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ARTICLES

THE DORMANT COMMERCE CLAUSE'S UNFULFILLED CONSTITUTIONAL PROMISE TO RULE OUT PROTECTIONISM: PROPOSAL FOR A NEW DOCTRINE

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[A] student of the (. . .) case law on [inter-state free trade] might understandably "close (. . .) his notebook, sell (. . .) his law books, and resolve (. . .) to take up some easy study, like nuclear physics or higher mathematics."

Cole v Whitfield, 1988, High Court of Australia

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The federal market is a cornerstone of every federal polity. It would be difficult to imagine American federalism without the internal free trade constitutionalized by the Dormant Commerce Clause (DCC). This Article provides a criticism of the Supreme Court's DCC case law and proposes a new approach that takes economic reality into account.

The Article demonstrates that the Supreme Court's DCC case law, owing to its countenancing unnecessary restrictions of trade, fails to fulfill the constitutional function one may attribute to a federal market. First, it seems the Supreme Court replaced the inquiry that fits the Constitution with one that it felt comfortable with. Although the case law promises to suppress state protectionism, in fact, it deals merely with naked protectionism and, thus, gives states a very wide playing field to shelter local economic interests. Second, the Supreme Court's case law is inconsistent in the sense that it does not do what it promises to do. The Court promises to suppress state protectionism but, instead, it invalidates only those measures that are outrageously protectionist; it examines existential necessity but ignores the question of extensional necessity. Furthermore, it promises a two-step analysis that distinguishes between the restriction of trade and its justification, but the analysis usually does not get to the second step, since only those measures are pronounced restrictive in the first place that could not be sufficiently justified in the second place.

The paper proposes a substantive sliding-scale approach that takes economic reality into account. This implies that the current two-limb test should be replaced with a three-limb test providing for an increasingly closer scrutiny of symmetric, asymmetric, and discriminatory impact. It demonstrates that the

idea of suppressing state protectionism implies two requirements of necessity. The first one, labeled by this Article as "existential necessity," requires that completely unnecessary restriction of trade be ruled out. The second one, baptized as "extensional necessity," filters out restrictions that go beyond what is necessary and turns on the existence of less restrictive regulatory alternatives. This calls for the comparison of policy options in terms of trade restrictiveness and effectiveness but involves no genuine value choice. The proposed doctrine's novelty lies in the introduction of extensional necessity, which is patently overlooked in the Supreme Court's current case law.

INTRODUCTION

The federal market is a cornerstone of every federal polity. It would be difficult to imagine American federalism without the internal free trade constitutionalized by the Dormant Commerce Clause (DCC).[1] US constitutional history (the era between the Articles of Confederation and the US Constitution) showed that state protectionism is the breeding ground of state separatism.[2] Comparative law confirms this experience: In Canada, the unsatisfactory constitutionalizing of interstate free trade[3] resulted in a plight where there are

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1. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 401 (2d ed. 1988) ("Without [Commerce Clause, Supremacy Clause, and Privileges and Immunities Clause], the Union as we know it would be unthinkable."). In the context of the constitutionalization of free trade, see Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153 (2005) (arguing that Congress should not be allowed to overrule the Supreme Court's Dormant Commerce Clause decisions).

2. The state tariffs and trade wars that emerged after the Articles of Confederation showed that the federal government needs to be vested with the commerce power and state protectionism may undermine the political union among the states. *See* JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY: 1783-1789, at 145-46 (1888); Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005).

3. "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." Constitution Act, 1867, 30 & 31 Vict., c. 3 § 121 (UK). In 1921, in *Gold Seal Ltd. v. Alberta (Attorney-General)*, Justice Mignault defined the ambit of section 121 as follows: "I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted 'free,' that is to say without any tax or duty imposed as a condition of their admission. The essential word here is 'free' and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade." Gold Seal Ltd. v.

greater obstacles to trade among states (provinces) than to trade between Canada and foreign countries.[4] This provoked Canadian provinces to create an alternative framework for internal commerce that is completely alien to a full-fledged federal system: They concluded an interprovincial free trade agreement (Canadian Free Trade Agreement), which is largely based on the pattern of free trade agreements concluded with foreign nations under international law.[5] Still, the DCC is probably one of the most controversial subjects of US constitutionalism. First, although almost as old as the Constitution itself,[6] the DCC is a doctrine without a textual basis,[7] which was read into the Constitution by the Supreme Court, and is, hence, subject to existential criticism.[8] Second, the DCC is a stepchild: for constitutional lawyers, it is too much trade law; for trade lawyers, it is too much constitutional law. Unfortunately, the Supreme Court's contradictory and inconsistent case law has not really helped to enhance its legitimacy. This has been exacerbated by the fact that the DCC, as a limitation on states' policy decisions, inevitably involves issues located at the edge of justiciability.

This Article demonstrates that the Supreme Court's DCC case law, owing to its countenancing unnecessary restrictions of trade, fails to fulfill the constitutional function one may attribute to a federal market. First, it seems the Supreme Court replaced the inquiry that fits the Constitution with one that it felt comfortable with.[9] Although the case law promises to suppress state

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Alberta (Attorney-General), [1921] 62 S.C.R. 424, 470. (Can. Alta. S.C.C.), This interpretation has been recently confirmed in *R. v. Comeau*. R. v. Comeau, [2018] S.C.R. 342 (Can.).

4. *See* FILIP PALDA, PROVINCIAL TRADE WARS: WHY THE BLOCKADE MUST END xi-xiii (Filip Palda ed., 1994) (citing STELIOS LOIZIDES & MICHAEL GRANT, BARRIERS TO INTERPROVINCIAL TRADE: FIFTY CASE STUDIES (1992)).

5. Canadian Free Trade Agreement, Jul. 1, 2017, https://www.cfta-alec.ca/wp-content/uploads/2021/03/CFTA-Consolidated-Text-Final-English_March-23-2021.pdf [https://perma.cc/6M4A-GJMM]. The 2015 Canadian Free Trade Agreement replaced the 1994 Agreement on Internal Trade. Agreement on Internal Trade, Feb. 18, 2015, https://www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf. [https://perma.cc/Z8G5-9FA6].

6. The roots of this doctrine go back to *Gibbons v. Ogden*. Gibbons v. Ogden, 22 U.S. 1 (1824).

7. *Cf.* Michael DeBow, *Codifying the Dormant Commerce Clause*, 1995 PUB. INT. L. REV. 69 (arguing that Congress should codify the DCC or at least its antidiscrimination provisions).

8. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348-49 (2007) (Scalia, J., concurring in part); *Id.* at 349-55 (Thomas, J., concurring in the judgment); DeBow, *supra* note 7, at 73 ("The Dormant Commerce Clause Is Bad Constitutional Law."); Amy M. Petragnani, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215 (1994) (arguing that the DCC should be abandoned); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569. For a rebuttal of the existential criticism, see Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877 (2011).

9. *Cf.* Timothy J. Slattery, *The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle*, 17 WM. & MARY BILL RTS. J. 1243, 1261 (2009) ("Strict scrutiny, as

protectionism, in fact, it deals merely with naked protectionism and, thus, gives states a very wide playing field to shelter local economic interests. The Supreme Court gradually replaced a surplus inquiry, which was criticized as illegitimate and located at the edge of justiciability, with a purpose inquiry the Court felt comfortable with. Nonetheless, it is highly questionable whether the arbitrary purpose inquiry is more justiciable than a substantive analysis. In fact, the purpose inquiry proved equally illegitimate given its unpredictability and arbitrariness, let alone that it goes against constitutional expectations and economic efficiency.

Second, the Supreme Court's case law is inconsistent in the sense that it does not do what it promises to do. The Court promises to suppress state protectionism but, instead, it invalidates only those measures that are outrageously protectionist; it examines "existential necessity" but ignores the question of "extensional necessity." Furthermore, it promises a two-step analysis that distinguishes between the restriction of trade and its justification, but the analysis usually does not get to the second step, since only those measures are pronounced restrictive in the first place that could not be sufficiently justified in the second place.

The Article proposes a substantive sliding-scale approach that takes economic reality into account. This implies that the current two-limb test should be replaced with a three-limb test providing for an increasingly close scrutiny of symmetric, asymmetric, and discriminatory impact. It demonstrates that the idea of suppressing state protectionism implies two requirements of necessity. The first one, labelled by this paper as "existential necessity," requires that completely unnecessary restriction of trade be ruled out. The second one, baptized as "extensional necessity," filters out restrictions that go beyond what is necessary and turns on the existence of less restrictive regulatory alternatives. This calls for the comparison of policy options in terms of trade restrictiveness and effectiveness but involves no genuine value choice. The proposed doctrine's novelty lies in the introduction of extensional necessity, which is patently overlooked in the Supreme Court's current case law.

In terms of ontology, the DCC may be conceived as ruling out either unnecessary trade restrictions (political union rationale) or unreasonably costly ones (economic efficiency rationale). Nonetheless, the two conceptions turn into each other, if, as demanded by federalism, states are afforded the prerogative to make value choices in the first place.[10] To grasp the economic efficiency aspects of the DCC, this Article, using economics' concept of social surplus, coins three new terms: (1) "local surplus", which accounts for the benefits of the state

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opposed to other approaches under the Dormant Commerce Clause, provides a more 'principled' approach, (footnote omitted) which the Court typically desires, especially where doctrine has been continuously murky for nearly a century.").

10. *Cf.* Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 411 (1992) ("[W]hen judges assume the responsibility of regulating commerce in the absence of legislative direction, they take power not only from the states but from the people as well.").

measure to the local community; (2) "federal surplus", which accounts for the benefits of free trade to the federal community; and (3) "national surplus", which is the sum of the local and the federal surpluses. Federalism dictates, as an important element of this equation and as a core principle, that significant deference be given to states to unilaterally set the value of local benefits, that is, to determine the rate of exchange when converting local benefits to the national surplus. In this sense, the proposed doctrine makes sure that states may not enrich the local community at an unreasonably high cost to the federal community.

The Article presents the above thesis in the following steps. Section II provides a concise account of the Supreme Court's purpose inquiry-dominated case law. Section III explains why the purpose inquiry fails to fulfil its constitutional function, especially when facing asymmetric impact, and refutes a number of misconceptions the case law, explicitly or implicitly, relies on. This section showcases five important points: (1) Protectionism is not a question of explicitness or regulatory intent but an objective category; (2) the traditional concept of discrimination is incomprehensible in trade disputes; (3) trade restrictions have a split personality (Baptist-Bootlegger coalition); (4) discrimination cannot be reasonably established solely by means of qualitative analysis; and (5) substantive analysis does not necessarily involve value choices and courts have the faculty to carry it out. Section IV suggests a new conceptualization for the DCC's purpose and function by means of a novel theory. Section V translates this novel theory to a legal test and proposes a new doctrine. Section VI provides a summary of the paper's findings and proposals.

The Article does not deal with the existential question of whether the DCC, as an extratextual concept, has a constitutional basis but proceeds from the mainstream notion that it is an appropriate judicial doctrine. Hence, it does not engage with the question of whether the DCC is a constitutional control that must be done. Nonetheless, it does argue that if it must be done (and according to the Supreme Court, it must), then it must be done well.

By way of disclaimer, the Article deals with the general theory, doctrine, and legal test of the DCC and does not address its various sub-questions, such as the somewhat distinct status of tax cases,[11] the exceptions to the scope of the

11. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). For a comprehensive overview on the status of tax cases in the DCC case law, see Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331 (2020).

DCC, such as the market-participant exception,[12] and the question of extraterritorial regulation as a specifically prohibited form of state action.[13]

I. THE SUPREME COURT'S DCC CASE LAW: PRETENSE AND PRACTICE

The internal contradictions in the Supreme Court's DCC case law make it resistant to a traditional doctrinal presentation.[14] The judicial practice "often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles."[15] Half a century ago, the Supreme Court even called this case law a "quagmire"[16] and, unfortunately, this characterization has not lost its accuracy. It would be an obvious alternative to present this case law through the dichotomy of constitutional operative rules and decision rules.[17] Unfortunately, however, DCC case law's blatant inconsistency prevents this, too. Although there are competing and complementary theories about the function of the DCC (such as political union, rectification of the deficiencies of the democratic process, and economic efficiency), the Supreme Court has never identified a monolith rationale,[18] instead the Court has "advanced differing justifications, sometimes in the same opinion."[19] In the same vein, promise, appearance, and reality diverge visibly; although the Supreme Court established a two-pronged test as a decision rule, there is a relatively general understanding that, if reading the Court's judgments between the lines, the contours of a different, unwritten legal test show up. The case law *promises* to apply strict scrutiny to discriminatory state measures and a burden

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12. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 356-71 (2007) (Alito, J., dissenting). For a more general overview, see Bradford Mank, *The Supreme Court's New Public-Private Distinction Under the Dormant Commerce Clause: Avoiding the Traditional versus Nontraditional Classification Trap*, 37 HASTINGS CONST. L.Q. 1 (2009); Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 303-06 (2017).

13. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982); Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth., 476 U.S. 573, 582-83 (1986); Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989).

14. For an attempt to provide a comprehensive overview in a unitary framework, see Michael Anthony Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395 (1998).

15. TRIBE, *supra* note 1, at 439; *see* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 479 (1982) ("It seems that the only thing consistently predictable about the Court['s DCC case law] is its continued unpredicability [sic].").

16. Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

17. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005). For an application of this conceptual structure to the DCC, see Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 505-16 (2008).

18. *See generally* Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847 (2007).

19. Denning, *supra* note 17, at 479.

review to nondiscriminatory ones.[20] In contrast to this, the Court *appears* to carry out a purpose inquiry targeting measures that feature a protectionist intent. Still, *in reality*, the Supreme Court does not care about protectionist purpose and merely chases naked protectionism.[21]

This section uses Freud's psychoanalytic theory as a metaphor to present the contradictory layers of the Supreme Court's current case law. Superego operates as the moral conscience, id is the instinctual part of the psyche, while ego is a rational agent that bridges moral high ground and instinctual desires.[22] In this metaphor, the same as the meaning of life, the rationale of the DCC remains in the sphere of metaphysics.

On the level of textbook principles, the Supreme Court's case law sets out an ambitious two-pronged test as its superego. First, discriminatory measures are subject to strict scrutiny and escape constitutional invalidation only if justified by compelling reasons. Second, nondiscriminatory measures are subject to burden review, where the burden on interstate commerce and the putative local benefits are balanced and the state measure is struck down if the former is clearly excessive in relation to the latter.

This doctrine emerged in the 1970s and superseded various early attempts to conceptualize the DCC, such as the approach based on states' police power,[23] the distinction between local and national subject matters,[24] and the distinction between direct and indirect burdens on interstate commerce[25].[26] The earlier

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20. *See* Brown-Forman Distillers v. N. Y. Liquor Auth., 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.") (internal citations omitted).

21. This was recently confirmed by the Supreme Court in *Nat'l. Pork Producers Council v. Ross*, 598 U.S. 356, 377 (2023) ("[T]he antidiscrimination rule . . . lies at the core of our dormant Commerce Clause jurisprudence.").

22. SIGMUND FREUD, DAS ICH UND DAS ES (Internationaler Psycho-analytischer Verlag, Leipzig, Vienna & Zurich, 1923).

23. *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

24. *See* Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851).

25. *See* Hall v. De Cuir, 95 U.S. 485, 488 (1877) ("State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.").

26. *See* Catherine G. O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 610-12 (1997); Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 384-90 (2013); Lee J. Strang, *The Supreme Court's Attempts Via Its Dormant Commerce Clause Jurisprudence to Navigate State Police Power and National Free Trade: Potential Lessons for International Trade*, *in* WORLD TRADE AND LOCAL PUBLIC INTEREST 137, 141-47 (Csongor István Nagy ed., Springer, 2020).

attempts to give a comprehensive conceptualization grasped the problem as a question of constitutional division of powers.[27] The first one-and-a-half century of the DCC featured the Supreme Court's futile attempt to delimitate state from federal regulatory competence.[28] This attempt is doomed to fail, as even the most local regulation can have protectionist effects, while state regulation of interstate commerce can be perfectly evenhanded and neutral. The current two-pronged test brought about a Copernican-turn in the history of the DCC: It replaced regulatory competence with effects on trade, while earlier, a measure qualified as acceptable because it had come under state regulatory competence. Currently, a measure comes under state regulatory competence because it is acceptable.

The restriction-centered approach was a welcome development but has been criticized for extending the legal test to issues that are not justiciable or are located at the edge of justiciability.[29] The central point of this criticism was that courts cannot and should not carry out balancing, because they lack the institutional competence to engage in policy analysis and the constitutional authorization to make value choices.[30] This opened the floor to purpose inquiry:

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27. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 612-15 (1997) (Thomas, J., dissenting); Denning, *supra* note 17, at 478-79; James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties" – 1824 to 1945*, 52 CREIGHTON L. REV. 243 (2019).

28. *See, e.g.*, *Gibbons*, 22 U.S. at 1; Norman R. Williams, *The Dormant Commerce Clause: Why Gibbons v. Ogden Should be Restored to the Canon*, 49 ST. LOUIS U. L.J. 817 (2005); Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829); *Cooley*, 53 U.S. at 299 (embracing the doctrine of selective exclusivity); James A. Todd, Cooley v. Board of Wardens *and its Nineteenth-Century Legacy*, 45 J. SUP. CT. HIST. 7 (2020). For an overview of the historical trajectory, see Kalen, *supra* note 26, at 384-90; Sam Kalen, *Dormant Commerce Clause's Aging Burden*, 49 VAL. U. L. REV. 723 (2015).

29. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment) ("[A]pplication of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.").

30. *See, e.g.*, Earl M. Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy*, 19 HARV. J.L. & PUB. POL'Y 121 (1995) (the DCC should give substantial weight to state autonomy.); Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (the DCC expects courts to decide "whether a particular line is longer than a particular rock is heavy"); Denning, *supra* note 17, at 454 ("Balancing required the weighing of competing, but incommensurable, interests—incommensurable because of a lack of an identifiable metric."). *See also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981) ("[I]t is not the function of the Courts to substitute their evaluation of legislative facts for that of the legislature."). Recently, in *Nat'l Pork Producers Council v. Ross*, Justice Gorsuch, joined by Justice Thomas and Justice Barrett, plainly ruled out the judicial balancing of incommensurable values and regarded this as a "policy choice" that "usually belong[s] to the people and their elected representatives." Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 382 (2023). On the contrary, Chief Justice Roberts, joined by Justice Alito, Justice Kavanaugh and Justice Jackson, noted that "sometimes there is no avoiding the need to weigh seemingly incommensurable values." *Id.* at 398.

While maintaining the above two-pronged test as "constitutional frosting," the Supreme Court moved towards chasing protectionist purpose as a monistic legal test.[31] For instance, in *Kassel v. Consolidated Freightways Corp.*, which was one of the rare cases where the burden review (applied because the state measure was found non-discriminatory) resulted in invalidation,[32] the plurality judgment repeatedly referred to the discriminatory purpose behind the law, which suggested that the measure was excessively restrictive because it had a protectionist purpose.[33] This process culminated in *National Pork Producers Council v. Ross*, where a divided Supreme Court put it bluntly that the DCC deals only and exclusively with protectionist (or discriminatory) purpose. [34] In terms of legal test, the first prong screens out facial discrimination that can be identified after a quick look, while the second prong disguised discrimination, which is more complex or hidden, and, hence, whose discriminatory purpose cannot be readily perceived.[35] The purpose inquiry was seen as the rational and practically minded ego of the DCC doctrine. It neutralized a good deal of the criticism, as it excluded judicial value choices and called on courts to ascertain regulatory purpose, which they do in other fields of constitutional law (such as in equal protection cases). Unfortunately, however, it generated a snowball effect and gave rise to a minimalist approach (which reflects the DCC case law's id). While courts are, indeed, not perfectly placed to engage in policy analysis and make value choices, they can, and in various fields of constitutional adjudication do, engage in substantive policy analysis, compare regulatory options, and to a limited extent, gauge values and, in this sense, make value choices.[36] Nonetheless, it seems that the Supreme Court succumbed to the

31. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("The crucial inquiry, therefore, must be directed to determining whether ch. 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."); *see also* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 18 URBAN LAW. 567, 568 (1986) (proposing that "courts invalidate only laws that intentionally discriminate against interstate commerce."); O'Grady, *supra* note 26, at 622-34; Francis, *supra* note 12, at 278-92.

32. Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981).

33. *Id.* at 670-72.

34. *Nat'l Pork Producers*, 598 U.S. 356.

35. The Court held that "'no clear line' separates the *Pike* line of cases from core antidiscrimination precedents. . . . If some cases focus on whether a state law discriminates on its face, the Pike line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." *Id.* at 377. Although the case is the most recent application of the two-pronged test, it actually confirms that the DCC virtually operates through a discrimination-centered one-prong test. This implies that the second prong of the test, notwithstanding the clear language of *Pike*, is about nothing more but disguised discrimination. Perversely, the Supreme Court overlooked the salient contradiction that, in several cases, it did quash disguised discrimination under the first prong, which implies that this cannot be the function of the second prong.

36. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

mounting criticism, which persuaded it about its lack of authority and competence to even touch upon substantive analysis; while maintaining the elevated mantra, the Court developed a practice that invalidates merely "naked protectionism," that is, trade restrictions that have either no justification at all in terms of a local legitimate end, or the justification is bogus and used as a pretext. As a matter of practice, only saliently discriminatory trade restrictions are invalidated under the DCC—those that are facially discriminatory and those that have an asymmetric impact but no rational basis whatsoever. In the absence of facial discrimination, the question is if the state can come up with a credible theory of local legitimate ends. If there is an apparently colorable explanation, the measure is put on the burden review track. Wanting that, asymmetric impact may amount to discrimination. This is, however, contradictory; if the local legitimate end saves the measure from being characterized as discriminatory, it will presumably also save it under the highly deferential burden review.

The above is very well demonstrated if contrasting the Supreme Court's judgments in *Hunt v. Washington State Apple Advertising Commission*[37] and *Exxon Corp. v Governor of Maryland*.[38] In *Hunt*, North Carolina law prohibited the use of state grades on closed containers of apples and required the display of either the applicable US Department of Agriculture (USDA) grade or a notice indicating no classification.[39] Washington state grades used higher standards than the USDA and, hence, earned a distinct recognition and a strong reputation in the market.[40] The Supreme Court found that "the statute ha[d] the effect of stripping away from the Washington apple industry the competitive and economic advantages it ha[d] earned for itself through its expensive inspection and grading system."[41] The Supreme Court found that, although the North Carolina law "was not intended to be discriminatory,"[42] it had a discriminatory effect; hence, it violated the Constitution.[43]

Nonetheless, a year later, the Court apparently contradicted *Hunt* by upholding a law that had nearly perfect asymmetric impact. In *Exxon*, producers and refiners were prohibited from operating gasoline stations in Maryland.[44] As there were no producers or refiners in Maryland, the prohibition applied, in essence, to out-of-state businesses.[45] The gas stations not covered by the prohibition were operated by in-state businesses (99% of the non-integrated stations were operated by local enterprises).[46] Notwithstanding the clear asymmetric effect, the Supreme Court held that a regulatory distinction based

37. 432 U.S. 333 (1977).
38. 437 U.S. 117 (1978).
39. *Hunt*, 432 U.S. at 335.
40. *Id.*
41. *Id.* at 351.
42. *Id.* at 335.
43. *Id.* at 352-53.
44. *Exxon*, 437 U.S. at 119.
45. *Id.* at 125.
46. *Id.* at 138.

on the structure or method of operation in a retail market was not discriminatory and, hence, did not violate the Constitution.[47]

The only plausible way to distinguish the two cases (and explain the apparent antagonism between them) is that, although the Supreme Court purported to decide based on effect, the effect was relevant only if the regulatory distinction revealed a protectionist intent. The regulatory distinction in *Hunt* was of a discriminatory nature (whatever this may mean).[48] In *Exxon*, the regulatory distinction was not inherently connected to out-of-stateness: for the Supreme Court, the asymmetric impact revealed no protectionist intent and was the result of an origin-neutral regulatory distinction.[49] As explained in Section II.D., this does not seem convincing, given that the business policy to produce high-quality products is not—neither in abstract nor in concrete terms—more inherently linked to out-of-stateness than vertical integration.[50] At the same time, the Supreme Court's obsession with "naked protectionism" provides a very persuasive explanation why the two cases reached diametrically opposite conclusions. The measures in both cases entailed highly asymmetric impact, and adaptability was not a real possibility.[51] Nonetheless, there was an important difference between the two cases. In *Hunt*, North Carolina's justification failed even under the rational basis test and, hence, qualified as naked protectionism.[52] On the other hand, the restriction in *Exxon* could not be immediately rejected and therefore called for substantive consideration; what's more, because of the virtually per se treatment, no substantive consideration could have been carried out, if pronouncing the measure discriminatory.[53]

The development of the minimalist approach played out in two steps. On the one hand, the Supreme Court suppressed substantive analysis as to both prongs of the legal test. Discriminatory measures proved to be virtually per se invalid,[54] although even discriminatory measures may enhance the national surplus and, hence, may be constitutional.[55] The requirement to show a compelling reason to save a discriminatory measure proved to be so burdensome

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47. *Id.* at 125-28 ("We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market . . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.") (internal citations omitted).

48. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 354 (1977).

49. *Exxon,* 437 U.S. at 126.

50. *See* discussion *infra* Section II.D.

51. *Exxon,* 437 U.S. 117; *Hunt,* 432 U.S. 333.

52. *Hunt,* 432 U.S. 333.

53. *Exxon,* 437 U.S. at 124-34.

54. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 99 (1994). *See* James M. McGoldrick, *The Dormant Commerce Clause: The Endgame—From Southern Pacific to Tennessee Wine & Spirits—1945 to 2019*, 40 PACE L. REV. 44, 87-106 (2020).

55. *See* Brian M. Brown & Amy P. Lund, *Flow Control Ordinances Under the Dormant Commerce Clause: Unconstitutional Restraint on Commerce?*, 5 U. BALT. J. ENV'T. L. 92, 101-04 (1995); Paul E. Mcgreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1195 (1998).

that it has only been met in one Supreme Court case: *Maine v. Taylor*, in which the Supreme Court endorsed an animal protection quarantine.[56] Maine banned the importation of baitfish to prevent the infection of native fish.[57] The Court found that "Maine 'clearly ha[d] a legitimate and substantial purpose in prohibiting the importation of live bait fish,' because 'substantial uncertainties' surrounded the effects that baitfish parasites would have on the State's unique population of wild fish, and the consequences of introducing nonnative species were similarly unpredictable."[58] Hence, it concluded that Maine had a compelling reason to ban importation and there was no less discriminatory alternative to filter out infected baitfish.[59] On the other hand, the outcome of burden review, embedding the highly deferential rational basis standard, became similarly predictable.[60] No state measure has been invalidated under the burden review in the last four decades.[61] When encountering a non-discriminatory measure, the Supreme Court, after dutifully paying lip service to the burden review, rubber-stamped it. The banishment of substantive analysis made discrimination the pivot and resulted in two per se categories: discriminatory measures are virtually per se invalid, while non-discriminatory measures are virtually per se valid.

The paramount importance attributed to discrimination determined how the Supreme Court defined this notion—discrimination connotes invalidity, lack of discrimination validity.[62] Hence, aside from express discrimination, which cannot be pronounced non-discriminatory under any standard, the Court refused to pronounce a measure discriminatory if the state offered any justification that met the rational basis standard.[63] The last case where a measure involving no express discrimination was invalidated by the Supreme Court was in 1977.[64]

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56. Maine v. Taylor, 477 U.S. 131, 151 (1986); *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 472 (6th ed. 2020); Brannon P. Denning, *Is The Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L. J. 623, 624 (2007).

57. *Maine*, 477 U.S. at 141.

58. *Id.* at 142-43.

59. *Id.* at 151-52.

60. *See* Francis, *supra* note 12, at 292-303 (demonstrating that burden review "dwindled dramatically").

61. Edgar v. MITE Corp., 457 U.S. 624 (1982). *See* David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 49 (2007). The most recent case where the Supreme Court applied the *Pike* test (and upheld the state measure) is *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

62. Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844 (2004).

63. Francis, *supra* note 12, at 288 ("The *United Haulers* Court wrapped up, and drove home its emphasis on subjective purpose, with a truly remarkable account of burden review (i.e., the deferential scrutiny applicable to all measures, including non-discriminatory ones). The Court described this highly deferential standard of review as the appropriate metric—not just for measures that were non-discriminatory—but for laws that were '*directed to legitimate local concerns*, with effects upon interstate commerce that are only incidental.' The strong rule against discrimination now seemed to be reserved only for those forms of discrimination that were not subjectively 'directed to legitimate local concerns.'").

64. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977).

This effectively meant that whichever proxies a state used to identify out-of-staters and discriminate them, the measure was treated as per se valid, unless the state's justification failed even under the rational basis review.

In *General Motors Corp. v. Tracy*, the Supreme Court was very close to pronouncing facial discrimination as non-discriminatory. [65] Ohio provided an exemption to general sales and use taxes on natural gas sold by local distribution companies (LDC).[66] This exemption was not available to gas sales by other vendors.[67] Originally, LDCs had a de facto monopoly over gas sales to consumers, but, as a result of liberalization, the market was opened up for producers and independent marketers.[68] Consumers could also buy from these and pay pipelines separately for transportation.[69]

The distinction was very close to facial discrimination. All LDCs were local companies,[70] and out-of-staters becoming an LDC was mainly a theoretical possibility.[71] Out-of-state gas traders could purchase distribution networks and earn an LDC status but could not realistically be expected to do so in order to benefit from the tax exemption.[72] The costs of such a naturalization were extremely high, even prohibitive, and it was economically irrational to assume these expenses.[73] Notwithstanding the above, the Supreme Court held that the Ohio tax exemption did not violate the DCC; it found it non-discriminatory and acquitted it under the burden review.[74] LDCs provided a public service, and the Supreme Court was presumably deterred by the consequences of the straightforward invalidation discrimination would have entailed, although the regulatory distinction could be a textbook example of de facto discrimination and the Court had to come very close to pronouncing facial discrimination as non-discriminatory.[75] LDCs provided a public service: they sold gas bundled with state-mandated rights and benefits, while independent marketers were not subject to such regulatory minimum standards.[76] The Court injected this consideration into the discrimination analysis by concluding that LDCs and

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65. General Motors Corp. v. Tracy, 519 U.S. 278 (1997).
66. *Id.* at 281-82.
67. *Id.*
68. *Id.* at 283.
69. *Id.*
70. *Id.* at 288.
71. *Id.* at 310.
72. *See id.*
73. *See id.*
74. *Id.*
75. In *Haulers*, the Supreme Court faced a similar dilemma and ducked it by introducing an undefined exception for laws favoring the local government. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007) ("[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism."); *See* Norman R. Williams & Brannon Denning, *The "New Protectionism" and the American Common Market*, 85 NOTRE DAME L. REV. 247 (2009). For a law and economics criticism, see William J. Cantrell, *Cleaning Up the Mess: United Haulers, the Dormant Commerce Clause, and Transaction Costs Economics*, 34 COLUM. J. ENV'T L. 149 (2009).
76. *See* General Motors Corp. v. Tracy, 519 U.S. 278, 282 (1997).

independent marketers were not substantially similarly situated, hence, the differential treatment was not tantamount to discrimination.[77] The regulated segment made up of the "core market of small, captive users, typified by residential consumers who want and need the bundled product"[78] was not attractive for new entrants and, hence, LDCs did not compete with independent marketers here. On the contrary, LDCs and independent marketers did compete in the non-regulated segment made up of bulk buyers.[79] Nonetheless, the Supreme Court was concerned that the extension of the tax exemption to producers and independent marketers may imperil the security of supply in the regulated segment.[80] The tax exemption conferred a competitive advantage on LDCs, and they could use the profit earned in the non-regulated segment to provide the regulated service, which might not have been viable under market circumstances.

The DCC's bifurcated legal test put the Supreme Court in a headache-producing plight. Treating the scheme as discriminatory (as it was) would have sealed its fate, since discriminatory measures are virtually per se invalid. Treating it as an evenhanded regulation (although it was not) virtually gives the state a carte blanche to adopt any measure that is somehow connected to—though not necessarily warranted by—a local legitimate end. The bifurcated legal test did not allow the Court to investigate the measure and subject it to substantive scrutiny without the inflexibility of per se invalidity. The Court explained its unwillingness to carry out any substantive analysis by the lack of expertness and institutional resources.[81]

The case presented a classical problem of the liberalization of network industries: the regulatory securing of universal service in a competitive market.[82] For a long time, network industries (telecommunications, electricity, natural gas etc.) were considered, on both sides of the Atlantic, to feature a natural monopoly and be inapt for free market.[83] Hence, after an initial stage of unregulated monopoly, states started heavily regulating these industries. The idea was to create a legal monopoly and also secure a public service (universal service) to household customers.[84] The latter implied a general duty to supply and uniform regulated prices.[85] Incumbents could not gerrymander by limiting the service to high profitability regions and the scheme could make use of internal cross-subsidization.[86] This era was followed by the realization that

77. *Id.* at 310.

78. *See id.* at 301.

79. *Id.*

80. *Id.* at 303-07.

81. *Id.* at 308-09.

82. Csongor István Nagy, *The Metamorphoses of Universal Service in the European Telecommunications and Energy Sector: A Trans-Sectoral Perspective*, 14 GER. L.J. 1731 (2013).

83. *See* Manuela Mosca, *On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition*, 15 EUR. J. HIST. ECON. THOUGHT 317 (2008).

84. *See id.*

85. *See Tracy*, 519 U.S. at 296 ("just and reasonable" rates).

86. *Id*. at 297.

network effects do not necessarily exclude competition.[87] In natural gas, while the network may be considered a natural monopoly, the marketing of the molecule can be carried out under competitive circumstances.[88] The ensuing liberalization of the market, however, raised a difficult question: how to transfer universal service and finance in the competitive market? Regulatory practice has developed various methods that are less restrictive but equally, or even more, effective than the above Ohio measure.[89] Question zero is if the universal service is, indeed, not viable in the market and the incumbent is compelled to operate at a loss at all. In the absence of this, there is no need for subsidization. If necessary, subsidization can be done via wealth transfers that do not distort competition in the market. A good example is electronic communications' universal service fund, which is made up of contributions paid after the sales in the competitive market segment.[90] These subsidization measures secure the necessary funding but do not distort competition and do not restrict trade, since they equally apply to all market operators that are selling in the non-regulated segment.

Interestingly and contradictorily, the DCC case law uses the very same review standard to exonerate facially neutral disparate treatment from the stain of discrimination that is carried out under burden review. Not surprisingly, if a facially neutral measure was not pronounced discriminatory, it could not fail under the burden review. The Supreme Court was presumably motivated by the desire to minimize the risk of erroneous decisions, as discriminatory measures are virtually per se invalid, which implies that justifications stand nearly zero chance to save them. Accordingly, if the state raised a seemingly plausible justification, the Court had to detour the analysis from the discrimination-track to give this justification substantive consideration. Nonetheless, the rigid discrimination-based standard dramatically increased the risk of erroneous decisions, predominantly in terms of false negatives, but also in terms of false positives. There are plenty of cases where facially neutral measures, which serve protectionist purposes by using local legitimate ends as a pretext, go beyond what is necessary to achieve these ends.[91] Although these cases call for judicial intervention, the Supreme Court's case law treats them unreasonably leniently by subjecting them to a burden review (to avoid the unreasonably stifling per se treatment). This results in a perverse situation where an asymmetric measure's classification does not hinge on the nature of the regulatory distinction (whether

87. *See* Mosca, *supra* note 83.

88. John Burrit McArthur, *Anti-Trust in the New [De]regulated Natural Gas Industry*, 18 ENERGY L. J. 1, 20 (1997); Nagy, *supra* note 82, at 1752, 1754.

89. MICHAEL HARKER, ANTJE KREUTZMANN & CATHERINE WADDAMS, PUBLIC SERVICE OBLIGATIONS AND COMPETITION 50-51 (2013).

90. *See Universal Service*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/ universal-service (last visited Nov. 9, 2023).

91. *See, e.g.*, Csongor István Nagy, *Can a Protectionist Measure be Non-Discriminatory? Comparative Federal Markets and a Proposal for a Definition of Discrimination Under s 92 of the Australian Constitution*, 51(1) FED. L. R. 58, 70-72 (2023).

it is related to out-of-stateness or not) but on the purported justification. Although this should be determined by the nature of the regulatory distinction, asymmetric impact is not considered to be discriminatory, if, after a quick look, it appears to be possibly justifiable.[92] Furthermore, even discriminatory measures may be justified by legitimate local ends, hence, their virtual per se invalidity raises the risk of false positives.

II. WHY DOES THE PURPOSE-INQUIRY FAIL? FIVE MISCONCEPTIONS

This section demonstrates five important points. First, protectionism is an objective category and is independent of whether the measure is warranted or not by a local legitimate end. Second, the traditional concept of discrimination is incomprehensible in trade matters, because here the measure is the agent and not the projection of competitive differences. Third, the purpose-inquiry often fails, because trade-restrictions are not monolithic but have a split-personality (Baptist-Bootlegger coalition). Hence, the relevant question is not, whether the measure has a protectionist intent, but whether it goes beyond what is necessary to achieve the desired public interest goal. Fourth, discrimination cannot be reasonably established by means of qualitative analysis. Under the appropriate standard, the relevant question should be, whether the measure has an asymmetric impact when taking into account rational economic adaptability. Fifth, substantive analysis does not necessarily involve value choices, and courts have the faculty to carry it out.

A. The Misconception That Protectionism Turns on Explicitness and Regulatory Intent

Protectionism consists of conferring a competitive advantage on in-state business or creating a disadvantage for out-of-state businesses (or of striping the latter of a competitive advantage).[93] This may be described through the notion of asymmetric impact, which generates protectionist effects. The DCC case law treats discriminatory measures as virtually per se unconstitutional, irrespective of their economic impact—that is, irrespective of the trade volumes affected and the extent of the competitive advantage they confer).[94] In contrast with this, in

92. *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338-39 (2007).

93. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)

94. *Id.* at 455 ("The volume of commerce affected measures only the *extent* of discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce."); Maryland v. Louisiana, 451 U.S. 725, 760 (1981) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 269 (1984) ("However, neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present 'competitive threat' to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead, they go only to the extent of such competition.").

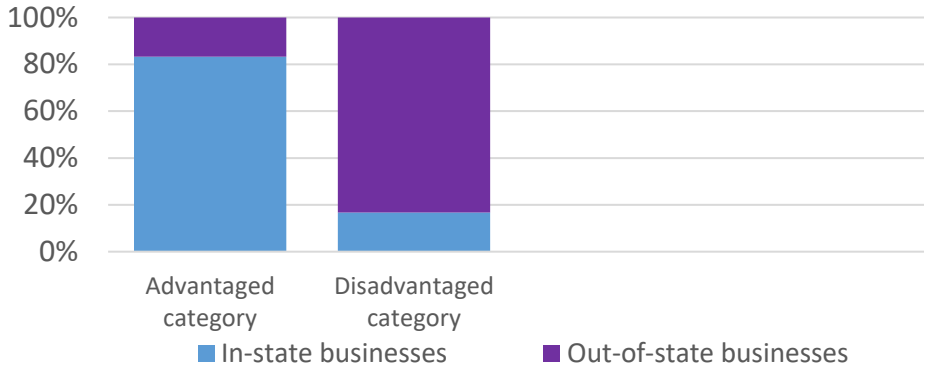
terms of economic reality, protectionism is a question of market impact; it is also a question of degree. Furthermore, the economic impact (extent of the competitive advantage) and the explicitness of the discrimination are not inherently linked. Using an international trade example, the European ban on hormonized beef, although not explicit, has had a huge economic impact on US imports.[95] On the other hand, a 1% tariff would be explicit but have little impact.

Asymmetric impact is a question of ratio; it is based on the categories erected by the pertinent regulatory distinction and exists if the burden for out-of-staters is statistically higher than for in-state businesses.

	In-state businesses	**Out-of-state businesses**
Advantaged category	80%	20%
Disadvantaged category	20%	80%

Alternatively, a regulatory distinction entails asymmetric impact if out-of-state businesses are overrepresented in the disadvantaged category and underrepresented in the advantaged category.

95. Appellate Body Report, *European Communities—EC Measures Concerning Meat and Meat Products*, WTO Doc. WT/DS26/AB/R & WT/DS48/AB/R, (adopted Jan. 16, 1998).



Similar to regulatory restrictions of competition in the market, protectionist effects can be justified by local legitimate ends. The economic damages entailed by protectionist effects may be counter-balanced, for instance, by external economic effects. However, this does not change the input side of the equation: justified and unjustified measures may have the very same protectionist effects. Justified restrictions may be as equally (or even more) protectionist in terms of effects as unjustified restrictions, the only difference being that (to use antitrust law's parlance) unjustified measures are "naked restrictions," while justified ones are "ancillary restrictions."[96] It is not the lack of protectionism that saves these restrictions but the fact that they have a redeeming virtue. The prohibition of the online sale of chocolate, telemarketing of prescription drugs, and online gambling have roughly the same effects on trade: they hit out-of-staters much more, as setting up physical presence is costlier for them than for in-state business, which are physically present anyway. The assessment of these three restrictions turns on the justification. Chocolate is not a product that calls for careful regulation (unless the state wants to restrict its sale to fight obesity). On the contrary, prescription drugs can be abused, and there are similarly good reasons to restrict gambling under the legal age. The foregoing three bans protect local economic interests, since online activities pertain to out-of-state businesses in the sense that it is costlier for them to adapt to sell from brick-and-mortar outlets. The difference between chocolate, on the one hand, and prescription drugs and gambling, on the other, is that the ban on the online sale of chocolate generates no value to counterbalance its negative impact on trade, while in the market for prescription drugs and gambling, there is a market failure in the form of external economic effects (negative externalities).[97] Accordingly, the final assessment of the measure does not hinge on whether the distinction is based on a characteristic that, in the common sense, is paramount to out-of-state

96. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898); CSONGOR ISTVAN NAGY, EU AND US COMPETITION LAW: DIVIDED IN UNITY? 39-74 (2013).

97. *See* Office of National Drug Control Policy, *How Illicit Drug Use Affects Business and the Economy*, The White House, https://obamawhitehouse.archives.gov/ondcp/ondcp-fact-sheets/how-illicit-drug-use-affects-business-and-the-economy [https://perma.cc/4NP7-J9FE] (last visited Oct. 26 2023).

origin, but on whether it is warranted by a local legitimate end that is proportionate or is used as a pretext to foster local business interests. When purported local legitimate end is not accepted, courts may tend to find that the measure has a protectionist purpose, even though a measure may restrict trade even if it is justified. The intensity of trade-restrictiveness should, however, play a role in this assessment. A measure that has a slight asymmetric impact may be innocuous and, hence, be justified with a lower number of benefits than measures that have significant disparate effects.

B. The Misconception That Equal Protection Law's Legal Test Works in Trade Matters

The Supreme Court's DCC case law, either implicitly or explicitly, takes over equal protection law's understanding of discrimination. The Court has silently drawn on the tiers of scrutiny it developed for equal protection cases,[98] as if out-of-stateness were a suspect classification. Equal protection law's ambit, when it gets to suspect classification, focuses on facial discrimination; it rules out facially neutral laws only if they have a discriminatory purpose.[99] This agrees with the DCC case law, which invalidates measures motivated by a discriminatory purpose. Facial discrimination corroborates this: in cases of facially neutral but asymmetric measures, extra circumstances need to be shown to prove invidiousness.[100] Although the Court acknowledged that the equal protection clause and the DCC have different constitutional functions,[101] it has essentially treated out-of-stateness in trade matters as a suspect classification and applied the ensuing legal test.[102] It applies strict scrutiny to facial

98. *See* Barry Sullivan, *Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens: Searching for the Golden Mean in U.S. Constitutional Law*, 20 EUR. J.L. REFORM 181, 186 (2018).

99. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

100. *Davis*, 426 U.S. at 242.

101. In the context of the McCarran-Ferguson Act, which immunized the regulation and taxation of the insurance industry from the DCC, the Supreme Court noted that the equal protection clause and the DCC have different constitutional functions and, hence, the former may still apply to industries statutorily immunized from the latter. W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656-57 (1981); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985) ("The two constitutional provisions perform different functions in the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.").

102. For a comparison between DCC and equal protection cases, see Larsen, *supra* note 62. *Cf.* F. Italia Patti, *Judicial Deference and Political Power in Fourteenth Amendment and Dormant Commerce Clause Cases*, 56 SAN DIEGO L. REV. 221 (2019) (arguing that different standards of review should be applied to DCC and Fourteenth Amendment cases).

discrimination[103] and the rational basis test to asymmetric impact.[104] This implies that asymmetric measures that are not facially discriminatory, irrespective of how asymmetric the impact is, amount to discrimination only if they are motivated by a proven discriminatory intent. Nonetheless, the discrimination apt for the adjudication of equal protection cases is incomprehensible in trade matters.

Equal protection law defines discrimination as disparate treatment requiring more than mere asymmetric impact.[105] The translation of this conception to trade disputes entails the idea that protectionism covers merely purposeful discrimination.[106] An alternative way to put this is that it is not the asymmetric impact, but the regulatory distinction hinging on out-of-state origin that is ruled out under the DCC. These are measures that feature naked protectionism—that is, they are not motivated by any consideration but pure protectionism). This is, however, in stark contrast with economic reality, as there is no inherent connection between the explicitness of protectionist motivations and the size of the competitive advantage or disadvantage it generates. Furthermore, trade restrictions related to a local legitimate end feature no naked protectionism (due to existential necessity) but may still be objectionable by going beyond what is necessary (due to failing in extensional necessity). In terms of economic reality,[107] measures that generate comparatively higher costs for out-of-state businesses are tantamount to the arch-protectionist measures of tariffs or

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103. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."); Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 101 (1994); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 360 (2007) (Alito, J., dissenting); Slattery, *supra* note 9, at 1259, 1261.

104. This became patent, for instance, in *Minnesota v. Clover Leaf Creamery Co.*, where the Supreme Court did not engage in a full-fledged burden review, but simply referred to the rational basis analysis carried out in the application of the equal protection clause. 449 U.S. 456, 473 (1981). In his dissent, Justice Powell noted that the difference from the analysis under "rational basis" is that "[u]nder the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext." *Id.* at 476 n.2 (Powell, J., dissenting). *See* James D. Fox, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?,* 1 AVE MARIA L. REV. 175, 206-13 (2003); Francis, *supra* note 12, at 277 ("[B]urden review has decayed into minimal rational basis review at best.").

105. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. Rev. 494 (2003); *see* Slattery, *supra* note 9, at 1261.

106. *See* David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Potential Unsettling of the "Well-Settled Principles",* 22 UNIV. TOL. L. REV. 675, 704-10 (1991) (calling this the requirement of invidiousness, which is present in both fundamental rights and DCC cases).

107. On a comparative note, in *Palmer v Western*, the High Court of Australia held that "[p]rotectionism involves discrimination . . . in favour of the local State by conferring a competitive or market advantage over one or more other States. The assessment of a local competitive advantage requires consideration of economic concepts of cross-elasticity of supply and demand to identify competition between goods or services in the local State and other States. . . . It is difficult to avoid these economic concepts in the assessment of protectionism." *Palmer v Western Australia*, [2021] HCA 5, 83 (Austl.).

quantitative restrictions (quotas). For example, banning online gambling would effectively drive out out-of-state businesses from the market, while a 1% tariff is clearly protectionist but has little impact. Of course, as a practical experience, purposeful protectionism normally results in larger impact than innocent measures—if the state engages in protectionism on purpose, it presumably makes sure that the measure has an impact. If a state introduces a tariff, it does that to protect local businesses and very probably makes sure to set a tariff rate that is high enough.

There are two major problems with applying equal protection law's doctrinal approach to DCC cases.

First, the DCC is a structural element of federalism and, hence, cannot be applied by means of equal protection law's conceptual toolkit. Equal protection law's standards of scrutiny (strict scrutiny, intermediate scrutiny, rational basis) distill important judicial experience as to how to review government action. Different levels of state protectionism deserve different levels of scrutiny, hence, the tiers of scrutiny are useful tools in this regard, as they represent a sliding-scale, whereas trade and local legitimate ends are compared and contrasted. Nonetheless, the entry points of the analysis are of no use here, as DCC cases are not about rights-protection but about federalism. The treatment of DCC cases needs all the three tiers of scrutiny, depending on whether the measure at stake is discriminatory, asymmetric, or symmetric.

Second, and more importantly, equal treatment law's conception of discrimination is determined by the approach and thinking of anti-discrimination law, where the measure is not the agent but the projection of social differences. When it gets to equal protection, it is generally accepted that the law cannot make up for the social differences. For instance, students applying to the same university do not have the same background; some of them come from families where they were provided high quality education from a very early age and have internalized social norms, values and ambition, while others come from families who could not secure but low-quality education and social patterns featuring less ambition. Given that the two groups have different characteristics, fairness may require that they are not treated similarly (treating unequals equally is equally as discriminatory as treating equals unequally). This subtle difference is, however, not taken into account by equal treatment law. On the one hand, the law is evidently incapable of correcting social differences. On the other hand, anti-discrimination law does not promise equality in the sense of abolishing social differences. What it promises instead is equal chances at the admission exam. This is why equal treatment is looking for something more than asymmetric impact. Put in the extreme, if university admission exams took into account individual differences perfectly, at the end of the day every applicant would get the same score. The logic of the exam is quite the opposite: everyone has an equal chance in the sense they are required to meet the very same requirements, even though they have different talents and backgrounds. It is believed that, theoretically, everyone can hit the target, even if extra

enthusiasm is needed in case of disadvantaged groups. The logic of trade law is, however, quite different. The differences in terms of characteristics are not attributable to social differences, and they are certainly not differences the law is expected to overcome.

The fact that applicants of a certain race or ethnic origin do worse on the police entrance exam than the majority does not imply discrimination in the legal sense, notwithstanding the clear asymmetric impact.[108] However, in cross-border commerce, the state measure is the agent and not the projection of competitive differences. In equal protection cases the measure produces asymmetric outcomes, because different social groups are in asymmetric positions. In contrast, trade disputes are not about pre-existing asymmetries, since it is the state measure that, instead of leaving the choice to the market, attributes legal relevance to certain characteristics and creates an asymmetric situation by way of a regulatory distinction. Put another way, the disparate outcome is not the consequence, but the cause, of unequal opportunities.

C. The Misconception That Trade Restrictions Are Monolithic

A purpose-inquiry is inapt to separate the wheat from the chaff, not only because it is unpredictable and arbitrary, but also because state measures are quite often the result of a blend of regulatory and protectionist considerations. This may make the identification of the purpose difficult and, at times, impossible. While there are certainly measures that reflect pernicious protectionism, and also trade restrictions that are evidently justifiable, quite a few feature an unholy coalition between Baptists and Bootleggers.[109] This metaphor refers to plights where public choices are influenced by both selfish (destructive) economic interests and legitimate value-driven considerations.[110] According to this metaphor, the prohibition of alcohol is supported by both Baptists and Bootleggers. Baptists have a principled reason: they think that drinking alcohol is immoral. Bootleggers are driven by economic

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108. *See* Washington v. Davis, 426 U.S. 229 (1976).

109. Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, AEI J. ON GOV'T & SOC'Y 12, 13 (1983) ("Bootleggers . . . support Sunday closing laws that shut down all the local bars and liquor stores [because they increase the demand for illegal spirits]. Baptists support the same laws and lobby vigorously for them [because they believe drinking on Sunday is immoral].").

110. Of course, Baptist-Bootlegger coalitions emerge concerning any regulatory choice, outside the sphere of cross-border trade. *See* Jonathan H. Adler et al., *Baptists, Bootleggers & Electronic Cigarettes*, 33 YALE J. ON REGUL. 313, 316 (2016) (describing the operation of Baptist-Bootlegger coalitions through the regulatory treatment of electronic cigarettes. These products "pose fewer health risks than traditional tobacco products" and, hence, "provide significant health benefits". On the other hand, they pose a substantial threat to the interests of both incumbent tobacco firms and producers of tobacco-cessation products and may potentially affect tax revenues. With the support of some public health advocates, this resulted in a perverse coalition for treating e-cigarettes, from a regulatory perspective, in the same way as traditional tobacco products.).

consideration—the abolition of the prohibition eradicates the black market, and if there is no black market, there is no need for Bootleggers. Although this is a perverse coalition, it must be noted that the moral strand represented by the Baptists is real and genuine and not fake or forged.

A measure may be motived both by the desire to foster local business interests and legitimate regulatory considerations. In some cases, the latter are used only as a pretext and are not real. Nonetheless, in other cases, both are genuine: selfish interest groups longing for protectionist spoon-feeding (Bootleggers) combine with stakeholders endeavoring to protect social values (Baptists). This may make the purpose inquiry vain.

What is the true object of a measure that serves the well-being of the citizenry and, at the same time, protects local producers? Trade law provides numerous examples for such measures. Domestic fishing companies may combine with animal protection non-governmental organizations (NGOs) to cut out foreign goods produced via methods causing unnecessary pain to animals (killing dolphins or turtles),[111] or local farmers may combine with public health advocates to cut out foreign products disinfected in an alternative way (such as chlorine-washed chickens).[112] When a state bans plastic bottles and prescribes the use of refillable glass bottles, this clearly favors domestic bottlers (which may be either local brands or franchisees). However, this does not detract from the measure's genuine environmental benefits and public interest roots.[113]

The following case very well demonstrates the unholy marriage between Baptists and Bootleggers and how it makes the purpose inquiry unfeasible.[114] Assume that retail chains offer large discounts for eggs during peak seasons

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111. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DB58/AB/R (adopted Oct. 12, 1998); Panel Report, *United States—Restrictions on Imports of Tuna*, WTO Doc. DS/21/R – 39S/155 (adopted Sept. 3, 1991)

112. For a further example, see Metodi Sotirov et al., *The Emergence of the European Union Timber Regulation: How Baptists, Bootleggers, Devil Shifting and Moral Legitimacy Drive Change in the Environmental Governance of Global Timber Trade*, 81 FOREST POL'Y & ECONS., 69 (2017). (arguing that the new EU timber trade regulation's prohibition to place illegally harvested timber on the EU market and due diligence requirement against economic operators putting timber products in circulation in the EU for the first time are, partially, the products of a Baptist-Bootlegger coalition between environmental organizations and the European timber industry, where the former strived to reduce illegally harvested timber, while the latter were seeking protection against cheap foreign products).

113. In *Castlemaine Tooheys Ltd v South Australia*, (1990) 169 CLR 436, South Australia introduced a regime that heavily discriminated against non-refillable bottles. The most glaring provision of the new regime was that it set the refund amount for refillable glass bottles at 4 cents, while that for non-refillable bottles and cans at 15 cents. The High Court found the regulatory distinction discriminatory, given that out-of-state brewers typically used non-refillable bottles to avoid the long-haul transportation of empty bottles, while local brewers could refill the bottles in South Australia. *Id.* at 473. The 1986 rules used an inherent attribute of out-of-state producers as a proxy to single them out, hence, they had no possibility to adapt so as to be included in the advantaged regulatory category (that is, to switch to refillable bottles).

114. Csongor István Nagy, *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*, 9 CZECH Y.B. INT'L LAW 197, 209 (2018).

(such as Easter and Christmas), but in the discounted packages they sell small (S) eggs; as a corollary, during these periods, their acquisitions concentrate on (S) eggs and, hence, medium (M), large (L) and extra-large (XL) eggs do not benefit from the peak seasons. Local egg producers have the capacity to cover the entire local demand even in peak seasons but cannot supply a sufficient quantity of small (S) eggs. The reason is that these are laid by young hens, which make up only a small portion of the local hen population. As a consequence, a considerable part of the retail stores' turnover is made up of out-of-state eggs. This market practice is hurtful to the interests of both Baptists and Bootleggers. Local egg producers lose their market, which is taken over by out-of-state products. At the same time, this market practice is deceptive, as consumers purchase seemingly discounted products, which are more expensive by weight. Baptists and Bootleggers join forces to convince the state legislature to prohibit the retail sale of small (S) eggs.

This ban could be scarcely judged on the basis of the measure's intent. The consumer protection motivation is genuine, though exaggerated. The reason why this measure earns little sympathy is that it apparently goes beyond what is necessary to protect consumers. This can, however, be established only after a substantive analysis, where different regulatory alternatives are compared and contrasted in respect to trade-restrictiveness and effectiveness in protecting consumers from unfair market practices. Labelling is an alternative to the total retail ban. It is evidently less restrictive, however, it may also be less effective in protecting consumers, who may not read product labels. Still, a court may reach the conclusion that labelling, though somewhat less effective in protecting consumers from buying (S) eggs unnoticed, is a reasonable alternative to the total retail ban, which goes beyond what is necessary to address this regulatory problem.

Minnesota v. Clover Leaf Creamery Co.[115] presents a good example of the Baptist-Bootlegger coalition and demonstrates why the purpose inquiry fails in such cases. Minnesota banned the use of non-refillable plastic jugs for milk, while allowing non-refillable paperboard packaging.[116] The measure purported to foster environmental protection;[117] however, it also had a significant protectionist effect. Minnesota had a huge paperboard industry but produced no plastic jugs.[118] The protectionist effect was so significant that Minnesota courts established protectionist purpose and found that environmental protection was merely a pretext to protect the local packaging industry.[119]

The DCC's bifurcated legal test plunged the Supreme Court into a Hamletian dilemma: it could either pronounce the Minnesota measure discriminatory and then suppress the environmental aspect due to the ensuing

115. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
116. *Id.* at 458.
117. *Id.*
118. *Id.* at 473.
119. *Id.* at 460-61, 475-76.

per se treatment, or subject it to the overly deferential burden review and turn a blind eye to the protectionist aspects without requiring Minnesota to show the consistency of its approach and that there are no less restrictive but similarly effective alternatives. On the one hand, Minnesota referred to an important local end that is normally considered legitimate. On the other hand, this reference could not be judged without looking into the merits of the defense, comparing different regulatory alternatives, their contribution to the protection of the environment, and their trade-restrictiveness. The evidence suggested that paperboard packaging was not, or not significantly, more protective of the environment.[120] Plastic jugs were generally considered lighter and, hence, their transportation involved less energy.[121] In terms of recycling, the difference between the paperboard and plastic jugs was not significant enough to justify a total ban for the latter.[122]

Finally, the Supreme Court opted for the burden review, notwithstanding the clear asymmetric impact and the factual conclusions of the purpose inquiry of Minnesota courts.[123] This implied that the measure could be sustained even if it was inconsistent and less restrictive but similarly effective alternatives were available. In respect to the burden review, the Court simply referred to its analysis under the Equal Protection Clause.

> The Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another type, already established in the market, is permitted to continue in use. Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.[124]

The Court's judgment implied a very high threshold for establishing discrimination. Perversely, the regulatory distinction was based on an inherent characteristic of Minnesota business interests: due to natural reasons (abundance of pulpwood), Minnesota had a huge paper, but no plastic, production capacity.[125] Still, the purported justification turned a discriminatory measure into evenhanded regulation, but a discriminatory measure is discriminatory even if it is justified. The Court indicated that even outspoken protectionism would be insufficient to turn asymmetric impact into discrimination.[126]

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120. *Id.* at 469-70.
121. Clover Leaf Creamery Co. v. State, 289 N.W.2d 79, 84 (Minn. 1980)
122. *Clover Leaf Creamery Co.*, 449 U.S. at 469-70.
123. *Id.* at 471.
124. *Id.* at 466 (emphasis in original).
125. *Id.* at 473.
126. *Id.* at 463 n.7.

The judgment clearly showed the shortcomings of the bifurcated legal test and its inability to cope with measures of dual motivation. While the nearly per se treatment of discriminatory measures appeared to be too stifling for an environmental measure, the burden review was overly deferential, incapable of filtering out restrictions that have a less restrictive but equally effective alternative.[127] Minnesota argued that it did not ban plastic and paperboard nonrefillable containers simultaneously in order to avoid shocking effects in the market.[128] The Court accepted this argument, even though Minnesota, instead of banning plastic jugs and not restricting the use of paperboards, could have symmetrically reduced the use of these two, for instance, by limiting the quantity in circulation or introducing a tax for non-refillable containers. Graduation is a legitimate consideration but has nothing to do with the blatantly asymmetric treatment of plastic and paperboard nonrefillable containers.

D. The Misconception That Discrimination Can Be Established by Means of Qualitative Analysis

The current case law is normally conceived as purporting to identify protectionist (discriminatory) purpose by applying an "intent and effect" test; that is, a state measure is discriminatory if it has both a protectionist intent and effect. An alternative way to conceive the case law and the lenient treatment of asymmetric measures is that the Supreme Court engages in a qualitative analysis. This means that however conspicuous the asymmetric impact may be, the state measure violates the DCC only if the disparate impact can be traced back to a regulatory distinction that is protectionist in nature, as it is the protectionist nature of the regulatory distinction that confirms the protectionist purpose.[129]

The DCC case law is impregnated by the principle that asymmetric impact does not equal discrimination. As noted above, in the context of equal protection law's legal test, it is not the asymmetric impact but the regulatory distinction

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127. *Id.* at 473 ("Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis.").

128. *Id.* at 467 ("Moreover, the State explains, to ban both the plastic and the paperboard nonreturnable milk container at once would cause an enormous disruption in the milk industry because few dairies are now able to package their products in refillable bottles or plastic pouches. Thus, by banning the plastic container while continuing to permit the paperboard container, the State was able to prevent the industry from becoming reliant on the new container, while avoiding severe economic dislocation. The Minnesota Supreme Court did not directly address this justification, but we find it supported by our precedents as well.").

129. *Cf.* Francis, *supra* note 12, at 266 ("By requiring the regulatory solution to fit the policy problem, the Court essentially invites the state to show that it is not in fact 'discriminating' in the sense of treating similar things dissimilarly, but instead responding even-handedly to an asymmetric problem.").

hinging on out-of-state origin that is ruled out. According to the idea of qualitative analysis, it is not the measure's asymmetric impact, but its direct or indirect reliance on out-of-stateness that makes it discriminatory. What makes a difference is not that the burdens are disparate, but that they vary with out-of-stateness. Asymmetric impact is based on a quantitative analysis; it showcases that out-of-staters are subject to comparatively higher burdens, but it does not tell us anything about whether they are subject to these comparatively higher burdens because they are of out-of-state origin. Hence, one may argue that a qualitative analysis needs to be carried out to ascertain if the pertinent regulatory distinction is discriminatory or not.

Although the above argument may appear to be plausible, it leads to a vicious circle and an arbitrary legal test. The term "qualitative" is the catchword for an evaluative assessment, which finally turns on some colloquial understanding of protectionism. Put another way, the question is whether the distinction is of a kind that reveals a protectionist purpose. The idea of qualitative analysis manifests the idea that correlation between the comparatively higher burden and out-of-stateness is not sufficient to establish discrimination, but it does not tell us what may turn quantitative to qualitative correlation.

It is submitted that what turns statistical correlation to discrimination is not the abstract quality of the regulatory distinction, but the fact that adaptation is costlier for out-of-staters than for in-staters. Furthermore, adaptability is not an abstract legal question centering around some transcendent quality, but an economic question that can be assessed only in the context of a real market. Once the comparison is carried out in relation to an idealized hypothetical out-of-state firm, the analysis again becomes a qualitative examination based on common sense or subjective understanding. If the question is whether compliance for an idealized out-of-state firm is costlier than for an in-state firm, then the characteristics peculiar to out-state-firms in a given moment may be ignored. This approach leads to the same vicious circle as the qualitative analysis. Accordingly, the key issue is the counterfactual and the relevant time horizon: if adaptation is time-consuming, the measure may temporarily, but effectively, protect local businesses.

Asymmetric impact requires no qualitative assessment and normally proceeds from a market snapshot. The key question is whether compliance generates equal costs for in-state and out-of-state businesses. It may be the case that foreign businesses are over-represented in the disadvantaged category, but this is temporary and incidental, and they may, without the incurrence of any significant costs, adapt to get in the advantaged category. However, intuition suggests that this may be rare, as usually there is a reason why out-of-staters have the characteristics they have. For instance, certain business models, formats, or sizes may pertain to cross-border businesses. Online sales and integrated businesses excel in interstate trade, while small (often family-owned) companies tend to be local. A ban on online sales or a steeply progressive tax

rate hitting huge enterprises may be seemingly neutral, but, in terms of economic reality, represent higher adaptation costs for out-of-state businesses.

The main problem with the qualitative analysis is that it lacks a consistent metric and leads to arbitrary and inconsequent outcomes. This is very well demonstrated by contrasting the Supreme Court's judgments in *Hunt v. Washington State Apple Advertising Commission*[130] and *Exxon Corp. v Governor of Maryland*.[131] In *Hunt*, North Carolina law prohibited the use of state grades on closed containers of apples and required the display of either the applicable US Department of Agriculture (USDA) grade or a notice indicating no classification.[132] Washington state grades used higher standards than the USDA and, hence, earned a distinct recognition and a strong reputation in the market.[133] The Supreme Court found that "the statute ha[d] the effect of stripping away from the Washington apple industry the competitive and economic advantages it ha[d] earned for itself through its expensive inspection and grading system."[134] The Supreme Court concluded that the regulatory distinction used by the North Carolina statute revealed a protectionist intent and, hence, violated the Constitution.[135] Nonetheless, a year later, the Supreme Court apparently contradicted *Hunt* by acquitting a law that had nearly perfect asymmetric impact. In *Exxon Corp.*, producers and refiners were prohibited from operating gasoline stations in Maryland.[136] As there were no producers or refiners in Maryland, the prohibition applied, in essence, to out-of-state businesses. The gas stations not covered by the prohibition were operated by in-state businesses (99% of the non-integrated stations were operated by local enterprises).[137] Notwithstanding the clear protectionist effect, the Supreme Court held that a regulatory distinction based on the structure or method of operation in a retail market[138] reveals no protectionist intent and concluded that the asymmetric impact was the result of an origin-neutral regulatory distinction.

Out-of-staters could, in both cases, adapt to the regulatory distinction to overcome the disadvantage, but in neither of them could they be reasonably expected to do so. In *Hunt*, they could have changed their business policy to produce low quality (and low price) apples instead of high-quality produce, but it would have been senseless (in fact, cynical) to expect them to do so. In *Exxon*, out-of-staters could have sold their refineries to partake in the benefits of the law, but it would have been equally cynical to call this a chance to adapt. The

130. Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977).

131. Exxon Corp. v Governor of Maryland, 437 U.S. 117 (1978).

132. *Hunt*, 432 U.S. at 335.

133. *Id.* at 336.

134. *Id.* at 351.

135. *Id.* at 352-53.

136. *Exxon*, 437 U.S. at 119-20.

137. *Id.* at 138.

138. *Id.* at 128 ("We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

disparate treatment of the two cases featured the arbitrariness of the qualitative analysis. The business policy to produce high-quality products was not—neither in abstract nor in concrete terms—more inherently linked to out-of-stateness than vertical integration. One could argue that the high quality was part of the natural makings of Washington apples, while vertical integration was a variable feature. Unfortunately, this idea goes against economic reality: high quality is partially, and strong branding is completely, a business policy decision, and it is not a coincidence that integrated companies linger in exile in inter-state commerce.

The futility of the qualitative analysis is also showcased by the Supreme Court's judgment in *General Motors Corp. v. Tracy*,[139] which demonstrated that even nearly facial discrimination may slip through the fingers of qualitative analysis. Ohio provided preferential treatment to the sales made by local distribution companies (LDC), that is, enterprises that owned local pipelines.[140] Earlier, before the natural gas market was liberalized, LDC's had been incumbent companies, had a monopoly and, very importantly, were all local companies.[141] Theoretically, an out-of-state business could become an LDC by purchasing or building a distribution network, but this was unrealistic. The costs of becoming an LDC were extremely high, even prohibitive, and it was, economically, completely irrational to assume these expenses in order to acquire the preferential tax treatment.

Courts have a natural aversion to equating snapshot-based asymmetric impact with discrimination. Even if out-of-staters are more heavily hit by the measure, they may adapt to get into the advantaged group and eliminate the asymmetry. For instance, if agents (consignees) are subject to more favorable tax rules than distributors, out-of-state suppliers may re-structure their marketing systems. However, quite often it is not reasonable for them to adjust, and the chance to get into the advantaged group remains only a theoretical possibility. If the law applies a favorable tax rate to small and midsize enterprises (SME), it may still be irrational for out-of-staters to convert their capital-accumulating multistate (or multinational) businesses to SMEs, as they may lose more in terms of economic efficiency than they win in terms of tax saving. As another example, if the law discriminates franchise-based restaurant chains against single-owner chains, the former may switch business format by buying up the franchisees. However, it may still be rational for them to preserve this format, because in a cross-border context the tax savings may be outweighed by the loss in terms of economic inefficiency. In the latter case, although the theoretical possibility to adjust exists, the law embedding asymmetric impact may be seen as an artful way to discriminate. Furthermore, the fact that a snapshot reveals an asymmetric impact may suggest there is an economic reason that explains why out-of-state enterprises have the

139. 519 U.S. 278 (1997).
140. *Id.* at 282.
141. *Id.* at 288.

characteristics they have. In reality, the qualitative approach is unpredictable, because the question of whether the feature is intrinsically linked to out-of-stateness is a question of degree. Hence, the idea to identify out-of-stateness-based distinctions gives very little guidance in difficult cases.

E. The Misconception That Courts Cannot Carry Out a Substantive Analysis

The Supreme Court's case law features a strong and desperate endeavor to avoid all substantive analysis at any cost. To put it in an extreme way, denying adjudication for lack of institutional competence may be tantamount to denial of justice. After all, the Court defers to a presumptively biased decision-maker: the state whose measure is subject to scrutiny. Unfortunately, as part of this endeavor, the Court avoids not only value choices (genuine balancing), but also perfectly justiciable substantive analysis. Namely, substantive analysis does not necessarily involve value choices; courts may compare regulatory options in terms of trade-restrictiveness and effectiveness and inquire whether they go beyond what is necessary without contrasting disgeneric values. The conclusion that the same local end may be achieved with a similar rate of effectiveness by means of an alternative regulatory solution involves no value-choice; if there is a less restrictive, but similarly effective, alternative to the measure adopted by the state, the Court can establish that the restriction of trade goes beyond what is necessary without engaging in genuine balancing by comparing the trade restriction and the local legitimate end. If the same goal can be achieved through a less restrictive measure that has the same, or a comparably high, rate of effectiveness, that means that the measure restricts trade unnecessarily. Albeit that regulatory alternatives rarely feature the very same rate of effectiveness, confronting two measures with comparable levels of effectiveness is justiciable. In the same vein, courts have the faculty to inquire about the state policy's internal consistency. States tend to protect the public interest more vigorously when this is in line with the interest of in-state businesses (Baptist-Bootlegger coalition), but their enthusiasm may fade in the absence of such economic interests (Baptists are not backed by Bootleggers). A state may be keen on striving against the accumulation of litter and insist on the use of refillable bottles for beer when this disadvantages out-of-state brewers and protects the local beer industry, but may care saliently less about the environmental effects of non-recycled plastic bottles when it is about soft drinks and mineral water, where domestic stakes are considered less significant.[142] Finally, burden and standard of proof are legal tools that can be used to minimize erroneous decisions.

142. *See Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

The High Court of Australia,[143] the Court of Justice of the European Union[144] and the Appellate Body (AB) of the WTO[145] do regularly engage in substantive analysis aimed to ascertain if the state measure has a less restrictive alternative. The AB's formulation in *Brazil – Retreaded Tyres*[146] is very expressive of how substantive analysis can be carried out without making a genuine value choice.

> We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued." If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available".[147]

The consistency inquiry is also an important aspect of the substantive analysis and involves no value choice. The lack of internal consistency may justify the invalidation of the measure. For instance, in *Castlemaine Tooheys Ltd v South Australia*, South Australia set disparate refund amounts for refillable glass bottles and non-refillable bottles and cans containing beer.[148] The difference was highly significant (4 and 15 cents) and had a discriminatory effect: out-of-state brewers used non-refillable bottles to avoid the long-haul transportation of empty bottles (local brewers could refill the bottles in South Australia).[149] Although the measure was purported to protect the environment, the state's justification suffered from internal inconsistency; it treated beer, where South Australia had an industry to protect, and soft drinks, where the protectionist interest was apparently missing, differently.[150] While the refund amount of non-refillable beer bottles was 15 cents (contrary to 4 cents applicable to refillable glass bottles), the refund amount for non-refillable bottles containing

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143. *See, e.g.*, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, ¶¶ 110-12. For an analysis, see Michael Coper, *Betfair Pty Ltd v Western Australia and the New Jurisprudence of Section 92*, 88 AUSTL. L.J. 204 (2014).

144. *See, e.g.*,. FEDERICO ORTINO, BASIC LEGAL INSTRUMENTS FOR THE LIBERALISATION OF TRADE: A COMPARATIVE ANALYSIS OF EC AND WTO LAW 387-434 (2004).

145. Csongor István Nagy, *Clash of Trade and National Public Interest in WTO Law: The Illusion of 'Weighing and Balancing' and the Theory of Reservation*, 23 J. INT'L ECON. L. 143 (2020).

146. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).

147. *Id.* ¶ 156.

148. *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 459.

149. *Id.* at 458-59, 462.

150. *Id.* at 459.

"carbonated soft drink, water or mineral water" was only 5 cents.[151] This internal inconsistency suggested that environmental protection was important when it was backed by protectionist interests (Baptist-Bootlegger coalition), while the litter problem simply lost its relevance once it was about soft drinks (i.e. when Baptists were not backed by Bootleggers).[152] In *US – Clove Cigarettes*,[153] a case adjudicated by the Appellate Body of the WTO, the United States banned flavored cigarettes, including clove cigarettes, on the basis that they were more addictive, especially for youth, but exempted menthol cigarettes.[154] Not surprisingly, clove cigarettes were predominantly imports, while some menthol cigarettes were locally produced.[155] The reference to the protection of public health was valid: clove cigarettes, in some ways, are more addictive than ordinary cigarettes, due to the flavor and chemical profile.[156] Nonetheless, the measure was inconsistent, because menthol cigarettes, though equally addictive, were exempted.[157] Again, the local legitimate end was important when it was backed by protectionist interests (Baptist-Bootlegger coalition), but it lost its relevance once it was about locally produced products (i.e. when Baptists were not backed by Bootleggers).

III. RATIONALE AND CONSTITUTIONAL EXPECTATIONS: PROPOSAL FOR A THEORY

This section briefly presents the three main existential theories of the DCC and demonstrates that, although they offer diverging philosophical underpinnings as to the DCC's *raison d'être* and function and lead to diverging semantic constructions, the particular difference between them are small and they may be united in a uniform doctrinal architecture.

The DCC's constitutional necessity has traditionally been explained with three theories, which are both competing and complementary.[158] The first theory is the political union rationale.[159] The idea is based on the experience that protectionist action attracts likeminded reaction and, at the end of the day, may

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151. *Id.* at 462.

152. *Id.* at 475-76.

153. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012).

154. *Id.* at 7.

155. *Id.* at 78-79.

156. Mithra Salmassi, *Clove Cigarettes: Dangerously Smooth*, P'SHIP TO END ADDICTION (Oct. 2009), https://drugfree.org/drug-and-alcohol-news/clove-cigarettes-dangerously-smooth [https://perma.cc/VX8N-96QR].

157. Apellate Body Report, *supra* note 153, at 80.

158. *Cf.* Bruce F. Broll, *The Economic Liberty Rationale in the Dormant Commerce Clause*, 49 S.D. L. REV. 824 (2004) (proposing an economic liberty rationale for the DCC); Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1 (2003) (providing a game theory perspective of the DCC); Fox, *supra* note 104, at 180-85.

159. Denning, *supra* note 17, at 484-85.

undermine the political union lying at the heart of the federal system.[160] This theory justifies the suppression of state measures that may provoke reactions from other states.[161] A tariff or a quota may certainly have such a backlash, the same as those state measures that are regarded by common sense to be the surrogates of a tariff or a quota.[162] Measures that feature a noticeable protectionist purpose have the same potential to provoke trade conflicts.[163] The second theory is complementary and is based on the alleged deficiencies of the democratic process: out-of-state businesses have less of a chance to channel their interests in the democratic process than in-state businesses, hence, state measures may be less attentive to their interests.[164] This goes against the idea of federalism, as out-of-staters are still part of the Nation and thus, deserve equal consideration. The DCC is meant to make up for this deficiency in the political process. The third theory is based on the idea that protectionism causes economic inefficiency and thus, filtering out protectionist measures increases the national surplus[165] This theory attributes the most ambitious role to the DCC. In terms of constitutional underpinning, this is the least originalist interpretation. Nonetheless, it has its clear merits and justification, as it treats state and federal governments as part of the same "family" and conceives the function of the DCC to maximize the overall surplus without impairing states' rights.[166]

The three theories, while representing divergent philosophical strands, are actually more convergent in terms of practical outcome than they may appear at first glance.[167]

The political union theory[168] is probably the mainstream justification of the DCC. It suggests that the DCC aims to obviate economic isolation and

160. Stearns, *supra* note 158, at 11; Denning, *supra* note 17, at 484-85.

161. Stearns, *supra* note 158, at 11.

162. *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."); Regan, *supra* note 31, at 1091.

163. Regan, *supra* note 31, at 1201-02.

164. Broll, *supra* note 158, at 833-34.

165. *Id.* at 833.

166. *Id.*

167. For an attempt to overcome these competing theories, see Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 413-14 (2008) (proposing a deliberative equality model).

168. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (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."); Granholm v. Heald, 544 U.S. 460, 472 (2005) ("[I]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' This rule is essential to the foundations of the Union.") (internal citations omitted).

balkanization[169] and is activated once there is visible protectionism, since this can provoke reaction from other states and cause trade wars.[170] Facial discrimination is clearly protectionist, the same as those trade restrictions that cannot be explained with any local legitimate end (either because no justification is proffered or because local public interest is used as a pretext). These amount to naked restrictions. Under this theory, courts are not expected to compare, contrast, and balance trade restrictions and the furtherance of the local public interest. The question of necessity should be judged without making a value-choice. An important but often overlooked aspect of this approach is that measures going beyond what is necessary are just as unnecessary as measures that are not necessary at all. The latter is referred to in this Article as "existential necessity" and embeds the question of whether the measures are justified at all. The former is referred to as "extensional necessity" and embraces the question of whether the measure goes beyond what is necessary.

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169. *Baldwin*, 294 U.S. at 527 ("What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement."); Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951) ("To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) ("The few simple words of the Commerce Clause—'The Congress shall have Power . . . to regulate Commerce . . . among the several States . . .'—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that, in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."). As to economic balkanization, see Jonathan H. Adler, *Climate Balkanization: Dormant Commerce and the Limits of State Energy Policy*, 3 LSU J. ENERGY L. & RES. 153 (2014).

170. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538-39 (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, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. 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?"); 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."); Granholm v. Heald, 544 U.S. 460, 473 (2005) ("The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war."). *See* Denning, *supra* note 17, at 484-85.

The democratic process theory[171] may justify judicial intervention to make up for out-of-staters' underrepresentation in the political process,[172] unless the political process is deemed functional.[173] However, this is a complementary rationale, which cannot provide a comprehensive justification for the DCC.[174] It approaches the issue from an equal protection perspective and justifies that origin-based regulatory distinctions be treated as suspect classification.[175] The starting point is that out-of-staters, who are not part of the local electorate, cannot effectively take part in the political process to have their interests protected. Their status parallels that of marginalized minorities under the Equal Protection Clause. The notion that people should rely on polls and not courts to have their interests protected does not work in the case of marginalized

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171. *See* S.C. State Highway Dep't v. Barnwell Bros, 303 U.S. 177, 184 n.2 (1938) ("State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. Underlying the stated rule has been the thought, often expressed in judicial opinion, 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.") (internal citations omitted); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994); Williams, *supra* note 167, at 411; *see, e.g.*, South-Central 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. v. Rice, 434 U.S. 429, 444 n.18 (1978); 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).

172. *S. Pac. Co.*, 325 U.S. at 767 n.2 ("[T]o 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."); *West Lynn Creamery, Inc.*, 512 U.S. at 200 ("[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy."); *see* Russell Korobkin, *The Local Politics of Acid Rain: Public Versus Private Decisionmaking and the Dormant Commerce Clause in a New Era of Environmental Law*, 75 BOS. UNIV. L. REV. 689, 748-49 (1995) (arguing that courts are capable of protecting underrepresented economic interests); see also the virtual representation theory, advocated, for example, in Eule, *supra* note 15, at 444; Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (proposing a stringent judicial review in case of systematic underrepresentation).

173. *See generally Raymond Motor Transp., Inc.*, 434 U.S. at 444 n.18 (The "burden [of state highway regulations] 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", hence, special deference is warranted); *Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17 ("The existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse."); United Haulers Assn. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 (2007) ("Here, the citizens and businesses of the Counties bear the costs of the ordinances. There is no reason to step in and hand local businesses a victory they could not obtain through the political process.").

174. Denning, *supra* note 17, at 481-84.

175. *Id.*

minorities, who have less of a chance to have their voices heard.[176] In the famous Footnote Four in *United States v. Carolene Products Co.*, the Supreme Court held that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[177] This results in strict scrutiny where facial discrimination is nearly per se invalid, and the measure may survive constitutional review only if it was passed to further a compelling governmental interest. A facially neutral measure that disparately harms a suspect class is invalid only if its adoption was motivated by a discriminatory purpose.[178] Accordingly, the legal test resulting from the democratic process theory is tantamount to the current approach of the Supreme Court and is more reserved than the legal test justified by the political union theory. The equal protection analysis justified by the democratic process theory provides that facially neutral measures are invalidated only if they have an asymmetric impact and are motivated by a protectionist purpose. This theory does not rule out extensional unnecessity.

The democratic process theory cannot provide a comprehensive theory for two reasons. First, it names the deficiencies of the political process as the reason for judicial intervention.[179] This points to the legal test governing equal protection cases; however, as explained in Section II.B., the approach of equal protection case law is unworkable in trade disputes.[180] Second, this theory is complementary to the two others in the sense that more includes the less—*in maiore minus est*—as both the political union and the economic efficiency theory lead to a more comprehensive legal test that embraces the democratic process theory.

The economic efficiency theory treats the United States common market as a single "economic unit"—a "federal free trade unit"[181]—based on the

176. *See generally* William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1 (2010); Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565 (2013); Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection, and Substantive Due Process*, 20 U. PA. J. CONST. L. 983 (2018).

177. United States v. Carolene Prod's. Co., 304 U.S. 144, 152 n.4 (1938).

178. *See* Washington v, Davis, 426 U.S. 229, 239 (1976).

179. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994).

180. *See* discussion *supra* Section II.B.

181. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) ("This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units . . . 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."); *Id.* at 539 ("Our 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 export, and no foreign state will by customs duties or regulations exclude them.

constitutionalization of free trade. It features the desire to maximize the national surplus by ruling out overly costly trade restrictions that impair the federal surplus more than they increase the local surplus.[182] "Protectionist legislation, as well as some other laws, interferes with the efficient disposition of resources throughout the country. By excluding some commerce from a state, these statutes may lead to a lower level of economic performance than would be possible in the absence of the statutes."[183] This Article conceptualizes this theory by means of the trinity of three surpluses (drawing on economics' concept of social surplus). "Local surplus" refers to the benefits generated locally. "Federal surplus" is tantamount to the federal interest in free inter-state trade. "National surplus" is the sum of the foregoing two elements. It is in the national interest to maximize the national surplus, and in a federation the national surplus is made up of both the federal and the local benefits, since both are part of the same family.

The difficult point in this theory is the exchange rate between the local and the national surplus; this is the point where the parallelism to competition economics' concept of social surplus is limping. First, consumer and producer surplus are both expressed in monetary terms as the difference between the market price and the reservation price.[184] Consumer surplus is made up of the difference between the maximum price the consumer is inclined to pay, and the price actually paid.[185] Producer surplus is the difference between the lowest price the producer is inclined to charge and the price actually charged.[186] Local and federal benefits are, however, not commensurate, and there is no universal equivalent to convert and compare them. Thus, an exchange rate needs to be set, and it is here where state sovereignty justifies a good deal of deferentialism. Second, contrary to social surplus, which can be redistributed by means of a wealth transfer, there is no chance for such a redistribution in DCC cases. Local surplus lost to enhance national surplus cannot be compensated. This also confirms the need for deferentialism. These considerations imply that deference

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Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."); *see also* McLeod v. J. E. Dilworth Co., 322 U. S. 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States."), *and* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370 (1976) (confirming *McLeod*); Freeman v. Hewit, 329 U.S. 249, 252 (1946) ("[T]he Commerce Clause . . . , by its own force created an area of trade free from interference by the States."); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977) (confirming *Freeman*).

182. Broll, *supra* note 158, at 833.

183. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 225 (9th ed. 2023).

184. *See* CFI Team, *Consumer Surplus and Producer Surplus*, CFI (Mar. 24, 2021), https://corporatefinanceinstitute.com/resources/economics/consumer-surplus-and-producer-surplus/ [https://perma.cc/D2J8-JW68].

185. *Consumer's Surplus,* MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/consumer%27s%20surplus [https://perma.cc/T8MV-CW3W].

186. *Producer's Surplus*, MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/producer%27s%20surplus [https://perma.cc/8KBQ-8H5Y].

has to be given to states to unilaterally set the exchange rate ("deferential exchange rate").

The political union and the economic efficiency theories lead to two concurring approaches—the former rules out unnecessary trade restrictions, while the latter is unreasonably costly (which impairs the national surplus). However, if turned into a doctrinal structure, they lead to surprisingly similar practical outcomes. If states have the prerogative to set the exchange rate in the first place, the meanings of "unnecessary" and "unreasonably costly" will be very similar. The economic efficiency approach apparently goes beyond the political union approach. If there is an equally effective but less restrictive alternative, that is per se inefficient. If the measure's contribution to the public interest is not worth the loss in trade, it is unreasonably costly. In the same vein, a less restrictive but less effective measure can also be more efficient by generating a large national surplus. Nonetheless, the difference between this and the political union approach remains semantic, as long as states have the prerogative to set the exchange rate between local and national benefits. The political union theory justifies a necessity test, while the economic efficiency theory justifies a balancing test. Although the latter overtly expects courts to make value choices, the difference between the necessity and balancing tests is less dramatic.

On the one hand, both approaches involve some value choice. Though explicit in balancing, courts applying the necessity test also need to evaluate the legitimate end. The reason is practical: two regulatory alternatives that restrict trade with different intensity seldom have the same effectiveness in pursuing the local legitimate end. For instance, a total ban is more restrictive than control or labeling, but it is also more effective. Hence, it is not practical to require the plaintiff to prove that there is a less restrictive regulatory alternative that has the very same (or higher) rate of effectiveness. What can be reasonably required is that alternative measures have a similar or comparable rate of effectiveness. This analytical latitude involves some implied value choice; there are significant local legitimate ends (e.g. public health) where the alternative measure is expected to have the same rate of effectiveness, while there are legitimate ends (e.g. consumer protection) where a similar rate of effectiveness may be sufficient to prove the lack of extensional necessity. Put another way, it is not the exact rate but rather the level of effectiveness that is cast in stone; this gives courts some flexibility when comparing regulatory alternatives.

On the other hand, the value choice required for the balancing test (using the above semantics: the determination of the rate of exchange) is much more limited than it may look at first glance, and its reality hinges on the deference afforded to the state. Federalism dictates that states have the prerogative to set the "price" of their local legitimate end and, thus, to determine the exchange rate. This implies that, in principle, states are empowered to unilaterally set the exchange rate. This prerogative yields no omnipotence, but the embedded value choice is subject merely to a good faith review. Nonetheless, if the

determination of the exchange rate is the prerogative of the states, there may be little difference between the necessity and the balancing test.

The analytical latitude embedded in the necessity examination and the deferential review of states' exchange rate determinations can turn into each other. In fact, both may give floor to judicial activism depending on how the concepts are used in practice. A more deferential approach conceives the function of the DCC as ruling out unnecessary trade restrictions. A more activist approach conceives it as ruling out trade restrictions that, though necessary, are unreasonably costly in terms of impairing the national surplus. Still, whichever ultimate aim is attributed to the DCC, the "less restrictive alternative" (LRA) technique enables structured balancing. As a matter of practice, even the balancing analysis hinges on the assessment of alternative regulatory responses. Furthermore, both the necessity and the balancing test include substantive policy analysis, which does not necessarily involve a value choice. If extensional necessity is part of the analytical matrix, it is inevitable to compare different regulatory arrangements in terms of trade restrictiveness and effectiveness. The main difference between the necessity analysis and balancing analysis is not the technique but the way it is operated.

IV. THE OPERATIVE AND THE DECISION RULE: PROPOSAL FOR A DOCTRINE

The DCC should play out by comparing different regulatory alternatives so as to find a less restrictive but similarly effective alternative measure. If the plaintiff can prove that there is an alternative way to pursue the same legitimate end that is similarly effective but less restrictive with respect to trade, the measure should be invalidated for not meeting the requirement of extensional necessity. In such a situation, the Court does not compare disgeneric values because it does not inquire into whether the state measure pursues the local legitimate end at a too high cost as compared to inter-state commerce. Instead, the Court examines whether the same goal can be achieved by means of a less restrictive measure. This examination involves some policy analysis but no value choice. Building from this notion, a three-pronged test and a sliding scale approach are proposed to replace the current two-tiered approach to the DCC.

First, the current fork-in-the-road test should be replaced with a three-pronged test, in which an intermediate category should be introduced. State measures that have a discriminatory effect and purpose should be kept under the current strict scrutiny standard, while the lenient burden review (tantamount to the rational basis standard) should apply to measures that have no asymmetric impact. Additionally, a new category should be introduced for measures that have an asymmetric impact (protectionist effect) but no protectionist purpose;

intermediate scrutiny should govern these cases.[187] Currently these measures come under burden review.

For the time being, discriminatory measures are nearly per se illegal (subject to strict scrutiny), while non-discriminatory measures are subject to a deferential burden review (rational basis review). Measures that have a protectionist effect, but no protectionist intent, come under the second prong. The intermediate category should come between these two prongs; it should apply to measures that have an asymmetric impact but involve no discrimination in the narrower sense. With this, the intensity of the scrutiny would be brought in line with the intensity of the protectionism.

Second, discrimination and asymmetric impact should take into account economic reality. This implies that instead of an obscure qualitative analysis based on common sense, the inquiry should aim to determine if out-of-staters face comparatively higher compliance costs than in-state businesses. The current, rather abstract, qualitative analysis should be replaced with a microeconomic analysis. If a snapshot of the market reveals an asymmetric impact, the examination needs to extend to the question of adaptability.

Third, the idea of a less restrictive alternative provides a structured and focused analytical method and defines how the burden of proof should be allocated. This implies that courts are not expected to engage in an amorphous balancing exercise.

In addition to structured balancing, there are a few rules of thumb that may assist courts. First, the rule that a trade restriction is disproportionate if there is a less restrictive alternative that yields the same or similar results in terms of local benefits will help courts avoid a genuine balancing test. If the same aim can be achieved through a less restrictive measure that has the same or a comparably high rate of effectiveness, the measure restricts trade unnecessarily. While regulatory alternatives rarely feature the very same rate of effectiveness, comparing two measures with comparable levels of effectiveness is more within the comfort zone of courts than a full-blown balancing.

Second, at times, the rule that a local legitimate end may trigger a more deferential approach. For instance, when public health is involved, a less restrictive and slightly less effective measure may not be regarded as a reasonable alternative given that states are not expected to accept any less effective measure if public health is seriously endangered.

Third, the rule that the analysis of the measure's consistency may, at times, also obviate the need for a comprehensive balancing. States tend to protect the public interest more vigorously when this is in line with the interest of domestic producers, while states enthusiasm may fade in the absence of such economic interests. The coalition of the Baptist and the Bootlegger is more powerful than what the Baptist can achieve as lone fighter. A state may be keen on striving

187. *Cf.* O'Grady, *supra* note 26, at 577-610 (distinguishing between discrimination and protectionism, conceiving the latter as a purposeful endeavor to isolate and/or protect a segment of the local industry from interstate competition).

against the accumulation of litter and insist on the use of refillable bottles for beer—even when it disadvantages out-of-state brewers and protects the local beer industry—but may care saliently less about the environmental effects of non-recycled plastic bottles when it is about soft drinks and mineral water—where domestic stakes are considered less significant.

Fourth, when facing high risks of false positives and false negatives, courts have traditionally used burden and standard of proof to minimize the chance of erroneous decisions. The identification of the relevant questions does not imply that the Court is expected to be an expert in environmental engineering and medical sciences. Instead, the Court is expected to provide a structured allocation of the burden of proof. Furthermore, judicial deferentialism and states' margin of appreciation have also eased the difficulties pertaining to decisions under uncertainty. The same as administrative courts, the Court under the DCC is not expected to step into the shoes of the regulatory state. Rather, it is expected to review the constitutionality of the measure and ascertain whether the state exceeded the limits set out by the federal constitution.

CONCLUSION

The Supreme Court's current DCC case law countenances unnecessary restrictions on trade and, thus, fails to fulfill its constitutional function. Using Freud's psychoanalytic theory as a metaphor, the contradictory layers of DCC case law can be reconstructed as follows. The DCC's "super-ego" consists of a two-pronged test. Discriminatory measures are subject to strict scrutiny, while non-discriminatory measures are subject to a rational basis review (burden review). The DCC's "ego" is protectionist purpose; the Court is said to invalidate those trade restrictions that feature a protectionist intent. In reality, the case law's "id" is much more withheld. The Supreme Court suppresses merely naked protectionism. That is, measures that have no credible warrant. This involves the prohibition of two types of trade restrictions: (1) facially discriminatory measures and (2) facially neutral but asymmetric measures that cannot be justified even under the rational basis standard.

It is a fair reconstruction of the trajectory of the case law that the Supreme Court has replaced the necessary inquiry with one it feels more comfortable with. The assessment of public choices involving incommensurable values is located at the edge of justiciability and generates a good deal of judicial discomfort, hence, the Court replaced the DCC's legal test with an equal protection jurisprudence concept of purpose-centered discrimination. Assessing discrimination is a lawyer's job, and courts regularly engage in such work.[188] The problem with this approach is that a patient needs the treatment that helps and not a second-best treatment the doctor feels comfortable with. This case law

188. O'Grady, *supra* note 26, at 584-85 ("Of course, courts are not unfamiliar with testing a myriad of rules, regulations, and policies for 'discrimination' in other areas of law, and typically, the discrimination comparison process requires a comparison of similarly situated interests.").

is inconsistent and goes against the self-proclaimed function of the DCC inasmuch as it condones unnecessary trade restrictions. While the case law rules out trade restrictions that are completely unnecessary (existential necessity), it condones restrictions that go beyond what is necessary (extensional necessity).

The reasons why the purpose inquiry fails are manifold. First, the purpose inquiry is arbitrary, as it focuses on regulatory distinctions that are protectionist by nature and ignores measures that are protectionist in terms of economic reality (adaptability). Second, establishing the purpose of a measure is quite often impossible, given that a measure may be backed by both legitimate and protectionist motivations. In some cases, protectionism may use local legitimate ends as a pretext. In others, the measure may be equally motivated by protectionist and legitimate regulatory considerations (Baptist-Bootlegger coalition).

The purpose inquiry was apparently imported from equal protection cases. In cases of suspect classification, such as race, religion, national origin, and alienage, a measure may breach the equal protection clause if it discriminates purposefully. This is evident if the measure is facially discriminatory. In the absence of such explicitness, a law having an asymmetric impact, however asymmetric this impact may be, qualifies as discriminatory only if this is the result of discriminatory intent. The fact that white students are more successful at the admission exam than students having a minority background does not in and of itself prove discrimination, because the exam results may be the reflection of existing social inequalities. Equal protection law does not counter social inequalities, it merely prohibits unequal treatment.

Nonetheless, this rationale does not work with respect to trade disputes, because here the disparate outcome is not the consequence but the cause of unequal opportunities. In equal protection cases, the law produces asymmetric outcomes because different social groups are in asymmetric positions. In contrast, trade disputes are not about pre-existing asymmetries, as it is the state measure that, instead of leaving the choice to the market, attributes legal relevance to certain characteristics and makes them asymmetric by way of a regulatory distinction.

When the asymmetric impact simply mirrors the existing social inequalities, it is not created by the measure. Contrarily, when economic regulation has an asymmetric impact, it cannot be conceived as a reflection of a pre-existing economic disadvantage; the disadvantage is created by the law. The reason for the asymmetric impact is not that out-of-state businesses are socially disadvantaged but that they are simply different. In equal protection cases, a member of a socially disadvantaged group may overcome the disadvantage with extra effort. Courts tend to see purposeful discrimination in cases where the asymmetric impact was the result of characteristics that could not be overcome; disparate impact is tolerated if it involves disadvantages that can be overcome (such as poverty, lack of education, conviction, and drug consumption). However, this distinction between disadvantaging characteristics that can and

cannot be overcome is inconceivable in free trade matters. There are certainly requirements that out-of-state businesses cannot adapt to. Difficult cases, however, involve requirements that are costlier for out-of-state businesses to adapt to and, thus, generate a competitive disadvantage rather than an inability to adapt. Applying the metaphor of the admission exam: in free trade law, success in the market, which is made up of the repetitious choices of consumers, is the admission exam. When a measure has an asymmetric impact, out-of-state businesses do not claim that the law should counter-balance their competitive disadvantage, e.g. by means of providing a product subsidy to overcome a cost disadvantage. Instead, they claim that the law should not create a competitive disadvantage by using a regulatory distinction that has a disparate impact and should leave the choice to the consumers.

The purpose of the DCC may be conceived as either ruling out unnecessary or unreasonably costly trade restrictions. A restriction is unnecessary if it is completely needless (existential necessity) or if it goes beyond what is necessary to achieve the local legitimate end (extensional necessity). The latter may be explored by demonstrating that there is a less restrictive but similarly effective way to achieve the same purpose. A trade restriction is unreasonably costly if, overall, it decreases the national surplus, which is comprised of the federal surplus (free inter-state trade) and the local surplus (the local benefits generated by the measure). That is, it harms the federal surplus more than it increases the local surplus. While the latter suggests a more activist judicial role, the two approaches turn into each other if, as federalism dictates, states have the prerogative to set the exchange rate between the local surplus and national surplus, with the consequence that "unnecessary" and "unreasonably costly" overlap and involve no meaningful judicial value choice.

The above considerations warrant that the analysis under the DCC should effectively extend to the question of justiciability. Contrary to the general opinion, this can be a more objective standard than the subjective and ad-hoc purpose-inquiry. Although courts are generally considered to be reluctant and less capable of carrying out a substantive analysis, this need not be a mathematical equation and may reasonably consider the uncertainty and information vacuum featuring such cases. Courts may engage in structured balancing, which uses the tiers of scrutiny they are familiar with. In equal protection cases, courts compare the encroachment on a fundamental right to the government interest but do so in a structured way. Translating this to DCC cases, courts may apply different standards of scrutiny depending on the economic impact of the trade restriction (and not the graveness of the state's "evil mind"). The impact on trade (and on federal surplus) does not depend on the level of purposefulness but on the extent of the competitive disadvantage. In equal protection cases, courts tend to leave this balancing to the political process but will intervene in cases involving politically underrepresented groups. This

rationale works in DCC cases, too: out-of-state stakeholders have less of a chance to channel their interests into the political process.[189]

This Article proposed a substantive sliding-scale approach that takes economic reality into account. This implies that the current two-limb test should be replaced with a three-limb test providing for an increasingly close scrutiny for symmetric, asymmetric, and discriminatory impact. Currently, discriminatory measures are nearly per se illegal (subject to strict scrutiny), while non-discriminatory measures are subject to a deferential burden review (rational basis review), and measures that have a protectionist effect, but no protectionist intent, come under the second prong. The proposed intermediate category, which would call for intermediate scrutiny, would be inserted between these two prongs for measures that have an asymmetric impact but involve no discrimination in the narrower sense. With this, the intensity of the scrutiny would be brought in line with the intensity of protectionism. Furthermore, discrimination and asymmetric impact should take economic reality into account. This implies that instead of the obscure qualitative analysis based on common sense, the inquiry should aim to determine if out-of-state businesses face comparatively higher compliance costs than in-state businesses. The current, rather abstract, qualitative analysis should be replaced with a microeconomic analysis. If a snapshot of the market reveals an asymmetric impact, the examination needs to extend to the question of adaptability. The idea of suppressing state protectionism implies two requirements of necessity. "Existential necessity" requires that completely unnecessary restriction on trade be ruled out. "Extensional necessity," which is patently overlooked in the Supreme Court's current case law, filters out restrictions that go beyond what is necessary and turns on the existence of less restrictive regulatory alternatives. Ultimately, this calls for a substantive analysis by means of comparing policy options in terms of trade-restrictiveness and effectiveness but involves no genuine value choice.

189. *See* Helvering v. Gerhardt, 304 U.S. 405, 412 (1938) ("[T]he people of the states, acting through their representatives, are laying a tax on their own institutions, and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation, and, in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.").