

THE FOUNDATIONS OF THE AMERICAN COMMON MARKET

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The United States Constitution commits the United States to a common market system, yet, unfortunately, the nature and scope of the American common market have been incompletely—and, at times, inconsistently—described by the U.S. Supreme Court. This Article provides an original, theoretical account of the Court’s commitment to national economic union. As I argue, the central constitutional commitment is one of deliberative equality—that is, states and localities may regulate or tax interstate commerce if and only if the government gives equal regard to similarly situated in-state and out-of-state interests burdened by the regulation or tax. Deliberative equality provides a powerful normative justification for the judicial review of state measures that inhibit interstate trade. Yet, at the same time, deliberative equality provides ample room for states to respond to public policy issues in divergent ways consistent with the desires of the local citizenry. In this way, deliberative equality offers a superior theoretical foundation than alternative theories embraced by the Court, which overemphasize either free trade or state regulatory autonomy. The relative superiority of deliberative equality and the defects in the alternative approaches are both illustrated by the Supreme Court’s recent decisions involving the states’ power to regulate commerce, which inject further confusion into an area already in need of analytical clarity.

INTRODUCTION

The United States Constitution commits the nation to a liberal, free-trade regime among the states. That commitment is embodied in

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several constitutional provisions that limit the authority of the states to restrict interstate trade or commerce, most notably the “dormant Commerce Clause.”¹ As the Supreme Court has observed, these provisions effectively create a common market trading system for the nation.² Although the adoption of liberal international trading regimes, such as the World Trade Organization, has prompted substantial controversy both within the United States and around the globe,³ Americans have seemingly embraced the idea of domestic free trade.

To say that the Constitution creates a domestic free trade regime, though, tells us little about the nature or constitutional contours of that system. Common market systems are neither uniform nor self-identifying. While all common markets presuppose a reasonable degree of mobility of goods, services, capital, and labor across interior borders,⁴ such trading regimes span a spectrum from aggressive common market systems that prohibit protectionism and promote trade harmonization (such as the European Union),⁵ to more moderate trading unions that disfavor protectionism but do not require substantial trade harmonization (such as the WTO),⁶ to weak custom unions that prohibit only the imposition of tariffs and quotas on member

1 See U.S. CONST. art. I, § 8, cl. 3. For close to two centuries, the Supreme Court has acknowledged the existence of a “dormant” or “negative” component of the Commerce Clause restricting state authority to regulate interstate commercial activities. For a comprehensive analysis of this history, see Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847 (2007). Other relevant provisions include the Privileges and Immunities Clause of Article IV, the Import-Export Clause, and the Equal Protection Clause. U.S. CONST. art. IV, § 2; *id.* art. I, § 10; *id.* amend. XIV, § 1.

2 See *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976); see also Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 235 (1999) (noting that the Dormant Commerce Clause creates an area of free trade among the states).

3 See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 512–13, 521–25 (2000) (describing the conflict surrounding free trade policies and institutions).

4 See Richard B. Collins, *Economic Union As a Constitutional Value*, 63 N.Y.U. L. REV. 43, 60 (1988).

5 See, e.g., Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 YALE L.J. 1186, 1199 (2006) (describing the European Union trading regime).

6 See, e.g., GAETAN VERHOOSSEL, NATIONAL TREATMENT AND WTO DISPUTE SETTLEMENT 2 (2002) (describing WTO commitment to non-discrimination without “deep market integration”).

states' goods.⁷ The key question centers upon the constitutional contours of the American common market. To what extent are states free to adopt tax or regulatory measures that interfere with interstate commerce?

This question has plagued the Court for most of its history. Indeed, the dormant Commerce Clause is perhaps the most litigated aspect of the U.S. Constitution, and the Court has struggled over time to articulate a coherent approach to assessing state and local regulations and taxes under the dormant Commerce Clause.⁸ Since the New Deal, the Court has settled on two different normative theories as the foundation of the dormant Commerce Clause. On the one hand, there is the *Carolene Products*-style virtual representation theory, according to which those state measures that burden politically unrepresented, out-of-state interests are subject to searching judicial scrutiny.⁹ On the other hand, there is the antiprotectionism theory, according to which only those state measures that favor in-state economic interests at the expense of out-of-state competitors are inconsistent with national economic union.¹⁰ Despite the significant differences between these two competing theories, the Court has signaled its approval of both as the touchstone of the dormant Commerce Clause.¹¹ Indeed, in the past two years, the Court has invoked both theories at the same time.¹²

7 See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 513–14 (1997) (describing various types of free trade unions).

8 See generally Williams, *supra* note 1 (discussing history of Supreme Court's dormant Commerce Clause jurisprudence).

9 See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 83–84 (1980) (describing representation-reinforcing process theory of judicial review); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 444 (1982) (identifying protection of representational government as a goal for judicial review of state commercial regulation); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 129–30 (describing more stringent judicial review where some parties' interests are systematically unrepresented).

10 Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986).

11 Compare *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588 (1997) (noting that the dormant Commerce Clause prohibits protectionism), with *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (noting that the dormant Commerce Clause serves to protect unrepresented out-of-state interests from exploitation).

12 See *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1808 (2008); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1797 (2007).

As one might imagine, this theoretical confusion has resulted in a tangled web of doctrinal rules. Although the Court has repeatedly said that the dormant Commerce Clause prohibits “discrimination against interstate commerce,” the Court has failed to delineate exactly what types of measures are discriminatory,¹³ and its decisions often appear contradictory.¹⁴ At the same time, the Court has also condemned certain types of nondiscriminatory measures, but its approach to reviewing these measures has proven even more puzzling. Not only has the Court failed to provide any theoretical justification for scrutinizing nondiscriminatory measures, its decisions invoke seemingly arbitrary distinctions between valid and invalid laws.¹⁵ And, while the Court has struck down several statutes for regulating extra-territorially, it has never made clear the connection between the dormant Commerce Clause and that limitation on state action.¹⁶

These failures of theory and doctrine have led opponents of the dormant Commerce Clause, such as Justices Scalia and Thomas, to declare that the Court’s decisions make “no sense” and to urge the Court to reform its approach to reviewing state and local regulations of interstate trade.¹⁷ Justice Thomas even goes so far as to advocate

13 See Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 224 (1957) (“It is recognized that ‘discrimination’ and ‘discriminatory’ are not self-defining terms”); Collins, *supra* note 4, at 78 (noting “confusion” in Court’s application of anti-discrimination standard); Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT’s-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1414 (1994) (noting that “the term ‘discrimination’ is hardly self-explanatory, and the courts have not developed a clear test”); Graetz & Warren, *supra* note 5, at 1237 (noting Court’s failure to implement “a coherent nondiscrimination requirement”); Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 55 (1981) (describing the Supreme Court’s approach to discriminatory regulation as “somewhat muddled”).

14 Compare *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 350–52 (1977) (invalidating statute that burdened out-of-state businesses), with *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126–27 (1978) (upholding statute whose burdens were felt almost entirely by out-of-state businesses).

15 Compare *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–94 (1987) (upholding state corporation statute that denied voting rights to purchaser of controlling block of shares in absence of approval by a majority of outstanding shares of each class of stock), with *Edgar v. MITE Corp.*, 457 U.S. 624, 643–44 (1982) (invalidating statute that required Illinois Secretary of State to approve tender offers for stock of certain corporations).

16 See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 334 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986).

17 *Tyler Pipe Indus., Inc. v. Wash. Dep’t. of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part); see also *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (declaring the

the wholesale repudiation of the dormant Commerce Clause.¹⁸ Others outside the Court have endorsed the dormant Commerce Clause but have urged the Court to narrow its scope, focusing exclusively on rooting out laws adopted for protectionist reasons.¹⁹ Meanwhile, some critics urge the Court to accept protectionism in certain circumstances.²⁰ Even the Clause's defenders agree that the Court's decisions are uncertain or confusing and that the Court must do a better job articulating the constitutional contours of the American common market.²¹

This Article disagrees with the prevailing antagonism to the dormant Commerce Clause and takes up the critics' challenge, providing an original, normative justification for the judicial review of state regulatory and tax measures that impact interstate trade. As I argue, the central constitutional commitment is one of *deliberative equality*—that is, states and localities may regulate or tax interstate trade if and only

Court's doctrine to be "hopelessly confused"); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 223 (contending that the Court's test for discrimination does not serve the purposes asserted in its defense).

18 See *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). Justices Scalia and Thomas would police egregious instances of state protectionism under the guise of the Article IV Privileges and Immunities Clause or the Article I Import-Export Clause. See *Tyler Pipe*, 483 U.S. at 263–65 (Scalia, J., concurring in part and dissenting in part); Eule, *supra* note 9, at 446–47; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571; see also Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895, 935 (1990) (urging repeal of dormant Commerce Clause without replacement); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 456 (1992) (urging repeal of the dormant Commerce Clause without indicating any constitutional provision to substitute for it).

19 See, e.g., Maltz, *supra* note 13, at 64–65 (restricting dormant Commerce Clause review exclusively to those measures that violate the "free location" principle); Regan, *supra* note 10, at 1092; Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1243 (1986) (arguing that a purpose to benefit in-state interests at the expense of out-of-state interests is a critical consideration in Supreme Court decisions).

20 See, e.g., Heinzerling, *supra* note 17, at 220–23 (arguing that the nondiscrimination requirement serves no valid purpose and should be rejected *in toto*); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1194–95 (1998) (arguing that discrimination is constitutionally prohibited only where it discourages competition or harms the national economy).

21 See, e.g., Collins, *supra* note 4, at 62, 78; Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 791–93, 843 (1996); Donald H. Regan, *Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing*, Da Capo, 99 MICH. L. REV. 1853, 1869–74 (2001).

if the state or local government gives *equal regard* to similarly situated in-state and out-of-state interests burdened by the regulation or tax. Stated differently, in considering proposed legislation, states cannot act on parochial impulses but must be indifferent to the geographic residence of the interests burdened by a measure—they may not discount the significance of the burdens on commerce simply because those burdens are borne by out-of-state individuals or businesses.

Deliberative equality differs from and is superior to the two prevailing (and incompatible) theoretical conceptions of the dormant Commerce Clause for two reasons. First, it is the most faithful to the Framers' conception of the role of the Commerce Clause. Second, as a functional matter, it best accommodates the competing constitutional values of free trade and state political autonomy. In contrast, both the virtual representation and antiprotectionism models are at odds with the historical understanding of the Commerce Clause. Moreover, as a functional matter, the virtual representation theory overvalues free trade to the exclusion of federalism interests, viewing every state commercial measure with skepticism and as worthy of judicial scrutiny because of the exclusion of unrepresented out-of-state interests. The antiprotectionism theory, in turn, overvalues federalism interests to the exclusion of free trade, ignoring the fact that non-protectionist measures can be the product of parochial considerations and can, as a result, significantly burden interstate commerce in ways that unjustifiably harm out-of-state interests. Deliberative equality, which is less demanding than virtual representation and more demanding than antiprotectionism, respects state political autonomy by allowing states to adopt their own regulatory and tax schemes, but it requires that states refrain from acting on parochial considerations.

Part I describes the principle of deliberative equality and shows how it is consistent with the acknowledged, constitutionally rooted desire to have state and local representatives respond to the needs of their constituents. Part II then demonstrates how deliberative equality coheres with the Framers' understanding of the danger of state regulation of interstate commerce and best accommodates the interests underlying the American common market. Part III then compares the principle of deliberative equality to the virtual representation model, showing how the latter provides an overly broad and ultimately judicially unworkable approach to defending interstate trade. Part IV, in turn, contrasts deliberative equality with the antiprotectionism model, which overemphasizes state regulatory autonomy and therefore underprotects interstate trade. Finally, Part V considers the Court's recent decisions in *United Haulers Ass'n v.*

*Oneida-Herkimer Solid Waste Management Authority*²² and *Department of Revenue v. Davis*,²³ demonstrating that the Court's confusion regarding the underlying theoretical conception of the dormant Commerce Clause produced an unstable doctrinal resolution. As this concluding Part shows, deliberative equality would have provided a more sound and attractive foundation for resolving those and other cases.

I. DELIBERATIVE EQUALITY AND FREE TRADE

The American common market serves important political and economic values, but those values cannot be promoted to the exclusion of state regulatory autonomy. Rather, there is a need for a theoretical account that accommodates and synthesizes the constitutional interest in free trade and the acknowledged federalism-based need to respect state legislative autonomy. In subpart A, I describe the principle of deliberative equality, showing how it accommodates these competing constitutional values. In subpart B, I then address the scope of the model—to what types of state actions the model applies—showing how the model is consistent with the acknowledged desire to have state and local representatives work for the benefit of their constituents.

A. *The Deliberative Equality Model*

The most robust protection for the common market would be a requirement that states actually treat in-state and out-of-state interests equally. Such an imposing demand, however, would virtually eliminate state legislative autonomy because every state commercial regulation or tax adversely affects some out-of-state interests. To use a hypothetical made famous by Donald Regan, suppose that a state bans plastic widgets solely because of environmental concerns about the disposal of plastic items.²⁴ Suppose further that all plastic widget manufacturers are out-of-state and that the state has a thriving wooden widget industry. To require this state to give equal treatment to out-of-state goods and services—to treat plastic widgets like wooden widgets merely because the former are from out-of-state—would preclude the state from addressing its legitimate environmental concerns about plastic widgets. In short, equal treatment is simply too imposing a constitutional requirement to undergird the American common market.

22 127 S. Ct. 1786 (2007).

23 128 S. Ct. 1801 (2008).

24 Regan, *supra* note 21, at 1857–58.

Although states must remain free to treat out-of-state interests differently or worse than in-state interests when justified, there is the obvious need to prevent such differential treatment from occurring because of a legislature's hostility or indifference to out-of-state interests. The instinctive reaction to the plastic widget ban changes dramatically if the legislature's purpose was not to protect the environment but to favor in-state wooden widget manufacturers. This problem can be addressed by diluting the constitutional requirement: states need not actually accord *equal treatment* to out-of-state interests, but rather only give *equal regard* to such out-of-state interests as they give to similarly situated in-state interests. Viewed in this way, the constitutional commitment to a common market within the American federal union permits states and local governments to enact commercial measures—it does not disable states entirely from regulating commerce—but it does require that state and local policymaking bodies give equal regard to similarly situated out-of-state and in-state interests adversely affected or burdened by such measures. States may not treat the concerns of out-of-state interests worse than those of like in-state interests simply because of their state residence. This is the principle of deliberative equality.

While deliberative equality does not require equality of treatment, it does obviously condemn parochialism (favoritism toward in-state interests) in the legislature's consideration of commercial regulations or taxes. Such parochialism is manifestly apparent in protectionist measures—statutes whose aim and effect is to benefit in-state interests at the expense of out-of-state competitors. For example, a state considering a tariff on out-of-state goods obviously is treating the burden imposed on the out-of-state producers as immaterial because of their out-of-state status—indeed, the whole purpose of such protectionist measures is to transfer wealth from the out-of-state interests to the “protected” in-state competitors.

Protectionism, though the most obvious, is only one form in which states may exhibit parochial impulses or considerations of the sort condemned by deliberative equality. Parochialism may also lead states to adopt needlessly burdensome regulatory schemes that differ from other states' rules or to tax interstate trade more than purely intrastate commerce. Stated differently, parochialism can manifest itself in non-protectionist measures that pose the problem of regulatory or tax harmonization. For example, suppose a state (State A) requires candy manufacturers to print a warning about the dangers of obesity on all candy bars sold in the state. The content of the warning, though, differs from that specified by other states, thereby requiring candy manufactures to print different labels for State A's

market.²⁵ This regulatory measure is nonprotectionist—it burdens both in-state and out-of-state candy manufacturers equally—but it imposes significant costs on candy manufacturers, which must print special labels for State *A*-destined candy bars. Now suppose that the state legislature, in considering this proposed measure, notes that it will likely generate \$15 million a year in benefits (in the form of decreased costs for obesity-related health care, etc.). And, now suppose that the legislature notes that, while the total cost of this measure nationally will be \$40 million (the total cost for all candy manufacturers to print special labels), in-state businesses account for only \$10 million of this loss. Expressly noting that the in-state benefits exceed the in-state costs, the legislature enacts this measure.

In this hypothetical, the legislature has violated the principle of deliberative equality. It treated the burden of the proposed measure on out-of-state interests differently from the burden on in-state interests. Specifically, the legislature considered the measure's cost on in-state candy manufacturers, but it disregarded entirely the measure's impact on out-of-state manufacturers merely because they were out-of-state. Indeed, the only reason that the measure passed was because of the legislature's parochial concern only with the costs borne by in-state manufacturers.

Of course, not every burdensome regulation or tax is the product of parochialism and therefore violative of deliberative equality. Take, for example, the same proposed candy warning label requirement, but now suppose that State *A*'s warning label is much more effective at discouraging obesity than the warnings required by other states. As a consequence, the measure will generate \$50 million in benefits for State *A*, while the costs remain the same. Acknowledging the costs on both in-state and out-of-state manufacturers, the legislature enacts the measure, once again noting that the benefits outweigh the costs. In this hypothetical, there is no violation of the principle of deliberative equality. The legislature did not treat out-of-state costs differently from in-state costs. Indeed, the state treated both in-state and out-of-state candy manufacturers with equal regard despite their different locations. The measure passed because the legislature believed that the benefits outweighed the costs, both in-state and out-of-state.

As these two examples demonstrate, the principle of deliberative equality does not obliterate the states as sovereign, legal entities. Each state is free to adopt its own policies and may do so even if out-of-state

25 *Cf. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (invalidating state law requiring interstate trucks to have curved mudflaps, while other states did not require such mudflaps or required straight mudflaps).

interests are adversely affected to a substantial degree (as in the second hypothetical). Moreover, states are free to evaluate and weigh the benefits of state action differently than other states; one state may properly value the benefit of a healthy citizenry (or a clean environment) more highly than another state. In fact, in considering whether to adopt a particular regulation or tax, states need not use cost-benefit analysis or even consider the burden on out-of-state interests.²⁶ The only limitation is that, to the extent that states consider the degree to which a proposed measure burdens in-state interests, they must also consider and accord the same weight to burdens on out-of-state interests.

Lastly in this regard, deliberative equality differs from and should not be confused with the more demanding requirement that states act in the nation's best interest—that states act in the nation-regarding manner expected of Congress.²⁷ Were Congress to consider a national candy labeling requirement, for example, we would expect it to measure the costs and benefits to all interests in the nation. In contrast, the principle of deliberative equality requires equal regard only for out-of-state interests burdened by a proposed regulation or tax; it does not require equal regard for out-of-state interests benefited by the regulation or tax. The reason for this omission is that the latter requirement would be inconsistent with our conception of federalism, which requires that states do no harm to other states but does not require that states act for the benefit of outsiders.²⁸ Suppose that a state was considering a measure whose costs would be borne almost exclusively by in-state residents and whose benefits would accrue almost entirely to out-of-state residents. Even if the measure's benefits to the nation outweighed its costs, it would be strange to say that the state is required, as a constitutional matter, to enact the measure—it

26 A state, for example, might properly view the preservation of human life in certain contexts as sufficiently important as to justify any cost. See *Bhd. of Locomotive Firemen v. Chicago, Rock Island & Pac. R.R., Co.*, 393 U.S. 129, 139–40 (1968).

27 See *THE FEDERALIST* NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (remarking that in a republic the public views may be “refine[d] and enlarge[d] by passing them through the medium of a chosen body of citizens, whose wisdom may best discover the true interests of their country”).

28 See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (noting that Illinois has no legitimate interest in regulating tender offers for the benefit of out-of-state shareholders); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935) (noting that New York has no legitimate interest in setting minimum price for milk for the benefit of Vermont dairy farmers). When the Constitution requires states to undertake action for the benefit of outsiders, it says so explicitly. See U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause); *id.* IV, § 2, cl. 2 (Extradition and Fugitive Slave Clauses), *repealed in part by id.* amend. XIII.

might be nice for the state to enact the measure but not compulsory for it to do so.

B. *Deliberative Equality and Permissible Forms of Parochialism*

Deliberative equality obviously restricts states' ability to act on parochial impulses. Curiously, it is precisely this feature of deliberative equality that prompts the most vigorous criticism. The principal objection to deliberative equality is that, by condemning parochialism, it expects too much from state and local lawmakers and is inconsistent with our constitutional commitment to state autonomy, which—so the argument goes—empowers state and local officials to act in a parochial fashion to address the needs and desires of local constituencies.²⁹ As Earl Maltz has put it, “to establish local governments designed to respond to local needs and then question actions by those governments because of a lack of national perspective would be almost perversely incongruous.”³⁰ Indeed, as evidence of the constitutional propriety of parochialism, proponents of this view point to the so-called “market participant” exception to the dormant Commerce Clause, which allows state and local governments to favor local businesses when acting as a market participant rather than market regulator.³¹

The problem with this objection to deliberative equality is that it overstates the case for parochialism. To begin with, the notion that state autonomy permits states to act on whatever impulses or considerations that they want is erroneous. The Constitution restricts state legislative considerations in numerous ways; for example, state legislators cannot act with racial³² or sexist³³ animus. Thus, the point cannot be that federalism entitles states to do and think as they please; rather, the point must be more limited—that parochialism in particular is constitutionally protected as a concomitant part of state sovereignty. But why would that be?

29 See Maltz, *supra* note 13, at 80; Regan, *supra* note 10, at 1165.

30 Maltz, *supra* note 13, at 80; see also Regan, *supra* note 10, at 1164–65 (“Nonrepresentation of foreign interests follows from the simple fact that there are separate states; and the existence of separate states, while it might be a defect in an ideal political system, can hardly be treated as a defect in ours.”).

31 See *Reeves, Inc. v. Stake*, 447 U.S. 429, 435–39 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806–10 (1976); Maltz, *supra* note 13, at 68.

32 See, e.g., *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (“[R]ace-based districting by our state legislatures demands close judicial scrutiny.”).

33 See, e.g., *United States v. Virginia*, 518 U.S. 515, 532 (1996) (noting that the Equal Protection Clause forbids treating women differently merely because of their gender).

There is surely no constitutional obligation for a legislature to act on parochial considerations; a state legislator who gives serious consideration to out-of-state or national interests has not violated any constitutional duty, state or federal. Nor can it be that parochialism is a constitutional right of state and local legislatures. The Constitution expressly prohibits states from disparaging out-of-state interests in certain contexts,³⁴ and even the critics offer alternative accounts of the dormant Commerce Clause that restrict state legislative parochialism.³⁵ Moreover, if Congress were to adopt a statute preempting state and local commercial measures adopted with a parochial bias, surely no one would contest the statute's constitutionality. Parochial attitudes are undoubtedly the product of state and local officials' geographically limited electoral accountability, but to acknowledge that parochialism is likely is not to say that it is constitutionally protected.

But what about the market participant exception? Does not its existence demonstrate that parochialism is constitutionally acceptable? This is not the place for a full exploration of the market participant exception to the dormant Commerce Clause,³⁶ but a cursory review of the basis for the exception illuminates the limited extent to which it sanctions parochialism and, more importantly, how deliberative equality is consistent with a limited exception for parochialism in nonregulatory contexts.

Deliberative equality establishes the general, background constitutional rule: states and local governments may not use their regulatory or taxation powers in a parochial fashion.³⁷ As discussed more fully below,³⁸ deliberative equality's prohibition on such types of measures is both faithful to the Framers' desire to prevent parochialism in the regulation of commerce and is desirable as a constitutional matter because it promotes national economic union, discourages interstate rivalries, and encourages national economic growth. Parochially motivated taxes or regulations imperil all three values by fragmenting the

34 U.S. CONST. art. IV, § 1, cl. 1 (Full Faith and Credit Clause); *id.* art. IV, § 2, cl. 1 (Privileges and Immunities Clauses).

35 See Maltz, *supra* note 13, at 64–65 (arguing that states may not act to disadvantage out-of-state interests); Regan, *supra* note 10, at 1165 (arguing that states may not act with protectionist intent).

36 For those interested in such matters, see, for example, Dan T. Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 499–508 (1981); and Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469 (2008).

37 See, e.g., *Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350–52 (1977).

38 See discussion *infra* Part III.

national economy, inviting interstate trade wars, and reducing overall national economic output. A tariff on out-of-state goods provides a classic example of such dangers: tariffs hinder the interstate trade in goods and services and invite retaliatory tariffs from other states.³⁹ As a consequence, the Supreme Court has been notably hostile to tariffs and other forms of state regulation that operate in practice as a tariff.⁴⁰ Were, for example, the State of Oregon to forbid the importation of California wines, there would be no doubt that the Court would strike down the measure.⁴¹

Deliberative equality, however, does not condemn all forms of parochially motivated legislative action. Specifically, deliberative equality does not apply to those state actions for which state citizens have uniquely borne the cost. The classic example is a state's decision to purchase supplies for state use exclusively from local suppliers. In this situation, the state is deciding how to use its own funds, which are raised predominantly from taxes on in-state citizens. Thus, while Oregon may not ban private individuals from purchasing California wines, there would surely be no problem from the standpoint of deliberative equality with the Governor of Oregon choosing to serve only Oregon wines at dinners or receptions at the Governor's mansion.

This distinction between parochial regulations and taxes, on the one hand, and parochial spending programs, on the other hand, is rooted in sound, theoretical considerations. When a state regulates or taxes interstate commerce, it is not distributing any good or service paid for by state citizens. In such situations, the demands of deliberative equality are not counterbalanced by any opposing, fairness-based need to favor in-state residents. Indeed, if anything, the selective imposition of taxes and regulations on out-of-state interests is unfair. In contrast, when a state spends taxpayer dollars, it is fair as a matter of political justice for state citizens to demand that those funds be used for the benefit of state residents.⁴² It is they, not nonresidents, who are the ones predominately paying such taxes, and, therefore, it is just that the state attempt to use such taxes for the citizens' benefit. Moreover, were the rule any other, certain types of public goods would never be produced by state or local governments because of the free rider problem. Few, if any, states would undertake expensive social programs, such as creating subsidized state universities, if the costs were borne exclusively by in-state citizens but the benefits were

39 See, e.g., *Granholm*, 544 U.S. at 473.

40 *Id.*

41 *Id.*

42 See *Williams*, *supra* note 36, at 492–94.

shared with free-riding nonresidents, who did not contribute to the cost of the program.⁴³ In short, parochialism in the distribution of state taxpayer funds is both fair and necessary to remedy potential free rider problems in the provision of public benefits.

Lastly, as a doctrinal matter, this distinction between parochial regulations and taxes, on the one hand, and parochial spending programs, on the other hand, forms the essence of the “market participant” exception. Every case in which the Court has applied the exception has involved state or local distribution of taxpayer owned or funded resources. Thus, for example, the Court has upheld the constitutionality of South Dakota’s policy of restricting the sale of cement produced at a state-owned plant exclusively to state residents.⁴⁴ Likewise, the Court upheld the City of Boston’s regulation requiring all contractors on city-funded construction projects to employ a specified percentage of city residents on the public works.⁴⁵ When Massachusetts imposed a milk tax that fell exclusively on private out-of-state dairies, however, the Court condemned the measure.⁴⁶

In sum, deliberative equality condemns parochially motivated taxes and regulations. In deciding whether and how to use their regulatory and taxation powers, state and local governments must not weigh the interests of in-state citizens and nonresidents differently—that is, they may not discount the costs borne by out-of-state residents merely because of their out-of-state status. At the same time, however, deliberative equality does not forbid states from spending taxpayer funds for the exclusive or predominant benefit of in-state residents, as the market participant exception permits. Stated differently, deliberative equality is fully consistent with our constitutional commitment to have state and local officials respond to local needs.

II. THE CONSTITUTIONAL CASE FOR DELIBERATIVE EQUALITY

With the foregoing description and understanding of deliberative equality in mind, the obvious question is whether deliberative equality

43 *Id.*

44 *Reeves, Inc. v. Stake*, 447 U.S. 429, 446–47 (1980); *see also* *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996) (allowing the state of South Dakota—as market participant—to institute an in-state ownership requirement for video lottery machine companies).

45 *White v. Mass. Council of Constr. Employees, Inc.*, 460 U.S. 204, 215 (1983). Likewise, lower courts have upheld state purchasing programs that contain preferences for local vendors and products. *See* *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1314–15 (4th Cir. 1994); *J.F. Shea Co. v. City of Chicago*, 992 F.2d 745, 748–50 (7th Cir. 1993).

46 *See* *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994).

is rooted in the Constitution. Why should we read the Constitution to embody the principle of deliberative equality? For two reasons: first, deliberative equality is consistent with the Framers' understanding of the dangers of state taxation of interstate commerce, and, second, it offers the best accommodation of the political values underlying the dormant Commerce Clause.

A. *The Framers' Fear of Parochialism*

As Albert Abel exhaustively documented, the Framers of the Constitution understood the Commerce Clause to limit state authority over interstate commerce so as to promote interstate trade.⁴⁷ The weaknesses of the Confederation era system of commercial regulation, in which commercial regulation and taxation was left principally to the states,⁴⁸ was one of the primary reasons that the Constitutional Convention was called.⁴⁹ That concern regarding state commercial authority carried over into the Convention, at which there was universal agreement that the power over interstate commerce had to be transferred from the states to Congress. Significantly, the delegates viewed the Clause less as the fount of federal legislative authority and

47 See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

48 The Articles of Confederation left it to each state to regulate trade. The Articles empowered Congress to regulate trade with Indians but only to the extent that "the legislative right of any State within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION art. IX (U.S. 1781). Similarly, Congress could enter into treaties with foreign powers, but "no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." *Id.*

49 See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) ("The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to take into consideration the trade of the United States" (internal quotation marks omitted)); see also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 259, at 240 (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833) (noting that during the Confederation era, "each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view"); Collins, *supra* note 4, at 52 (noting that most historians believe that commercial issues prompted the Constitutional Convention); Eule, *supra* note 9, at 430, 435 (noting that fear of commercial warfare among states "is almost uniformly conceded to be the primary, if not sole, catalyst for the convention of 1787" and that "the Constitutional Convention was prompted by commercial protectionism").

more as a restriction on state authority.⁵⁰ Indeed, as Abel concluded, the delegates assumed that the federal commerce power within its domain was exclusive and “presupposed the withdrawal of authority *pari passu* from the states.”⁵¹

Although there was widespread agreement regarding the need to divest states of their authority over interstate commerce, there was little discussion of the exact type of state measures that the Clause was meant to forbid.⁵² Nevertheless, what little discussion there was at the Constitutional Convention indicated hostility to parochial measures that favored in-state interests at the expense of out-of-state interests.⁵³ Several delegates expressed fear that, if states were left with legislative control over commerce, they would enact nakedly parochial measures, such as taxes on in-transit goods from outside the state destined for market elsewhere.⁵⁴ Significantly, their concerns were mollified by

50 See Regan, *supra* note 10, at 1125. The Commerce Clause itself was approved unanimously without dissent or substantial debate. See Abel, *supra* note 47, at 444. Moreover, the few times that interstate trade was discussed by the delegates, they expressed their expectation that the Clause would prevent states from adopting hostile or discriminatory measures that injured other states. See *id.* at 470 & n.169; see also *id.* at 471 (“There is thus not a single occasion in the proceedings of the convention itself where the grant of power over commerce between the states was advanced as the basis for independent affirmative regulation by the federal government. Instead, it was uniformly mentioned as a device for preventing obstructive or partial regulations by the states.”).

51 Abel, *supra* note 47, at 493. Any doubt on this score was settled by James Madison, the primary architect of the Constitution, who acknowledged many years later that the Commerce Clause was intended to operate as a restriction on state authority. See Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14, 14–15 (Phila., J.B. Lippincott & Co. 1865); see also Letter from James Madison to Prof. Davis (1832), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra*, at 232, 251–54 (noting the “transfer of the power [to tax imports and exports] to a common authority capable of exercising it with effect”). This expectation manifested itself in other constitutional provisions that divest states of authority to restrict trade among the states. See, e.g., U.S. CONST. art. I, § 10, cls. 2, 3; *id.* art. IV, § 2, cl. 1.

52 See Abel, *supra* note 47, at 470 (noting that, in the Convention records, there are only six references to the type of state measures condemned by the Clause).

53 *Id.* (noting that all references involved “discriminatory” measures).

54 See James Madison, Notes on the Constitutional Convention (Aug. 21, 1787) [hereinafter Madison, August 21 Notes], in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 355, 359–60 (Max Farrand ed., rev. ed. 1937) (noting that when John Langdon of New Hampshire expressed concern that some states would levy export taxes on in-transit goods produced in other states, Oliver Ellsworth reassured him that the Commerce Clause would protect states from such measures); James Madison, Notes on the Constitutional Convention (Aug. 28, 1787) [hereinafter Madison, August 28 Notes], in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 437, 440–41 (noting that, when James Madison moved to ban states from laying

reassurances from other delegates that the Commerce Clause barred such measures.⁵⁵

Moreover, once the struggle for ratification began, the need to constitutionally ban such parochialism became an enduring theme of the Federalists' campaign. Writing as Publius in the *Federalist Papers*, Alexander Hamilton criticized the "interfering and unneighborly regulations" of commerce adopted by some states that treated residents of other states "in no better light than that of foreigners and aliens."⁵⁶ Hamilton's choice of language is instructive; his concern that states would treat nonresidents like "foreigners" signals very plainly that it is parochialism that is the evil to which the Commerce Clause is addressed. In a similar fashion, James Madison warned of the likelihood that, without the Constitution, seaboard states would use their control over seaborne commerce to collect "indirect revenue" from consumers in inland states.⁵⁷ Once again, the example selected is telling. Madison's fear was that states would impose taxes on out-of-state individuals that they were not prepared to bear themselves—an obvious violation of deliberative equality.

To be sure, neither Madison nor any other of the Framers spoke expressly in terms of deliberative equality, and, for that reason, I do not make a strong originalist claim that the Framers consciously *intended* the courts to enforce the principle of deliberative equality. Rather, my claim is a more modest but equally powerful one—that the principle of deliberative equality offers the best way of understanding what the Framers thought and sought to do. Given the paucity of discussion regarding the matter, any theory of the dormant Commerce Clause—whether it is the virtual representation theory or antiprotectionist model—must necessarily rest on such interpretive inferences about how best to make sense of what few statements the Framers did utter on the subject. In my view, the best reading of the historical record suggests that the Framers feared the consequences of allowing states to adopt parochial commercial measures. Indeed, as discussed more fully below,⁵⁸ it is the competing theories of the dormant Commerce Clause that are ahistorical.

import embargoes, Gouverneur Morris responded that the measure was unnecessary because the power to regulate interstate trade was vested in the general government by Commerce Clause).

55 See, e.g., sources cited *supra* note 54.

56 THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 27, at 144–45.

57 THE FEDERALIST NO. 42 (James Madison), *supra* note 27, at 267–68.

58 See *infra* text accompanying notes 143–47.

B. *Accommodating Free Trade and Federalism*

In addition to its historical pedigree, deliberative equality is also constitutionally desirable because it best accommodates the competing interests underlying the American common market. Free trade among the states is constitutionally favored for three reasons: to promote political union, to reduce the likelihood of interstate retaliation, and to foster economic wealth. At the same time, however, the need to preserve state regulatory and taxation autonomy requires that states be allowed to adopt commercial regulations and taxes of their own choosing, which will inevitably disrupt free interstate trade to some degree.

1. Political Union

The first and most important value promoted by the Constitution's protection for free trade is political union. Free trade promotes political union by encouraging the economic integration of the states.⁵⁹ The dangers to political union are particularly apparent in the context of protectionist measures. Excluding out-of-state goods and services merely because of their origin signals in a potent fashion that the manufacturers of the excluded goods are not members of the same political community as in-state manufacturers.⁶⁰ In effect, the excluding state is saying to out-of-state companies: "You're not one of us; you're a foreigner whom we need not treat equally with our own residents." Such attempts at economic isolationism only serve to reinforce nativist impulses for political isolation, and, for that reason, the Court has viewed such protectionist measures as hostile to national political union. As Justice Cardozo eloquently put it in striking down a protectionist state regulation, the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."⁶¹ More recently (and earnestly), the Court declared that the suppression of such protectionist impulses "is essential to the foundations of the Union."⁶²

Though less apparent, nonprotectionist but burdensome commercial regulations and taxes also undermine political union. Subjecting interstate commerce to a multitude of burdensome and divergent regulations and taxes only serves to disrupt interstate trade

59 See, e.g., Jim Chen & Daniel J. Gifford, *Law As Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315, 1322-23 (1995).

60 Regan, *supra* note 10, at 1113.

61 *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

62 *Granholt v. Heald*, 544 U.S. 460, 472 (2005).

and concomitantly promote the economic isolation of each state, which in turn encourages political isolation. Indeed, it was Alexander Hamilton who first warned of the political dangers of such conflicting regulatory measures, declaring that “the gradual conflicts of State regulations” would induce state citizens to view nonresidents as “foreigners and aliens”⁶³—hardly a desirable result in a constitutional system dedicated to political union.

Deliberative equality obviously promotes political union by requiring states to give equal regard to interests located in other states. This equality of regard reduces the salience of independent state identities and emphasizes that, when it comes to the regulation or taxation of interstate commerce, we are all viewed as citizens of the same economic unit regardless of our state residence. In this respect, deliberative equality makes real the Framers’ promise that, as Justice Jackson breathlessly intoned, “our economic unit is the Nation.”⁶⁴

2. Retaliation

Closely related to the first concern with political union is the second: that trade-inhibiting state regulations and taxes are likely to encourage retaliatory measures by those states whose citizens are adversely affected by the measures.⁶⁵ Once again, the likelihood of such commercial reprisals if the states were left to their own devices was a prevalent concern of the Framers. “Competitions of commerce,” Hamilton warned, “would be another fruitful source of contention.”⁶⁶ Elaborating, Hamilton pointed to “those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens” and predicted that “[t]he infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.”⁶⁷

Not surprisingly, this concern has found expression in many judicial decisions reviewing state commercial measures. Condemning a law that restricted the export of milk to other states, Justice Jackson expressly adverted to the likelihood of punitive reprisals were such economic embargoes allowed:

63 THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 27, at 145.

64 H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537; *see also* Collins, *supra* note 4, at 45 (“Economic union was unquestionably a principal aim of the framers.”).

65 *See* Regan, *supra* note 10, at 1114; Smith, *supra* note 19, at 1208.

66 THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 27, at 62.

67 *Id.* at 63.

We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in the favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?⁶⁸

In short, protectionism—in whatever form—only encourages further protectionism, thereby threatening to ignite a trade war among the states.⁶⁹

More recently, the Court condemned “an ongoing, low-level trade war” involving the direct shipment of wine to consumers from wineries.⁷⁰ Twenty-six states allowed the direct shipment of wines to some extent, but some states, such as Michigan and New York, forbade direct shipment by out-of-state wineries, and thirteen states closed their markets to wineries from states that did not reciprocally allow the direct shipment of wine from their wineries.⁷¹ These restrictions, according to the Court, generated trade hostility among the states and encouraged the proliferation of retaliatory measures. Indeed, the Court noted that, in 1986, in response to other states' protection of local wineries, California rescinded its policy of allowing

68 *H.P. Hood & Sons*, 336 U.S. at 538–39; *see also* *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (noting that the dormant Commerce Clause prohibits “laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent”).

69 *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (noting that protectionist measures open the door “to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation”). Once again, the adoption of nonprotectionist but unduly burdensome regulations or taxes may also exacerbate interstate trade relations. Take, for example, a statute that limits the lengths of trains in a state. *Cf. S. Pac. Co. v. Arizona*, 325 U.S. 761, 763 (1945) (invalidating Arizona train limit law that forbade trains with more than fourteen passenger cars or seventy freight cars). The measure is nonprotectionist, but it will impose substantial costs on out-of-state companies, who, in turn, may lobby their own states to adopt nondiscriminatory regulations or taxes that impose severe costs on companies located in the original state.

70 *Granholt v. Heald*, 544 U.S. 460, 473 (2005).

71 *Id.* at 467–68.

direct shipments of wine from all wineries and adopted its reciprocity statute, closing its wine market to direct shipments from wineries in states that did not allow the direct shipment of Californian wines.⁷²

As should be obvious, the principle of deliberative equality minimizes the likelihood of retaliatory trade wars among the states by requiring each state to give equal regard to like out-of-state interests. True, a state whose domestic industry is burdened by a valid regulation or tax adopted by another state may still feel the desire to retaliate,⁷³ but that urge will be tempered, if not eliminated, in most cases by the first state's knowledge that the enacting state gave equal regard to its businesses. Knowing that one's interests have been considered and treated equally with others—that the principle of deliberative equality has been observed—does much to take the sting out of any loss and diminish the impetus to retaliate.

Of course, not everyone agrees that interstate commercial strife—or at least its possibility—is either undesirable or inevitable. Edmund Kitch, for instance, has argued that there is no need to constitutionalize a rule in favor of free trade because, left to their own devices, the states will negotiate an optimum level of market access via bilateral or multilateral trade agreements.⁷⁴ On this view, the threat of retaliation is a beneficial and inherent part of such a negotiation-based trading regime that encourages states to reach mutually beneficial accommodations. Indeed, the international trading regime is built upon such a negotiated structure. In other words, what's good enough for the international realm is good enough for the national realm too, and, on this view, deliberative equality is an unnecessary ingredient of the American common market.

Although interesting, this challenge to deliberative equality is overstated. First, the notion that states must negotiate market access in other states under threat of retaliation is in tension with the concept of federal union discussed above. Oregonians would rightly be dismayed that their ability to sell goods in California is wholly contingent upon California agreeing to accept Oregon-made goods—that, despite each state being equal members of the United States, it is within California's right to exclude Oregon goods subject only to the sanction that Oregon may do likewise to California's goods. Indeed, the Court has expressly declared that the states “should not be compelled to negotiate with each other regarding favored or disfavored

72 *Id.* at 473.

73 See Regan, *supra* note 10, at 1133.

74 Edmund W. Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* 9, 13–14 (A. Dan Tarlock ed., 1981).

status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests.”⁷⁵ For this reason, the Court has been rightly hostile to reciprocity agreements in which a state conditions market access for another state’s goods upon similar access for its goods.⁷⁶

Nor has the analogy to the international trading system proved persuasive, at least to the Court. To the contrary, the Court has pointedly rejected it, observing that “[h]owever available such methods [of negotiation and retaliation] in an international system of trade between wholly sovereign nation states, they may not constitutionally be employed by the States that constitute the common market created by the Framers of the Constitution.”⁷⁷ In the Court’s view, the states do not occupy the same constitutional status vis-à-vis one another as sovereign nations do; while the United States may use negotiation and the threat of retaliation in its dealings with foreign nations, the states may not act in a similar fashion.

Second, even if a negotiation-based trading system were constitutionally consistent with the American federal union, there are several reasons to be skeptical that a negotiation-based trading regime would produce an optimum level of market access. States may play favorites in dispensing market access, with particularly undesirable consequences for small or distant states. It is easy to believe that California would open its markets to goods from Oregon, Texas, or Florida, but what about New Hampshire or Rhode Island? That Rhode Island might close its market to goods from California might not trouble California in the least. Moreover, even with regard to those states that reach negotiated trade agreements, the ensuing trade agreements might only partially liberalize trade in goods and services. Indeed, the numerous exceptions to free trade contained in international trading agreements, such as the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services, indicate that states will not always perceive the benefits of free trade and agree to liberal trading regimes.⁷⁸ And, of course, trade wars are nasty things. While it is

75 *Granholm*, 544 U.S. at 472.

76 *See* *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 381 (1976) (invalidating a Mississippi milk reciprocity requirement); *see also* *Granholm*, 544 U.S. at 473 (criticizing reciprocity requirements).

77 *Cottrell*, 424 U.S. at 380.

78 *See* General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A3, A60–A63, 55 U.N.T.S. 194; General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 183 (1995).

not guaranteed that trade wars between various states would erupt in a negotiation-based trading regime, there is no guarantee that they would not either. For these reasons, it is entirely understandable for federal unions such as the United States to wish to minimize the circumstances likely to trigger such interstate trade tensions, as deliberative equality does.

3. Economic Efficiency

Finally, state restrictions on interstate trade are inefficient and reduce overall national wealth.⁷⁹ This is the classic case for free trade made by David Ricardo in the nineteenth century.⁸⁰ Of course, Ricardo was addressing trade among nations, but the principle is the same within a federal system of government. Because of the principle of comparative advantage, even a state that is inefficient in producing goods or services stands to gain by trading with other states that are more efficient in producing such goods or services.⁸¹ Indeed, the Supreme Court has favorably noted the wealth gains that have accrued to states by virtue of the American common market system.⁸² Deliberative equality, by restricting state parochial impulses and thereby promoting interstate trade, fosters national economic growth.

Of course, the notion that economic efficiency has (or should have) some constitutional status troubles many individuals.⁸³ To suggest that the Constitution protects economic efficiency—much less that courts should enforce such protection—seems at first glance to urge a reprisal of the *Lochner* era, when the federal courts aggressively policed state regulations in the name of a laissez faire capitalist ideology.⁸⁴ *Lochner v. New York*⁸⁵ and its progeny were properly con-

79 Regan, *supra* note 21, at 1880; Smith, *supra* note 19, at 1208. *But see* Collins, *supra* note 4, at 63 (contesting the claim that economic efficiency is constitutional value).

80 See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (3d ed. 1821), reprinted in 1 THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 128, 128–49 (Piero Sraffa ed., Liberty Fund 1951).

81 For a complete discussion of the theory of comparative advantage, see PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS (6th ed. 2003).

82 *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949) (“The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce . . .”).

83 See, e.g., Maltz, *supra* note 13, at 79–80.

84 See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage for women), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum hour legislation for bakers).

85 198 U.S. 45.

demned on the ground that there was no constitutional commitment to a particular economic model—that decisions regarding the economy are appropriately left to the political sphere.⁸⁶ If a state wishes to enact legislation that is economically inefficient, so be it. Indeed, after the demise of *Lochner* during the New Deal,⁸⁷ the Court upheld the constitutionality of a number of measures that were economically inefficient.⁸⁸ Drawing upon this universal criticism of *Lochner*, critics such as Earl Maltz point out that there is no more basis for courts to police against inefficiency caused by protectionism or trade disharmony than inefficiency caused by burdensome taxes or regulations.⁸⁹ The Constitution, so the argument goes, is indifferent to both types of measures, which are therefore left to the political process.

There are two available responses: one could either agree with the substance of the criticism but argue that *Lochner's* endorsement of laissez faire capitalism was right, or one could attempt to distinguish wealth gains from a common market system from wealth gains produced by a free market system, arguing that only the former deserve constitutional protection. The first response is a non-starter. Hostility to *Lochner* is virtually universal, shared by both conservative and liberal jurists and commentators alike.⁹⁰ As a consequence, proponents of the American common market must identify how inefficiency caused by protectionism or regulatory disharmony differs from the run-of-the-mill inefficiency caused by any governmental intrusion into the market economy and, more importantly, to demonstrate how that difference justifies intrusive judicial review in the name of the American common market.

86 See, e.g., *Tyson & Brother United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting); *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

87 See, e.g., *W. Coast Hotel*, 300 U.S. at 400 (overruling *Adkins*).

88 See *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

89 See Maltz, *supra* note 13, at 80; McGinley, *supra* note 18, at 436–37.

90 See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 429 (2001) (Breyer, J., dissenting) (opinion joined by Justices Ginsburg and O'Connor); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (opinion joined by Justices White, Scalia, and Thomas); Eule, *supra* note 9, at 438 (noting the “mistake” of *Lochner*). A notable exception is Mark Tushnet, who sees no distinction between inefficiency caused by trade disruption and inefficiency caused by run-of-the-mill regulatory measures and who endorses judicial review under substantive due process in both contexts. See Tushnet, *supra* note 9, at 148.

a. Unjustified Inefficiency

Attempting to distinguish inefficiency caused by trade-restrictive measures from inefficiency generally, Donald Regan contends that protectionism is inefficient in a constitutionally troubling way “because it diverts business away from presumptively low-cost producers without any colorable justification in terms of a benefit that deserves approval from the point of view of the nation as a whole”—what he subsequently calls a “federally cognizable benefit.”⁹¹ Regan defines that concept by example. He tells us that a tariff does not generate such a benefit because the gain to the importing/tax-collecting state is offset by the loss to exporting/tax-paying states—there is no net gain to the nation as a whole.⁹² Yet, it is clear that Regan does not mean to engage in some crude, utilitarian analysis, weighing gains achieved by one state against costs incurred by others. Rather, Regan offers Oregon’s bottle bill, which imposes sizable costs on out-of-state bottlers and beverage distributors as an example of a law that confers a federally cognizable benefit—here, the elimination of litter.⁹³ Why, despite the high costs imposed on out-of-state interests, is the elimination of litter a federally cognizable benefit? Not because the benefits outweigh the measure’s cost, but because, as Regan declares, “Oregon says it is.”⁹⁴

This is an imaginative approach, but it all hinges on the ability to identify “federally cognizable benefits,” whose presence renders inefficiency constitutionally unproblematic. And therein lies the problem. Allowing each state to define for itself what constitutes a “federally cognizable benefit” strips the concept of any meaning: it is whatever a state says it is. Moreover, and as a consequence, the concept loses any limiting effect on state power; any state goal can be a “federally cognizable benefit.” Indeed, it is hard to see why, contrary to Regan’s condemnation of it, a protectionist tariff could not be legitimately defended on the ground that the protection of domestic industry is important to the state—that the protection of domestic industry is a federally cognizable benefit because the state “says it is.” In short, once one allows states to define what are legitimate grounds for regu-

91 Regan, *supra* note 10, at 1118; *see also* Collins, *supra* note 4, at 64 (disguishing “market efficiency” from “interstate commercial harmony”).

92 *See* Regan, *supra* note 10, at 1118 (“From the point of view of the nation as a whole, such a bare transfer of welfare between similarly situated parties in different states creates no benefit at all.”).

93 *See id.* at 1102–03; *see also* *Am. Can Co. v. Or. Liquor Control Comm’n*, 517 P.2d 691, 703 (Or. Ct. App. 1973) (upholding Oregon’s bottle bill as valid legislation under the Commerce Clause).

94 Regan, *supra* note 10, at 1118.

lating interstate commerce, there is no principled way to distinguish a law prescribing maximum hours for bakers from a tariff on flour produced out-of-state.

More fundamentally, it is simply impossible to distinguish on economic grounds inefficiency caused by trade-inhibiting measures from that caused by other types of regulatory or tax measures, such as a minimum wage law or environmental regulation. Both types of measures impose social dead-weight losses that can be monetized. Moreover, as an economic matter, the latter can be just as or more burdensome than the former. Consider, for example, a manufacturer of plastic widgets located in California. Suppose further that Arizona imposed a one percent tariff on the import of plastic widgets, while California prohibited the manufacture and sale of plastic widgets. Both state measures create inefficiency as understood by welfare economists by depriving would-be consumers and producers of otherwise desirable market exchanges, yet the California measure, which is not protectionist, creates far more inefficiency in economic terms and is more burdensome on the manufacturer than the avowedly protectionist Arizona tariff. In short, economic theory does not provide any basis for treating trade-inhibiting provisions differently as a categorical matter than other regulatory or tax measures. Inefficiency is inefficiency, no matter its cause.

b. Parochialism and Inefficiency

There is another response to the *Lochner* objection that is more persuasive. One can acknowledge that inefficiency is inefficiency, but argue that certain types of legislative deliberations are more likely than others to enact inefficient measures. This response is grounded in *political* process theory: that the Constitution does not disfavor inefficiency as such, but rather those political processes that are not appropriately attuned to the costs of inefficiency. Stated differently, the Constitution limits state authority to act in economically inefficient ways only when the political process cannot be trusted to evaluate the relative benefits and burdens of particular regulatory or tax measures. On this view, *Lochner* was wrong because the New York legislature could be trusted to adequately assess the costs and benefits of the maximum hour law, but, in contrast, it cannot be trusted to evaluate the costs and benefits of a tariff on out-of-state flour. Why not?

Specifically, parochialism may lead to the adoption of unwise or economically inefficient measures. Recall the candy labeling law from Part I.A in which the in-state benefits exceeded the in-state costs but

not the costs nationally.⁹⁵ A parochially minded state legislature considering only the impact of the law on its constituents might conclude that the benefits of such a law outweigh the costs of the measure and might, therefore, enact the measure, even though the measure's benefits do not outweigh all its costs (that is, it is an economically inefficient measure). Indeed, at the margin, the state or local government's refusal to take into account the impact on out-of-state interests—that is, its parochial deliberations—may be determinative of whether a particular measure is enacted. On the other hand, were the state legislature also to consider the impact of the law on out-of-state interests, it might conclude that the benefits do not outweigh the costs (which now include those incurred by out-of-state interests) and might, therefore, refuse to enact the measure. As a consequence, forbidding parochialism would promote economic efficiency by preventing legislatures from underestimating the costs of proposed regulatory measures.

At the same time, prohibiting parochialism is not equivalent to promoting unfettered capitalism. Critically, not all economically inefficient measures are the product of parochialism. Indeed, many, if not most, state regulations and taxes are economically inefficient in that they disrupt economic exchanges that would make the participants better off. For example, the maximum hour law for bakers invalidated in *Lochner* was undoubtedly inefficient in an economic sense, but there was no suggestion that the New York legislature was tainted by parochial concerns. Thus, forbidding parochialism would not hinder state and local governments from adopting inexpedient or inefficient measures as such.

As should be apparent, this focus on the problem of parochialism offers a way out of the *Lochner* dilemma. The American common market does not value interstate trade for some neoclassical capitalist ideal that unfettered economic activity is always good.⁹⁶ Rather, our constitutional commitment to the common market rests on the more limited, political notion, that state parochialism may infect state political processes in undesirable ways, such as by leading to the adoption of economically ill-advised measures that but for such parochialism would not have passed. Stated differently, the Constitution's concern

95 See *supra* Part I.A.

96 See Collins, *supra* note 4, at 62 (“Describing the national interest as free trade is misleading because it implies that the doctrine’s essential purpose is economic efficiency . . .”). As Collins notes, the Framers were not laissez faire capitalists. See *id.* at 64. Rather, Collins posits that they were interested only in promoting “interstate commercial harmony.” *Id.* at 62. While true, that term does not provide sufficient guidance as to which commercial measures are prohibited and which permitted.

is not with economic efficiency as such—states are free to prefer other values at the expense of economic efficiency if they want—but with state parochialism that encourages the adoption of economically inefficient measures because some of the burdens are borne by out-of-state interests.⁹⁷ Economic inefficiency is merely the tangible price that the nation pays as a result of such parochialism.

Viewing the American common market as grounded in political, rather than economic, theory liberates the debate over the dormant Commerce Clause from the customary free-trade-versus-democratic-autonomy argument that plagues the discussion of international trading agreements.⁹⁸ The American common market does not limit democratic decisionmaking, but rather ensures that such decisionmaking shows equal regard for all of the interests affected by a measure. For that reason, even those who reject the notion that the Constitution commits us to *laissez faire* capitalism can believe more limitedly that the Constitution commits us to a common market system. Indeed, common markets are not necessarily *laissez faire* markets, as the European common market and WTO potently demonstrate. And, respect for out-of-state interests does not entail a regulatory race to the *laissez faire* bottom, in which all commercial regulations and taxes are constitutionally invalidated.

Finally and most importantly, this understanding of the nature of the Constitution's commitment to economic efficiency points in favor of the principle of deliberative equality as the constitutional foundation of the American common market. Deliberative equality encourages free trade by limiting the number of trade-inhibiting measures that a state is likely to enact. If a state must consider on equal terms costs borne by in-state and like out-of-state interests, states will have less leeway to adopt trade-inhibiting measures. There are many measures whose in-state benefits exceed the in-state costs but not the measure's total costs. The principle of deliberative equality bars the state from adopting these measures (at least to the extent the measure's costs were at all important to the legislature). At the same time, though, the principle of deliberative equality is faithful to the distinction between a common market and a free market discussed above. States remain free to adopt a panoply of commercial regulations and taxes, all of which interfere in market operations to some extent.

97 Eule, *supra* note 9, at 428, 444–46; *see also* Heinzerling, *supra* note 17, at 252 (discussing relationship between process theory and economic efficiency).

98 For an example of such a criticism of the dormant Commerce Clause, *see* McGinley, *supra* note 18, at 448–50, 455–56.

Deliberative equality does not replicate *Lochner's* hostility to regulatory interference with free market exchanges.

* * * *

In sum, deliberative equality bans state and local governments from acting on parochial animus or indifference to out-of-state interests. At the same time, however, it respects state regulatory autonomy, permitting states to adopt trade-inhibiting measures so long as those measures are not the product of provincialism. More than merely being an appealing conception of the American common market, deliberative equality is consistent with the Framers' understanding of the dangers to federal union posed by state regulation and taxation of interstate commerce. Moreover, it harmonizes the competing values of free trade and state regulatory autonomy. As such, it provides the best normative foundation and understanding of the American common market.

III. THE VIRTUAL REPRESENTATION MODEL OF THE DORMANT COMMERCE CLAUSE

Deliberative equality offers a compelling, balanced, and historically faithful synthesis of the competing interests of free trade and state autonomy. Since the New Deal, however, the Court has invoked two different theoretical models to support its dormant Commerce Clause jurisprudence: the virtual representation model and the antiprotectionism model. This Part discusses the former, while the next Part addresses the latter.

According to the virtual representation model, the dormant Commerce Clause prohibits states and local governments from adopting regulations and taxes that burden out-of-state (and therefore politically unrepresented) individuals.⁹⁹ As Mark Tushnet, a proponent of this model, has explained, the virtual representation theory "can be viewed as a political application of the economists' theory of externalities: because a legislative body may underestimate the burdens that its proposals place on people who do not participate in its

99 See Eule, *supra* note 9, at 442; Tushnet, *supra* note 9, at 125, 128; see also James M. O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 409, 418 (1982) (noting that "the decision-making process should take into account the interests of all persons significantly affected by the [state's] decision" and urging dormant Commerce Clause review when such complete participation does not take place). Eule, of course, would locate his process theory in a revitalized Article IV Privileges and Immunities Clause, rather than in the dormant Commerce Clause. This difference is immaterial for present purposes.

selection, the resulting statutes may be inefficient. Judicial review may on occasion eliminate those inefficiencies.”¹⁰⁰ On this view, rigorous judicial review of the merits of the legislation is a substitute for the political participation that outside interests have been denied—a sort of “virtual representation.”¹⁰¹

The origins of the virtual representation model can be traced to the U.S. Supreme Court’s decision in 1938 in *South Carolina State Highway Department v. Barnwell Bros.*,¹⁰² which upheld against a dormant Commerce Clause challenge South Carolina’s prohibition on semi-tractor trailers beyond a certain width and weight from using state highways. Writing for the Court, Justice Stone famously declared that “when the regulation is of such a character that its burden falls principally upon those without the state, 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.”¹⁰³ In such cases, judicial review of the merits of the legislation serves as a substitute for the political influence that outside interests might have had were it not for the fact they were outsiders. On the other hand, the fact that a regulation or tax’s burden falls equally on in-state and out-of-state interests alike was, according to Stone, “a safeguard

100 Tushnet, *supra* note 9, at 129 n.14; *see also* O’Fallon, *supra* note 99, at 400 (noting that only when “all persons whose interests are implicated significantly by a decision have had the opportunity to register their preferences through the electoral process” should courts defer to the legislative process).

101 ELY, *supra* note 9, at 100–01. For an interesting application of this theory to the issue of international trade under the WTO, see Peter M. Gerhart & Michael S. Baron, *Understanding National Treatment: The Participatory Vision of the WTO*, 14 *IND. INT’L & COMP. L. REV.* 505, 515–30 (2004).

102 303 U.S. 177, 192–93 (1938).

103 *Id.* at 185 n.2; *see also* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-5, at 1051 (3d ed. 2000) (noting that the Court’s rigorous review of discriminatory measures flows from its appreciation of parochial political accountability of state and local lawmakers). Conversely, several commentators argue that nondiscriminatory regulations and taxes do not warrant judicial scrutiny because they burden in-state and out-of-state interests equally and, therefore, state political processes can be trusted to accurately weigh the respective costs and benefits of the regulation or tax. *See* Eule, *supra* note 9, at 473; Maltz, *supra* note 13, at 78. As Julian Eule has argued, “[a] state legislature is unlikely to burden its own citizenry beyond the degree needed to achieve the desired benefit.” Eule, *supra* note 9, at 473; *see also* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 404 (1994) (O’Connor, J., concurring) (“The Court generally defers to health and safety regulations because ‘their burden usually falls on local economic interests as well as other States’ economic interests, thus insuring that a State’s own political processes will serve as a check against unduly burdensome regulations.’” (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978))).

against their abuse,” obviating the need for close judicial scrutiny.¹⁰⁴ Ever since *Barnwell*, the Court has repeatedly invoked this rationale for scrutinizing state and local commercial regulations and taxes that impact out-of-state interests.¹⁰⁵

At first glance, this approach undeniably has some surface appeal—after all, as John Hart Ely observed, we typically trust legislatures to make the right decision for their constituents because they are accountable to them.¹⁰⁶ If a state were to systematically deny representation to a particular group—say, all the women in the state—we would expect the resulting legislation to be skewed in favor of the represented interests (in this case, men) and against the unrepresented group (women). For the same reason, the systematic exclusion of out-of-state interests leads us to suspect that legislation will be skewed in favor of in-state interests and against out-of-state interests. For example, states are inclined to impose tariffs on out-of-state goods because the benefits accrue to politically influential in-state interests while the costs are ostensibly born by politically powerless out-of-state interests.¹⁰⁷

The virtual representation theory’s surface appeal, however, evaporates on closer inspection because the model fails to give due regard to state regulatory autonomy; indeed, the model virtually eliminates it. To see why, answer the following question: what can a state government do to avoid the rigorous judicial scrutiny that this model justifies? A state that does not wish to have all of its legislation scrutinized for gender bias can extend the franchise to women,¹⁰⁸ and, once it has done so, there is no need for the judiciary to serve as the “virtual

104 *Barnwell Bros.*, 303 U.S. at 187.

105 See, e.g., *W. Lynn Creamery v. Healy*, 512 U.S. 186, 200 (1994); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473 n.17 (1981); *Raymond Motor Transp.*, 434 U.S. at 444 n.18; *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940).

106 ELY, *supra* note 9, at 83–84. In fact, John Hart Ely drew upon Stone’s theory to create his famous, representation-reinforcing theory of judicial review. See *id.* at 75–77. Of course, as Donald Regan has observed, one need not subscribe entirely to Ely’s theory, which has come under attack, to believe that the dormant Commerce Clause might constitute a particular, more limited instance in which such process review is justified. See Regan, *supra* note 10, at 1161.

107 See Eule, *supra* note 9, at 445–46; Farber & Hudec, *supra* note 13, at 1404–05; Heinzerling, *supra* note 17, at 251–52; Regan, *supra* note 10, at 1161.

108 Of course, women today have the franchise as a matter of constitutional right. See U.S. CONST. amend. XIX.

representative” of women’s interests.¹⁰⁹ But that same response cannot be adopted with regard to out-of-state interests. States cannot extend the franchise to all out-of-state interests; to do so would eliminate state governments as separate, sovereign entities and be completely unworkable in practice.¹¹⁰ Consequently, judicial scrutiny to compensate for the electoral exclusion of out-of-state interests is perpetual and universal under this theory.

Proponents of the virtual representation model, such as Mark Tushnet and Julian Eule, have an answer to this objection. In their view, the courts’ duty of virtual representation arises—that is, judicial scrutiny is triggered—only when out-of-state interests are *disproportionately* affected by a state measure.¹¹¹ In contrast, when a measure’s burdens fall equally on in-state and out-of-state interests, rigorous judicial review of the merits of the legislation is unnecessary because, in their view, the state political process can be trusted to evaluate the merits of the legislation accurately. Critically, their trust in the political process is based on the notion that, when in-state individuals are equally affected, the in-state interests serve as surrogate representatives for excluded out-of-state individuals, obviating the need for compensatory judicial review on behalf of the latter.

It is the premise of this limitation—that in-state individuals can serve as surrogate representatives for out-of-state individuals—that is the fatal flaw in this more limited variant of the virtual representation

109 For an ironic example of such reluctance on the part of the judiciary to play that role once women received the franchise, see *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923) (invalidating a minimum wage law for women), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

110 See Maltz, *supra* note 13, at 80; Regan, *supra* note 10, at 1164–65. Since a state could never predict *ex ante* what outside interests might be adversely affected by future legislation by it or its local governments, the only way to avoid strict scrutiny of its measures would be to extend the franchise to all voting-age U.S. citizens, transforming each state legislature into a mini-Congress.

111 See Eule, *supra* note 9, at 460–61; Tushnet, *supra* note 9, at 135. Interestingly, this limitation was first suggested by the Court in *Barnwell*. See *S.C. Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938) (noting that judicial scrutiny is applicable only to those measures whose burdens fell “principally” on out-of-state interests). In subsequent cases, however, the Supreme Court dispensed with this limitation on the theory. See, e.g., *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767–68 n.2 (1945) (“[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940) (“[T]o the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.”).

model. The whole notion of surrogate representation has a checkered past. Prior to the Revolutionary War, Britain justified the lack of parliamentary representation for the American colonists on the ground that British subjects at home adequately represented the colonists' interests.¹¹² Similarly, in the nineteenth century, opponents of women's suffrage argued that enfranchised men adequately represented the interests of the disenfranchised women.¹¹³ In light of these historical events, the suggestion that the denial of political representation can be remedied by providing a surrogate bears a heavy burden of persuasion.

On the face of it, the idea that in-state individuals can serve as adequate surrogates for out-of-state individuals is as implausible as the suggestion that British subjects were adequate surrogates for American colonists or that men were adequate surrogates for women. In the latter instances, there were obvious and substantial conflicts of interest between the enfranchised and disenfranchised groups that negated the notion that the former was an adequate surrogate for the latter.¹¹⁴ The same problem exists with regard to the surrogate representation of out-of-state interests by in-state interests. In-state businesses are often competitors of the out-of-state businesses that they supposedly represent. That competitive relationship destroys whatever coherence of interest one might theoretically suppose to exist. For example, in-state businesses might not oppose a burdensome measure, believing that their out-of-state competitors will be comparatively harmed more by the measure, thereby improving the in-state businesses' competitive position.¹¹⁵ Or the state may buy off in-state businesses with subsidies or promises of future assistance or regulatory relief.¹¹⁶

112 TRIBE, *supra* note 103, § 6-5, at 1055 n.23; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 173 (1969).

113 See, e.g., Cong. Globe, 39th Cong., 1st Sess. 3035 (1866) (statement of Sen. Henderson) ("[The ballot] is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother."); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981-87 (2002) (discussing how men were viewed as the head of the household and governed the other members of the family).

114 See WOOD, *supra* note 112, at 173-81; Siegel, *supra* note 113, at 991-92.

115 Cf. Heinzerling, *supra* note 17, at 254-55 (noting that in-state consumers may have different interests than out-of-state consumers and therefore cannot serve as effective surrogates).

116 Tushnet, *supra* note 9, at 137; see also *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1975) (noting that exemptions were likely the product of political compromise to alleviate the statute's burden on local industry).

Indeed, in-state interests often seek statutory exemptions or other forms of legislative relief to alleviate the costs of regulations imposed on them and their out-of-state competitors. A telling and potent example of such an effort took place in *West Lynn Creamery v. Healy*.¹¹⁷ There, the State of Massachusetts imposed a milk tax on all milk, but, to mollify in-state dairies, the proceeds of the tax were used to subsidize in-state dairies.¹¹⁸ As the Court expressly noted in invalidating the measure, the subsidy provision ensured that in-state dairies had no incentive to fight the tax, which therefore fell exclusively in practice on out-of-state dairies.¹¹⁹ In short, the competitive relationship between the in-state dairies and the out-of-state dairies negated the possibility that the former were adequate surrogates for the latter.

To be sure, one might try to address the foregoing conflict-of-interest problem by eschewing reliance on in-state competitors and instead attempting to identify other potential in-state surrogates whose interests are sufficiently aligned with the out-of-state interests. The difficulties with this approach, however, are illuminated by *Minnesota v. Clover Leaf Creamery Co.*,¹²⁰ in which the Supreme Court tried such a move. At issue was Minnesota's ban on the sale of milk in non-returnable, non-refillable plastic containers.¹²¹ The law burdened plastic resin manufactures, which were all out-of-state—in other words, there were no in-state plastic resin manufacturers to serve as surrogates for the out-of-state companies.¹²² The Court nevertheless noted that among the companies challenging the law were several Minnesota dairies that used plastic containers, a Minnesota company that used the resin to produce plastic milk jugs, and a Minnesota milk retailer.¹²³ The Court surmised that these in-state companies were suitable surrogates for the out-of-state resin manufactures.¹²⁴

Contrary to the Court's suppositions, however, none of the identified surrogates were adequate substitutes for the out-of-state manufacturers. As for the in-state dairies, even the Court itself noted that the law's impact on the dairies was "slight" because they could simply switch to paper containers,¹²⁵ and the same must have been true for the milk retailer. The in-state container producer seemed a better

117 512 U.S. 186 (1994).

118 *See id.* at 191.

119 *Id.* at 200.

120 449 U.S. 456 (1981).

121 *Id.* at 458.

122 *See id.* at 473.

123 *Id.* at 458 n.1.

124 *See id.* at 473 n.17.

125 *Id.* at 472.

potential fit, but the Court made no attempt to ascertain whether its interests in fact aligned with those of the out-of-state resin manufacturers. It is equally possible that the jug manufacturer also produced paper jugs, could easily retool to produce such containers, or was prepared to focus its sales efforts in other states, in which case its interests would differ from those of the out-of-state resin manufactures.¹²⁶ True, the mere fact that these Minnesota companies had filed suit against the statute indicated their opposition to the statute, but it seems more significant that the out-of-state resin manufactures also joined the suit, suggesting that the manufactures did not view the Minnesota companies as sufficient surrogates even to prosecute the suit, let alone “represent” them before the legislature. In short, even if they share some general opposition to a given law, different companies in different lines of business almost invariably possess different interests that negate the possibility of surrogate representation.

More importantly, even if in-state interests could serve as suitable surrogates for out-of-state interests as a practical matter, the denial of actual representation for the latter would still be problematic in principle. If one believes that individuals should have the right to influence governmental decisions through representatives of their own choosing—which is the underlying premise of this theory—it makes no sense to say that such a right evaporates when there are substantial numbers of in-state individuals who can serve as surrogates for the excluded individuals.¹²⁷ It would have been no answer to the American colonists’ demands for representation that many British subjects also objected to the Stamp Act, nor would it have been at all responsive to women’s demands for suffrage to say that many men cared about the plight of women.

Lastly on this point, the surrogate representation response ignores entirely the fact that politics is all about numbers—specifically, the number of votes a legislator is likely to win or lose by supporting a given policy. Even if there are numerous in-state individuals whose interests are perfectly aligned with out-of-state groups and who vigorously oppose a given measure, the disenfranchisement of out-of-state interests still warps the legislative process to the disadvantage of the out-of-state interests. When the number of in-state supporters and

126 This last possibility seems the most likely, as the container manufacturer sold jugs to out-of-state dairies and most of its sales remained unaffected by the law. See Brief for Respondents at 28, *Clover Leaf Creamery*, 449 U.S. 456 (No. 79–117), 1980 WL 339367; see also TRIBE, *supra* note 103, § 6-5, at 1055 n.23 (discussing likelihood that in-state jug manufacturer’s interests differed from resin manufacturer’s).

127 See Regan, *supra* note 10, at 1162–63 (noting that *Carolene Products* theory requires consideration of all foreigners harmed in non-trivial manner by state law).

opponents is roughly even, the exclusion of out-of-state groups is likely to be determinative of the passage of the contested measure. With out-of-state interests excluded, the measure may pass, but, if they were included, they might tip the political balance and induce legislators to vote against the measure. James O'Fallon has put the point more generally: "The presence of adversely affected constituents, even in significant numbers, by no means assures that the balance of interests represented accurately reflects the balance of interests in the nation as a whole."¹²⁸

For these reasons, the virtual representation model leaves courts with no option but to scrutinize each and every state and local law that impacts out-of-state individuals, but that leads to the second major problem with this theory: the theory does not provide meaningful guidance to courts regarding what to look for or what type of doctrinal rules to deploy.¹²⁹ The theory correctly points out that the exclusion of out-of-state interests is likely to skew the legislative process in favor of in-state interests, but, beyond that useful (and correct) insight, it leaves courts with no framework for determining which laws should be invalidated and which upheld. The most obvious doctrinal rule suggested by the theory—that state measures that adversely affect unrepresented interests are *per se* invalid—is a non-starter. Every state commercial measure adversely affects some unrepresented out-of-state interests. Consequently, such a *per se* rule would leave state and local governments powerless to adopt any commercial regulations or taxes.¹³⁰

One could weaken the rule to a presumption—state measures that adversely affect unrepresented interests are presumed invalid—but that opens up another can of worms: how strong is the presumption and what must a state show to rebut the presumption? Theoretically, one might answer that those measures that would have been enacted despite the exclusion of out-of-state interests are valid, but that requires courts to engage in the difficult, counterfactual determination whether a particular measure would have been adopted had out-of-state interests been provided political representation. Even the simplest, quantitative approach—asking how many out-of-state indi-

128 O'Fallon, *supra* note 99, at 413. Thus, in contrast to Eule and Tushnet, O'Fallon believes that "all" affected persons are entitled to a participatory role. *Id.* at 401.

129 See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56–57 (1997) (describing how every constitutional value must be implemented through a doctrinal rule of some sort).

130 See Regan, *supra* note 10, at 1163–64 (rejecting virtual representation theory because it would lead to invalidation of too many state and local measures).

viduals are adversely affected by the measure, adding them to the number of in-state opponents, and then comparing that figure to the number of in-state supporters of the measure—is utterly unworkable. There is no way for courts to calculate those numbers, and, even if they could, it would still be necessary for the courts to determine whether, in light of those numbers, the legislature (or, even more difficult, individual legislators) would have voted differently—a task of mind-boggling complexity.

Instead, proponents of the virtual representation theory typically urge the courts to balance the measures' burdens and benefits as called for by the balancing test from *Pike v. Bruce Church, Inc.*¹³¹ Yet, this approach, though workable, is untethered to the theory of virtual representation. The virtual representation model rests upon the desire to ensure majoritarian democracy—in this context, to ensure that states may not burden thousands of unrepresented out-of-state individuals simply for the benefit of a fewer number of in-state citizens. The *Pike* balancing test, however, focuses exclusively on whether the measure's burden on interstate commerce is "clearly excessive" when compared to the measure's local benefits.¹³² As a consequence, deploying the *Pike* rule will not necessarily root out instances of minoritarian tyranny that the virtual representation model abhors. To see why, consider a proposed state measure that would burden 1,000 out-of-state residents by \$1 each. The measure, though, will generate a benefit for two in-state citizens of \$100,000 each. This would be a classic example of the tyranny of the minority that the theory of virtual representation condemns—two politically influential in-state individuals burdening numerous unrepresented out-of-state individuals—yet, the measure, whose benefits exceed its costs, survives *Pike* review.

Conversely, the *Pike* rule will condemn measures that do not offend the theory of virtual representation. Consider a state measure that burdens greatly two out-of-state individuals to the tune of, say, \$500,000 each, but benefits 10,000 in-state citizens in a modest way, say, \$5 each. The *Pike* test condemns this measure,¹³³ even though the measure clearly satisfies the majoritarian concern underlying the

131 397 U.S. 137, 142 (1970); see also Eule, *supra* note 9, at 469–74 (proposing balancing inquiry when measure disproportionately affects out-of-state interests); O'Fallon, *supra* note 99, at 413; Tushnet, *supra* note 9, at 142.

132 *Pike*, 397 U.S. at 142.

133 *Cf. id.* at 140, 145 (invalidating Arizona cantaloupe packaging requirement that would cost one out-of-state grower \$200,000, even though all Arizona cantaloupe growers would be modestly benefited by the requirement).

theory of virtual representation.¹³⁴ From the vantage point of the theory of virtual representation, the *Pike* rule is fatally over- and under-inclusive. The rule may serve to implement other theoretical models, but virtual representation is not among them.

* * * *

In sum, the theory of virtual representation does not provide a superior normative foundation for the American common market. Although it promotes free interstate trade, it unduly limits state legislative autonomy. To avoid the intrusive judicial review mandated by this theory, states would have to open up the franchise to out-of-state individuals. Since no state would do such a thing, the theory therefore mandates intrusive *Lochner*-style judicial review of each and every state commercial regulation and tax. Worse still, the theory offers no workable guidance to courts on how to perform such review. In short, virtual representation is too demanding in principle and too unworkable in practice to provide the normative foundation for the American common market.

IV. THE ANTIPROTECTIONISM MODEL OF THE DORMANT COMMERCE CLAUSE

The other theoretical model deployed by the U.S. Supreme Court is the antiprotectionism model, according to which the dormant Commerce Clause prohibits state and local governments from adopting regulations or taxes that are intended to benefit in-state interests at the expense of out-of-state competitors. Thus, for example, taxes and regulations adopted so as to shield in-state industries from out-of-state competition, such as tariffs on out-of-state producers' goods, are unconstitutional.¹³⁵ Rooting out economic protectionism, however, is the sole goal and function of the antiprotectionism model. In the absence of such protectionist intent, state and local commercial regulations and taxes are constitutional regardless of the severity of

134 One could harmonize the result in *Pike* with the theory of virtual representation by abolishing the one person, one vote principle and substituting a one dollar, one vote principle. On this view, the California cantaloupe grower is entitled to greater political influence than all the Arizona growers because he suffers more in dollar terms than all of them gain. No one to my knowledge, however, has ever proposed such a plutocratic conception of the theory of virtual representation.

135 See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) ("The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State.").

their impact on interstate trade and regardless whether parochialism corrupted the legislative deliberations.¹³⁶

The antiprotectionism model has a long, historical pedigree. Even before the New Deal, several Supreme Court decisions invalidated state and local laws on the ground that the measures were adopted so as to favor local businesses at the expense of out-of-state competitors.¹³⁷ Although the New Deal wrought a substantial change in the Court's approach to the Commerce Clause, the Court's antipathy to protectionist measures was not affected.¹³⁸ Indeed, it became more acute, with the Court expressly linking the Commerce Clause to the role of eliminating state protectionism. For example, in *H.P. Hood & Sons, Inc. v. Du Mond*,¹³⁹ which invalidated New York's attempt to insulate its dairy industry from out-of-state competition, Justice Jackson decried state efforts to protect local industries, explicitly observing that the dormant Commerce Clause served to prevent the adoption of such measures.¹⁴⁰ As Jackson categorically put it,

[O]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.¹⁴¹

136 See Regan, *supra* note 10, at 1092, 1100.

137 See, e.g., *Welton v. Missouri*, 91 U.S. 275, 280–82 (1876) (invalidating a Missouri statute that required traveling salesmen who sold out-of-state goods (but not salesmen who sold in-state goods) to procure a license); see also *Voight v. Wright*, 141 U.S. 62, 66 (1891) (invalidating a Virginia law requiring inspection only of out-of-state flour); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 497–98 (1887) (invalidating Tennessee privilege tax applied to salesmen of out-of-state goods); *Walling v. Michigan*, 116 U.S. 446, 458 (1886) (invalidating Michigan tax on out-of-state salesmen selling liquor that was manufactured out-of-state); *Webber v. Virginia*, 103 U.S. 344, 350 (1881) (invalidating similar Virginia license tax on vendors of out-of-state goods); *Tiernan v. Rinker*, 102 U.S. 123, 127 (1880) (suggesting that Texas occupation tax on liquor vendors that exempts vendors of in-state wine and beer is discriminatory and therefore violates dormant Commerce Clause); *Guy v. Baltimore*, 100 U.S. 434, 443 (1880) (invalidating discriminatory wharfage fee on ships unloading out-of-state goods); *Cook v. Pennsylvania*, 97 U.S. 566, 573 (1878) (invalidating auctioneer tax levied on sale of foreign goods); *Morrill v. Wisconsin*, 154 U.S. 626, 626 (1877) (invalidating similar Wisconsin license tax on peddlers of out-of-state goods).

138 See Williams, *supra* note 1, at 1908.

139 336 U.S. 525 (1949).

140 See *id.* at 533–35 (noting that aversion to discrimination was “deeply rooted in both our history and our law”); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (“Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.”).

141 *H.P. Hood & Sons*, 336 U.S. at 539.

In the decades following the New Deal, the Court has continued to view the role of the dormant Commerce Clause in this light. As the Court succinctly put it in one case, the dormant Commerce Clause “prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹⁴²

The antiprotectionism model obviously has a good deal of appeal. After all, there are few serious supporters of interstate protectionism, at least outside state and local legislatures. The flaw in the antiprotectionism model, however, involves not what measures it condemns but rather what measures it upholds. Unlike deliberative equality, which invalidates nonprotectionist but parochial measures, the antiprotectionism model validates all state and local regulations and taxes that are not protectionist. It is this refusal to address the dangers posed by nonprotectionist measures that renders the antiprotectionism model a normatively unattractive foundation for the dor-

142 *New Energy Co. v. Limbach*, 486 U.S. 269, 273–74 (1988); *see also* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588 (1997) (“Protectionism, whether targeted at for-profit entities or serving, as here, to encourage nonprofits to keep their efforts close to home, is forbidden under the dormant Commerce Clause.”); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (“In its negative aspect, the Commerce Clause ‘prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994))); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (“‘This “negative” aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” (quoting *New Energy Co.*, 486 U.S. at 273–74)); *id.* at 205 (“Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.”); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”); *Or. Waste Sys. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 106 (1994) (“[R]egulating interstate commerce in such a way as to give those who handle domestic articles of commerce a cost advantage over their competitors handling similar items produced elsewhere constitutes such protectionism.”); *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (“‘This “negative” aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” (quoting *New Energy Co.*, 486 U.S. at 273–74)); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (“[S]tate-imposed burdens cannot be squared with the Commerce Clause when they serve only ‘simple economic protectionism.’” (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))).

mant Commerce Clause. Stated differently, the antiprotectionism model underprotects the American common market.

As an initial matter, antiprotectionism's refusal to condemn parochial but nonprotectionist regulations and taxes is at odds with the historical record regarding the Framers' understanding of the Commerce Clause. As noted above, there is little evidence regarding what type of state measures the Framers thought were prohibited by the Commerce Clause. At the Constitutional Convention, there were only six instances in which delegates discussed the matter in any detail.¹⁴³ Protectionist measures, such as import tariffs, were certainly mentioned,¹⁴⁴ but so too were other, nonprotectionist measures, such as tariffs on in-transit goods and navigation tributes.¹⁴⁵ Likewise, during the ratification debates, there was scant mention of the subject, but what little discussion there was pointed to a broader concern than merely with protectionism. Recall that James Madison in the *Federalist* warned that the Commerce Clause would prevent seaboard states from taxing goods in transit between inland states and other states or foreign nations.¹⁴⁶ Madison's concern was not solely that the seaboard states would levy the taxes so as to bolster their own domestic industry—the seaboard states might not have a domestic industry producing the taxed good—but also that the seaboard states would levy the transit taxes simply to generate revenue at the expense of other, noncompeting producers and consumers in the inland states.¹⁴⁷ In short, while the historical record is far from conclusive, the Framers expressed concern about parochial state taxes that would not qualify as protectionist and, therefore, would survive constitutional review under the antiprotectionism model.

More importantly, though, the antiprotectionism model undervalues the interests in interstate trade by ignoring the dangers to interstate commerce posed by parochial but non-protectionist regulations and taxes. Recall that free interstate trade is valuable because it promotes political union, discourages interstate trade wars, and fosters

143 See Abel, *supra* note 47, at 470–71.

144 Madison, August 21 Notes, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 54, at 360–61 (export duties); Madison, August 28 Notes, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 54, at 437, 441 (import duties).

145 See, e.g., James McHenry, Notes on the Constitutional Convention (Sept. 4, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 54, at 503, 503–04.

146 THE FEDERALIST NO. 42 (James Madison), *supra* note 27, at 268; see *supra* text accompanying note 57.

147 See THE FEDERALIST NO. 42 (James Madison), *supra* note 27, at 267–68.

economic growth.¹⁴⁸ Nonprotectionist but parochial regulations and taxes seriously undermine all three constitutional values. To see how, consider a hypothetical ban adopted by State *A* on the sale of avocados that contain less than eight percent oil content.¹⁴⁹ Suppose that State *A* has no avocado growers nor any in-state industry that would benefit from the exclusion of avocados from the domestic market (in other words, the measure is not protectionist as understood by the antiprotectionism model). Suppose further that other states use a different, more lenient oil standard, say a six percent minimum avocado oil content requirement. In short, State *A* has adopted a regulation that varies in substantive content from that of other states—a circumstance that is common in the United States with respect to matters other than avocados. This is the problem of trade harmonization, and it is a real problem that costs interstate businesses substantial sums every year.¹⁵⁰

Now suppose that State *A* had no particularly good reason for adopting its eight percent standard and that, despite the enormous costs the regulation would impose on out-of-state avocado growers, the state legislature simply ignored those costs because they were born by out-of-state interests (i.e., suppose that it is a parochial measure that violates deliberative equality). Under these circumstances, the eight percent standard interferes with interstate commerce in ways that undermine political union, encourage interstate trade rivalries, and retards economic growth. Other states with avocado growers will certainly be upset that State *A* imposed such costs on their avocado growers without giving any consideration to the burdens imposed on the growers, and these other states may seek to find a way to retaliate against industries located in State *A*. Likewise, by suppressing the trade in six percent avocados, State *A* has generated social welfare losses by preventing voluntary market exchanges that would otherwise take place absent the regulation. In short, nonprotectionist parochial measures of this sort pose a substantial threat to interstate trade and the underlying constitutional values that it promotes.

148 See *supra* Part II.B.

149 Cf. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 133, 133–34 (1963) (describing California’s ban on selling avocados with less than eight percent oil content).

150 See, e.g., Daniel Shaviro, *Some Observations Concerning Multijurisdictional Tax Competition*, in *REGULATORY COMPETITION AND ECONOMIC INTEGRATION* 49, 59 (Daniel C. Esty & Damien Geradin eds., 2001) (discussing the compliance costs for nationwide businesses in the area of state taxes); see also *S. Pac. Co. v. Arizona*, 325 U.S. 761, 772, 775–76 (1945) (invalidating Arizona train limit statute on this ground).

These defects in the antiprotectionism model have not been lost on the Supreme Court, which—despite its professed embrace of the model—has never strictly limited itself solely to invalidating protectionist measures. Rather, the Court has invalidated nonprotectionist measures that have imposed substantial costs on interstate commerce without significant countervailing benefits to the enacting state—measures that can only be understood as parochial in nature. A classic example is *Bibb v. Navajo Freight Lines, Inc.*,¹⁵¹ in which the Court invalidated Illinois' requirement that semi-tractor trailer trucks using Illinois highways be equipped with curved mudflaps.¹⁵² Not only did most other states permit the use of straight mudflaps, Arkansas affirmatively required them.¹⁵³ As a consequence, the Illinois measure imposed substantial costs on out-of-state interstate truckers, who would be forced to change their mudflaps at the Illinois border.¹⁵⁴ At the same time, the Court found that curved mudflaps were no safer than straight mudflaps and potentially less safe in some circumstances.¹⁵⁵ Even though the measure was not protectionist—there was no evidence that Illinois had enacted the measure to benefit an Illinois-based company or industry—the Court nevertheless invalidated the measure as unduly burdening interstate commerce.¹⁵⁶ There are other examples.¹⁵⁷ In short, even the Court has implicitly acknowledged the limitations of the antiprotectionism model and refused to adhere to a strict requirement that nonprotectionist measures be upheld.

In response, proponents of the antiprotectionism model acknowledge that nonprotectionist measures can be burdensome but argue that there is no way to determine when interstate trade has been *unduly* burdened. In their view, a proper respect for state sovereignty therefore entitles states to adopt taxes and regulations of their own

151 359 U.S. 520 (1959).

152 *Id.*

153 *See id.* at 523.

154 *See id.* at 527–28; *see also* *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005) (invalidating on *Pike* grounds a Virginia law that precluded establishment of new motor vehicle franchises whenever an existing franchisee filed protest).

155 *Navajo Freight Lines*, 359 U.S. at 525 (noting that curved flap decreased brake effectiveness).

156 *See id.* at 527–28.

157 *See, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142–46 (1970); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 771–72, 774–75 (1945).

choosing regardless of the measures' impact on interstate commerce.¹⁵⁸

This is a potent response, but it is first necessary to clarify exactly what the proponents mean by it. They cannot be claiming that the Constitution *entitles* states to enact nonprotectionist measures as a matter of state autonomy. As part of its affirmative power over commerce, Congress can undoubtedly preempt state measures that are not protectionist in nature, as it often does in imposing a uniform rule of trade that preempts state rules in particular areas.¹⁵⁹ In fact, even the staunchest proponents of the antiprotectionist model support Congress's power to do so.¹⁶⁰ Rather, the proponents' point must be that the judiciary does not have the ability to enforce constitutional limits on state authority beyond eliminating protectionist regulations and taxes. Stated differently, for its proponents, the antiprotectionism model is the only constitutional model that the judiciary can apply in a principled matter; attempts to go beyond antiprotectionism embroil the judiciary in making judgments beyond its capabilities.

Among the current Justices of the Court, Justice Scalia has most often made this claim, contending that the test from *Pike v. Bruce Church, Inc.*—which the Court uses to root out unduly burdensome regulations and which focuses on whether a state regulation's burden on interstate commerce is grossly excessive in comparison to the measure's local benefits¹⁶¹—improperly requires courts to balance incommensurable values. As he has put it, comparing benefits and burdens is akin to “judging whether a particular line is longer than a particular rock is heavy.”¹⁶²

As an initial matter, the attacks on the Court's efforts to identify unduly burdensome regulations, such as through the *Pike* balancing test, seem vastly overblown. Policymaking often (and, according to some, should always) involves the comparison of costs and benefits, most of which can be monetized. In fact, by executive order, every President from Ronald Reagan to George W. Bush has required fed-

158 See Regan, *supra* note 10, at 1177.

159 See, e.g., 42 U.S.C. §§ 7521, 7543 (2000) (prescribing uniform motor vehicle emission standards and preempting state standards except in limited circumstances).

160 See Regan, *supra* note 10, at 1175–76; see also Redish & Nugent, *supra* note 18, at 598 (arguing that Congress can preempt state law when uniformity is required).

161 See, e.g., *Raymond Motor Transp.*, 434 U.S. at 441–44 (applying the *Pike* test to conclude that “the challenged regulations unconstitutionally burden interstate commerce”).

162 *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment); see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79–80 (1993) (Scalia, J., concurring in part and concurring in the judgment) (criticizing *Pike* balancing test as too indeterminate).

eral agencies to weigh the costs and benefits of proposed regulatory actions.¹⁶³ Moreover, when legislatures or executive officials do so (and they often do so), there is no particular reason why courts cannot review the political branches' analysis. Indeed, with respect to federal agencies, courts often do so without any objection to the practice on this ground.¹⁶⁴ In light of these unquestioned practices by the federal courts, it seems hard to believe that the *Pike* balancing test has embroiled the Court in tasks for which it is unprepared or institutionally ill-suited.

More importantly, though, the *Pike* balancing test is not the sole formula to protect interstate trade against unduly burdensome state regulations; indeed, it may not even be the best one. In contrast to the *Pike* test, deliberative equality does not require the judiciary to balance costs and benefits or make any judgment as to whether the former are "grossly excessive" when compared to the latter. Rather, deliberative equality demands only that courts assess whether the legislature's balancing of those factors reflects some parochial disregard of out-of-state interests. The inquiry centers not on the quantum of costs and their relationship to the measure's benefits, but rather on how the legislature assessed those costs. To put it in Justice Scalia's terms, deliberative equality does not require courts to determine whether a line is longer than a pile of rocks is heavy but rather to assess whether the legislature undervalued the weight of the pile because it refused to weigh the rocks that came from out-of-state. Like all judicial formulae that focus on the legislature's deliberations,¹⁶⁵ that inquiry is well within the judiciary's ability to perform and does not involve the Court in balancing incommensurable values. Thus, whatever may be said about the *Pike* balancing test, deliberative equality provides a judicially workable and principled means for assessing the validity of nonprotectionist measures. Stated differently, antiprotectionism does not exhaust the capabilities of the federal judiciary as its proponents presuppose.

In a last, rear-guard defense of the antiprotectionism model, Donald Regan concedes the need to supplement the model but only in the context of regulations involving transportation or taxes on interstate commerce.¹⁶⁶ In all other cases—specifically, cases involv-

163 See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

164 See, e.g., *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42–43 (1983) (engaging in hard look review of agency policy decisions).

165 See, e.g., *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (requiring, to establish an equal protection violation, evidence that legislature intended to classify along racial lines).

166 See Regan, *supra* note 10, at 1104–05, 1182–85.

ing the regulation of the trade in goods and services—Regan contends that antiprotectionism is all the courts should be doing.¹⁶⁷ Yet, the very reasons that Regan proffers as justification for this limitation point toward a more expansive conception of the dormant Commerce Clause than that provided by the antiprotectionism model. For example, Regan contends that burdensome but non-protectionist transportation regulations appropriately raise constitutional concerns because there is “a national interest in the existence of an effective transportation network linking the states” and because such a network is “essential to genuine political union.”¹⁶⁸ But the same can be said for interstate trade generally. Trade in goods and services is necessary to promote national political integration; indeed, interstate transportation is presumably important because it fosters such trade in goods and services. Likewise, it is equally true that one state’s burdensome regulations or taxes can adversely impact other states’ trade as much as transportation restrictions; were one state to adopt the hypothetical avocado law discussed above, the impact of such a measure would surely be felt in other states too. In short, the need to protect interstate commerce from non-protectionist but parochial regulations and taxes is not limited to any particular areas of interstate commerce but applies across the board to all facets of it.

* * * *

In sum, the principle of deliberative equality provides the best normative justification for the American common market. It is most faithful to the vision of the Commerce Clause articulated by the Framers, and it promotes political union, suppresses interstate trade animus that may give rise to retaliatory actions, and fosters economic efficiency. Yet, at the same time, deliberative equality still provides ample room for states to adopt their own regulatory and tax policies. In contrast, the virtual representation model is too broad, curtailing state autonomy in undesirable or unworkable ways. The antiprotectionism model, on the other hand, is too narrow, leaving interstate commerce subject to divergent state regulatory and taxation regimes that may severely burden such trade.

V. DELIBERATIVE EQUALITY AND SOVEREIGN PROTECTIONISM

This is not the place to elaborate in a comprehensive and detailed fashion the doctrinal contours of a constitutional regime

167 *See id.* at 1104–05.

168 *Id.* at 1184.

committed to the principle of deliberative equality. That task must await another day. Nevertheless, it is possible to illustrate how deliberative equality rules out one particular form of state action that the Court has recently endorsed as consistent with the dormant Commerce Clause—namely, that states may enact regulations and taxes that favor governmental operations at the expense of out-of-state private or public competitors.

In the past two years, the Court has embraced an exception to the dormant Commerce Clause for governmental efforts to protect public entities from outside competition. In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, the Court upheld the constitutionality of a solid-waste flow control ordinance that required all solid waste be processed at local, municipally owned facilities,¹⁶⁹ and, in *Department of Revenue v. Davis*, the Court upheld the constitutionality of a state income tax imposed on the interest earned on out-of-state municipal bonds, even though the interest earned on bonds issued by the state and its political subdivisions were exempt from taxation.¹⁷⁰ In both cases, the Court rested its decision on the ground that the state may enact regulatory or tax measures to protect its own governmental operations or functions from outside competition.¹⁷¹ I call this form of state action “sovereign protectionism,” and, as this subpart shows, it is inconsistent with a constitutional regime committed to deliberative equality.

A. *The Decisions*

In *United Haulers*, the Court confronted the constitutionality of solid waste flow control ordinances adopted by several counties in New York that required private garbage haulers to deliver all solid waste collected within the counties to a municipally owned processing station. In response to a solid waste disposal crisis in the 1980s, the state legislature created the Oneida-Herkimer Solid Waste Management Authority to collect, process, and dispose of all solid waste in the counties.¹⁷² Thereafter, the Authority assumed responsibility for processing and disposing solid waste in the counties, although private waste hauling companies were allowed to continue to collect trash from county residents and transport it to the Authority’s processing

169 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt Auth.*, 127 S. Ct. 1786, 1790–92, 1798 (2007).

170 *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1804–08 (2008).

171 *See id.* at 1810; *United Haulers*, 127 S. Ct. at 1795.

172 N.Y. PUB. AUTH. LAW §§ 2049-aa to -yy (McKinney 1995).

facilities.¹⁷³ To offset the cost of operating its processing facilities, the Authority charged the haulers tipping fees based on the weight and composition of the solid waste brought to the Authority's facilities.¹⁷⁴ These fees were substantially higher than the fees that private processors typically charged.¹⁷⁵ To ensure that the haulers did not bypass the Authority's facilities in favor of lower cost, private facilities, the counties adopted flow-control ordinances that required that all solid waste generated within the counties be delivered to the Authority's processing facilities.¹⁷⁶ The practical effect of the flow-control ordinances was to exclude private waste management companies from processing Oneida and Herkimer solid waste.

From the standpoint of the dormant Commerce Clause, the invalidity of such flow-control ordinances had seemingly been resolved by the Court thirteen years earlier in *C & A Carbone, Inc. v. Town of Clarkstown*.¹⁷⁷ There, the Court had held that the Town of Clarkstown's flow-control ordinance, which was almost identical in substance to the Oneida and Herkimer county ordinances, discriminated against interstate commerce by excluding out-of-state waste processors from competing for local waste.¹⁷⁸ The only difference between the Clarkstown and Oneida/Herkimer ordinances was the fact that the favored processing facility in the latter counties was municipally owned, a seemingly immaterial difference.

In *United Haulers*, however, the Court upheld the Oneida-Herkimer flow control ordinance. Writing for the Court, Chief Justice Roberts did not overrule *Carbone* but rather distinguished it precisely on the ground that municipal ownership of the favored facility rendered the counties' flow-control ordinance unproblematic.¹⁷⁹ Significantly, the Court did not hold that the counties' ordinances were immune from constitutional challenge because the counties were acting as market participants; as even the counties conceded, that exception to the dormant Commerce Clause was inapplicable.¹⁸⁰ Rather,

173 *United Haulers*, 127 S. Ct. at 1791.

174 *Id.*

175 *Id.*

176 *Id.*

177 511 U.S. 383 (1994).

178 *Id.* at 390.

179 *United Haulers*, 127 S. Ct. at 1795.

180 See Brief for Respondents at 24–25, *United Haulers*, 127 S. Ct. 1786 (No. 05–1345), 2006 WL 3606273. The flow-control ordinances did not reflect a decision by the counties regarding with whom to contract or to whom to distribute county-owned resources; rather, the ordinances were manifestly regulatory in nature, forbidding private parties from taking their trash to other, privately owned, waste management facilities for processing. See *United Haulers*, 127 S. Ct. at 1807 (Alito, J.,

the Court announced that the Oneida and Herkimer flow-control ordinances did not discriminate against interstate commerce because the counties were not favoring private in-state businesses but rather municipally owned solid waste processing facilities. As the Court tersely put it, “States and municipalities are not private businesses,” and “it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.”¹⁸¹ Applying the lenient test reserved for nondiscriminatory measures, the Court concluded that any burden on interstate commerce was clearly outweighed by the benefits of the measure in ensuring the financial security of the municipal facilities.¹⁸²

While the flow control ordinances at issue in *United Haulers* harmed private competitors, the measure at issue in *Department of Revenue v. Davis* involved a state attempt to benefit itself at the expense of other state and local governments. The State of Kentucky has a personal income tax. In defining the income subject to the tax, Kentucky follows the federal income tax code’s definition of income, which excludes interest earned on bonds issued by states and their political subdivisions from taxation.¹⁸³ At the same time, however, Kentucky expressly subjects to taxation the interest earned on bonds issued by other states or their municipalities.¹⁸⁴ Kentucky’s actions are hardly unique: of the forty-three states with an income tax, forty-two provide preferential tax treatment for some or all in-state municipal bonds.¹⁸⁵

In *Davis*, the Court upheld Kentucky’s differential taxation scheme. Writing for the Court, Justice Souter declared that the result followed “*a fortiori*” from *United Haulers*, which he read as distinguish-

dissenting). In contrast to the flow-control ordinances, the counties’ decision to contract with private waste companies to remove and dispose of the waste handled at the municipally owned facility were within the market participant exception. *See United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 158 (2d Cir. 2006), *aff’d*, 127 S. Ct. 1786. Likewise, had the Authority agreed only to receive waste from county residents that decision almost certainly would have fit within the exception. *Cf. Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812–14 (1976) (upholding a similar policy to pay bounties only on vehicles processed by in-state automobile processors).

181 *United Haulers*, 127 S. Ct. at 1795.

182 *See id.* at 1797. Justice Scalia did not join that portion of the Court’s opinion. *See id.* at 1799 (Scalia, J., concurring in part). Justice Alito, joined by Justices Stevens and Kennedy, dissented. *See id.* at 1807 (Alito, J., dissenting).

183 *See* 26 U.S.C. § 103(a) (2006); KY. REV. STAT. ANN. § 141.010 (8)–(14) (West 2006).

184 KY. REV. STAT. ANN. § 141.010(10)(c) (West 2006 & Supp. 2007).

185 *See Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1807 n.7 (2008). Only Indiana accords similar tax treatment to out-of-state municipal bonds as they do in-state bonds. *See id.*

ing between state measures that favored governmental operations and those that favored private enterprises.¹⁸⁶ On that basis, the Kentucky taxation scheme was not discriminatory because it “favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests.”¹⁸⁷ Treating the measure as nondiscriminatory, the Court then declared that it was unable to perform the lenient review required for such measures because “the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary” to determine that the measure’s costs clearly exceed its benefits.¹⁸⁸ Consequently, the Kentucky measure was constitutional.

B. *The Court’s Defense of Sovereign Protectionism*

In both cases, the Court offered three distinct reasons why sovereign protectionism is consistent with the dormant Commerce Clause. First, drawing upon the antiprotectionism model, the Court announced that laws that favor the government, rather than local private businesses, are unlikely to be motivated by “simple economic protectionism” and, therefore, do not deserve searching judicial scrutiny.¹⁸⁹ Second, the Court noted that the particular favored gov-

186 *See id.* at 1810.

187 *Id.* at 1811. Justice Souter, this time joined by only two other Justices, also concluded that Kentucky’s differential taxation scheme fit within the market participant exception to the dormant Commerce Clause. *Id.*; *see also* *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding a South Dakota policy to sell cement from state-owned plant only to in-state residents under the market participant exception). For reasons that I detail at length elsewhere, I find the plurality’s reliance on the market participant exception unavailing. *See* Norman R. Williams & Brannon P. Denning, *The New Protectionism and the Dormant Commerce Clause* 61–68 (2008) (unpublished manuscript on file with author). In short, Kentucky is not purchasing or selling any item; it has not, for example, decided to sell its bonds only to Kentucky citizens, a policy that might arguably qualify as within the exception. Rather, Kentucky is taxing bonds sold by other states to Kentucky taxpayers. And, as the Supreme Court has recognized, the exercise of the power of taxation with respect to a transaction to which the state is not a party is prototypically the exercise of a sovereign power outside the market participant exception. *See* *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988); *see also* Ethan Yale & Brian Galle, *Muni Bonds and the Dormant Commerce Clause After United Haulers*, 115 *TAX NOTES* 1037, 1041 (2007) (“Taxation is a ‘regulatory’ function, not one performed by market participants.”). Even the Ohio Court of Appeals, which upheld Ohio’s discriminatory municipal bond tax, agreed that the market participant exception did not apply. *See* *Shaper v. Tracy*, 647 N.E.2d 550, 552 (Ohio Ct. App. 1994).

188 *Davis*, 128 S. Ct. at 1817.

189 *See id.* at 1810; *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* 127 S. Ct. 1786, 1796 (2007).

ernmental operations—waste processing (*United Haulers*) and municipal financing (*Davis*)—were “traditionally” or “quintessentially” public functions and, as such, should be exempt from standard dormant Commerce Clause review.¹⁹⁰ Third, invoking the virtual representation model, the Court declared that, because local interests also bear the cost of measures that favor the government, such interests can be trusted to oppose sovereign protectionism in the political process, obviating the need for judicial scrutiny.¹⁹¹

As an initial matter, the Court’s opinions in *United Haulers* and *Davis* reveal clearly the Court’s inability or refusal to settle on one theoretical model for the dormant Commerce Clause. Although the models are theoretically inconsistent and point to divergent rulings in different circumstances,¹⁹² the Court invoked both of them and attempted to show how sovereign protectionism is consistent with both. The Court’s continuing theoretical equivocation only serves to exacerbate rather than lessen the confusion regarding how to adjudicate dormant Commerce Clause challenges.

More to the point, none of the reasons proffered by the Court for upholding sovereign protectionism withstand scrutiny. Take the Court’s first claim that governmental favoritism is unlikely to be motivated by base protectionism. Even were one to embrace the antiprotectionism model as the appropriate theoretical account of the dormant Commerce Clause, the Court’s assertion that the model is inapplicable because governments typically do not act for protectionist reasons is problematic. Governments undoubtedly act differently than private enterprises,¹⁹³ but that is not the issue. Rather, for antiprotectionists, the question is whether governmental favoritism of its own operations that compete with other private or public enterprises is likely to be the product of protectionist motivations, and, on this question, there is just as much reason to believe that state or local governments are likely to act upon protectionist considerations when the benefited operation is owned by the government as when the benefited operation is privately held. The same political processes that make it likely for state and local governments to act on parochial

190 *Davis*, 128 S. Ct. at 1810; *United Haulers*, 127 S. Ct. at 1796.

191 *Davis*, 128 S. Ct. at 1809–10, 1815–17; *United Haulers*, 127 S. Ct. at 1797.

192 For example, were a county near the state border to adopt a similar flow-control ordinance favoring its municipally owned processing station—i.e., were the burdens of such sovereign protectionism to fall principally on out-of-state interests—the antiprotectionist model would bless the ordinance’s constitutionality, while the virtual representation model would condemn it.

193 See *Reeves, Inc. v. Stake*, 447 U.S. 429, 450 (Powell, J., dissenting); Coenen, *supra* note 36, at 421–22; Varat, *supra* note 36, at 506.

impulses to favor local businesses at the expense of out-of-state competitors likewise encourage state and local governments to favor their own operations at the expense of out-of-state competitors. As with private protectionism, sovereign protectionism benefits local workers and businesses.¹⁹⁴ Indeed, the fact that local voters have paid for the favored government operations through their taxes makes them even more likely to demand parochial regulations to favor the municipal facility in order to recoup their municipal investment.

Contrary to the Court's professed faith in the bona fides of government motives, a more faithful application of the antiprotectionist model would subject state and local favoritism of their operations to searching judicial scrutiny, not exempt them from it. To be sure, government laws that favor government operations may sometimes be motivated by reasons other than base parochialism—in *United Haulers*, for example, Oneida claimed that the flow control ordinance was motivated by environmental concerns¹⁹⁵—but the problem with the Court's approach is precisely that it exempts such measures from the scrutiny necessary to ensure that protectionism did not drive the adoption of the measure.¹⁹⁶

Attempting to avoid the consequences of this line of reasoning, the Court in *Davis* redefined protectionism to mean only efforts to shield private enterprise from outside competition. For the Court, sovereign protectionism does not constitute protectionism, or at least not the type of protectionism against which the dormant Commerce Clause is aimed.¹⁹⁷ Yet, the Court gave no reason for its curious and restrictive conception of protectionism, and, as a matter of first principles, there is no obvious reason to treat “public” or “sovereign” protectionism as less opprobrious than “private” protectionism. The same concerns that animate the Constitution's hostility to protectionism directed against private entities for the benefit of local companies apply equally to protectionism directed against out-of-state governments for the benefit of in-state governments. Such public protectionism undermines political union, invites retaliatory conduct from adversely affected states, and inhibits the efficient allocation of resources in ways that are unlikely to be corrected by normal state political processes.

In fact, when directed at another government, sovereign protectionism is actually of greater constitutional concern. When a state

194 See *United Haulers*, 127 S. Ct. at 1807 (Alito, J., dissenting).

195 See *id.* at 1815–17.

196 See *id.* at 1809.

197 *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1817 (2008).

enacts a protectionist measure to benefit in-state private interests at the expense of out-of-state businesses, the other states are one step removed from the harm—it is the citizens of the state, not the state itself, that suffer the injury.¹⁹⁸ When a state enacts a protectionist measure to benefit itself at the expense of other states, however, the harm is visited directly upon the other states—there is no private intermediary. As such, the likelihood of political antagonism and retaliatory action is heightened. Indeed, the fact that every state but one with an income tax has followed Kentucky’s protectionist approach to the taxation of municipal bonds¹⁹⁹ testifies powerfully to the retaliatory impulse to which sovereign protectionism directed at another sovereign gives rise. For this reason, the Court is right that sovereign protectionism is qualitatively different from “the private protectionism that has driven the development of the dormant Commerce Clause,”²⁰⁰ but it draws the wrong conclusion from it. Sovereign protectionism is a more, not less, dangerous variant of protectionism generally.

Nor is there any more force to the Court’s second claim that dormant Commerce Clause scrutiny is unnecessary or inappropriate with respect to the government’s performance of traditional governmental functions. Even if state and local governments have traditionally been involved in waste processing or bond financing,²⁰¹ that fact has no bearing upon the constitutionality of sovereign protectionism. The issue is not whether local governments may provide such services—they undoubtedly may—but whether state and local governments can shield their own operations from out-of-state competition. Once a state or local government has begun performing functions that compete with other private or public entities, the fact that government has historically or traditionally performed such functions does not provide any justification for state or local efforts to insulate such government operations from out-of-state competition. Protectionism with respect to traditional government functions is surely just as problematic as protectionism with respect to nontraditional governmental functions.

198 Of course, the state itself may properly take umbrage at the harm done to its citizens, and, in fact, the Supreme Court has expressly recognized that states may sue other states on behalf of their citizens harmed by a protectionist measure. See *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992).

199 See *supra* notes 183–85 and accompanying text.

200 See *Davis*, 128 S. Ct. at 1817.

201 It was certainly not true of Oneida and Herkimer counties, where the counties became involved only after the waste crisis of the 1980s. See *United Haulers*, 127 S. Ct. at 1790–91; see also *id.* at 1811 (Alito, J., dissenting) (noting that, today, most solid waste is processed at privately owned facilities).

To be fair, the Court does not suggest the contrary; rather, the thrust of its claim seems to be that, regardless of the danger posed by protectionism with respect to traditional governmental functions, judicial review to prevent it is even worse. In the Court's view, applying the dormant Commerce Clause to state efforts to perform their traditional governmental functions unduly interferes with those functions.²⁰² The Court, however, never explains why that is so, and, on analysis, the Court's concern seems vastly overblown. Judicial review under the dormant Commerce Clause is not some wide-ranging, roving, *Lochner*-esque process in which courts scrutinize and second-guess the substantive merits of state and local laws; rather, the required review is of highly limited scope, which affords ample room to and respect for state autonomy. Specifically, under the modern dormant Commerce Clause doctrine, it is only when a law discriminates against interstate commerce that searching judicial scrutiny is triggered, and even then the state may validate the measure by demonstrating that the discriminatory feature of the measure is not the product of protectionist motives.²⁰³ Hence, so long as state and local governments do not enact discriminatory measures for protectionist reasons, they remain free to discharge their "traditional governmental functions" in whatever manner they wish.

Moreover, even if the Court's concern was justified, it is far from clear that the Court's "traditional governmental functions" rule is the appropriate mechanism to use to protect state autonomy. At one time, the Court deployed a similar test so as to protect state and local operations from federal, not private, interference. This was the "integral governmental functions" rule of *National League of Cities v. Usery*.²⁰⁴ The Court, however, subsequently overruled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*,²⁰⁵ holding that the "integral governmental functions" rule was both unworkable in practice and unsound in principle.²⁰⁶ As the Court explained, the line distinguishing between integral or traditional governmental functions and

202 See *Davis*, 128 S. Ct. at 1810–11; see also *id.* at 1821 (Scalia, J., concurring in part) ("To apply the negative Commerce Clause in this area would broaden the doctrine 'beyond its existing scope, and intrude on a regulatory sphere traditionally occupied by . . . the States.'" (quoting *United Haulers*, 127 S. Ct. at 1798)).

203 *United Haulers*, 127 S. Ct. at 1793.

204 426 U.S. 833, 851 (1976) (holding that Congress' commerce power did not authorize Congress to regulate the "integral governmental functions" of state and local governments), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

205 469 U.S. 528.

206 *Id.* at 546.

other state governmental functions was “elusive at best.”²⁰⁷ The Court was particularly worried that the integral government functions rule required unelected federal judges to make unprincipled decisions as to which state functions were sufficiently important to warrant immunity from federal regulation.²⁰⁸ Those same concerns apply with equal force to the Court’s attempt to resurrect *Usery* in the name of protecting some state and local governmental functions from searching judicial review under the dormant Commerce Clause.²⁰⁹

Lastly, there is no merit to the Court’s third and final argument from *United Haulers* that judicial review of sovereign protectionism is unnecessary because other, in-state interests are also harmed by such sovereign protectionism.²¹⁰ Even if one were to embrace the virtual representation account of the dormant Commerce Clause, the Court’s reasoning is deeply problematic. In *United Haulers*, for example, the Court made no attempt to ascertain whether all or even most of the burdens of the measure fell on in-state interests. Rather, ignoring the impact of the measure on trash processors, the Court noted only that “the most palpable harm”—higher trash removal prices—fell on local residents.²¹¹

As an initial matter, it seems hard to believe that county residents, who presumably experienced only modest increases in garbage collection prices, were harmed more than private waste processors, who presumably lost millions of dollars in revenue and profits. Yet, even if that were true, the Court’s relative trivialization of the harm suffered by private waste processors misses the point. The virtual representation model has never been understood to turn upon whether “the most palpable harm” was felt locally or extraterritorially. Rather, the virtual representation model focuses on whether out-of-state interests have been harmed and, if so (as is almost always the case), whether in-state interests served as surrogate representatives of the non-residents.²¹² Here, not only did the Court make no effort to determine whether local residents had served as surrogate representatives

207 *Id.* at 539.

208 *See id.* at 545–46.

209 *See also United Haulers*, 127 S. Ct. at 1810–11 (Alito, J., dissenting) (noting similarity to *Usery*).

210 *See id.* at 1797 (majority opinion). In *Davis*, Kentucky seized on this reasoning, arguing that the burden of the measure fell “exclusively” on in-state interests. *See* Brief for Petitioners at 3–4, *Dep’t. of Revenue v. Davis*, 128 S. Ct. 1801 (2008) (No. 06-666), 2007 WL 2115450. Interestingly, however, the Court made no mention of the incidence of the tax.

211 *United Haulers*, 127 S. Ct. at 1797.

212 *See Regan*, *supra* note 10, at 1161–62.

of the waste processors, there was every reason to believe that the residents hadn't fulfilled that role: because the ordinances' individual impact on each resident was small—perhaps only an increase of a few dollars for garbage service—local residents would have little reason to mobilize against the measure. It was a classic collective action problem.²¹³

Worse, by pointing out that local residents were harmed by the measure, the Court seemed to suggest that any localized burden would be sufficient to insulate regulations or taxes from stringent judicial review.²¹⁴ Yet, the mere fact that some in-state interests are harmed by a particular measure is not sufficient to insulate it from dormant Commerce Clause review. Almost all regulations and taxes impose some local burdens, usually in the form of higher costs for local consumers or producers of the regulated or taxed good or service.²¹⁵ Tariffs on out-of-state goods impose burdens on local consumers, yet they are clearly unconstitutional despite that fact.²¹⁶ By suggesting that any local burden would suffice, the Court potentially insulated every commercial regulation or tax from judicial scrutiny.

In a sense, the Court's desire to limit the impact of the virtual representation model is understandable. As noted above,²¹⁷ one of the defects in the model is that, because all regulations and taxes impose some burden on interstate commerce, it requires all state and local regulations and taxes to be rigorously scrutinized. Yet, *United Haulers* goes too far in the opposite extreme by suggesting that the presence of any local burden insulates the measure from judicial scrutiny. While the Court's concerns are entirely understandable, its remedy effectively eliminates judicial review under the dormant Commerce Clause and, in so doing, reveals clearly the underlying flaw in the virtual representation model—its inability to delineate which

213 See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724–26 (1985); see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 39 (1991) (“Finally, for any given level of per capita benefit to group members from a legal change, a larger group will likely face a smaller opposition that is more motivated because it suffers greater per capita costs. Hence, large groups are not just less effective in their own right; they also generally face more effective opposition than small groups.”); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 892 (1987) (“Political activity should be dominated by small groups of individuals seeking to benefit themselves, usually at the public expense.”).

214 See *United Haulers*, 127 S. Ct. at 1797.

215 See, e.g., DANIEL SHAVIRO, *FEDERALISM IN TAXATION* 6 (1993) (“The capacity of state and local taxation to burden national markets has long been recognized.”).

216 See *W. Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994).

217 See *supra* Part III.

state and local commercial regulations deserve rigorous judicial scrutiny and which do not.

C. *Deliberative Equality Applied*

In contrast to the Court's muddled defense of sovereign protectionism, deliberative equality provides a coherent, normatively superior way of adjudicating these cases. Rather than focusing dispositively on whether the favored function or operation is public or private, deliberative equality focuses the judicial inquiry on whether the state or local government gave equal regard to both in-state and out-of-state interests burdened by the particular measure.²¹⁸ Some forms of municipal favoritism may pass that test; some may not. In either case, it is the measure's burdens rather than its beneficiaries that are the proper focus of the Court's review. That the measure favors governmental rather than private operations has no formal significance.

Ironically, had the Court applied the deliberative equality model in *United Haulers*, it would have reached the same result as there was no evidence that the counties had weighed the burdens imposed on out-of-state interests differently than they had in-state interests. The plaintiffs in the action were six private waste haulers that operated in the counties and their local trade association. Undoubtedly, the waste haulers were harmed by the flow control ordinance in that they paid higher tipping fees than they otherwise would have if they could transport the waste to private waste processing facilities, but the haulers were all New York based businesses.²¹⁹ There was no evidence, however, that the flow-control ordinances burdened out-of-state waste haulers, let alone that the counties had ignored or trivialized the impact on such businesses in adopting the ordinances.

To be sure, out-of-state private waste processing facilities could legitimately claim that the flow control ordinances worked to their disadvantage vis-à-vis the Authority. It is somewhat telling, however, that no such facility joined the lawsuit, thereby suggesting that any harm to out-of-state processors was minimal (or least not substantial enough to warrant litigation). More importantly, as the Supreme Court expressly observed, there was no evidence that the flow control

218 See *supra* Part I.A.

219 See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 153–54 (2d Cir. 2006), *aff'd* 127 S. Ct. 352. Indeed, the National Solid Waste Management Association (NSWMA) moved to intervene in the case precisely on the ground that the haulers were all local businesses and were therefore, according to NSWMA, incapable of representing the interests of out-of-state companies. See Memorandum of Law at 14, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, No. 95-CV-0516 (N.D.N.Y. Mar. 4, 2002).

ordinance worked primarily to the disadvantage of out-of-state waste processors.²²⁰ Rather, the burden of the flow control ordinances fell as well on in-state waste processors. Indeed, given the location of Oneida and Herkimer counties in central New York, it was highly unlikely that only out-of-state waste processors were harmed or—more importantly from the standpoint of deliberative equality—that the counties had given greater regard to in-state waste processors than out-of-state processors in considering the measure. In short, given the significant presence of in-state interests burdened by the measure, it was unlikely that the counties had acted on parochial considerations in violation of deliberative equality. Certainly, the plaintiffs offered no evidence suggesting the contrary.

In contrast, deliberative equality would have produced the opposite result in *Davis*. Kentucky's tax on the interest on out-of-state municipal bonds is nothing more than a tariff, and, like all tariffs on out-of-state goods and services, it is manifestly a violation of deliberative equality. Kentucky's protectionist purpose is manifest: it seeks to discourage its residents from purchasing out-of-state municipal bonds and, concomitantly, to encourage them to purchase in-state municipal bonds so as to promote its own public financing needs.²²¹ As such, it is imposing a burden on out-of-state governments (and their taxpayers), which are denied access to Kentucky's capital markets on equal footing with Kentucky and its local governments. Yet, Kentucky clearly dismissed that burden entirely; indeed, nothing else plausibly explains Kentucky's decision to exempt its own municipal bonds from taxation but not those issued by its sister states or their political subdivisions.²²² This is a classic failure of equal regard and, therefore, a patent violation of deliberative equality.

Interestingly, before the Court, Kentucky defended its refusal to give any consideration of the impact of its tax on other states and their local governments—that is to say, Kentucky proudly admitted its violation of deliberative equality.²²³ Though such post hoc statements made subsequently in the context of judicial proceedings are not strictly relevant—deliberative equality focuses on the legislature's deliberations at the time the measure is enacted, not how the state's lawyers may subsequently defend the measure in ensuing judicial proceedings—Kentucky's litigation position offers valuable insight into

220 *United Haulers*, 127 S. Ct. at 1797.

221 *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1803 (2008).

222 Further (and subsequently) confirming the violation of deliberative equality, Kentucky argued to the Court that the only burden of consequence is that felt by its own local taxpayers. See Brief for Petitioners, *supra* note 210, at 24–25.

223 See *id.* at 28.

and confirmation of Kentucky's disregard for its sister states. Specifically, Kentucky argued that other states did not warrant consideration by it because they provide no services to Kentucky residents.²²⁴ As a factual matter, that is not correct,²²⁵ but, even if it were, it is beside the point from the standpoint of deliberative equality. A state cannot excuse its failure of deliberative equality on the ground that outside interests do not deserve equal regard for some reason—equal regard is something owed to outside interests by virtue of our federal union, not by virtue (as Kentucky would have it) of their provision of services to in-state residents.

* * * *

In sum, *United Haulers* and *Davis* reflect the shortcomings of a constitutional regime premised on antiprotectionism or virtual representation. The Court's decision in *United Haulers* undoubtedly reflected a desire to provide state and local governments with greater regulatory autonomy—to free them from the strictures of constitutional limits that the Court perceived as too stringent. The Court simply and instinctively did not believe that Oneida and Herkimer counties had acted unconstitutionally. The problem arose from the fact that the Court could not find a way to reconcile the flow-control ordinances with either of its prevailing theoretical models in a coherent fashion. Unwilling to jettison the models, it was forced to reconceptualize them in a more narrow, unprincipled fashion that validated the flow control ordinances. Hence, the Court redefined the antiprotectionism model to exclude public protectionism and limited the virtual representation model to only those state measures whose burdens are felt exclusively out-of-state—a null set.

Davis, in turn, illuminates the danger of the theoretical missteps made in *United Haulers*. Having redefined the antiprotectionist model to categorically exclude sovereign protectionism, the Court was left with no option but to uphold a patently protectionist tariff on out-of-state municipal bonds. Even worse, in embracing such protectionism, the Court opened the door to myriad other forms of sovereign protectionism.²²⁶ If a state can tax out-of-state municipal bonds, it can ban their purchase by residents.²²⁷ If a state can require its own citizens to use state-owned garbage dumps, so too can it require all state school

224 *See id.*

225 Other states provide services, such as roads, parks, police and fire protection, and courts, to Kentucky residents that do business in or visit those states.

226 For a full account of the possibilities, see Williams & Denning, *supra* note 187.

227 *Id.* at 52.

children to attend in-state public schools²²⁸ or demand that all state construction contractors purchase their cement from the state-owned cement factory.²²⁹ The Court's response to such fears—that Congress can address any problems that might arise by statutorily forbidding sovereign protectionism in particular industries²³⁰—is woefully insufficient.²³¹

The mistakes made in *United Haulers* and *Davis* will haunt the Court and country for years to come. That is all the more unfortunate because it need not have been this way. Under deliberative equality, state and local governments may enact tax or regulatory measures that displace private or public competition so long as they provide equal regard to out-of-state interests as they do in-state interests. Hence, while *Davis* would have come out differently, the Court could have upheld the Oneida and Herkimer solid waste flow control ordinances in *United Haulers* without endorsing sovereign protectionism. Properly understood, the dormant Commerce Clause provides ample room for state and local governments to address pressing local problems. As a consequence, the Court's fascination with sovereign protectionism is both misguided and unnecessary.

CONCLUSION

Free trade, both interstate and international, involves the issue of borders: to what extent should the fact that trade crosses a border matter to its permissibility? Common market systems attempt to promote free trade by minimizing the significance that attaches to borders. In a perfect common market, the border is inconsequential—trade and commerce proceeds as if within a unitary nation. But therein lies the rub: in a federal system, such as the United States, internal borders are an inherent component of the constitutional order. States, by virtue of their constitutional status, may enact certain

228 *But see* *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that state law requiring all elementary school children to attend public schools violated Fourteenth Amendment's Due Process Clause).

229 *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding state requirement banning out-of-state individuals from purchasing cement from state-owned cement plant).

230 *United Haulers Ass'n v. Oneida-Heckimer Solid Waste Mgmt.*, 127 S. Ct. 1786, 1797 n.7 (2007).

231 *See* *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring); *see also* *Williams & Denning*, *supra* note 187, at 56–57 (arguing that the large number of local protectionist measures and the constitutional limits on the legislative process “make congressional action difficult as a formal matter and therefore unlikely as a practical matter”).

measures of their choosing, and some of those measures will undoubtedly have trade-inhibiting effect.

Reconciling the competing demands of free interstate trade and state autonomy is not an easy task. It has confronted the courts for nearly two centuries, and it continues to give rise to heated debates. The principle of deliberative equality, however, provides a coherent, normatively attractive foundation for performing that inevitable task. Deliberative equality permits states to regulate and tax interstate commerce, but it forbids the states from acting in a parochial manner by disregarding the impact of such measures on out-of-state interests. In that way, deliberative equality entails a robust common market in which parochially motivated taxes and regulations are prohibited but state regulatory autonomy is preserved. This is the American common market.

