup> The

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Does not regulation, *ex vi termini*, imply harmony and uniformity of action? If this must be admitted to be the natural and proper force of the term, let us suppose that the additional term, *uniform*, had been introduced into the constitution, so as to provide that Congress should have power to make uniform regulations of commerce throughout the United States. Then, according to the adjudications on the power of establishing a uniform rule of naturalization, and uniform laws of bankruptcy, throughout the United States, this power would unquestionably have been exclusive in Congress. But *regulation* of that commerce which pervades the Union, necessarily implies *uniformity*, and the same result, therefore, follows as if the word had been inserted.

*Id.* at 177–78.

<sup>130</sup> *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

<sup>131</sup> *Id.* at 311 (Argument of Mr. Ogden); see also *id.* at 386 (Argument of Mr. J.P. Hall, counsel) (taking as a given that Congress’s regulation of commerce “must be uniform throughout the nation”); *id.* at 405–06 (Opinion of J. McLean).

<sup>132</sup> *Id.* at 414.

<sup>133</sup> *Id.* at 420.

<sup>134</sup> *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1870).

<sup>135</sup> *Id.*; see also *R.R. Co. v. Richmond*, 86 U.S. (18 Wall.) 584, 589 (1873) (“The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse . . .”); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 227 (1899) (“[T]he object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation . . .”).

Commerce Clause, the Port Preference Clause, and the Uniformity Clause were “regarded as limitations upon the power of Congress to regulate commerce, and as intended to secure entire commercial equality.”<sup>136</sup>

#### IV. FORGETTING THE PAST

How did the Court go from declaring in the mid-nineteenth century that the principle “[t]hat all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality,”<sup>137</sup> and therefore “that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations,”<sup>138</sup> to categorically insisting in the mid-twentieth century that “there is no requirement of uniformity in connection with the

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<sup>136</sup> *Ward*, 79 U.S. (12 Wall.) at 432. This principle is also reflected in *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889). In *Stoutenburgh*, the Supreme Court of the District of Columbia offered a ringing endorsement, albeit in dicta, of the constitutional mandate for nondiscrimination in commercial regulation, even when Congress legislates in its capacity as the District’s local legislature:

Such is the declaration by the Supreme Court of the United States, of the spirit and scope of these constitutional provisions; that they are necessary to the harmony and repose of the States; that they are necessary to the equal justice and equal privileges of the citizens of all the States of this Union; that they cannot be restricted at all; and that whatever rule is made with reference to them must be a uniform rule by the Congress of the United States acting as the National Legislature, regulating and controlling the commerce of the entire domain of the United States, with a view to do equal justice between all the parts of the country and to take away any possibility of prejudice or any suggestion of injustice or discrimination by one as against another.

*Id.* at 501–02.

Defending this decision in the United States Supreme Court, counsel argued that the “whole theory of the Constitution is that all commercial regulations should be uniform.” Brief of the Defendant in Error at 11, *Stoutenburgh* (No. 722). Quoting the Uniformity Clause and the Port Preference Clause, counsel argued that the “spirit of these restrictions, if not the letter, would surely cover this case.” *Id.* The Supreme Court affirmed on other grounds. With regard to uniformity, the Court said only:

It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question solely for the District of Columbia, because whenever Congress acts upon the subject, the regulations it establishes must constitute a system applicable to the whole country, but the disposition of this case calls for no expression of opinion upon that point.

*Stoutenburgh*, 129 U.S. at 148.

<sup>137</sup> *The Passenger Cases*, 48 U.S. (7 How.) 283, 420 (1849).

<sup>138</sup> *Ward*, 79 U.S. (12 Wall.) at 431.



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commerce power”?<sup>139</sup> What accounts for the Court’s 180-degree reversal?

As we shall see, this sea change can be traced to the Court’s treatment of a series of pre-Prohibition laws regulating the distribution of alcoholic beverages in dry states.<sup>140</sup> Although this line of cases began by championing the uniformity principle, it ended with an intemperate dictum that led the Court to mistakenly assassinate the principle altogether.

But first, a little background: As noted above, the Framers desired uniformity in commercial regulations for two reasons: efficiency and nondiscrimination. To many of the Framers, these reasons represented two sides of the same coin. Requiring a single standard to be applied nationwide is both efficient—it precludes commercial bickering and undercutting among the states—and fair—it ensures that all states are subject to the same rules and therefore precludes the powerful states from using their influence in Congress to oppress their weaker rivals. To use the taxonomy set out above, the Framers desired both “uniform rules” and “uniform treatment.”

In the late nineteenth and early twentieth centuries, however, the efficiency rationale for uniformity in constitutional law began to erode, and thus the mandate for uniform rules faded away, leaving only the requirement of uniform treatment. This erosion occurred across the board, under the Uniformity Clause, the Bankruptcy Clause, the Port Preference Clause, and the Commerce Clause.

Consider first the Bankruptcy Clause, which empowers Congress to establish uniform bankruptcy laws.<sup>141</sup> The earliest federal bankruptcy laws, in the late eighteenth and early nineteenth centuries, “categorically replaced the variant exemption policies of the states with a uniform federal rule . . . to combat the desperate commercial straits of the nation.”<sup>142</sup> These were uniform rules enacted in a

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<sup>139</sup> *Currin v. Wallace*, 306 U.S. 1, 14 (1939).

<sup>140</sup> A good summary of these cases can be found in Barry Cushman, *Lochner, Liquor and Longshoremen: A Puzzle in Progressive Era Federalism*, 32 *J. Mar. L. & Com.* 1, 22–36 (2001).

<sup>141</sup> U.S. Const. art. I, § 8, cl. 4.

<sup>142</sup> Koffler, *supra* note 99, at 43–44.

quest for efficiency—in Daniel Webster’s words, in an effort to tame a creditor relations system that had become “hydra-headed and the slave of four and twenty masters.”<sup>143</sup>

In the bankruptcy laws enacted in the late nineteenth century, however, Congress took the exact opposite approach, incorporating and preserving the various exemption laws that existed in the several states.<sup>144</sup> As a result, the ultimate precepts of federal bankruptcy law varied from state to state, depending on each state’s unique exemption provisions. Congress had abandoned uniform rules, and it saw no constitutional problem with doing so, choosing instead to view the Bankruptcy Clause’s requirement of “uniform Laws . . . on the subject of Bankruptcies throughout the United States” as a mandate only for uniform treatment of the states. Senator Fessenden of Maine explained:

The idea of some gentlemen is that the law, to be uniform, must be equal in its operations. I do not hold to that idea at all. If we make a rule which operates upon the States equally, that is to say, which is equal in its terms, so far as the States are concerned, it would not be unconstitutional simply because, owing to the particular provisions of the several States, the operation would not be precisely similar.<sup>145</sup>

The Supreme Court, when it confronted the issue in 1902, agreed with Senator Fessenden and the Congress.<sup>146</sup> The Court’s opinion is somewhat muddled in its reasoning, but nonetheless clear in its conclusion: the uniformity required by the Bankruptcy Clause “is geographical and not personal,” and therefore a bankruptcy law is, “in the constitutional sense, uniform throughout the United States” even when differences in incorporated state laws produce nonidentical outcomes from state to state.<sup>147</sup> In the following decades, the Court reiterated that “[n]otwithstanding this re-

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<sup>143</sup> F. Regis Noel, *A History of the Bankruptcy Clause of the Constitution of the United States of America* 111 (1918).

<sup>144</sup> See Koffler, *supra* note 99, at 51–54. Thus, the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 548 (repealed 1978), expressly disavowed any effect on “the allowance to bankrupts of the exemptions which are prescribed by . . . State laws.”

<sup>145</sup> Charles Warren, *Bankruptcy in United States History* 106–07 (1935).

<sup>146</sup> See *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 190 (1902).

<sup>147</sup> *Id.* at 188, 190.

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quirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States.”<sup>148</sup>

These cases ignored the efficiency rationale for uniformity<sup>149</sup>—which, if aggressively pursued, would have yielded the opposite result—and instead focused solely on the nondiscrimination rationale, pursuant to which uniform rules are unnecessary, as long as uniform treatment is preserved. In Senator Fessenden’s words, incorporating state law is permissible because the uniformity mandate in the bankruptcy “provision of the Constitution unquestionably was intended to apply to the several States to prevent any distinction being made between them.”<sup>150</sup>

Around the same time, and for the same reasons, the Court reached a similar result in interpreting the Uniformity Clause. Early rhetoric surrounding the Uniformity Clause, which demands that “all Duties, Imposts and Excises shall be uniform throughout the United States,”<sup>151</sup> emphasized not only nondiscrimination concerns,<sup>152</sup> but also efficiency concerns.<sup>153</sup> After all, it was the ineffi-

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<sup>148</sup> *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918).

<sup>149</sup> There is very little historical evidence of the Framers’ rationale for including the uniformity requirement in the Bankruptcy Clause. See Koffler, *supra* note 99, at 35–37. According to Justice Story, the primary rationale was efficiency:

It is obvious, that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its own local interests, and pursuits. Under such circumstances no uniformity of system or operations can be expected.

3 Story, *supra* note 50, § 1102. Differences in state laws “may work gross injustice and inequality, and nourish feuds and discontents in neighbouring states.” 3 *id.* § 1102.

There will always be found in every state a large mass of politicians, who will deem it more safe to consult their own temporary interests and popularity, by a narrow system of preferences, than to enlarge the boundaries, so as to give to distant creditors a fair share of the fortune of a ruined debtor. There can be no other adequate remedy, than giving a power to the general government, to introduce and perpetuate a uniform system.

3 *Id.* This rationale closely mirrors the efficiency rationale expressed by the Framers for demanding uniformity in the exercise of the commerce and taxation powers. See *supra* Part III.

<sup>150</sup> Warren, *supra* note 145, at 107.

<sup>151</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>152</sup> See *supra* Part III.

<sup>153</sup> See, e.g., 3 Farrand, *supra* note 79, at 116 (recounting Charles Pinckney’s explanation at the Convention that “the complete power of regulating the trade of the Un-

cient trade wars between the states that prompted demands for federal power to regulate and tax commercial shipments in the first place.<sup>154</sup>

But in the late nineteenth and early twentieth centuries, just as it had done with the Bankruptcy Clause, the Court abandoned the efficiency rationale and staked its uniformity claim entirely on principles of nondiscrimination. Indeed, at the turn of the century, the Court canvassed the historical record in some detail and concluded, drawing in part on an 1884 interpretation of the Port Preference Clause,<sup>155</sup> that “the possible discrimination against one or more States was the *only thing* intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts and excises.”<sup>156</sup> As such, the Court found no constitutional infirmity with federal tax laws that incorporated the laws of the several states, even though federal tax liability varied from state to state as a result of their operation.<sup>157</sup> Here again, the Court rejected

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ion, and levying such imposts and duties upon the same” was “to invest the United States with the power of rendering our maritime regulations uniform and efficient”).

<sup>154</sup> See *supra* Section III.A.

<sup>155</sup> See *The Head Money Cases*, 112 U.S. 580, 594–95 (1884). The Port Preference Clause is, self-evidently, purely a nondiscrimination provision. It was never intended to serve the goal of efficiency. In fact, Luther Martin, who proposed it, recognized that it might well be *inefficient*. See sources cited *supra* note 101. As discussed in Section VI.B below, the nineteenth-century Court interpreted the Port Preference Clause to forbid only categorical, state-by-state discrimination. “[W]hat is forbidden is[] not discrimination between individual ports within the same or different States, but discrimination between States”—the favoring of all of the ports of one state over all of the ports of another. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855). This vision of the constitutional constraint as a prohibition against discrimination along state lines is consistent with the Court’s contemporary interpretations of the uniformity mandate under the Bankruptcy and Uniformity Clauses.

<sup>156</sup> *Knowlton v. Moore*, 178 U.S. 41, 89 (1900) (emphasis added).

<sup>157</sup> For instance, in *Florida v. Mellon*, 273 U.S. 12, 17 (1927), the Court declared:

The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax.

As one commentator has explained, this discussion (though it may have been dicta) countenanced “a federal tax rate which explicitly varied by reference to th[e] ‘dissimilar laws’” of the several states. Laurence Claus, “Uniform Throughout the United States”: Limits on Taxing as Limits on Spending, 18 *Const. Comment.* 517, 525 (2001);

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demands for uniform rules, instead defining the constitutional mandate for uniformity in terms of uniform treatment alone.

This denigration of the efficiency rationale for uniformity—with its consequent rejection of the mandate for uniform rules (but not uniform treatment)—was likewise reflected in the Court’s turn of the century Commerce Clause jurisprudence. In *Leisy v. Hardin*, the Court stunned the temperance movement by holding that the dormant Commerce Clause<sup>158</sup> precluded dry states from forbidding the sale of alcoholic beverages that had been shipped in interstate commerce and remained in their original packages.<sup>159</sup> According to the Court, because “interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system,” the “power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States.”<sup>160</sup> But the Court went on to explain that Congress could choose to use its exclusive power in this

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see also, *Riggs v. Del Drago*, 317 U.S. 95, 102 (1942) (“Nor does the fact that the ultimate incidence of the federal estate tax is governed by state law violate the requirement of geographical uniformity.”); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 583 (1937) (rejecting a Uniformity Clause challenge to a federal tax law that afforded a credit for contributions paid to certain state social security schemes); *Poe v. Seaborn*, 282 U.S. 101, 117–18 (1930) (holding that “differences of state law, which may bring a person within or without the category designated by Congress as taxable” do not violate the Uniformity Clause); cf. 26 U.S.C. § 104(c) (2001) (providing that punitive damages, which generally are included in income, may be excluded if they are awarded in a wrongful death action in a state which allows only punitive damages in those actions); *Knowlton*, 178 U.S. at 107–08 (explaining that differences in state testamentary and intestacy laws do not render a federal tax on legacies and distributive shares nonuniform).

<sup>158</sup> Although the Commerce Clause is, textually, simply an affirmative grant of power to Congress, the Court held early on that it also contains a “dormant” or “negative” component, precluding the states from regulating commerce in certain circumstances. These early holdings were themselves based on the recognition that principles of uniformity underlie the Commerce Clause. The states cannot regulate in areas which necessitate “a single uniform rule, operating equally on the commerce of the United States in every port.” *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

<sup>159</sup> 135 U.S. 100, 124–25 (1890).

<sup>160</sup> *Id.* at 109.

arena to permit the states to decide for themselves whether to prohibit the importation of alcoholic beverages.<sup>161</sup>

Congress accepted the Court's offer and took up debate on the Wilson Act<sup>162</sup>—which allowed the states to preclude the sale of imported liquor—shortly after the *Leisy* decision. Although it was ultimately enacted into law, the Wilson bill initially met with fierce congressional opposition on constitutional grounds.<sup>163</sup> Significantly, the dispute between the bill's opponents and proponents did not turn on whether the Commerce Clause mandated uniformity; everyone seemed to concede that it did.<sup>164</sup> Rather, the dispute was over the meaning and extent of the uniformity requirement.

The bill's opponents advocated a constitutional mandate for uniform rules, not just uniform treatment, under the Commerce Clause. They argued that, notwithstanding the dicta from *Leisy* suggesting that Congress is empowered to authorize state regulation of commercial matters that would otherwise demand a uniform rule, the Commerce Clause would not permit such a result:

The object of Congressional regulation of commerce among the States was to secure 'one system' applicable to all the states. . . . Instead of having 'one system,' we shall have as many systems as there may be States. The laws and regulations prescribed by the States would be as various as the characteristics of their population and wholly wanting in uniformity.<sup>165</sup>

"The very object of this clause in the Constitution was to create uniformity," the opposition charged, "and yet the [bill] would destroy all uniformity."<sup>166</sup> The bill would "destroy the interstate-commerce clause of the Constitution and all the purposes for which

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<sup>161</sup> See *id.* at 108 ("[A] subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action.").

<sup>162</sup> Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (2000)).

<sup>163</sup> See Cushman, *supra* note 140, at 25–26.

<sup>164</sup> See, e.g., 21 Cong. Rec. 5369 (1890) (statement of Sen. Morgan) ("Uniformity in taxation, uniformity in the enactment of a bankrupt law, uniformity in the exercise of every branch of power that is confided to the Congress of the United States, seems to be a constitutional prerequisite of its exercise, and it ought to be.").

<sup>165</sup> *Id.* app. at 437 (statement of Rep. Culberson).

<sup>166</sup> 21 Cong. Rec. 4966 (1890) (statement of Sen. Vest).

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it was enacted originally, and so far from having uniformity we should have diversity and hostility.”<sup>167</sup>

Supporters of the bill countered that Congress can allow for nonuniform results without running afoul of the uniformity constraint on the commerce power. It was enough that the bill treated all states alike: “The effect of the bill, if it shall become a law, will be to leave every State in the Union free to determine for itself what its policy shall be in respect of the traffic in intoxicating liquors.”<sup>168</sup> This is constitutionally acceptable, as it “[g]iv[es] no preference to one State over another.”<sup>169</sup>

Like the bill’s supporters, the opposition also emphasized the need for uniform treatment and concurred that discriminating between states in the exercise of the commerce power was strictly forbidden. “What would you think of an act . . . of Congress over commerce among the States, discriminating in favor of one State and against another?” asked one senator, rhetorically.<sup>170</sup> The answer was self-evident: “That power does not exist in Congress. It is denied from the very nature of things in respect to commerce among the States.”<sup>171</sup> But to the opposition, because the uniformity mandate extended beyond uniform treatment to uniform rules, the Commerce Clause would not countenance affording the states the opportunity to choose for themselves whether to allow the impor-

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<sup>167</sup> *Id.* at 4957; see also *id.* at 4955 (“Are we upon the dictum of the Supreme Court to tear down the barriers of the Constitution? . . . What is the meaning of the [Uniformity Clause]? It means exactly the same thing that [the Commerce Clause] means, that the Congress shall have power to regulate commerce among the States.”); *id.* at 4966 (noting that the Port Preference Clause “and this clause regulating commerce were based on the same idea to produce uniformity, equality among the States, and to do away with the evils which had existed under the old Articles of Confederation, . . . and we now propose to bring back that same state of things”); *id.* at 5325 (statement of Sen. Coke); *id.* at 5331 (statement of Sen. Eustis); *id.* app. at 494 (statement of Rep. Rogers).

<sup>168</sup> *Id.* at 4954 (statement of Sen. Wilson).

<sup>169</sup> *Id.* at 4965 (statement of Sen. Edmunds). At one point, Senator Edmunds appeared to advocate the Supreme Court’s current position—that there is no uniformity limit whatsoever on the commerce power. See *id.* (“When it comes to the regulations of commerce as distinguished from the taxing power, no such limitation or reservation or proviso was imposed upon it.”). But his emphasis on the fact that the bill treats all states the same suggests that he was willing to concede a mandate for uniform treatment, just not one for uniform rules.

<sup>170</sup> *Id.* at 5372 (statement of Sen. Morgan).

<sup>171</sup> *Id.* at 5371.

tation of goods: “That the State discriminated against consents to the discrimination can make no difference, as we have seen. It is not in the power of a State to give force and validity even within its own borders to an act of Congress passed in violation of the Constitution.”<sup>172</sup>

Once enacted, the Wilson Act was quickly challenged in court. Echoing the arguments of the congressional opposition, the challengers contended that the law was unconstitutional because it “lacks the element of *uniformity*, which . . . is an indispensable requisite of the regulation of inter-State commerce.”<sup>173</sup> The term “uniformity” was used here in the sense of uniform rules, not just uniform treatment: “[I]t was contemplated by the Framers of the constitution that any law enacted by Congress in the exercise of the [commerce power] should be uniform in its operation.”<sup>174</sup> Thus, exercises of the commerce power must result in “a uniform rule of regulation throughout the country.”<sup>175</sup> Allowing the states to choose for themselves whether to regulate therefore violates the uniformity mandate: “If some of the States should have laws that would reach the subject, and others not, which is and ever will be the case, then there would always be that want of *uniformity* of regulation . . . which we have seen is a requisite of any regulation of inter-State commerce.”<sup>176</sup>

Opposing counsel defended the constitutionality of the Wilson Act on the ground that it was uniform to the extent mandated by the Commerce Clause:<sup>177</sup> “It is a regulation of commerce, uniform and general in its operation” in that it applies equally to all of the states; “the want of uniformity,” to the extent that there was one,

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<sup>172</sup> Id. at 4956 (statement of Sen. Vest, quoting a report by the Senate Judiciary Committee).

<sup>173</sup> Brief for the Appellee at 19, *Wilkerson v. Rahrer*, 140 U.S. 545 (1891) (No. 1529).

<sup>174</sup> Id. at 40.

<sup>175</sup> Id. at 22.

<sup>176</sup> Id. at 24–25.

<sup>177</sup> Actually, counsel was unwilling to concede the existence of any sort of uniformity constraint on the commerce power. See Brief for the Appellant at 16, *Rahrer* (No. 1529) (“The constitution does not require that the regulation of interstate commerce shall be uniform throughout the several States. But if it did, this statute is not open to objection upon that account.”).



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resulted from divergent state laws, which did not affect the constitutionality of the federal statute.<sup>178</sup>

In *Wilkerson v. Rahrer*,<sup>179</sup> the Court agreed, holding, as its prior decision in *Leisy* had suggested, that a law allowing all of the states to regulate as they saw fit did not violate the Commerce Clause. Although its opinion is a bit cursory on the point, the Court strongly implied that the Commerce Clause does indeed contain a uniformity mandate, but one limited (like its counterparts in the Bankruptcy and Uniformity Clauses) only to nondiscrimination between the states: “[Congress] has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.”<sup>180</sup> In other words, in the relevant constitutional sense, the federal statute was uniform in that it applied equally in every state (uniform treatment); it was only a difference in *state* laws that led to nonuniformity in the alcohol market (nonuniform rules). And that difference was not of a constitutional dimension.

When the Wilson Act proved ineffective, Congress enacted (over a presidential veto) the Webb-Kenyon Act,<sup>181</sup> which prohibited the shipment of alcohol into dry states. As with the Wilson Act, the congressional opposition to the Webb-Kenyon Act argued that the law “would subvert the whole intent, spirit, and purpose of the commerce clause, which is essentially to establish a uniform system.”<sup>182</sup> That concern was echoed by President Taft, who declared in his veto message that

[i]t was certainly intended by that clause to secure uniformity in the regulation of commerce between the States. To suspend that purpose and to permit the States to exercise their old authority

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<sup>178</sup> Id. at 14.

<sup>179</sup> 140 U.S. 545, 562–65 (1891).

<sup>180</sup> Id. at 561. The Court explained that “the object was undoubtedly sought to be attained [by the Commerce Clause] of preventing commercial regulations partial in their character or contrary to the common interests.” Id.

<sup>181</sup> Webb-Kenyon Act, ch. 90, 37 Stat. 699–700 (1913) (codified as amended at 27 U.S.C. § 122 (2000)).

<sup>182</sup> 49 Cong. Rec. 2904 (1913) (statement of Sen. (and future Justice) Sutherland). The primary opposition to the law focused on an argument that it violated the non-delegation doctrine. See Cushman, *supra* note 140, at 28–29.

before they became States, to interfere with commerce between them and their neighbors, is to defeat the constitutional purpose.<sup>183</sup>

In *James Clark Distilling Co. v. Western Maryland Railway Co.*,<sup>184</sup> the Court rejected these concerns and sustained the constitutionality of the Webb-Kenyon Act—hardly a surprising result, as both *Leisy* and *Rahrer* had already conclusively answered these constitutional objections. Still, the curious and unfortunate way in which the Court went about rejecting these arguments sowed the seeds of the evisceration of the uniformity constraint on the commerce power.

Relying on its prior decisions in *Leisy* and *Rahrer*, the Court made short work of the claim that a statute of this nature is non-uniform:

So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself.<sup>185</sup>

In other words, the uniformity required by the Constitution is uniform treatment, not uniform rules—the very same conclusion that the Court had recently reached under both the Uniformity Clause and the Bankruptcy Clause.

So far so good. Unfortunately, although the issue was therefore settled, the Court immediately added, seemingly as an afterthought: “But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States.”<sup>186</sup>

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<sup>183</sup> 49 Cong. Rec. 4292 (1913).

<sup>184</sup> 242 U.S. 311, 332 (1917).

<sup>185</sup> Id. at 326–27.

<sup>186</sup> Id. at 327.

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What did the Court mean by this? It appears, based on the rest of the paragraph and the paragraphs that follow, that when the Court declared that the Commerce Clause does not require laws to be “uniform throughout the United States,” it was speaking only of uniform rules, not uniform treatment. In other words, the Court meant only to say that the Commerce Clause does not mandate uniform rules. We can determine this because the Court explained that it was rejecting “the argument relied upon” by the President and the Attorney General.<sup>187</sup> Their

sole claim [was] that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the States by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence in the nature of things was wanting in uniformity.<sup>188</sup>

This is an argument for uniform rules, not uniform treatment.

What is more, the Court then went on to examine the *Leisy* opinion in some detail, and concluded that *Leisy* “plainly refutes” the uniformity argument before the Court.<sup>189</sup> *Leisy*, it will be recalled, had rejected the idea that the Commerce Clause requires uniform rules, but had nonetheless acknowledged the constitutional mandate that interstate commerce “must be governed by a uniform system”<sup>190</sup>—a mandate that both Congress and the Court had understood to require uniform treatment. Even those legislators who agreed with *Leisy*’s rejection of uniform rules had conceded that uniform *treatment* was still required.

If the Court had meant to go further—to refer to (and reject) a mandate for uniform treatment under the Commerce Clause—any such discussion would have been quintessential dicta. The Webb-Kenyon Act in fact treated all states equally, and no one had sug-

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 326.

<sup>189</sup> *Id.* at 327–30. *Leisy* refutes the argument for uniform rules because it necessarily stands for the proposition that, even with regard to matters on which the dormant Commerce Clause precludes the states (in the absence of federal legislation) from adopting nonuniform rules, Congress is nonetheless empowered to step in and authorize the states to enact disparate regulations.

<sup>190</sup> *Leisy v. Hardin*, 135 U.S. 100, 108–09 (1890).

gested (or even had any reason to suggest) that the Commerce Clause did not require uniformity of that sort.

As such, it hardly seems likely that the Court intended to venture an opinion on the question of uniform treatment. Rather, what the Court appears to have meant is this: this statute is uniform because it treats all of the states the same. Those who demand more—that a single, uniform rule must ultimately apply to individuals in every state—are asking for something that the Constitution does not require.

Still, the meaning apparently intended by the Court is not the most obvious and natural reading of the language actually employed. This passage from *James Clark Distilling* creates the immediate impression that the Commerce Clause does not require *any* kind of uniformity at all—neither uniform rules, nor uniform treatment. That the Court chose this language to convey a very different point (a rejection of only uniform rules), suggests that the Justices failed even to contemplate the possible existence of a uniform treatment objection to a federal law. Had they considered that objection, they would have chosen their words more carefully. But they did not. In its rush to convincingly spurn a losing and outmoded argument for uniform rules, the Court appears to have lost sight altogether of the notion of constitutional uniformity—uniform treatment—that it had recently articulated in reference to the bankruptcy and tax powers, and that it had long held to be applicable to the commerce power.

That was an unfortunate oversight, for in subsequent cases, the Court took this passage from *James Clark Distilling* at face value, interpreting it to reject not only a mandate for uniform rules, but also one for uniform treatment. It was this naked statement—at best dysfunctionally inarticulate, at worst an ill-considered and erroneous *dictum*—that alone spawned the line of cases recounting the principle that there is no uniformity requirement in the exercise of the commerce power.<sup>191</sup> Based solely on this authority (and a

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<sup>191</sup> See *Currin v. Wallace*, 306 U.S. 1, 13–14 (1939) (relying solely on *James Clark Distilling* and on the absence of the word “uniform” in the Commerce Clause as contrasted with the Uniformity Clause); *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (relying on the same authorities); *Hodel v. Indiana*, 452 U.S. 314, 332 (1981) (relying solely on *Central Roig* and *Currin*); *Ry. Labor Executives’ Ass’n v.*

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superficial textual comparison between the Commerce Clause and the Uniformity and Bankruptcy Clauses), the Court declared in 1950 that Congress was free to impose quotas limiting the amount of sugar produced in various domestic geographic regions that could be offered for sale in the continental United States.<sup>192</sup> The proposition that there is no uniformity constraint whatsoever in the Commerce Clause, and that Congress is therefore free to discriminate between the states in the exercise of the commerce power—a proposition directly contrary to a century-and-a-half-old understanding of the scope of that power—had taken root. By the 1980s, the Court took it as a given that the uniformity—uniform treatment—mandated by the Bankruptcy and Uniformity Clauses is not mandated by the Commerce Clause.<sup>193</sup>

## V. TOWARD A MORE SENSIBLE MODERN RULE

To summarize, the Court's current rule is the product of vulgar textualism, forgotten history, and sloppy opinion writing—hardly an illustrious pedigree. Still, why is all of that not just water under the bridge? The law often evolves in less-than-intellectually impressive ways, but it evolves nonetheless. What is the necessity

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Gibbons, 455 U.S. 457, 468–69 (1982) (relying on *Central Roig, Hodel*, and a textual comparison of the Commerce Clause and the Bankruptcy Clause).

<sup>192</sup> *Cent. Roig Ref. Co.*, 338 U.S. at 606, 616. The briefs in *Central Roig* illustrate the disappearance of the uniformity constraint on the commerce power. One brief argues in passing that, because the Commerce Clause was “intended to establish a single national economy,” the challenged statute “runs directly contrary to the economic theory which animates the Constitution.” Brief for the Gov't of P.R. at 108, *Cent. Roig Ref. Co.* (No. 32). But the central thrust of the constitutional challenge to the statute essentially conceded the lack of a uniformity constraint by arguing that the discrimination was so arbitrary as to violate what would come to be known as the equal protection component of the Due Process Clause. See Brief for the Respondents *Cent. Roig Refining Co. and Western Sugar Refining Co.* at 32–33, *Cent. Roig Ref. Co.* (No. 30). The briefs on the other side cited *Currin v. Wallace* for the proposition that there is no requirement of uniformity under the Commerce Clause. See Brief for the American Sugar Refining Co., et al., Respondents-Intervenors at 26–27, *Cent. Roig Ref. Co.* (No. 27).

<sup>193</sup> See *Ry. Labor Executives' Ass'n*, 455 U.S. at 468, 470–71, 475 (“Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause.”); *Hodel*, 452 U.S. at 332.

of—or the point in—going backwards? After all, it might seem the height of folly to concern ourselves with what the Framers thought about the commerce power, given the fact that our contemporary understanding of the nature and scope of that power is so radically different from that of the framing generation. As I hope to demonstrate, however, in this particular regard, the original intent should still matter, even if we embrace the expansive modern reading of the Commerce Clause.

### *A. Originalism*

To be clear, in emphasizing the importance of the intent of the Framers, I do not mean to invoke the notion of “originalism” as orthodoxy in constitutional interpretation. To the contrary, on this particular issue, originalism might, ironically, produce a result that strays unacceptably far from history.

An old-fashioned originalist—one who interprets the Constitution to reflect for all time the original, subjective intent of the Framers—would surely be tempted to say, in light of the evidence presented above, that the Constitution imposes a uniformity constraint on the exercise of the commerce power.<sup>194</sup> Most self-professed originalists today, however, subscribe to a theory of “original meaning” rather than “original intent.” That is to say, they seek to interpret the Constitution according to the original, objective meaning of the text, rather than the subjective meaning that one or even all of the Framers may have intended.<sup>195</sup> According to Justice Scalia,

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<sup>194</sup> See, e.g., Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 *Cornell L. Rev.* 350, 350–51 (1988); Edwin Meese III, *Construing the Constitution*, Address Before the District of Columbia Chapter of the Federalist Society Lawyers Division 19 *U.C. Davis L. Rev.* 22, 26 (1985) (“Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated *or implied* by the Constitution, it should be followed.”). Of course, an originalist of this stripe, if she sticks to her guns, would also limit the commerce power to the narrow scope contemplated by the Framers, such that any discriminatory exercise of that power would violate the plain language of either the Uniformity Clause or the Port Preference Clause, see *supra* Section III.B.2, and such that most of the modern statutes enacted under the commerce power would be unconstitutional regardless of whether they are nonuniform. As such, the point would essentially be moot.

<sup>195</sup> For a thorough discussion of the evolution of originalism from a subjective to an objective inquiry, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loy. L. Rev.* 611, 620–29 (1999). For a detailed history of originalism, including an excel-

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the most outspoken and influential champion of this interpretive theory,<sup>196</sup> the proper inquiry is a search “for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris . . . . Government by unexpressed intent is . . . tyrannical. It is the *law* that governs, not the intent of the lawgiver.”<sup>197</sup> Judge Bork has expanded on this point:

Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. When lawmakers use words, the law that results is what those words ordinarily mean.<sup>198</sup>

Modern originalists are, in other words, primarily textualists.

This emphasis on textual meaning would seemingly lead a modern originalist to reject a generalized uniformity constraint on the commerce power, notwithstanding the historical support outlined above. Even though the Framers intended such a constraint to exist, the fact remains that, as the Constitution ended up being writ-

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lent summary of the writings and beliefs of modern textual originalists, see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Geo. L.J.* 1113, 1134–48 (2003). Of course, there are a variety of distinct interpretative theories that might be said to fall under the broad tent of modern textualism and originalism. It is certainly possible that not all originalists and textualists would agree as to the proper resolution of the issue at hand.

<sup>196</sup> See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) [hereinafter *Scalia, Interpretation*]; Antonin Scalia, *Originalism: The Lesser Evil*, Address at the University of Cincinnati 57 *U. Cin. L. Rev.* 849 (1989) [hereinafter *Scalia, Originalism*].

<sup>197</sup> *Scalia, Interpretation*, supra note 196, at 17.

<sup>198</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 144 (1990).

ten, the Commerce Clause contains no express uniformity limitation, the Uniformity Clause applies on its face only to “Duties, Imposts and Excises,” and the Port Preference Clause forbids only the giving of preferences “to the *Ports* of one state over those of another.” An objective reading of these texts does not yield a prohibition against nonuniform regulations of commerce, except where those regulations take the form of taxes or operate as a preference for the ports of a particular state. The subjective intentions of the Framers to the contrary are, to the modern, textual originalist, irrelevant.<sup>199</sup>

It is true, of course, that originalists regularly consult historical sources, including many of the sources cited above, to discern the original meaning of the constitutional text.<sup>200</sup> But much of the historical evidence relied upon above would not be helpful to the originalist enterprise. This material—evidence, in Judge Bork’s words, of “the subjective intentions of all the members of a ratifying convention,”<sup>201</sup> rather than evidence of the original, objective meaning of the text—is off-limits to today’s originalists. There is, for instance, no way that a typical citizen<sup>202</sup> in 1787 could have known of the entwined histories at the Convention of the Uniformity Clause, the Port Preference Clause, and the Commerce Clause.<sup>203</sup> The proceedings at the Convention had, after all, been

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<sup>199</sup> See, e.g., Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *Geo. Wash. L. Rev.* 1119, 1119 (1998) (explaining that “the project of textualism is to deny that intent should matter . . . and to affirm the primacy of *text*”).

<sup>200</sup> See Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 *UCLA L. Rev.* 217 (2004).

<sup>201</sup> Bork, *supra* note 198, at 144.

<sup>202</sup> Although the originalists have not reached a consensus about whose understanding of the meaning of the text should be dispositive, they tend to focus on the understanding of a hypothetical typical citizen, or perhaps a typical voter at a state ratification convention. See *id.* at 220–21, 226–27.

<sup>203</sup> See Kesavan & Paulsen, *supra* note 195, at 1115–16 (recounting the “conventional wisdom” among modern originalists that “the Constitution’s secret drafting history should not be admissible evidence in proving propositions about constitutional meaning”). Kesavan and Paulsen take issue with the modern consensus, but for the most part only on the ground that these sources are often useful in “provid[ing] important evidence of the way informed eighteenth-century Americans understood and used the language of the Constitution.” *Id.* at 1186–87. In other words, they are useful only to the extent that they can help to clarify the objective meaning of the text. See *id.* at 1198–1214; *id.* at 1201 (“If we are trying to prove that a constitutional word or phrase means X, the secret drafting history may help to confirm that the ordinary us-



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shrouded in the strictest secrecy.<sup>204</sup> And, as it happens, the sources that are most compelling to the originalists—the Federalist Papers and other records from the ratification debates<sup>205</sup>—are the least helpful here. There was comparatively little discussion of the uniformity mandate in the public ratification debate.

Still, one could certainly argue, given the widely known historical context, that reasonable citizens would have believed a uniformity constraint—whether or not it was explicitly articulated in the text—to be inherent in the very nature of a federal commerce power. The lack of uniformity was, after all, the catalyst for the Convention, and everyone was well aware of the overwhelming desire to prohibit federal discrimination among the states. But to a textualist, such an argument strays dangerously far from the constitutional text; if uniformity is an inherent limit on a federal power of this nature, why does the Constitution contain an explicit uniformity constraint in some related clauses?<sup>206</sup> Subordinating these textual differences between clauses to a claim of unwritten, implicit meaning would seem to defeat the principal purpose of the new originalism—to constrain the will of judges through reliance on the objective meaning of the text.<sup>207</sup>

Of course, in other circumstances, prominent modern originalists have been known to travel well beyond the constitutional

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age of a constitutional word or phrase is indeed X.”). Kesavan and Paulsen would presumably not place substantial weight on evidence from the Convention that indicates that the Framers intended a result that was not conveyed by the original, objective meaning of the text.

<sup>204</sup> See Collier & Collier, *supra* note 60, at 83–84.

<sup>205</sup> See Scalia, *Interpretation*, *supra* note 196, at 38.

<sup>206</sup> Cf. *Harmelin v. Michigan*, 501 U.S. 957, 976–78 (1991) (Scalia, J., separate opinion) (arguing that because the Framers were aware of explicit bars on disproportionate punishment in state constitutions, the omission of an explicit bar in the Eighth Amendment should be interpreted as intentional); Amar, *supra* note 49, *passim* (advocating a textualist theory of constitutional interpretation that determines meaning by comparing the language of different clauses).

<sup>207</sup> See Smith, *supra* note 200, at 223–24, 229–30; David A. Strauss, *The New Textualism in Constitutional Law*, 66 *Geo. Wash. L. Rev.* 1153, 1156 (1998) (“Many of the most prominent exponents of textualism—notably Justice Black a generation ago and Justice Scalia today—urge that departing from the text permits judges too much leeway to read their own views into the law.”).

text.<sup>208</sup> To the extent that those deviations can be reconciled at all with the textual originalist enterprise,<sup>209</sup> however, they do not appear to be sufficiently analogous to serve as precedents for abandoning the text on the issue at hand. For when it comes to the uniformity constraint, there is no tradition of *stare decisis* upon which to justify a deviation from the text,<sup>210</sup> there is no long-standing and widely known historical practice that pre-dates the framing,<sup>211</sup> and there are, in fact, provisions of the text that speak to the issue at hand.<sup>212</sup>

If the originalists are going to adopt a uniformity constraint on the commerce power, they will likely do so based on the theory that sometimes two wrongs make a right. Originalists believe that the modern expansion of the commerce power is inconsistent with the original meaning of the text. That is the first wrong, but it is a wrong in which the originalists have acquiesced. Virtually every modern originalist has expressed a willingness (or at least a resignation) to accept at least some of the modern expansion of the

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<sup>208</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997) (Scalia, J.) (holding, on the basis of history, that the Constitution precludes the federal government from requiring state executive officials to perform acts in service of a federal statutory program); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30–35 (1989) (Scalia, J., concurring in part and dissenting in part) (refusing to abide by the narrow text of the Eleventh Amendment on the ground that that amendment was drafted on the assumption of the existence of a broader immunity principle).

<sup>209</sup> For suggestions that they cannot, see Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. Colo. L. Rev. 953, 969–71 (1999), Martin H. Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 Nw. U. L. Rev. 165, 169 n.31 (1993).

<sup>210</sup> Cf. *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 495–96 (1987) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the *Hans v. Louisiana* Court's nontextual interpretation of the Eleventh Amendment should not be disturbed because Congress has been relying on it for a century).

<sup>211</sup> Cf. *Union Gas Co.*, 491 U.S. at 31–32 (Scalia, J., concurring in part and dissenting in part) (endorsing a broad interpretation of the Eleventh Amendment, based on the idea that “the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away”).

<sup>212</sup> Cf. *Printz*, 521 U.S. at 905 (“Because there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”).

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commerce power beyond the narrow scope contemplated by the framing generation.<sup>213</sup> It is only because of this first wrong that the lack of an express uniformity constraint in the Commerce Clause matters; as noted above, if the commerce power were constrained to its eighteenth-century scope, the Port Preference Clause and the Uniformity Clause would be sufficient to enforce the uniformity mandate.<sup>214</sup> It is quite possible that, in order to preserve a textual limitation on discrimination between the states that is no longer adequate in the face of what they perceive to be an illegitimate expansion of federal power, the originalists would compound the sin of disregarding the original plain meaning of the scope of the commerce power by also disregarding the plain textual limitations on the uniformity constraint.

That would certainly be a plausible thing for an originalist to do. But one wonders whether the lure of the plain text, and the general impetus to move closer to, not further from, original meaning would simply prove too compelling to overcome.<sup>215</sup> If so, then I respectfully part company with the originalists. To capitulate to the narrow text here is to miss the forest for the trees, and to arrive at a result demonstrably at odds with a historical backdrop that—for reasons that I will explain shortly—should play a central role in determining constitutional meaning. It is ironic then that in one of the rare instances in which the history might actually be clear enough

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<sup>213</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (observing that “case law has drifted far from the original understanding of the Commerce Clause” and recommending that in the future, the Court 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”); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 *Harv. J.L. & Pub. Pol’y* 849, 851 (2002) (“[T]hat the scope of the commerce power has expanded so far beyond the original understanding of that power’s boundaries that any attempt to adhere strictly to its original meaning today would likely be futile and inappropriate.”). See generally Scalia, *Originalism*, *supra* note 196, at 861 (“[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis*.”).

<sup>214</sup> See *supra* Section III.B.2.

<sup>215</sup> Cf. *Am. Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment) (“I decline to adopt [a rule of prospective decisionmaking] because, as I have discussed above, such a mode of action is fundamentally beyond judicial power—and although ‘negative’ Commerce Clause decisionmaking is as well, two wrongs do not make a right.”).

to provide concrete answers to real questions,<sup>216</sup> there is a danger that the originalists would choose to ignore it.

### *B. A Better Role for History*

As the foregoing makes clear, to reject orthodox originalism in this instance (and others, for that matter) is not to suggest that historical evidence is irrelevant in constitutional interpretation. The notion that those who do not swallow whole the originalist credo must instead subscribe to an “original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence”<sup>217</sup> is largely a boogeyman of the originalists’ own making. In truth, as Professor Farber has explained, “[a]lmost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation.”<sup>218</sup>

Most modern interpreters of the Constitution, including most of the Justices of the Supreme Court in the last century, have spurned orthodox originalism in favor of a more flexible constitutionalism, one that takes to heart Chief Justice John Marshall’s admonition that “we must never forget, that it is *a constitution* we are expounding.”<sup>219</sup> According to Marshall, the Constitution, by “[i]ts nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”<sup>220</sup> It was “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”<sup>221</sup>

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<sup>216</sup> This is one of the most frequently expressed criticisms of originalism—that the historical sources rarely yield a clear answer. See Smith, *supra* note 200, at 225, 230–31.

<sup>217</sup> *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

<sup>218</sup> Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *Ohio St. L.J.* 1085, 1086 (1989); see also Barnett, *supra* note 195, at 611–29 (detailing the modern consensus that the historical understanding matters in constitutional interpretation); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 880–81 (1996) (noting that “[e]veryone agrees that the text of the Constitution matters” and “[v]irtually everyone agrees that the specific intentions of the Framers count for something”).

<sup>219</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 415 (emphasis omitted).

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Because the Constitution was so intended, most modern constitutional theorists are inclined to “take the Framers’ understanding at a certain level of abstraction or generality.”<sup>222</sup> In Justice Brennan’s words, “[t]he Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic contours.”<sup>223</sup> Thus, to “remain faithful to the content of the Constitution,” we cannot be slaves to the narrow, original meaning of the text.<sup>224</sup>

Most modern constitutional theorists care a great deal about the original meaning of the text and the original intent of the Framers, not necessarily as conclusions, but rather as sources (along with the case law that has been developed under the Constitution) from which to distill primary constitutional principles—the fundamental values and limitations that the Constitution was meant to protect and enact. These broad principles are then continuously refined and adapted to govern the contemporary problems of an ever-changing world.<sup>225</sup>

On this view, the narrow original meaning of the text is not the beginning and the end of constitutional decisionmaking. Rather, the constitutional meaning is capable of being informed and shaped by American history, both before and after the framing. As such, it matters that the Framers believed something, even if they did not clearly and objectively express that belief in the text. Their beliefs can help us understand, at a suitably broad level of abstraction, the values that are reflected in the words that they did include

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<sup>222</sup> Cass R. Sunstein, *Five Theses on Originalism*, 19 Harv. J.L. & Pub. Pol’y 311, 313 (1996).

<sup>223</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Address at Georgetown University 19 U.C. Davis L. Rev. 2, 6 (1985).

<sup>224</sup> *Id.*

<sup>225</sup> This basic belief takes many forms and has been articulated in countless different ways. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 4–6 (1955); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1182–88 (1993); Strauss, *supra* note 218, at 881; Sunstein, *supra* note 222, at 314–15. There are nearly as many alternatives to orthodox originalism as there are law professors, and it is not my purpose here to endorse any one of them.

in the Constitution—values that should continue to govern today's problems, unless there is a valid reason for abandoning them.<sup>226</sup>

If we step back to this level of generality, the lack of a clear textual expression of the general uniformity constraint of the commerce power is by no means dispositive.<sup>227</sup> Indeed, this may be the

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<sup>226</sup> Cf. Kesavan & Paulsen, *supra* note 195, at 1126 (noting that non-originalists often rely on the Constitution's "secret drafting history" as a useful tool for determining a historical baseline of constitutional meaning).

<sup>227</sup> In fact, in far less compelling circumstances, the Court has already implied a uniformity constraint on a federal power that contains no such express limitation. Together, U.S. Const. art. III, § 2, which extends the federal judicial power to cases in admiralty, and the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, empower Congress to enact rules of admiralty law. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 214–15 (1917). The "fundamental purpose" of the admiralty jurisdiction provision was to "preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within the control of the Federal Government." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920); see also 3 Elliot's Debates, *supra* note 57, at 532 (quoting Madison's statement at the Virginia Ratification Convention that "[t]o the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform."); 3 Elliot's Debates, *supra* note 57, at 571 (quoting Edmund Randolph's statement at the Virginia Ratification Convention that "[c]ases of admiralty and maritime jurisdiction . . . ought . . . to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions—this jurisdiction ought to be in the federal judiciary." (emphasis omitted)). For this reason, the Court has long held—notwithstanding the fact that the Constitution nowhere mentions a uniformity requirement in admiralty—that Congress is precluded from enacting nonuniform rules of maritime law; to allow Congress to do so "would defeat the very purpose of the grant" of federal power. *Knickerbocker Ice*, 253 U.S. at 164.

*Knickerbocker Ice* has been discredited, see *Ceres Terminals, Inc. v. Indus. Comm'n of Ill.*, 53 F.3d 183, 184 (7th Cir. 1995), but not because of its prohibition on nonuniform maritime laws. Rather, its disrepute stems from its impermissibly stringent understanding of the mandate of uniformity. *Knickerbocker Ice* held that, because of the uniformity constraint, Congress could not incorporate diverse state standards into federal admiralty law. 253 U.S. at 164. That strict reading of the constitutional uniformity mandate as requiring uniform rules is inconsistent with general uniformity law, see *supra* Part IV, and the Court would likely reject it today. See *Wash. v. W.C. Dawson & Co.*, 264 U.S. 219, 234–35 (1924) (Brandeis, J., dissenting) (explaining that the notion that Congress may not incorporate state law when enacting maritime regulations is inconsistent with the prevailing conception of uniformity in other areas of constitutional law); William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 *Stan. L. Rev.* 387, 405 (1983) ("*Knickerbocker Ice Co.* was thus wrongly decided, even if one grants Justice McReynolds his dubious premise that the Constitution requires nationally uniform law when maritime law is federal. . . . It was [the conception that a uniformity mandate precludes Congress from incorporating state law], rather than a

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paradigmatic example of a fundamental constitutional value that is not clearly reflected in the text.

Professor Tribe has cautioned against a modern constitutional textualism that interprets isolated clauses with insufficient attention to matters of constitutional structure and historical background, thereby placing undue weight on the absence of a particular limiting word in the text.<sup>228</sup> Such caution is especially appropriate when the history gives us reason to believe that the Constitution would never have been ratified if it had been generally understood that the lack of the limiting word was intentional and significant.<sup>229</sup>

That is the situation here. The uniformity constraint on the commerce power was of the utmost importance to the framing generation, and it is highly unlikely that the Constitution would have been proposed or ratified without it.<sup>230</sup>

What is more, the historical evidence, along with the structure and drafting history of Article I, belies any significance to the absence of the word “uniform” from the Commerce Clause.<sup>231</sup> As explained above, the provision that ultimately became the Uniformity Clause originally mandated uniformity in both taxes and commercial regulations, in accordance with the Madisonian proposal that prompted the Convention in the first place, and with the Framers’ understanding that the power to regulate commerce and the power to tax commerce were one and the same. It was only through inadvertent stylistic tinkering that the Constitution as enacted did not contain an express uniformity limitation on all commercial regulations.

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requirement that national laws be uniform, that doomed Congress’s attempt to return power to the states.” (emphasis omitted)).

<sup>228</sup> See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1239–45 (1995) (criticizing Professors Ackerman and Amar for placing significant weight on the lack of the word “only” in certain clauses where the constitutional structure and historical background make clear that those clauses were meant to be exclusive).

<sup>229</sup> See *id.* at 1243.

<sup>230</sup> See 3 Farrand, *supra* note 79, at 365–66 (quoting Rep. Williamson’s statement that “I do not hazard much in saying, that the present Constitution had never been adopted without those preliminary guards in it.”).

<sup>231</sup> See *supra* Part III.

That omission was of no consequence to the Framers. Given their narrow understanding of the scope of the commerce power—which they imagined to extend only to the power to tax commercial shipping and to regulate commercial sea shipping and navigation—they had reason to believe that the combined effect of the Commerce Clause, the Uniformity Clause, and the Port Preference Clause was to effectuate fully the Madisonian proposal. That is to say, they had reason to believe that those clauses were sufficient to grant Congress plenary authority to tax and regulate commercial matters, but to require that all such regulations be uniform.<sup>232</sup>

Today, however, as our understanding of the scope of the commerce power has expanded well beyond the original meaning of the Commerce Clause, the sum of the three parts, as each is currently understood, no longer adds up to the entire whole. We currently read the power to “regulate Commerce” extremely broadly, but we continue to confine the uniformity constraint to the narrow confines of “Duties, Imposts and Excises” under the Uniformity Clause and “Preferences to the Ports of one State over those of another” under the Port Preference Clause. That leaves all other regulations enacted under the commerce power—which constitute the vast majority of modern federal regulatory statutes—unconstrained by a uniformity limitation.

This makes little sense. If we read the Commerce Clause more broadly today than the Framers originally intended, we should make sure that we read the clauses that establish the core limitation on that power broadly enough to keep up. Otherwise, we end up with a particularly perverse result. As the Framers were jealous enough to ensure that the limited, eighteenth-century commerce power could not be misused to prejudice individual states, we can safely assume that, had they been aware of the extent to which that power would be expanded in the future—to approach a plenary federal police power—they would have been doubly terrified by the potential for regional favoritism.

We should not let the Framers’ stylistic choice of wording—perfectly sensible at the time, but unfortunate in light of subsequent, unforeseen developments—stand in the way of what was

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<sup>232</sup> See *supra* Section III.B.2.



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perhaps their single most fundamental concern at the Convention. To do so would be to read the Constitution like an ordinary statute—to “forget that it is a *constitution* we are expounding” rather than a “legal code”—and to elevate the text to a conclusive status that it does not, and should not, hold in matters of constitutional law. Rather, we should extract from the text and drafting history of the Commerce Clause, the Uniformity Clause, and the Port Preference Clause, and from the additional, compelling evidence of historical context and original intent, a broader, more general principle of constitutional law: that Congress may not discriminate among states in its exercise of the commerce power, however broadly the contours of that power come to be understood. Only then do we ensure that the broad animating principles of the Constitution remain relevant and vital through the changing course of history.<sup>233</sup>

*C. A Sensible Rule*

Inferring a mandate in the Commerce Clause for uniform treatment, but not for uniform rules, might appear to be at least partially inconsistent with the very history upon which I am relying. It was, after all, the desire for uniform *rules* that prompted the Constitutional Convention. But appearances can be deceiving. In fact, limiting the mandate to uniform treatment makes eminent sense and does no harm to the principles championed in Philadelphia.

To begin with, there is the importance of consistency. The Supreme Court has indicated that it considers the same basic principle—uniform treatment—to underlie the uniformity mandate of the Uniformity Clause, the Bankruptcy Clause, and the Port Preference Clause.<sup>234</sup> As well it should, given the history recounted

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<sup>233</sup> Of course, the notion of what counts as impermissible discrimination—just like the notion of what counts as commerce—can surely evolve over time to afford Congress the necessary flexibility to address the needs of a changing nation. See *infra* Part VI. But the core principle that Congress must treat the states uniformly and fairly should endure.

<sup>234</sup> See *United States v. Ptasynski*, 462 U.S. 74, 83 n.13 (1983) (“Although the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uniformity Clause, we have looked to the interpretation of one Clause in determining the meaning of the other.”); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 160 (1974) (“Our construction of the Bankruptcy Clause’s uniformity provision com-

above. That same principle should also underlie the uniformity mandate of the Commerce Clause. Because the Port Preference Clause and the Uniformity Clause were both intended to be expressions of a single, general uniformity limitation on the power to regulate commerce,<sup>235</sup> the nature of that generalized constraint, if it is recognized under the Commerce Clause, should reflect the nature of the uniformity mandate under these other, narrower provisions.<sup>236</sup>

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ports with this Court's construction of other 'uniform' provisions of the Constitution."); *Knowlton v. Moore*, 178 U.S. 41, 106 (1900) (holding that the uniformity principle articulated in a case interpreting the Port Preference Clause applies also to the Uniformity Clause "since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception").

<sup>235</sup> As for the Bankruptcy Clause, Madison recognized that "[t]he power of establishing uniform laws of bankruptcy, is . . . intimately connected with the regulation of commerce," *The Federalist* No. 42, at 56 (James Madison) (Legal Classics Library 1983), an observation echoed by the Supreme Court on a number of occasions, see *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 465 (1982) ("Distinguishing a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy Clause is admittedly not an easy task, for the two Clauses are closely related."); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 195 (1819) ("The bankrupt law is said to grow out of the exigencies of commerce . . .").

<sup>236</sup> Although the Naturalization Clause also contains an express uniformity limitation, the Supreme Court has never had the occasion to interpret it. See Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696, 1697-98 (1999). Early lower court decisions were inclined to treat the uniformity mandate of the Naturalization Clause as coextensive with the uniformity demanded by the Bankruptcy and Uniformity Clauses (that is, uniform treatment), but more recent cases have tended to read the naturalization mandate as a strict demand for uniform rules. See *id.* at 1705-20; cf. *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (dictum) ("Congress' power is to 'establish an uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity."). The recent trend in the case law follows the work of several commentators who have argued that the Naturalization Clause—which was born exclusively out of a desire for uniform rules, rather than nondiscrimination, and which provides for "an uniform Rule," rather than "uniform laws"—demands a stricter brand of uniformity than is required elsewhere in the Constitution. See Bennett, *supra*, at 1719-20; Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. Rev. 591, 633-36 (1994) (arguing that Congress should not be able to incorporate state laws when exercising the naturalization power); Michael T. Hertz, *Limits to the Naturalization Power*, 64 Geo. L.J. 1007, 1017-18 (1976) (same).

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Second, and more importantly, it makes good sense to give Congress the discretion to decide whether or not to impose uniform rules, but not the discretion to discriminate among the states. The Framers sought uniform rules in the service of efficiency—to prevent infighting and chaos in commercial regulations; that was the motivation for federalizing the commerce power. But, as the Supreme Court recognized as early as its landmark decision in *Cooley v. Board of Wardens*, to require uniform rules in every single aspect of commercial regulation would actually subvert efficiency.<sup>237</sup>

After all,

the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [rules for pilotage in local ports], as imperatively demanding that diversity, which alone can meet the local necessities of navigation.<sup>238</sup>

For subjects that fall within the latter category, where local conditions vary substantially, it is more efficient to allow regulation at the local level than to forcefully impose a single, inflexible national standard.

Thus, an uncompromising mandate for uniform rules would actually be inconsistent with the spirit of the Convention and with the desires that gave rise to the uniformity principle in the first place. The *Cooley* Court attempted to ameliorate this problem by creating separate legal rules to govern the two categories: in those areas that required a single, uniform rule, only Congress was empowered to regulate (and when it did act, it was required to impose uniform rules); but in those areas that were local in nature and did not necessitate a uniform federal rule, both the states and Congress possessed concurrent power to act.<sup>239</sup>

Under *Cooley*, the Court was the ultimate arbiter of the line between the two categories. But in *Leisy v. Hardin*, the first of the trilogy of liquor cases discussed above, the Court transferred the

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<sup>237</sup> 53 U.S. (12 How.) 299, 319 (1851).

<sup>238</sup> *Id.* at 319.

<sup>239</sup> See *id.*

ultimate authority—the final say about whether uniformity (of rules) is desirable in any particular instance—to Congress.<sup>240</sup> Thus, the Court allowed Congress to permit the states to enact nonuniform rules even in areas that, in the Court’s judgment, would seem to necessitate uniformity.<sup>241</sup> As one early commentator recognized, the “significant and salutary effect [of *Leisy*] was to take constitutional rigidity out of the commerce clause problem and substitute the flexible and adaptable will of Congress.”<sup>242</sup>

That decision was perfectly sensible. It did not ignore the efficiency rationale for the uniformity mandate; it simply recognized that the efficiency question is best left to Congress. There is, after all, no reason not to trust Congress to decide for itself whether a given situation calls for a nationally uniform rule or a series of locally tailored standards. Congress can be trusted to make these decisions because, when the Framers were concerned about the need for uniform rules, it was the *states* that they distrusted. Giving Congress the option to impose uniform rules whenever it concludes that it is in the best interests of the nation as a whole to do so will adequately ensure that the nation will never repeat the failures of the Articles of Confederation, pursuant to which Congress was powerless to stem the tide of divergent and inefficient state regulations. As Professor David Currie put it, “[i]t is difficult to understand why the federal interest in a free commerce, whether land or sea, is in need of protection from the action of the very body to whose care it is intrusted.”<sup>243</sup> Currie further explained:

In many instances there is utility in having federal laws correspond with those of the state in which a transaction takes place; and because of the state interest in these matters, and the declaration by Congress that uniformity is not of grave importance,

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<sup>240</sup> 135 U.S. 100, 108–09 (1890).

<sup>241</sup> See *id.* at 109–10.

<sup>242</sup> Noel T. Dowling, *Interstate Commerce and State Power*, 27 *Va. L. Rev.* 1, 6 (1940).

<sup>243</sup> David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 *Sup. Ct. Rev.* 158, 191.

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even the Commerce Clause's injunction of uniformity has been overridden.<sup>244</sup>

But when the Framers were concerned about the need for uniform *treatment*, it was *Congress* that they distrusted, not the states. The desire for uniform rules may have necessitated the federalization of the commerce power, but a congressional commerce power carried with it the potential to be misused to discriminate among the states. The uniform treatment constraint was born of the desire to eliminate that potential. Thus, although it makes sense to give Congress the ultimate authority to determine whether to impose uniform rules, it makes absolutely no sense to give Congress the power to determine whether to treat the states equally. It was the desire to rid Congress of precisely that power that gave rise to the uniformity constraint in the first place.

Whatever one thinks of the political safeguards of federalism as a general rule—the notion that the political process can be trusted to police the boundary between federal and state authority without judicial intervention<sup>245</sup>—that notion would seem to be inapplicable here.<sup>246</sup> It is, after all, a fundamental tenet upon which all modern constitutional law is constructed that, where discrimination on the basis of a suspect classification is at issue, the political process cannot be trusted to resolve the problem.<sup>247</sup> When Congress uses the

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<sup>244</sup> Id; see also Cohen, *supra* note 227, at 405 (“It would stand the Constitution on its head to invalidate general congressional approval of state regulation of a particular subject matter area on the basis of a prohibition protecting the states [from discrimination].”).

<sup>245</sup> See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 216 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 544, 546 (1954).

<sup>246</sup> In any event, in recent years, the political safeguards of federalism have not found favor with the Supreme Court. The Court has taken an active role in enforcing its understanding of the constitutional limits on the federal government. See, e.g., *United States v. Morrison*, 529 U.S. 598, 602 (2000); *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>247</sup> See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); John Hart Ely, *Democracy and Distrust* 145–48 (1980). Of course, with regard to individuals, not all forms of discrimination are constitutionally suspect, only those that single out for unfavorable treatment “discrete and insular minorities.” *Carolene Prods. Co.*, 304 U.S. at 152 n.4. The Supreme Court has interpreted this requirement to mandate

commerce power to discriminate between the states, the disadvantaged states—or the people thereof—cannot achieve adequate redress through political channels.<sup>248</sup> That was the very reason why the Framers felt compelled to insist on a uniformity constraint on the federal commerce power.

#### *D. Continuing Vitality*

For this reason, a uniform-treatment constraint on the commerce power made sense in the eighteenth and nineteenth centuries. But why should the Court bother to resuscitate it now, nearly a century after its unheralded demise? After all, the incessant regional squabbles that characterized the founding era and provided the impetus for the uniformity constraint have faded with the passage of time. Still, regardless of whether we think that the uniformity constraint makes sense today (I will explain below why I think that it does), mainstream non-originalist constitutional theory suggests—as I have endeavored to demonstrate above—that it is a fundamental constitutional value. That alone is enough to establish at least a presumption that we should continue to honor it. The es-

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heightened judicial scrutiny whenever a statute discriminates on the basis of a suspect classification—such as race—even when the statute seeks to benefit a minority at the expense of the majority. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995). Just as the Fourteenth Amendment was specifically intended to preclude discrimination between races, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989), the Uniformity and Port Preference Clauses were specifically intended to preclude discrimination between states. In a sense, statehood is a suspect classification when it comes to the commerce and tax powers. The Framers felt that, without the uniformity constraint, the political process could not be relied upon to protect the interests of the minority states, just as “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

<sup>248</sup> Cf. *South Carolina v. Baker*, 485 U.S. 505, 512–13 (1988) (“Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation. Nor do we attempt any definitive articulation here. It suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.” (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985))).

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sence of a constitutional theory, after all, is that it produces results by which we must abide, regardless of whether we would choose them if we were unconstrained by the Constitution.<sup>249</sup>

Even if we believe that it is sometimes acceptable in light of changed circumstances to abandon fundamental constitutional principles without formal constitutional amendment,<sup>250</sup> there is no basis for doing so here. As noted above, the decline of the uniformity mandate was the result of sloppy decisionmaking by the Supreme Court, not a principled determination to abandon the elemental values of the founding generation. Nor has the principle of uniformity been swept away or rendered irrelevant by the fundamental changes in the constitutional order that took place around the time of the Civil War and the New Deal.

The Civil War, and the amendments that followed it, may have given Congress more leeway to pass laws targeted at particular states—namely, the Southern ones—in light of the fundamental evils that were far more entrenched in those states than in the others. But the Supreme Court has already acknowledged that fact by holding that, in light of these genuine differences in circumstances, Congress can restrict the geographic application of statutes passed

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<sup>249</sup> See, e.g., Richard H. Fallon, How to Choose a Constitutional Theory, 87 Cal. L. Rev. 535, 537 (1999).

<sup>250</sup> Whether the core constitutional principles yielded by the text, structure, and history read at an appropriately general level should themselves be capable of radical change over time is a matter of some dispute among non-originalist constitutional theorists. Some scholars view constitutional law in common law terms, and believe that core principles can be altered if the change “is the product of an evolutionary trend and is supported by good arguments of policy or fairness.” David A. Strauss, What is Constitutional Theory?, 87 Cal. L. Rev. 581, 585 (1999). Others have written of an informal amendment process that takes place outside of Article V in moments of “higher lawmaking” on the part of the people. See, e.g., Bruce Ackerman, *We the People: Foundations* 266–95 (1991); Bruce Ackerman, *We the People: Transformations* 3–32 (1998). Other scholars, however, believe that the fundamental constitutional principles—especially those involving the structure of government and the vertical or horizontal allocation of power—are essentially inviolate in the absence of formal amendment. See, e.g., Tribe, *supra* note 228, at 1247–48. Tribe notes that “[s]ome of the variables in architecture-defining sentences, such as ‘commerce’ in Article I . . . might have some evolutionary potential even if the basic architecture is deemed to have a fixed meaning.” *Id.* at 1247 n.89. On this theory, the scope of the commerce power can change, as can the contours of the uniformity principle, but the basic notion that Congress is empowered to regulate commerce and must do so in an even-handed manner cannot.

under the Civil War amendments.<sup>251</sup> Thus, for example, the Voting Rights Act can target only those states with a history of racially discriminatory voting laws.<sup>252</sup> But it is difficult to see why the Civil War era altered the right of the states to be free from unequal federal treatment in matters unrelated to the evils of discrimination against individuals or groups. Thus, the Uniformity Clause and the Port Preference Clause still have vitality in the postbellum era, and so too should the general uniformity limit on the commerce power.<sup>253</sup> Indeed, the Court continued to recognize that limit after the ratification of the Civil War amendments.<sup>254</sup>

The New Deal represented an even more significant alteration of the balance between federal and state power, but not in a way that would seem to affect the nondiscrimination principle. The growth of the commerce power in that era was not explicitly or implicitly conditioned upon or conceptually tied to the waning of the uniformity principle. Simply put, there was nothing that Congress attempted to do during the New Deal that could not have been accomplished while continuing to recognize the uniformity constraint on the commerce power. The New Deal gave Congress greater power to regulate on a nationwide basis, not greater power to discriminate between states. Indeed, “greater national uniformity”—in the sense of uniform rules, but therefore, by definition, also uniform treatment—was a “cardinal princip[le] of the New Deal.”<sup>255</sup>

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<sup>251</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

<sup>252</sup> See *id.* Even if there were a uniformity constraint on Congress’s Civil War amendment powers, a law of this sort might still pass constitutional muster if it could be demonstrated that the problem that it seeks to resolve exists only in the targeted states. See *infra* Part VI.

<sup>253</sup> It is true that, due to the Supreme Court’s narrow interpretation in *The Civil Rights Cases*, 109 U.S. 3, 17–19 (1883), of the power afforded to Congress by § 5 of the Fourteenth Amendment, the commerce power has been the source of many federal civil rights laws. But those laws have in fact been drafted in geographically neutral terms. Congress has not felt the need to target specific states or regions, but rather has imposed uniform rules of nondiscrimination.

<sup>254</sup> See, e.g., *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1870).

<sup>255</sup> R. Shep Melnick, *Federalism and the New Rights*, 14 *Yale L. & Pol’y Rev.* 325, 337 (1996); see also, e.g., Armstrong, *supra* note 52, at 47–69; Owen J. Roberts, *The Court and the Constitution* 61 (1951) (discussing early judicial opposition to the New Deal: “Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country”); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 *U. Pa. L. Rev.* 1111, 1155



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Thus, the abandonment of the uniformity principle is not justified either by a sensible, common-law-like evolution of constitutional doctrine, or by the fundamental changes in the constitutional order that took place in the late nineteenth and mid-twentieth centuries. Even so, we might still inquire whether the principle is simply anachronistic. Perhaps, although the principle was neither thoughtfully abandoned nor cataclysmically cast aside in a great constitutional reordering, it is nonetheless unnecessary and out of place in twenty-first-century America—an archaic relic of the peculiar world of the eighteenth century that is no more relevant today than the powdered wig or the Third Amendment.

I do not believe that it is. It is certainly true that, as our sense of a shared national identity has grown over the decades, the rampant regionalism of the eighteenth century has significantly cooled. But realism has by no means disappeared altogether, and indeed may well be rearing its ugly head once again. The most recent electoral college maps—and the incessant political rhetoric of “red state America” (the South and the Plains) and “blue state America” (the Northeast, the industrial Midwest, and the West Coast)—paint a chilling portrait of a nation once again strongly divided on geographic grounds.<sup>256</sup> The prospect of regional discrimination of a type that seemed unthinkable twenty years ago is suddenly more plausible than it has been in decades. And even if this particular divide is just a minor flare-up, who is to say that the future will not bring worse? Years of inactivity will naturally cause a constitutional value to atrophy somewhat, but if we therefore treat the uniformity principle as anachronistic and allow it to expire altogether, it will not be there for us when changed circumstances make it relevant once again. Those who do not learn the lessons of history are, as they say, condemned to repeat it.

In any event, even if we could be sure that strict regional discrimination is a permanent relic of the past, there would still be a great deal of potential for abuse in empowering Congress to legislate nonuniformly pursuant to the Commerce Clause. One lesson

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(1990) (noting that “one of the central New Deal justifications for the creation of administrative agencies was their role in promoting the uniformity” of law).

<sup>256</sup> Indeed, the 2004 electoral college map bears a disturbing resemblance to the antebellum divide between free states and territories and slave states and territories.

that we can learn from the Sports Protection Act discussed above is that, in today's world, powerful lobbies can purchase an unfair advantage (or bring about a disadvantage) for a single state or group of states. The sponsors of the Sports Protection Act candidly admitted that they "agreed to grandfathering because [they] had no choice;" they could not muster the votes to pass the bill without appeasing powerful lobbies by exempting states that had already legalized sports betting or had already created sports-based lotteries.<sup>257</sup> That statutes like the Sports Protection Act benefit a minority of states at the expense of the majority, instead of vice versa, should not matter. The Framers may have been concerned primarily with the tyranny of the majority of states, but the principle that they endorsed is a broader one. Because "[t]ime works changes, brings into existence new conditions and purposes," a constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth."<sup>258</sup> The uniformity mandate is broad enough to prohibit all discrimination between the states, whether it takes the form of the North ganging up on the South, or the South and West ganging up on the North,<sup>259</sup> or Virginia being favored over Maryland,<sup>260</sup> or Nevada getting a special benefit denied to the rest of the Union.<sup>261</sup>

Indeed, the likelihood of Congress granting a favor to a single state is, in some ways, greater now than it was at the time of the framing, as the states no longer participate directly in the choosing of federal officers. In the eighteenth century, federal senators were

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<sup>257</sup> 138 Cong. Rec. 12,976 (1992) (statement of Sen. Hatch).

<sup>258</sup> *Weems v. United States*, 217 U.S. 349, 373 (1910).

<sup>259</sup> See supra notes 91–93 and accompanying text.

<sup>260</sup> See supra note 101 (recounting Luther Martin's concern that Congress would divert commercial traffic intended for Maryland to the ports of Virginia).

<sup>261</sup> See *United States v. Ptasynski*, 462 U.S. 74, 85–86 (1983) ("Nor is there any indication that Congress sought to benefit Alaska for reasons that would offend the purpose of the [Uniformity] Clause. Nothing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States."); Letter from Professor Laurence H. Tribe to Senators Bennett Johnston and James McClure (July 19, 1989), in *Puerto Rico's Political Status: Hearings on S.712 before the Senate Comm. on Finance, 101st Cong.*, pt. 1, 301, 301 (1989) [hereinafter *Puerto Rico Hearings*] (reading *Ptasynski* to preclude "a naked preference for [a] state as a state," even in the presence of differential economic conditions).

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chosen by their state's legislature;<sup>262</sup> today, of course, they are elected directly by the people.<sup>263</sup> In the eighteenth century, many state legislatures chose their state's slate of presidential electors; today, of course, the people elect the President (who is empowered to veto a discriminatory federal law).<sup>264</sup> Thus freed of these mechanisms that once forced it to answer directly to the states and that were intended in part to ensure that it acted in the interest of the states,<sup>265</sup> today's federal government can enact discriminatory laws that many, even most, states would oppose, without fear of adverse consequences.<sup>266</sup> Again, the Sports Protection Act, which was passed over the vehement opposition of the disfavored states, provides a striking example.

For these reasons, there is no justification for the Court's abandonment of the uniformity constraint on the commerce power. When presented with the opportunity, the Court should disavow its recent pronouncements and return to the traditional understanding. Importantly, *stare decisis* does not counsel otherwise, for the Court need not overrule a single case in order to repudiate the modern rule. Although the Court has repeated its current position on many occasions, each of these statements has, in fact, been dic-

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<sup>262</sup> See U.S. Const. art. I, § 3.

<sup>263</sup> See U.S. Const. amend. XVII.

<sup>264</sup> See *Bush v. Gore*, 531 U.S. 98, 104 (2000); *McPherson v. Blacker*, 146 U.S. 1, 28–33 (1892).

<sup>265</sup> Madison observed that

[w]ithout the intervention of the state legislatures, the president of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of themselves determine it. The senate will be elected absolutely and exclusively by the state legislatures. . . . Thus each of the principal branches of the federal government will owe its existence more or less to the favor of the state governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them.

The *Federalist* No. 45, at 80 (James Madison) (Legal Classics Library 1983).

<sup>266</sup> It is true that if the *people* of the disadvantaged states are upset by the law, they can show their displeasure at the ballot box. But the people of a state may not feel the same way about a law (such as one curtailing the state's ability to raise taxes) that their state government does. Or they might not care enough about the law to base their congressional and presidential votes on it. And, of course, where Congress is advantaging a majority of states at the expense of a minority, the people of the minority states will not be able to effectuate change through voting even if they want to. This precise concern gave rise to the uniform-treatment mandate.

tum.<sup>267</sup> Notwithstanding its clear and firm language, the Court has never squarely held that there is no requirement of uniform treatment under the Commerce Clause.

## VI. CONSEQUENCES

What would it mean, in practical terms, to revitalize the uniformity constraint on the commerce power? What would happen to the United States Code?

If the courts were to recognize such a constraint, its contours would conform to the uniformity rules that have been developed under the Uniformity Clause, the Port Preference Clause, and the Bankruptcy Clause.<sup>268</sup> Unfortunately, those rules are anything but clear. The Supreme Court to this point has failed to articulate a coherent doctrinal framework for determining uniformity.<sup>269</sup> Indeed, constitutional scholars disagree at the most fundamental level about whether the Court has promulgated a strict prohibition

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<sup>267</sup> As explained above in Part IV, the statement in *James Clark Distilling Co.* that gave rise to the modern rule was clearly dicta. *Currin v. Wallace* also contains a powerful rejection of the uniformity constraint, but that was a case in which the discrimination complained of was between various businesses within a single state, rather than between states. See 306 U.S. 1, 13–14 (1939). *Morgan v. Virginia* contains similar language, but that was a case invalidating a state law under the dormant Commerce Clause, rather than a federal law under the affirmative commerce power, and the language appeared only in a concurring opinion. See 328 U.S. 373, 388–89 (1946) (Frankfurter, J., concurring). *Central Roig Refining Co.* upheld a regional sugar quota system, but only against a challenge brought by the government and producers of Puerto Rico. See *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 609–10, 615–16 (1950). The Court has long held that the uniformity constraint, at least under the Uniformity Clause, does not apply to Puerto Rico. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). *Hodel v. Indiana* rejected the notion of a uniformity limit on the commerce power in the course of upholding a statute that was geographically neutral, though it had a disparate impact on the midwestern states. See 452 U.S. 314, 332 (1981). Such a statute would clearly be constitutional even if the Court were to recognize the uniformity constraint. See *infra* Section VI.A. Finally, the discussion of the lack of a uniformity constraint on the commerce power in *Railway Labor* was also dicta; *Railway Labor* was decided under the Bankruptcy Clause, not the Commerce Clause. See *Ry. Labor Executives Ass’n v. Gibbons*, 455 U.S. 457, 468–69 (1982).

<sup>268</sup> See *supra* Section V.C.

<sup>269</sup> See, e.g., Philip Joseph Deutch, Note, The Uniformity Clause and Puerto Rican Statehood, 43 *Stan. L. Rev.* 685, 707–08 (1991) (noting that the Court’s “decisions under the Uniformity Clause” are characterized by the failure to “clearly explain the requirements of the Uniformity Clause and the precise basis of [the] decision”).

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against virtually all forms of unequal treatment or a flexible and permissive standard permitting all but the most egregious discrimination.<sup>270</sup> As such, there has been a great deal of scholarly criticism of the Supreme Court's uniformity decisions under those clauses, arguing that they are murky and insufficiently theorized,<sup>271</sup> and that, to the extent that they do establish rules, they hold too modest a view of the uniformity requirement.<sup>272</sup>

It is not my purpose here to evaluate and criticize existing uniformity jurisprudence under the Uniformity and Bankruptcy Clauses or to attempt to articulate a comprehensive theory of constitutional uniformity. That project, while sorely needed, is well beyond the scope of this Article. My point in these pages is simply that courts should apply the constitutional uniformity rule, however it is ultimately constituted, to all regulations of commerce. In this Part, I draw upon the existing case law—however incomplete and unsatisfying it may be—in order to sketch out briefly the potential consequences of doing so. To be sure, this Part raises more questions than it answers, but that is the whole point of this Article—to resurrect fundamental constitutional questions that have long been forgotten.

A substantial degree of flexibility characterizes the case law confronting the uniformity rule. In accordance with the method of constitutional decisionmaking described above, the Court has allowed the concept of uniformity to evolve over time in order to ensure that Congress does not find its hands unnecessarily tied when addressing problems never envisioned by the Framers. But the Court has never lost sight of the uniformity principle altogether and continues to cast a skeptical eye on laws that appear to discriminate between the states as states. As such, recognizing a generalized uniformity limitation on the commerce power would not take an intolerable bite out of the United States Code. It would,

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<sup>270</sup> Compare Puerto Rico Hearings, *supra* note 261, at 301, 301–02 (advocating a strict rule), with Statement of Professor Paul Gewirtz, *in* Puerto Rico's Political Status: Hearings on S.712 before the Senate Comm. on Finance, 101st Cong., pt. 1, 40, 40–48 (1989) (advocating a loose standard).

<sup>271</sup> See, e.g., Claus, *supra* note 157, *passim*; Deutch, *supra* note 269, at 695–708.

<sup>272</sup> See, e.g., Koffler, *supra* note 99, *passim*; Lund, *supra* note 77, at 1193 (arguing that the Court's recent decisions “leave[] the uniformity clause virtually an empty shell”).

however, call into question the constitutionality of the many statutes like the Sports Protection Act that regulate explicitly along state lines.

*A. What the Uniformity Mandate is Not*

Because the Court has long since abandoned any notion of a constitutional mandate for uniform rules, revitalizing the uniformity constraint on the commerce power would not call into question the constitutionality of the many federal statutes enacted pursuant to that power that incorporate state regulatory standards. For example, federal law permits national banks to open new branches in a particular state only in accordance with that state's laws governing the expansion and branching of state-chartered banks.<sup>273</sup> These statutes engender nonuniform rules—as a result of variations in state law—but do not constitute nonuniform treatment. In enacting them, Congress has not discriminated among states, but rather has placed all of the states on equal footing. If Montana feels that Idaho is gaining an advantage because the incorporated Idaho branching rules are more favorable than the incorporated Montana rules, Montana can change its law, and federal law will change along with it. As such, this federal law is uniform in the constitutional sense, notwithstanding the resultant varying standards throughout the states.<sup>274</sup>

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<sup>273</sup> See 12 U.S.C. § 36(c) (2000) (“A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city . . . in which said association is situated . . . and (2) at any point within the State . . . if such establishment and operation are at the time authorized to State banks by the statute law of the State . . . by language specifically granting such authority affirmatively . . . and subject to the restrictions as to location imposed by the law of the State on State banks.”). Other federal exercises of the commerce power incorporating state law include, for example, 18 U.S.C. § 13 (2000) (using state law to define “assimilated” federal crimes in federal enclaves); 18 U.S.C. § 1961(1)(A) (2000) (incorporating state law crimes into the definition of RICO federal offenses); 28 U.S.C. § 2007(a) (2000) (abolishing imprisonment for debt where state law does so); and 42 U.S.C. § 1988(a) (2000) (adopting state remedies to supplement federal civil rights remedies).

<sup>274</sup> See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 440 (1946) (upholding the constitutionality of the McCarran-Ferguson Act, an exercise of the commerce power that left the regulation of the insurance industry to the states).

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Although the Commerce Clause does not require uniform rules, it does mandate uniform treatment, that is, nondiscrimination. Even so, most of the countless federal statutes on the books that can be said to, in some sense, discriminate between states in the course of regulating commerce would not fall victim to the uniformity limitation. The Supreme Court has proceeded with caution in this arena, and the mandate for uniform treatment is, in fact, quite narrow in its reach. In particular, there would be no constitutional problem with laws that discriminate purely in effect. Granting subsidies to corn farmers,<sup>275</sup> for instance, benefits Nebraska a lot more than it benefits Alaska. Although such a law is, in some sense, discriminatory, it is nonetheless uniform in the constitutional sense.

This much was clear to the Framers. Before the Convention, opponents of a federal taxing power expressed concern that, because of the differences in the geography and economies of the several states, even uniform federal taxes would operate unequally.<sup>276</sup> At the Convention, these concerns led the Framers to preclude all taxes on exports. As Oliver Ellsworth put it, “[t]he produce of different States is such as to prevent uniformity in such taxes. [T]here are indeed but a few articles that could be taxed at all; as Tob[acco] rice & indigo, and a tax on these alone would be partial & unjust” insofar as they are grown only in the South.<sup>277</sup> But that was as far as the Framers were willing to go. They surely recognized that, although the potential for regional discrimination in the operation of ostensibly uniform federal laws was perhaps most salient with regard to export taxes,<sup>278</sup> the same concern was present with all forms of federal commercial regulation and

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<sup>275</sup> See 7 U.S.C. § 608(1)–(3) (2000).

<sup>276</sup> See, e.g., 5 Elliot’s Debates, supra note 57, at 34 (“Mr. RUTLEDGE objected to the term ‘generally,’ as implying a degree of uniformity in the tax which would render it unequal.”); 5 id. (“Mr. LEE . . . contended that the states would never consent to a uniform tax, because it would be unequal . . . .”); 1 id. at 101 (noting Rhode Island’s objection to a federal power to impose import duties “[t]hat the proposed duty would be unequal in its operation, bearing hardest upon the most commercial states, and so would press peculiarly hard upon that state which draws its chief support from commerce”).

<sup>277</sup> 2 Farrand, supra note 79, at 360; see also supra note 106 (discussing the Southern insistence on the Export Clause).

<sup>278</sup> See 2 Farrand, supra note 79, at 363 (Madison’s August 21 notes from the Convention quoted George Mason as saying that “[t]he case of Exports was not the same

of federal commercial regulation and taxation.<sup>279</sup> But since creating a federal commerce power was essential in to saving the fledgling Union, the nation was just going to have to live with the discrimination that inheres even in the facially uniform exercise of it.<sup>280</sup>

After the Convention, many Anti-Federalists found this concern reason enough to oppose ratification. Luther Martin, for instance, lamented to the Maryland legislature that, notwithstanding the uniformity requirement, Congress was empowered to enact regulations that would have a disparate effect on certain states:

[T]hough there is a provision that all duties, imposts, and excises, shall be uniform,—that is, to be laid to the same amount on the same articles in each state,—yet this will not prevent Congress from having it in their power to cause them to fall very unequally, and much heavier on some states than on others, because these duties may be laid on articles but little or not at all used in some states, and of absolute necessity for the use and consumption of others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole, or nearly the whole, of it would be paid by the last, to wit, the states which use and consume the articles on which the imposts and excises are laid.<sup>281</sup>

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with that of imports. The latter were the same throughout the States: the former very different.”).

<sup>279</sup> To take just one prominent example, the Southern delegates—whose states had no ship-building industry and relied on English boats for their shipping—feared that the Northern states would force through Congress a bill (like those already enacted by the New England states) requiring all American imports and exports to be carried in American-made ships. Such a bill would have greatly enhanced the Northern ship-building industry at the expense of Southern exports to foreign nations. See 2 Farrand, *supra* note 79, at 450–53; Warren, *supra* note 60, at 579–80.

<sup>280</sup> Cf. 2 Farrand, *supra* note 79, at 450 (quoting Mr. Clymer’s comments that “[t]he diversity of commercial interests, of necessity creates difficulties, which ought not to be increased by unnecessary restrictions. The Northern & middle States will be ruined, if not enabled to defend themselves against foreign regulations.”).

<sup>281</sup> 1 Elliot’s Debates, *supra* note 57, at 369. These concerns were echoed by many Anti-Federalists. For instance, William Grayson argued to the Virginia Ratification Convention:

The best writers on this subject lay it down as a fundamental principle, that he who lays a tax should bear his proportion of paying it. A tax that might with propriety be laid, and with ease collected, in Delaware, might be highly improper in Virginia. The taxes cannot be uniform throughout the states without



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To some Anti-Federalists, the potential for mischief—for discrimination—inherent in such a power, even when constrained by a uniformity mandate, was simply too great.

But, of course, the Constitution was ratified despite these concerns, and the Supreme Court has long held, under both the Port Preference Clause<sup>282</sup> and the Uniformity Clause,<sup>283</sup> that the uniformity requirement mandates only “geographic uniformity,” not “intrinsic uniformity.” In other words, the uniformity requirement

do[es] not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.<sup>284</sup>

There is indeed a potential for mischief here, as the Anti-Federalists recognized. But that potential is a necessary evil, one that was recognized and accepted by the Framers. For better or for worse, disparate impact of this sort is an unavoidable consequence of nationwide regulation in a diverse country. The differential

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being oppressive to some[.] If they be not uniform, some of the members will lay taxes, in the payment of which they will bear no proportion. The members of Delaware will assist in laying a tax on our slaves, of which they will pay no part whatever. The members of Delaware do not return to Virginia, to give an account of their conduct. This total want of responsibility and fellow-feeling will destroy the benefits of representation.

3 id. at 285; see also 3 id. at 215–16 (statement of James Monroe). For Madison’s response, see 3 id. at 306–07.

<sup>282</sup> See *The Head Money Cases*, 112 U.S. 580, 594–95 (1884).

<sup>283</sup> See *Knowlton v. Moore*, 178 U.S. 41, 83–106 (1900).

<sup>284</sup> Id. at 84; see also *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908) (“It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another cannot be construed as a violation of [the Port Preference Clause.]”); *The Head Money Cases*, 112 U.S. at 594 (“Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it? The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.”).

benefits that inure to some states from a law like this do not derive from political distinctions drawn on geographic lines; instead they result from genuine geographic differences among the states.

Extending this principle to all regulations of commerce, laws that are more burdensome to some states than to others—such as, say, costly environmental constraints on coal mining—will be constitutional as long as they do not treat the same object or activity differently in different parts of the country. Were the law otherwise, Congress would be powerless, for it is impossible to ensure that every federal law will benefit all states equally. As the Court conceded long ago, “[p]erfect uniformity and perfect equality of [regulation], in all the aspects in which the human mind can view it, is a baseless dream.”<sup>285</sup>

### *B. Discrimination on the Basis of Locality*

A more difficult question is presented by the “discrimination” that stems from laws that benefit a single locality, as opposed to an entire state. At first blush, case law suggests that such laws would not run afoul of the uniformity constraint. The Court recognized long ago that “there are many acts of congress passed in the exercise of this power to regulate commerce,” such as “[t]he improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce” that of necessity benefit a locality within one particular state.<sup>286</sup> Early critics of these laws contended that they violated the Port Preference Clause.<sup>287</sup> But the Supreme Court has long held otherwise, even though they inure to the benefit of a single port.<sup>288</sup> The Court has explained that, “what is forbidden is, not discrimination between individual ports within the same or different States, but discrimination between States.”<sup>289</sup> Thus, the Port

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<sup>285</sup> *The Head Money Cases*, 112 U.S. at 595.

<sup>286</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.* 59 U.S. (18 How.) 421, 433 (1855).

<sup>287</sup> See, e.g., James Buchanan, Veto Message to the Senate (Feb. 2, 1860), in U.S. Senate Journal, 36th Cong., 1st Sess., 114, 117 (“If the construction of a harbor or deepening the channel of a river be a regulation of commerce, . . . this would give the ports of the State within which these improvements were made a preference over the ports of other States, and thus be a violation of the Constitution.”).

<sup>288</sup> See *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) at 435.

<sup>289</sup> *Id.*

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Preference Clause does not preclude acts that directly benefit one or a few ports of one state while “only incidentally injuriously affect[ing] those of another.”<sup>290</sup> What is prohibited is the categorical favoring of the ports of one state over those of another.<sup>291</sup>

It is not clear what relevance, if any, those early decisions under the Port Preference Clause should have in determining the meaning of the general uniformity constraint on the commerce power today. It would surely be possible to extend these early cases to sanction all forms of commercial regulation that explicitly benefit or burden individual localities, so long as they do not benefit or burden entire states.<sup>292</sup> But I believe that it would be improper to do so, as subsequent changes in the law have undermined those cases in important ways.

Without even reaching the question of discrimination, a debate raged in the early Republic as to whether Congress’s enumerated powers extended to making improvements to commercial waterways.<sup>293</sup> The Federalists, on the one hand, believed that both the Spending and Commerce Clauses authorized these laws.<sup>294</sup> The

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<sup>290</sup> *South Carolina v. Georgia*, 93 U.S. 4, 13 (1876).

<sup>291</sup> See *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) at 435 (“[I]n order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.”).

<sup>292</sup> That principle would look something like this: Because the uniformity constraint is concerned only with the categorically disparate treatment of the states, granting a benefit to (or imposing a detriment upon) a single locality is generally acceptable if it is a necessary byproduct of a legitimate effort to improve interstate commerce, as long as the distinction is not drawn along state lines. To give an admittedly far-fetched and silly hypothetical example, it would, on this principle, be permissible for Congress, in an effort to support a slumping national tourist industry, to grant an exception to the endangered-species laws allowing the killing of a few endangered bison each year at the Billings Hunting Festival, so long as the exception did not apply to the rest of Montana.

<sup>293</sup> See President Monroe’s Message to Congress (Dec. 2, 1817), *in* U.S. House Journal, 15th Cong., 1st Sess. 15, 15 (“A difference of opinion has existed from the first formation of our constitution, to the present time, among our most enlightened and virtuous citizens, respecting the right of Congress to establish such a system of improvement.”); see also Alan L. Blume, A Proposal for Funding Port Dredging to Improve the Efficiency of the Nation’s Marine Transportation System, 33 *J. Mar. L. & Com.* 37, 39 (2002).

<sup>294</sup> See Archibald Cox, *The Court and the Constitution* 168–69 (1987); Blume, *supra* note 293, at 39. The Spending Clause provides: “The Congress shall have Power . . . to

Anti-Federalists and Jeffersonians, on the other hand, believed that neither clause extended this far.<sup>295</sup>

As a matter of original meaning, the Anti-Federalists may well have had the better argument. The delegates to the Convention rejected a proposal by Benjamin Franklin to specifically empower Congress “to provide for cutting canals where deemed necessary,” and they did so in part out of the fear of discrimination—the belief that it would be unfair to build a canal that benefits only one state when all states collectively would bear the expense of construction.<sup>296</sup>

But whatever the intent of the Framers, it became clear early on that such laws allowing Congress to provide for the improvement of commercial waterways were necessary to the economic development of the nation. Thus, over the course of the nineteenth century, the Court and Congress eventually reached a consensus view that laws of this sort were constitutional. As the commerce power had already developed teeth, and the spending power had not yet done so, the Court originally chose to ground these statutes in the authority of the Commerce Clause.<sup>297</sup> This decision, however, presented a conundrum: as exercises of the commerce power, these laws were subject to the uniformity constraint of the Port Preference Clause; yet they were necessary laws, and it was impossible to enact them in such a way that they would apply equally to every state. A lighthouse will, of course, rest in just one state.

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pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. Const. art. I, § 8, cl. 1.

<sup>295</sup> See President Madison’s Veto Message to the House of Representatives (Mar. 3, 1817), *in* 4 Elliot’s Debates, *supra* note 57, at 469 (“The power to regulate commerce among the several states cannot include a power to construct roads and canals, and to improve the navigation of watercourses, in order to facilitate, promote, and secure, such a commerce, without a latitude of construction departing from the ordinary import of the terms.”); President Monroe’s Message to Congress (Dec. 2, 1817), *in* U.S. House Journal, 15th Cong., 1st Sess. 15, 15; President Jefferson’s Message to Congress (1806), *in* 16 Annals of Cong., 9th Cong., 2d Sess. 11, 14–15; Blume, *supra* note 293, at 39.

<sup>296</sup> See 5 Elliot’s Debates, *supra* note 57, at 543 (“Mr. SHERMAN objected. The expense, in such cases, will fall on the United States, and the benefit accrue to the places where the canals may be cut.”). Some of the Framers apparently believed, however, that such a specific enumeration was unnecessary, as this authority was inherent in the spending power. See 2 Farrand, *supra* note 79, at 529.

<sup>297</sup> See Blume, *supra* note 293, at 47–51.

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When faced with this conundrum, the Court recognized that this type of “discrimination,” however unfortunate and however contrary to the spirit of the Convention, is simply unavoidable—a necessary evil if we are to empower the national government to foster and protect interstate and international commerce. We cannot very well dig a canal in every state in the Union every time we realize the need for a new one in a single state or region. As important as it is, the antidiscrimination principle of the Port Preference Clause must be flexible enough to allow for reasonable and efficient governance. Thus, the Court was forced to gut the Port Preference Clause in order to avoid effectively eviscerating an essential federal function.<sup>298</sup>

Today, however, we would think of laws of this sort as falling within the ambit of the spending power, rather than the commerce power.<sup>299</sup> We now understand the spending power to encompass all expenditures of federal funds (as distinct from regulations), even expenditures for the purposes of improving commerce.<sup>300</sup> Therefore, contrary to what the Court believed in the nineteenth century, modern understanding maintains that laws of this sort are not subject to the Port Preference Clause (or to the general uniformity constraint on the commerce power) at all.<sup>301</sup> Today, there is, in fact, no conundrum, and it is not necessary to limit the Port Preference Clause in order to save an essential federal power.

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<sup>298</sup> See *Kansas v. United States*, 797 F. Supp. 1042, 1049 (D.D.C. 1992) (observing that, as a result of the early case law, “the Port Preference Clause has been rendered almost a historical nullity,” and that there is “no case in which the Port Preference Clause has been used to strike down an act of Congress”), aff’d, 16 F.3d 435 (D.C. Cir. 1994).

<sup>299</sup> See Blume, *supra* note 293, at 43.

<sup>300</sup> See Erwin Chemerinsky, *Protecting the Spending Power*, 4 Chap. L. Rev. 89, 91–93 (2001) (explaining the modern understanding that the spending power is broad enough to cover expenditures designed to improve interstate commerce, such as the interstate highway system and the air traffic control system).

<sup>301</sup> The spending power is understood to be free from any sort of uniformity constraint. See *id.* (arguing that the Spending Clause, for good reason, empowers Congress to favor individual states). This Article leaves to the side any questions that might arise when Congress purports to ground its nonuniform acts in the Spending Clause, rather than the Commerce Clause. For a suggestion that the spending power is also constrained by a uniformity requirement, see Laurence Claus, *Budgetary Federalism in the United States of America*, 50 Am. J. Comp. L. 581, 581 (2002); Claus, *supra* note 157, at 536–48.

Because the nineteenth-century cases that limited the scope of the Port Preference Clause's nondiscrimination mandate did so only out of a now-rejected perception of necessity, we should decline to extend them to the generalized uniformity constraint on the commerce power.<sup>302</sup> To do so—to interpret the Commerce Clause's uniformity mandate to permit laws that regulate in geographic terms and explicitly favor (or disfavor) particular localities, as long as they do not favor (or disfavor) all localities within a particular state or states—would be to create an exception with the potential to swallow the rule and to eviscerate the fundamental constitutional principle. Congress could achieve the very same end and avoid the constitutional problems with the Sports Protection Act, for example, by affording the exception to Las Vegas, rather than to Nevada. But a discriminatory regulation of that sort should be no more permissible under the Commerce Clause than a law exempting all residents of New York City from the federal income tax would be permissible under the Uniformity Clause.<sup>303</sup> Such laws discriminate on geographic grounds in precisely the way that the Framers feared.<sup>304</sup> They should be subject to the same constitutional scrutiny imposed upon laws that regulate along state lines.<sup>305</sup>

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<sup>302</sup> Indeed, even if it were necessary to employ the commerce power (rather than the spending power) to enact laws authorizing the construction of canals and lighthouses, and therefore also necessary to respect the restriction of the uniformity mandate in the old Port Preference Clause cases, it would make little sense to extend those cases to all laws enacted pursuant to the commerce power. Although federal spending and construction, by their very nature, often have to favor one place over another, federal regulation does not. Regulations can easily be drafted to be applicable throughout the Union. The unavoidable necessity for discrimination that characterizes the spending issue is inapplicable to regulatory acts.

<sup>303</sup> In *United States v. Ptasynski*, 462 U.S. 74 (1983), discussed in Section VI.C, *infra*, the Supreme Court closely scrutinized under the Uniformity Clause a law that benefited certain localities in the state of Alaska, but not the state as a whole, thus distancing itself from the early Port Preference Clause cases and indicating that the uniformity principle can be violated by laws that favor particular localities.

<sup>304</sup> See *supra* note 101 and accompanying text (noting that Luther Martin's motivation for proposing the Port Preference Clause was his fear that Congress would give preferences to Norfolk over Baltimore).

<sup>305</sup> Perhaps the most obvious example of a federal law that burdens, as opposed to benefits, a particular locality (much to the chagrin of an entire state), is the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101–10270 (2000), § 10101(30) of which establishes Yucca Mountain, Nevada, as the location for the nation's only high-level nuclear waste repository. The courts, however, have held that statute to be an exercise of

*C. The Scope of the Uniformity Mandate*

The troubling statutes are those that establish rules or standards that apply differently in different states or that treat some states (or localities) differently than others, while rendering the states powerless to remedy the inequality. Of course Congress can impose environmental constraints on coal mining, but can Congress constrain West Virginia coal mining but not Illinois coal mining? Of course Congress can incorporate state branching rules into the federal bank regulatory scheme, but can Congress allow unlimited federal bank branching in Montana but not in Idaho? In general, I do not believe that it can.

Because the uniformity principle is a mandate of geographic uniformity designed to protect against discrimination between the states, the Court has explained that distinctions drawn on the basis of geographic boundaries are highly suspect. Three cases—two decided under the Bankruptcy Clause and one under the Uniformity Clause—articulate the Court’s current position, as best as it can be discerned.

In the first of these cases, the *Regional Rail Reorganization Act Cases*,<sup>306</sup> the Court sustained the constitutionality of a federal statute that regulated the reorganization of railroads in the Northeast and Midwest. The act did not appear to be uniform on its face; it applied only to railroad bankruptcies taking place within a specific seventeen-state region.<sup>307</sup> Nevertheless, the Court noted that “[t]he uniformity provision does not deny Congress the power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.”<sup>308</sup> The statute was drafted to cover only an isolated region because the problem of railroad bankruptcy was one that existed only in that region:

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Congress’s authority under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, rather than the Commerce Clause. See *Nevada v. Watkins*, 914 F.2d 1545, 1552–53 (9th Cir. 1990). As such, this law, like other statutes regulating the use of federally owned property, is not subject to a uniformity mandate.

<sup>306</sup> 419 U.S. 102, 160–61 (1974).

<sup>307</sup> See *id.* at 108 n.2.

<sup>308</sup> *Id.* at 159.

No railroad reorganization proceeding, within the meaning of the Rail Act, was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute's effective date. Thus the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.<sup>309</sup>

As such, "the definition of the region does not obscure the reality" that the statute in fact applied to all railroad reorganizations in the nation.<sup>310</sup>

Subsequently, in *Railway Labor Executives' Ass'n v. Gibbons*,<sup>311</sup> the Court struck down a federal bankruptcy statute that, by its terms, applied to only a single railroad operating in a single region.<sup>312</sup> The Court reiterated its holding in the *Regional Rail Reorganization Act Cases* that Congress is empowered to tackle geographically isolated problems, but made clear that federal laws must apply uniformly wherever those problems are presented. The statute at issue in *Railway Labor* was unconstitutional because there were other, similar railroad reorganizations in progress in other states to which the statute did not apply.<sup>313</sup> Congress had acted to protect the economies of the states in one region from the threat of a regional railroad bankruptcy,<sup>314</sup> but had done nothing to address the similar threat being posed to the economies of other states in other regions by similar regional railroad bankruptcy proceedings.<sup>315</sup>

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<sup>309</sup> Id. at 159–60.

<sup>310</sup> Id. at 161.

<sup>311</sup> 455 U.S. 457, 470–73 (1982).

<sup>312</sup> According to the Senate Report, the railroad in question was "a major rail system in the midwestern United States, providing vital service to the States of Illinois, Iowa, Kansas, Missouri, Oklahoma, Texas, New Mexico, Arkansas, Tennessee, Colorado, Nebraska, Minnesota, and Louisiana." S. Rep. No. 96-614, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1156, 1157.

<sup>313</sup> See *Ry. Labor Executives' Ass'n*, 455 U.S. at 470–71.

<sup>314</sup> See 45 U.S.C. § 1001(3) (2000) (finding that "a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates").

<sup>315</sup> Some of the language of *Railway Labor* suggests that the Court's decision was driven less by concerns about geographic discrimination than by the fact that Congress had singled out a lone railroad for special treatment. See 455 U.S. at 457 ("A



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Finally, in *United States v. Ptasynski*,<sup>316</sup> the Court rejected a Uniformity Clause challenge to a federal statute that taxed domestically produced oil, but exempted from the tax all “Exempt Alaskan Oil.” The Court explained that where, as in this case, Congress “frame[s] a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination.”<sup>317</sup> Close scrutiny of the oil tax revealed no such discrimination. Although the tax was framed in geographic terms, it was “not drawn on state political lines.”<sup>318</sup> In fact, less than twenty percent of all oil produced in Alaska qualified as “Exempt Alaska Oil.”<sup>319</sup> The exempted oil was only that portion of Alaskan oil that was produced in such extreme and remote climates that it cost fifteen times more to drill for it.<sup>320</sup> Congress feared that taxing oil from these remote outposts “would discourage exploration and development of res-

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law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor.”). The Court’s focus on that fact was a product of scholarly research suggesting that a principal motivation for the uniformity constraint on the bankruptcy power was the desire to put an end to the practice previously employed by some state legislatures of enacting private bankruptcy bills, a practice that fostered unfairness and corruption. See *id.* at 472; William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 492 (1953). But see, e.g., Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 Sup. Ct. Rev. 25, 32–33 (arguing that “rather than preventing Congress from passing private bills, the uniformity requirement was intended to ensure that Congress enacted laws that were applicable across jurisdictions”). Because that motivation did not underlie the uniformity constraint on the commerce and taxing powers, this aspect of *Railway Labor* is not particularly germane to the question at hand. Still, despite this language, on the whole, the Court’s decision in *Railway Labor* is best understood as an application of the geographic discrimination principle. What made the statute at issue nonuniform was not that it targeted a single railroad; instead, the statute was nonuniform because it targeted the only bankrupt railroad operating in one region of the country, but not the bankrupt railroads operating in other regions that presented similar problems. *Ry. Labor Executives’ Ass’n*, 455 U.S. at 470. The statute was a naked preference for the midwestern states. See *id.*

<sup>316</sup> 462 U.S. 74, 77, 85 (1983).

<sup>317</sup> *Id.* at 85.

<sup>318</sup> *Id.* at 78.

<sup>319</sup> See *id.* at 77.

<sup>320</sup> See *id.* at 78.

ervoirs in areas of extreme climatic conditions.”<sup>321</sup> The Court held that Congress

had before it ample evidence of the disproportionate costs and difficulties—the fragile ecology, the harsh environment, and the remote location—associated with extracting oil from this region. We cannot fault its determination, based on neutral factors, that this oil required separate treatment. Nor is there any indication that Congress sought to benefit Alaska for reasons that would offend the purpose of the Clause. Nothing in the Act’s legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States. This is especially clear because the windfall profit tax itself falls heavily on the State of Alaska.<sup>322</sup>

In fact, noted the Court, Congress could just as easily have described the class of exempt oil in nongeographic terms.<sup>323</sup>

At base, these cases reveal a Court wrestling with the proper balance between, on one hand, the need to allow Congress the flexibility to take into account the genuine geographic differences that pervade our vast nation, and on the other hand, the fear of unjustified discrimination between states. One can certainly question whether the Court has, to this point, struck the right balance; it

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<sup>321</sup> Id. at 79 (quoting H.R. Conf. Rep. No. 96-817, at 103 (1980), reprinted in 1980 U.S.C.C.A.N. 642, 656).

<sup>322</sup> Id. at 85–86.

<sup>323</sup> Id. at 86. A recent decision of the Federal Circuit employed similar reasoning under the Port Preference Clause (though it did not cite or rely upon the Uniformity Clause cases). In *Thomson Multimedia, Inc. v. United States*, 340 F.3d 1355, 1366 (Fed. Cir. 2003), cert. denied, 124 S. Ct. 2158 (2004), the court rejected a Port Preference Clause challenge to the provisions of the Harbor Maintenance Tax that exempt commercial cargo loaded or unloaded in Hawaii or Alaska from a federal *ad valorem* charge. See 26 U.S.C. § 4462(b) (2000). The court concluded that Congress neither intended nor brought about an actual preference for the ports of the exempted states. *Thomson Multimedia*, 340 F.3d at 1366. Rather, the exemption did nothing more than level the playing field and make up for the geographic isolation that makes Alaska and Hawaii disproportionately reliant on commercial shipping. See id. at 1364–66. The court concluded that the fact that the exemption mentions the states by name was of no matter, as the exemption could easily have been drafted in nongeographic terms to achieve the same effect. See id. at 1366 (“In essence, naming the states . . . as exempted merely served as a proxy for a complex formula defining excessive isolation causing a greater dependency on domestic cargo than that experienced by other coastal states.”).

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may well be the case that these decisions give Congress too much leeway to achieve discriminatory results through crafty, geographically neutral drafting.<sup>324</sup> In truth, the Court is still feeling its way to the proper equilibrium.

But no matter how unclear and incomplete the uniformity cases may be—and they surely leave substantial play in the doctrinal joints<sup>325</sup> (indeed, they do not even offer a clear statement of the level of judicial scrutiny to be applied<sup>326</sup>)—they do yield at least a basic blueprint of the current rule of uniformity as it would apply to the Commerce Clause. The rule would seem to be this: Congressional acts enacted pursuant to the commerce power should be subject to some form of heightened scrutiny if they regulate in geographic terms, and, in particular, should be viewed with significant skepticism if their regulatory scope is explicitly drawn along state lines. Unless Congress can present other compelling, nondiscriminatory justifications for the differential treatment (and can establish the lack of reasonable, nondiscriminatory alternatives), these statutes should be upheld only if they were enacted to solve a localized problem that does not exist elsewhere in the nation, such that they could have easily been drawn in reasonable non-geographic terms to achieve the same effect.<sup>327</sup> Reviewing courts

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<sup>324</sup> See Koffler, *supra* note 99, at 76; Lund, *supra* note 77, at 1206–08.

<sup>325</sup> See, e.g., Deutch, *supra* note 269, at 707–10 (noting that some scholars read *Ptasynski* broadly as affording Congress significant discretion to address geographic differences in its legislation, while others read the case more narrowly as precluding nearly all geographically nonuniform enactments).

<sup>326</sup> See Lawrence Zelenak, Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?, 44 *Tax L. Rev.* 563, 591 (1989) (noting that *Ptasynski* “sends mixed signals” and concluding that “[p]erhaps all that can be said is that *Ptasynski* suggests a level of scrutiny somewhat higher than that of traditional rational basis analysis, but still quite deferential”).

<sup>327</sup> Professor Tribe has read *Ptasynski* even more aggressively, to stand for the proposition that the Court will never “sustain a provision that was drawn specifically in terms of the political boundaries of a State.” Statement of Professor Laurence H. Tribe (Nov. 14, 1989), *reprinted in* Puerto Rico Hearings, *supra* note 261, at 36, 39. Moreover, according to Tribe, even if a statute is drafted in geographically neutral terms, it will be struck down if it lacks a neutral justification and its purpose and effect are to afford a naked preference for an individual state. See Letter from Professor Laurence H. Tribe to Senators Johnston and McClure, Enclosed Memorandum of Law (July 18, 1989), *reprinted in* Puerto Rico Hearings, *supra* note 261, at 301, 305. Tribe emphasizes that the uniformity principle should not be rendered an “almost meaningless invitation to artful legislative drafting.” *Id.* at 302.

should ensure both that these statutes were not adopted for impermissible purposes (that is, to favor or disfavor particular states) and that they do not treat similarly situated persons or objects differently in different states.<sup>328</sup>

#### *D. Applying the Uniformity Mandate*

To demonstrate this rule in a hypothetical scenario, imagine that Congress wants to use the commerce power to ameliorate the effects of a devastating hurricane in the Southeast. A federal bill providing for hurricane relief for Florida, perhaps by temporarily exempting all businesses in that state from costly environmental regulatory standards and employee-benefits rules, would be unconstitutional: obviously, the hurricane could not have affected every business in the state of Florida, from Key West to Jacksonville. Use of the state boundary would operate as a naked preference for a single state. But a bill providing relief to all Florida businesses harmed by the hurricane would likely be constitutional, so long as the hurricane did not also affect other states. Specifically naming Florida in the law would probably not matter, since the bill could easily have been drafted to the same end in geographically neutral terms—for example, “all businesses that suffered substantial hurricane damage.” But if Georgia and South Carolina were also ravaged by the hurricane, a bill targeting only Florida businesses would be unconstitutional.

And finally, if, during the same time frame, Kansas had also experienced a spate of powerful tornados, the hurricane relief bill would not be unconstitutional for failing also to provide relief to Kansas businesses that had suffered tornado damage. In a post-*Lochner* world, the Court should allow Congress substantial leeway in the level of abstraction at which it defines the problem that it seeks to solve (i.e. “hurricane” rather than “all natural disasters”),<sup>329</sup> as long as that level is sensibly targeted to genuine differ-

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<sup>328</sup> By contrast, statutes that apply on their face to the entire country, but operate in effect more harshly or favorably in particular states, should pass constitutional muster as long as Congress had a rational basis for enacting them.

<sup>329</sup> See generally *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (noting that the “Constitution does not require things which are different in fact or opinion to be treated in

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ences in circumstances.<sup>330</sup> Because the uniformity principle does not, and cannot, require absolute equality of benefits, the courts should afford significant deference to Congress in defining the scope of the problem that it chooses to address.

Despite this deference and flexibility, however, there are a number of federal statutes enacted pursuant to the commerce power that would be suspect under this rule. Consider, for instance, ERISA section 514(b), which exempts Hawaii from the full scope of ERISA preemption.<sup>331</sup> Congress enacted section 514(b) in response to a judicial decision holding the Hawaii Prepaid Health Care Act<sup>332</sup> preempted by ERISA.<sup>333</sup> “[A]fter lobbying by the Hawaii Congressional delegation and certain state officials,”<sup>334</sup> Congress concluded that the preemption of the Hawaii statute had been “inadvertent” and retroactively exempted it by name from ERISA’s broad preemptive force.<sup>335</sup> This favorable treatment was afforded only to Hawaii. As the House Conference Report explains, “[t]he provision states that it is not to be considered a precedent for extending non-preemption to any other State law.”<sup>336</sup> Such a naked preference is highly suspect, and would be unlikely to survive heightened judicial scrutiny.

While the basic contours of the uniform-treatment requirement are clear enough, the clarity quickly breaks down at the margins. A difficult subcategory of federal statutes that single out particular states or regions for favorable treatment includes the many federal laws that include “grandfathering” provisions that exempt certain pre-existing state laws from the regulatory scope of a new federal

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law as though they were the same,” and that the Constitution allows a state legislature “to write into law the differences between agriculture and other economic pursuits”).

<sup>330</sup> Thus, the Uniformity Clause does not require Congress to tax tobacco at the same rate as wheat, even though one could imagine a single, uniform “crop tax.” It does, however, preclude Congress from taxing North Carolina tobacco at a different rate than Virginia tobacco.

<sup>331</sup> See 29 U.S.C. § 1144(b)(5) (2000).

<sup>332</sup> Haw. Rev. Stat. Ann. §§ 393-1 to -51 (Michie Supp. 2004).

<sup>333</sup> See *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 706-07 (N.D. Cal. 1977), aff’d, 633 F.2d 760 (9th Cir. 1980), aff’d, 454 U.S. 801 (1981).

<sup>334</sup> *Council of Haw. Hotels v. Agsalud*, 594 F. Supp. 449, 451-52 (D. Haw. 1984).

<sup>335</sup> See S. Rep. No. 97-646, at 18 (1982), reprinted in 1982 U.S.C.C.A.N. 4580, 4595.

<sup>336</sup> H.R. Conf. Rep. No. 97-984, at 18 (1982), reprinted in 1982 U.S.C.C.A.N. 4598, 4603.

act. For instance, the Internet Tax Freedom Act precludes all state taxes on Internet access, but exempts those state taxes already in place when the statute was enacted.<sup>337</sup> Similarly, the Privacy Act of 1974 precludes the states from requiring individuals to disclose their social security numbers in order to receive a government benefit or exercise a right, but exempts those states that already require disclosure as a condition of voting.<sup>338</sup> These statutes, by affording special treatment to certain states and by regulating along clear state lines, are constitutionally suspect.

The Sports Protection Act discussed above falls into this category of constitutionally suspect statutes. If one accepts the thesis of this Article—that Congress is constrained in all exercises of the commerce power by a requirement to legislate uniformly—then the Sports Protection Act is in serious trouble. It regulates along state lines and exempts certain states from its scope, yet the problem that it addresses—sports gambling—is not “geographically isolated”;<sup>339</sup> even Congress admitted that the problem was national in scope.<sup>340</sup> Indeed, if Congress is correct that sports gambling is an evil to be eradicated, it is surely a bigger problem in Nevada, where it is entrenched, than it is in Utah. If the uniformity principle is to mean anything, Congress cannot offer as an excuse for discrimination the fact that a law might be more palatable to the people of one state than those of another, or that the lobbies of particularly strong states will not stand for passage of a nationwide regulation.<sup>341</sup>

The only geographic distinction between the exempted states and the covered states was the variation in existing state laws at the time that Congress took up the issue. That difference was not one in the nature or scope of the problem sought to be remedied; it was simply a difference in the way in which the states had, to that point,

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<sup>337</sup> Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998) (codified at 47 U.S.C. § 151 (2000)).

<sup>338</sup> See *McKay v. Thompson*, 226 F.3d 752, 755 (6th Cir. 2000).

<sup>339</sup> *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974).

<sup>340</sup> See S. Rep. No. 102-248, at 5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 (“Sports gambling is a national problem.”).

<sup>341</sup> Nor can Congress avoid constitutional scrutiny by recasting its intent as “stopping the spread of *X* to other states,” rather than “stamping out *X*.” The uniformity principle requires that *X* be treated in the same manner everywhere that it occurs.

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chosen to deal with the problem. This is a classic example of grandfathering. Statutes of this sort take into account differences in state law, but they are an altogether different animal from federal statutes that incorporate state laws, such as those that were upheld around the turn of the century when the Court abandoned any pretense of a mandate for uniform rules. Unlike statutes that incorporate state law, grandfathering statutes do not afford all of the states the same regulatory options. Only those states that were grandfathered in can avoid the federal law. The other states are forever denied that option.

Grandfathering is surely a defensible reason for differential treatment. It hardly smacks of favoritism that Congress would want to exempt from the scope of new federal statutory schemes states that had already relied on the lack of federal regulation.<sup>342</sup> Because laws of this sort take as their starting point genuine differences in state law, they are less problematic than naked preferences granted out of the blue. Yet the fact remains that they place some states at a permanent disadvantage. And in doing so, they violate the core constitutional principle of geographic uniformity—the principle that a federal law must treat the same problem in the same manner in every state in which it exists. As such, it is questionable whether most grandfathering laws (except, perhaps for phase-out laws designed to give states time to adjust to new federal regulations) would pass constitutional muster.

An interesting test case for grandfathering as a justification for nonuniformity is presented by the provisions of the Clean Air Act (“CAA”)<sup>343</sup> that afford special privileges to the state of California. The CAA generally prohibits the states from enacting their own motor vehicle emissions standards, but it provides that the EPA can waive preemption for states that controlled auto emissions prior to March 30, 1966.<sup>344</sup> As Congress was well aware, California

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<sup>342</sup> See S. Rep. No. 102-248, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559 (“Neither has the committee any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry, or to prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced.”).

<sup>343</sup> 42 U.S.C. §§ 7401–7671q (2000).

<sup>344</sup> 42 U.S.C. § 7543(a)–(b) (2000).

is the only state that meets this condition.<sup>345</sup> Thus, California—and only California—is entitled to promulgate its own set of emissions standards, as long as they meet with EPA approval. And the CAA goes even further: Not only does it leave California free to set its own standards, it also provides that all of the other states can choose to employ the California standards, in lieu of the federal ones.<sup>346</sup> Thus, the CAA affords forty-nine states a limited choice: comply with federal law or comply with California law.<sup>347</sup> Only California is empowered to set its own standards. Only California is granted, in the words of one House Report, “the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”<sup>348</sup>

This is an egregious example of discrimination among the states that goes well beyond run-of-the-mill grandfathering provisions, both because it gives California the ongoing ability to craft new rules and regulations (rather than simply preserving its preexisting regulations), and because it allows California to set secondary, quasi-national standards that can be adopted by other states.

Yet Congress had sound reasons for choosing this path. As the House Report explains, “California was afforded special status due to that State’s pioneering role in regulating automobile-related emissions, which pre-dated the Federal effort. In addition, Califor-

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<sup>345</sup> See Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. Davis L. Rev. 281, 292–93 (2003).

<sup>346</sup> 42 U.S.C. § 7507 (2000) allows states to employ standards other than the federal ones only if, inter alia, “such standards are identical to the California standards for which a waiver has been granted for such model year.” See also 42 U.S.C. § 7543(e) (2000), which preempts regulation of nonroad engine emissions, but authorizes California (by name) to promulgate its own standards, and permits the other states to choose to employ the California standards in lieu of the federal ones.

<sup>347</sup> See 42 U.S.C. § 7507 (2000) (“Nothing in this section . . . shall be construed as authorizing any such State . . . to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a ‘third vehicle’) or otherwise create such a ‘third vehicle.’”); see also H.R. Rep. No. 95-294, at 310 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1389 (“States are not authorized to adopt or enforce standards other than the California standards.”).

<sup>348</sup> H.R. Rep. No. 95-294, at 301–02 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1380–81; see also *id.* at 301, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1380. (“In general, the Environmental Protection Agency has liberally construed the waiver provision so as to permit California to proceed with its own regulatory program in accordance with the intent of the 1967 Act.”).



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nia's air pollution problem was then, and still appears to be, among the most pervasive and acute in the Nation."<sup>349</sup> What is more, as Professor Carlson has explained, choosing to exempt California—and to empower it to set standards that other states may follow—represents a creative form of modified cooperative federalism:

Congress attempted to take advantage of the particular comparative advantages that [California] has in managing an environmental problem, while maintaining a strong national role. In the case of mobile source emissions, uniform regulation seems obviously desirable. The prospect of fifty separate standards for automobiles is untenable. But California has unique air pollution problems and an economy large enough to support separate standards. Congress quite creatively attempted to capitalize on California's comparative advantages by privileging its status under the Act. The result is that California can experiment and lead the way in forcing clean air technology while otherwise ensuring uniform national standards.<sup>350</sup>

Professor Carlson outlines a number of ways in which this system might well lead to greater innovation in environmental protection than would result either from affording similar regulatory authority to all fifty states, or from denying that authority to any of them.<sup>351</sup>

The ultimate question is whether California's unique situation with regard to air pollution, and the unique benefits that may flow to the entire nation as a result of affording California this special privilege, are significant enough to justify the full extent of the differential treatment. I take no position here on the proper answer to that question. My point is only that the courts should be asking the question, but have not been doing so.

Finally, leaving aside grandfather clauses and other exemptions from federal laws, at least two other categories of congressional acts that would raise concerns under the uniformity constraint ex-

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<sup>349</sup> H.R. Rep. No. 95-294, at 301 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1380. See also Carlson, *supra* note 345, at 311 ("By exempting the state from preemption, the CAA has also bolstered California's longstanding leadership in regulating mobile source emissions; the state is probably unique in the country in the amount of expertise and sophistication it has developed in the regulation of auto emissions.").

<sup>350</sup> Carlson, *supra* note 345, at 313-14.

<sup>351</sup> See *id.* at 311-18.

ist: laws targeting particular geographic regions and laws establishing state-based quotas.

In the former category are statutes such as 46 U.S.C. § 8104, which limits the number of number of work hours per day of employees on towing boats, but only those towing boats “operating on the Great Lakes, harbors of the Great Lakes, and connecting or tributary waters between Gary, Indiana, Duluth, Minnesota, Niagara Falls, New York, and Ogdensburg, New York.”<sup>352</sup> If a statute of this sort is to survive judicial scrutiny, it must be the case that Congress was responding to a problem unique to the regulated region.

In the latter category are statutes like the provisions of the Agriculture Adjustment Act that call for state-by-state production quotas for crops such as tobacco, wheat, and cotton.<sup>353</sup> Such quotas would seem to be necessary in order to enforce a nationwide production cap, but the courts should scrutinize them very closely to ensure both a lack of discriminatory motive and that the quotas are set on the basis of legitimate criteria that, as far as practicable, treat all of the states equally.

#### CONCLUSION

Today, the law takes for granted a proposition that would have been shocking to the Framers—that Congress is free to use the commerce power to discriminate between the states. There is no satisfactory justification for abandoning the historical consensus to the contrary, and there are many reasons to revive it. As the commerce power has grown far beyond the scope originally contemplated by the Framers, if we are to do justice to a core constitutional principle, it is more important now than ever before that we revitalize the uniformity constraint on the exercise of that power—even if the Framers’ intention to mandate that constraint was, in hindsight, imperfectly expressed.

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<sup>352</sup> 42 U.S.C. § 8104 (2000). This statute was upheld forty years ago pursuant to the current rule that the Commerce Clause does not require uniform legislation. See *United States v. Buckeye S.S. Co.*, 183 F. Supp. 644, 650 (N.D. Ohio 1960), *aff’d*, 287 F.2d 679, 679–80 (6th Cir. 1961).

<sup>353</sup> See 7 U.S.C. § 1313 (2000) (tobacco); 7 U.S.C. § 1434 (2000) (wheat); 7 U.S.C. § 1344 (2000) (cotton).