Settled Law?

Introduction

Over the course of my studies I became aware of a clause referred to as the Dormant Commerce Clause. Thinking in terms of dormant, meaning inactive, I was curious as to why it should influence Court decisions which in some cases were considered significant. Though none of the research I engaged in specifically stated it in these terms, I soon realized the term dormant, meant Congress had taken no positive action on an issue, in essence, the congressional failure to act opened the door to judiciary action. The Commerce Clause itself reads "The Congress shall have the power… To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…"[1] Reading about Justice Thomas's early concurrences with decisions that invalidated state laws and his subsequent change to one of dissent piqued my interest, which resulted in the selection of this topic.

In light of Justice Thomas's dissents and arguments[2] it appears that this issue should be revisited with a view to reversing course from earlier decisions and their progeny. My paper will first briefly explore the history and context of the Negative/Dormant Commerce Clause doctrine, Justice Thomas's early concurrences, followed by Justice Thomas's epiphany and resulting dissents. Finally I will defend my thesis by presenting additional information and research that supports and informs my conclusions.

[1] ROBERT L. MADDEX, THE U.S. CONSTITUTION A TO Z (2 ed.) 99 (2008).
[2] RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION. 50. (2014).

Article I § 1 grants Congress legislative powers, enumerated in the various clauses, it is generally conceded that if a power is not specifically granted to the federal government, the power rests with the state. Article 1 § 8 enumerates various fiscal powers of Congress including the Commerce Clause which is the basis for the Negative/Dormant Commerce Clause. The Negative Commerce Clause is a legal doctrine holding that § 8 "not only grants power to Congress to regulate commerce among the states but also confers power on the Court to protect the right to engage in interstate trade free from restrictive state regulation."[3] Therefore "irrespective of whether Congress itself has acted on the basis of its delegated power to prohibit this interference, it holds that the Court is constitutionally authorized to protect this "area of free trade… and invalidate all discriminatory burdens it [the court] concludes are unjustified."[4] This line of judicial reasoning basically took the delegated power of Congress and repositioned that power in the hands of the Supreme Court. The debate on this clause generated the question, whether Congress has exclusive or concurrent power over interstate and intrastate commerce, and what if Congress has failed to act or declined to act?[5] There is long history of Supreme Court decisions that resulted in the extension of Federal power into activities that incurred wholly within the boundaries of a particular state (i.e. mining, agriculture, and manufacturing) and the Negative Commerce Clause became the doctrine upon which that extension took place. The extension was based on the reasoning that "A farmer in Iowa who does not plant an additional acre of corn in one year affects in an infinitesimal way, the future price of grain on the world

[3] *Id.* at 50.
[4] *Id.* at 50.
[5] RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 228 (2014).

market."[6] In scientific research that impact would be considered an occurrence simply by chance alone, with no significant difference in the data examined.

A complete history of Supreme Court decisions using the Dormant Commerce Clause Doctrine (DCCD) is beyond the scope of this paper and is not considered especially germane since this doctrine has been part of Constitutional jurisprudence for 200 years and many of the decisions are irreconcilable between themselves. Cases with similar facts have been decided contrarily with diverse basis for the findings. Justice Thomas's association with the DCCD began his first year on the bench (1991) with his joining in the decision in *Chemical Waste Management v. Hunt* [7] which applied the doctrine of DCCD and was later cited in a majority opinion he himself wrote in *Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon*[8] which relied on the DCCD in determining that surcharges on waste from another state was in fact discriminatory and therefore invalid under the DCCD. Those cases began a string of decisions Thomas either wrote or joined in until the *Camps Newfound/Owatonna v. Town of Harrison*. [9] In this case the majority found that a Maine statue violated the DCCD when it exempted a charitable organization from personal property taxes if it principally benefitted residents but did not exempt the organization if it principally benefitted out of state residents. Justice Stevens argued that the Commerce clause "not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by states but also immediately effected a curtailment of power that the Court could enforce."[10] Justice

[6] ROBERT L. MADDEX, THE U.S. CONSTITUTION A TO Z (2 ed.) 102. (2008).
[7] *Chemical Waste Management v. Hunt* 504 U.S. 334 (1992).
[8] *Oregon Waste System v. Department of Environmental Quality of the State of Oregon* 511 U.S. 93 (1994).
[9] *Camps Newfoundland/Owatonna v. Town of Harrison* 520 U.S. 564 (1997).
[10] RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION. 51. (2014).

Thomas identified the Import-Export Clause as the "appropriate textual mechanism with which to address the more egregious of State actions, discriminating against interstate commerce.[11]

Camps Newfoundland/Owatonna v. Town of Harrison case appears to comprise the most thorough and cogent arguments for both sides of the negative Commerce Clause issue. Justice Stevens delivered the opinion with Justices O'Connor, Kennedy, Souter, and Breyer joining. Justice Scalia filed a dissenting opinion with Chief Justice Rehnquist, Justices Thomas and Ginsburg joining and Justice Thomas filed a second separate dissent with Scalia joining and Chief Justice Rehnquist joining as to part one. Justice Stevens argued that Maine's law denied a non-profit camp real estate property tax relief as facially unconstitutional and in violation of the Commerce Clause of United State Constitution. It did so because Maine's law discriminated against campers from outside the state (who were the majority of the campers) by increasing the cost of the camp. His support for this argument came from *Gibbons v. Odgden* in which the court said "if there was one object overriding every other in the adoption of the constitution, it was to keep the commercial intercourse among the states from all invidious and partial restraints"[12] in the opinion of Justice Stevens that Maine's law violated that principle and was therefore unconstitutional.

Scalia's dissent focused on the idea that Maine's Law furthered the purpose of providing care for Maine residents and asserted "Originally designed to create a national market for commercial activity, it is today invoked to prevent a state from giving tax breaks to charities that benefit the State's inhabitants"[13] He further argued that the court's decision failed to ask the

[11] *Id.* at 53.
[12] *Camps Newfoundland/Owatonna v. Town of Harrison* 520 U.S. 564, 571 (1997).
[13] *Id.* at 595.

question as to "whether the purpose of tax exemption justify [sic] its favoritism."[14] An answer in the affirmative would require validation of Maine's Law. Scalia actually used Justice Stevens own words in support of his own contention, Stephens had previously written "Neither the overnight visitor, the unfriendly agent of a hostile power, the resident diplomat, nor the illegal entrant, can advance even a colorable claim to a share in the bounty that a conscientious sovereign makes available to its own citizens." [15] This is an interesting statement in light of some claims being placed on state's resources by current illegal entrants.

In a reversal of his previous approach and arguments, Justice Thomas dissented in the *Camps Newfound/Owatonna v. Town of Harrison* case, not only dissenting with the opinion of the Court in this specific case but laying the foundational arguments for revisiting the "justifications for our involvement in the negative aspects of the Commerce Clause" suggesting the need "to abandon that failed jurisprudence" and "to consider restoring the original Import Export Clause check on discriminatory state taxation to what appears to be its proper role".[16] In this argument Thomas now joined Justice Scalia's arguments from earlier cases that "the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved unworkable in application."[17] It should be noted that Scalia's and Thomas's originalist approach to the DCCD doctrine differs in two areas, Scalia argues there is no basis for the DCCD in the Constitution's text and stops there. Thomas, on the other hand, goes further with his original general meaning approach and identifies the Import-Export Clause as the

[14] *Id.*
[15] *Id.* at 604.
[16] RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION. 52. (2014).
[17] *Id.* at 51.

appropriate mechanism to address state laws that discriminate against interstate commerce.[18] In addition Justice Scalia is willing to join on stare decisis grounds the enforcement of DCCD, at least when the doctrine is not expanded further, while Thomas has completely rejected the DCCD and refuses to join an opinion that enforces it. [19]

Justice Thomas authored a thorough and rigorous separate dissent in this case based on his assertion that the

> The improper expansion undertaken today is possible only because our negative Commerce Clause jurisprudence, developed primarily to invalidate discriminatory state taxation of interstate commerce, was already overbroad and unnecessary. It was over broad because, unmoored from any constitutional text, it brought within the supervisory authority of the federal courts state action far afield from the discriminatory taxes it was primarily designed to check. It was unnecessary because the Constitution would seem to provide an express check on the States' power to levy certain discriminatory taxes on commerce of other States – not in the judicially created negative Commerce Clause, but in article I, § 10 Import-Export Clause.[20]

Justice Thomas then wades through the history of cases starting in 1869 and explains his theory for using the Import-Export Clause in place of the negative Commerce Clause. Brannon Denning argues that the "Import-Export Clause was understood in 1878 to apply only to foreign commerce – a holding that stood unquestioned by the court until Justice Thomas's Camps Newfoundland/ Owatonna dissent." [21] Denning then goes on to trace the history of the Import-

[18] *Id.* at 53.
[19] *Id.*
[20] *Camps Newfoundland/Owatonna v. Town of Harrison* 520 U.S. 564, 610 (1997).
[21] BRANNON P. DENNING, JUSTICE THOMAS, THE IMPORT-EXPORT CLAUSE, AND CAMPS NEWFOUNLAND/OWATONNA V. HARRISON 70 U. Colo. L. Rev. 155 160 (1998).

Export Clause application in early cases *Woodruff v. Parham* in which the Court ceased using the Import-Export Clause and began using the dormant Commerce Clause relegating the Import-Export Clause to foreign goods and excluding interstate commerce.[22] According to Denning, victims of interstate commerce discrimination "would thereafter have to seek redress under the Commerce Clause."[23] Denning addresses another approach to the application of DCCD in a different article, that is considered a deep or maximalist approach, that of "promoting an economic theory of free trade" with the opportunity to apply the DCCD to a host of state laws that inhibit free trade.[24] Denning is clearly not in favor of the latter approach, but argues for a minimalist approach. In yet another article in recognition of the incoherence and unpredictability of court decisions regarding the DCCD Denning presents the case for the Supreme Court settling on a ""constitutional operative proposition" rooted in the text and history of the Constitution and the Commerce Clause, and devising "decision rules" that would implement that constitutional command."[25] The main thrust of the article is a road map for how the court might indeed accomplish that task.

Justice Scalia, while stressing that the DCCD has no basis in the text of the Constitution is still willing to accept its application on the grounds of stare decisis in cases where there is no expansion of the doctrine.[26] In fact Justice Scalia in *Intel Containers International Corporation v. Huddleston* indicated he would "enforce a self-executing, 'negative' Commerce Clause…

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[22] *Id.* at 163.
[23] *Id.* at 165.
[24] BRANNON P. DENNING, CUNO AND THE COURT THE CASE FOR MINIMALISM, 4 Geo. J.L. & Pub. Pol'y 33 42 (2006).
[25] BRANNON P. DENNING, RECONSTRUCTING THE DORMANT COMMERCE CLAUSE DOCTRINE, 50 Wm. & Mary L. Rev. 417, 420 (2008).
[26] RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION. 52 (2014).

against a state law that facially discriminates against interstate commerce," and "against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court."[27]

Amar suggests one needs to use a broad interpretation of the term *commerce* when interpreting the Commerce Clause which of course also translates into a broader scope for the Dormant Commerce Clause. He asserts "But "commerce" also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets."[28] Webster's Dictionary, the 1828 version, gives the definition of commerce as "an interchange or mutual change of goods, wares, production or property of any kind" then goes onto include the "interchange of work, business, civilities, mutual dealings in common life" along with sexual intercourse as encompassing the idea of commerce, all clarifications lending credibility to a broad reading of the term *commerce*.[29] Though Amar also notes that structurally the clause supports a reading, that it would be better for the Federal government to be involved in regulating commerce with multiple states, foreign nations, and Indian tribes, than for a single state acting on its own, perhaps an argument for another day.

Brannon Denning in several law review articles builds a strong case for the Dormant Commerce Clause Doctrine based on the text of the Constitution and the historical context that influenced the minds of the Framers who "saw the need for locating the power to regulate interstate commerce in Congress."[30] Denning suggests that revisionist accounts of the state

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[27] *Id.*
[28] AKIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY. 107 (2006).
[29] DANIEL WEBSTER. AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged (1828) Retrieved from http://websterdictionary1828.com/Dictionary/commerce on September 3, 2015.

[30] BRANNON P. DENNING, CONFEDERATION-ERA DISCRIMINATION AGAINST INTERSTATE COMMERCE AND THE LEGITIMACY OF THE DORMANT COMMERCE CLAUSE DOCTRINE, 37 94 Ky. L.J. 37 (2005).

legislation passed under the Articles of Confederation missed "examples of discrimination against interstate commerce present in state commercial legislation"[31] and documents several laws in the northeast states with seaports that imposed tariffs on goods being transported between ports in foreign ships which though directed at the English affected other states as well. This failure to properly read history led to a misunderstanding of the significance of interstate discrimination during the Articles of Confederation period. He also refers to comments by the framers about the "inability of the Confederation government to stop commercial predation among the states."[32] Brannon completes his argument with specific examples from Virginia, New York and Connecticut and other states legislative actions to discriminate against interstate commerce. He then concludes with Madison's 1829 assertion that the Commerce Clause "grew out of the abuse of power by the importing states in taxing the non-importing states, and was intended as a negative and preventative provision against injustice among the states themselves."[33] Brannon provides convincing presentations of the arguments for the use of the negative Commerce Clause as appropriate.

Before I argue too strongly on behalf of my thesis I must concur with Denning's assessment in

> that Congress has had the power for nearly 150 years to halt judicial enforcement of the DCCD through use of its affirmative commerce power. That it has chosen to do so very rarely suggests at least an indifference to, if not acquiescence in, the judicial role that even Justice Scalia has conceded is tantamount to "intellectual adverse possession.[34]

[31] *Id.* at 39.
[32] *Id.* at 50.
[33] *Id.* at 81.
[34] *Id.* at 99.

Notwithstanding Congressional indifference it seems to me that the individual states ought to regain and retain power to regulate intrastate commerce and especially over intrastate activities such as manufacturing, agriculture, and mining. For support of this stance I turn to Justice Thomas's assertion that "the negative Commerce Clause, makes little sense, and has proved to virtually unworkable in application…" and further has led the Court "to make policy laden judgements that we are ill equipped to and arguably unauthorized to make."[35] Thomas makes the case that state laws that are discriminatory against other states could be adjudicated under the Import-Export Clause making moot the need for the negative Commerce Clause.

In spite of historical Court decisions to the contrary I have to cast my lot with the classical liberal interpretation of the Commerce Clause i.e. that the Constitution does not

> allocate all power over all transactions to the national government. Local commercial transactions do not fall within the scope of the commerce clause… nor does the Commerce Clause cover the common activities that are internal to the state, including agriculture, manufacture, and mining, each of which can be regulated by the state in where the activity is located.[36]

The continuing problem of the Dormant Commerce Clause which in essence blocks state legislation over the areas of legitimate Commerce Clause coverage, is that an "aggressive reading of the dormant Commerce Clause could impose sharp limitations on states' exercise of their normal police powers"[37] and limit a state's exercise of its sovereignty over the health and welfare of its citizens. While perhaps not having reached a concrete conclusion regarding the negative commerce clause I have realized through this research and study that the evolution of

[35] RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION. 51. (2014).
[36] RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 147-148 (2014).
[37] *Id.* at 227.

judicial interpretation and application of the U.S. Constitution Commerce Clause itself is a morass of convoluted and wandering case decisions and arguments with stare decisis basically ideologically driven. The research certainly dispels my naive assumptions about decisions being driven by interpretive cannons such as textual, original meaning, or constitutional restoration, for there appears to be, especially, in the case of the negative Commerce Clause a long line of decisions and reversals based on desired political, economic and social outcomes. Enlightening yet disappointing, hardly settled!