The Proposed Domestic Charity Exception: An Unwise Addition to the Dormant Commerce Clause Family

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I. INTRODUCTION

Many of the limitations on state power created by the Constitution are expressly stated in its text. Most prominent among these restrictions is Article I, Section 10, which prohibits, among other things, the States from coining their own money, entering into any treaty, alliance, or confederation, or passing any law impairing the obligation of contracts.\(^1\) It has been manifest that in these areas the States do not have the authority to regulate. A much more difficult scenario arises, however, where the Constitution endows the federal government with the ability to legislate but is silent concerning the States’ right to take action. Perhaps the most controversial of these silent regions is the “negative,” or “dormant” aspect of the Commerce Clause. The clause itself declares that “Congress shall have the Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”\(^2\) This power has served two functions under Supreme Court jurisprudence: (1)

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1. U.S. Const. art. I, § 10, cl. 1. This clause provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”
2. U.S. Const. art. I, § 8, cl. 3.
as a seemingly limitless source of congressional authority to enact legislation,\(^3\) and (2) as a questionable latent restriction upon the ability of the States to create laws that have an effect on interstate commerce.\(^4\) While the ability of Congress to use the Commerce Clause to regulate is fairly well-settled, the Dormant Commerce Clause has been described by the Supreme Court itself as a “morass.”\(^5\) Much of the incertitude that surrounds the doctrine can be attributed to the fact that it is found nowhere within the Constitution; it is a judicial exegesis.\(^6\) Unconstrained by text, the Dormant Commerce Clause has been used to nullify a wide, seemingly unrelated variety of state initiatives, including waste management,\(^7\) vehicle length restrictions,\(^8\) milk processing,\(^9\) and most recently, in \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine}, a tax exemption for charities that serve mostly state residents.\(^10\)

On its face the holding in \textit{Camps Newfound/Owatonna} is unremarkable, as the Court has previously held that discriminatory tax exemptions are repugnant to the Commerce Clause.\(^11\) What is interesting, however, is the Dissent’s suggestion that perhaps a “Domestic Charity” exception to the Dormant Commerce Clause should be created,\(^12\) along the lines of the Court’s “Market Participant” jurisprudence.\(^13\) It would allow a State to provide “social welfare to only (or principally) its own residents — [regardless of] whether it be accomplished directly or

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3. \textit{See}, \textit{e.g.}, \textit{Wickard v. Filburn}, 317 U.S. 111 (1942) (upheld Agricultural Adjustment Act of 1938, which set quotas on wheat to be consumed at the same farm on which it was grown, under a “cumulative effect” theory). \textit{But see} \textit{U.S. v. Lopez}, 115 S. Ct. 1624 (1995) (invalidated Gun-Free School Zones Act of 1990 because it did not have a “substantial” effect on interstate commerce), which seems to indicate that some limitations do still exist.

4. \textit{See}, \textit{e.g.}, \textit{West Lynn Creamery, Inc. v. Healy}, 114 S. Ct. 2205 (1994) (invalidated a state tax and subsidy because the two in combination benefited in-state milk producers at the expense of their out-of-state counterparts); \textit{Hunt v. Washington State Apple Advertising Commission}, 432 U.S. 333 (1977) (invalidated a North Carolina statute requiring all closed containers of apples shipped or sold in the State to bear the U.S. grade or no grade at all on the grounds that the burden on interstate commerce far outweighed the statute's limited benefit to North Carolina consumers).


by providing tax exemptions, cash or other property to private organizations that perform the work for the State.” The purpose of this article is to examine the feasibility of such an exception. Providing welfare benefits does not appear to have anything to do with the economic protectionism the Framers of the Constitution were so wary of, but it is questionable whether that fact alone justifies the creation of yet another wrinkle to an already confused doctrine.

The article consists of five (5) sections. Part I will briefly discuss the origins of the Dormant Commerce Clause — from the problems created by the lack of a commerce power under the Articles of Confederation to the landmark opinions of Gibbons v. Ogden and Willson v. Black Bird Creek Marsh Co. Next, Part II will attempt to make some sense of the modern Court’s Dormant Commerce Clause principles and allow the reader to get the current “lay of the land.” Part III addresses why the doctrine’s relatively clear tenets rarely result in lucid decisions, while Part IV introduces the troubling Camps Newfound/Owatonna decision itself. Finally, Part V explores the plausibility of creating a “Domestic Charity” exception, examining whether such an exclusion would violate the three modern theories that purportedly support Dormant Commerce Clause jurisprudence and what class of activities might fall within its parameters.

A. Revolutionary Economic Warfare

The navigation laws and commercial restrictions forced by Great Britain upon the Colonies contributed mightily to the sense of alienation that led to the American Revolution. British legislation such as the Currency Act of 1764, which prohibited the Colonies from issuing paper money, hindered commercial activity and led to angry, and sometimes violent, condemnation. Once the nationalist outburst of the Revolution began to subside, however, the new States seemingly forgot the animos-

17. 27 U.S. (2 Pet.) 245 (1829).
20. See Colin Bonwick, The American Revolution 71 (University Press of Virginia, 1991). Clashes between the British soldiers and civilians became increasingly common following the creation of a new ministry by George Grenville in 1763. One of Grenville’s main objectives was to strengthen the trade legislation of the Colonies and to raise greater revenue for their defense. Legislation such as the Currency Act and the Stamp Act of 1765 was created to further such goals, but the Colonies protested that such legislation was an unwarranted extension of
ity that was created by the English commercial restrictions. "When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began."21 "No longer subject to the navigation laws of the British Parliament, which . . . brought . . . uniformity among the colonial ports; each of the new-born States was left in perfect liberty to adopt such regulations as appeared conducive to its individual interests, regardless of the consequences upon its neighbors."22

Explanations for such self-serving behavior abound. Some commentators believe it was primarily the result of losing Great Britain as a trading partner — the decrease in the size of the market compelling the States to implement protective measures for the benefit of in-state producers.23 Other observers contend that these restrictions arose because even as colonies the States were envious and obstinate, and the Revolutionary War had only temporarily displaced the centrifugal forces originating from their diversity.24 Whatever the inspiration was for such revenue generating measures, the ability to enact them was closely guarded by the States, and as a result the Articles of Confederation contained no tax or commerce powers.25

The continued inability of the federal government to regulate commerce allowed the States to persist in discriminating against one another in commercial trade. States that possessed the established ports through which trade with the British had formerly been conducted began to exact tax revenue from those States less favorably situated.26 James Madison compared New Jersey, trapped between the ports of New York and Philadelphia, "to a cask tapped at both ends."27 Even when the federal government did attempt to step in, it was usually an act of futility. "The states flouted their constitutional obligations. The Articles obliged the states to 'abide by the determinations of the United States, in Congress assembled,' but there was no way to force the states to comply."28

One of the major objectives of the Constitutional Convention was the prevention of further such economic warfare. According to Richard

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22. Towle, supra note 19, at 108.
25. See Towle, supra note 19, at 109; Levy & Mahoney, supra note 24, at 6.
26. See Towle, supra note 19, at 108.
27. See Levy & Mahoney, supra note 24, at 7-8.
28. Id. at 6.
Collins, "[i]nterstate rivalry was the Convention's greatest concern." Alexander Hamilton, in his summary of the Annapolis meeting, stated that the Constitutional Convention was necessary to "harmonize trade relations." Edmund Randolph was reported by James Madison to have cited "the federal government[']s [inability to] check the quarrels between states" as a deficiency of the Articles of Confederation which needed to be corrected. In accordance with such considerations, several restrictions on state power were implemented within the text of the new Constitution. Among these were a prohibition on retroactive legislation, emitting bills of credit, and imposing import duties for the purpose of raising revenue. Also included was the Commerce Clause.

The text of the Commerce Clause clearly confers upon Congress the ability to regulate; it is less certain, however, that the clause was designed to act as a restriction upon the States. Some commentators find such an intention to limit local legislative activity in the broad nature of the Commerce Clause itself. For example, Robert Stern suggests that "[t]he history and proceedings of the Convention . . . indicate that the purpose of the commerce clause was to give the Federal Government as much control over commercial transactions as was and would in the future be essential to the general welfare of the union." Conversely, other scholars have rejected such liberal constitutional interpretations. Martin Redish and Shane Nugent have observed that it seems rather unlikely the Founding Fathers would have created a prohibition on state power in the form of a grant of power to the federal government; the delegates could have simply expressed any intended restriction in Article I, Section 10 of the Constitution along with other powers denied to the States. The purpose of this article, however, is not to

33. Id.
34. U.S. Const. art. I, § 10, cl. 2.
35. U.S. Const. art. I, § 8, cl. 3.
38. See Redish & Nugent, supra note 36, at 586.
enter into the intellectual fray concerning the legitimacy of the negative doctrine as a whole.\textsuperscript{39} Regardless of whether one feels the Dormant Commerce Clause is a valid exercise of judicial authority or not, most scholars agree that the rule will not be tossed on the jurisprudential scrap heap anytime soon.\textsuperscript{40} A historical perspective is included merely to illustrate that while there was plainly a need to restrict the commercial activity of the States at the time the Constitution was written, it is far from certain that the Commerce Clause was the vehicle chosen by the Framers to accomplish this task. Such uncertainty has continued to plague the modern Court, with several members sharing a belief that the doctrine's restrictive objectives are properly accomplished through other constitutional means.\textsuperscript{41} In light of such disparate perspectives, it is truly remarkable that the negative aspect of the Commerce Clause was so readily apparent to early Chief Justice John Marshall.

B. Initial Judicial Explications

The Supreme Court first addressed the power of the Commerce Clause in the absence of congressional activity in the case of \textit{Gibbons v. Ogden}.\textsuperscript{42} \textit{Gibbons} involved an act of the New York legislature which gave Robert Livingston and Robert Fulton the exclusive steamship navigation rights to all the waters of the State.\textsuperscript{43} Livingston and Fulton later assigned to Ogden the right to operate a steamship between New York City and Elizabeth Point, New Jersey.\textsuperscript{44} Gibbons, a competing ferry owner who already ran a service between the two cities, was enjoined by the courts of New York from continuing to operate his ships due to the grant possessed by Ogden.\textsuperscript{45} In response, Gibbons argued that the statute creating Ogden's monopoly was invalid because it was repugnant to the Commerce Clause.\textsuperscript{46} Specifically, he contended that the federal commerce power was exclusive and barred the New York legislature

\textsuperscript{39} For a good overview of the arguments for and against the continued existence of the Dormant Commerce Clause, see Redish & Nugent, \textit{supra} note 36 (argues Dormant Commerce Clause is illegitimate), and Regan, \textit{supra} note 37 (argues Dormant Commerce Clause is a valid doctrine), respectively.


\textsuperscript{41} See \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine}, 117 S. Ct. 1590, 1615 (1997) (Thomas, J., joined by Scalia, J., dissenting) (argues that the Article I, § 10 Import-Export Clause creates an express check on the States’ ability to impose discriminatory taxes on the commerce of other states).

\textsuperscript{42} 22 U.S. (9 Wheat.) 1 (1824).

\textsuperscript{43} See \textit{id.} at 1-2.

\textsuperscript{44} See \textit{id.} at 2.

\textsuperscript{45} See \textit{id.}

\textsuperscript{46} See \textit{id.} at 186.
Although this argument intrigued the Court, Chief Justice Marshall did not dispositively address it in his opinion. Instead, he framed the issue presented for review as whether "a State [can] regulate commerce with foreign nations and among the States, while Congress is regulating it?" He found that the New York statute directly conflicted with a 1793 licensing law enacted by Congress, and that consequently the monopoly granted by the State was invalid due to the Supremacy Clause. From the standpoint of Dormant Commerce Clause jurisprudence, however, the crucial portion of the decision was Marshall’s examination in dicta of Ogden’s exclusivity argument. The Chief Justice compared the federal power to tax, which he believed was concurrent, with the power to regulate commerce. After noting that “[i]n imposing taxes for State purposes, [a State is] not doing what Congress is empowered to do,” Marshall went on to add that “when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.” Such a statement, although not critical to the decision itself, was the initial indication that the Court might limit the States’ ability to regulate a field of interstate commerce even when Congress had taken no action. Marshall’s interpretation of the Commerce Clause was taken one step further by Justice Johnson in his concurrence; he believed that “[t]he power of a sovereign state over commerce . . . necessarily implies the power to determine what shall remain unrestrained; it follows, that the power must be exclusive.”

While the dicta of the Gibbons decision began to lay down the philosophical groundwork of the Dormant Commerce Clause, it was the Willson v. Black Bird Creek Marsh Co. ruling that solidified the doctrine’s existence as a possible limitation upon the commercial power of the States. In Willson, the Black Bird Creek Marsh Company was authorized by the State of Delaware to erect a dam across a creek which connected with the Delaware River. Willson and others, the owners of a ship which regularly navigated the creek, broke through the dam and were subsequently sued by the Black Bird Creek Marsh Company for

47. See id. at 198.
48. Id. at 200.
49. See id. at 221.
50. Id. at 199-200.
51. Id. at 227 (Johnson, J., concurring).
52. 27 U.S. (2 Pet.) 245 (1829).
53. See id. at 245-46.
trespass. The sailors defended their actions by arguing that the Delaware statute which allowed the dam to be built was incongruous with the Commerce Clause. The Court rejected this contention, and in the process explicitly acknowledged for the first time the existence of a latent restriction upon the ability of the States to enact legislation that affects interstate commerce. Chief Justice Marshall wrote: "[w]e do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can . . . be considered as repugnant to the power to regulate commerce in its dormant state." In reaching this conclusion, the Court conducted the type of cost-benefit analysis that has since become a hallmark of the Dormant Commerce Clause. It implicitly reasoned that the economic and health benefits of damming the creek outweighed the negligible effect on interstate navigation such activity would have. Formally recognizing the negative aspect of the Commerce Clause has proven to be the easiest part of the Court's dormant jurisprudence, however; it has spent the last 170 years attempting to justify and delimit Chief Justice Marshall's conception.

II. THE DORMANT COMMERCE CLAUSE TODAY

It is beyond the scope of this article to detail the innumerable twists and turns in the development of the Dormant Commerce Clause since Gibbons and Willson. Nonetheless, a brief summary of the current state of the doctrine is helpful in attempting to understand the difficulties presented by the suggestion in Camps Newfound/Owatonna that another exception to the precept be created. Justice Scalia presents a good overview of dormant jurisprudence in his Camps Newfound/Owatonna dissent, and his outline will form the backbone of the synopsis presented here.

The first determination that the Court seems to make when it encounters a state initiative that restricts interstate commerce is whether the law is facially neutral or facially discriminatory. According to Scalia, "where . . . a state law is nondiscriminatory, but nonetheless adversely affects interstate commerce, we employ a deferential 'balancing test,'

54. See id. at 246.
55. See id. at 251-52.
56. Id. at 252 (emphasis added).
60. See id. at 1608-09.
under which the law will be sustained unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 61 On the other hand, "[w]here a state law facially discriminates against interstate commerce, we observe what has sometimes been referred to as a 'virtually per se rule of invalidity.'" 62

A good example of the facially neutral balancing test in action is the Exxon Corp. v. Governor of Maryland decision, 63 which scrutinized a Maryland initiative that prohibited all producers and refiners of petroleum from operating retail service stations within that State. 64 Exxon argued that although the statute had a neutral facade, "the divestiture requirements [impermissibly fell] solely on interstate companies" because Maryland did not produce or refine any gasoline. 65 The Court disagreed and held that the law did not violate the Dormant Commerce Clause. 66 Weighing the statute's burden on interstate commerce against the legitimacy of the benefits it conferred locally, the Court found no hindrance to national commercial interests at all, much less an undue one. Noting that "the Clause protects the interstate market, not particular interstate firms," 67 it reasoned that because all of Maryland's petroleum would still come from out-of-state under the statute (now just from independent dealers), there was no discrimination against interstate commerce. 68 Since no burden was present, an examination of the "putative benefits" portion of the balancing test was deemed unnecessary, although the Court believed the "[S]tate [did have a] legitimate purpose in controlling the gasoline retail market." 69

The facially discriminatory mode of analysis was employed by the Court in the case of Maine v. Taylor. 70 There the State of Maine enacted a statute which prohibited the importation of live baitfish, the primary justification being that wild Maine fish would be at risk of contracting

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61. Id. at 1608 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 147 (1970)).
62. Id., (emphasis in original).
63. 437 U.S. 117 (1978). See also Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 352-53 (1977) ("Despite the statute's facial neutrality . . . [w]hen discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake").
64. See 437 U.S. at 119.
65. Id. at 125.
66. See id. at 133-34.
67. Id. at 127.
68. See id. at 125-26.
69. Id. at 125.
70. 477 U.S. 131 (1986). See also City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) ("On its face, [the New Jersey law] imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space").
parasites from the foreign animals. The Court initially observed that the law created a "restrict[ion] [on] interstate trade [of] the most direct manner possible." Nonetheless, it held that because the limitations on state power created by the Dormant Commerce Clause are not absolute, there was still a possibility that the statute could be found constitutional. For this to occur, Maine was required to satisfy the "strict scrutiny" test, under which the statute had to be proven to serve a legitimate local purpose which could not be accomplished by less discriminatory means. Remarkably, the State was able to make such a showing. The Court believed that Maine had "a legitimate interest in guarding against imperfectly understood environmental risks," and further that because there were no current sampling and inspection procedures in existence to check baitfish for parasites, the "abstract possibility" of developing such a test "[d]id not make those procedures an ['a]vailabl[e] . . . nondiscriminatory alternativ[e]' for purposes of the commerce clause." It should be noted, however, that this is the only case to date in which a facially discriminatory statute has satisfied "strict scrutiny" muster.

Until fairly recently, the Court's analysis would end at this point; the statute in question would either survive the facially discriminatory strict scrutiny test or the facially neutral balancing test or be declared constitutionally invalid. In Hughes v. Alexandria Scrap Corp., however, the so-called "Market Participant" exception was announced. According to Scalia, this exception "preserve[s] from judicial invalidation laws that confer advantages upon the State's residents but do so without regulating interstate commerce." The Court in Hughes examined a Maryland statutory scheme aimed at ridding the State of unsightly automobile hulks. The statute provided that Maryland would pay a bounty to all scrap processors that destroyed abandoned vehicles, but made it more difficult for out-of-state processors to collect the money by imposing additional documentation requirements upon them. The Alexandria Scrap Corporation complained that such requirements "interfer[ed] with . . . the flow of bounty-eligible hulks

71. See 477 U.S. at 140-41.
72. Id. at 137.
73. See id. at 138.
74. See id. at 138 (citations omitted).
75. Id. at 148.
76. Id. at 147 (alteration in original) (citation omitted).
77. 426 U.S. 794 (1976).
78. See id. at 810.
80. See Hughes, 426 U.S. at 800-01.
across state lines," and in doing so violated the Commerce Clause.\(^8\) The Court disagreed, noting that unlike in earlier cases where violations had been found, Maryland was not interfering with the normal functioning of the interstate market.\(^8\) Instead, all the State was doing was purchasing abandoned automobiles, and "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."\(^8\) This "Market Participant" exception was extended to situations in which the State is acting as a seller in Reeves v. Stake,\(^8\) and as an employer in White v. Massachusetts Council of Construction Employers.\(^8\)

It is from this rough set of criteria that the Court has attempted to balance the right of the States to enact police legislation with the need to promote free trade among all the markets of the nation. Unfortunately, it has proven to be considerably easier to summarize these rules than to employ them. The Court has confused and frustrated observers by applying the strict scrutiny test to statutes that appear to be facially neutral,\(^8\) finding valid legislation to be unconstitutional when combined with other valid legislation,\(^8\) and seemingly abandoning the facially neutral test altogether for transportation statutes.\(^8\) As one commentator has observed, the Court's Dormant Commerce Clause jurisprudence "often appears to turn more on ad hoc reactions to particular cases than on any consistent application of coherent principles."\(^8\) Why then has a doctrine with such seemingly straight-forward guidelines turned into, as one Justice succinctly put it, a "tangled underbrush,"\(^9\) apt to capture unwary state legislatures?

III. THE CONFUSION WROUGHT BY MARSHALL'S IMAGINARY FRIEND

One obvious reason for the Court's inconsistent Dormant Commerce Clause edicts is the negative doctrine's reliance upon the silence of Congress as a source of constitutional legitimacy.\(^9\) Under this

\(^8\) See id. at 810.
\(^9\) See id. at 806.
\(^9\) See id. at 802.
\(^8\) 447 U.S. 429 (1980).
\(^8\) 460 U.S. 204 (1983).
\(^8\) See West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2214-15 (1994) (valid Massachusetts tax on all creamery dealers combined with valid subsidy paid to in-state farmers violates the Commerce Clause).
\(^8\) L. Tribe, AMERICAN CONSTITUTIONAL LAW 439 (2d ed. 1988).
rationale, the Court is merely carrying out the unexpressed will of Congress in approving or rejecting state activities affecting interstate commerce. If the Court feels a particular enterprise overly burdens the national market, the silence of Congress is deemed indicative of an intent to restrict such local regulations. Conversely, if the Court believes a state initiative does not unduly implicate commerce that is national in character, the failure of Congress to act is seen as a sign that regulation is permissible. In essence, the Court is holding "that Congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking." 

While such an ambiguous pronouncement may delight a linguist, it does little to guide the local officeholder charged with implementing a potentially unconstitutional mandate. The Court never articulates the standards by which it delineates the unexpressed will of Congress, making it impossible for interested observers to accurately predict whether a particular regulation will survive such scrutiny. The interpretation of congressional silence also rests upon a jump in logic that seems frequently unwarranted. The Court presumes that Congress is always attempting to communicate some sort of an opinion concerning the legitimacy of state regulation, ignoring the more plausible explanation that legislative inactivity is caused by a simple lack of awareness that a particular field of commerce is being regulated at the local level. To confuse matters even further, members of the Court regularly waver in their advocacy of silence as a guide to legislative intent. In one example cited by John Grabow, Justices Burger, O'Connor, and Powell heavily criticized the "novel theory that congressional intent can be inferred from its silence" a mere year after relying upon exactly that theory in interpreting the Communications Act of 1934. When this lack of judicial decisiveness is combined with the unspoken standards and often baseless presumptions employed in interpreting legislative silence, it is no wonder that the unexpressed will of Congress has been deemed a "poor beacon to follow."

Perhaps recognizing the tenuousness of basing Dormant Commerce

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93. See id.
94. Id. (quoting Thomas Powell, Business Taxes and Interstate Commerce, Proceeding of the Nat'L Tax Ass'n, 337, 338-39 (1937)).
98. Zuber, 396 U.S. at 185.
Clause jurisprudence solely on such a dim light, the Court has enunciated several other theories that purport to explain adjudication under the negative doctrine. Unfortunately, these propositions have proven to be no more reliable than congressional silence in providing guidance to legislative and judicial bodies considering regulations that affect interstate commerce. One frequently employed approach, the Economic Theory, emphasizes freedom of trade as a constitutional value that requires the Court to step in when the States unreasonably interfere with national commerce.99 The usual justification for this principle is that protectionist measures "interfere with the efficient disposition of resources throughout the country,"100 therein exemplifying the type of commercial warfare that the Commerce Clause was arguably designed to inhibit.101 While the eradication of onerous trade barriers would seem to be a fairly straight-forward premise, in practice it requires complex value judgments that invite inconsistent results. To determine whether the economic burden created by a state initiative is excessive, the Court must weigh the local interest involved against the harm imposed on interstate commerce—a process one Justice has deemed akin to "judging whether a particular line is longer than a particular rock is heavy."102 This observation rings especially true when the questionable regulation involves health and safety, since under such circumstances the Court must balance the value of human life against economic efficiency.103

The Court has also attempted to explain the nuances of its pronouncements through a Mixed Political and Economic Theory which stresses the need to correct distortions to the political process caused by protectionist legislation.104 Such bureaucratic perversion is believed to arise when a State institutes a regulation which principally burdens those

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100. STONE, supra note 58, at 293.
101. See, e.g., Collins, supra note 15, at 64. ("A basic purpose of the framers was to curb interstate exploitation by stronger states and by those with geographic advantages").
104. See STONE ET AL., supra note 58, at 293-94. The Dormant Commerce Clause is additionally purported to rest on a purely Political Theory, which espouses that the negative doctrine is necessary to protect the union from "state statutes [which] are incompatible with the ideal of a unified nation." Id. at 293. Although such a supposition is attractive in light of our nation's early economic discord, its actual role in Dormant Commerce Clause jurisprudence is questionable. The Court regularly allows the States to favor local interests over out-of-state interests, so long as the burden imposed on interstate commerce is not exorbitant. See, e.g., Exxon
located outside of its borders, since in such a scenario “legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.” Given this notion, one would expect the Court to defer to the will of the State when those affected by local legislation are represented in the political process. As at least one commentator has observed, however, this deference does not appear to actually occur; instead the Court has continued to closely scrutinize such cases. Thus, rather then invoking a bright-line rule based upon political representation, the Court has chosen to retain a line of precedent that places indeterminate emphasis upon popular suffrage. As a result, the Mixed Political and Economic Theory provides questionable guidance to those parties concerned with issues that potentially implicate the Dormant Commerce Clause.

The inconsistent application of dormant principles is also presumably generated in part by the fact that the Court is engaging in what amounts to legislative behavior. Rather than performing “the normal judicial task of interpreting and applying text or determining and applying common-law tradition,” the Court makes Lochner-esque value judgments concerning the wisdom of state economic initiatives. If the Court is not satisfied with the justification offered by the State for implementing a particular regulation, it will act as a “super-legislature” and overrule the wisdom of elected officials and their constituents. Leaving aside the very real possibility that the Court is violating the separation of powers philosophy behind the Constitution in undertaking such a practice, the judicial system as a whole appears to be ill-suited to conduct the type of intricate analysis necessary to determine whether a local mandate actually creates an undue burden on interstate commerce. Unlike Congress and its agencies, which have vast resources at their disposal to conduct a thorough investigation of complex economic policies, courts are at the mercy of experts furnished by parties in interest.

106. See Chapin, supra note 92, at 178.
112. See Redish & Nugent, supra note 36, at 594.
and inefficient formal procedures. As a result of these limitations, the balancing of interests conducted by the Court is performed, if not in the proverbial dark, at least under a heavy fog. Considering such difficult conditions, it should probably come as a surprise to no one that nine economic layman cannot consistently decide national commercial problems.

In sum then, the Court has developed such a wide variety of enigmatic theories to support Dormant Commerce Clause jurisprudence that each Justice can essentially rummage through the philosophies to reach the result in a particular case that he or she feels is appropriate. This creates a situation in which seemingly bedrock "facially neutral" and "facially discriminatory" tests become little more than window dressing. The chaos which one might expect to result from reliance upon such capricious standards was on full display in the remarkable Camps Newfound/Owatonna decision, where the five-person majority and four-person dissent managed to disagree on the applicability of virtually every Dormant Commerce Clause tenet previously announced by the Court.

IV. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine

In 1996 Maine created “a general exemption from real estate and personal, property taxes for ‘benevolent and charitable institutions incorporated’ by the State.” The intent of this exemption, as interpreted by the Maine Supreme Judicial Court, was the reimbursement of those charitable organizations that had provided the State’s citizens with social welfare benefits. The Maine court reasoned that when an institution [through] its charitable activities relieves the government of part of [its welfare] burden, [that institution] is conferring a pecuniary benefit upon the body politic, and in receiving exemption from taxation it is merely being given a ‘quid pro quo’ for its services in providing something which otherwise the government would have to provide.

While the statute created a complete tax exemption for charitable

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114. See Chapin, supra note 92, at 182.
116. Id. at 1594 n.2 (quoting ME. REV. STAT. ANN., tit. 36, §652 (1)(A) (Supp. 1996).
institutions that provide benefits primarily to Maine residents, those organizations catering principally to out-of-state clientele were only eligible for a limited tax break.\textsuperscript{119}

Camps Newfound/Owatonna is a nonprofit institution that runs a Christian Science summer camp for children in Harrison, Maine.\textsuperscript{120} About 95\% of the children that attend the camp are not Maine residents.\textsuperscript{121} In addition to receiving income from an endowment and contributions from private donors, the bulk of the institution's revenue comes from camper tuition which averages $400 per week.\textsuperscript{122} The camp paid more than $20,000 per year in real estate and personal property taxes between 1989 and 1991, but due to the fact that most of its children come from outside of Maine, it was not eligible to receive the charitable tax exemption.\textsuperscript{123} Moreover, since the tuition received by Camps Newfound/Owatonna each week exceeded $30 per child, under the statute the camp was ineligible to receive even the restricted exemption.\textsuperscript{124}

In 1992 the camp requested that the Town of Harrison refund the property taxes paid to it by the institution between 1989 and 1991, as well as a future exemption from such taxes.\textsuperscript{125} The primary basis for the camp's request was its belief that the Maine charitable exemption violated the Commerce Clause.\textsuperscript{126} The Town of Harrison promptly rejected the request, and as a result the camp filed suit against the city and its tax assessors and collectors.\textsuperscript{127} The Superior Court of Maine agreed with the camp that the statute burdened interstate commerce in an impermissible manner, but on appeal the Maine Supreme Judicial Court reversed, finding the tax exemption to "regulate[ ] evenhandedly with only incidental effects on interstate commerce."\textsuperscript{128}

The United States Supreme Court granted certiorari and overturned the decision of the Maine Supreme Judicial Court, holding that the property tax exemption ran

\begin{itemize}
\item \textsuperscript{120} \textit{See} \textit{Camps Newfound/Owatonna, Inc.}, 117 S. Ct. at 1594.
\item \textsuperscript{121} \textit{See id.}
\item \textsuperscript{122} \textit{See id.}
\item \textsuperscript{123} \textit{See id.}
\item \textsuperscript{124} \textit{See id. at 1594-95.}
\item \textsuperscript{125} \textit{See id. at 1595.}
\item \textsuperscript{126} \textit{See id.} The camp also contended that the Maine tax exemption violated the Privileges and Immunities Clause, Art IV, § 2, of the U.S. Constitution, and the Equal Protection Clause of both the U.S. and Maine Constitution. \textit{See id. at 1595 n.4}. The Maine Supreme Judicial Court held that the statute did not violate either the federal or state Equal Protection Clause, and also found that the Privileges and Immunities Clause of the federal Constitution was complied with. As a result, none of these claims were before the U.S. Supreme Court. \textit{Id.}
\item \textsuperscript{127} \textit{See id.}
\item \textsuperscript{128} \textit{Id.} (quoting \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine}, 655 A.2d. 876, 879 (Me. 1995)).
\end{itemize}
afoul of the Dormant Commerce Clause.\textsuperscript{129}

\section*{A. \textit{Analysis of the Majority}}

In an opinion written by Justice Stevens, the Majority examined a wide range of arguments presented by the Town of Harrison. The municipality’s initial contention was that the tax exemption did not trigger Dormant Commerce Clause scrutiny of any sort, either because the children who attended the camp were not “articles of commerce” or because the camp’s “product [was] delivered and ‘consumed’ entirely within Maine.”\textsuperscript{130} The Court rejected each of these propositions, noting first that the camp received most of its children from outside of Maine, thus necessarily creating transportation across state lines (which the Court previously held to implicate commerce concerns).\textsuperscript{131} Moreover, the Court deemed the summer camp to be akin to the racially discriminatory hotel in \textit{Heart of Atlanta Motel, Inc. v. U.S.},\textsuperscript{132} whose products were consumed locally but nonetheless negatively affected commerce by discouraging interstate travel.\textsuperscript{133} The Town’s final argument against dormant analysis was that the doctrine did not apply to real estate taxes; this contention was also dismissed by the Court, which observed that “a tax on real estate, like any other tax, may impermissibly burden interstate commerce.”\textsuperscript{134}

Having ascertained that the Dormant Commerce Clause was implicated by the Maine tax exemption, the Court then turned its attention to figuring out whether the statute was facially neutral or facially discriminatory. For the Majority, this determination was relatively simple: “[i]t is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce . . . [T]he statute encourages affected entities to limit their out-of-state clientele, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market.”\textsuperscript{135} The Majority believed the statute was functionally similar to an impermissible export tariff, targeting out-of-state consumers “by taxing the businesses that principally serve them.”\textsuperscript{136} Curiously, after finding the tax exemption facially discriminatory, the Court declined to address whether the statute may have nonetheless passed its

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{129} See \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine}, 117 S. Ct. 1590, 1595, 1596-98 (1997).
\item \textsuperscript{130} \textit{Id.} at 1596 (quoting Brief for Respondents 17-18).
\item \textsuperscript{131} See \textit{Camps Newfound/Owatonna, Inc.}, 117 S. Ct. at 1596-97.
\item \textsuperscript{132} 379 U.S. 241 (1964).
\item \textsuperscript{133} See \textit{Camps Newfound/Owatonna, Inc.}, 117 S. Ct. at 1597.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.} at 1598.
\item \textsuperscript{136} \textit{Id.} at 1600.
\end{itemize}
\end{footnotesize}
"strict scrutiny" test.\textsuperscript{137} It reasoned, somewhat unconvincingly, that since the Town of Harrison failed to defend the exemption under the test, there was no duty placed upon the Court to do so for it.\textsuperscript{138}

Once the Majority determined to its satisfaction that the tax exemption violated the negative aspect of the Commerce Clause, it briefly addressed the expediency of creating a different rule for tax exemptions granted to charitable organizations.\textsuperscript{139} Observing that in previous decisions it held the Dormant Commerce Clause applicable to non-profit activities, the Court reaffirmed this position but acknowledged that perhaps a charitable exception is warranted.\textsuperscript{140} Instead of closely examining the feasibility of such an exclusionary rule, however, the Court chose to defer to the legislative branch: "[i]f there is need for a special exception for nonprofits, Congress not only has the power to create it, but also is in a far better position than we to determine its dimensions."\textsuperscript{141} The Dissent demonstrated greater interest in a judicially conceived exclusion and addressed the possibility at length.\textsuperscript{142}

The Town of Harrison’s final attempt to vindicate the tax exemption was based upon a theory that the statute should be perceived as an outlay of government funds, thereby constituting either a permissible subsidy or a “purchase” of charitable services by the State of Maine.\textsuperscript{143} It first reasoned that a tax exemption is economically no different than a subsidy, which the Court had previously indicated in dicta survived Dormant Commerce Clause scrutiny.\textsuperscript{144} The Majority found this argument unavailing, noting that it had also previously indicated that there is a “constitutionally significant difference” between a tax exemption and a subsidy.\textsuperscript{145} The Town next contended that the tax exemption constituted a “purchase” of welfare assistance which invoked the “Market Participant” exception.\textsuperscript{146} The Court rejected this proposition as well, observing it held in New Energy Company of Indiana v. Limbach\textsuperscript{147} that although a tax program may have “the purpose and effect of subsidizing a particular industry,” that “does not transform it into a form of state

\textsuperscript{137} See id. at 1601.
\textsuperscript{138} See id. at 1601-02.
\textsuperscript{139} See id. at 1602-04.
\textsuperscript{140} See id.
\textsuperscript{141} Id. at 1604.
\textsuperscript{142} See supra notes 165-68 and accompanying text.
\textsuperscript{143} See Camps Newfound/Owatonna, Inc., 117 S. Ct. at 1604-05.
\textsuperscript{144} See id. at 1605. (The Town relied upon dicta in West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2214 (1994)) to support its argument that a tax exemption is no different than a subsidy).
\textsuperscript{145} Camps Newfound/Owatonna, Inc., 117 S. Ct. at 1605-06.
\textsuperscript{146} See id. at 1606.
\textsuperscript{147} 486 U.S. 269 (1988).
THE PROPOSED DOMESTIC CHARITY EXCEPTION

participation in the free market."\(^{148}\)

Having found every justification offered by the Town of Harrison to be deficient, the Majority then held the Maine charitable tax exemption unconstitutional.\(^{149}\)

B. Analysis of the Dissent

In stark contrast to the Majority’s opinion the Dissent would have upheld the Maine statute under any of the previously enunciated Dormant Commerce Clause standards. It believed that the tax exemption “survives even our most demanding commerce-clause scrutiny”\(^{150}\) because the statute “has nothing to do with [the] economic protectionism” that the Dormant Commerce Clause doctrine was created to combat.\(^{151}\)

The Dissent began its analysis by scrutinizing the Majority’s conclusion that the Maine statute was facially discriminatory.\(^{152}\) The Court recently held that disparate treatment is discriminatory only if the objects of the discrimination are similarly situated for constitutional purposes,\(^{153}\) and to the Dissent this distinction exonerated the tax exemption.\(^{154}\) It observed that for purposes of receiving a tax subsidy, property used to help relieve a State of its welfare burden is not similarly situated to property which is used primarily to benefit non-residents.\(^{155}\) Accordingly, the Dissent argued that the Maine exemption was incapable of being facially discriminatory, and deserved to be examined under the more tolerant “balancing test” applied to facially neutral legislation.\(^{156}\) Employing this “balancing test,” the Dissent would have held that the health and safety concerns promoted by assisting charitable institutions outweighed any effect that the Maine statute may have had on interstate commerce.\(^{157}\) Acknowledging that some observers might remain unconvinced that the tax exemption was in fact facially neutral, the Dissent went on to uphold the statute under the facially discriminatory “virtually per se rule of invalidity” as well.\(^{158}\)

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149. *See* *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1608.
150. *Id.* (Scalia, J., joined by Rehnquist, C.J., Ginsburg, J. and Thomas, J., dissenting).
151. *Id.* at 1614.
152. *See* *id.* at 1608.
155. *See* *id.*
156. *See* *id.*
157. *See* *id.*
158. *See* *id.* at 1611-13.
While the Dissent did make a half-hearted attempt to justify the Maine tax exemption under the previously announced “per se rules” and “balancing tests,” it becomes plain in reading the Dissent’s opinion that it believed these inquiries were completely unnecessary. In its view, the statute did not raise Dormant Commerce Clause concerns at all. The Dissent opined that the Maine initiative was a carefully crafted exemption aimed only at reimbursing those entities that provide welfare benefits to the State’s residents. Such a statute does not implicate the negative aspect of the Commerce Clause, the Dissent reasoned, because “[o]ur cases have always recognized the legitimacy of limiting state-provided welfare benefits to bona fide residents.” While acknowledging that there is a difference between a State providing such benefits directly and compensating a private organization for doing so, the Dissent did not believe it was constitutionally significant. “[S]ince] a State that provides social services directly may limit its largesse to its own residents, [we] see no reason why a State that chooses to provide some of its social services indirectly—by compensating or subsidizing private charitable providers—cannot be similarly restrictive.” Consequently, the Dissent advised going beyond mere approval of the Maine exemption under traditional dormant scrutiny. Arguing that the provision of social welfare benefits “implicates none of the concerns underlying our negative-commerce-clause jurisprudence,” it advocated the creation of entirely new limitation to the Dormant Commerce Clause — the “Domestic Charity” exception.

V. CRITICAL EXAMINATION OF SCALIA’S PROPOSED “DOMESTIC CHARITY” EXCEPTION

It is not particularly surprising that an opinion written by Justice Scalia supports the formulation of another restriction upon the reach of the Dormant Commerce Clause. In the West Lynn Creamery v. Healy decision in which he concurred, Scalia voiced his sentiment that “[t]he object [of the Court] should be . . . to produce a clear rule that honors the holdings of our past decisions but declines to extend the rationale that produced those decisions any further.” Camps Newfound/Owatonna represents just such an expansion, this time into the uncharted waters of tax exemptions for non-profit charitable organizations. What is rather interesting, however, is how close Scalia came to convincing the Court

159. See id. at 1609.
160. Id. at 1612.
161. Id. at 1612-13 (emphasis in original).
162. Id. at 1613-14.
that such an exception is warranted. Whereas in the past his proposed limitations to the doctrine had met with little enthusiasm, the narrow 5-4 decision (with a non-committal majority) in *Camps Newfound/Owatonna* seems to indicate that the Court may be prepared to rein in its Dormant Commerce Clause jurisprudence, if only just a bit.

As was mentioned earlier in this article, there are three principles theories currently utilized to support the existence of the Commerce Clause in its negative state—the Political Theory, the Economic Theory, and the Mixed Political/Economic Theory. Although it is questionable whether the Court consistently follows such tenets, they nonetheless encapsulate the aspirations of the dormant doctrine in its idealized state, and thus provide a helpful framework in which to determine whether a given local initiative should be deemed unconstitutional or not. To ascertain whether the “Domestic Charity” exception advocated by Scalia, Rehnquist, Ginsburg and Thomas is doctrinally sound, one ought to begin by examining it in light of these suppositions.

**A. Faithfulness to Fundamentals**

Professor Donald Regan has written an excellent exposition on the Dormant Commerce Clause which explains the three theories and the self-serving behavior they were designed to combat. He observes that the Court seems to be primarily concerned with preventing “purposeful protectionism” when it employs the Dormant Commerce Clause, and suggests that a state statute is protectionist if and only if: (a) the statute was adopted for the purposes of improving the competitive position of local (in-state) economic actors vis-à-vis their foreign (out-of-state) competitors; and (b) the statute is analogous in form to the traditional instruments of protectionism—the tariff, the quota, or the outright embargo.

Is the Maine tax exemption a piece of protectionist legislation under this standard? The answer seems to be no. Although such an exemption is analogous to a traditional instrument of purposeful protectionism, it doesn’t satisfy the first prong of the Regan test. The stat-

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165. See *supra* notes 139-41 and accompanying text.
166. See *Stone, et al.*, *supra* note 58, at 293; *supra* notes 99-108 and accompanying text.
167. See *supra* notes 99-108 and accompanying text.
168. See Regan, *supra* note 37.
169. See *id.* at 1093.
170. *Id.* at 1094-95.
ute was created to compensate private charities that furnished forms of social welfare which Maine itself couldn’t provide, not to improve the competitive position of the State’s charitable organizations in relation to their foreign counterparts. In the words of the Maine Supreme Judicial Court, the objective of the tax exemption was merely to give a “quid pro quo” to “[a]ny institution which by its charitable activities relieves the government of part of [its welfare] burden.”\(^{172}\) Instructive too in this regard is the Majority opinion at the United States Supreme Court level, which never maintained that the statute was adopted for any purpose other than the simple remuneration of deserving benevolent organizations.\(^{173}\)

Assuming, arguendo, that the Maine statute did meet the criteria of his “protectionist” definition, Regan goes on to consider the three primary objections to such legislation: (1) the “concept of union” objection (Political Theory), (2) the “resentment/retaliation” objection (Mixed Theory), and (3) the “efficiency” objection (Economic Theory).\(^{174}\) The Maine charitable tax exemption does not appear to implicate any of the concerns behind these familiar principles,\(^{175}\) and hence seems beyond Dormant Commerce Clause reproach.

The first objection, “concept of union,” is based upon the argument that protectionist legislation is at odds with political unity because it “is

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173. Regan concentrates on what he calls the “movement-of-goods area” in his thesis that the Court is concerned with preventing purposeful protectionism. Regan, supra note 37, at 1093. These cases are defined by what is not included among them—cases involving regulation of highways and other interstate transportation instrumentalities, cases involving taxation of interstate commerce, and cases involving the “Market Participant” exception. See id. at 1098-99. While Regan’s protectionism theory applies to all scenarios invoking Dormant Commerce Clause scrutiny, in these cases he believes additional national interests are often at work. Since the Maine exemption implicates tax considerations, it is worth examining what these other national interests are in the taxation area.

Regan observes that in addition to suppressing protectionism, the Court’s other concern with interstate taxation is ensuring that it be fairly apportioned. See id. at 1185-86. In a nutshell, this requirement prevents the States from taxing interstate companies in the same manner in which they tax intrastate companies, since such a scheme would “produce multiple taxation when [a] business operates in many states.” Id. at 1186. Accordingly, “states may not levy taxes on the total operations of interstate business.” Id. Charitable tax exemptions, however, do not operate in the same manner as do unapportioned taxes. Whereas such taxes continue to be constitutionally deficient regardless if they are applied in a perfectly uniform manner, see id. at 1187, “generally applicable nondiscriminatory tax exemptions [do not run] afoul of the dormant Commerce Clause.” Camps Newfound/Owatonna, Inc., 117 S. Ct. at 1604 n.19. Consequently, the fair apportionment requirement is not transposable to charitable tax exemptions, and such exemptions are properly scrutinized solely under Regan’s protectionism theory.

174. See Regan, supra note 37, at 1112-13.

175. See supra notes 99-108 and accompanying text.
the economic equivalent of war.” Regan notes, however, that legislation is not economically hostile if “[i]t takes nothing away from [non-state residents] that we would normally think they have as much right to as [state residents] have.” Under this delimitation, a State may discriminate in the distribution of welfare benefits without acting in a protectionist manner since non-state residents have no right to such advantages to begin with. This conclusion conforms with the observations of the Dissent in Camps Newfound/Owatonna, which pointed out that the Court has long acknowledged the ability of the States to confine the welfare benefits that they confer to their own residents. The Maine tax exemption falls squarely into Regan’s caveat, as its impetus was merely the reimbursement of charitable organizations that had contributed to the public assistance efforts of the community. While the Majority did not disagree with this characterization of the statute’s purpose, it nonetheless contended that non-discriminatory means of providing welfare benefits were available to Maine, and therefore that the statute was making a gratuitous distinction between state residents and non-state residents. The validity of such alternatives is questionable, however, as the options offered by the Majority appear to also be discriminatory, just in a non-regulatory way. Ultimately then, the lack of economic hostility and reasonable alternatives indicate that the Maine tax exemption does not raise any “concept of union” concerns.

The “resentment/retaliation” objection is that protectionist statutes tend to produce an antagonistic environment in which the States are encouraged to economically retaliate against one another, eventually resulting in commercial isolation throughout the nation. The Majority relied in part upon this theory when it found the Maine statute to be unconstitutional, surmising that the exemption was in the class of legislation “destructive to the harmony of the States.” As pointed out by the Dissent, however, “States have restricted public assistance since colonial times . . . and such self-interested behavior . . . is inherent in the very structure of our federal system.”

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176. Regan, supra note 37, at 1113.
177. Id.
179. See id. at 1601 n.16.
180. See id. at 1612 n.3 (Scalia, J., joined by Rehnquist, C.J., Ginsburg, J., and Thomas, J., dissenting).
181. See Regan, supra note 37, at 1114-15.
183. Camps Newfound/Owatonna, Inc., 117 S. Ct. at 1612 (Citation omitted) (Scalia, J., joined by Rehnquist, C.J., Ginsburg, J., and Thomas, J., dissenting).
vertible tradition, it would seem to be disingenuous to insinuate that state-imposed limitations upon those who may receive welfare benefits threaten "the political viability of the union itself." Over two hundred years of history instead suggests that charitable initiatives like the Maine tax exemption do not induce the type of hostile conditions that the "resentment/retribution" objection warns against, and therefore such legislation fails to have a protectionist effect.

Regan’s final objection is based upon “inefficiency.” It holds that protectionist measures are wasteful because they push business away from efficient out-of-state producers without any sort of federally cognizable justification for doing so. While such a theory was not explicitly utilized by the Majority, it seems plain most commentators would find a federally cognizable benefit in Maine’s attempt to ensure that its populace has access to social welfare programs. According to Regan, “[s]o long as there is no constitutionally stipulated policy against [the purpose of the state statute, the achievement of the statutes goals] is a good thing from the federal viewpoint if [the State] says it is.” Since it is hard to imagine a constitutionally stipulated policy against providing welfare assistance to Maine’s less fortunate citizens, and because Maine clearly believed such governmental support to be a “good thing,” the charitable tax exemption would appear to provide the necessary cognizable benefit. Moreover, while a particular welfare plan may be “inefficient” in the eyes of Mr. Herbert Spencer, it would be difficult for anyone to rationally argue that such a program may not be maintained by a State because a different State can provide the same program at a lower cost. Public assistance is supported by loftier principles. Accordingly, the Maine statute avoids implicating the “inefficiency” objection and traditional protectionist concerns.

In the end then, the charitable tax exemption does not seem to invoke any of the three central objections to state behavior that support Dormant Commerce Clause jurisprudence. It is neither “the economic equivalent of war,” a predecessor to commercial retaliation, or "inefficient" in a constitutionally relevant sense. While this revea-

184. See Regan, supra note 37, at 1114.
185. See Id. at 1115.
186. See id. at 1118.
187. See id.
188. Herbert Spencer was a nineteenth-century social darwinist who is perhaps best known as being the inspiration for Justice Holmes’ famous statement that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
189. See supra notes 173-77 and accompanying text.
190. See supra notes 178-81 and accompanying text.
191. See supra notes 182-85 and accompanying text.
tion indicates that the Court was probably incorrect in deeming the Maine statute unconstitutional, it does not necessarily indicate that the creation of an entirely new exception to the Dormant Commerce Clause is warranted. Since any exception is just that, an exception to the rule, it must provide viable parameters, lest the exclusion engulf the entire doctrine.

B. The Impossible Task of Creating Meaningful Limitations

One of the most hotly contested points in the Camps Newfound/Owatonna decision involved this very issue. While addressing the Town of Harrison’s contention that the charitable tax exemption fell within the “Market Participant” exception, the Majority opined that the Maine statute was undesirably expansive: “Maine’s tax exemption—which sweeps to cover broad swathes of the nonprofit sector—. . . would swallow the rule against discriminatory tax schemes.” The Dissent vigorously disagreed, arguing the exemption was not applicable to all non-profit organizations, only those “benevolent and charitable institutions . . . organized and conducted exclusively for benevolent and charitable purposes” which used the exempted property “to further the organization’s charitable purposes.” While this exchange was in reference to a proposed expansion of an already existing Dormant Commerce Clause exception, it is equally relevant to any discussion concerning the feasibility of creating a new exception. What the dialogue plainly demonstrates is a fundamental disagreement between the members of the Court. Is the Maine statute too broad to constitute suitable inspiration for another Dormant Commerce Clause standard, as the Majority believes, or is it sufficiently limited in its reach to be an appropriate influence, as the Dissent would suggest?

At first blush the position of the Dissent appears to have some merit. In addition to the text of the charitable tax exemption itself, Scalia relied upon several decisions by the court’s of Maine in attempting to provide limitations to the reach of the statute. The most prominent difficulty in creating such boundaries is defining what constitutes the “charity” which is to be dispensed. The Maine Supreme Judicial Court previously attempted to make this determination, characterizing “charity” as those activities which are for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by

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193. Id. at 1609 (Scalia, J., joined by Rehnquist, C.J., Ginsburg, J., and Thomas, J., dissenting) (quoting Poland v. Poland Spring Health Institute, Inc., 649 A.2d 1098, 1100 (Me. 1994)).
relieving their bodies from disease, suffering, or constraint, by assist-
ing them to establish themselves in life,
or by erecting or maintaining public buildings or works or otherwise
lessening the burdens of government.\footnote{194}

The Dissent in \textit{Camps Newfound/Owatonna} found this description
to be sufficiently specific to justify excluding the Maine tax initiative
from Dormant Commerce Clause scrutiny.\footnote{195} It pointed to several exam-
pies where the exemption had been denied to an institution as proof that
the statute had enforceable limitations.\footnote{196} Included among these illustra-
tions were several organizations that most people would consider “chari-
table,” such as a wildlife sanctuary, a church and a public housing
complex.\footnote{197} The proffered basis for denying the exemption was that
these bodies did not provide sufficient public benefits or failed to use
their property solely for charitable purposes.\footnote{198} In light of such strict
judicial scrutiny, one might justifiably wonder whether the tax exemp-
tion had too \textit{narrow} of a scope.

Upon closer examination, however, it becomes readily apparent
that the statute suffers from just the opposite deficiency — it is too
broad to be prudently applied. The Dissent’s analysis, while initially
appealing, is incomplete in that it fails to address the previous renounce-
ment of a line of precedent which required the Court to determine
whether an organization’s behavior fell within an imprecisely defined
category of activities. In \textit{Garcia v. San Antonio Metropolitan Transit
Authority}, the Court rejected “as unsound in principle and unworkable in
practice” a Commerce Clause immunity doctrine whose applicability
was judicially determined according to whether a particular governmen-
tal function was “integral” or “traditional”.\footnote{199} The basis for this repudia-
tion was threefold—the Court felt that from a historical, a nonhistorical,
and a federalism standpoint such an endeavor was unwise.\footnote{200} These
concerns are equally applicable to the proposed “Domestic Charity”
exception, indicating that the Court would be ill-advised to enter into the
practice of defining “charitable” functions.

The problem the \textit{Garcia} Court had with the historical approach of
determining what type of behavior falls within a defined group of activi-
ties was that it “prevents a court from accommodating changes in . . .

\begin{footnotes}
\item[194.] Lewiston v. Marcotte Congregate Housing, Inc., 673 A.2d 209, 211-12 (Me. 1996).
\item[195.] See \textit{Camps Newfound/Owatonna, Inc.}, 117 S. Ct. at 1610 n.1 (Scalia, J., joined by
\item[196.] See id. at 1610.
\item[197.] See id.
\item[198.] See id.
\item[200.] See id. at 543-47.
\end{footnotes}
historical functions . . . "\textsuperscript{201}") Such an appraisal is likely to suffer from "historical nearsightedness; today's self-evidently [member activity] is often yesterday's suspect innovation."\textsuperscript{202} In the case of the "charity" definition given in \textit{Camps Newfound/Owatonna}, this same predicament would arise. The judiciary would be faced with the futile task of attempting to determine whether an activity purporting to assist a person "to establish themselves in life"\textsuperscript{203} was an actual means of providing charitable benefits. Decisions based upon a hard-line interpretation of "historical" functions would inevitably result in an organization experimenting with a recent welfare innovation unfairly being found not to be engaged in a charitable activity. Alternatively, a group whose work was once arguably benevolent might be eligible for an undeserved exclusion from Dormant Commerce Clause scrutiny due to judicial ignorance. In the words of the \textit{Garcia} Court, this is "line-drawing of the most arbitrary sort."\textsuperscript{204}

Any nonhistorical model employed to ascertain whether an activity is charitable would also be deficient. In \textit{Garcia}, the Court acknowledged that attempting to identify "traditional governmental functions" based upon a standard of "unique" or "necessary" services would be even more unwieldy than simply speculating which activities are "traditional."\textsuperscript{205} That having been said, one of the presumed limitations of the charitable exemption was the Maine Supreme Judicial Court's insistence that any organization receiving the tax benefit "bring its claim unmistakably within the spirit and intent of the act creating the exemption."\textsuperscript{206} The determination of whether an institution's activities are motivated by the proper "spirit and intent" of "charity" would seem to be no more reasonable than attempting to discern whether a "traditional governmental function" is "unique" or "necessary." All the Court would be doing is trading one unmanageable standard for another, a practice renounced in \textit{Garcia}.

Finally, the creation of an exception to the Dormant Commerce Clause based upon judicial determination of what constitutes a benevolent act would not be "faithful to the role of federalism in a democratic society."\textsuperscript{207} \textit{Garcia} rejected any rule establishing the constitutionality of

\begin{itemize}
\item \textsuperscript{201} Id. at 543.
\item \textsuperscript{202} Id. at 544 n.9.
\item \textsuperscript{203} Lewiston v. Marcotte Congregate Housing, Inc., 673 A.2d 209, 211 (Me. 1996).
\item \textsuperscript{204} Garcia, 469 U.S. at 544.
\item \textsuperscript{205} See id. at 545.
\item \textsuperscript{207} Garcia, 469 U.S. at 546.
\end{itemize}
a state action which turned on whether the Court believed an activity was "traditional" or "necessary" because such an inquiry "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." The determination of whether an act was "charitable" would plainly implicate the same concerns. Judicial officers, with their unavoidable biases and disparate life experiences, would be placed in the unabridged position of being able to reject the public's opinion of what constitutes charity and implement their own interpretation. What is ironic about this is that Scalia has long contended that Dormant Commerce Clause jurisprudence places the Court in an illegitimate legislative position. By requiring the judiciary to determine whether an activity is charitable, however, Scalia's proposed exception actually encourages such a role.

C. A Further Muddying of the Waters

Assuming the Dissent's would-be limitation was not precluded by sensible precedent, there is still another basis for rejecting such a creation—practicality. As was discussed in Part III, on its best days the Dormant Commerce Clause is a bewildering doctrine with inconsistently applied principles. Russell Chapin believes that "[negative] jurisprudence, unlike legislation that provides clear guidance for the future, cannot be harmonized and provides no bright-line test that the states can follow in framing their regulations." Even the staunchest supporters of the rule have acknowledged its confused condition. Regan, for example, has conceded that there tends to be a "discrepancy between word and deed." In light of this incongruity, it would hardly seem wise to add yet another ingredient to the "cloudy waters" of the Dormant Commerce Clause. The Court has proven in the past that such supplements, rather than clarifying the doctrine, instead tend to provide an incentive for each Justice to follow his or her own personal agenda. The split Court in Camps Newfound/Owatonna is a prime example of this phenomenon. The Dissent was able to vindicate the charitable tax exemption regardless of how the statute was characterized, while the

208. Id.
209. See, e.g., American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 200-205 (1990) (Scalia, J. concurring) ("[O]ur exercise of the 'negative' Commerce Clause function has ultimately cast us in [an] essentially legislative role . . . . I believe that this jurisprudence takes us, self-consciously and avowedly, beyond the judicial role itself").
210. See supra notes 91-117 and accompanying text.
211. Chapin, supra note 92, at 181.
212. Regan, supra note 37, at 1284.
214. See supra notes 91-117 and accompanying text.
Majority could not despite using supposedly the same criteria. Accordingly, while the Maine initiative may have unjustly been deemed unconstitutional, that mistake alone cannot substantiate the creation of an entirely new exception. Before being given another shiny judicial toy, the Court should be required to demonstrate it can play consistently with the ones it already has.

VI. Conclusion

Ultimately, *Camps Newfound/Owatonna* is testament to a Court which managed to lose sight of the purposes animating Dormant Commerce Clause jurisprudence in its haste to reach a sensible decision. The Majority deemed the charitable tax exemption unconstitutional because precedent allowed for such a result, not because the statute truly implicated the type of "economic Balkanization" that plagued our nation in its formative years and which the Founding Fathers and Chief Justice Marshall sought to eliminate. The Dissent took a more pragmatic approach when it recognized that the exemption had little to do with commercial protectionism, but then obtusely advocated the creation of an unworkable exception to the doctrine. The unfortunate victims of this impasse are the deserving welfare recipients of the State of Maine.

What the two sides should have done was work together. While the Majority was correct in insisting that the Court limit the instruments of its judicial dissection to the Dormant Commerce Clause principles that had previously been laid down, the Dissent was also correct in questioning whether the noble ideals supporting those tenets were truly transgressed by the Maine statute. The position of the Majority promotes doctrinal predictability, while the view of the Dissent ensures materiality. If the two respective approaches had been combined, as they should always be, it seems likely that the charitable tax exemption would have been upheld by the Court. A potentially boundless "Domestic Charity" exception would do nothing to promote such a consensus, and as such would be an unnecessary and unwelcome addition to the Dormant Commerce Clause family.

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